

RECKONING WITH ADJUDICATION'S EXCEPTIONALISM NORM

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ABSTRACT

Unlike rulemaking and judicial review, administrative adjudication is governed by a norm of exceptionalism. Agencies rarely adjudicate according to the Administrative Procedure Act's formal adjudication provisions, and the statute has little role in defining informal adjudication or specifying its minimum procedural requirements. Due process has almost nothing to say about the matter. The result is that there are few uniform, cross-cutting procedural requirements in adjudication, and most hearings are conducted using procedures tailored for individual agencies or programs. This Article explores the benefits and costs of adjudication's exceptionalism norm, an analysis that implicates the familiar tension between uniformity and specialization in the law. It argues that the exceptionalism norm overemphasizes specialization, at great cost. This Article urges a new regime designed to more properly balance the values of specialization and uniformity. The proposal contemplates that as in rulemaking, the project would entail an interbranch effort to protect fundamental rights and promote institutional integrity while preserving space for needed agency discretion.

TABLE OF CONTENTS

Introduction.....	1750
I. Adjudication's Exceptionalism Norm.....	1756
A. A Hole in Administrative Law's Standard Narrative	1756
B. A Cross Section of Adjudication Programs.....	1760
1. <i>Social Security Administration</i>	1764
2. <i>Patent Trial and Appeal Board</i>	1765
3. <i>Executive Office of Immigration Review</i>	1767
4. <i>Equal Employment Opportunity Commission</i>	1768

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5. <i>Department of Agriculture</i>	1770
6. <i>Board of Veterans' Appeals</i>	1772
C. Exceptionalism's Effect on Procedures	1772
II. Evaluating Exceptionalism	1775
A. Harm to Individual Interests	1777
B. Harm to Institutional Integrity	1783
C. Capturing the Benefits of Exceptionalism.....	1786
D. Summary and Conclusion	1790
III. Toward a Remedy	1792
A. The Overarching Structure	1792
B. The Minimum Requirements	1795
C. The Institutional Question	1797
IV. Objections	1802
Conclusion	1805

INTRODUCTION

Administrative law is commonly understood as a quasi-constitutional body of law, supported by the APA as its superstatute backbone, which applies uniformly across the administrative state.¹ This standard narrative, which has coalesced over the past decade or so, has three distinct but related threads. First, administrative law is “quasi-constitutional” because it provides rules that perform constitutional functions in a realm little governed by the U.S. Constitution.² These functions include constituting government institutions, determining institutional boundaries, regulating the relationship between agencies and citizens, and protecting fundamental values. The second thread of the standard narrative provides that the core of administrative law’s quasi-constitution is a superstatute³: the APA.⁴ Enacted after an intense political and normative debate, the APA codified a fierce compromise regarding the

1. See Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807, 811–24 (2018); Emily S. Bremer, *The Exceptionalism Norm in Administrative Adjudication*, 2019 WIS. L. REV. 1351, 1357–71 [hereinafter Bremer, *Exceptionalism Norm*].

2. Emily S. Bremer, *The Unwritten Administrative Constitution*, 65 FLA. L. REV. 1215, 1218, 1221–22 (2014) [hereinafter Bremer, *Unwritten Administrative Constitution*].

3. See generally WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION (2010); William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001).

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

structure, operation, and place of administrative agencies within the federal government.⁵ That compromise has proven to be so durable for so long that it is, at least as a practical matter, entrenched.⁶ These characteristics give the APA its superstatute status and lend it significant normative weight.⁷ The third thread in the narrative is a concept that arises from the first two: because administrative law is a quasi-constitutional field supported by a superstatute, scholars and courts have rejected “administrative law exceptionalism”—that is, claims that individual agencies or regulatory fields are so unique that they should be exempted from general principles of administrative law and procedure.⁸ For example, the Supreme Court has refused to apply a more deferential standard of review to the Internal Revenue Service’s (“IRS”) interpretation of the tax code⁹ and has held that the Patent and Trademark Office (“PTO”) is subject to traditional standards of judicial review.¹⁰

Although this standard narrative is offered to explain the status and operation of administrative law generally, it does not fit

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

6. See Bremer, *Unwritten Administrative Constitution*, *supra* note 2, at 1236–44; Kovacs, *supra* note 4, at 1208.

7. See Kovacs, *supra* note 4, at 1223–37.

8. See, e.g., 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, 270–72 (2007); 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, 1730–31 (2007); Patrick J. Smith, *The APA's Arbitrary and Capricious Standard and IRS Regulations*, 136 TAX NOTES 271, 271 (2012); Christopher J. Walker, *Chevron Deference and Patent Exceptionalism*, 65 DUKE L.J. ONLINE 149, 149–50 (2016) [hereinafter Walker, *Patent Exceptionalism*]; Eleanor D. Wood, Note, *Rejecting Tax Exceptionalism: Bringing Temporary Treasury Regulations Back in Line with the APA*, 100 MINN. L. REV. 839, 840–42 (2015). *But see* Richard Murphy, *Pragmatic Administrative Law and Tax Exceptionalism*, 64 DUKE L.J. ONLINE 21, 23 (2014); James M. Puckett, *Structural Tax Exceptionalism*, 49 GA. L. REV. 1067, 1074–75 (2015); Lawrence Zelenak, *Maybe Just a Little Bit Special, After All?*, 63 DUKE L.J. 1897, 1898–1901, 1918–20 (2014).

