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# The Lost World of the Administrative Procedure Act: A Literature Review

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# THE LOST WORLD OF THE ADMINISTRATIVE PROCEDURE ACT: A LITERATURE REVIEW

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*Despite dramatic changes in the regulatory state over the last seventy-five years, Westlaw reports that Congress has only amended the Administrative Procedure Act (APA) sixteen times since its enactment in 1946. But that does not mean the APA has remained unchanged. The statutory text bears little resemblance to modern administrative law doctrine and regulatory practice. In response to developments in administrative governance, federal courts have substantially refashioned the APA's requirements for administrative procedure and judicial review of agency action. As part of the George Mason Law Review's Administrative Procedure Act at 75 Symposium, this Essay seeks to chronicle these mismatches between statutory text and doctrinal and regulatory reality. It focuses on the APA's administrative procedure and judicial review provisions, as well as key aspects of presidential administration that operate outside of the APA. Through presenting this annotation and literature review of the lost world of the APA, the Essay identifies potential areas for further legislative reform, judicial engagement, and scholarly attention—to better conform administrative practice to the text of the APA.*

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## INTRODUCTION

The Administrative Procedure Act (APA) celebrates its seventy-fifth birthday this year.<sup>1</sup> Its birth in 1946 was the result of a “fierce compromise” after a decade-long battle between proponents and opponents of the New Deal administrative state.<sup>2</sup> Over the decades, the APA has matured to become the quasi-constitution of the modern administrative state. In 1978, for instance, the then-law professor after whom the *Law Review*’s home institution is named remarked 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.”<sup>3</sup> It is thus only fitting that the Editors decided to publish this festschrift to mark the APA’s first seventy-five years.

Since 1946 the APA has set the default rules governing the federal administrative state.<sup>4</sup> It dictates how federal agencies regulate and how the federal courts supervise, review, and constrain agency action. The APA also opens up space for public participation in the regulatory process, while attempting to close out undue outside influence and lobbying. Notwithstanding the APA’s longevity, Westlaw reports that

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<sup>1</sup> Pub. L. No. 79-404, 60 Stat. 237 (codified as amended at 5 U.S.C. §§ 551–706 (2012)).

<sup>2</sup> George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1560 (1996). See generally Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219 (1986).

<sup>3</sup> Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 363; see also Kathryn E. Kovacs, *Superstatute Theory and the Administrative Procedure Act*, 90 IND. L.J. 1207, 1209 (2015) (drawing on WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010), to argue that the APA is a “superstatute”).

<sup>4</sup> Congress can, and sometimes does, override the APA’s default rules in the organic statutes that govern particular agencies. See 5 U.S.C. § 559 (“Subsequent statute may not be held to supersede or modify [the APA], except to the extent that it does so expressly.”). See generally Stephanie Hoffer, Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. 221, 243–50 (2014) (detailing the APA’s default judicial review standards and how other statutes can depart from those APA default standards).

Congress has only amended the APA sixteen times.<sup>5</sup> Yet, as I have observed, even this figure overstates the legislative reshaping. Over the decades, Congress has only significantly amended the APA four—or at most five—times: the Freedom of Information Act (FOIA) in 1966, the Privacy Act in 1974, the Government in the Sunshine Act in 1976, the waiver of sovereign immunity amendment in 1976, and, to a lesser extent, the renaming of administrative law judges in 1978. If we exclude two FOIA modernizations in 1996 and 2016, there hasn't been a significant APA legislative reform more than four decades.<sup>6</sup>

This lack of significant legislative reform does not mean the APA was perfect or fully developed at birth.<sup>7</sup> The APA, as applied by courts and followed by agencies, has evolved considerably over the decades. Indeed, the statutory text bears little resemblance to modern

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<sup>5</sup>This figure is based on the amendments listed in the Westlaw popular name table for the APA. The amendments are discussed further in Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629, 633–38 (7017).

<sup>6</sup>Walker, *supra* note 5, at 635. As I have noted, “Westlaw’s popular name table does not capture every amendment to the Freedom of Information Act and Privacy Act. Nor does it consider other statutory provisions in Title 5 of the U.S. Code that deal with federal agencies yet lie outside of the sections of Title 5 that codify the original APA.” *Id.* at 634 n.17 (citations omitted).

<sup>7</sup>The legislative failure to modernize the APA is not for a complete lack of trying. Over the decades, the American Bar Association and the Administrative Conference of the United States have recommended numerous consensus-driven, common-sense reforms. *See id.* at 638–48 (summarizing efforts). More recently, many Republicans—joined by some Democrats—have introduced a number of bills to modernize the APA. *See id.* at 648–49. The Portman–Heitkamp Regulatory Accountability Act of 2017, S. 951, 115th Cong. (2017), is perhaps the most comprehensive and promising reform proposal in decades. Professor Cass Sunstein, for instance, declared that this legislation “deserves careful attention,” as it’s “an intelligent, constructive, complex, imperfect bill.” Cass R. Sunstein, *A Regulatory Reform Bill That Everyone Should Like*, BLOOMBERG (June 22, 2017), <https://www.bloomberg.com/opinion/articles/2017-06-22/a-regulatory-reform-bill-that-everyone-should-like>. *But see* Ronald M. Levin, *The Regulatory Accountability Act and the Future of APA Revision*, 94 CHI.-KENT L. REV. 487, 489 (2019) (“The basic thrust of this essay is that these assessments [of the Regulatory Accountability Act] have been too upbeat. . . . [S]ome of the most consequential items in both bills—proposals that have given them the most propulsive force and political potency—have been decidedly worrisome.”). I’ve analyzed the Regulatory Accountability Act at length, disclosing there that I worked on the legislation in 2017 as an academic fellow in Senator Orrin Hatch’s office. Walker, *supra* note 5, at 629 n.\* & 648–70. And in August 2020, the U.S. Department of Justice issued a 129-page report, *see* U.S. DEP’T OF JUSTICE, MODERNIZING THE ADMINISTRATIVE PROCEDURE ACT (2020), <https://www.justice.gov/file/1302321/download>, which argues that now is time for Congress to modernize the APA.

regulatory practice. The Supreme Court and the lower courts—with the D.C. Circuit playing a prominent role—have substantially rewritten the rules of the road. They have done so by grafting onto the APA myriad administrative common law doctrines,<sup>8</sup> in response to what Professor Gary Lawson has coined “the rise and rise of the administrative state.”<sup>9</sup> In 1980, Professor Kenneth Culp Davis observed: “Most administrative law is judge-made law, and most judge-made administrative law is administrative common law.”<sup>10</sup> That is largely still true today. Regulatory practice, moreover, has outgrown the APA in other ways in which even courts have failed to grapple.

This observation is far from novel. Professors Daniel Farber and Anne Joseph O’Connell, for example, explored this phenomenon with respect to the APA and administrative law more generally in their majestic article *The Lost World of Administrative Law*.<sup>11</sup> (Indeed, this Essay’s title honors their work.) As Farber and O’Connell observed, “there is an increasing mismatch between the suppositions of modern administrative law and the realities of modern regulation. Or to put it another way, administrative law seems more and more to be based on

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<sup>8</sup> See, e.g., Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1295 (2012) (defining and defending “administrative common law” as “administrative law doctrines and requirements that are largely judicially created, as opposed to those specified by Congress, the President, or individual agencies”). But see John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 115 (1998) (arguing against administrative common law in the judicial review context).

<sup>9</sup> Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

<sup>10</sup> Kenneth Culp Davis, *Administrative Common Law and the Vermont Yankee Opinion*, 1980 UTAH L. REV. 3, 3; cf. Jack M. Beermann, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1, 4 (2011) (“The most that one can confidently say today is that administrative law contains elements that appear to be highly statutorily focused alongside elements in which courts exercise the discretion of a common law court.”). See generally Aaron L. Nielson, *Visualizing Change in Administrative Law*, 49 GA. L. REV. 757, 776–93 (2015) (detailing how administrative law has changed in various ways since the APA).

<sup>11</sup> Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137 (2014). To be sure, even Farber and O’Connell observed that they “are far from the first to point out aspects of this problem, but the scale of the problem and the need for pragmatic solutions are in need of further exploration.” *Id.* at 1140. Moreover, Farber and O’Connell’s lost world of administrative law encompasses both “statutes and judicial rulings.” *Id.* at 1141. In this Essay, by contrast, the lost world of the APA separates out the APA’s statutory text from not just modern regulatory practice but also subsequent judicial revisions to the APA.

legal fictions.”<sup>12</sup> Indeed, anyone who has ever taught administrative law struggles to teach through this mismatch between statutory text and regulatory practice.

But this mismatch is even more poignant for those of us who teach Legislation and Regulation—a course that is growing in popularity as a required first-year course in law schools across the nation.<sup>13</sup> As the course title indicates, the first half focuses on legislation—or, more precisely, statutory interpretation.<sup>14</sup> In other words, we spend half a semester exploring how to read and interpret statutory text. These aspiring lawyers learn that some version of textualism is the predominant interpretive theory today.<sup>15</sup> They read dozens of opinions where courts emphasize that the text of a statute generally controls. Most of the hard work of interpretation, they learn, entails resolving ambiguities in statutory text through a variety of interpretive tools, including canons of construction, arguments from statutory structure, context, and purpose, and reference to legislative and other statutory history.

