

The Exceptionalism Norm in Administrative Adjudication

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CSAS Working Paper 17-002

Perspectives on the PTAB : The New Role of the Administrative State
in the

Innovation Economy, November 9, 2017



Antonin Scalia Law School
C. BOYDEN GRAY CENTER
FOR THE STUDY OF THE
ADMINISTRATIVE STATE
George Mason University®

THE EXCEPTIONALISM NORM IN ADMINISTRATIVE ADJUDICATION

2019 WISCONSIN LAW REVIEW (forthcoming)

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The standard narrative envisions administrative law as a quasi-constitutional field with the Administrative Procedure Act (APA) as its superstatute backbone. In rulemaking and judicial review, this narrative is compelling and has facilitated judicial and scholarly rejection of agency claims to “exceptionalism,” i.e., exception from uniform, cross-cutting administrative law principles. This Article argues that there is a significant omission from the standard narrative: adjudication. Here, Congress, the courts, agencies, and scholars have embraced the use of unique institutional structures and procedural rules tailored to suit the needs of individual agencies and regulatory programs. As a consequence, most adjudication is conducted outside of the APA, which has little role in defining “adjudication” or specifying its minimum procedures. In adjudication, this Article argues, exceptionalism is the norm. On the level of theory, this undermines administrative law’s standard narrative. More practically, although exceptionalism may benefit individual programs, it threatens system-wide harms – to transparency, fairness, and quality procedural design – that escape program-specific evaluation.

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INTRODUCTION

Over the past decade or so, scholars have developed a normative account of administrative law as a quasi-constitutional field with the Administrative Procedure Act (APA) as its “superstatute” backbone. This narrative not only explains the nature and operation of administrative law, but for many it helps to legitimate the administrative state. In this narrative, administrative law is quasi-constitutional because it defines and determines the powers and placement of the administrative state, a component of the federal government that is both essential to modern governance and largely absent from the written constitution.¹ At the core of this small-c constitution is the APA, which has been widely identified as a “superstatute”² because it was “enacted after lengthy normative debate” and has become “entrenched” in the sense that it has “prove[n] robust as a solution, a standard, or a norm over time.”³ Enacted in 1946, the APA has provided a durable foundation for administrative state, offering uniform, cross-cutting norms that the courts have fleshed out through a significant body of administrative common law.

Pitching against this standard narrative of administrative law, a few agencies have claimed to be so unique, so “exceptional,” that the traditional

¹ See Emily S. Bremer, *The Unwritten Administrative Constitution*, 66 FLA. L. REV. 1215 (2014) [hereinafter Bremer, *Unwritten*]; Mila Sohoni, *The Administrative Constitution in Exile*, 57 WM. & MARY L. REV. 922 (2016); see also Jerry L. Mashaw, *Governmental Practice and Presidential Direction: Lesson’s from the Antebellum Republic?*, 45 WILLAMETTE L. REV. 659, 660 (2009).

² Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1208 (2015).

³ Kovacs, *supra* note 2, at 1209 (quotation marks omitted); see generally WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010).

principles of administrative law do not apply to them.⁴ The agencies making these claims do so in an effort to be exempted from ordinary standards of judicial review and the procedural requirements that generally apply in rulemaking. Courts and scholars have increasingly rejected these claims to “administrative exceptionalism,”⁵ thereby defending and extending the standard narrative of administrative law as a body of uniform, quasi-constitutional norms, often grounded in the APA, that apply to all federal administrative agencies.

But is the standard narrative of administrative law as sound as this account suggests? As noted, the examples offered in support of the narrative typically involve rulemaking and judicial review. And it is in these areas that claims to administrative exceptionalism have most often been made—and rejected. This is no coincidence. In rulemaking and judicial review, there is ample evidence that the APA successfully operates as a superstatute, supplying enduring, quasi-constitutional principles that have long applied to all agencies, regardless of their structure, position, purpose, or jurisdiction. In these most high profile, salient areas of administrative law, the standard narrative finds strong support. And it is generally assumed that the reality of rulemaking and judicial review not only supports the normative vision in those contexts, but within administrative law more broadly.

Absent from the standard narrative of administrative law is adjudication—an important area of administration within which a radically different reality prevails. Agencies rarely adjudicate under the APA’s so-called “formal” adjudication provisions.⁶ Congress and individual agencies have repeatedly ignored these provisions, preferring instead to create unique adjudicatory proceedings designed to meet the individual needs of

⁴ See, e.g., Kristin E. Hickman, *Administrative Law’s Growing Influence on U.S. Tax Administration*, 3 J. TAX ADMIN. 82, 83 (2017) [hereinafter Hickman, *Growing Influence*] (discussing the Department of Justice’s efforts to limit the application of ordinary administrative law principles to the Department of the Treasury and the Internal Revenue Service). Beyond the tax context, see *infra* at note 84 (citing other articles contributing to the substantial literature on tax exceptionalism), claims of administrative exceptionalism have been made in the areas of patent law, see *infra* at note 85, and immigration, see *infra* at note 86.

⁵ Some scholars have rejected “administrative law exceptionalism” so strongly as describe it as “the misperception that a particular regulatory field is so different from the rest of the regulatory state that general administrative law principles do not apply.” Christopher J. Walker, *Chevron Deference and Patent Exceptionalism*, 65 DUKE L.J. ONLINE 149, 149 (2016) [hereinafter Walker, *Patent Exceptionalism*].

⁶ See 5 U.S.C. § 554, 556, 557; Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CAL. L. REV. 141 (2018).

different administrative agencies and programs. For their part, the courts have acquiesced in—and even supported—the proliferation of non-uniform adjudicatory procedures by deferring to agency procedural design choices and suppressing the APA’s role in defining adjudicative formality. Although most adjudication is thus “informal,” the APA contains no provision establishing minimum procedural requirements for “informal” adjudication.⁷ Without the legal foundation that such a provision would provide, the courts have not developed a body of administrative common law fleshing out minimum procedural requirements for informal adjudicatory hearings. Scholars have identified some common procedures observed in informal hearings, but these are neither legally required nor consistently observed.⁸

This Article brings this adjudicative reality to life—and assesses its implications for administrative law and theory—through a case study of the Leahy-Smith America Invents Act (AIA). This high-profile statute created several different proceedings through which the U.S. Patent and Trademark Office (PTO) adjudicates challenges to issued patents.⁹ These proceedings are conducted by the Patent Trial and Appeal Board (PTAB), an entity newly formed by the AIA. The statute established several different kinds of PTAB proceedings, including *inter partes* review, covered business method review, and post-grant review.¹⁰ All three of these proceedings are designed to facilitate reexamination of previously issued patents. Congress provided detailed procedural requirements for each of these proceedings. Following the AIA’s enactment, the PTO adopted regulations further specifying the applicable procedures. *Inter partes* review is a quintessential example of the tailored adjudicatory schemes that long ago became the norm in administrative adjudication.

This Article first evaluates whether *inter partes* review proceedings before the PTAB are “formal” adjudications. The question is important because, if the proceedings are properly characterized as “formal,” it is more likely that courts will give maximum deference to the PTAB’s

⁷ But see 5 U.S.C. § 555 (addressing “ancillary matters” that may arise in adjudication, among other kinds of agency proceedings).

⁸ See Michael Asimow, *Evidentiary Hearings Outside the Administrative Procedure Act*, Final Report to the Administrative Conference of the United States (Nov. 10, 2016) https://www.acus.gov/sites/default/files/documents/adjudication-outside-the-administrative-procedure-act-final-report_0.pdf [hereinafter Asimow Report].

⁹ See Pub. L. No. 112-29, 125 Stat. 285 (Sept. 16, 2011).

¹⁰ See generally Eric C. Cohen, *A Primer on Inter Partes Review, Covered Business Method Review, and Post-Grant Review before the Patent Trial and Appeal Board*, 24 FED. CIR. BAR J. 1 (2014).

decisions.¹¹ This could have significant consequences for the balance of power in patent law between the PTO and the federal courts, particularly the U.S. Court of Appeals for the Federal Circuit. Patent scholars have disagreed about whether the AIA's new proceedings are "formal" adjudications.¹² The disagreement stems partly from different views about the historical role of the PTO, the AIA's intent and importance, and the normative value and proper goals of patent law. The Federal Circuit has characterized *inter partes* review proceedings as "formal" adjudications, but with relatively little analysis and not for the purpose of giving any deference to the PTAB's substantive patent law decisions.¹³ Did the court get it right?

The analysis reveals profound uncertainty and a general absence of uniform principles in the administrative law of adjudication. Administrative law offers four distinct approaches to determining whether *inter partes* review proceedings are "formal" adjudications. The APA's adjudication provisions have a different role in each of these four approaches.¹⁴ Importantly, they do not always operate as the *source* of law, as would be expected for a superstatute. In some instances, the APA merely identifies or describes the necessary procedural elements of formality, which the agency may voluntarily impose upon itself through its procedural regulations. The most familiar and consequential approach to defining adjudicative formality is found within the broader standard for determining whether an agency's decisions are entitled to judicial deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*¹⁵ Here, "formality" is defined amorphously and not necessarily in reference to the APA's adjudication provisions. In this approach, the APA

¹¹ See *United States v. Mead Corp.*, 533 U.S. 218 (2001); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). It bears noting that some scholars have argued that *Chevron* does not actually affect case outcomes. See, e.g., Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 829 (2010); Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 85 (2011). New empirical evidence appears to the contrary. See Kent H. Barnett & Christopher J. Walker, *Chevron in the Circuit Court*, 116 MICH. L. REV. 1 (2017).

¹² Compare Stuart Minor Benjamin & Arti K. Rai, *Administrative Power in the Era of Patent Stare Decisis*, 65 DUKE L.J. 1563 (2016); Melissa F. Wasserman, *The Changing Guard of Patent Law: Chevron Deference for the PTO*, 54 WM. & MARY L. REV. 1959 (2013), with John M. Golden, *Working Without Chevron: The PTO as Prime Mover*, 65 DUKE L.J. 1657 (2016).

¹³ See, e.g., *Belden Inc. v. Berk-Tek*, 805 F.3d 1064, 1080 (Fed. Cir. 2015).

¹⁴ See 5 U.S.C. § 554, 556, 557.

¹⁵ 467 U.S. 837, 842-43 (1984); see *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001).

is not the source of law, and although the statute may be useful as a descriptive benchmark, it may also have little or no relevance. Stranger still, the various approaches to adjudicative formality yield at least three different answers to the question of whether *inter partes* review proceedings are formal adjudications. Finally, if *inter partes* review proceedings are “informal” adjudications, they do not have all of the elements that have been identified as common to such hearings.¹⁶

This analysis may be useful for patent experts, but it also offers a broader lesson for administrative law and theory. *Inter partes* review proceedings provide a vivid case study in the modern, fractured reality of administrative adjudication. This case study reveals that, in adjudication, exceptionalism *is* the norm. That a norm-defying characteristic could *be* the prevailing norm suggests that that, in the context of adjudication, the APA does not operate as a superstatute. Moreover, it suggests that in the realm of adjudication, the unwritten administrative constitution, if not absent, is exceedingly weak. Moving from theory to practice, exceptionalism in administrative adjudication has benefits – but it also has underappreciated costs. The benefits of exceptionalism flow from the opportunity it provides to tailor adjudicatory procedures to fit the specific needs of a particular agency and regulatory program. The costs are to uniformity, transparency, and sound institutional and procedural design. These system-wide harms are underappreciated in the program-specific treatment that Congress, the courts, and scholars typically afford to the study of adjudication.

This Article proceeds in three parts. Part I frames the inquiry by explaining the standard narrative of administrative law as a quasi-constitutional field with the APA as its superstatute backbone. It explains why this narrative appears to be sound in the contexts of rulemaking and judicial review and explains how the narrative has facilitated ready rejection of individual agency claims to exceptionalism. Adjudication, however, is conspicuously absent from this story. To illuminate the reasons for adjudication’s omission, Part II offers the new patent adjudication procedures created by the America Invents Act of 2011, and particularly *inter partes* review, as a case study. This part briefly situates *inter partes* review in historical context before exploring the AIA’s new framework for joint congressional-administrative design of *inter partes* review procedures. It examines these procedures in detail, arguing that Congress and the PTO did not even consider the APA as the relevant touchstone of procedural design. District court patent litigation was instead used as the default model that was tailored to serve the substantive regulatory goals of

¹⁶ See Asimow Report, *supra* note 8, at 35.

administrative patent adjudication. The law's accommodation of this exceptionalism has upstream doctrinal consequences. It has contributed to the development of four different approaches to the question of whether an adjudication is "formal," each of which yields a different conclusion as applied to *inter partes* review proceedings. In this analysis, the APA has only a limited and variable role. The statute fares little better if *inter partes* review is classified as "informal" adjudication. Part III reflects on what the *inter partes* review analysis suggests about administrative law and theory. It argues that, unlike judicial review and rulemaking, adjudication is ruled by a norm of exceptionalism. This presents a challenge to the standard narrative of administrative law and also has practical implications that warrant greater attention and concern.

I. THE STANDARD NARRATIVE OF ADMINISTRATIVE LAW

A. Administrative Law's Quasi-Constitutional Status

Administrative law is increasingly conceptualized as a quasi-constitutional field. There are various definitions of what "constitutional" means in this context, although those definitions sometimes overlap and are often complementary. In one formulation, "administrative constitutionalism" refers to the many ways in which federal agencies act "to interpret and implement the U.S. Constitution."¹⁷ As a practical matter, an administrative agency is often the first—and sometimes the last—to consider the constitutional implications of or limitations on its own action.¹⁸ For example, when the Federal Communications Commission (FCC) decides how to regulate broadcasters, it is called upon in the first instance to consider the First Amendment limitations upon its own action.¹⁹ To take another example, when an agency is designing its own procedures for administering a new or modified regulatory program, it must consider what minimum requirements are imposed by the Fifth Amendment's Due Process Clause.²⁰ Other examples of administrative constitutionalism arise

¹⁷ Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1896, 1896 (2013).

¹⁸ See Emily S. Bremer & Sharon B. Jacobs, *Agency Innovation in Vermont Yankee's White Space*, 32 J. ENVTL. L. & LAND USE 523, 531-32 (2017).

¹⁹ See *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012).

²⁰ Bremer & Jacobs, *supra* note 18, at 531-32; see U.S. Const. Amend. V, § 4. Although such programs are created by statute, agencies typically have broad discretion to flesh out the procedures they will observe. See *Vermont Yankee Nuclear Power Corp. v. Nat. Res.*

in connection with other constitutional provisions.²¹ Some aspects of administrative constitutionalism, such as the appropriate degree of judicial deference to an agency's constitutional determination, have long been the subject of scholarly examination. But only in the last decade have scholars sought to take account of how administrative agencies, through the phenomenon of administrative constitutionalism, contribute to the interpretation of the U.S. Constitution.²²

Another sense in which administrative law is "constitutional" is that it performs constitutional functions in an important area in which the U.S. Constitution has little or no application. Generally speaking, the U.S. Constitution neither acknowledges nor addresses the administrative state.²³ As Professor Jerry Mashaw has put it, "[t]here is a hole in the Constitution where administration might have been."²⁴ Ordinary administrative law helps to fill this hole by serving many of the functions traditionally associated with constitutions: "creating and ordering important political institutions, authorizing and limiting the exercise of government power, and defining relationships both among government institutions and between the government and citizens."²⁵ The APA, which is widely regarded as a quasi-constitutional framework statute, is the backbone of this unwritten administrative constitution.²⁶ But other cross-

Def. Council, 235 U.S. 519, 524 (1978); *see generally* Part II.B. (explaining how the PTO has exercised its discretion to complete the procedural design of *inter partes* review).

²¹ *See, e.g.,* SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* (2014) (examining how the National Labor Relations Board and the Federal Communications Commission interpreted and implemented the Fifth Amendment's Equal Protection Clause).

²² *See* Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 20129, 2098 (2011); Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 806 (2010).

²³ Bremer, *Unwritten*, *supra* note 1, at 1217-18; Steven Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1010 (2007); William N. Eskridge, Jr. & John Ferejohn, *Constitutional Horticulture: Deliberation-Respecting Judicial Review*, 87 TEX. L. REV. 1273, 1281-82 (2009); Peter K. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 576-77 (1984).

²⁴ Jerry L. Mashaw, *Governmental Practice and Presidential Direction: Lessons from the Antebellum Republic?*, 45 WILLAMETTE L. REV. 659, 660 (2009).

²⁵ Bremer, *Unwritten*, *supra* note 1, at 1219.

²⁶ *See* Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1077 (2009); William R. Andersen, *Chevron in the States: An Assessment and a Proposal*, 58 ADMIN. L. REV. 1017, 1033 (2006); Michael Asimow, *The Spreading Umbrella: Extending the APA's Adjudication Provisions to All Evidentiary Hearings Required by Statute*, 56 ADMIN. L. REV. 1003, 1004 (2004) [hereinafter Asimow, *Spreading Umbrella*]; Jerry L. Mashaw, *Federal*

cutting statutes, a significant body of administrative common law, and various executive policy directives also contribute to it.²⁷ These laws are rarely mandated by the Constitution, but they are animated by familiar constitutional concerns, such as the separation of powers.²⁸ Thus, as Professor Gillian Metzger has argued, “a fair amount of ordinary administrative law qualifies as constitutional common law.”²⁹

Within this broader realm of administrative constitutionalism lies a conception of the APA as a “superstatute.”³⁰ “Superstatutes” are “enacted ‘after lengthy normative debate’ and ‘prove robust as a solution, a standard, or a norm over time.’”³¹ Although superstatutes are often described as being “entrenched,”³² it is perhaps more accurate to say that, as a descriptive matter, they enjoy extraordinary stability by virtue of their widespread acceptance.³³ Despite this and other disagreement regarding discrete aspects of superstatute theory, there appears to be widespread agreement that the APA is a key example of a superstatute.³⁴ This is because

Administration and Administrative Law in the Gilded Age, 119 YALE L.J. 1362, 1365 (2010); Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI-KENT L. REV. 1039, 1039 (1997).

²⁷ See Bremer, *Unwritten*, *supra* note 1, at 1234-49.

²⁸ See *id.* at 1249-53; Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 484 (2010) [hereinafter Metzger, *Constitutional Common Law*].

²⁹ Metzger, *Constitutional Common Law*, *supra* note 28, at 484.

³⁰ See Kovacs, *supra* note 2; Adrian Vermeule, *Superstatutes* (New Republic Online, Oct. 26, 2010), archived at <https://perma.cc/Y555-RXJ3>; see also ESKRIDGE & FEREJOHN, *supra* note 3. Other statutes that have been identified as superstatutes include the Civil Rights Act of 1964, the Voting Rights Act of 1965, see Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007), and the Social Security Act, see Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408 (2007).

³¹ Kovacs, *supra* note 2, at 1209 (quoting ESKRIDGE & FEREJOHN, *supra* note 3, at 111).

³² See, e.g., ESKRIDGE & FEREJOHN, *supra* note 3, at 7; Ackerman, *supra* note 30, at 1757-93; Daryl Levinson & Benjamin Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 426-29 (2015); Young, *supra* note 30, at 426.

³³ See Bremer, *Unwritten*, *supra* note 1, at 1229-34; Mathew D. McCubbins & Daniel B. Rodriguez, *Superstatutory Entrenchment: A Positive and Normative Interrogatory*, 120 YALE L.J. ONLINE 387 (2011). In contrast, an entrenched rule is one that is legally protected against change through ordinary legislative processes. Thus, the U.S. Constitution is entrenched by virtue of its provisions requiring extraordinary measures for amendment. See U.S. CONST. ART. V.

³⁴ See Kovacs, *supra* note 2, at 1223-37. This is not entirely new. In 1978, then-Professor Antonin Scalia explained that, by the early 1970s, “it became obvious even to the obtuse—that the Supreme Court regarded the APA as a sort of superstatute, or subconstitution, in the field of administrative process: a basic framework that was not lightly to be supplanted or embellished.” Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 363.

the APA emerged in 1946 following a lengthy public debate and represented a “fierce compromise” regarding the powers and placement of administrative agencies within the federal government.³⁵ Although Congress can amend the APA through ordinary legislative processes, its core provisions have proven seemingly impervious to amendment.³⁶ Thus, for nearly three-quarters of a century, the APA has operated as a source of uniform, default rules governing administrative agencies. The statute’s constitutional character and cross-cutting application lends it the significant “normative weight” associated with a superstatute.