9. See *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 55–56 (2011); Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. 221, 222 (2014); *see also* Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up To Be Tax Lawyers*, 13 VA. TAX REV. 517, 518–19 (1994) (criticizing tax myopia as a “misperception”). The *Duke Law Journal* dedicated a previous symposium to the topic of administrative law exceptionalism in tax. *See generally* Amandeep S. Grewal, *Foreword: Taking Administrative Law to Tax*, 63 DUKE L.J. 1625 (2014).

10. See *Dickinson v. Zurko*, 527 U.S. 150, 152 (1999); Walker, *Patent Exceptionalism*, *supra* note 8, at 149 n.3.

adjudication, one of the two primary forms of agency policymaking.¹¹ This significant deficiency was long overlooked because the standard narrative has been built using examples drawn from rulemaking and judicial review, important areas in which the narrative has undeniable explanatory power. In those contexts, the narrative's three strands—administrative law's quasi-constitutional status, the APA as a superstatute, and the rejection of administrative exceptionalism—operate together to produce a unified descriptive and normative account of how administrative law operates. Adjudication, however, defies the standard narrative.

In a previous article, I argued that adjudication is ruled by a norm of exceptionalism: a presumption in favor of procedural specialization and against uniform, cross-cutting procedural requirements.¹² In the immediate wake of the APA's adoption, the Supreme Court briefly but vigorously defended the statutory regime in *Wong Yang Sung v. McGrath*,¹³ a case involving deportation hearings.¹⁴ Congress overrode the Court's program-specific holding by statute.¹⁵ The Supreme Court capitulated,¹⁶ and over the ensuing decades courts adopted a thoroughly deferential posture toward procedural due process in adjudication, in both its constitutional and statutory variants.¹⁷ Just as the episode set the judicial tone, so too was it a harbinger of the legislature's attitude toward administrative adjudication. Over the decades, Congress routinely has ignored or deviated from the APA, creating unique adjudication procedures to suit the needs of individual agencies or regulatory programs. Aided by the unified and permissive congressional-judicial attitude, agencies have consistently avoided the APA's adjudication provisions. The consequence has been a severe cabining of the APA's adjudication provisions, outside of which have flourished hundreds of distinct procedural regimes that share virtually no common source of law.¹⁸

11. See Bremer, *Exceptionalism Norm*, *supra* note 1, at 1353–54.

12. See *id.* at 1409–11.

13. *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950).

14. *Id.* at 52–53.

15. *Marcello v. Bonds*, 349 U.S. 302, 306 (1955); William Funk, *The Rise and Purported Demise of Wong Yang Sung*, 58 ADMIN. L. REV. 881, 885 (2006) [hereinafter Funk, *The Rise and Purported Demise of Wong Yang Sung*].

16. See *Marcello*, 349 U.S. at 306–07.

17. *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

18. Cf. Matthew Lee Wiener, *Chairman's Foreword* to MICHAEL ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT, at v (2019) [hereinafter ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION] (“[T]he statutes that

Adjudication's exceptionalism norm turns administrative law's standard narrative on its head. In this important context, nearly every agency and program is viewed as so unique that it warrants exception from the APA.¹⁹ The APA itself probably contributes to the problem. Under the APA, "adjudication" is a catch-all category encompassing any "agency process for the formulation of an order,"²⁰ which in turn is defined as "the whole or a part of a final disposition . . . in a matter other than rule making but including licensing."²¹ But the problem goes deeper. It is blackletter law that "formal" adjudications are conducted under the APA's adjudication provisions, while "informal" adjudications are subject only to the minimal requirements of the APA's "ancillary matters" provision²² and constitutional due process.²³ As Professor Michael Asimow has persuasively shown, however, the traditional division of adjudication into "formal" and "informal" varieties is inaccurate and misleading in view of actual agency practice.²⁴ A careful analysis of the caselaw further reveals that the concepts essential to this blackletter doctrine—"formal," "informal," and even "adjudication"—lack any stable or coherent meaning.²⁵ The APA's adjudication provisions are more ignored than entrenched, and the exceptionalism norm by definition, albeit paradoxically, reveals the APA's failure to "prove robust as a solution, a standard, or a norm over

govern [informal adjudications] often say little, if anything, about the basic procedures [the agency] must observe, and thereby leave procedural choices in agency hands."). The regulations and guidance that establish the procedural structure of many adjudication programs may be understood as the internal administrative law of adjudication. *See generally* Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239 (2017).

19. *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, 1005–08 (2004) [hereinafter Asimow, *The Spreading Umbrella*]; Jeffrey S. Lubbers, *APA-Adjudication: Is the Quest for Uniformity Faltering?*, 10 ADMIN. L.J. AM. U. 65, 70–72 (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, 357 (1985).

20. 5 U.S.C. § 551(7) (2018).

21. *Id.* § 551(6).

22. *Id.* § 555.

23. *See* Emily S. Bremer, *Designing the Decider*, 16 GEO. J.L. & PUB. POL'Y 67, 69 & n.10, 71 (2018) [hereinafter Bremer, *Designing the Decider*]; *see also* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

24. MICHAEL ASIMOW, EVIDENTIARY HEARINGS OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 3 (2016) [hereinafter ASIMOW, EVIDENTIARY HEARINGS], https://www.acus.gov/sites/default/files/documents/adjudication-outside-the-administrative-procedure-act-final-report_0.pdf [https://perma.cc/4EDA-DQGG].