Once we reach the halfway point of the course, our attention turns from legislation and statutory interpretation to an introduction to the regulatory state. And this is when the students encounter for the first time the enigmatic APA. When I reach this point in the semester, I tell my students that regulatory lawyers would commit malpractice if they just followed the text of the APA. Even seemingly unambiguous text does not mean what it says. And courts have added entirely new requirements to various sections of the APA. We then spend a couple weeks working through a number of examples where the APA’s text—the “lost world”—differs substantially from how federal courts have interpreted and in some cases rewritten the APA.

In this contribution to the *Law Review’s* APA at 75 Symposium, my ambition is quite modest. This Essay seeks to memorialize the lost world of the 75-year-old APA—*i.e.*, the mismatches between the

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<sup>12</sup> *Id.* at 1140.

<sup>13</sup> See, e.g., Abbe R. Gluck, *The Ripple Effect of “Leg-Reg” on the Study of Legislation and Administrative Law in the Law School Curriculum*, 65 J. LEGAL EDUC. 121 (2015) (empirically exploring the rise of Legislation and Regulation and its effect on the upper-level curriculum).

<sup>14</sup> See, e.g., Dakota S. Rudesill, Christopher J. Walker & Daniel P. Tokaji, *A Program in Legislation*, 65 J. LEGAL EDUC. 70, 71–78 (2015) (outlining the standard Legislation and Regulation syllabus and its variations).

<sup>15</sup> Cf. Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265 (2020) (exploring the various strands of textualism).

statutory text, on the one hand, and judicial interpretation and regulatory practice, on the other. In that sense, the Essay annotates the key provisions of the APA. This is by no means a comprehensive annotation. In the field of administrative law, we are long overdue for a desktop annotated treatise on the APA. Instead, I focus on the most substantial mismatches. Nor is it a comprehensive analysis of those mismatches. As the Essay will document, others have written extensively on some of these mismatches. In that sense this Essay is both an annotation and a literature review of the APA at 75.

This Essay proceeds as follows: Part I annotates the APA’s key “Administrative Procedure” provisions, and then Part II turns to the “Judicial Review” provisions. Part III briefly surveys the president’s role in the regulatory state that largely is absent from the APA’s text yet omnipresent in administrative governance today. Through presenting this annotation and literature review, I hope to illustrate potential areas for further legislative reform, judicial engagement, and scholarly attention—in order to better conform administrative practice to the APA’s statutory language.

## I. ADMINISTRATIVE PROCEDURE UNDER THE APA

With respect to administrative procedure, the APA establishes detailed procedures for the two core means of agency action—rulemaking and adjudication—while recognizing that other statutes may provide for different forms of and procedures for agency action.<sup>16</sup>

The conventional account is that the Supreme Court has rebuffed judicial efforts to graft on additional agency procedures not required by statute. To some extent that is true. Most famously, the *Vermont Yankee*<sup>17</sup> Court held that “[a]gencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them.”<sup>18</sup> More recently, in *Perez v. Mortgage Bankers*

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<sup>16</sup> See 5 U.S.C. § 553 (rulemaking provisions); § 554 (adjudication provisions); § 559 (recognizing that other statutes can provide additional or different agency procedures).

<sup>17</sup> *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519 (1978).

<sup>18</sup> *Id.* at 524. See generally Gillian E. Metzger, *The Story of Vermont Yankee*, in ADMINISTRATIVE LAW STORIES 124, 149–50 (Peter L. Strauss ed., 2006) (observing that the *Vermont Yankee* “opinion is a masterpiece of obfuscation”); Antonin Scalia, *Vermont Yankee: The APA, The D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 356 (similar).

Ass'n,<sup>19</sup> the Court rejected another D.C. Circuit administrative common law doctrine—the requirement of rulemaking to reverse certain agency guidance—and held that this *Paralyzed Veterans*<sup>20</sup> doctrine “improperly imposes on agencies an obligation beyond the ‘maximum procedural requirements’ specified in the APA.”<sup>21</sup>

But the conventional account is incomplete. With respect to both rulemaking and adjudication, today’s administrative state—and the APA that governs it—looks much different from what the framers of the APA likely envisioned. Or, perhaps more precisely, it departs substantially from the statutory text.<sup>22</sup> Let’s consider rulemaking and adjudication in turn.

A. *Rulemaking: From Formal to Informal to More-Formal Informal to Subregulatory Guidance*

The main provisions for agency rulemaking under the APA can be found in Section 553. The terms are plain on their face, and require agencies to engage in three stages for rulemaking.

First, the agency must provide a “general notice of proposed rulemaking” that discloses “(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.”<sup>23</sup>

Second, the agency must facilitate public participation. This entails allowing “interested persons an opportunity to participate in the rule making through submission of written data, views, or

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<sup>19</sup> 527 U.S. 92 (2015).

<sup>20</sup> *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997) (“Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.”), *abrogated by* *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92 (2015).

<sup>21</sup> *Mortgage Bankers*, 575 U.S. at 100 (quoting *Vermont Yankee*, 435 U.S. at 524). See generally Kathryn E. Kovacs, *Pixelating Administrative Common Law in Perez v. Mortgage Bankers Association*, 124 YALE L.J. F. 31 (2015).

<sup>22</sup> This Essay is more of a textualist, rather than originalist, project, as it compares the statutory text to current doctrine and regulatory doctrine. It does not engage in the important yet daunting task of examining the historical, original meaning of the terms Congress included in the APA.

<sup>23</sup> 5 U.S.C. § 553(b).

arguments with or without opportunity for oral presentation.”<sup>24</sup> Importantly, the APA requires more formal procedures “[w]hen rules are required by statute to be made on the record after an opportunity for an agency hearing.”<sup>25</sup> In those circumstances, Sections 556 and 557 apply, which require a trial-like hearing before the agency head, a subset of members on a multi-member agency commission or board, or an administrative law judge. This formal hearing resembles civil litigation in federal court, with interested parties having the right to put on witnesses, introduce evidence, cross-examine witnesses, and the like.<sup>26</sup> (Part I.B.1 returns to these formal procedures, as they similarly apply to formal adjudication under the APA).

Third, after the agency has heard from the public, it must issue a final rule that “incorporate[s] in the rules adopted a concise general statement of their basis and purpose.”<sup>27</sup> For formal rulemaking where Sections 556 and 557 apply, the agency must issue a more-detailed statement as part of the final rule, which includes “(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and (B) the appropriate rule, order, sanction, relief, or denial thereof.”<sup>28</sup>

The statutory text seems straightforward. But its application today is not. There are at least three chapters in the rulemaking story.

### 1. From Formal to Informal Rulemaking

Students of administrative law are no doubt quite familiar with the first chapter in this story—the death of formal rulemaking and the rise of informal, notice-and-comment rulemaking. Few professors who teach Administrative Law (or Legislation and Regulation) would fail to assign the Supreme Court’s decision in *United States v. Florida East Coast Railway Co.*<sup>29</sup>

Based on the text of the APA, one would reasonably conclude that any time the agency’s organic statute requires a hearing as part of the rulemaking, that triggers the APA’s more formal trial-like proceedings detailed in Sections 556 and 557. But in *Florida East Coast Railway*,

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<sup>24</sup> *Id.* § 553(c).

<sup>25</sup> *Id.*

<sup>26</sup> *See id.* §§ 556–557.

<sup>27</sup> *Id.* § 553(c).

<sup>28</sup> *Id.* § 557(c).

<sup>29</sup> 410 U.S. 224 (1973).

the Court rejected that conclusion. It held that the APA's formal provisions do not apply just because the agency's organic statute requires a "hearing"; the organic statute must require both "on the record" and "after . . . an agency hearing."<sup>30</sup> Few, if any, statutes contain such language. As Professor Aaron Nielson concluded in his extensive defense of formal rulemaking, *Florida East Coast Railway*—"a case which has won little praise for its reasoning but whose policy outcome has been celebrated"—"largely put an end to formal rulemaking."<sup>31</sup>

*Florida East Coast Railway* made an additional contribution to how APA rulemaking operates. It held that when an organic statute requires a "hearing," that "does not necessarily embrace either the right to present evidence orally and to cross-examine opposing witnesses, or the right to present oral argument to the agency's decisionmaker."<sup>32</sup> A "paper" hearing is perfectly appropriate for informal, notice-and-comment rulemaking.<sup>33</sup>

In sum, *Florida East Coast Railway* can be viewed as the antithesis of the *Vermont Yankee* problem. The Court did not graft procedural requirements onto the APA that lack any textual support. Instead, the *Florida East Coast Railway* Court, for all intents and purposes, deleted from the APA the formal hearing requirements for rulemaking. As outlined in Part I.A.2, over the next decades the Court

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<sup>30</sup> *Id.* at 237–38. The Court noted that these magic words might not always be required, such that "other statutory language having the same meaning could trigger the provisions of ss 556 and 557 in rulemaking proceedings." *Id.* at 238. That wrinkle has not made a difference since.