Taken together, the literature on administrative constitutionalism, the small-c constitutional character of ordinary administrative law, and the APA’s superstatute status offer what has become the standard narrative of administrative law. There are deep interconnections between these three facially distinct literatures. Read together, they present a powerful narrative of the origins and contours of administrative law as a quasi-constitutional field governing the operation of the administrative state and its placement among the other branches of the federal government.³⁷ Within this narrative, the APA is an indispensable protagonist. As a framework statute, however, the APA is relatively skeletal, leaving ample room for judicial elaboration of its requirements. As a consequence, “[a]dministrative law is infused with common law.”³⁸ This administrative common law is controversial but essential to administrative law’s constitutional character.³⁹

As will become evident as the discussion continues below, the examples that best support this account of administrative law are drawn

³⁵ See George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. L. REV. 1557 (1996).

³⁶ Bremer, *Unwritten*, *supra* note 1; see also Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629 (2017) [hereinafter Walker, *Modernizing*] (explaining recent interest in bipartisan legislative reform to modernize the APA).

³⁷ This narrative is controversial in its own right. See, e.g., McCubbins & Rodriguez, *supra* note 33. It is also interesting that it has emerged during the same period an apparent renaissance of sentiment against the administrative state. See Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017). It may be worth asking whether these phenomena are related.

³⁸ Kovacs, *supra* note 2, at 1213.

³⁹ There is accordingly a large and growing literature examining, critiquing, and defending the phenomenon of administrative common law. See, e.g., Jack M. Beermann, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1 (2011); Bremer, *Unwritten*, *supra* note 1; John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113 (1998); Kovacs, *supra* note 2; Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293 (2012).

from the areas of rulemaking and judicial review of agency action. This Article will focus predominately on the former because it involves the matter of minimum procedural requirements for agency action, and is thus more relevant to this Article's subject. In any event, the ubiquity of examples from the rulemaking context raises the question at the heart of this Article: what about adjudication? Before turning to this question, it is worth examining the relationships between, first, constitutionalism and uniformity and, next, between uniformity and the rejection of administrative exceptionalism.

B. Constitutionalism and Uniformity

One beneficial characteristic of administrative law that is intimately connected to its constitutional character is that it provides uniform principles that apply across all federal administrative agencies.⁴⁰ Indeed, administrative law's ability to perform constitutional functions *requires* this uniform, cross-cutting application. For example, determining the place of the administrative state within the federal government requires separation of powers norms that apply generally to the administrative state, i.e., to all individual agencies. This relationship between constitutional status, cross-cutting effect, and uniformity will become clear through a discussion of the law governing rulemaking and judicial review of agency action.

In keeping with its superstatute status, the APA plays a key role in supplying the foundation for the uniform norms that prevail in rulemaking and judicial review.⁴¹ In the rulemaking context, the APA imposes minimum procedural requirements on agencies. These requirements are fleshed out by the courts through administrative common law. In the judicial review context, the APA also operates as the legal foundation of judicial authority to review agency decisionmaking. But here, the common law does not merely embellish upon the APA's minimal requirements, but instead provides detailed rules that are in tension if not outright conflict with the statutory text. Others have considered the validity of administrative common law that is, or appears to be, inconsistent with the APA's text.⁴² Setting this important question to one side, what matters for purposes of this Article is how the APA has successfully seeded the

⁴⁰ The benefits of uniformity are explored in Part I.C., below.

⁴¹ Cf. Margaret B. Kwoka, *First-Person FOIA*, 127 YALE L.J. 2204, 2257 (2018) (explaining that the APA "provides a baseline set of procedures that apply to all agency proceedings").

⁴² See, e.g., Kovacs, *supra* note 2.

development of uniform, cross-cutting principles of administrative law in the areas of rulemaking and judicial review.

Administrative rulemaking across the federal government is governed by a cross-institutional consensus on a set of uniform principles and procedural requirements. One uniformly recognized norm is that agencies may create legally binding regulations using “informal” instead of “formal” rulemaking.⁴³ In the rulemaking context, these terms have a clear meaning. “Formal” rulemaking, which is almost never used today, is a trial-like proceeding conducted under sections 553, 556, and 557 of the APA.⁴⁴ In contrast, “informal” rulemaking is conducted according to the minimum procedural requirements established by Section 553 of the APA.⁴⁵ Reflecting the core attributes of the Section 553 process, informal rulemaking is commonly referred to as “notice-and-comment” rulemaking. As formal rulemaking has been rendered irrelevant, nearly all agency regulations today are adopted through notice-and-comment rulemaking.⁴⁶

Section 553 provides the minimum procedural elements of informal rulemaking and has served as the focal point for the development of other cross-cutting requirements that do not appear in the APA’s text. The statutory requirements themselves are often described as “minimal” or even “skeletal.”⁴⁷ Under Section 553, the agency is required to publish a notice of proposed rulemaking, accept public comment on the proposal, and publish a final rule.⁴⁸ Over time, however, the APA’s facially undemanding requirements have been embellished by the courts, the

⁴³ See *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224 (1973).

⁴⁴ See Kent H. Barnett, *How the Supreme Court Derailed Formal Rulemaking*, 85 GEO. WASH. L. REV. ARGUENDO 1 (2017). As discussed in Part II.C.1., “informal rulemaking” is considered sufficiently “formal” for the courts to give *Chevron* deference to the resulting agency decision. The detailed, uniform procedural norms established by Section 553 of the APA make this possible. Thus, for judicial deference purposes “informal” rulemaking is always sufficiently formal to warrant *Chevron* deference, but “informal” adjudication is only sometimes sufficiently formal to warrant *Chevron* deference. Because there is no adjudicatory analogue to Section 553, and therefore no set of clearly identifiable procedural minimums that apply to informal adjudication, the determination of formality for deference purposes must be made on an agency- and program-specific basis.

⁴⁵ See 5 U.S.C. § 553.

⁴⁶ See, e.g., Stuart Shapiro, *Agency Oversight as “Whac-A-Mole”: The Challenge of Restricting Agency Use of NonLegislative Rules*, 37 HARV. J.L. & PUB. POL’Y 523, 523 (2014) (“Formal rulemaking, requiring a quasi-judicial proceeding, is rarely used by agencies. It is extremely burdensome for them and, after a period of initial experimentation with the approach, agencies have largely abandoned it.”)

⁴⁷ E.g., M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1440 (2004).

⁴⁸ See 5 U.S.C. § 553(b), (c), & (d).

Congress, and the President.⁴⁹ This phenomenon, which is controversial for reasons not directly relevant to this Article, is referred to as the “ossification” of the rulemaking process.⁵⁰ The key point for purposes of this Article is that ossification provides powerful evidence of a consensus among the three branches of government that Section 553 is the fundamental procedural baseline that defines “rulemaking.”⁵¹

The judiciary’s acceptance of Section 553 as the sine qua non of rulemaking is evinced by the substantial body of administrative common law that fleshes out the statute’s skeletal requirements.⁵² This administrative common law has been criticized as violating the Supreme Court’s admonition in *Vermont Yankee* that courts should not impose additional requirements on agencies beyond those contained in the APA.⁵³

⁴⁹ See generally Curtis W. Copeland, *Regulatory Analysis Requirements: A Review and Recommendations for Reform*, Report to the Administrative Conference of the United States (Apr. 23, 2012), <https://www.acus.gov/sites/default/files/documents/COR-Final-Reg-Analysis-Report-for-5-3-12-Mtg.pdf> (thoroughly identifying and analyzing the various additional requirements that have been imposed upon agencies in rulemaking and regulation). Hybrid rulemaking, which is discussed further below, is a more trial-like procedure, typically imposed by Congress on an individual agency for substantive policy reasons. It is therefore a little bit like the tailored procedures that are the norm in informal adjudication. Unlike tailored adjudication programs, however, hybrid rulemaking regimes are relatively rare and are usually constructed using the APA’s rulemaking provisions (formal and informal) as the procedural design baseline.

⁵⁰ See, e.g., Aaron Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85, 94 (2018) (“Rulemaking is not used as often as it should be, the thesis goes, because all three branches of the federal government have imposed onerous procedural requirements on rulemaking.”); Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493 (2012); Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950-1990*, 80 GEO. WASH. L. REV. 144 (2012).

⁵¹ Of course, the APA also includes express definitions of “rule” and “rule making,” which have been criticized. See 5 U.S.C. § 551(4) (defining “rule making”); 551(5) (defining “rule”); Ronald M. Levin, *The Case for (Finally) Fixing the APA’s Definition of ‘Rule’*, 56 ADMIN. L. REV. 1077 (2004). Scholars have also recently begun to study “unorthodox rulemaking,” which deviates from the traditional process. See Abee R. Gluck, Anne Joseph O’Connell, and Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789 (2015). Of course, even this may be viewed evidence of the existence of a deeply rooted traditional process.

⁵² See, e.g., Metzger, *Embracing*, *supra* note 39; Beermann, *supra* note 39, at 24–26; John F. Duffy, *supra* note 39, at 189–90 (1998); Kenneth Culp Davis, *Administrative Common Law and the Vermont Yankee Opinion*, 1980 UTAH L. REV. 3.

⁵³ See *Vermont Yankee*, 435 U.S. at 525; see also Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856 (identifying various judicial doctrines, including many that are part of the administrative common law of rulemaking,

One response to this criticism, however, is that most if not all of the common law principles are consistent with and in furtherance of the APA's requirements. For example, the judicial requirement that an agency's final rule be a "logical outgrowth" of its proposed rule is designed to ensure the proper functioning and integrity of the notice-and-comment process.⁵⁴ After all, how can the public have a meaningful opportunity to comment on a proposal that is not written in such a way as to give fair notice as to what the agency might do in its final rule?⁵⁵ The requirement that an agency provide to the public any information on which its proposal depends serves a similar function.⁵⁶

Moving beyond the courts, it is also clear that the President and administrative agencies have embraced Section 553 as the legal and procedural foundation of rulemaking. For example, Executive Order 12866, requiring benefit-cost analysis and presidential review of rulemaking, is structured in a way that makes sense only if the relevant underlying procedure is that established by Section 553 of the APA.⁵⁷ An agency's responsibilities under E.O. 12866 are defined by reference to the relevant stage of the notice-and-comment rulemaking process, such as in connection with the publication of a notice of proposed rulemaking.⁵⁸ Agency procedural innovation in the rulemaking context, such as that which has been necessary to facilitate electronic rulemaking, has likewise been consciously designed to further the norms and principles embodied in Section 553 and its attendant administrative common law.⁵⁹ Agencies often voluntarily observe notice-and-comment procedures in circumstances in which the APA does not require it, suggesting profound internalization of

that are inconsistent with the APA and therefore should be overruled in a *Vermont Yankee II*).

⁵⁴ See generally Phillip M. Kannan, *The Logical Outgrowth Doctrine in Rulemaking*, 48 ADMIN. L. REV. 213 (1996).

⁵⁵ See Beermann & Lawson, *supra* note 53, at 895.

⁵⁶ See *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 392-93 (D.C. Cir. 1973); Beermann & Lawson, *supra* note 53, at 893.

⁵⁷ See Executive Order 12866, Regulatory Planning and Review, 58 Fed. Reg. 8207 (Oct. 4, 1993).

⁵⁸ See 5 U.S.C. § 553(b).

⁵⁹ See, e.g., Admin. Conf. of the U.S., Recommendation 2013-5, *Social Media in Rulemaking*, 78 Fed. Reg. 76,269, 76,269 (Dec. 17, 2013); Admin. Conf. of the U.S., Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, 76 Fed. Reg. 48,789, 48,789 (Aug. 9, 2011); Bridget C.E. Dooling, *Legal Issues in E-Rulemaking*, 63 ADMIN. L. REV. 893 (2011); Elizabeth G. Porter & Kathryn A. Watts, 91 N.Y.U. L. REV. 1183 (2016).

and respect for notice-and-comment norms.⁶⁰ The PTO's AIA rulemakings are one example: the PTO used notice-and-comment rulemaking to develop its procedures under the AIA despite the APA's exemption of procedural rules from notice-and-comment requirements.⁶¹ More broadly, when an agency is authorized or directed by Congress to enact substantive regulations, questions about the appropriate procedure rarely arise. These questions are unnecessary because of the pervasive understanding that Section 553 of the APA, as interpreted through administrative common law, defines the rulemaking process.

Even Congress has internalized the constitutional, superstatute character of Section 553 of the APA. Like the President, Congress has created additional procedural requirements that fit atop those found in Section 553. For example, the Congressional Review Act, which allows Congress to block major rules developed by administrative agencies, is designed with Section 553 as the obvious procedural baseline.⁶² In addition, Congress has only infrequently deviated from the APA's procedural defaults for rulemaking and, when it has created agency-specific rulemaking procedures, it has typically used the APA as the inspiration for its procedural design choices. In the late 1970s and early 1980s, Congress briefly experimented with creating tailored rulemaking procedures for individual agencies. The Federal Trade Commission (FTC) and the Occupational Safety and Health Administration (OSHA) are the principal agencies that were subject to these "hybrid" rulemaking procedures. As the name suggests, in these instances, Congress modified the APA's default rules by designing rulemaking procedures that included some but not all of the trial-like components of the APA's formal rulemaking procedures. In other words, hybrid rulemaking requirements typically add certain elements of the APA's formal procedures on top of the process established by Section 553.⁶³ These experiments generally were not well received and were infrequently replicated.⁶⁴ Thus, although Congress has created a

⁶⁰ See generally Emily S. Bremer, *A Long History of Encouraging Voluntary Agency Efforts to Expand Public Engagement in Informal Rulemaking*, ADMINISTRATIVE FIX, <https://www.acus.gov/newsroom/administrative-fix-blog/long-history-encouraging-voluntary-agency-efforts-expand-public>.

⁶¹ See 5 U.S.C. § 553(b)(A).

⁶² See 5 U.S.C. §§ 801-808.

⁶³ Indeed, the term "hybrid rulemaking" also has been used to refer to similar procedures created through administrative common law, particularly before the Supreme Court's decision in *Vermont Yankee*. See, e.g., Richard B. Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805, 1814 (1978).

⁶⁴ The Administrative Conference studied hybrid rulemaking regimes and the challenges that agencies have faced in implementing them. See Admin. Conf. of the U.S.,

variety of cross-cutting requirements that are layered on top of Section 553, it has usually declined to create special rulemaking procedures to accommodate the unique needs of individual agencies or regulatory schemes. Instead, Congress typically directs or authorizes an agency to adopt regulations to implement a substantive statute, knowing that the language will be interpreted to require the agency to conduct a rulemaking proceeding under Section 553 of the APA.⁶⁵ As we shall see, this is substantially in contrast to what Congress has done in the context of adjudication.

One might object that this paints too rosy a picture of administrative rulemaking, ignoring a variety of specialized processes that have evolved to meet certain, special needs that agencies sometimes encounter in rulemaking. It is indeed a fair point that there is a spectrum of agency processes that can be described as “rulemaking.”⁶⁶ For example, the development of non-binding policy statements and other kinds of guidance may be classified as “rulemaking.”⁶⁷ Most relevant to this Article’s procedural focus, however, are the various kinds of legally binding rules that are developed using a process that deviates from the prototypical notice-and-comment process.⁶⁸ These include direct final rules, interim final rules, and other rules that fall within the “good cause” exception to

Recommendation 80-1, *Trade Regulation Rulemaking Under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act*, 45 Fed. Reg. 46,772 (July 11, 1980); Admin. Conf. of the U.S., Recommendation 79-5, *Hybrid Rulemaking Procedures of the Federal Trade Commission – Administration of the Program to Reimburse Participants’ Expenses*, 45 Fed. Reg. 2309 (Jan. 11, 1980); Admin. Conf. of the United States, Recommendation 79-1, *Hybrid Rulemaking Procedures of the Federal Trade Commission*, 44 Fed. Reg. 38,817 (July 3, 1979).

⁶⁵ The interpretive convention used to determine when Congress intends to convey rulemaking authority has shifted over time to accommodate a judicial preference for administrative policymaking through rulemaking instead of through adjudication. See Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002)

⁶⁶ See Peter L. Strauss, Comment, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1464 (1992).

⁶⁷ See Strauss, *supra* note 66, at 1464.

⁶⁸ The U.S. Government Accountability Office (GOA) has extensively documented agency adoption of regulations without publication of a Notice of Proposed Rulemaking (NPRM), the key document that Section 553 requires agencies to publish in order to kick off a typical notice-and-comment rulemaking. See 5 U.S.C. § 553; GAO, *Agencies Could Take Additional Steps to Respond to Public Comments*, GAO-13-21 (Dec. 20, 2012), <https://www.gao.gov/products/GAO-13-21>; GAO, *Agencies Often Published Final Actions Without Proposed Rules*, GGD-98-126 (Aug. 31, 1998), <https://www.gao.gov/products/GGD-98-126>.

Section 553.⁶⁹ In a direct final rulemaking, an agency publishes a rule that becomes effective on a stated date if no adverse comments are filed within a specified comment period.⁷⁰ An agency can use this approach effectively for minor or otherwise non-controversial regulatory changes. If the agency receives even a single adverse comment, the agency withdraws the direct final rule and, if it wishes to proceed with the rulemaking, it must do so through an ordinary notice-and-comment proceeding. An interim final rule (which is sometimes also referred to as a temporary rule) is one that becomes effective without prior notice and public comment, and which may remain effective only for a limited period of time.⁷¹ Agencies typically use interim final rules to address exigent matters, inviting public comment on the rule only after the rule has become effective.⁷² Finally, agencies may adopt legally binding rules without prior notice and comment in other circumstances in which “the agency for good cause finds . . . that notice and public procedure [is] impracticable, unnecessary, or contrary to the public interest.”⁷³ This is the so-called “good cause” exception.

The key point is that these and other specialized rulemaking procedures are designed to operate within the APA’s statutory structure. Many of them have arisen in connection with actions that the APA exempts from notice-and-comment requirements, while others are designed to comply in a non-traditional way with those requirements. Thus, the courts have permitted interim-final rulemaking in instances where the agency qualifies for “the impracticability or public interest prongs of the APA’s good cause exception.”⁷⁴ Direct final rulemaking fits within the “unnecessary” prong of the good cause exception.⁷⁵ To make an interim final rule final-final, an agency conducts a traditional notice-and-comment rulemaking, in compliance with Section 553.⁷⁶ Similarly, an adverse comment submitted in response to a direct final rulemaking demonstrates

⁶⁹ See 5 U.S.C. § 553(b)(B); Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703 (1999) [hereinafter Asimow, *Interim-Final*];

⁷⁰ See Emily S. Bremer, *Incorporation by Reference in an Open-Government Age*, 36 HARV. J.L. & PUB. POL’Y 131, 194 (2013) [hereinafter Bremer, *Incorporation by Reference*]; Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1 (1995).

⁷¹ See Bremer, *Incorporation by Reference*, *supra* note 70, at 194.

⁷² See Asimow, *Interim-Final*, *supra* note 69, at 704.

⁷³ 5 U.S.C. § 553(b)(B).

⁷⁴ Asimow, *Interim-Final*, *supra* note 69, at 718 (footnotes omitted); see also Kristin Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 485 (2013) [hereinafter Hickman, *Force of Law*].

⁷⁵ See 5 U.S.C. § 553(b)(B); Levin, *supra* note 70, at 11.

⁷⁶ Asimow, *Interim-Final*, *supra* note 69, at 722 (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213-15 (1988)).

that public procedure on the rule is necessary, thereby removing the action from the good cause exception and requiring the agency to comply with Section 553 if it wishes to proceed with the rule.⁷⁷ Other types of specialized rulemaking actions likewise fit within the APA's structure. Non-binding guidance documents may be adopted without notice and comment, but that is because they fall within an APA exemption.⁷⁸ Finally, in the few instances in which Congress has created "hybrid" rulemaking procedures to suit the particular needs of an individual agency or regulatory program, it has used the APA as the touchstone of procedural design, combining Section 553's notice-and-comment requirements with some aspects of the trial-like procedures found in Sections 556 and 557.