25. *See* Bremer, *Exceptionalism Norm*, *supra* note 1, at 1400–03, 1409–10.

time.”²⁶ The inescapable conclusion is that in adjudication, the APA is no superstatute. Turning to the final strand of the standard narrative, the vast and varied rules that govern agency adjudication surely serve some of the functions associated with constitutions, but the rules are nonuniform, easily changeable, and incoherent in core respects. Adjudication may be governed by an unwritten constitution. But not one that is sound.²⁷

This Article argues that adjudication’s exceptionalism norm should be rejected because it insufficiently protects individual interests and undermines the institutional integrity of the administrative state. By definition, the norm rejects uniformity, even with respect to the most fundamental of procedures. The result is that programs often lack basic procedural protections, with potentially severe consequences for affected individuals. But it is hard to know how frequently procedural protections are relaxed or omitted because the exceptionalism norm promotes widespread diversity that defeats transparency and impedes both legal and political oversight. Even when subpar procedures can be identified, the exceptionalism norm rejects the kind of cross-cutting minimum requirements that would enable reform. Although procedural flexibility could facilitate system-wide procedural improvement over time, the norm’s near-total rejection of uniformity provides no foundation for successes—or failures—in procedural experimentation to be disseminated across agencies and programs. Exceptionalism also undermines efficiency: each agency must mind its own procedures, deprived of the information and expertise that would be generated and made available by centralized review of uniform requirements. Finally, the norm undermines the institutional integrity of the administrative state by allowing procedural regimes that ignore the special needs of quasi-judicial action in an administrative context. Overall, this Article argues, the costs of exceptionalism outweigh its benefits.

At the heart of this analysis is a familiar tension between uniformity and specialization. This tension arises in other procedural fields, most notably civil procedure and federal courts, as well as in the debate over the uniform law movement. This Article draws on the experience and literature in these areas to enrich its discussion, arguing that uniformity and specialization are not mutually exclusive goals but

26. Kovacs, *supra* note 4, at 1209 (quoting Eskridge & Ferejohn, *supra* note 3, at 1216); see ESKRIDGE & FERREJOHN, *supra* note 3, at 111.

27. See Bremer, *Exceptionalism Norm*, *supra* note 1, at 1356.

competing values that must be properly balanced. Adjudication's exceptionalism norm rejects any such balance. Instead, the norm's purpose and effect are to limit uniformity to the greatest extent possible, in favor of maximizing space for specialization.²⁸ This Article rejects both adjudication's exceptionalism norm and its zero-sum approach to procedural design. It argues not for complete uniformity—which is neither desirable nor achievable—but rather for an approach calibrated to balance uniformity and specialization in adjudication procedures. Such an approach prevails with respect to the other primary form of agency policymaking: rulemaking. As in rulemaking, adjudication would benefit from the development and enforcement of a core set of minimum procedural requirements that apply uniformly across all agencies. This Article considers the possibilities for achieving this goal, arguing that the project requires the involvement of all branches of the federal government. It concludes by addressing various objections to the proposal.

This Article proceeds in four parts. Part I explores the effects of adjudication's exceptionalism norm through a series of six examples of adjudication programs. This cross section, though small, offers a sense of the variety among adjudication programs, along dimensions such as size, structure, and regulatory purpose. It also allows some examination of how exceptionalism affects the system-wide observance of the most basic procedural protections of individual interests and institutional integrity. Part II uses this foundation to argue that the exceptionalism norm harms both individual and institutional interests. Although it offers benefits for individual programs, the norm's extremity puts some of the most valuable system-wide benefits of procedural flexibility out of reach. In the end, Part II argues that the exceptionalism norm should be rejected. Part III considers how best to forge a new and more defensible norm in administrative adjudication. It recognizes that this effort may serve two distinct goals: enforcing minimum procedural requirements and pursuing uniformity. It argues that the best and most feasible solution may be found where these possibilities overlap, in a regime similar to that which governs rulemaking. At the broadest level, this would bring administrative law's standard narrative to bear on adjudication. Part

28. Constitutional due process defines the limits here, see *Mathews*, 424 U.S. at 334–35, but they are modest and flexible, resulting in a narrowing judicial role in procedural innovation across a variety of contexts, see Jason Parkin, *Dialogic Due Process*, 167 U. PA. L. REV. 1115, 1118 (2019).

IV identifies and briefly responds to objections, with the goal of provoking further discussion.

I. ADJUDICATION'S EXCEPTIONALISM NORM

This Part begins by briefly explaining adjudication's exceptionalism norm and how that norm contradicts the standard narrative of administrative law that fares so well with respect to rulemaking and judicial review. It then explores the consequences of the norm by offering six examples of agency adjudication.

A. *A Hole in Administrative Law's Standard Narrative*

As explained above, adjudication does not fit the standard narrative of administrative law. To understand the implications of this proposition, it may be worthwhile to consider what it means to say that rulemaking—the other primary form of agency policymaking—does fit the standard narrative.²⁹ Rulemaking is the process through which agencies develop rules or regulations that have general, prospective, legal effect.³⁰ The APA provides for two kinds of rulemaking: formal and informal.³¹ Today, the formal rulemaking process is all but dead, and the vast majority of regulations are adopted through informal rulemaking.³² This process is commonly referred to as “notice-and-comment” rulemaking,³³ a term that roughly describes the minimum procedures required by § 553 of the APA.³⁴ The courts have fleshed out these minimum procedures through a robust body of administrative common law.³⁵ The executive, agencies, courts, Congress, and scholars have accepted the notice-and-comment process

29. See generally M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383 (2004) (exploring the methods by which agencies make policy, including rulemaking, and those methods' processes, effects, and susceptibility to judicial review).

30. See 5 U.S.C. § 551(4)–(5) (2018).

31. Compare *id.* § 553 (providing procedures for informal notice-and-comment rulemaking), with *id.* §§ 556–557 (providing procedures for formal rulemaking).