<sup>31</sup> Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237, 247 (2014). See generally Michael P. Healy, *Florida East Coast Railway and the Structure of Administrative Law*, 58 ADMIN. L. REV. 1039 (2006) (exploring what the decision means beyond its core holding). As Professor Barnett explores by examining the Justices' papers, the Court's prior decision in *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972), "rendered *Florida East Coast Railway* a fait accompli, stifling the limited persuasive force of the parties' briefing and Justice Douglas's notoriously hard-to-follow dissent." Kent Barnett, *How the Supreme Court Derailed Formal Rulemaking*, 85 GEO. WASH. L. REV. ARGUENDO 1, 3 (2017); see also *id.* at 4 ("Together, *Allegheny-Ludlum* and *Florida East Coast Railway* . . . all but ended formal rulemaking in the federal administrative state.").

<sup>32</sup> *Florida East Coast Railway*, 410 U.S. at 240.

<sup>33</sup> Indeed, the Court held that, even when the APA's formal hearing requirements apply, "a specific statutory mandate that the proceedings take place on the record after hearing may be satisfied in some circumstances by evidentiary submission in written form only." *Id.* at 241.

arguably rewrote the APA to reintroduce more-formal rulemaking procedures.

## 2. From Informal to More-Formal Rulemaking

With the formal rulemaking provisions essentially excised from the APA, what we have left should be a straightforward notice-and-comment rulemaking process. The agency must merely provide a general statement of proposed rulemaking, allow the public to comment on the proposed rule, and then issue a final rule that includes a concise statement of basis and purpose.

Not so fast. In what Professor Richard Stewart coined administrative law's Reformation, federal courts responded to concerns about unbounded agency discretion by further proceduralizing (or formalizing) notice-and-comment rulemaking.<sup>34</sup> Four such evolutions bear mention here.

First, at the public notice stage, much more is required than just a "general notice" of "either the terms or substance of the proposed rule or a description of the subjects and issues involved."<sup>35</sup> Courts have expanded on this statutory provision to require a detailed explanation of the proposed rule and a disclosure of the underlying rationales and supporting data. The most prominent administrative common law here is the *Portland Cement*<sup>36</sup> doctrine. As the D.C. Circuit explained in *Portland Cement Ass'n v. Ruckelshaus*, "[i]n order that rule-making proceedings to determine standards be conducted in orderly fashion, information should generally be disclosed as to the basis of a proposed rule at the time of issuance."<sup>37</sup> "If this [initial disclosure] is not feasible, as in case of statutory time constraints," the court further explained, "information that is material to the subject at hand should be disclosed as it becomes available, and comments received, even though subsequent to issuance of the rule—with court authorization, where necessary."<sup>38</sup> This doctrine is not without controversy. As then-Judge Kavanaugh argued, the *Portland Cement* disclosure doctrine "stands on a shaky legal foundation (even though it may make sense

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<sup>34</sup> Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1669–70 (1975).

<sup>35</sup> 5 U.S.C. § 553(b)(3).

<sup>36</sup> *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973).

<sup>37</sup> *Id.* at 394.

<sup>38</sup> *Id.*

as a policy matter in some cases)” because it “cannot be squared with the text of § 553 of the APA.”<sup>39</sup>

Second, informal rulemaking—in contrast to formal rulemaking—is not “on the record,” and thus Section 553 arguably does not require the agency to maintain a publicly available administrative record for the proceeding.<sup>40</sup> Yet the Supreme Court has repeatedly emphasized that an agency’s action must be judged based on the “administrative record made.”<sup>41</sup> This administrative record requirement, along with *Portland Cement* and related doctrines, have led to substantial investments by federal agencies to create online databases to facilitate public access to the proposed rulemaking, accompanying data and studies, and the public comments lodged. The General Services Administration has taken over many of these functions with the launch of regulations.gov.<sup>42</sup>

Third, it would be error to read the APA to provide that the final rule need only include “a *concise general* statement of their basis and purpose.”<sup>43</sup> Instead, final rules today include voluminous preambles that are anything but concise or general. As a result, there is a whole subfield in administrative law, pioneered by Professor Kevin Stack, that explores the implications of these preambles for regulatory interpretation and administration governance.<sup>44</sup> Again, federal courts

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<sup>39</sup> *Am. Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227, 246 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part); *see also* Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 894 (2007) (arguing that *Portland Cement* is “a violation of the basic principle of *Vermont Yankee* that Congress and the agencies, but not the courts, have the power to decide on proper agency procedures”); *accord* Kathryn E. Kovacs, *Rules About Rulemaking and the Rise of the Unitary Executive*, 70 ADMIN. L. REV. 515, 537–39 (2018).

<sup>40</sup> *See, e.g.*, Kovacs, *supra* note 39, at 533–37.

<sup>41</sup> *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 (1978) (citing *Camp v. Pitts*, 411 U.S. 138 (1973); *SEC v. Chenery Corp.*, 318 U.S. 80 (1943)). This administrative record requirement finds some support in the APA’s judicial review provisions. In particular, the APA instructs that “the court shall review the whole record or those parts of it cited by a party.” 5 U.S.C. § 706.

<sup>42</sup> For more on the General Services Administration’s eRulemaking initiative, *see* <https://www.regulations.gov/aboutProgram>.

<sup>43</sup> *Id.* § 553(c) (emphasis added).

<sup>44</sup> *See, e.g.*, Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355 (2012); Kevin M. Stack, *Preambles as Guidance*, 84 GEO. WASH. L. REV. 1252 (2016); *see also, e.g.*, Jennifer Nou, *Regulatory Textualism*, 65 DUKE L.J. 101 (2015); Christopher J. Walker, *Inside Regulatory Interpretation: A Research Note*, 114 MICH. L. REV. FIRST IMPRESSIONS 61 (2015).

seem to be driving this divergence between statutory text and regulatory practice. The Supreme Court has interpreted the APA to require that “[a]n agency must consider and respond to significant comments received during the period for public comment.”<sup>45</sup> That is because, the D.C. Circuit has explained, this APA-guaranteed “opportunity to comment is meaningless unless the agency responds to significant points raised by the public.”<sup>46</sup> This APA evolution may make a lot of policy sense. But it makes little textual sense. After all, the APA requires a “concise” and “general” articulation of the final rule’s “basis and purpose.”<sup>47</sup>

Fourth, just as federal courts have required agencies to respond to significant comments, they have required that the final rule be a “logical outgrowth” of the proposed rule.<sup>48</sup> In other words, as the D.C. Circuit has framed the doctrine, “[w]here the change between proposed and final rule is important, the question for the court is whether the final rule is a ‘logical outgrowth’ of the rulemaking proceeding.”<sup>49</sup> The Supreme Court has explained that, under the logical outgrowth doctrine, “[t]he object, in short, is one of fair notice.”<sup>50</sup> Nothing in the APA expressly requires this. Indeed, the APA instructs agencies to provide a “general notice of proposed rulemaking” that discloses “the legal authority under which the rule is proposed” and “either the terms or substance of the proposed rule *or a description of the subjects and issues involved.*”<sup>51</sup>

By highlighting these mismatches between statutory text and administrative common law, I do not intend to suggest that these judicial innovations make for bad policy. Indeed, elsewhere I have praised them as common-sense, bipartisan reforms that Congress

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<sup>45</sup> *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1203 (2015) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

<sup>46</sup> *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35–36 (D.C. Cir. 1977) (per curiam) (footnote omitted).

<sup>47</sup> See, e.g., *Kovacs*, *supra* note 39, at 542–44.

<sup>48</sup> See, e.g., *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (2d Cir. 1986); *United Steelworkers of America, AFL-CIO-CLC v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980); *South Terminal Corp. v. EPA*, 504 F.2d 646, 659 (1st Cir. 1974). See generally Phillip M. Kannan, *The Logical Outgrowth Doctrine in Rulemaking*, 48 ADMIN. L. REV. 213 (1996).

<sup>49</sup> *Marshall*, 647 F.2d at 1221.

<sup>50</sup> *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007).

<sup>51</sup> 5 U.S.C. § 553(b) (emphasis).

should include in any modernization of the APA.<sup>52</sup> In many ways, the federal courts have developed administrative common law to reintroduce a more-formal rulemaking process that the Supreme Court essentially killed in *Florida East Coast Railway*.