In sum, in the context of rulemaking at least, the APA operates as *the source of default procedural rules* that agencies must follow to enact regulations. The pervasive acceptance—by Congress, the President, the courts, and administrative agencies—of Section 553 as the authoritative source of rulemaking procedures obviates the need for Congress or agencies to design context-specific procedural rules. To put it another way: Section 553 defines "rulemaking." And it does so in an active sense. It does not merely *describe* the kind of process that qualifies as "rulemaking." Thus, it is never necessary to compare the procedures required by an agency's organic statute to the procedural elements of Section 553 in order to determine whether the organic statute creates a "rulemaking" process.⁷⁹ Instead, an organic statute can (and usually does) simply call for the agency to promulgate regulations, without specifying any procedure at all. In contrast to what occurs in adjudication, tailored rulemaking procedures are not created out of whole cloth, without reference to or consideration of the rulemaking procedures established in the APA. In the rulemaking context, then, the APA operates as one would expect a quasi-constitutional superstatute to operate: as a source of default procedural rules that apply uniformly across agencies. The APA appears to contemplate that it will operate in this way: Section 559 provides that a "[s]ubsequent statute may

⁷⁷ E.g., Bremer, *Incorporation by Reference*, *supra* note 70, at 194 (explaining that direct-final rulemaking permits an agency to lawfully truncate the rulemaking process").

⁷⁸ See 5 U.S.C. § 553(b)(A).

⁷⁹ There are, of course, other difficult definitional issues that arise in rulemaking, such as whether a rule is "binding" vs. "nonbinding," or "interpretative" vs. "substantive." Some of these issues can be traced to infirmities in the APA's definition of a "rule," which is related to, but distinct from, the question of how "rulemaking" is understood. See Levin, *supra* note 173.

not be held to supersede or modify” the APA “except to the extent that it does so expressly.”⁸⁰

Judicial review principles are, in character and operation, fundamentally similar to rulemaking principles. First, administrative common law is as prevalent here as it is in the rulemaking context. In both rulemaking and judicial review, the APA serves as the foundation of the administrative common law, albeit in slightly different ways. In rulemaking, the APA operates as the source of the procedural minima that the courts have fleshed out through common law. In judicial review, in contrast, the APA’s role is more passive: its judicial review provisions are relevant predominantly because they facilitate judicial review of agency action.⁸¹ In judicial review, as several scholars have argued, there is greater apparent conflict between the statutory text and the prevailing judicial review doctrines.⁸² Despite this more complex relationship with the APA’s text, administrative common law doctrines that determine the scope of judicial deference to administrative agencies are cross-cutting. These doctrines thus successfully perform the constitutional function of fitting agencies into the separation of powers because they establish uniform principles that are applicable across all agencies. A second similarity between the rulemaking and judicial review contexts is that Congress, the President, and administrative agencies all appear to agree that the judicial review norms seeded by the APA and fleshed out in administrative common law are validly cross-cutting, uniform norms. Administrative agencies consider the judicial deference doctrines in structuring their own actions. Congress similarly appears to recognize the cross-cutting, constitutional character of these norms. One small indication of this is the recent legislative effort to abolish *Chevron* deference through the Separation of Powers Restoration Act of 2016.⁸³

C. Uniformity and the Rejection of Administrative Exceptionalism

One thing that emerges from the preceding discussion is that affirming the uniformity of administrative law principles implicitly acknowledges that those principles apply across all administrative

⁸⁰ 5 U.S.C. § 559. Another part of Section 559 creates an exception for “additional requirements...recognized by law” at the time the APA was adopted. *Id.*

⁸¹ See 5 U.S.C. § 706.

⁸² See Duffy, *supra* note 39, at 193–99; Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 476 (1989); Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 868 (2001).

⁸³ See H.R. 114-622.

agencies. This relationship between uniformity and cross-cutting application may seem obvious, but several recent cases and a burgeoning literature on “administrative exceptionalism” suggests that it is not always so. “Administrative exceptionalism” refers to claims that traditional administrative law principles do not or cannot apply to discrete and allegedly unique administrative agencies or regulatory programs. In this context, the “traditional administrative law principles” at issue generally include the uniform, cross-cutting rules governing agency rulemaking and judicial review of agency action. Claims to administrative exceptionalism have been made in the contexts of tax,⁸⁴ patent,⁸⁵ and immigration law.⁸⁶

Recognizing the benefits of uniformity and the relationship between uniformity and cross-cutting application, scholars and courts have generally rejected administrative exceptionalism.⁸⁷ Most relevant to the

⁸⁴ See Michael Asimow, *Public Participation in the Adoption of Temporary Treasury Regulations*, 44 TAX LAW. 343 (1991) (criticizing Treasury’s evasion of notice-and-comment rulemaking requirements); Hickman, *Growing Influence*, *supra* note 4; Kristin E. Hickman, *Rejecting Tax Exceptionalism: Bringing Temporary Treasury Regulations Back in Line with the APA*, 100 MINN. L. REV. 839 (2015); Kristin E. Hickman, *Coloring Outside the Lines, Examining Treasury’s (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727 (2007); Stephanie Hoffer & Christopher J. Walker, *Is the Chief Justice a Tax Lawyer?*, 2015 PEPP. L. REV. 33, 42-43; Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. 221, 222 (2014); Richard Murphy, *Pragmatic Administrative Law and Tax Exceptionalism*, 64 DUKE L.J. ONLINE 21 (2014); James M. Puckett, *Structural Tax Exceptionalism*, 49 GA. L. REV. 1067 (2015); Patrick J. Smith, *The APA’s Arbitrary and Capricious Standard and IRS Regulations*, 136 TAX NOTES 271 (2012); Lawrence Zelenak, *Maybe Just a Little Bit Special, After All?*, 63 DUKE L.J. 1897 (2014).

⁸⁵ See Stuart Minor Benjamin & Arti K. Rai, *Administrative Power in the Era of Patent Stare Decisis*, 65 DUKE L.J. 1563 (2016); Stuart Minor Benjamin & Arti K. Rai, *Who’s Afraid of the APA? What the Patent System Can Learn from Administrative Law*, 95 GEO. L.J. 269 (2007) [hereinafter Benjamin & Rai, *Who’s Afraid*]; Michael D. Frakes & Melissa F. Wasserman, *Patent Office Cohorts*, 65 DUKE L.J. 1601 (2016); Golden, *supra* note 12, 65 DUKE L.J. 1657 (2016); Jonathan S. Masur, *CBA at the PTO*, 65 DUKE L.J. 1701 (2016); Walker, *Patent Exceptionalism*, *supra* note 5.

⁸⁶ See Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671 (2007); Christopher J. Walker, *Referral, Remand, and Dialogue in Administrative Law*, 101 IOWA L. REV. ONLINE 84 (2016); *cf.* David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. L. REV. 583 (2017) (documenting the myriad doctrines that set immigration outside of traditional constitutional principles).

⁸⁷ See, e.g., Justin (Gus) Hurwitz, *Administrative Antitrust*, 21 GEO. MASON L. REV. 1191, 1210 (2014) (describing “the Court’s increasing hostility towards administrative exceptionalism”); *but see* Golden, *supra* note 12 (arguing that the PTO is not entitled to *Chevron* deference); Puckett, *supra* note 84, at 1067 (arguing that scholarly pronouncements of the death of exceptionalism are exaggerations); Zelenak, *supra* note 84 (defending some measure of tax exceptionalism).

patent law focus of this article is *Dickinson v. Zurko*, in which the Supreme Court held that the APA's standard for judicial review of agency factual determinations applies to the PTO.⁸⁸ In so holding, the Court rejected the Federal Circuit's approach, according to which an admittedly ambiguous provision in a pre-APA statute governing the PTO was sufficient to override the APA. In explaining its decision, the Supreme Court explained that "[t]he APA was meant to bring uniformity to a field full of variation and diversity. It would frustrate that purpose to permit divergence on the basis of a requirement 'recognized' only as ambiguous."⁸⁹ Over a decade later, in *Mayo Foundation for Medical Education and Research v. United States*, the Supreme Court the Court reaffirmed the importance of uniformity in administrative law when it held that "[t]he principles underlying our decision in *Chevron* apply with full force in the tax context."⁹⁰ Moving from the judicial review to the rulemaking context, a recent district court decision rejected the IRS's claim that its temporary regulations interpreting the tax code are exempt from the APA's notice-and-comment requirements.⁹¹

The rejection of administrative exceptionalism is both proof and consequence of the quasi-constitutional character of the uniform norms that prevail in rulemaking and judicial review. As explained above, uniformity is an essential attribute of constitutional norms, and claims for administrative exceptionalism are, at bottom, claims of privilege against uniformity.⁹²

II.ADJUDICATION: A SIGNIFICANT, SLIGHTED OUTLIER

Throughout the discussion so far—of administrative constitutionalism, uniformity and cross-cutting application, and the rejection of administrative exceptionalism—adjudication has been conspicuously absent. Scholars have built these components of administrative law's standard narrative primarily by drawing examples from the contexts of rulemaking and judicial review. In those contexts, the

⁸⁸ See 527 U.S. 150.

⁸⁹ 527 U.S. at 154 (quoting 5 U.S.C. § 559).

⁹⁰ *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 55 (2011).

⁹¹ *Chamber of Commerce of the U.S. v. IRS*, 2017 WL 4682050 (W.D. Tex. 2017).

⁹² The tension between uniformity or "universality" and tailoring or "exceptionalism" is not unique to administrative law. See Peter Lee, *The Supreme Assimilation of Patent Law*, 114 MICH. L. REV. 1413, 1418-21 (2016) "Although the law has long prized universalism and broad consistency, these values frequently clash with the sprawling, technical nature of law and a countervailing pull toward tailoring legal domains to their unique subject matter." *Id.* at 1421.

narrative is powerful. But the examples are offered not only to prove something about rulemaking and judicial review: they are offered to support a vision of administrative law *as a whole*. Adjudication is a large and significant category of agency action. Its absence from the standard narrative of administrative law is curious and potentially problematic. Has adjudication simply been overlooked or has it been left out because it does not fit the standard narrative?

This Part investigates the curious case of the missing mode of agency action via a ground-up examination of agency adjudication. It begins by offering a deep dive into one of the many highly tailored adjudicatory schemes that exist throughout the federal government: the newly created *inter partes* review proceeding through which the PTO considers certain challenges to previously issued patents. The idiosyncratic qualities of this tailored adjudication scheme are drawn out through comparison to the procedures used in other adjudicatory programs. The broad diversity of agency adjudication is thrown into further relief through a discussion of several scholars' recent efforts to chart the vast and formless world of agency adjudication. These efforts reveal that the commonly used term "informal adjudication" has little consistent or useful meaning. Moreover, a review of established case law reveals that "formal adjudication" is a similarly vacuous concept. The courts have created several different tests for "formal" adjudication. By applying these tests to *inter partes* proceedings, it emerges that not only are there multiple tests for "formal adjudication," but those tests yield different results as applied to the same adjudicatory program. Overall, this analysis demonstrates that, in contrast to rulemaking and judicial review, adjudication is a field ruled by a prevailing norm of exceptionalism.

A. A Case Study in Patent Adjudication

To begin with a bit of institutional context, the PTO is the administrative agency that is tasked with carrying out Congress's delegated constitutional authority "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."⁹³ Although the patent system is nearly as old as the nation itself, Congress has modified its

⁹³ See U.S. CONST. Art. I, § 8, cl. 8; see generally Samiyyah R. Ali, Note, *The Great Balancing Act: The Effect of the America Invents Act on the Division of Power Between the Patent and Trademark Office and the Federal Circuit*, 69 VAND. L. REV. 217, 222-23 (2016) (discussing the PTO's history).

executive structure on multiple occasions.⁹⁴ In modern times, the PTO has generally exercised authority over initial patentability determinations, while courts have had a significant role in the development of substantive patent law, giving little deference to what has been viewed as a relatively weak agency.⁹⁵ This structure has set the PTO apart from other agencies, such that patent law has been recognized as one of the more exceptional fields of administration. Indeed, it was not until 1999 that the Supreme Court held that the APA's judicial review standards applied to the PTO, bring the agency more in to the mainstream of administrative law.⁹⁶

Congress's most recent, significant reform of the administrative patent structure was accomplished in 2011 with the AIA's enactment.⁹⁷ The statute created the PTAB and authorized it to preside over several newly created processes for evaluating previously issued patents.⁹⁸ One of these processes is *inter partes* review, which involves adjudicative reexamination of issued patents.⁹⁹ The procedures used in *inter partes* review were jointly designed by Congress and the PTO according to a framework established by the AIA. The AIA provides a detailed procedural structure and expressly directed the PTO to adopt regulations to complete the procedural design.¹⁰⁰ The agency fulfilled this statutory mandate by adopting detailed procedural regulations and issuing guidance designed to assist participants in trials before the PTAB.

As frequently occurs in adjudication, substantive policy concerns were a driving force behind the AIA's procedural reforms. These concerns included a "widespread belief" that the PTO was issuing a high volume of low-quality patents and that its patentability determinations were highly

⁹⁴ See Bayh-Dole Act, Pub. L. No. 96-517, § 1, 94 STAT. 2015, 3015-17 (Dec. 12, 1980) (codified as amended at 35 U.S.C. §§ 301-307); Patent Act of 1952, Pub. L. No. 82-593, § 6, 66 Stat. 792, 793 (1952); Patent Act of 1836, ch. 357, § 1, 5 Stat. 117, 117-18 (1836).

⁹⁵ See Ali, *supra* note 93, at 222-23, 224; see also John F. Duffy, *The FCC and the Patent System: Progressive Ideals, Jacksonian Realism, and the Technology of Regulation*, 71 U. COLO. L. REV. 1071, 1134 (2000); Sapna Kumar, *The Accidental Agency?*, 65 FLA. L. REV. 229 (2013).

⁹⁶ See *Dickinson v. Zurko*, 527 U.S. 150, 150 (1999).

⁹⁷ See, e.g., Stephen Yelderman, *Do Patent Challenges Increase Competition?*, 83 U. CHI. L. REV. 1943, 1996 ("One of the most significant patent reforms in recent years was the expansion of postissuance review procedures in the Patent Office under the 2011 AIA.").

⁹⁸ See 35 U.S.C. §§ 6, 316(c); Cohen, *supra* note 10, at 1-2. The PTAB is composed of the PTO "Director, the Deputy Director, the Commissioner for Patents, the Commissioner for Trademarks, and the administrative patent judges." 35 U.S.C. § 6(a).

⁹⁹ The Supreme Court recently upheld *inter partes* review against constitutional challenge. See *Oil States Energy Servs., LLC v. Greene's Energy Group, LLC*, https://www.supremecourt.gov/opinions/17pdf/16-712_87ad.pdf (2018).

¹⁰⁰ See 35 U.S.C. § 316(a).

inconsistent.¹⁰¹ Some argued that the PTO issued so many bad patents because it lacked sufficient resources to efficiently and effectively carry out its responsibilities with respect to patent applications.¹⁰² Before the AIA, bad patents could be invalidated by the PTO through *inter partes* reexamination or by the federal district courts through patent infringement litigation. But these alternatives were costly and time-consuming.¹⁰³ As a consequence, many argued that the system was not capable of weeding out the many bad patents that were issued.

The AIA addressed these concerns principally through procedural reforms designed to facilitate easier, less expensive, and more frequent invalidation and narrowing of issued patents.¹⁰⁴ The statute is relatively lenient in allowing the PTAB to institute an *inter partes* review proceeding.¹⁰⁵ Once review is instituted, the AIA provides that “the petitioner shall have the burden of providing a proposition of unpatentability by a preponderance of the evidence,”¹⁰⁶ a lower standard than the “clear and convincing” standard applied by federal courts in a civil action for patent infringement.¹⁰⁷ To make invalidation less costly and time-consuming, the AIA requires that *inter partes* review proceedings be completed within one year of their institution.¹⁰⁸ The statute also alleviates some of the burden on the PTO’s examination division by creating the PTAB to preside over the new, post-issuance proceedings, including *inter partes* review.¹⁰⁹ The process was further streamlined via a statutory provision allowing appeals from the PTAB’s final, written decisions to be

¹⁰¹ See Frakes & Wasserman, *supra* note 85, at 1603.

¹⁰² See, e.g., Frakes & Wasserman, *supra* note 85, at 1607-10 (explaining the harms attributed to the PTO’s issuance of invalid patents and inconsistent patentability decisions).

¹⁰³ See Cohen, *supra* note 10, at 2.

¹⁰⁴ Scholars have already begun to empirically evaluate how litigants are responding to the AIA’s procedural reforms. See, e.g., Saurabh Vishnubhakat, Arti K. Rain, and Jay P. Kesan, *Strategic Decision Making in Dual PTAB and District Court Proceedings*, 31 BERKELEY TECH. L.J. 45 (2016).

¹⁰⁵ A proceeding may be instituted when the information contained in an *inter partes* petition and the response thereto “shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” 35 U.S.C. § 314(a).

¹⁰⁶ *Id.* § 316(e).

¹⁰⁷ See Benjamin & Rai, *supra* note 12, at 1565-67, 1570-71.

¹⁰⁸ See 35 U.S.C. § 316(a)(11); Cohen, *supra* note 10, at 1.

¹⁰⁹ See 35 U.S.C. § 316(c), 326(c). Before the AIA, the PTO’s examination division was responsible for both initial examination of patent applications and reexamination of issued patents. See Bayh-Dole Act, Pub. L. No. 96-517, § 1, 94 STAT. 2015, 3015-17 (Dec. 12, 1980) (codified as amended at 35 U.S.C. §§ 301-307).

taken directly to the U.S. Court of Appeals for the Federal Circuit.¹¹⁰ Finally, the AIA “convert[ed] *inter partes* reexamination from an examinational to an adjudicative proceeding,” allowing Congress and the PTO to jointly design a more trial-like proceeding.¹¹¹ These aspects of the statute were designed to make the administrative process more attractive and familiar to those who would otherwise litigate patent validity questions in federal district court.¹¹²

Turning to the institutional components of the statutory design, the AIA constitutes the PTAB and tasks it with responsibility for presiding over the newly created, adjudicatory reexamination proceedings. The PTAB is composed of the PTO Director and Deputy Director, the Commissioners for Patents and Trademarks, and the administrative patent judges.¹¹³ The AIA defines the basic contours of the unique position of “administrative patent judge.”¹¹⁴ These adjudicating officials are not generalist Administrative Law Judges (ALJs),¹¹⁵ but rather “shall be persons of competent legal knowledge and scientific ability who are appointed by the Secretary [of Commerce], in consultation with the [PTO] Director.”¹¹⁶ The statute empowers the Secretary to grandfather in administrative patent judges who were appointed before this standard took effect as part of the AIA’s enactment.¹¹⁷ Meanwhile, the PTO Director is authorized to “fix the rate of

¹¹⁰ 35 U.S.C. § 141(c).

¹¹¹ See, e.g., 35 U.S.C. § 316(a)(5) (directing the PTO to adopt regulations allowing the depositions and other trial-like discovery tools); *Abbot Labs. v. Cordis Corp.*, 710 F.3d 1318, 1326 (Fed. Cir. 2013).

¹¹² H.R. Rep. No. 112–98, pt. 1, at 46–47 (2011); see *Abbott*, 710 F.3d at 1326.

¹¹³ 35 U.S.C. § 6(a).

¹¹⁴ See 35 U.S.C. § 6(a); see generally Michael Astorino, Matt Clements, Bart A. Gerstenblith, & Meredith Petravick, *Day in the Life of an Administrative Patent Judge*, https://www.uspto.gov/sites/default/files/documents/a_day_in_the_life_of_an_apj.pdf.