32. E.g., *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 128 n.5 (2015) (Thomas, J., concurring) (“Today . . . formal rulemaking is the Yeti of administrative law. There are isolated sightings of it in the ratemaking context, but elsewhere it proves elusive.”); Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237, 238 (2014).

33. See, e.g., *Perez*, 575 U.S. at 96.

34. See 5 U.S.C. § 553.

35. See, e.g., TODD GARVEY, CONG. RESEARCH SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW 13–17 (2017); Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1295 (2012).

as the default definition of “rulemaking.”³⁶ Thus, when Congress authorizes an agency to adopt regulations, it typically allows § 553 to supply the default procedural rules, only rarely creating unique procedural schemes.³⁷ When Congress, the executive, or agencies impose or observe additional procedures in rulemaking, they generally do so by embellishing the APA’s notice-and-comment process.³⁸ For their part, courts and scholars define rulemaking according to § 553’s procedures and have mostly rejected the claims of individual agencies for special exception from those procedural requirements.³⁹ This rejection of “administrative exceptionalism” in rulemaking ensures that all agencies are uniformly subject to the general administrative law principles established by § 553 and fleshed out by the courts. The

36. See Margaret B. Kwoka, *Deference, Chenery, and FOIA*, 73 MD. L. REV. 1060, 1090–91 (2014); cf. *Nat’l Venture Capital Ass’n v. Duke*, 291 F. Supp. 3d 5, 16 (D.D.C. 2017) (“Because notice and comment is the default, ‘the onus is on the [agency] to establish that notice and comment’ should not be given.” (alteration in original) (quoting *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 801 n.6 (D.C. Cir. 1983))).

37. For example, “[v]irtually all of the Dodd-Frank rules to which deadlines apply are legislative rules, for which notice-and-comment is the default procedural requirement.” Jacob E. Gersen, *Administrative Law Goes to Wall Street: The New Administrative Process*, 65 ADMIN. L. REV. 689, 731 (2013). When Congress imposes agency- or program-specific rulemaking requirements, it typically adds to—but does not displace—the requirements of § 553. See Henry H. Perritt, Jr., *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 GEO. L.J. 1625, 1696 (1986) [hereinafter Perritt, *Negotiated Rulemaking Before Federal Agencies*]. Such “hybrid rulemaking” procedures, the paradigmatic examples of which are found in the Magnuson-Moss Act (governing the Federal Trade Commission) and the Occupational Safety and Health Act, are not the norm and are generally disfavored. See Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 112 (1998); Perritt, *Negotiated Rulemaking Before Federal Agencies*, *supra*, at 1696; see also ACUS Recommendation 79-1: Hybrid Rulemaking Procedures of the Federal Trade Commission, 44 Fed. Reg. 38,817 (July 3, 1979); ACUS Recommendation 80-1: Trade Regulation Rulemaking Under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 45 Fed. Reg. 46,772 (July 11, 1980).

38. See Perritt, *Negotiated Rulemaking Before Federal Agencies*, *supra* note 37, at 1696; see also ACUS Recommendation 80-1, 45 Fed. Reg. at 46,773 (recommending that, to avoid confusion, Congress not require procedures in addition to § 553, but that agencies should have discretion to use extra procedures).

39. See, e.g., Benjamin & Rai, *supra* note 8, at 270–72 (rejecting patent law exceptionalism); Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1683–87 (2007) (describing potential hurdles to a judicially created immigration law exceptionalism); Hoffer & Walker, *supra* note 9, at 222 (describing the death of tax exceptionalism); Wood, *supra* note 8, at 840–42 (setting up the problem of Treasury noncompliance with the APA). Scholarly rejection of administrative exceptionalism has not been unanimous. See, e.g., John M. Golden, *Working Without Chevron: The PTO As Prime Mover*, 65 DUKE L.J. 1657, 1659 (2016) (arguing for how the PTO can influence substantive patent law without the deference that ordinary administrative law principles would provide); Puckett, *supra* note 8, at 1074–75 (arguing that structural tax exceptionalism has important benefits and should not casually be set aside); Zelenak, *supra* note 8, at 1898–1901, 1918–20 (arguing for at least a limited tax exceptionalism).

resulting regime is not one of pure uniformity. Agencies have discretion to tailor the process to their unique needs provided that they comply with the APA's minimum requirements.⁴⁰ Thus, agencies may impose additional procedures on themselves in rulemaking.⁴¹ And agencies have fairly broad latitude to experiment with procedural innovations during the stages of the process that are not addressed by the APA.⁴²

An inverse reality prevails in adjudication, which is governed by a norm of exceptionalism. As in rulemaking, most administrative adjudication is “informal.” But the similarities end there. The APA has no adjudicatory analogue to § 553 that provides default procedures for informal adjudication.⁴³ Lacking a statutory substrate, the courts have not developed such procedures through administrative common law. Due process provides a theoretical floor, but in practice, its requirements are so flexible that it imposes minimal limitations on agency procedural discretion. The result is that there are few, if any, general principles of administrative adjudication. Most adjudications are conducted according to procedures that have been tailored to suit the substantive needs of the individual agency or regulatory program.