One final development merits a brief mention. The text of the APA allows federal agencies to promulgate a rule without first engaging in the notice-and-comment process when they can demonstrate “good cause”—*i.e.*, when “notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”<sup>53</sup> Agencies have increasingly turned to, and perhaps abused, this “good cause” exception to bypass the notice-and-comment process. In 2012, for example, the Government Accountability Office found that federal agencies from 2003 through 2010 skipped the notice-and-comment process for 35% of “major” rules and 44% of nonmajor rules.<sup>54</sup> Of those major rules issued without notice and comment, the agencies engaged in post-promulgation notice-and-comment processes 65% of the time.<sup>55</sup>

Professor Kristin Hickman and Mark Thomson have explored in detail this rise of interim final rulemaking and how, in practice, it can be inconsistent with the APA.<sup>56</sup> In light of those concerns, they have argued for a strong judicial presumption against the validity of postpromulgation notice and comment.<sup>57</sup> I have similarly endorsed such a judicial standard, going perhaps further to argue that if the court finds there was no good cause to skip notice and comment, perhaps the error should be deemed structural such that no showing of prejudice is required.<sup>58</sup>

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<sup>52</sup> See Walker, *supra* note 5, at 638–48.

<sup>53</sup> 5 U.S.C. § 553(b)(3)(B).

<sup>54</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-21, FEDERAL RULEMAKING: AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS 3 n.6, 8 (2012), <http://www.gao.gov/assets/660/651052.pdf>.

<sup>55</sup> *Id.* at 24–25.

<sup>56</sup> Kristin Hickman & Mark Thomson, *Open Minds and Harmless Errors: Judicial Review of Post-Promulgation Notice and Comment*, 101 CORNELL L. REV. 261, 285–305 (2016).

<sup>57</sup> *Id.* at 311 (arguing that “a strong presumption against the validity of postpromulgation notice and comment best respects the balance between an express statutory command for prepromulgation notice and comment and a particularized harmless error rule.”).

<sup>58</sup> Christopher J. Walker, *Against Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. ONLINE 106, 118–19 & n.75 (2017).

### 3. From Rulemaking to Subregulatory Guidance

In recent years, more scholarly and policy attention has been paid to agencies' shift from rulemaking to agency guidance as a regulatory tool.<sup>59</sup> The APA presently does not address agency guidance, other than to exempt "interpretative rules, general statements of policy, [and] rules of agency organization, procedure, or practice" from the APA's rulemaking provisions.<sup>60</sup> As Professor Ron Levin has detailed, "[q]uestions pertaining to the application of this exemption may constitute the single most frequently litigated and important issue of rulemaking procedure in the federal courts today."<sup>61</sup>

The conventional understanding is that agency guidance does not have the force of law, and thus is not judicially reviewable absent the agency's application of that guidance in enforcement or adjudication. Whether agency guidance is actually nonbinding on regulated parties—formally, or at least functionally—is subject to debate.<sup>62</sup> Last year, for example, the Justice Department issued an interim final rule that sets forth rules and procedures for creating agency guidance documents, including that "[g]uidance documents may not be used as a substitute for regulation and may not be used to impose new standards of conduct on persons outside the Executive Branch . . . ."<sup>63</sup>

What is clear, however, is that subregulatory guidance plays a critical role in modern administrative governance. Yet the text of the APA barely contemplates its existence, much less provides sufficient instructions on its appropriate use.

#### B. *Adjudication: The Predominance of Adjudication Between Formal and Informal*

If asked what the predominant form of administrative procedure under the APA is today, most scholars and students of administrative law would say notice-and-comment rulemaking. But it is important to

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<sup>59</sup> See generally Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REG. 165 (2019) (detailing current debates on agency guidance and presenting findings of extensive empirical study on agencies' use of subregulatory guidance).

<sup>60</sup> 5 U.S.C. § 553(b)(A).

<sup>61</sup> Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. 263, 263 (2018).

<sup>62</sup> See, e.g., Parrillo, *supra* note 59, at 184–231 (detailing incentives of regulated entities to comply with agency guidance).

<sup>63</sup> 28 C.F.R. § 50.27(e)(1)(i), <https://www.justice.gov/file/1308736/download>.

realize that, in 1946, the founders of the APA were primarily concerned with administrative adjudication.<sup>64</sup> Indeed, it was not until the 1960s and 1970s that we saw the shift from adjudication to rulemaking—perhaps viewing it as a more democratically legitimate mode of administration.<sup>65</sup>

Last year, in my introduction to the *Duke Law Journal* Charting the New Landscape of Administrative Adjudication Symposium, I surveyed how in recent years the tides have started to turn back to adjudication—in terms of both scholarly and judicial attention.<sup>66</sup> Here, I divide the story of agency adjudication into three chapters, drawing substantially from Professor Melissa Wasserman and my more extended account.<sup>67</sup> At the outset, it is worth noting that the adjudication and rulemaking stories differ in theme and main takeaways. The evolution of rulemaking demonstrates inconsistency between the APA’s text and modern administrative law doctrine and practice. The evolutionary story of adjudication, by contrast, is more about how the new world of agency adjudication exists largely outside of the APA. Put differently, administrative adjudication has largely outgrown the APA, and Congress has done little to remedy that.

### 1. The Lost World of APA Formal Adjudication

Like rulemaking, the APA divides adjudication into two broad categories: formal and informal. Or more precisely, Section 554 sets forth the procedures “in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing.”<sup>68</sup> For those Section 554 adjudications, the formal hearing provisions of Section 556 and 557 apply, discussed in Part I.A.1.<sup>69</sup> The APA has little to say about what has been termed “informal

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<sup>64</sup> See Shepherd, *supra* note 2, at 1575–77 (detailing the APA’s founding).

<sup>65</sup> See, e.g., Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 456 (1986); accord Farber & O’Connell, *supra* note 11, at 1143–44.

<sup>66</sup> Christopher J. Walker, *Charting the New Landscape of Administrative Adjudication*, 69 DUKE L.J. 1687, 1689–90 (2020).

<sup>67</sup> Christopher J. Walker, & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 148–73 (2019).

<sup>68</sup> 5 U.S.C. § 554(a). Section 554 includes a number of exceptions, including where a statute requires a trial de novo, the “agency is acting as an agency for a court,” or the matter deals with “inspections test, and election,” “military or foreign affairs functions,” or “the certification of worker representations.” *Id.*

<sup>69</sup> *Id.*

adjudication”—that residual category that encompasses any agency adjudication not subject to Section 554.<sup>70</sup>

For APA-governed formal adjudications—what Professor Wasserman and I have coined the lost world of agency adjudication—the APA requires, subject to modification in the agency’s organic statute, a number of trial-like procedures that one would find in a bench trial in federal court. The following table summarizes the key statutory requirements for APA-governed formal adjudication.<sup>71</sup>

The paradigmatic APA-governed formal adjudication involves an evidentiary hearing before an administrative law judge (ALJ). The parties are entitled to oral arguments, rebuttal, and cross-examination of witnesses. The ALJ presiding over the hearing is functionally equivalent to a trial judge in a bench trial. The ALJ is the principal factfinder and initial decision maker, and the APA empowers ALJs to “regulate the course of the hearing.”<sup>72</sup> Although ALJs do not have life tenure like federal judges, Congress has limited agency control over the selection, retention, and removal of ALJs, such that they enjoy strong decisional independence.<sup>73</sup> A party dissatisfied with an ALJ’s initial decision may seek further agency appellate review (and then judicial review), and the agency head generally has final decisionmaking authority.<sup>74</sup>

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<sup>70</sup> Section 555, dealing with “ancillary matters,” provides for some procedural protections that apply to informal adjudications. *Id.* § 555. Section 558 addresses the imposition of sanctions and the handling of licenses. *Id.* § 558.

<sup>71</sup> This table draws from 1 RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE 703 (2010), and is reproduced from Walker & Wasserman, *supra* note 67, at 149 tbl.1.

<sup>72</sup> 5 U.S.C. § 557(c)(A)–(B).

<sup>73</sup> See 5 U.S.C. § 554(d)(2), § 3105, § 5372. See generally Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 346 (1991); Jeffrey S. Lubbers, *Federal Administrative Law Judges: A Focus on our Invisible Judiciary*, 33 ADMIN. L. REV. 109, 112–20 (1981); Paul R. Verkuil, *Reflections Upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341, 1344 (1992).

<sup>74</sup> 5 U.S.C. § 557(b) (providing that, in cases where “the agency did not preside at the reception of the evidence, the presiding employee . . . shall initially decide the case,” and that initial “decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule”). See generally CHRISTOPHER J. WALKER & MATTHEW WIENER, AGENCY APPELLATE SYSTEMS (Final Report to Admin. Conf. U.S., 2020), <https://ssrn.com/abstract=3728393>; Russell L. Weaver, *Appellate Review in Executive Departments and Agencies*, 48 ADMIN. L. REV. 251 (1996).