¹¹⁵ Adjudication under the APA’s so-called “formal” adjudication provisions, see 5 U.S.C. §§ 554, 556, 557, is typically conducted by ALJs, who are granted some independence from their employing agency by virtue of the Office of Personnel Management’s (OPM) statutory responsibilities regarding ALJ selection, certification, and tenure. OPM requires that ALJs be generalists and prevents adjudicating agencies from requiring specialized knowledge or experience as a condition on appointment. See ADMINISTRATIVE CONFERENCE OF THE UNITED STATES OFFICE OF THE CHAIRMAN, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: EVALUATING THE STATUS AND PLACEMENT OF ADJUDICATORS IN THE FEDERAL SECTOR HEARING PROGRAM 5 (Mar. 31, 2014) [hereinafter EEOC REPORT], available at <https://www.acus.gov/research-projects/status-and-placement-agency-adjudicators>.

¹¹⁶ 35 U.S.C. § 6(a).

¹¹⁷ See *id.* § 35(d).

basic pay for the administrative patent judges . . . at not greater than the rate of basic pay payable for level III of the Executive Schedule under section 5314 of title 5.”¹¹⁸ Level III of the Executive Schedule has recently been set at \$168,700 per year (as of January 2015)¹¹⁹ and, more recently, at \$170,400 per year (effective January 2016).¹²⁰ As of 2015, there were 225 administrative patent judges, each earning between \$137,200 and \$168,700 per year.¹²¹

In addition to designing the unique identity of the presiding officials, the AIA provides detailed, trial-like procedures for *inter partes* review. The statute sets filing deadlines, specifies the required contents of a petition requesting *inter partes* review, and requires the Director to make such petitions publicly available.¹²² It grants the patent owner the right to file a preliminary response to a petition¹²³ and also addresses the timing,¹²⁴ notice,¹²⁵ and non-appealability¹²⁶ of the PTAB’s decision of whether to institute a proceeding. Once *inter partes* review is instituted, the statute determines the relationship between that proceeding and other proceedings regarding the same patent(s), such as a civil action for infringement filed in federal district court.¹²⁷ The statute empowers the PTAB to join subsequent petitioners to an instituted proceeding¹²⁸ and to “stay, transfer, consolidate[e], or terminat[e]” an *inter partes* review

¹¹⁸ *Id.* § 3(b)(6). “The powers and duties of the United States Patent and Trademark Office shall be vested in an Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office (in this title referred to as the ‘Director’).” *Id.* § 3(a)(1). The Director must be a U.S. citizen, is appointed by the President with the Senate’s advice and consent, and “shall be a person who has a professional background and experience in patent or trademark law.” *Id.*

¹¹⁹ See <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2015/EX.pdf>.

¹²⁰ See <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2016/EX.pdf>.

¹²¹ See Asimow Report, *supra* note 8, at 73 (citing Michael Wagner, *An Introduction to Administrative Patent Judges at the Patent Trial and Appeal Board*, FEDERAL LAWYER (March 2015, p. 36)). ALJs are paid at approximately the same rate, and are similarly limited by the basic rate of pay for level III executives. See 5 U.S.C. § 5304(g)(2); OPM, 2015 Locality Rates of Pay, Administrative Law Judges, https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2015/ALJ_LOC.pdf.

¹²² See 35 U.S.C. §§ 311(c), 312.

¹²³ See *id.* § 313.

¹²⁴ See *id.* § 314(b).

¹²⁵ See *id.* § 314(c).

¹²⁶ See *id.* § 314(d).

¹²⁷ See *id.* § 315(a)-(b).

¹²⁸ See *id.* § 315(c).

proceeding or other related proceeding or matter in the event that multiple administrative proceedings involving the same patent arise.¹²⁹ Delving even further into the details, the statute addresses settlement¹³⁰ and estoppel based on previous administrative or judicial proceedings,¹³¹ requires PTAB decisions to be in writing,¹³² permits appeals,¹³³ and creates a certification process to confirm the final consequences of a decision for an affected patent.¹³⁴

Despite these many detailed provisions, the statute expressly contemplates that PTO regulations will further flesh out the *inter partes* procedural design. It provides that “[t]he Director shall prescribe regulations” to address thirteen enumerated subjects.¹³⁵ These administratively determined procedural elements include, for example, rules “prescribing sanctions for abuse of discovery,”¹³⁶ “providing either party with the right to an oral hearing as part of the proceeding,”¹³⁷ and “setting a time period for requesting joinder.”¹³⁸ The PTO Director is also mandated to “establish, by regulation, fees to be paid by the person requesting” *inter partes* review, “in such amounts as the Director determines to be reasonable, considering the aggregate costs of the review.”¹³⁹ In addition to these specific directives, Congress articulated an overarching policy to guide the PTO’s development of its procedural regulations, instructing that “the Director shall consider the effect of any such regulation on the economy, the integrity of the patent system, the efficient administration of the Office, and the ability of the Office to timely complete *inter partes* review proceedings.”¹⁴⁰ Together, these various provisions contemplate a significant administrative role in the procedural design of *inter partes* review.

As directed by Congress, the PTO has implemented the AIA by adopting extensive procedural regulations¹⁴¹ and guidance documents that

¹²⁹ See *id.* § 315(d).

¹³⁰ See *id.* § 317.

¹³¹ *Id.* § 315(e).

¹³² See *id.* § 318(a).

¹³³ See *id.* § 319.

¹³⁴ See *id.* § 318(b).

¹³⁵ *Id.* §§ 316(a)(1)-(13).

¹³⁶ *Id.* § 316(a)(6).

¹³⁷ *Id.* § 316(a)(10).

¹³⁸ *Id.* § 316(a)(12).

¹³⁹ *Id.* § 311(a).

¹⁴⁰ *Id.* § 316(b).

¹⁴¹ Through an integrated series of notice-and-comment rulemakings, the agency adopted a separate set of regulations for each type of proceeding. See Changes to

offer practical advice about how to understand and navigate the new processes.¹⁴² The PTO's guidance, which is called a "Trial Guide," has the flavor of court rules.¹⁴³ In the various rulemaking and guidance documents, the PTO interprets the AIA as establishing minimum procedural requirements for each of the new post-issuance proceedings.¹⁴⁴ The Trial Guide summarizes these statutory minima and then explains how the PTO has built upon the statute to complete the PTAB's procedures.¹⁴⁵

The regulations the PTO adopted to complete the *inter partes* procedural design are detailed and substantially trial-like. Indeed, a lawyer with experience litigating in the federal courts will find much that is familiar in the *inter partes* review process. This similarity to federal practice is manifestly intentional. Following Congress's lead, the PTO ignored the APA and instead used federal district court patent practice as the touchstone for its procedural design. The approach is apparent even in the smallest details, from the ministerial matters of electronic filing and discovery¹⁴⁶ and the rules permitting licensed counsel to be admitted *pro hac vice* before the PTAB,¹⁴⁷ to the provisions contemplating the use of initial conference calls and scheduling orders¹⁴⁸ and requiring the submission of

Implement Inter Partes Review Proceedings, Post-Grant Review Proceedings, etc., 77 Fed. Reg. 48,679 (Aug. 14, 2012); Rules of Practice for Trials Before the Patent Trial and Appeal Board and Judicial Review of Patent Trial and Appeal Board Decisions, 77 Fed. Reg. 48,611 (Aug. 14, 2012); Transitional Program for Covered Business Method Patents: Definitions of Covered Business Method Patent and Technological Invention, 77 Fed. Reg. 48,733 (Aug. 14, 2012); *see also* Changes to Implement Inventor's Oath or Declaration Provisions of Leahy-Smith America Invents Act, 77 Fed. Reg. 48,775 (Aug. 14, 2012); Changes to Implement Supplemental Examination Provisions of Leahy-Smit America Invents Act and Revise Reexamination Fees, 77 Fed. Reg. 48,827 (Aug. 14, 2012).

¹⁴² Office Patent Trial Guide, 77 Fed. Reg. 48,756 (Aug. 14, 2012). Although apparently offered as non-binding guidance, the agency used a notice-and-comment process to develop the Trial Guide. The guide was also published in the "Rules and Regulations" section of the *Federal Register*, but it contains no regulatory text and was not codified in the CFR. An interpretative rule or guidance document is exempt from the APA's notice-and-comment rulemaking requirements. *See* 5 U.S.C. § 553(b)(A). The PTO thus voluntarily observed the APA's rulemaking requirements in this proceeding. Among the many who participated in the proceeding by commenting on the guide was a member of Congress who was a principal author of the AIA. *See* 77 Fed. Reg. at 48,756.

¹⁴³ Compare 77 Fed. Reg. 48,756 with D.D.C.R. (Sept. 2017), available at <http://www.dcd.uscourts.gov/sites/dcd/files/LocalRulesSept2017.pdf>.

¹⁴⁴ *Id.* at 48,756.

¹⁴⁵ *Id.* at 48,756-58.

¹⁴⁶ *See id.* at 48,758-59, 48,762.

¹⁴⁷ *See id.* at 48,758.

¹⁴⁸ *See id.* at 48,765.

mandatory notices and disclosures at the outset of the proceeding¹⁴⁹ and of discovery.¹⁵⁰ The intention behind the design is evident in the many instances in which the regulations and Trial Practice Guide liberally draw on – and in some instances even embellish upon – the Federal Rules of Civil Procedure,¹⁵¹ the Federal Rules of Evidence,¹⁵² Federal Circuit caselaw and rules,¹⁵³ and other federal practice materials and authorities.¹⁵⁴ Although the statute does not expressly require the PTO to rely on these materials, the agency recognized that “[t]his approach is consistent with the legislative history of the AIA.”¹⁵⁵ Indeed, Congress’s effort to provide a more efficient and cost-effective alternative to patent litigation in the federal courts is perhaps obviously well served by the PTO’s adaptation of judicial litigation procedures in the new administrative context of *inter partes* review.

There is ample additional evidence in the regulations and guidance to support the proposition that the PTO eschewed the APA in favor of federal litigation as the relevant procedural design baseline. Two examples will suffice to show the pervasiveness of the approach. First, the *inter partes*

¹⁴⁹ See *id.* at 48,759-60.

¹⁵⁰ See *id.* at 48,761-62.

¹⁵¹ For example, the Federal Rules of Civil Procedure are used to define what constitutes confidential information. See *id.* at 48,760 (citing FED. R. CIV. P. 26(c)(1)(G)). In addition, “[t]he types of discovery available under the Federal Rules of Civil Procedure can be sought by the parties.” *Id.* at 48,761. The rules offer two options when the parties agree to mandatory initial disclosures: the “first option is modeled after Rule 26(A)(1)(A) of the Federal Rules of Civil Procedure” while the “second option is more extensive.” *Id.* at 48,762.

¹⁵² See, e.g., *id.* at 48,762 (citing FED. R. EVID. 502); *id.* at 48,763 (citing FED. R. EVID. 705).

¹⁵³ For example, the PTO cites Federal Circuit caselaw in its rules governing affidavits. See *id.* at 48,763 (citing *Rohm & Haas Co. v. Brotech Corp.*, 127 F.3d 1089, 1092 (Fed. Cir. 1997)). For e-Discovery, the PTO has adopted the Federal Circuit’s Model Order for patent cases, “modified to reflect the differences in statutory requirements.” *Id.* at 48,762.

¹⁵⁴ For example, the definitions of “real party-in-interest” and the standard for determining who is in “privity” with a party is drawn from the Federal Rules of Civil Procedure and attendant federal authorities. See *id.* at 48,759 (citing FED. R. CIV. P. 17(a); *Taylor v. Sturgell*, 553 U.S. 880 (2008); ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, *FEDERAL PRACTICE & PROCEDURE* §§ 4449, 4451 (2d ed. 2011)). The Guide cites 11th Circuit caselaw to support its rule imposing page limits in motions, explaining that “[f]ederal courts routinely use page limits to manage motions practice as ‘[e]ffective writing is concise writing.’” 77 Fed. Reg. at 48,763 (quoting *Spaziano v. Singletary*, 36 F.3d 1028, 1031 n.2 (11th Cir. 1994)).

¹⁵⁵ E.g., 77 Fed. Reg. at 48,759 (speaking directly to the agency’s use of the definition of “privity” used in the Federal Rules of Civil Procedure).

review procedures include detailed discovery rules that mirror those applicable in federal court. The rules provide for routine discovery that can proceed without Board authorization, including the production of exhibits referenced in testimony, cross-examination of declarants, and “relevant information that is inconsistent with a position advanced during the proceeding.”¹⁵⁶ Additional discovery may be obtained by the parties’ agreement or with the Board’s authorization when, as contemplated by the statute, it is “necessary in the interest of justice.”¹⁵⁷ The parties may also request that the Board issue a subpoena to compel testimony.¹⁵⁸ Second, *inter partes* review includes a petitions and motions practice before the PTAB that should be familiar to the experienced federal litigator.¹⁵⁹ The PTO’s Trial Practice Guide offers comprehensive guidance to lawyers appearing before the PTAB, using an approach that is informed by the PTO’s pre-AIA experience in reexamination proceedings.¹⁶⁰ In this regard, the agency has blended its administrative experience into the statute’s litigation-based template.

It bears emphasizing something that this discussion suggests: the PTO’s detailed rules reflect a thoughtful, sophisticated approach to procedural design. In some instances, the agency’s reasoning is supplied by the statute. One example is the “interest of justice” standard for additional

¹⁵⁶ *Id.* at 48,761. The provisions governing routine discovery provide examples to help define “inconsistent statements” and to address witness expenses and document translation. *See id.* The agency also offers detailed rules and guidance governing the live testimony and cross-examination of witnesses. *See id.* at 48,762; *see also* Appendix D: Testimony Guidelines.

¹⁵⁷ *See* 35 U.S.C. § 316(a)(5)(B); 77 Fed. Reg. at 48,761.

¹⁵⁸ *See* 35 U.S.C. § 24; 77 Fed. Reg. at 48,761; *see also* *Abbott*, 710 F.3d at 1326 (explaining that the AIA “demonstrates that Congress intended for subpoenas under section 24 to be made available in those proceedings in which depositions are relied upon by the PTO”). The APA’s adjudication provisions do not generally authorize ALJs to issue subpoenas, instead requiring that Congress grant the subpoena power to the individual agency via some other statute. *See* 5 U.S.C. § 556(c).

¹⁵⁹ The regulatory procedures address everything from the small details such as page limits to important matters such as evidentiary standards and burdens of proof. *See* 77 Fed. Reg. at 48,763.

¹⁶⁰ *See id.* at 48,763. For example, in explaining its rules regarding page limits in petitions, motions, and other documents, the Guide explains that “the Board’s experience is that the presentation of an overwhelming number of issues tends to detract from the argument being presented, and can cause otherwise meritorious issues to be overlooked or misapprehended.” *Id.*; *see also id.* (explaining that “[t]he Board has found that th[e] practice” of deciding procedural issues during or immediately following a conference call “simplifies a proceeding by focusing the issues early, reducing costs and efforts associated with motions that are beyond the scope of the proceeding”).

discovery.¹⁶¹ In other instances, the reasoning is more generally grounded in the PTO's efforts to fulfill the AIA's mandate to complete the procedural design of *inter partes* review. For example, the agency's rules governing accessibility of filings and the protection of confidential information are designed to "strike a balance between the public's interest in maintaining a complete and understandable file history and the parties' interest in protecting truly sensitive information."¹⁶² Another example is found in the agency's statement that "[r]outine discovery places the parties on a level playing field and streamlines the proceeding."¹⁶³ Some important aspects of the design are neither compelled nor contemplated by the statute. Particularly noteworthy in this regard is that the PTO has voluntarily adopted a prohibition on *ex parte* communications.¹⁶⁴

B. Patent Adjudication in Doctrinal Perspective

The standard doctrinal framework for understanding agency processes is grounded in the APA, which identifies two core agency processes: "adjudication" and "rulemaking." "Adjudication" is an "agency process for the formulation of an order,"¹⁶⁵ while "rule making" is an "agency process for formulating, amending, or repealing a rule."¹⁶⁶ The APA in turn defines a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."¹⁶⁷ Adjudication is rendered a catch-all category by virtue of the statute's definition of "order" as "the whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing."¹⁶⁸ Both rulemaking and adjudication have "formal" and "informal" variants, depending on which APA procedures apply to the proceedings. Taken together, this statutory framework

¹⁶¹ See 35 U.S.C. § 316(a)(5)(B).

¹⁶² 77 Fed. Reg. at 48,760.

¹⁶³ *Id.* at 48,761.

¹⁶⁴ See *id.* at 48,758.

¹⁶⁵ 5 U.S.C. § 551(7).

¹⁶⁶ *Id.* § 551(5).

¹⁶⁷ *Id.* § 551(4).

¹⁶⁸ *Id.* § 551(6).

produces four categories of agency procedure:

	Adjudication	Rulemaking
Formal	5 U.S.C. §§ 554, 556, 557	5 U.S.C. §§ 553, 556, 557
Informal	5 U.S.C. § 555 U.S. Const. Art. V	5 U.S.C. § 553

This is how agency procedure has long been conceptualized and how it is taught in law schools today.¹⁶⁹

In this straightforward account, formal and informal adjudication are easy categories to define and understand. After all, “formal” adjudication simply refers to adjudicatory hearings that Congress has required by statute to be conducted in accord with the APA’s adjudication provisions, 5 U.S.C. §§ 554, 556, and 557. “Informal” adjudication includes all other adjudicatory hearings, which are subject to the minimum requirements of Constitutional due process and must comply with the § 555 of the APA. The latter is the provision of the APA that addresses “ancillary matters.”¹⁷⁰ It is not an adjudication-specific provision, although it addresses various matters that may arise in adjudication, such as representation for parties compelled to appear before an agency¹⁷¹ and the use of administrative subpoenas.¹⁷²

The difficulty is that this framework ignores adjudication’s reigning principle: exceptionalism. This section argues that exceptionalism has profound upstream doctrinal consequences and has rendered the formal-informal dichotomy nearly useless as applied to adjudication.¹⁷³ It constructs this argument in three parts, using *inter partes* review as its focal point. First, it asks whether *inter partes* review proceedings are “formal” adjudications. This question arises in several different contexts, and

¹⁶⁹ See, e.g., RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO, & PAUL R. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 248-49 (6th ed. 2013). Any number of treatises and textbooks understand formal adjudication in this way.

¹⁷⁰ 5 U.S.C. § 555.

¹⁷¹ See *id.* § 555(b).

¹⁷² See *id.* § 555(d).

¹⁷³ Indeed, “[a]s has often been pointed out, the APA’s definitions of ‘adjudication’ and ‘rulemaking’ are flawed and do not reflect actual practice.” Asimow Report, *supra* note 8, at 7 (citing Ronald M. Levin, *The Case for (Finally) Fixing the APA’s Definition of “Rule,”* 56 ADMIN. L. REV. 1077 (2004)).

administrative law unsurprisingly offers several different, context-specific approaches to answering it. What is surprising is that the APA plays a different role in each approach and, as applied to *inter partes* review, each approach yields a different result. This outcome suggests that administrative law has failed to produce a traditional, uniform principle defining “formal” adjudication. Second, this section inquires whether the APA has succeeded, as it has in rulemaking, in providing a foundation for the development of uniform, cross-cutting minimum procedures for “informal” adjudication. Once again using *inter partes* review as a quintessential example, it answers in the negative. Third and finally, this section concludes that the formal-informal dichotomy should be abandoned in favor of a more realistic (and complex) classification scheme for agency adjudications.