In a prior article, I used a detailed examination of one administrative adjudication scheme—the Patent and Trial Appeal Board's (“PTAB”) *inter partes* review process—to show concretely how adjudication defies administrative law's standard narrative.⁴⁴ This approach illuminated a number of important points that would have escaped a shorter and necessarily more superficial treatment. First, it demonstrated how, in the absence of a uniform set of default procedural rules, it is difficult and laborious to construct an individual

40. See *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978).

41. *Id.*

42. See Bridget C.E. Dooling, *Legal Issues in E-Rulemaking*, 63 ADMIN. L. REV. 893, 897 (2011); cf. Henry H. Perritt, Jr., *Negotiated Rulemaking in Practice*, 5 J. POL'Y ANALYSIS & MGMT. 482, 486 (1986) (arguing that the need for public comment on a rule can be satisfied by “[u]sing negotiations to prepare a proposed rule, and then allowing notice-and-comment rulemaking”).

43. See *supra* notes 19–27 and accompanying text. As noted, the APA has a provision addressing “ancillary matters,” and these matters may arise in adjudication. See 5 U.S.C. § 555 (2018). But that provision does not attempt to provide a default procedural regime for informal adjudication, as § 553 does for informal rulemaking.

44. See generally Bremer, *Exceptionalism Norm*, *supra* note 1.

procedural process from the ground up.⁴⁵ Second, the in-depth examination of *inter partes* review revealed the way that adjudication's exceptionalism norm changes the conduct of every federal government institution when adjudication rather than rulemaking is at issue. Congress sought to fashion an "adjudicative" process by creating a detailed statutory structure designed to import federal district court processes into an administrative context.⁴⁶ Congress did not use—and apparently did not even consider using—the APA's adjudication provisions as the relevant procedural baseline. Following Congress's lead, when the PTO fleshed out the *inter partes* review procedures through regulations and guidance, it also used federal district court practice—and not the APA—as the touchstone of its procedural design. On judicial review of the agency's action, the Federal Circuit has characterized *inter partes* review as formal APA adjudication,⁴⁷ but it is not clear what effect that characterization has had on the agency's process.

Perhaps the most striking takeaway from the case study of PTAB adjudication is that the APA has little stable role in defining "formal" or "informal" adjudication or specifying the essential procedural elements of adjudication. Indeed, the courts have offered four different approaches to defining "formal" adjudication, the application of which lead to at least three possible answers to the question of whether *inter*

45. The exercise requires a close examination of applicable statutes, regulations, and other agency documents and practices, as well as careful consideration of how these various materials interact with and affect one another. Fully describing the *inter partes* review process required ten pages, only a fraction of the hundreds of pages of statutes, regulations, and agency guidance that establish the *inter partes* review procedures. *See id.* at 21–30. Even this omits other sources of information about the *inter partes* review process that any good lawyer representing a client before the PTAB would consult, such as judicial decisions, previous PTAB decisions, and valuable but unwritten information gleaned through experience practicing before the agency. *Cf.* Samuel P. Jordan, *Local Rules and the Limits of Trans-Territorial Procedure*, 52 WM. & MARY L. REV. 415, 461 (2010) [hereinafter Jordan, *Local Rules*] (discussing the need for lawyers to learn local rules as an argument for cementing local legal practice through rulemaking).

46. *See* H.R. REP. NO. 112-98, at 46–47 (2011).

47. *See* *Anacor Pharm., Inc. v. Iancu*, 889 F.3d 1372, 1379 (Fed. Cir. 2018); *Novartis AG v. Torrent Pharm. Ltd.*, 853 F.3d 1316, 1324 (Fed. Cir. 2017); *Rovalma, S.A. v. Bohler-Edelstahl GmbH & Co. KG*, 856 F.3d 1019, 1029 (Fed. Cir. 2017); *In re NuVasive, Inc.*, 841 F.3d 966, 971 (Fed. Cir. 2016) (quoting *Dell Inc. v. Accelaron, LLC*, 818 F.3d 1293, 1301 (Fed. Cir. 2016)); *Synopsis, Inc. v. Mentor Graphics Corp.*, 814 F.3d 1309, 1322 (Fed. Cir. 2016), *overruled on other grounds by* *Aqua Prods., Inc. v. Matal*, 872 F.3d 1290 (Fed. Cir. 2017) (en banc); *Belden Inc. v. Berk-Tek LLC*, 805 F.3d 1064, 1080 (Fed. Cir. 2015).

partes review is formal adjudication.⁴⁸ The seemingly inescapable conclusion is that, at least in the context of adjudication, the APA does not operate as a superstatute. For scholars, practitioners, and policymakers familiar with other areas of administrative law, this result may be surprising and disheartening.

B. A Cross Section of Adjudication Programs

To complement the perspective of my previous article's in-depth examination of a single adjudication program, this Article uses a series of examples of how agencies use and conduct adjudication to give a broader view of the effects of adjudication's exceptionalism norm. The resulting cross section reveals the great diversity of federal adjudication programs and the procedures that are observed within them. This sets the stage for Part II's normative evaluation of exceptionalism's virtues and vices.

The examples draw from an unprecedented database of information about administrative adjudication that was made available through a project undertaken by the Administrative Conference of the United States ("ACUS") to catalog the procedures used in adjudicatory programs throughout the federal government.⁴⁹ The project discards the formal-informal dichotomy for classifying agency adjudications, instead dividing adjudication programs into three categories: Type A, Type B, and Type C.⁵⁰ Type A adjudications are those subject by statute or regulation to the APA's procedures for "formal" adjudication, 5 U.S.C. §§ 554, 556, and 557.⁵¹ Type B adjudications are proceedings in which a statute, regulation, or executive order requires an evidentiary hearing that is not subject to

48. Courts have applied *de novo*, compelled, voluntary, and deference approaches. Bremer, *Exceptionalism Norm*, *supra* note 1, at 1399–1400. The three answers include all the possibilities: that *inter partes* review is formal, maybe formal, and informal. *Id.*

49. ACUS is a free-standing federal agency that studies administrative procedure and makes recommendations for improvements "to administrative agencies, . . . the President, Congress, [and] the Judicial Conference of the United States." 5 U.S.C. § 594(1) (2018); *see also* ACUS, ADMIN. CONF. U.S., <https://www.acus.gov/acus> [<https://perma.cc/JPS7-F5SV>]. I was employed as an Attorney Advisor at ACUS when the project was started in 2013, and I was promoted to serve as the agency's Research Chief while the project was still ongoing. I was not, however, staffed to the project and did not participate in the study design or data collection.