APA-Governed Formal Adjudication		
	Statutory Requirement	APA Provision
1.	Notice of Legal Authority and Matters of Fact and Law Asserted	§ 554(b)
2.	Oral Evidentiary Hearing Before the Agency or Administrative Law Judge Who Must Be Impartial	§ 556(b)
3.	Limitations on Adjudicator's Ex Parte Communications with Parties and Within Agency	§§ 554(d), 557(d)(1)
4.	Availability of Legal or Other Authorized Representation	§ 555(b)
5.	Burden of Proof on Order's Proponent	§ 556(d)
6.	Party Entitled to Present Oral or Documentary Evidence	§ 556(d)
7.	Party Entitled to Cross-Examine Witnesses if Required for Full Disclosure of Facts	§ 556(d)
8.	Decision Limited to Bases Included in Hearing Record	§ 556(d)
9.	Party Entitled to Transcript of Evidence from Exclusive Record for Decision	§ 556(e)
10.	Decision Includes Reasons for All Material Findings and Conclusions	§ 557(c)(3)(A)
11.	Agency Head Final Decisionmaking Authority and De Novo Review of ALJ Decisions	§ 557(b)

## 2. The New World of Formal-Like Adjudication

As Professor Wasserman and I have chronicled, the vast majority of agency adjudications are not paradigmatic “formal” adjudications as set forth in the APA. That is the lost world. The new world of agency adjudication involves a variety of less-independent administrative judges, hearing officers, and other agency personnel adjudicating disputes. In the modern regulatory state, these administrative judges outnumber ALJs at least fivefold.<sup>75</sup> As Professor Michael Asimow has observed, the APA “fails to regulate in any significant way the vast and rapidly increasing number of more or less formal evidentiary adjudicatory hearings required by federal statutes that are not conducted by ALJs and yet are functionally indistinguishable from the hearings that are conducted by ALJs.”<sup>76</sup>

<sup>75</sup>Kent Barnett & Russell Weaver, *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal*, 53 GA. L. REV. 1, 5 (2019).

<sup>76</sup>Michael Asimow, *The Spreading Umbrella: Extending the APA's Adjudication Provisions to All Evidentiary Hearings Required by Statute*, 56 ADMIN. L. REV. 1003, 1020 (2004) (footnote omitted).

In this new world, it turns out that there is great diversity in procedures by which federal agencies adjudicate—some set by the respective agency’s organic statute but most set by regulation or subregulatory guidance. Professors Michael Asimow, Kent Barnett, and Emily Bremer, among others, have done critical work to map out the great diversity of non-APA formal-like adjudicative systems in the modern administrative judiciary and to identify current procedural deficiencies and structural flaws.<sup>77</sup> As Professor Bremer has underscored, it is not a new world just because the vast majority of adjudications take place outside of the formal provisions of the APA. There is also an APA-departing norm of “exceptionalism” in the new world of agency adjudication—“a presumption in favor of procedural specialization and against uniform, cross-cutting procedural requirements.”<sup>78</sup>

In other words, the APA tells us very little about the procedures and practices for the vast majority of formal-like adjudications in the modern administrative state today.

### 3. The Unchartered Frontier of Informal Adjudication

A brief note is merited on the relatively unchartered frontier of informal adjudication. Administrative law scholars have started to pay much more attention to formal-like agency adjudication that is not governed by the APA but where a statute or regulation requires an administrative hearing. As a field, however, we have barely begun to explore in any systematic manner the terrain of informal adjudication where an agency official adjudicates without holding a hearing.

This category of regulatory action is similarly vast and varied—ranging from tens of thousands of IRS tax adjudications a year<sup>79</sup> to hundreds of thousands of “shadow removals” of noncitizens from the

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<sup>77</sup> See, e.g., MICHAEL ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT (Admin. Conf. U.S. ed., 2019); Asimow, *supra* note 76; Kent Barnett, *Against Administrative Judges*, 49 UC DAVIS L. REV. 1643 (2016); Kent Barnett, *Regulating Impartiality in Agency Adjudication*, 69 DUKE L.J. 1695 (2020); Barnett & Weaver, *supra* note 75; Emily S. Bremer, *The Exceptionalism Norm in Administrative Adjudication*, 2019 WIS. L. REV. 1351.

<sup>78</sup> Emily S. Bremer, *Reckoning with Adjudication’s Exceptionalism Norm*, 69 DUKE L.J. 1749, 1752 (2020).

<sup>79</sup> See, e.g., Hoffer & Walker, *supra* note 4, at 276–89.

United States each year.<sup>80</sup> Importantly for our purposes, the APA says almost nothing about the administrative procedures for these informal adjudications.

## II. JUDICIAL REVIEW UNDER THE APA

With respect to the APA's judicial review provisions, extensive administrative common law remains on the books. Nearly two decades ago, Professor John Duffy penned an influential, 100-page article on administrative common law in judicial review.<sup>81</sup> Here, I merely survey some of these doctrines, divided into three categories: (A) threshold judicial review doctrines; (B) standards of review; and (C) judicial remedies.

### A. *Threshold Review Doctrines: Exhaustion, Ripeness, Standing, and the Presumption of Reviewability*

The APA's judicial review provisions apply broadly whenever Congress has made a particular agency action "reviewable by statute" or the action is "final agency action for which there is no other adequate remedy in a court."<sup>82</sup> It precludes judicial review only if another statute expressly does so or if "agency action is committed to agency discretion by law."<sup>83</sup> Outside of those two exceptions, the APA provides for judicial review for any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."<sup>84</sup>

Despite these relatively clear guidelines about who can seek judicial review under the APA as well as when and for what, courts have muddied the waters. As Professor Duffy explained, until the Supreme Court's 1993 decision in *Darby v. Cisneros*,<sup>85</sup> courts had grafted onto the APA an administrative exhaustion requirement—i.e., the rule that a party must exhaust all administrative remedies before

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<sup>80</sup> Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 183 (2017); see also SHOBA SIVAPRASAD WADHIA, BANNED: IMMIGRATION ENFORCEMENT IN THE TIME OF TRUMP ch.5 (2019).

<sup>81</sup> See Duffy, *supra* note 8, at 113–214.

<sup>82</sup> 5 U.S.C. § 704.

<sup>83</sup> *Id.* § 701(a); see *id.* § 559 ("Subsequent statute may not be held to supersede or modify [the APA], except to the extent that it does so expressly.").

<sup>84</sup> *Id.* § 702.

<sup>85</sup> 509 U.S. 137 (1993).

seeking judicial review.<sup>86</sup> The *Darby* Court rejected any such exhaustion requirement, holding that the APA's requirement of a "final agency action" is all that's required on that front.<sup>87</sup>

Although it eliminated the exhaustion requirement, the Court has grafted onto the APA two other atextual, threshold doctrines that may limit judicial review: prudential ripeness and prudential standing. In *Abbott Laboratories v. Gardner*,<sup>88</sup> the Court recognized a prudential ripeness doctrine for preenforcement review of agency action, which instructs courts "to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."<sup>89</sup> Professor Duffy argues at length that this administrative common law should be eliminated as inconsistent with the text of the APA.<sup>90</sup> More recently, the Court has perhaps hinted that prudential ripeness may not be long for this world.<sup>91</sup>

In *Ass'n of Data Processing Service Organizations, Inc. v. Camp*,<sup>92</sup> the Court held that prudential standing "concerns, apart from the [Article III jurisdictional] 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is *arguably* within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."<sup>93</sup> It interpreted the APA's zone of interest—any person "aggrieved by agency action within the meaning of a relevant statute"<sup>94</sup>—to "reflect 'aesthetic, conservational, and recreational' as well as economic values."<sup>95</sup> This zone-of-interest test for prudential standing, on its face, seems like it could be quite demanding, in ways that depart from the text of the

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<sup>86</sup> See Duffy, *supra* note 8, at 156–62.

<sup>87</sup> *Darby*, 509 U.S. at 144–47.

<sup>88</sup> 387 U.S. 136, 149 (1967), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977).

<sup>89</sup> *Id.* at 149 (1967).

<sup>90</sup> Duffy, *supra* note 8, at 162–81; *accord* Kovacs, *supra* note 3, at 1211 (expressing concern about the "prudential ripeness doctrine, which conflicts with the APA's promise of judicial review to any person who suffers a legal wrong and challenges final agency action").

<sup>91</sup> See *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014) ("In any event, we need not resolve the continuing vitality of the prudential ripeness doctrine in this case because the 'fitness' and 'hardship' factors are easily satisfied here.").

<sup>92</sup> 397 U.S. 150 (1970).

<sup>93</sup> *Id.* at 153 (emphasis added).

<sup>94</sup> 5 U.S.C. § 702.

<sup>95</sup> *Data Processing*, 397 U.S. at 154.