1. “Formal” Adjudication

To begin with might appear to be a straightforward doctrinal question, are *inter partes* review proceedings “formal” adjudications? In a string of cases, the Federal Circuit has so characterized them, albeit in a conclusory manner with little analysis or explanation.¹⁷⁴ For example, in *Belden Inc. v. Berk-Tek*, the first in this series of cases, the Federal Circuit characterized *inter partes* review as a “formal” adjudicatory proceedings with no analysis or indication as to how it arrived at the conclusion.¹⁷⁵ As in later, similar cases, the court explained that, because *inter partes* review proceedings are formal adjudication, the PTAB must comply with the APA’s adjudication provisions.¹⁷⁶ In *Belden*, the court found no violation of the APA, and the discussion is thus properly understood to be dicta. In several other cases, however, the Federal Circuit used the characterization of the proceedings as formal adjudications to support its conclusion that the PTAB violated a party’s rights “to notice of and a fair opportunity to meet

¹⁷⁴ See, e.g., *Novartis AG v. Torrent Pharm. Ltd.*, 853 F.3d 1316, 1324 (Fed. Cir. 2017); *In re: Nuvasive, Inc.*, 841 F.3d 966, 971 (Fed. Cir. 2016); *Genzyme Therapeutic Prods., Ltd. P’ship v. Biomarin Pharm. Inc.*, 825 F.3d 1360, 1365-66 (Fed. Cir. 2016); *SAS Inst., Inc. v. ComplementSoft, LLC*, 825 F.3d 1341, 1351 (Fed. Cir. 2016); *Dell Inc. v. Accelaron, LLC*, 818 F.3d 1293, 1298 (Fed. Cir. 2016); *Belden Inc. v. Berk-Tek LLC*, 805 F.3d 1064, 1080 (Fed. Cir. 2015). The Federal Circuit has cited *Dickinson v. Zurko*, 527 U.S. 150, 154 (1999), in support of this characterization, see *SAS Institute*, 825 F.3d at 1351, despite the fact that the case predates the AIA’s creation of *inter partes* review by more than a decade and does not discuss “formal” adjudication.

¹⁷⁵ 805 F.3d at 1080.

¹⁷⁶ See *id.* at 1080.

the grounds of rejection.”¹⁷⁷ To date, the Federal Circuit has predominately used the formality of *inter partes* review proceedings to enforce this right to notice and an opportunity to be heard. The court has not considered whether the formality of *inter partes* review requires the agency to observe other APA requirements or entitles the PTAB’s patentability decisions to judicial deference under *Chevron*.¹⁷⁸ Nor has it been particularly clear about its methodology for assessing the procedural formality of *inter partes* review.

A broader assessment of judicial caselaw, however, reveals that the law offers four distinct approaches to determining whether an agency’s proceedings are “formal” adjudications. Each approach is designed to address the question of adjudicative formality in a particular context, for a particular purpose.

The De Novo APA Approach.

The first approach to defining adjudicative formality is grounded in a legal standard established by the APA: the so-called “triggering” provision of the APA’s adjudication provisions. This standard is found in Section 554(a), which provides that the APA’s adjudication provisions “appl[y] ... in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing.”¹⁷⁹ As this language suggests, the identification of proceedings that must comply with the APA’s adjudication provisions is a function fulfilled not by the APA itself, but by another statute.¹⁸⁰ Thus, when an agency’s governing statute meets the standard established in Section 554(a), the agency must observe the APA’s so-called “formal” adjudication procedures.¹⁸¹ In de novo APA cases, courts have explained that Section 554 may apply even if its “magic words” (i.e., hearing “on the record”) are absent from an

¹⁷⁷ *Dell*, 818 F.3d at 1301; see also *In re: Nuvasive, Inc.*, 841 F.3d at 971-72; *SAS Institute*, 825 F.3d at 1351.

¹⁷⁸ In a recent case, *Aqua Products, Inc. v. Matal*, a divided en banc panel of the Federal Circuit held the agency’s decisions regarding certain burdens of proof under the AIA were reviewable under *Chevron*. See 872 F.3d 1290 (Fed. Cir. 2017).

¹⁷⁹ 5 U.S.C. § 554(a).

¹⁸⁰ See *id.* § 554(a); see also TOM C. CLARK, U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 41 (1947), available at <http://www.law.fsu.edu/library/admin/1947cover.html> [hereinafter ATTORNEY GENERAL’S MANUAL].

¹⁸¹ See *Portland Audubon Soc. v. Endangered Species Comm.*, 984 F.3d 1534 (9th Cir. 1993); *St. Louis Fuel & Supply Co., Inc. v. FERC*, 890 F.2d 446, 448 (D.C. Cir. 1989).

agency's governing statute.¹⁸² Rather than taking a mechanical approach, courts engage in a more holistic interpretation of the agency's statute and history to determine whether "Congress intended to *require* full agency adherence to all section 554 components."¹⁸³

The Supreme Court first applied this *de novo* APA approach in the 1950 case of *Wong Yang Sung v. McGrath*,¹⁸⁴ which raised the question of whether the APA's adjudication provisions applied to deportation hearings.¹⁸⁵ The Court began with a lengthy discussion of the APA's purposes,¹⁸⁶ highlighting the statutory goal of promoting uniformity across agencies and remedying the evil "practice of embodying in one person or agency the duties of prosecutor and judge."¹⁸⁷ Turning to the case before it, the Court stated that the deportation "hearing [is] a perfect exemplification of the practices so unanimously condemned" by Congress in enacting the APA.¹⁸⁸ In *Wong Yang Sung*, the interpretive question was whether deportation hearings were "required by statute" within the meaning of Section 554(a).¹⁸⁹ The key point of dispute, however, was whether this language reached hearings that, like deportation hearings, are required not by statute, but by the Constitution.¹⁹⁰ The Court answered this question in the affirmative, concluding that Section 554's "required by statute" language "exempts from that section's application only those hearings which administrative agencies may hold by regulation, rule, custom, or special dispensation; not those held by compulsion."¹⁹¹ The required "compulsion" could be found in a statute (as the APA expressly contemplates) or, as in *Wong Yang Sung*, in a judicial decision holding that the agency is constitutionally required to hold a hearing.¹⁹² It bears noting that this approach seems to accord with the accepted conceptual framework

¹⁸² See, e.g., *St. Louis Fuel*, 890 F.2d at 448.

¹⁸³ *Id.* at 449; see also *Lane v. USDA*, 120 F.3d 106, 110 (8th Cir. 1997) (citing *West Chicago v. NRC*, 701 F.2d 632, 641 (7th Cir. 1983)). As this discussion suggests, the APA's discrete procedural requirements for formal rulemaking are used to determine whether the APA applies and are also the consequences of a decision that the APA applies. This dual role appears to have created some confusion in the doctrine.

¹⁸⁴ 339 U.S. 445 (1950).

¹⁸⁵ See *id.* at 447.

¹⁸⁶ See *id.* at 448-50.

¹⁸⁷ *Id.* at 450; see also *id.* at 450-52.

¹⁸⁸ *Id.* at 452.

¹⁸⁹ *Id.* at 453.

¹⁹⁰ See *id.* at 453, 454.

¹⁹¹ *Id.* at 454.

¹⁹² See *id.* at 454.

for agency proceedings, suggesting that “formal” adjudications are simply those required be conducted under 5 U.S.C. §§ 554, 556, and 557.

Today, the *de novo* APA approach to defining adjudicative formality is applied almost exclusively in the context of disputes arising under the Equal Access to Justice Act (EAJA).¹⁹³ EAJA is an administrative fee-shifting statute. It provides that:

“[a]n agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.”¹⁹⁴

The statute further defines “[a]dversary adjudication” to mean “an adjudication under section 554” of the APA “in which the position of the United States is represented by counsel or otherwise.”¹⁹⁵ With respect to the first aspect of this definition, with which this Article is concerned,¹⁹⁶ courts have held that “[a] proceeding is ‘under’ § 554 if it is ‘subject to’ or ‘governed by’ that ‘section.’”¹⁹⁷ Just as the courts do not require Congress to use magic words to require APA adjudication, nor do they require Congress to use “magical passwords” to exempt an agency process from the APA.¹⁹⁸ This aspect of the doctrine gives effect to APA’s admonition that a “[s]ubsequent statute may not be held to supersede or modify [the APA], ... except to the extent that it does so expressly.”¹⁹⁹ Breaking down Section 554’s requirements, then, courts hold that it applies if an agency is (1) required by statute to conduct (2) an adjudication (3) on the record (4) after an opportunity for a hearing.²⁰⁰ If these elements are all present, a

¹⁹³ See 5 U.S.C. § 504; Asimow Report, *supra* note 8, at 8.

¹⁹⁴ 5 U.S.C. § 504(a).

¹⁹⁵ *Id.* § 504(b)(1)(C).

¹⁹⁶ This paper is not concerned with the question of *adversarial* adjudication, so that aspect of EAJA’s requirement is not analyzed.

¹⁹⁷ See *Aageson Grain & Cattle v. U.S. Dep’t of Agric.*, 500 F.3d 1038 (9th Cir. 2007) (quoting *Ardestani v. INS* 502 U.S. 129, 135 (1991)); see also, e.g., *Lane*, 120 F.3d at 108; *St. Louis Fuel*, 890 F.2d at 450-51.

¹⁹⁸ *Marcello v. Bonds*, 349 U.S. 302, 310 (1955); *Lane*, 120 F.3d at 110.

¹⁹⁹ 5 U.S.C. § 559.

²⁰⁰ See, e.g., *Lane* 120 F.3d at 108; see also *Portland Audubon*, 984 F.3d at 1540 (applying this test and holding that 5 U.S.C. § 557 prohibition on *ex parte* communications

court generally will find that the Section 554 applies, absent some strong indication of contrary congressional intent.

The EAJA context is unique—and has puzzled some scholars—because the courts accord neither weight nor deference to an agency's determination of whether its adjudicatory program is conducted "under section 554" of the APA.²⁰¹ Indeed, in these cases, the courts typically do not even consider the possibility of giving deference or weight to the agency's interpretation.²⁰² The principal reason, perhaps, is that EAJA functions as a waiver of sovereign immunity, and the courts therefore interpret it strictly.²⁰³ In addition, the EAJA cases do not directly implicate the question of an agency's discretion to determine its own procedures because the cases are primarily about the payment of government funds. In this context, the agency is not merely interpreting its own statute, but is primarily interpreting a cross-cutting statute. One agency's interpretation of EAJA (particularly if upheld by judicial decision) may have far-reaching implications for the payment of costs and fees by other agencies. As to this statutory overlay, the traditional justifications for judicial deference to an agency's characterization of its own procedures do not apply. In addition, the Supreme Court has "h[e]ld that the meaning of 'an adjudication under section 554' is unambiguous in the context of EAJA."²⁰⁴ This suggests that EAJA raises a step-one question that a court should answer *de novo* according to the two-step deference framework established by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*²⁰⁵ The courts appear to carry the rigidity of EAJA's unambiguous language throughout the analysis, treating Section 554(a) as similarly unambiguous.²⁰⁶

Courts applying the *de novo* APA approach have held that an agency's hearings are not subject to Section 554 if there is clear evidence that Congress intended to displace the APA's formal adjudication provisions with a comprehensive adjudication procedure tailored to meet the unique needs of the agency and its statutory mandate.²⁰⁷ The Supreme Court's decisions in *Marcello v. Bonds* and *Ardestani v. I.N.S.*, involving

applied to proceeding required by statute conducted "in accordance with sections 554, 556, of 557 ... of title 5," 16 U.S.C. § 1536(g)(6)).

²⁰¹ See Asimow Report, *supra* note 8, at 8.

²⁰² See, e.g., *Lane*, 120 F.3d at 109.

²⁰³ *Ardestani*, 502 U.S. at 138.

²⁰⁴ *Ardestani*, 502 U.S. at 135.

²⁰⁵ 467 U.S. 837, 842-43 (1984).

²⁰⁶ E.g., *Ardestani*, 502 U.S. at 519 ("We hold that the meaning of "an adjudication under section 554" is unambiguous in the context of the EAJA.").

²⁰⁷ See, e.g., *id.* at 518; *Marcello*, 349 U.S. at 310.

deportation proceedings under the Immigration and Naturalization Act (INA), are key examples. Six months after the Supreme Court's decision in *Wong Yang Sung*,²⁰⁸ Congress responded by including in the Supplemental Appropriation Act of 1951 a provision stating that deportation hearings "should not be governed by" the APA's adjudication provisions.²⁰⁹ The issue in *Marcello* was "whether the Congress reversed itself in the 1952 Immigration Act," which prescribed detailed procedures for deportation hearings, but contained no express exemption from the APA's requirements.²¹⁰ To resolve this issue, the Court began by comparing the Immigration Act's procedures to those established by the APA.²¹¹ The Court explained:

From the Immigration Act's detailed coverage of the same subject matter dealt with in the hearing provisions of the [APA], it is clear that Congress was setting up a specialized administrative procedure applicable to deportation hearings, drawing liberally on the analogous provisions of the [APA] and adapting them to the particular needs of the deportation process.²¹²

Furthermore, the Immigration Act contained a provision stating that "[t]he procedure [herein prescribed] shall be the sole and exclusive procedure for determining the deportability of an alien under this section."²¹³ Based on the legislative history of the Act, the Court interpreted this provision as a "clear and categorical" exclusion of the APA's applicability.²¹⁴ This was sufficient to overcome the APA's requirement that "modifications [of the APA] must be express."²¹⁵

A key example of adjudications that are "formal" from the de novo APA perspective are those conducted by the U.S. Department of Agriculture's National Appeal Division (NAD).²¹⁶ In *Lane v. U.S.*

²⁰⁸ 339 U.S. 445 (1950); see *supra* notes 184-192 and accompanying text.

²⁰⁹ *Marcello*, 349 U.S. at 306; see William Funk, *The Rise and Purported Demise of Wong Yang Sung*, 58 ADMIN. L. REV. 881 (2006).

²¹⁰ *Marcello*, 349 U.S. 306-07.

²¹¹ See *id.* at 307-08.

²¹² *Id.* at 308.

²¹³ *Id.* at 309 (alteration in original).

²¹⁴ *Id.* at 309-10.

²¹⁵ *Id.* at 310; see also 5 U.S.C. § 559.

²¹⁶ See *Five Points Rd. Joint Venture v. Johanns*, 542 F.3d 1121 (7th Cir. 2008); *Aageson Grain*, 500 F.3d 1038; *Lane*, 120 F.3d 106.

Department of Agriculture, the Eighth Circuit carefully examined the NAD statutes, which establish detailed adjudicative procedures.²¹⁷ The USDA argued that, like deportation hearings, the NAD “statutes are a separate, comprehensive statutory scheme that contain express procedures for conducting hearings.”²¹⁸ For this reason, the agency argued, the proceedings are not conducted “under” Section 554 of the APA. The Eighth Circuit rejected this argument because the NAD statutes do not: (1) contain any provision disclaiming the APA’s applicability; (2) conflict with any of the APA’s provisions; and (3) in one instance even cross-reference the APA.²¹⁹ Although the NAD statutes contain some “minor variations”²²⁰ on the APA’s adjudication provisions, those variations deal primarily with subjects the APA does not address.²²¹ In addition, the court explained, the legislative history of the NAD statutes contains no suggestion that Congress intended to exempt the agency from the APA.²²²

Inter partes review proceedings are not “formal” proceedings under the de novo APA approach because the AIA conveys a clear congressional intent to create a specialized adjudicatory procedure tailored to suit the specific needs of patent law.²²³ The AIA’s text contains no indication that Congress contemplated that the PTAB would conduct *inter partes* review proceedings according to the APA’s formal adjudication provisions.²²⁴ Nor does the legislative history contain any such indication.²²⁵ In the deportation context, the Court concluded that Congress had modified the APA model of adjudication to suit the needs of deportation, and this was sufficient to support the conclusion that the APA did not apply.²²⁶ Although one purpose of the AIA was to transform administrative patent reexamination into an adjudicative proceeding, there is no indication that Congress defined or understood “adjudicative” from an APA perspective.²²⁷ Indeed, the statute and legislative history convey the clear

²¹⁷ *Lane*, 120 F.3d at 108-10.

²¹⁸ *Id.* at 109.

²¹⁹ *Id.* at 109.

²²⁰ *Id.* at 110; *see also id.* (“There is not an extensive adaptation of the APA, only minor variations.”)

²²¹ *Id.* at 109.

²²² *See id.* at 110.

²²³ *See Marcello*, 349 U.S. at 308-10.

²²⁴ *See supra* at Part I.A.

²²⁵ *See Joe Matal, A Guide to the Legislative History of the America Invents Act: Part II of II*, 21 FED. CIR. B.J. 540, 598-623 (2012); *see generally* Joe Matal, *A Guide to the Legislative History of the America Invents Act: Part I of II*, 21 FED. CIR. B.J. 435 (2012).

²²⁶ *See Marcello*, 349 U.S. at 308-10.

²²⁷ *See Matal, supra* note 225, at 620.

impression that Congress viewed federal district court litigation—and not APA formal adjudication—as the relevant procedural baseline. In contrast to the USDA cases discussed above, there is no mention of the APA in the AIA or its legislative history. This makes sense if one considers that, as previously explained, Congress's intent in the AIA was to create a more efficient, less expensive alternative to federal court litigation. The AIA's detailed procedural provisions appear to tailor federal district court proceedings to suit the administrative patent adjudication context. And the PTO's procedural regulations suggest that this is how the agency interpreted Congress's mandate.²²⁸

That the AIA's *inter partes* review procedures omit certain key components of APA formal adjudications is further evidence that Congress did not take the APA as the relevant procedural baseline, let alone intend to require the PTAB to observe APA procedures. Two omissions from the AIA are especially notable. First, the AIA constitutes the PTAB and charges it with the responsibility for presiding over *inter partes* review proceedings.²²⁹ The administrative patent judges who share in this responsibility are not ALJs. They accordingly do not share in the independence and protection that the APA offers to ALJs.²³⁰ This is a central feature of the APA's adjudicatory design.²³¹ Its absence from the AIA is notable, albeit not conclusive. This is because the APA itself reserves the possibility of alternative structures for adjudicators.²³² The AIA's second omission is perhaps more glaring: the statute contains no prohibition on ex parte communications. The APA's prohibition on ex parte prohibitions is a significant feature of formal adjudication.²³³ Indeed, the courts have viewed the requirement as so fundamental that they have extended it to apply in

²²⁸ See *supra* at Part I.B.; cf. Matal, *supra* note 225, at 620 (explaining that “the bill . . . gives the [PTO] discretion in prescribing regulations governing the new proceedings,” and “[t]he [PTO] has made clear that it will use this discretion to convert inter partes into an adjudicative proceeding,” in a manner consistent with the bill's intended effect” (quoting 157 CONG. REC. S1375 (daily ed. Mar. 8, 2011) (statement of Sen. Kyl)).

²²⁹ See *supra* at notes 113-8, and accompanying text.

²³⁰ See, e.g., Michael Asimow, *The Spreading Umbrella: Extending the APA's Adjudication Provisions to All Evidentiary Hearings Required by Statute*, 56 ADMIN. L. REV. 1003, 1009 (2004) [hereinafter Asimow, *Spreading Umbrella*] (“The APA contains a set of provisions relating to the hiring, evaluation, rotation, compensation, and tenure of ALJs.”).

²³¹ See *Wong Yang Sung*, 339 U.S. 445.

²³² See 5 U.S.C. § 556(b)(3) (“This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute.”)

²³³ See 5 U.S.C. § 557(d)(1); *Portland Audubon*, 984 F.3d at 1540.

certain quasi-adjudicatory informal rulemaking proceedings.²³⁴ It is difficult to imagine how the matter of *ex parte* communications could have been wholly omitted from the AIA if Congress was tailoring the APA's model of adjudication to suit the needs of administrative patent adjudication.

The conclusion that *inter partes* review proceedings are informal adjudications accords with the reality that, under the *de novo* APA approach, not all trial-like proceedings are formal adjudications.²³⁵ The APA's formal procedures are often described as "trial-like."²³⁶ But, as the Supreme Court has explained, "Section 554 does not merely describe a type of agency proceeding; it also prescribes that certain procedures be followed in the adjudications that fall within its scope."²³⁷ Thus, there are agencies that adjudicate outside of the APA, i.e., informally, using procedures consistent with the APA's formal adjudication provisions.²³⁸ The mere similarity between these agencies' procedures and the procedures required under the APA does not make these adjudications formal in the *de novo* APA sense. In determining adjudicative formality under the *de novo* APA approach, the key question is whether Congress intended to *require* the agency to conduct its hearings under Sections 554, 556, and 557 of the APA. Or to put it another way: proceedings are formal from this perspective if the APA's adjudication provisions are the *source* of applicable procedural requirements.