50. ASIMOW, EVIDENTIARY HEARINGS, *supra* note 24, at 2.

51. *Id.* Type A thus includes proceedings that would not be considered "formal" under the traditional approach because they are not required *by statute* to be conducted under the APA's adjudication provisions. *See* 5 U.S.C. § 554(a).

the APA's adjudication provisions.⁵² In a Type B adjudication, the presiding officer is a non-ALJ adjudicator.⁵³ This person may be referred to as an "administrative judge," ("AJ"), although many other titles are used for substantially the same kind of official.⁵⁴ This decisionmaker must observe the "exclusive record principle," meaning that she "is confined to considering inputs from the parties (as well as matters officially noticed) when determining factual issues."⁵⁵ Type B proceedings are traditionally categorized as "informal" adjudications, although this is misleading because many, if not most, of them are conducted using trial-like procedures that are, in a colloquial sense, as or more formal than the APA's procedures.⁵⁶ Finally, Type C adjudications are those in which an evidentiary hearing is not legally required and the agency may decide without a hearing.⁵⁷ The ACUS project includes only Type A and Type B proceedings.⁵⁸ It produced a database of adjudication programs and procedures that is publicly available online and jointly supported by ACUS and Stanford Law School.⁵⁹

Adjudication is used in many different kinds of agencies to administer a broad range of programs that vary along multiple dimensions, including hearing structure, regulatory purpose, and program size. Structurally, some hearings are adversarial, while others are inquisitorial. An "adversarial" hearing is one that is "characterized by dispute or a clash of interests,"⁶⁰ in which two opposing parties present their dispute to a neutral judge for independent resolution. In contrast, an "inquisitorial" hearing is one in which "the judge conducts the trial, determines what questions to ask, and defines the scope and

52. ASIMOW, EVIDENTIARY HEARINGS, *supra* note 24, at 2.

53. *Id.*

54. Bremer, *Designing the Decider*, *supra* note 23, at 76.

55. ASIMOW, EVIDENTIARY HEARINGS, *supra* note 24, at 4.

56. *Id.* at 3. At the same time, and as the examples below will show, some Type B programs do not have all of the definitional characteristics suggested here, e.g., the exclusive record principle. *See infra* Part I.C.

57. ASIMOW, EVIDENTIARY HEARINGS, *supra* note 24, at 2.

58. *Id.* The project began with ACUS staff conducting a thorough search and review of the Code of Federal Regulations ("CFR") to identify adjudication programs and the procedures used to administer them. *FAQ*, ACUS-STAN. U. ADJUDICATION RES., <http://acus.law.stanford.edu/content/user-guide> [<https://perma.cc/2F5N-S5JG>]. The data so collected were sent to agencies for verification. Some agencies verified the information, but others did not.

59. *Federal Administrative Adjudication*, ACUS-STAN. U. ADJUDICATION RES., <http://acus.law.stanford.edu> [<https://perma.cc/6UNP-QCUN>].

60. *Adversarial*, BLACK'S LAW DICTIONARY (11th ed. 2019).

the extent of the inquiry.”⁶¹ Although adversarial hearings are a hallmark feature of the American legal system, courts have held that an inquisitorial hearing in the administrative context can satisfy the Constitution’s Due Process Clause.⁶² Regardless of hearing structure, adjudication is used for a wide variety of regulatory purposes, including to administer government-benefit programs, to make individual deportation determinations, to adjudicate federal employees’ discrimination claims, to evaluate the validity of patents, to resolve disputes between individual agencies and government contractors, and to resolve many different kinds of disputes between private parties.

The size of agency adjudication programs, as measured by caseload statistics, also varies widely. The caseload statistics of a handful of individual agencies match or dwarf those of the federal courts. For example, in 2013, 826,635 cases were filed with the Social Security Administration (“SSA”),⁶³ while a comparatively paltry 271,950 actions were filed in all of the U.S. district courts put together.⁶⁴ Table 1 provides caseload statistics for the ten largest adjudication programs in FY 2013.⁶⁵ Although some administrative programs adjudicate very few cases per year, there can be no doubt that most adjudication in the United States is conducted by administrative agencies, not federal courts.

61. *Inquisitorial System*, BLACK’S LAW DICTIONARY (11th ed. 2019).

62. See *Richardson v. Perales*, 402 U.S. 389, 408–410 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970); *Hepp v. Astrue*, 511 F.3d 798, 805–06 (8th Cir. 2008).

63. *SSAOBENE0001 – Hearing Level – Procedures*, ACUS-STAN. U. ADJUDICATION RES., <http://acus.law.stanford.edu/hearing-level/ssaobene0001-hearing-level-procedures> [<https://perma.cc/G4YK-7SKV>] [hereinafter *ACUS SSA Hearing Procedures*].

64. ADMIN. OFFICE OF THE U.S. COURTS, U.S. DISTRICT COURTS—CIVIL CASES COMMENCED, TERMINATED, AND PENDING DURING THE 12-MONTH PERIODS ENDING MARCH 31, 2012 AND 2013, at 1, https://www.uscourts.gov/sites/default/files/statistics_import_dir/C00Mar13.pdf [<https://perma.cc/2EW7-YXYZ>].