APA.<sup>96</sup> In practice, however, the Court has emphasized that this prudential standing requirement “is not meant to be especially demanding.”<sup>97</sup> The Court has explained:

We apply the test in keeping with Congress’s evident intent when enacting the APA to make agency action presumptively reviewable. We do not require any indication of congressional purpose to benefit the would-be plaintiff. And we have always conspicuously included the word “arguably” in the test to indicate that the benefit of any doubt goes to the plaintiff. The test forecloses suit only when a plaintiff’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.<sup>98</sup>

Recently, Professor Caleb Nelson has challenged this reading of *Data Processing* and of the APA more generally, arguing that “[t]he Supreme Court has never made a considered decision that when an agency is behaving unlawfully, the APA confers the same remedial rights upon plaintiffs whose interests are only ‘arguably’ within a protected zone as upon plaintiffs whose interests are indeed protected.”<sup>99</sup> Instead, he argues, the APA, as originally understood, limits remedial rights to those who are actually aggrieved, as opposed to just arguably aggrieved.<sup>100</sup>

On the other end of the spectrum, Professor Nicholas Bagley has criticized the Supreme Court’s recognition of a presumption of reviewability under the APA.<sup>101</sup> As he has argued at length, “[t]he ostensible statutory source for the presumption—the Administrative

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<sup>96</sup> See, e.g., JOSEPH VINING, *LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW 39* (1978) (declaring *Data Processing* “a shift in the axioms of legal thinking”); Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 *YALE L.J.* 425, 476, 495 (1974) (criticizing *Data Processing* as an “inappropriate notion of access standing” that preceded “focusing upon the claims for relief”); William A. Fletcher, *The Structure of Standing*, 98 *YALE L.J.* 221, 236 n.76 (1988) (“Under *Data Processing*’s view of the matter, whether plaintiff actually has the right to sue is a question of law on ‘the merits.’”).

<sup>97</sup> *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) (quoting *Clarke v. Securities Industry Ass’n*, 479 U.S. 388, 399 (1987)).

<sup>98</sup> *Id.* (internal citations and quotation marks omitted).

<sup>99</sup> Caleb Nelson, “*Standing*” and Remedial Rights in Administrative Law, 105 *VA. L. REV.* 703, 711 (2019)

<sup>100</sup> *Id.* at 803.

<sup>101</sup> Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 *HARV. L. REV.* 1285, 1289 (2014).

Procedure Act (APA)—nowhere instructs courts to construe statutes to avoid preclusion.”<sup>102</sup> Instead of such a presumption, Bagley has argued that courts should apply the APA’s statutory preclusion provision as written: “Where the best construction of a statute indicates that Congress meant to preclude judicial review, the courts should no longer insist that their participation is indispensable.”<sup>103</sup>

B. *Standards of Review: Chevron, Auer, and Hard-Look Review*

Section 706 is the heart of the APA’s judicial review provisions, as it sets the scope and standard of review for agency action. It instructs a reviewing court to “hold unlawful and set aside agency action, findings, and conclusions” if one of a number of factors is present.<sup>104</sup> In particular, such judicial action is warranted when agency action is:

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (B) contrary to constitutional right, power, privilege, or immunity;
- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (D) without observance of procedure required by law;
- (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
- (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.<sup>105</sup>

Section 706 further instructs that the reviewing court “compel agency action unlawfully withheld or unreasonably delayed”; that “the court shall review the whole record or those parts of it cited by a party”; and that “due account shall be taken of the rule of prejudicial error.”<sup>106</sup> Finally, Section 706 provides that “the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory

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<sup>102</sup> *Id.* at 1287 (footnote omitted).

<sup>103</sup> *Id.* at 1340.

<sup>104</sup> 5 U.S.C. § 706.

<sup>105</sup> *Id.* § 706(2).

<sup>106</sup> *Id.* § 706.

provisions, and determine the meaning or applicability of the terms of an agency action.”<sup>107</sup>

This Part focuses on two of the main judicial developments with respect to the APA’s standards of review: deference to administrative interpretations of law; and arbitrary and capricious review. Part II.C turns to judicial developments on the remedies front.

First, despite Section 706 commanding a reviewing court to “decide all relevant questions of law,” the Supreme Court has embraced judicial deference doctrines to administrative interpretations of law. With respect to agency *statutory* interpretations, the *Chevron* doctrine commands courts to defer to an agency’s reasonable interpretation of an ambiguous statute the agency administers.<sup>108</sup> With respect to agency *regulatory* interpretations, the *Auer* doctrine commands courts to defer to an agency’s interpretation of its own regulation so long as the agency’s interpretation is not “plainly erroneous or inconsistent with the regulation.”<sup>109</sup>

As I have documented elsewhere, in recent years a growing number of judges, scholars, and policymakers have criticized these doctrines, arguing among other things that they violate the constitutional separation of powers.<sup>110</sup> In 2018, the Supreme Court refused to overrule *Auer* deference<sup>111</sup>—although Justice Kagan’s approach for the majority arguably cabins the doctrine in substantial respects.<sup>112</sup> In casting the deciding vote, Chief Justice Roberts expressly noted that challenges to *Chevron* deference are still alive.<sup>113</sup>

Thousands of law review articles have been published on these deference doctrines, exploring so many questions. For our purposes,

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<sup>107</sup> *Id.*

<sup>108</sup> *Chevron*, U.S.A. v. NRDC, 467 U.S. 837, 842–43 (1984).

<sup>109</sup> *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

<sup>110</sup> See Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL’Y 103 (2018).

<sup>111</sup> *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019).

<sup>112</sup> See, e.g., Christopher J. Walker, *What Kisor Means for the Future of Auer Deference: The New Five-Step Kisor Deference Doctrine*, YALE J. ON REG.: NOTICE & COMMENT (June 26, 2019), <https://www.yalejreg.com/nc/what-kisor-means-for-the-future-of-auer-deference-the-new-five-step-kisor-deference-doctrine/>.

<sup>113</sup> *Kisor*, 139 S. Ct. at 2425 (Roberts, C.J., concurring in part) (“Issues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress.”).

though, the question is whether these judicial deference doctrines are consistent with the text of the APA. With respect to *Chevron*, Professor Aditya Bamzai has made the most compelling and comprehensive case that the deference doctrine is not consistent with the text, history, and structure of the APA.<sup>114</sup> More recently, Professor Cass Sunstein has defended *Chevron* deference as a proper interpretation of the APA.<sup>115</sup> In this Essay, I do not take sides in this debate. It is sufficient to appreciate that the most natural textual reading of Section 706's instruction that courts shall "decide all relevant questions of law" is de novo or plenary review. But federal courts have not accepted that reading. Instead, the Supreme Court has read the APA to include certain deference doctrines to administrative interpretations of law.<sup>116</sup>

Second, federal courts have interpreted Section 706's "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard of review in ways that are in tension with the plain text and, indeed, at times in tension with each other. On the one hand, the Supreme Court has interpreted this arbitrary-and-capricious standard as thin rationality review<sup>117</sup> as well as a super-deference to scientific and technical determinations.<sup>118</sup> On the other, the Supreme Court (in addition to lower courts) has adopted a "hard look" review that requires reasoned decisionmaking. In *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto Insurance*,<sup>119</sup> the Court articulated this more searching approach:

[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence

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<sup>114</sup>Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2017); see also Duffy, *supra* note 8, at 193–203 (raising similar arguments that the text of Section 706 of the APA does not support *Chevron* deference).

<sup>115</sup>Cass R. Sunstein, *Chevron as Law*, 107 GEO. L.J. 1613 (2019).

<sup>116</sup>See also Kristin E. Hickman & David Hahn, *Categorizing Chevron*, 81 OHIO ST. L.J. (forthcoming 2021) (exploring whether *Chevron* is a standard of review, rule of decision, or canon of construction), <https://ssrn.com/abstract=3693132>.

<sup>117</sup>Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355 (2016) (advocating for this more deferential approach set forth in *Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87 (1983)).

<sup>118</sup>Emily Hammond, *Super Deference, The Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733 (2011) (criticizing the Court's deferential approach in *Baltimore Gas*, 462 U.S. at 87).

<sup>119</sup>463 U.S. 29 (1983).

before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>120</sup>

The Roberts Court has sent mixed messages on this front. Consider two recent decisions. In *Department of Commerce v. New York*<sup>121</sup> (the census citizenship question case), the Court made two substantial moves. The Court seemed to embrace thin rationality review, emphasizing “the choice between reasonable policy alternatives in the face of uncertainty was the Secretary’s to make” and the importance of “[w]eighing that uncertainty against the value of obtaining more complete and accurate citizenship data.”<sup>122</sup> Yet conversely, the Court held that under the APA’s “reasoned explanation requirement,” an agency must “offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public.”<sup>123</sup> In other words, reasons that are pretextual are not sufficient.

Then last year, in *Department of Homeland Security v. Regents of University of California*<sup>124</sup> (the DACA immigration relief rescission case), the Court seemed to shift back to embracing a muscular version of hard look review. It held that arbitrary-and-capricious review under the APA requires the agency to consider reasonable regulatory alternatives and to demonstrate that the agency has adequately considered the reliance interests at stake in changing the regulatory baseline.<sup>125</sup> This decision is much more consistent with hard look review than the thin rationality review the Court embraced in the census citizen question case just one year prior.

It is worth noting that, unlike many of the other examples in this Essay, the Supreme Court’s conflicting approaches to arbitrary-and-capricious review may not be apt examples of judicial rewriting of the text of the APA. Instead, these precedents reveal a court struggling to give meaning to the terms arbitrary and capricious. But the Court’s struggles and shifting interpretations of the APA’s critical standard of

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<sup>120</sup> *Id.* at 43.

<sup>121</sup> 139 S. Ct. 2551 (2019).