A final, important point flows from this analysis: for purposes of determining adjudicative formality under the *de novo* APA approach, only the agency's *statute* matters.²³⁹ The agency's procedural regulations are

²³⁴ See, e.g., *Home Box Office, Inc. v. Fed. Commc'ns Comm'n*, 567 F.2d 9 (D.C. Cir. 1977); *Action for Children's Television, v. Fed. Commc'ns Comm'n*, 564 F.2d 458 (D.C. Cir. 1977); see also *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959); *Courtaulds (Ala.) Inc. v. Dixon*, 294 F.2d 899 (D.C. Cir. 1961).

²³⁵ But see Wasserman, *supra* note 12 at 1983 (concluding that the AIA requires formal adjudication under § 554 because Congress plainly contemplated trial-like proceedings); cf. *Ardestani*, 502 U.S. at 136 (rejecting argument in favor of broader reading of EAJA that would reach all "trial-type proceedings").

²³⁶ E.g., Wasserman, *supra* note 12, at 1983; John F. Stanley, Note, *The "Magic Words" of § 554: A New Test for Formal Adjudication Under the Administrative Procedure Act*, 56 HASTINGS L.J. 1067, 1068 (2005) ("Whether or not a party to a federal agency adjudication has the opportunity to a formal, trial-like hearing depends upon whether or not § 554 of the [APA] applies to that adjudication." (internal footnote omitted)).

²³⁷ *Ardestani*, 502 U.S. at 136.

²³⁸ See EEOC REPORT, *supra* note 115, at 5 available at <https://www.acus.gov/research-projects/status-and-placement-agency-adjudicators>; see also *infra* Part II.B.

²³⁹ See *Wong Yang Sung*, 339 U.S. at 50.

irrelevant. Thus, if there are components of the APA's formal adjudication requirements that are missing in the agency's statute, but are required by the agency's regulations, the combined procedural reality cannot be characterized as formal under the *de novo* APA approach. In *inter partes* review, the PTO has by regulation imposed the *ex parte* prohibition that the AIA conspicuously lacks. This regulation is not cognizable under the *de novo* APA approach to defining adjudicative formality. It may be relevant, however, from the agency procedural discretion perspective, which is discussed in the next section.

The Compelled Formality Approach.

The second approach to determining adjudicative formality is also grounded in the APA, but the analysis is softened significantly by the familiar overlay of agency procedural discretion. In the *de novo* APA approach discussed above, Section 554 is viewed through the lens of EAJA, which is strictly construed as a waiver of sovereign immunity and is viewed by the courts as unambiguous. This lends significant rigidity to the analysis of, first, Section 554 and, derivatively, the agency's governing statute. The compelled formality approach does not involve EAJA, and it is focused directly on the agency's adjudicatory procedures. Here, the question is whether the agency is required by statute to conduct formal adjudication under the APA, even if it would prefer to adjudicate informally. In this analysis, Section 554(a) is not viewed as rigid or unambiguous, and the agency's traditional authority to interpret its governing statute and own regulations is generally respected.²⁴⁰ In most instances, as a consequence, the agency's determination of the formality (or, more commonly, informality) of its adjudicatory procedures is ordinarily given effect.

The compelled formality approach applies when, outside of the EAJA context, an agency is called upon to determine whether it is required by statute to conduct formal adjudication under the APA. This need may arise because an agency is drafting procedural regulations to govern a new adjudicatory program or when a party appearing before the agency asserts that it has been denied some procedure required by the APA. The available judicial precedent predominately involves this latter variant.²⁴¹

²⁴⁰ See *Auer v. Robbins*, 519 U.S. 452 (1997); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

²⁴¹ See EEOC REPORT, *supra* note 115, at 6.

The range of circumstances in which an agency will be compelled to conduct formal adjudication is narrow. As discussed previously, the APA states that its formal adjudication provisions apply (with certain limited exceptions) to any “adjudication required by statute to be determined on the record after opportunity for an agency hearing.”²⁴² Under the compelled formality approach, courts do not force an agency to adjudicate under the APA unless the agency’s governing statute says that the APA applies²⁴³ or requires a hearing “on the record.”²⁴⁴ Although courts have disclaimed the necessity of these “magic words,”²⁴⁵ they have required a very clear statement of congressional intent to require formal adjudication.²⁴⁶ Indeed, notwithstanding the judiciary’s protestations, the commentators have described the caselaw as taking a “magic words” approach.²⁴⁷ When an agency’s statute does not include the phrase “on the record,” courts defer to the agency’s determination of whether its statute requires formal adjudication. Although this approach has been criticized, it is consistent with the fundamental administrative law principle that an agency has primary authority and expertise to interpret the statute it is charged with administering.²⁴⁸

Under the compelled formality approach, *inter partes* review proceedings are not formal adjudications. That is, a court would not compel the PTO to conduct *inter partes* review proceedings under the APA’s adjudication provisions. As previously noted, the AIA does not reference the APA’s adjudication provisions or contain the magic words hearing “on the record.”²⁴⁹ For the reasons set forth in the previous section, the best

²⁴² 5 U.S.C. § 554(a).

²⁴³ See, e.g., *Portland Audubon*, 984 F.3d at 1540.

²⁴⁴ See 5 U.S.C. § 554(a); *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12 (1st Cir. 2006); *Chemical Waste Mgmt., Inc. v. EPA* 873 F.2d 1477 (D.C. Cir. 1989); see also Asimow Report, *supra* note 8, at 7 (“The prevailing view is that the APA applies only if the statute says it applies or the statute explicitly calls for a hearing ‘on the record.’”).

²⁴⁵ E.g., *West Chicago*, 701 F.2d at 641 (“Although Section 554 specifies that the governing statute must satisfy the ‘on the record requirement, those three magic words need not appear for a court to determine that formal hearings are required.’”).

²⁴⁶ *West Chicago*, 701 F.2d at 641.

²⁴⁷ See Asimow Report, *supra* note 8, at 7. For a time, the First Circuit held that Congress intended the APA to apply to all adjudicatory hearings involving important public policy issues. See *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872 (1st Cir. 1978). It has more recently abandoned that approach, see *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12 (1st Cir. 2006), although there remains a 9th Circuit case that can be read to embrace a similar principle, see *Marathon Oil Co. v. EPA*, 564 F.2d 1253 (1977); Asimow Report, *supra* note 8, at 8 & n.24.

²⁴⁸ See *Bremer & Jacobs*, *supra* note 5.

²⁴⁹ See *supra* at Part III.A.1.

argument is that Congress did not intend for the PTAB to conduct *inter partes* review according to the APA's formal adjudication provisions. That argument only strengthens when it is evaluated through the lens of agency procedural discretion. If the PTO were to conclude that *inter partes* review proceedings are not subject to the APA, a court would likely uphold the agency's determination.

The Voluntary Formality Approach

The third approach to defining adjudicative formality involves the flip side of the compelled formality approach. It is applied in the relatively rare instances in which an agency that is *not required* by statute to formally adjudicate nonetheless chooses to voluntarily comply with the APA's adjudication provisions. One difficulty in discussing this approach is that there is little caselaw available to define it. Agencies rarely elect to adjudicate formally.²⁵⁰ And when an agency does elect to provide more procedure than is required by statute, that decision is unlikely to be challenged in court. For one thing, parties appearing before an agency are unlikely to complain that they have been afforded *too much* procedure. Moreover, it is well-established that "[a]gencies are free to grant additional procedural rights in the exercise of their discretion."²⁵¹

One reason an agency might voluntarily observe the APA's adjudication provisions would be to facilitate the appointment of ALJs to preside over the hearings in lieu of non-ALJ adjudicators.²⁵² Full compliance with the APA's requirements is necessary in this circumstance because the Office of Personnel Management (OPM), which is charged with statutory responsibility for the selection, certification, and tenure of ALJs, has taken the position that ALJs can only be appointed to preside over hearings that are required by statute or regulation to be conducted in a manner consistent with the APA's formal adjudication provisions.²⁵³ For

²⁵⁰ See EEOC REPORT, *supra* note 115, at 6.

²⁵¹ *Vermont Yankee*, 435 U.S. at 524; *see also, e.g.,* *New Life Evangelistic Ctr., Inc. v. Sebelius*, 753 F. Supp. 2d 103, 121 (D.D.C. 2010).

²⁵² *See generally* EEOC REPORT, *supra* note 115 (providing EEOC with guidance as to the legal, policy, and financial considerations relevant to its determination of whether to appoint ALJs in lieu of non-ALJ adjudicators in the Federal Sector Hearings Program).

²⁵³ *See* 5 U.S.C. §§ 1104(a), 1302(a), 1305, 3105, 3304, 3323(b), 3344, 4301(2)(D), 5372, and 7521; *see generally* VANESSA K. BURROWS, CONG. RESEARCH SERV., RL 34607, ADMINISTRATIVE LAW JUDGES: AN OVERVIEW (2010); Jeffrey S. Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 109, 111 (1981).

purposes of this analysis, then, procedural elements in the agency's statute *and* regulations may be considered.²⁵⁴ Moreover, all that is required is descriptive parity between *inter partes* review and APA adjudication—the more stringent requirement of demonstrating that the APA is the source of the procedural rules does not apply.

The PTO *might* be able to classify *inter partes* review as formal adjudication under the voluntary formality approach. There are at least two reasons for uncertainty here. First, as explained above, the strongest argument is that Congress did not intend for *inter partes* review to be conducted under the APA's adjudication provisions. This conclusion is supported by Congress's apparent inattention to the APA and intent to tailor district court litigation for the administrative context by enacting the AIA. But the statute is not conclusive on this point. Whether the AIA requires adjudication under the APA is, rather, contestable and contested.²⁵⁵ This is a source of ambiguity, which could convey more flexibility on the agency. Second, whether the PTO could classify *inter partes* review as formal adjudication might depend on the purpose and context of the agency's determination. If the agency offered the characterization to persuade a court to grant the agency's substantive decisions *Chevron* deference, the court might be more skeptical.²⁵⁶ More to the point, if securing judicial deference was the agency's goal, the voluntary formality approach would not apply. This is discussed further below. On the other hand, if the PTO's goal was to support a procedural design choice that offered greater procedural protection in *inter partes* review proceedings, a court (or another agency, such as OPM) would be more likely to uphold that exercise of the agency's procedural discretion.²⁵⁷

Under OPM's formulation of the voluntary formality approach, the PTO might characterize *inter partes* review as formal adjudication. Under this formulation of the approach, the PTO would need only show that the applicable procedures are consistent with the requirements of 5 U.S.C. §§ 554, 556, and 557. Having adopted by regulation the *ex parte* prohibition that is missing from the AIA, the PTO might demonstrate descriptive parity

²⁵⁴ See, e.g., EEOC REPORT, *supra* note 115, at 11-12 (discussing similar past efforts by the Social Security Administration and the Department of Labor).

²⁵⁵ See, e.g., Wasserman, *supra* note 12, at 1981-83; see also *supra* at Part II.C. (discussing the Federal Circuit's caselaw summarily characterizing *inter partes* review as formal adjudication).

²⁵⁶ For reasons discussed in the next section, however, it would not be necessary for the agency to prove that Congress intended AIA proceedings to be formal adjudications under the APA in order to make a compelling case for *Chevron* deference.

²⁵⁷ See *Vermont Yankee*, 435 U.S. at 524.

with the APA's adjudication provisions. The wrinkle here is that Congress affirmatively chose in the AIA not to require the appointment of ALJs and instead created the alternative position of the administrative patent judge. It thus seems unlikely, as a practical matter, that PTO would ever seek to appoint ALJs. Indeed, the AIA's administrative patent judge provisions could be read to deprive the PTO of the discretion that an adjudicating agency might ordinarily have to appoint ALJs.²⁵⁸

As noted above, if the PTO sought to characterize *inter partes* review as "formal" adjudication for purposes of securing judicial deference to the substance of its decisions, yet another standard would apply. The next section turns to this fourth and final approach to defining adjudicative formality.

The Judicial Deference Approach

The fourth and final approach to determining adjudicative formality is derived from the Supreme Court's precedents governing judicial deference to administrative decisions. One might reasonably object that this approach to defining adjudicative formality fits uneasily in a discussion focused on the nuts and bolts of agency procedure. After all, the judicial deference approach is derived from caselaw addressing the question of what deference, if any, the courts should give to an agency's substantive interpretive and policymaking decisions. Here, the characterization of an agency's procedure as "formal" or "informal" is just one component of that larger inquiry. The analysis that follows seeks to carve out the procedural component of the deference analysis for independent consideration. This will necessarily be dissatisfying to those interest in the deference analysis itself or in the broader question (which is much in dispute) of whether the courts should defer to the substance of the PTO's patentability determinations.

In the judicial deference approach, the APA's adjudication provisions can be relevant to characterizing the agency's procedures, but those provisions do not drive the analysis. Recall that in the *de novo* APA context, Section 554 of the APA dominates and is given special rigidity by EAJA's unambiguous waiver of sovereign immunity. In the compelled and voluntary formality approaches, the APA is still an overriding concern, but the focus both expands and softens. It expands beyond the language Section 554(a) to include a more detailed comparison between an agency's own procedures and the minimum procedural requirements established in

²⁵⁸ See EEOC REPORT, *supra* note 115, at 23-32.

Sections 556 and 557. The analysis also softens by virtue of an overlay of the traditional administrative law principles recognizing an agency's discretion to interpret its own statute and design its own procedures. In the fourth approach to adjudicative formality, these traditional principles of administrative discretion take center stage. Although the APA's adjudication provisions can be relevant, they do not have an essential role in the analysis. This is because the approach is not directly concerned with the agency's procedures at all. Instead, it is focused on discerning the scope of congressional delegation to the agency and is concerned with determining what, if any, deference a court should give to the agency's substantive decisions on judicial review of agency action.

For purposes of determining the scope of judicial deference to agency action, the central question is whether "Congress intended [the agency's decision] to carry the force of law."²⁵⁹ This concept of "force of law" is slippery, and the Supreme Court has not provided a definitive articulation of its meaning.²⁶⁰ The seminal cases on judicial deference, however, offer some guidance. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,²⁶¹ the Supreme Court held that an agency's decision is entitled to deference when it reflects a reasonable interpretation of an ambiguous statute that explicitly or implicitly delegates interpretive authority to the agency.²⁶² Later, in *United States v. Mead Corp.*,²⁶³ the Court provided guidance on how to identify a "delegation of specific interpretive authority" that warrants the application of *Chevron* deference.²⁶⁴ The

²⁵⁹ *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001); *see also id.* at 226-27 ("We hold that administrative implementation of a particular statutory provisions qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.")

²⁶⁰ *See, e.g., Hickman, Force of Law*, *supra* note 74, at 485 ("Having pronounced the force of law as the touchstone for *Chevron* deference, however, the Court has again declined to specify precisely what it means by that concept."); Rubenstein & Gulasekaram, *supra* note 86, at 606 n.122 ("The confusion [regarding the meaning of 'force of law'] is partly of the Court's own making."); Sidney A. Shapiro & Richard W. Murphy, *Eight Things Americans Can't Figure Out About Controlling Administrative Power*, 61 ADMIN. L. REV. 5, 23 (2009) (stating that "force of law" is "one of the more pernicious phrases in American administrative law").

²⁶¹ 467 U.S. 837 (1984).

²⁶² *See Chevron*, 467 U.S. at 843-44.

²⁶³ 533 U.S. 218 (2001).

²⁶⁴ *Mead* suggests that the requisite delegation may be found in provisions of an agency's statute that addressed substantive and not procedural matters. The Court explained implicit delegation may "be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be

delegation may be either express or implicit.²⁶⁵ In addition, the “[d]elegation ... may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.”²⁶⁶ This language suggests the possibility of establishing a congressional delegation by reference to the procedural provisions of the agency’s governing statute. Because the focus, however, is on *Congress’s* intent to delegate interpretive authority to the agency, procedural elements found only in the agency’s regulations are not relevant.

Although “formal” adjudication in the sense of adjudication statutorily subjected to the APA’s adjudication provisions would presumably qualify, the *Mead* court’s definition of procedural “formality” appears to sweep more broadly.²⁶⁷ The Court elaborated:

We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed. It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for *a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force*. Thus, the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication.²⁶⁸

able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which ‘Congress did not actually have an intent’ as to a particular result.” This paper, however, is concerned with how *Mead* defines procedural formality, particular in connection with administrative adjudication. Thus, it does not explore the possibilities for using substantive statutory provisions to build a persuasive case for judicial deference under the standard articulated in *Mead*.

²⁶⁵ *Mead*, 533 U.S. at 229; *Chevron*, 467 U.S. at 844.

²⁶⁶ *Mead*, 533 U.S. at 227 (emphasis added).

²⁶⁷ In contrast, the de novo APA and agency procedural discretion approaches discussed above in Parts II.A. and II.B., respectively, define “formal” as “conducted under the APA’s adjudication provisions,” see 5 U.S.C. § 554, 556, and 557. The principal difference between those two approaches is that in the former, APA adjudication is required by statute, while in the latter, APA adjudication is conducted (if at all) at the agency’s discretion.

²⁶⁸ *Mead*, 533 U.S. at 229-30 (emphasis added) (internal citation and footnote omitted).

This passage thus defines “formality” for judicial deference purposes as a “relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of [legal] force.”²⁶⁹ The Court states explicitly that notice-and-comment rulemaking—that is, *informal* rulemaking under the APA—meets this definition of formality.²⁷⁰ And it also suggests that “formal adjudication,” which presumably means “adjudication under the APA,” qualifies. In context, however, it does not appear that the Court means to suggest that APA adjudication is the only sufficiently formal kind under the *Mead* standard.²⁷¹ This reading is confirmed by the Court’s identification of certain *informal* adjudications as examples of proceedings sufficiently “formal” to merit judicial deference.²⁷²

There would appear to be at least three possible ways to establish that an adjudicatory process satisfies the *Mead* standard of formality. First, if Congress has by statute required the agency to adjudicate under the APA, that would surely suffice.²⁷³ Thus, if a proceeding is formal from the *de novo* APA perspective, it is also formal from the judicial deference perspective. For the reasons identified above, *inter partes* review does not qualify on this basis. Second, a proceeding may be “formal” under *Mead* if Congress created a tailored adjudicatory process that is substantially similar to APA adjudication. In this formulation, the APA need not be the source of procedural law, but the statute offers a descriptive benchmark for judging adjudicative formality. This would explain, for example, the Supreme Court’s identification of deportation hearings as an example of adjudicatory proceedings that meet *Mead*’s definition of formality.²⁷⁴ For the reasons set forth at the end of Section B, above, *inter partes* review

²⁶⁹ *Id.* at 230.

²⁷⁰ See 5 U.S.C. § 553.

²⁷¹ The Court’s use of the term “formal adjudication,” which traditionally means “adjudication under the APA,” is confusing because it appears here at the end of a paragraph in which the court is offering a different, more amorphous definition of formality. This is the kind of confusion that has led some academics to reject the formal-informal dichotomy in adjudication altogether. See, e.g., Asimow Report, *supra* note 8, at 3.

²⁷² See *Mead*, 533 U.S. at 229-30.

²⁷³ E.g., Wasserman, *supra* note 12, at 1969 (“The *Mead* Court further clarified that a congressional delegation of formal adjudicatory or rule-making power is generally sufficient to infer—more specifically, “a very good indicator” of—congressional intent to delegate interpretative authority to an agency.” (citing *Mead*, 533 U.S. at 229-31)).