65. This data was compiled from the ACUS database.

TABLE 1: TOP TEN LARGEST ADJUDICATION SCHEMES (FY 2013)

Agency	Program	Filed/ Opened	Decided/ Closed	Pending at Year End
Social Security Administration	Hearing Level Procedures (SSAOBENE0001)	826,635	793,580	847,984
Department of Health & Human Services	Medicare Hearing Level Procedures (HHSOOBEN0001)	384,151	79,377	240,116
Department of Justice	Immigration Hearing Level Procedures (DOJXEOIR0001)	271,279	253,942	*
Social Security Administration	Appeal Level Procedures (SSAOBENE0001)	172,492	176,251	157,311
Department of the Treasury	IRS Hearing Level Procedures (TRSYIRSA0008)	44,684	48,192	21,099
Department of Veterans Affairs	Board of Veterans' Appeals Hearing Level Procedures (DOVABENE0001)	41,612	41,910	60,365
Equal Employment Opportunity Commission	Office of Field Programs Hearing Level Procedures (EEOCFEDS0002)	7,077	6,789	8,313
Federal Mine Safety Health Review Commission	Hearing Level Procedures (FMSHFADJ0001)	6,898	12,262	7,612
Department of Health & Human Services	Departmental Appeals Board Medicare Appeals Council (HHSOOBEN0001)	4,277	2,591	4,637
Department of Labor	Office of Administrative Law Judges Hearing Level Procedures (LABROALJ0002)	4,269	3,534	5,004

* Data not available.

In the interest of space and time, only a handful of the 432 adjudication schemes included in the ACUS–Stanford Database can be included in this Article’s analysis.⁶⁶ I have selected six adjudication schemes in an effort to offer a cross section of the diverse characteristics evident in adjudication programs government-wide. In the remainder of this Section, I briefly explain these choices and also summarize the key characteristics of each agency and its mission, as well as the adjudication scheme I have selected to evaluate. Part I.C offers a snapshot of the procedural variation that is observable across the six exemplar programs.

1. *Social Security Administration.* The SSA is “an independent agency in the executive branch” responsible for administering federal social insurance and benefit programs.⁶⁷ Although the SSA operates five adjudication schemes,⁶⁸ I will focus here on the single scheme the agency uses to administer federal retirement and disability programs.⁶⁹ This scheme has both a hearing and appellate level.⁷⁰ At the hearing level, the proceedings are classified as Type A because they involve an oral hearing conducted before an ALJ under the APA’s adjudication provisions.⁷¹ The SSA nonetheless describes the hearings as “informal and non-adversarial,” at least in part because they are inquisitorial in structure.⁷² Although these SSA hearings are perhaps the most widely recognized example of “formal” APA adjudication—and the vast

66. The ACUS–Stanford Database catalogs adjudication “schemes,” which are defined as “one or more case types that are adjudicated by one office and that have similar sets of procedures[,] [e]ven if the case types are authorized under different statutes or regulations.” *FAQ*, *supra* note 58. On the other hand, “if two case types are handled by the same office, but their procedures are very different, then they are classified as different schemes.” *Id.* In this Article, I often refer to adjudication “programs,” but use “schemes” when I am reporting information contained in the database. The terms are related but not interchangeable.

67. 42 U.S.C. § 901 (2018).

68. *Social Security Administration*, ACUS-STAN. U. ADJUDICATION RES., <http://acus.law.stanford.edu/agency/social-security-administration> [<https://perma.cc/3WK4-44RG>].

69. *SSAOBENE0001*, ACUS-STAN. U. ADJUDICATION RES., <http://acus.law.stanford.edu/scheme/ssaobene0001> [<https://perma.cc/6SYW-YQEF>] [hereinafter *ACUS SSA Benefits*]. There are five case types within this scheme. *Id.* The information in the ACUS–Stanford database for this scheme has been verified by SSA. *ACUS SSA Hearing Procedures*, *supra* note 63.

70. *ACUS SSA Benefits*, *supra* note 69.

71. ASIMOW, EVIDENTIARY HEARINGS, *supra* note 24, at 1, 18.

72. *Sims v. Apfel*, 530 U.S. 103, 110–11 (2000); see *ACUS SSA Hearing Procedures*, *supra* note 63. The SSA has verified the information contained in the ACUS–Stanford database. *ACUS SSA Hearing Procedures*, *supra* note 63.

majority of all ALJs are employed by the SSA⁷³—there is some dispute about whether the Social Security Act *requires* the agency to conduct hearings under the APA.⁷⁴ Regardless, the hearings are profoundly important to millions of Americans. They are the process through which these individuals are granted—or denied—much-needed financial benefits.

Although the SSA's programs are conducted under the APA's adjudication provisions, they should be included in this study for several, interrelated reasons. First, they are perhaps the largest and most well-known adjudication programs in the federal government, serving the unique and important regulatory purpose of administering the federal social safety net. They are therefore an important component of the diverse landscape of agency adjudication. Second, because the SSA conducts these hearings under the APA's adjudication provisions, they offer a useful control group in evaluating the sufficiency of the procedures that are observed in adjudication programs. Third, the longstanding lack of clarity about whether the SSA is *required* to comply with the APA's adjudication provisions opens up the possibility that under the current, highly deferential standards, the SSA may have the discretion *not* to comply with the APA's procedures. Given the scope and importance of the programs, it is worth considering whether less protective procedures would be acceptable. If not here, why elsewhere? Finally, and for all of the reasons listed above, any proposed reform of the APA's definition of or procedures for adjudication must consider the potential consequences for the SSA's programs.