<sup>122</sup> *Id.* at 2569–71 (citing *Baltimore Gas*, 462 U.S. at 105); *see also id.* at 2571 (“By second-guessing the Secretary’s weighing of risks and benefits and penalizing him for departing from the Bureau’s inferences and assumptions, Justice BREYER—like the District Court—substitutes his judgment for that of the agency.”).

<sup>123</sup> *Dep’t of Commerce*, 139 S. Ct. at 2575–76.

<sup>124</sup> 140 S. Ct. 1891 (2020).

<sup>125</sup> *Id.* at 1911–13.

review should be a warning to administrative lawyers to not take the statutory text at face value. And it should prompt Congress to modernize the APA to bring much needed clarity. A similar conclusion could be drawn about *Auer* and *Chevron* deference, though the argument that judicial deference doctrines are inconsistent with Section 706's statutory text seems stronger in that context.

C. *Judicial Remedies: Remand Without Vacatur, Nationwide Injunctions, and Harmless Error*

Until the last half-dozen years or so, little attention had been given in the literature to questions of judicial remedies in administrative law.<sup>126</sup> Since then, however, such literature has exploded, especially in the context of the propriety of issuing a nationwide or universal injunction under the APA.

As mentioned in Part II.B, Section 706 includes at least three provisions that deal with remedies. First, it authorizes courts to “hold unlawful and set aside agency action, findings, and conclusions.”<sup>127</sup> Second, it authorizes courts to “compel agency action unlawfully withheld or unreasonably delayed.”<sup>128</sup> And third, it instructs that “due account shall be taken of the rule of prejudicial error.”<sup>129</sup> Section 705 also authorizes relief pending judicial review, including that the reviewing court “may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or

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<sup>126</sup> See, e.g., Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 256 (2017) (observing that questions about remedies “pervade administrative law, but they don’t get the attention they deserve”).

<sup>127</sup> 5 U.S.C. § 706(2).

<sup>128</sup> *Id.* § 706(1). Courts have interpreted this ability to compel agency action quite narrowly. See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (concluding “that an agency’s decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2)” of the APA). See generally Daniel Walters, *Symmetry’s Mandate: Constraining the Politicization of American Administrative Law*, 119 MICH. L. REV. 445 (2020) (surveying doctrines that insulate agency failures to regulate from judicial review and arguing against the existing asymmetry in the availability of judicial review for agency action compared to agency inaction).

<sup>129</sup> 5 U.S.C. § 706.

rights pending conclusion of the review proceedings.”<sup>130</sup> Section 702 also preserves the federal courts’ equitable remedial discretion.<sup>131</sup>

This Essay focuses on three ways in which judicial doctrine is in tension with Section 706’s text. The first two deal with what it means to “hold unlawful and set aside agency action.” In interpreting this provision, the Supreme Court has long embraced an “ordinary remand rule”: when a court concludes that an agency’s decision is erroneous, the ordinary course is to remand to the agency for additional investigation or explanation—as opposed to the court deciding the issue itself.<sup>132</sup> As I have detailed elsewhere, the ordinary remand rule applies not only to questions of fact, but also to the application of law to fact, policy judgments, and even certain questions of law.<sup>133</sup>

While this ordinary remand rule may seem consistent with Section 706’s language “hold unlawful and set aside,” it is important to note that courts have crafted onto the APA an exception to this general rule where the courts hold the agency action unlawful yet do *not* set it aside. That remedial doctrine is called remand without vacatur. As Professor Levin explores in the seminal article on the subject, remand without vacatur is a remedial innovation developed in the circuit courts over the last few decades, largely driven by the D.C. Circuit in the 1990s and 2000s.<sup>134</sup> This remedial doctrine allows courts to declare

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<sup>130</sup> *Id.* § 705. More recently, John Harrison has argued that Section 703 tells us as much if not more about judicial remedies under the APA than Section 706. John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, 38 YALE J. ON REG. BULL. 1 (2020). Exploring Section 703’s potential effect on judicial remedies exceeds this Essay’s ambition (and word limit).

<sup>131</sup> 5 U.S.C. § 702 (“Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.”).

<sup>132</sup> *See, e.g.,* *Negusie v. Holder*, 555 U.S. 511, 517 (2009) (“When the BIA has not spoken on ‘a matter that statutes place primarily in agency hands,’ our ordinary rule is to remand to ‘giv[e] the BIA the opportunity to address the matter in the first instance in light of its own expertise.’” (quoting *INS v. Ventura*, 537 U.S. 12, 16–17 (2002) (per curiam))). *See generally* 3 PIERCE, *supra* note 71, § 18.1.

<sup>133</sup> Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. 1553, 1561–79 (2014); *see also* Henry J. Friendly, *Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L.J. 199, 222–25 (trying to make sense of the general rule and its potential exceptions).

<sup>134</sup> Ronald M. Levin, “Vacation” at Sea: *Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 298–305 (2003).

an agency action arbitrary and capricious yet still keep it in place while the agency cures the procedural infirmities on remand. Once the agency has attempted to remedy those errors, challengers can then bring the modified action back to the court for further judicial review. If the agency action returns to court, the agency's post-remand reasoning and actions are considered part of the administrative record.

In 2014, the Administrative Conference of the United States documented that remand without vacatur has been used more than 70 times by the D.C. Circuit from 1972 through 2013 as well as at least once in the First, Third, Fifth, Eighth, Ninth, Tenth, and Federal Circuits.<sup>135</sup> Despite that the APA does not expressly provide the remedy, the Administrative Conference recommended that “[r]emand without vacatur should continue to be recognized as within the court’s equitable remedial authority on review of cases that arise under the Administrative Procedure Act (APA) and its judicial review provision, 5 U.S.C. § 706(2).”<sup>136</sup> In so recommending, the Administrative Conference noted:

[R]emand without vacatur is not without controversy. Some scholars argue that it can deprive litigants of relief from unlawful or inadequately reasoned agency decisions, reduce incentives to challenge improper or poorly reasoned agency behavior, promote judicial activism, and allow deviation from legislative directives. Critics have also suggested that it reduces pressure on agencies to comply with APA obligations and to respond to a judicial remand.<sup>137</sup>

The second debate about Section 706’s “set aside” language is whether it authorizes nationwide or universal injunctions that apply to enjoin an agency rule beyond the parties challenging the rule in the particular legal challenge. The conventional understanding has been that the APA authorizes universal vacatur of an agency rule or other regulatory action. But in recent years that conventional account has

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<sup>135</sup>STEPHANIE J. TATHAM, *THE UNUSUAL REMEDY OF REMAND WITHOUT VACATUR* 21, 27 (Report to Admin. Conf. of U.S. ed., 2014).

<sup>136</sup>Remand Without Vacatur, Administrative Conference Recommendation 2013–6, 78 Fed. Reg. 76269, 76273 (Dec. 17, 2013).

<sup>137</sup>*Id.* at 76272. In the DACA rescission case decided last year, the Supreme Court seemed to indirectly cast some doubt on remand without vacatur. See Christopher J. Walker, *What the DACA Rescission Case Means for Administrative Law: A New Frontier for Chenery I’s Ordinary Remand Rule?*, YALE J. ON REG.: NOTICE & COMMENT (June 19, 2020), <https://www.yalejreg.com/nc/what-the-daca-rescission-case-means-for-administrative-law-a-new-frontier-for-chenery-is-ordinary-remand-rule/>.

been challenged. In 2017, Professor Samuel Bray advanced the first comprehensive attack on nationwide injunctions, arguing that they are inconsistent with traditional equitable principles, with the scope of “judicial power” under Article III of the U.S. Constitution, and with good policy for judicial review.<sup>138</sup> A number of scholars have come to the nationwide injunction’s defense, including Professors Amanda Frost, Mila Sohoni, and Alan Trammell.<sup>139</sup> Professors John Harrison and Michael Morley, moreover, have responded with other reasons why at least some universal injunctions are improper.<sup>140</sup>

These articles are unlikely to be the last word on the subject. Indeed, the issue has been swirling at the Supreme Court in recent years, and the Court has yet to provide a definitive answer.<sup>141</sup> But the debate underscores the unsettled nature of the scope of “set aside” in the APA and how the modern realities of administrative law—in particular, the rise of district judges issuing nationwide injunctions—should encourage Congress to intervene to modernize the APA.<sup>142</sup>

The final example of an asserted mismatch between the APA and modern practice and doctrine concerns Section 706’s command that “due account shall be taken of the rule of prejudicial error.”<sup>143</sup> In a provocative article entitled *Remedial Restraint in Administrative Law*,

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<sup>138</sup>Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 418 (2017); cf. Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56, 56 (2017) (largely disagreeing with Professor Bray and concluding that “[a]lthough national injunctions are imperfect and crude forms of justice, they are better than no justice at all—which for some actions, may be the alternative”).

<sup>139</sup>Amanda Frost, *In Defense of Nationwide Injunctions*, 93 NYU L. REV. 1065 (2018); Mila Sohoni, *The Lost History of the “Universal” Injunction*, 133 HARV. L. REV. 920 (2020); Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121 (2020); Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67 (2019).