²⁷⁴ See *Mead*, 533 U.S. at 230 n.11 (citing *INS v. Aguirre-Aguirre*, 526 U.S. 415, 423-425 (1999)). As explained in Section A of this Part, deportation hearings are not “formal” from the *de novo* APA perspective. And yet the Supreme Court has characterized them as “formal” from the judicial deference perspective.

proceedings may well meet *Mead*'s definition of adjudicative formality because the AIA establishes a procedure that is substantially similar to that established by the APA's adjudication provisions.²⁷⁵ Third, even in the absence of substantial similarity to the APA's adjudication provisions, a procedure could conceivably still be characterized as a "relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of [legal] force."²⁷⁶ Although this standard is somewhat amorphous, the AIA's substantially "trial-like" or "court-like" procedures would appear to meet it.²⁷⁷

Summary and Conclusion

In summary, there are not only four distinct approaches to determining whether an adjudicatory process is "formal," but as applied to *inter partes* review, each approach yields a different answer. The chart below

Approach	Question	APA's Role	PTAB "Formal"?
De Novo	EAJA: "Adjudication" under or subject to APA § 554?	Source of Law (Rigid)	No
Compelled	Agency required by statute to adjudicate under APA?	Source of Law (Soft)	No
Voluntary	Agency discretion to voluntarily adjudicate under APA?	Descriptive	Maybe
Deference	Should court defer to agency because agency is authorized to speak with force of law?	Descriptive, If Any	Yes

From the rigid, APA-centric perspective that modern courts apply only in EAJA cases, *inter partes* review proceedings are not formal adjudications. From the more flexible, APA-centric perspectives that apply to agency procedural design decisions, *inter partes* review proceedings could be characterized as either informal or formal, depending on what institution is making the decision (court vs. agency) and for what purpose. Finally, from the judicial deference perspective, *inter partes* review proceedings are

²⁷⁵ In this analysis, substantial similarity should be sufficient. Thus, the AIA's failure to prohibit ex parte communications is not fatal to the analysis. Again, because the lodestar of this analysis is Congress's intent to authorize the agency to speak with the force of law, the PTO's imposition of an ex parte restriction by regulation is irrelevant.

²⁷⁶ *Mead*, 533 U.S. at 230.

²⁷⁷ See Benjamin & Rai, *supra* note 12, at 1582-90. A future draft of this article will offer a much more detailed analysis.

formal adjudications because the AIA creates a “relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of [legal] force.”²⁷⁸

This analysis suggests that – contrary to the conventional wisdom – administrative law has not generated a uniform, stable norm governing the seemingly simple question of whether an adjudicative process is “formal.”

2. “Informal” Adjudication

The conventional wisdom further holds that, if an adjudicatory process like *inter partes* review is not “formal,” then it must be “informal.” Is there a stable norm to be found in this second alternative? Is *inter partes* review informal adjudication and, if so, does that classification entail a clear set of minimum procedural elements?

The place to start, perhaps, is Section 555 of the APA, which is often identified as the provision that specifies the minimum procedural requirements for informal adjudication.²⁷⁹ One might interpret this to mean that Section 555 is the adjudicatory analog of Section 553, which establishes minimum procedures for informal rulemaking.²⁸⁰ But Section 555 is no such thing.²⁸¹ In fact, the provision is not specifically devoted to adjudication at all. Rather, it addresses various “ancillary matters” that may be relevant in a variety of agency proceedings, including informal adjudications.²⁸² These matters include the representation of persons compelled to appear before administrative agencies,²⁸³ certain due process rights in connection with

²⁷⁸ *Mead*, 533 U.S. at 230.

²⁷⁹ *E.g.*, *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 655 (1990) (explaining that “the minimal requirements for [informal adjudication] are set forth in the APA, 5 U.S.C. § 555”); *see* Asimow, *Spreading Umbrella*, *supra* note 230; Ronald J. Krotoszynski, Jr., *Taming the Tail that Wags the Dog: Ex Post and Ex Ante Constraints on Informal Adjudication*, 56 ADMIN. L. REV. 1057, 1058-59 (2004); *but see* Harold H. Bruff, *Coordinating Judicial Review In Administrative Law*, 39 UCLA L. REV. 1193, 1216-17 (1992) (stating that “[t]he APA provides only rudimentary procedures for rulemaking and none at all for informal adjudication”). Section 558, which address the imposition of sanctions, the determination of applications for licenses, and the suspension, revocation, and expiration of licenses may also apply to certain adjudications. *See* Asimow, *Spreading Umbrella*, *supra* note 230.

²⁸⁰ *See supra* at Part. 1.B.

²⁸¹ *See* Krotoszynski, *supra* note 279, at 1059.

²⁸² *See* 5 U.S.C. § 555; *but see* Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 315 n. 294 (1978) (suggesting that § 555(e) does not apply to informal adjudication).

²⁸³ 5 U.S.C. § 555(b).

agency investigations,²⁸⁴ limitations on the issuance of agency subpoenas,²⁸⁵ and requirements for agencies to provide notice and an explanation when denying certain requests for agency action.²⁸⁶ This scattershot of issues that may or may not arise in adjudication bears little resemblance to Section 553's brief but focused articulation of the notice-and-comment rulemaking process. In additional contrast to Section 553, Section 555 has not provided an effective substrate for the judicial development of caselaw fleshing out minimum procedural requirements for informal adjudication. There is no set of uniform norms defining "informal" adjudication to be found in the APA.

Perhaps recognizing the APA's lack of content, some have instead identified the Constitution's Due Process Clause as the principal source of minimum procedures for informal adjudication.²⁸⁷ And to be sure, the Due Process clause does establish the absolute floor. These minimum constraints are modest, for several reasons.²⁸⁸ First, the Due Process Clause does not reach all adjudications because it applies only when an agency's action threatens a deprivation of life, liberty, or property.²⁸⁹ Second, even when the clause applies, the Supreme Court has established a highly flexible, context-specific standard for determining the minimum procedures that are required by due process.²⁹⁰ The courts have resisted a detailed articulation of the minimum procedures required by due process. Third, the highly flexible, context-specific nature of the due process analysis has resulted in a substantial role for the agencies themselves in designing procedures to satisfy the Constitution's minimums.²⁹¹ As a practical matter, there are many instances in which the agency may be the first and last institution to address this aspect of the procedural design. Even when the courts review the agencies' choices, they often do so in a deferential posture. There may be good reasons for this judicial deference and the agency procedural

²⁸⁴ *Id.* § 555(c).

²⁸⁵ *Id.* § 555(d).

²⁸⁶ *Id.* § 555(e).

²⁸⁷ See, e.g., WILLIAM N. ESKRIDGE JR., ABBE R. GLUCK, & VICTORIA F. NOURSE, *STATUTES, REGULATION, AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES* 762 (2014).

²⁸⁸ See Emily S. Bremer, *Designing the Decider*, 16 GEO. J.L. & PUB. POL'Y 67, 73-74 (2018) [hereinafter Bremer, *Designing*]; Bremer & Jacobs, *supra* note 18, at 531.

²⁸⁹ See U.S. CONST. AMEND. V, § 4.

²⁹⁰ See *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

²⁹¹ As noted above, this is an area of significant administrative constitutionalism. See *supra* Part I.A.

discretion it facilitates.²⁹² But the important point for purposes of this article is that, like Section 555 of the APA, the Due Process Clause has not provided much foundation for the judicial articulation of minimum procedures that would apply in—and define—informal adjudication. If *inter partes* review is properly classified as informal adjudication, the doctrinal perspective offers little in the way of clear, uniform norms or procedures that might lend that classification some useful meaning.

C. Patent Adjudication in Systemic Perspective

As the discussion above suggests, administrative law doctrine supplies little in the way of minimum procedures for agency adjudication or otherwise supply stable, uniform norms to define “formal” and “informal” adjudication. Thus, if one seeks to understand *inter partes* review—or any other adjudicatory program that is conducted outside the APA’s adjudication provisions²⁹³—an approach to doing so must be found elsewhere. Perhaps an obvious alternative when doctrinal analysis fails is to shift towards a comparative analysis. In the context of this Article, this boils down to examining how *inter partes* review compares to the many other adjudicatory programs that exist throughout the federal government. Potentially instructive comparison could occur along two dimensions. First, at the level of design philosophy, by inquiring whether there are uniform, consistently applied principles that Congress and administrative agencies observe when designing adjudicatory programs. Obviously, this inquiry will be influenced by the doctrinal landscape discussed above, but it is more broadly concerned with identifying any common, system-wide principles of procedural design in adjudication. If there are such principles, did Congress and the PTO observe them in designing *inter partes* review? Second, at a more granular level, a comparative analysis could assess whether there is a core set of procedural elements that are common across non-APA adjudications. And, if so, does *inter partes* review include these common procedural elements or does it rather deviate from or embellish upon them?

At the level of design philosophy, the case study above paints a portrait of *inter partes* review as a heavily tailored process designed to suit the unique needs of patent adjudication and modeled off of judicial, rather than administrative, processes. The AIA and its implementing procedural

²⁹² See Adrian Vermeule, *Deference and Due Process*, 129 HARV. L. REV. 1890, 1919 (2016).

²⁹³ See 5 U.S.C. §§ 554, 556, 557.

regulations are exceptionally detailed, designed to accommodate the substantive needs of U.S. patent policy. Although the AIA's legislative history indicates that Congress intended to "convert[] *inter partes* reexamination from an examinational to an adjudicative proceeding," neither the legislative history nor the statutory text suggests that Congress understood "adjudicative" from an administrative perspective.²⁹⁴ To the contrary, the process created by statute and fleshed out through the PTO's regulations appears to be "adjudicative" in a judicial sense. As recounted above, judicial procedures, practices, and concepts are pervasive throughout the statute, regulations, and guidance. The APA or other administrative conceptions of adjudication appear to be almost entirely absent from the procedural design.²⁹⁵ This account suggests that *inter partes* review is exceptional, in at least two sense. First, it is exceptional as that term is used by administrative law scholars because it is a process not designed in accord with or otherwise subject to traditional principles of administrative law. Second, *inter partes* review is exceptional in a more colloquial sense, because it is a highly tailored and unique process designed to suit the needs of patent law and policy.

The exceptional nature of the *inter partes* procedural design, however, is common across many federal adjudicatory programs. Indeed, the ink was still wet on the APA when Congress first began to deviate from the statute's procedural defaults, creating specialized adjudicatory procedures to meet the needs of individual agencies and regulatory programs. As recounted above, the Supreme Court's decision in *Wong Yang Sung*, holding that deportation proceedings were subject to the APA's adjudication provisions, was decided in 1950, a mere four years after the APA's enactment.²⁹⁶ Congress acted swiftly to reverse this decision, making clear its intent that deportation proceedings should not be subject to the APA's default rules for administrative adjudication.²⁹⁷ Unlike in the rulemaking context, this example of congressional deviation from the APA was not a one-off event. Although the courts continued for some time to apply to *Wong Yang Sung*'s broader APA holding to other adjudication

²⁹⁴ *Abbot Labs.*, 710 F.3d at 1326 (quoting H.R.Rep. No. 112-98, pt. 1, at 46-47 (2011)).

²⁹⁵ One exception, arguably, is the PTO's adoption of a prohibition on ex parte communications, which is a hallmark of the APA's adjudication provisions, although judicial practices also embrace such a prohibition. See 77 Fed. Reg. at 48,758.

²⁹⁶ See *Wong Yang Sung*, 339 U.S. at 33; *supra* notes 184-192 and accompanying text.

²⁹⁷ See *supra* notes 208-215 and accompanying text.

programs,²⁹⁸ they too eventually abandoned it in favor of the now-familiar deferential judicial doctrines. This judicial turn facilitated administrative agency avoidance of the APA's adjudication provisions in favor of tailor-made procedures adopted via regulations, guidance, or unpublished practice.²⁹⁹ On a system-wide basis, the consequence of these congressional, judicial, and administrative acts is that, although there are hundreds of adjudication programs throughout the federal government, only a handful of agencies adjudicate according to the procedures established by the APA's adjudication provisions.³⁰⁰ Most agencies therefore adjudicate using unique procedures that have been congressionally or administratively tailored to suit the unique needs of the particular agency or regulatory program. Paradoxically, *exceptionalism* is the dominant principle of procedural design in adjudication.

Responding to the dominance of exceptionalism in the design of adjudicatory procedures, at least one scholar has urged that the traditional formal-informal dichotomy should be rejected in the adjudication context as unhelpful and even misleading.³⁰¹ In place of that traditional dichotomy, Professor Michael Asimow has offered an alternative classification scheme that divides agency adjudication programs into three types:

- Type A adjudications are those that are conducted in accordance with the APA's adjudication provisions.³⁰² In this classification scheme, the agency's observance of the APA may be according to any legal requirement, whether imposed by statute or regulation.³⁰³
- Type B adjudications are not conducted in accord with the APA's adjudication provisions, but do involve matters legally required to

²⁹⁸ See *Riss & Co. v. United States*, 341 U.S. 907 (1951); *Adams v. Witmer*, 271 F.2d 29 (9th Cir. 1958); *Funk*, *supra* note 209, at 886-87; *compare Cates v. Haderlein*, 189 F.2d 369, 372 (7th Cir. 1951), *with Cates v. Haderlein*, 342 U.S. 804 (1951).

²⁹⁹ See Asimow Report, *supra* note 8, at 17.

³⁰⁰ See *id.* at 2; Bremer, *Designing*, *supra* note **Error! Bookmark not defined.**, at 70.

³⁰¹ See Asimow Report, *supra* note 8, at 3; Admin. Conf. of the United States, Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,312, 94,314 (Dec. 23, 2016).

³⁰² See 5 U.S.C. § 554, 556, 557; Asimow Report, *supra* note 8, at 2.

³⁰³ When imposed by the agency's own regulations, this would be a matter of the agency's voluntary observance of the APA. The *de novo* APA approach discussed above is narrower and would not recognize such agencies as engaging in "formal" adjudication under the APA. See *Wong Yang Sung*, 339 U.S. at 33.

be decided following an evidentiary hearing.³⁰⁴ An “evidentiary hearing” is “a proceeding [in] which the parties make evidentiary submissions, have an opportunity to rebut testimony and arguments made by the opposition, and to which the exclusive record principle applies.”³⁰⁵ The “exclusive record principle,” confines the presiding official “to considering inputs from the parties (as well as matters officially noticed) when determining factual issues.”³⁰⁶

- Type C adjudications are those neither conducted in accord with the APA’s adjudication provisions nor are otherwise subject to a legal requirement for an evidentiary hearing.³⁰⁷

Very few agencies conduct Type A hearings, although in those proceedings, there is substantial procedural uniformity by virtue of the agencies’ observance of the APA’s adjudication requirements.³⁰⁸ As a consequence of congressional and administrative avoidance of the APA, therefore, the vast majority of adjudications are Type B or Type C adjudications. These proceedings escape the APA’s homogenizing influence and thus it is not immediately clear that even this more realistic classification scheme conveys much about the actual procedures observed in the bulk of federal adjudication programs.

Moving towards the second, more granular inquiry in the search for system-wide principles of adjudication, what do Type B and Type C programs look like? Despite broad discretion and the attraction of context-specific procedural design, do these programs share a core set of procedural characteristics? A recent, large-scale study sheds some light on the matter. This years-long study of Type A and Type B adjudication was conducted by Professor Asimow, on behalf of the Administrative Conference of the United States (ACUS).³⁰⁹ Type C adjudication was omitted from the study because it is such a large, varied, and obscure category that is nearly

³⁰⁴ Asimow Report, *supra* note 8, at 2, 10. The legal requirement for an evidentiary hearing may be imposed by statute, regulation, or executive order. *See id.*

³⁰⁵ *Id.* at 4, 10.

³⁰⁶ *Id.* at 4, 10.

³⁰⁷ Based solely on the AIA, it appears that these proceedings are Type B proceedings, and that is how Professor Asimow has classified them. *See id.* at 73-80 (offering a “deep dive” analysis of PTAB procedures).

³⁰⁸ *See id.* at 2; Bremer, *Designing*, *supra* note **Error! Bookmark not defined.**, at 70.

³⁰⁹ ACUS is a free-standing federal agency that studies administrative procedure and makes consensus-based recommendations for improvement to other agencies, the President, the Congress, and the Judicial Conference. *See* 5 U.S.C. §§ 591-96.

impossible to study on a large scale.³¹⁰ While somewhat troubling, this reality is perhaps a natural consequence of the APA's definition of adjudication, which operates as a catch-all category that includes myriad proceedings in which perhaps there is no pressing need for uniform, detailed procedures.³¹¹ Focusing on Type A and Type B proceedings captures the programs in which an absence of such uniform minimum procedures is likely to be most problematic, both practically and as a matter of sound administrative principle.³¹² At any rate, despite the study's narrowed focus on Type A and Type B proceedings, it has produced a large, publicly available database of federal agency adjudication programs. This database is jointly sponsored by ACUS and Stanford Law School.³¹³ It includes information about 432 adjudicatory schemes at 133 agencies across the federal government. Of the 432 total schemes, 103 are Type A and 230 are Type B schemes.³¹⁴ In addition to the database, the ACUS project is expected to produce several reports and recommendations, including one set of these that has already been completed.³¹⁵

This extensive study has identified a number of procedural elements that are common to many (but not all) Type B adjudications.³¹⁶ There are 20 of these elements, which are referred to as "best practices" and are divided into five categories:³¹⁷

- (1) Integrity of the decisionmaking process:³¹⁸
 - a. Observance of the exclusive record principle.
 - b. Restrictions on ex parte communications.
 - c. Separation of personnel performing adversary and decisional functions.
 - d. Rules governing the appropriate provision of non-adversarial, ex parte staff advice.
 - e. Elimination or prevention of bias in decisionmaking.

³¹⁰ See Asimow Report, *supra* note 8, at 2.

³¹¹ See 5 U.S.C. § 551(4)-(7); Emily S. Bremer, *The Agency Declaratory Judgment*, 78 OHIO ST. L.J. 1169, 1183 n.81 (2017); Cass R. Sunstein & Adrian Vermeule, *The Law of "Not Now": When Agencies Defer Decisions*, 103 GEO. L.J. 157, 170 (2014).

³¹² To put it another way, focusing on Type A and Type B proceedings is likely to capture the adjudications that should be subject to the APA according to the Supreme Court's logic in *Wong Yang Sung*, plus perhaps a few more.

³¹³ See ADJUDICATION RESEARCH, JOINT PROJECT OF ACUS AND STANFORD LAW SCHOOL, <https://acus.law.stanford.edu/>.

³¹⁴ See *id.*

³¹⁵ See Asimow Report, *supra* note 8.

³¹⁶ See *id.* at 35.

³¹⁷ See *id.* at 19.

³¹⁸ See *id.* at 20-23.

(2) Prehearing practices:³¹⁹

- a. Proper notice of the issues to be adjudicated.
- b. Assistance of self-represented or lay-represented parties.
- c. Encouragement and facilitation of alternative dispute resolution.
- d. Pretrial conferences.
- e. Electronic filing of documents.
- f. Discovery through mandatory disclosures and according to adjudicator order.
- g. Explanation of how subpoenas will be used, if the agency is authorized by statute to issue subpoenas.

(3) Hearing practices:³²⁰

- a. Use of administrative judges to conduct hearings and issue initial decisions.
- b. Use of video and telephonic conferencing to conduct all or parts of hearings.
- c. Use of written-only or “paper” hearings.
- d. Prescription of applicable evidentiary rules.
- e. Provision of an opportunity for rebuttal.

(4) Post-hearing processes:³²¹

- a. Provision of written decisions.
- b. Availability of higher-level reconsideration of the initial decision.

(5) Publication of a complete set of procedural regulations in the *Federal Register* and Code of Federal Regulations.³²²

This collection of procedural elements, however, is both more detailed and less illuminating about adjudication procedures than Section 553 of the APA is about rulemaking procedures. This is because most of Professor Asimow’s procedural elements are defined in sufficient breadth to cover a wide variety of actual, possible procedures. To take just one example, there is wide diversity among the rules and practices agencies employ with respect to “the use of administrative judges to conduct proceedings and issue initial decisions” (procedural element 3(a) in the list above). As I have argued elsewhere, there are a myriad of approaches that agencies can—and do—take to defining the precise identity, position, and

³¹⁹ See *id.* at 24-28.

³²⁰ See *id.* at 28-32.

³²¹ See *id.* at 32-34.

³²² See *id.* at 34.

powers of these decisionmakers.³²³ Indeed, another recent ACUS study examining the status, selection, oversight, and removal of administrative judges yielded a 96-page research report.³²⁴ Similar diversity is possible within the other procedural elements that Professor Asimow's study identifies. The consequence is that, even if these elements are relatively common across Type B proceedings, that fact reveals relatively little about administrative adjudication procedures.