<sup>140</sup>Harrison, *supra* note 130; Michael Morley, *Disaggregating Nationwide Injunctions*, 71 ALA. L. REV. 1 (2019).

<sup>141</sup>*See, e.g.*, Christopher J. Walker, *More from Various Legal Scholars on the Nationwide Injunction, “Universal Vacatur,” and the APA*, YALE J. ON REG.: NOTICE & COMMENT (Apr. 13, 2020) (discussing Supreme Court amicus briefs on issue), <https://www.yalejreg.com/nc/more-from-other-legal-scholars-on-the-nationwide-injunction-universal-vacatur-and-the-apa/>.

<sup>142</sup>*See, e.g.*, Adam White, *Congress Should Fix the Nationwide Injunction Problem with a Lottery*, YALE J. ON REG.: NOTICE & COMMENT (Feb. 11, 2020), <https://www.yalejreg.com/nc/congress-should-fix-the-nationwide-injunction-problem-with-a-lottery/>.

<sup>143</sup>5 U.S.C. § 706.

Professor Bagley has argued that many administrative law doctrines are inconsistent with the APA's command to conduct harmless error review.<sup>144</sup> Among the doctrines he identifies as potentially problematic are ones discussed in this Essay: nationwide injunctions; the logical outgrowth doctrine; limitations on the good cause exception to notice-and-comment rulemaking; limitations on agency guidance; arbitrary-and-capricious review's reasoned decisionmaking requirements; and the ordinary remand rule.<sup>145</sup>

In an article with the same title *except* with an "Against" at the front, I have responded at length to Bagley various arguments.<sup>146</sup> Here is my bottom line:

For those of us who are less trusting of the federal bureaucracy, we are much less likely to find agency errors harmless—especially errors related to the structures and procedures that attempt to compensate for the regulatory state's democratic deficits. The current rule-based approach of the ordinary remand rule better accounts for this distrust. And this rule-based approach is consistent with the text and structure of the APA's appellate review model, especially as the model has evolved over the decades to address various separation-of-powers concerns.<sup>147</sup>

Regardless of our disagreements on the extent of harmless error review under the APA, this is yet another example of how the text of the APA does not necessarily reflect how administrative law and regulatory practice function today. With how administrative common law has changed the APA's requirements for administrative process and judicial review, the judicial remedies availability under the APA may no longer strike the correct balance. Exploring those inquiries lies outside the ambitions of this Essay. But such consideration certainly should be part of any legislative effort to modernize the APA.

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<sup>144</sup> Bagley, *supra* note 126, at 255 ("The bulk of the Article will canvass categories of cases in which there is often a mismatch between the underlying violation and the harshness of the conventional remedy.").

<sup>145</sup> Professor Bagley expands on these arguments in Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345 (2019). *See also id.* at 348 ("The judicially imposed rigors of notice-and-comment rulemaking, the practice of invalidating guidance documents that are 'really' legislative rules, the Information Quality Act, the logical outgrowth doctrine, nationwide injunctions against invalid rules—all could and perhaps should be reconsidered.").

<sup>146</sup> Walker, *supra* note 58, at 106–26.

<sup>147</sup> *Id.* at 110.

## III. PRESIDENTIAL ADMINISTRATION OUTSIDE THE APA

It is only fitting that in the year the APA celebrates its seventy-fifth anniversary, we also mark twenty years since then-Professor Elena Kagan published *Presidential Administration* in the pages of the *Harvard Law Review*.<sup>148</sup> In that article, Professor Kagan reflected on her experience working in the Clinton White House and expounded on the powers and influence the President has over the modern administrative state. In particular, she identified three key techniques for presidential administration: review, directives, and appropriation.<sup>149</sup>

Importantly, the presidential administration Professor Kagan described operates almost entirely outside the contours of the APA.<sup>150</sup> And yet this presidential administration—through White House regulatory review, presidential directives, presidential appropriation of agency action as the President’s own action, and other bureaucratic oversight tools—has tremendous effects on the realities of administrative governance today. Professors Farber and O’Connell explored these particular mismatches in great detail in *The Lost World of Administrative Law*.<sup>151</sup> In contrast to the lost world, they observed, “[i]n the real world of administrative law, the White House is the main player.”<sup>152</sup>

Indeed, it is fair to conclude that presidential administration was Professors Farber and O’Connell’s main focus. Accordingly, this Essay will focus on just one example: presidential review of regulatory actions by the Office of Information and Regulatory Affairs (OIRA).

In 1981, President Ronald Reagan issued Executive Order 12,291, which created procedures by which OIRA, housed within the White House’s Office of Management and Budget (OMB), would review proposed agency regulations in order to improve the quality and consistency of agency rulemaking.<sup>153</sup> President Bill Clinton superseded President Reagan’s order in 1993 with Executive Order

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<sup>148</sup> Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001)

<sup>149</sup> *Id.* at 2285.

<sup>150</sup> See also Kathryn E. Kovacs, *Constraining the Statutory President*, 98 WASH. U. L. REV. 63, 68–69 (2020) (arguing that *Franklin v. Massachusetts*, 505 U.S. 778, 800–01 (1992), which held that the President is not an “agency” under the APA, was wrongly decided and should be overturned).

<sup>151</sup> See Farber & O’Connell, *supra* note 11, at 1155–73.

<sup>152</sup> *Id.* at 1183.

<sup>153</sup> Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981).

12,866.<sup>154</sup> But these best practices remained central in the new order.<sup>155</sup> Under Executive Order 12,866, “in deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating.”<sup>156</sup> Like its predecessor, Executive Order 12,866 declares that agencies must perform economic analysis and choose the regulatory approach that maximizes net benefits.<sup>157</sup> Each presidential administration since has employed OIRA and OMB to centralize review of proposed regulatory actions and insert the President directly into regulatory activities at federal agencies.

A large literature on OIRA unsurprisingly has developed, with strong critics, strong supporters, and many in between.<sup>158</sup> OIRA looms large in modern administrative governance. Yet it is largely absent in the United States Code, and even more so in the APA. Professors Farber and O’Connell drive home this point:

At a more fundamental level, most of OIRA’s operation is entirely a creature of administrative fiat. It is anomalous that such an important feature of the regulatory state has no statutory basis. Congress might want to consider providing a statutory framework for OIRA’s role, which could also address the process issues. This framework might address the substantive role of cost-benefit analysis in decision making, either expanding or contracting the current practice. Alternatively, the statute might be limited to process issues to ensure that the review process is transparent and fair, if only by codifying the procedures already embodied in executive orders so that they would have the force of law and be judicially reviewable.<sup>159</sup>

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<sup>154</sup> Exec. Order No. 12,866, 3 C.F.R. § 638 (1993).

<sup>155</sup> See Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 6 (1995).

<sup>156</sup> Exec. Order No. 12,866, § 1(a).

<sup>157</sup> *Id.* See generally Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 176–78 (1994) (comparing the Reagan and Clinton executive orders and concluding that “[t]he Clinton order focuses on a similar mandate, but describes it with greater nuance”).

<sup>158</sup> To provide just two examples, compare Lisa Heinzerling, *Inside EPA: A Former Insider’s Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENVTL. L. REV. 325 (2014) (criticizing OIRA), with Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838 (2013) (defending OIRA).

<sup>159</sup> Farber & O’Connell, *supra* note 11, at 1183 (footnotes omitted).

OIRA, moreover, is just one aspect of presidential administration that largely operates outside of the APA. Others include the use of presidential directives<sup>160</sup> and the President's budget.<sup>161</sup> When Congress turns to modernizing the APA, it should take a careful look at presidential administration and codify the aspects of presidential administration that warrant such inclusion in the APA—the quasi-constitution of the modern administrative state.

#### CONCLUSION

The APA has endured for three quarters of a century as the framework statute for the modern regulatory state. I expect it to live far beyond the century mark. Yet unless Congress seeks to modernize the APA, the mismatch between statutory text, on the one hand, and administrative doctrine and regulatory practice, on the other, will only increase. This Essay has not attempted to chart a path forward.<sup>162</sup> But by presenting this annotation and literature review of the lost world of the APA at 75, the Essay should hopefully shed light on potential areas for further legislative reform, judicial engagement, and scholarly attention. Maybe when we celebrate the APA at 100, we will need to take stock of how Congress modernized the statute since 2020.

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<sup>160</sup> See, e.g., Tara Leigh Grove, *Presidential Laws and the Missing Interpretive Theory*, 168 U. PA. L. REV. 877 (2020).

<sup>161</sup> See, e.g., Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182 (2016).

<sup>162</sup> Elsewhere I have suggested potential reforms to modernize the APA's provisions on rulemaking, adjudication, and judicial review. See Walker, *supra* note 5 (rulemaking and judicial review); Christopher J. Walker, *A Reform Agenda for Administrative Adjudication*, REGULATION (forthcoming 2021) (adjudication and judicial review), <https://ssrn.com/abstract=3737050>. But those discussions are preliminary and tentative. Much more serious study needs to be done.