Presumably to address this issue, Professor Asimow sought to shed further light on Type B adjudication procedures by subjecting ten of the 230 Type B schemes (or approximately 4.3%) to a careful "deep dive" examination. Each of the schemes so analyzed was assessed for observance of the twenty identified procedural elements or "best practices." The highest rate of conformity was 18 out of 20 (or 90%), while the lowest rate was 7 out of 20 (or 35%).³²⁵ Although Professor Asimow concluded that "[a] majority of the agencies . . . studied have already adopted most of the proposed best practices in their procedural regulations, manuals, or adjudicatory decisions," the wide range in conformity rates is striking.³²⁶ Coming back to the case study at the heart of this Article, the highly detailed PTAB and Trademark Trial and Appeal Board (TTAB) schemes, which were subject to one of Professor Asimow's "deep dives," include only 13 of the 20 best practices (or 65%).³²⁷ Of course, it is possible that "agencies might be observing these best practices without having codified them in regulations or manuals."³²⁸ But this possibility only emphasizes the practical difficulties of understanding the vast and varied world of agency adjudication. Widespread variation across non-APA adjudicatory

³²³ See Bremer, *Designing*, *supra* note **Error! Bookmark not defined.**, at 75-81.

³²⁴ See Kent Barnett et al., Non-ALJ Adjudicators in Federal Agencies: Status Selection, Oversight, and Removal, Final Report to the Administrative Conference of the United States (Sept. 24, 2018) <https://www.acus.gov/sites/default/files/documents/Administrative%20Judges%20Final%20Report%20Corrected%20-%20%289.24.18%29.pdf>. This variety may extend even to the ALJs who preside over APA hearings, because President Trump's recent executive order removes OPM from its role as the centralized gatekeeper for the certification and selection of ALJs. See Executive Order 13843, Excepting Administrative Law Judges from the Competitive Service, 83 Fed. Reg. 32,755 (July 13, 2018). The executive order raises the possibility that agencies will in the future have greater latitude to craft context-specific requirements for ALJs, such as by requiring subject matter expertise as a condition of employment.

³²⁵ See Asimow Report, *supra* note 8, at 35.

³²⁶ *Id.* at 17.

³²⁷ See *id.* at 35.

³²⁸ See *id.* at 35.

programs, combined with inconsistent documentation of procedures, makes it extremely difficult and laborious to systemically analyze the procedural landscape in administrative adjudication. Professor Asimow's multi-year study, extensive as it is, only scratches the surface.³²⁹

III. EXCEPTIONALISM AND ITS DISCONTENTS

A. Adjudication's Exceptionalism "Norm"

As the preceding Part demonstrates, there are few principles common to all federal adjudication programs and understanding adjudicatory procedures requires hard-won agency- and program-specific expertise.³³⁰ All three branches of government have helped to facilitate the common use of tailored, agency- and program-specific adjudicatory procedures. The result is widespread procedural diversity in adjudication,³³¹ the acceptance of which has wrought pervasive upstream effects on adjudication's overarching legal structure. One such effect is to permit the APA only a limited and variable role in defining "adjudication" and specifying its core procedural components. At a higher, doctrinal level, adjudication's procedural diversity vitiates the formal-informal dichotomy traditionally used to explain adjudication procedures on a system-wide basis. Indeed, continued use of the dichotomy only obscures the complex reality of adjudicatory practice. It allows law students, practitioners, judges, scholars, and policymakers to labor under the misperception that adjudication, like rulemaking and judicial review, is conducted according to an established set of cross-cutting, uniform procedures.

In other words, the governing norm in adjudication is exceptionalism. Recall that "administrative exceptionalism" refers to claims that an individual agency is so unique that it should be exempted from traditional administrative law principles.³³² In rulemaking and judicial

³²⁹ Reflecting this reality, ACUS is currently working "to develop a comprehensive guide on Type B and Type C adjudication to be entitled Sourcebook of Adjudication Outside the Administrative Procedure Act," <https://www.acus.gov/newsroom/administrative-fix-blog/update-sourcebook-federal-administrative-adjudication-outside-apa>.

³³⁰ See 5 U.S.C. §§ 554, 556, 557.

³³¹ See, e.g., Jeffrey S. Lubbers, *APA Adjudication: Is the Quest for Uniformity Failing*, 10 ADMIN. L.J. AM. U. 65 (1996); Elizabeth Ayres Whiteside, Comment, *Administrative Adjudications: An Overview of the Existing Models and Their Failure to Achieve Uniformity and a Proposal for a Uniform Adjudicatory Framework*, 46 OHIO ST. L.J. 355 (1985).

³³² See *infra* at Part I.C.

review—fields governed by robust, uniform legal principles—government institutions and scholars have generally rejected administrative exceptionalism. In adjudication, the opposite reality prevails. Here, government institutions and scholars have consistently supported the development of tailored procedural rules designed meet individual agency and program needs. The ink was hardly dry on the APA when Congress first exempted an agency from the APA's adjudication provisions, overriding the Supreme Court's decision in *Wong Yang Sung* and creating tailormade rules for deportation proceedings.³³³ Since then, Congress has made the same choice for hundreds of adjudicatory programs, either by directly creating tailormade procedures or by granting the relevant agency statutory authority to do the same. The AIA is merely a recent, extreme example of this phenomenon. It is extreme because it suggests that Congress has so thoroughly embraced adjudicatory exceptionalism that it can ignore the APA when designing a new adjudication program. Over the decades, the courts have followed Congress's lead, developing only the most modest requirements as a matter of due process, repeatedly upholding statutory deviations from the APA, and providing ample space for agencies to exercise procedural discretion in adjudication. Agencies have exercised this discretion to avoid the APA's adjudication provisions and to tailor adjudicatory procedures to suit programmatic needs. The result is extraordinary procedural diversity. Even the common elements of Type B adjudication, though broadly defined, are not consistently observed.

A "norm" of exceptionalism is a contradiction in terms: it is, by definition, rejection of cross-cutting, uniform principles of administrative law. The Supreme Court succinctly captured the longstanding consensus in adjudication when it observed that "[t]he incredible variety of administrative mechanisms in this country will not yield to any single organizing principle."³³⁴ This sets adjudication apart from rulemaking and judicial review, fields governed by readily ascertainable, uniform principles applicable across all agencies. The traditional administrative law principles that apply in these fields are grounded in the APA, which operates as the superstatutory backbone of the unwritten administrative constitution. As explained in Part I, the rejection of exceptionalism in rulemaking and judicial review is both proof and consequence of the standard narrative of administrative law. What are the consequences of adjudication's exceptionalism norm for administrative law's standard narrative?

³³³ See *Marcello v. Bonds*, 349 U.S. 302 (1955).

³³⁴ *Withrow v. Larkin*, 421 U.S. 35, 52 (1975).

B. Theoretical Consequences

At a minimum, the standard narrative of administrative law must account for adjudication's exceptionalism norm. As previously explained, the standard narrative holds that the APA is a superstatute that provides stable, broadly accepted principles governing the operation of the administrative state. Significantly embellished by a robust body of administrative common law, these statutory principles perform constitutional functions in an area in which the U.S. Constitution has little direct application. Scholars have constructed and defended this account of administrative law on the strength of examples from rulemaking and judicial review. But the argument is stated more broadly – it is not intended to be an account of the character and operation of administrative law *only* in the realms of rulemaking and judicial review. Rather, it is a theory that has been offered to explain administrative law generally – i.e., to extend to *all* areas of administrative law. Adjudication is a large, significant mode of agency action that does not conform to the standard narrative. The literature has failed to acknowledge and account for this discrepancy and that failure alone is problematic.

Adjudication's exceptionalism norm undermines the APA's superstatute character. As Part II explained, the APA has only a limited and variable role in defining adjudication and specifying its minimum procedures. This is both surprising and disappointing given that a core purpose of the APA was to address "the lack of uniformity among agency hearing officers and the perceived procedural unfairness of agency adjudication."³³⁵ Despite this purpose, Congress has routinely exempted agencies from the APA's adjudication provisions, courts have reduced to a minimum the mandatory reach of those provisions, and agencies have used their ample procedural discretion to avoid them. The result is widespread procedural diversity in an area in which the APA has not "prove[n] robust as a solution, a standard, or a norm over time," as is expected of a superstatute.³³⁶ Indeed, adjudication's exceptionalism norm represents a clear rejection – by Congress, courts, agencies, and scholars – of the APA as a superstatute in adjudication. Those who offer the APA as a ready example of a superstatute have not acknowledge this significant qualification.³³⁷ And given that adjudication is one of the two primary modes of agency

³³⁵ Lubbers, *supra* note 331, at 65.

³³⁶ ESKRIDGE & FEREJOHN, *supra* note 3, at 111.

³³⁷ See *supra* note 34 and accompanying text.

action and was a central focus of the APA's "fierce compromise," the exceptionalism norm presents a broader challenge to the characterization of the APA as a superstatute.

The normative implications of adjudication's exceptionalism norm may also extend beyond the administrative state's superstatutory backbone to affect its small-c constitutional status. Administrative law is said to have constitutional character because it performs constitutional functions in an area in which the written or codified U.S. Constitution has minimal application.³³⁸ These functions include constituting and ordering important governmental institutions, defining the legitimate exercise of authority through those institutions, determining the government-citizen relationship, and entrenching fundamental constitutional principles. There is, of course, a vast body of law governing adjudication. As in other areas of administrative law, there are statutes, regulations, guidance documents, and judicial decisions that determine the rules of administrative adjudication. These rules surely perform constitutional functions. For example, the AIA constitutes the PTAB and determines its place within patent's administrative structure. Together, the AIA and the PTO's regulations define the relationship between the PTAB and the private citizens who appear before it. But these rules—and the small-c constitutional principles they establish—are unique to the PTAB and its patent adjudication processes. Indeed, the exceptionalism norm means that adjudication rules are nearly always agency- or program-specific. As a consequence, the small-c constitutional compromises that are established in each adjudicatory program are unique and independent from the small-c constitutional compromises that are established in the hundreds of other adjudicatory programs that exist throughout the federal government.

Although the exceptionalism norm does not deprive individual adjudication rules of their constitutional function, it ensures the systemwide development of a poorer, disuniform small-c constitution of adjudication. Uniformity is an important characteristic of a sound constitution.³³⁹ It ensures that similarly situated people and institutions are treated alike.³⁴⁰ In rulemaking and judicial review, the development of

³³⁸ See *supra* Part I.A.

³³⁹ See, e.g., *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816) (citing the "importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution" (emphasis in original)).

³⁴⁰ See, e.g., Lisa A. Kloppenberg, *Measured Constitutional Steps*, 71 IND. L.J. 297, 332 (1996) ("The concern for promoting uniformity in federal constitutional law is grounded on a fairness principle: like cases should be decided alike."). Uniformity also has pragmatic

uniform, cross-cutting norms has been recognized as an important value of the administrative constitution. A different reality prevails in adjudication. By embracing exceptionalism, government institutions and scholars have prioritized other goals—typically program-specific, substantive regulatory goals, as in the case of patent adjudication—above the development and observance of uniform, cross-cutting principles of adjudication. In adjudication, similarly situated agencies and individuals are not treated alike—by design. In systemwide perspective, the result is a disuniform, and therefore poorer, small-c constitution of adjudication.

Finally, there is one important constitutional characteristic that the exceptionalism norm simply negates: entrenchment. Entrenchment protects constitutional principles, ensuring the longevity of their application. The APA is entrenched in the sense that it has proven largely impervious to amendment. Traditional principles of administrative law governing rulemaking and judicial review, which are grounded in the APA, have remained remarkably stable over time. Although the APA's adjudication provisions have not been significantly amended since the APA was adopted, they have been largely abandoned in favor of agency- and program-specific adjudication rules. The exceptionalism norm has severely cabined the APA's adjudication provisions, preventing the development of the kind of cross-cutting principles that a constitution would ordinarily protect against change. The resulting, tailored adjudication rules have minimal reach and are often established in regulations, guidance documents, agency decisions, and uncodified norms, all of which are more readily susceptible to change. In short, exceptionalism is fundamentally at odds with entrenchment.

C. Practical Effects

Adjudication's exceptionalism norm also has practical implications, both positive and negative. For purposes of this discussion, it is necessary to recognize that designing appropriate procedures requires both judgment and expertise. Procedures can provide necessary, valuable protection for all manner of important private and public interests. On the other hand, procedure is not costless. It requires time, effort, personnel, and resources. While insufficient procedures can endanger important interests, excessive procedures can delay time-sensitive agency decisionmaking or even block desirable agency action. Determining how much procedure is warranted

benefits, such as protecting reliance interests, preserving stability in governing norms, and promoting transparency. *See id.* at 332-33. These matters are addressed below in Part III.C.

therefore requires some benefit-cost analysis. Recognizing this, constitutional due process doctrine establishes a “flexible and context-specific” approach to determining what process is required before an administrative agency takes action.³⁴¹ By recognizing the need for contextual judgment in determining procedural minima, this approach also leaves room for the application of subject matter expertise in procedural decisionmaking. Indeed, Professor Adrian Vermeule has argued that, even in the constitutional due process context, courts should defer to the superior expertise of an administrative agency in making procedural decisions that are finely attuned to its unique statutory mission and the realities facing the industry it regulates.³⁴² The argument for such deference may be stronger in areas not subject to the commands of the written constitution.

The principal benefit and animating purpose of the exceptionalism norm is that it allows government to tailor adjudicatory procedures to suit the needs of individual agencies or regulatory programs. Freed from a strong expectation that the APA supplies the default procedures, Congress has greater latitude to statutorily tailor adjudication procedures. And by reducing the reach of cross-cutting requirements, exceptionalism expands the space available for agencies to exercise procedural discretion. There are several potential benefits of the tailored procedures that flourish in this environment. First, because the interests implicated in adjudication may vary across agencies and programs, tailored procedures may provide the best protection. Second, freeing agencies from the demands of the APA’s adjudication provisions and allowing them to innovate procedurally may promote efficiency in adjudication.³⁴³ Finally, allowing Congress and administrative agencies to tailor procedures gives government an additional, powerful tool that can be used to achieve substantive policy goals.³⁴⁴

Against the benefits of exceptionalism and the tailored procedures it facilitates are arrayed real costs. Exceptionalism destroys uniformity across agencies, making it difficult if not impossible for the public and even

³⁴¹ Bremer & Jacobs, *supra* note 18, at 532; see *Ingraham v. Wright*, 430 U.S. 651, 672-74 (1977).

³⁴² See Vermeule, *supra* note 292, at 1919.

³⁴³ See, e.g., Robert W. Hamilton, *Rulemaking on a Record by the Food and Drug Administration*, 50 TEX. L. REV. 1132, 1148 (1972).

³⁴⁴ See, e.g., Bremer & Jacobs, *supra* note 5, at 524, 526-27; Scalia, *supra* note 34, at 346. As the late Representative John Dingell colorfully put it, “I’ll let you write the substance . . . you let me write the procedure, and I’ll screw you every time.” Regulatory Reform Act: Hearing on H.R. 2327. Before the Subcomm. on Admin. Law and Governmental Regulations of the House Comm. on the Judiciary, 98th Cong. 312 (1983).

experts to understand what process is due in administrative adjudication.³⁴⁵ Ferreting out the common procedures across Type B adjudications has required more than five years of study by one of the leading scholars in administrative adjudication, assisted by a team of lawyers and other experts. This indicates a profound lack of transparency. Indeed, this Article has focused on a single adjudicatory scheme and yet required nearly ten pages to describe that scheme and another seventeen to analyze the seemingly simple question of whether the scheme is “formal” adjudication. An entire literature on patent law exceptionalism has engaged the same inquiry. For a non-lawyer citizen who must appear before an administrative agency, the process must seem opaque in the extreme. And for experts and non-experts alike, familiarity with one agency’s process is unlikely to shed much light on another agency’s process. Finally, with procedures as various and specialized as those that exist in administrative adjudication, the institutions of government may be deprived of the information necessary to assess and improve procedures. Generalist courts may not fully understand adjudicative procedures, while specialized courts such as the Federal Circuit resist the intrusion of traditional administrative law principles into areas in which they have abundant technical expertise. Congress, deprived of default procedural norms, may start from square one with every new adjudicative scheme, prioritizing substantive outcomes over procedural values and amplifying existing variation. Administrative agencies, charged with responsibility for filling out the procedural design, may have little information available to guide the sound exercise of their discretion. In sum, the problems caused by exceptionalism may only breed further exceptionalism.

These harms are both independent and obscuring of the quality or sufficiency of the adjudication procedures themselves. Adjudicating agencies across government could be observing adjudication procedures that are perfectly appropriate in the circumstances, designed to be sufficiently protective of affected interests, as well as efficient. But adjudication’s exceptionalism norm prevents an assessment of whether this optimal reality prevails, particularly on a system-wide basis. Not only does the exceptionalism norm make it exceedingly difficult to study adjudication procedures, but it has prevented the development of any meaningful, cross-cutting procedural minima. Thus, even if it were possible to compile a comprehensive picture of actual adjudication procedures, there is no clear standard against which to measure them. Although adjudication has received renewed attention—and criticism—in recent years,

³⁴⁵ See Bremer, *Designing*, *supra* note 288, at 83-85.

exceptionalism makes a systemic, reliable, coherent evaluation impossible.³⁴⁶ This should trouble everyone.

CONCLUSION

The standard narrative holds that administrative law is a quasi-constitutional body of law with the APA as its superstatutory backbone. This narrative is intended to both explain and legitimize the modern administrative state, which is not clearly established by the written U.S. constitution. The standard narrative has been constructed on the strength of examples drawn from rulemaking and judicial review. Understandably so—in these crucial, salient areas, the narrative appears to be sound. Both rulemaking and judicial review are governed by traditional administrative law principles that are grounded in the APA and apply uniformly across all administrative agencies. These principles are readily ascertainable and broadly recognized as authoritative by Congress, the courts, the executive, and administrative agencies. Individual agencies have occasionally sought to be exempted from the traditional administrative law principles of rulemaking or judicial review, seeking different rules tailored to suit their supposedly unique position or responsibilities. Courts and scholars have rejected these claims to administrative exceptionalism. This rejection is both proof and consequence of the standard narrative's soundness.

One of the APA's twin modes of agency action—adjudication—is absent from this otherwise compelling account of administrative law. Its omission is no mere oversight: adjudication is missing because it does not fit the standard narrative. Shortly after the APA's adoption, Congress began to exempt agencies from the statute's adjudication provisions, choosing time and again to create agency- and program-specific adjudication procedures. The courts have followed Congress's lead, by interpreting the APA's adjudication provisions to have minimal mandatory reach and by embracing a strong principle of agency procedural discretion. As exemplified by the AIA's patent adjudication structures, Congress and administrative agencies have used their freedom from the APA and the judicial common law it might support to create detailed adjudication processes specialized to further substantive regulatory goals. The result is

³⁴⁶ See, e.g., *Lucia v. SEC*, 585 U.S. ____ (2018); *Oil States*, 584 U.S. ____ (2018); Asimow Report, *supra* note 8; Kent H. Barnett, *Due Process for Article III – Rethinking Murray's Lessee*, ____ GEO. MASON L. REV. ____ (forthcoming 2019); Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 940 (2011); Christopher J. Walker, *Constitutional Tensions in Agency Adjudication*, 104 IOWA L. REV. ____ (forthcoming 2019); Walker & Wasserman, *supra* note 6.

astounding diversity in adjudication procedures. In this substantial field, every agency is special and unique enough to warrant exemption from the APA. Here, exceptionalism is the norm.

It is time for administrative law to reckon with adjudication's exceptionalism norm. On the level of theory, the norm sets adjudication firmly outside of administrative law's standard narrative. It undermines the APA's status as a superstatute and dilutes the small-c constitutional character of administrative law. Perhaps these consequences can be cabined to adjudication, requiring a qualification on the standard narrative. Or further consideration may reveal adjudication's exceptionalism norm to be a more powerful indictment of the standard narrative's normative power. On a practical level, the exceptionalism norm makes adjudication procedures opaque and deprives citizens and experts of a neutral baseline for evaluating the quality and sufficiency of procedures in individual adjudication programs. Systemic reform may be warranted, it cannot be unless and until adjudication's exceptionalism norm is acknowledged and confronted.