2. *Patent Trial and Appeal Board.* The PTAB is an adjudicatory body within the PTO, which is a subagency of the Department of

73. E.g., Evan D. Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?*, 16 GEO. J.L. & PUB. POL'Y 27, 63 (2018) ("The agency that employs the most ALJs is the [SSA], which employs more than 1,500 . . .").

74. See ADMIN. CONFERENCE OF THE U.S., EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: EVALUATING THE STATUS AND PLACEMENT OF ADJUDICATORS IN THE FEDERAL SECTOR HEARING PROGRAM 11 n.73 (2014) [hereinafter EEOC REPORT]; cf. *Richardson v. Perales*, 402 U.S. 389, 409 (1971) ("We need not decide whether the APA has general application to social security disability claims, for the social security administrative procedure does not vary from that prescribed by the APA."). See generally Robin J. Arzt, *Adjudications by Administrative Law Judges Pursuant to the Social Security Act Are Adjudications Pursuant to the Administrative Procedure Act*, 22 J. NAT'L ASS'N ADMIN. L. JUDGES 279 (2002).

Commerce.⁷⁵ The PTAB's work is conducted through a single adjudication scheme.⁷⁶ The scheme includes multiple case types, including most notably *inter partes* review⁷⁷ and post grant review⁷⁸ of patents.⁷⁹ These hearings are conducted according to procedures developed jointly by Congress—through the America Invents Act of 2011 (“AIA”)—and the PTO—through rules and guidance implementing the AIA.⁸⁰ These procedures were designed to reduce costs, improve efficiency, and better serve patent law's substantive goals.⁸¹ The hearings are adversarial in structure, and the resulting decisions determine the validity and scope of patents.⁸² The decisions can have significant consequences for patent holders as well as individuals and businesses who might otherwise find themselves being sued in federal court for patent infringement.

These proceedings are best classified as Type B adjudications, although there is some dispute about whether they are “formal” proceedings subject to the APA.⁸³ As has already been suggested, the proceedings are not conducted under the APA's adjudication

75. See 35 U.S.C. § 1(a) (2018) (establishing the PTO as an agency within the Department of Commerce); *id.* § 6(a) (establishing the PTAB). The Department of Commerce operates twenty adjudication schemes through its various sub-agencies and offices. *Department of Commerce*, ACUS-STAN. U. ADJUDICATION RES., <http://acus.law.stanford.edu/agency/departement-commerce> [https://perma.cc/R37D-N3ER].

76. *USDCPATE0021*, ACUS-STAN. U. ADJUDICATION RES., <http://acus.law.stanford.edu/scheme/usdcpate0021-0> [https://perma.cc/7574-D6AV].

77. *USDCPATE0021 – Case Type 1*, ACUS-STAN. U. ADJUDICATION RES., <http://acus.law.stanford.edu/case-type/usdcpate0021-case-type-1> [https://perma.cc/4ZM7-ZY83].

78. *USDCPATE0021 – Case Type 2*, ACUS-STAN. U. ADJUDICATION RES., <http://acus.law.stanford.edu/case-type/usdcpate0021-case-type-2> [https://perma.cc/G85U-NHQ3].

79. The remaining case types include derivations, *USDCPATE0021 – Case Type 3*, ACUS-STAN. U. ADJUDICATION RES., <http://acus.law.stanford.edu/case-type/usdcpate0021-case-type-3> [https://perma.cc/D4A2-88PV], the transitional program for covered business methods patents, *USDCPATE0021 – Case Type 4*, ACUS-STAN. U. ADJUDICATION RES., <http://acus.law.stanford.edu/case-type/usdcpate0021-case-type-4> [https://perma.cc/T27H-5JTP], and ex parte and ex parte reexamination appeals, *USDCPATE0021 – Case Type 5*, ACUS-STAN. U. ADJUDICATION RES., <http://acus.law.stanford.edu/case-type/usdcpate0021-case-type-5> [https://perma.cc/DE7A-AX3G].

80. Bremer, *Exceptionalism Norm*, *supra* note 1, at 1354.

81. *Id.* at 1373–74.

82. The Supreme Court recently rejected a constitutional challenge to the *inter partes* review process under Article III and the Seventh Amendment to the Constitution. *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1371–72 (2018).

83. See ASIMOW, *FEDERAL ADMINISTRATIVE ADJUDICATION*, *supra* note 18, at 164; Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 162–65 (2019).

provisions.⁸⁴ In drafting the AIA, Congress apparently did not consider the APA as a possible source of default procedural rules. Instead, it created a wholly new and quite detailed procedural regime to suit the particular needs of patent law, using federal district court proceedings as a touchstone for the design. In its implementing regulations and guidance, the PTO did likewise. The presiding officials in PTAB hearings are Administrative Patent Judges (“APJs”), not ALJs.⁸⁵ As I argued in a previous article, administrative law does not clearly answer the question of whether these proceedings are best classified as “formal” or “informal” hearings.⁸⁶ The courts have articulated four approaches to applying this traditional dichotomy. As applied to *inter partes* review proceedings before the PTAB, those approaches yield three different answers to the question of whether the hearings are formal adjudications.⁸⁷ This indeterminacy is borne out in the available case law. The Federal Circuit has classified the hearings as “formal” adjudications for limited procedural purposes—for example, notice requirements⁸⁸—but has suggested that the hearings are not formal for deference purposes.⁸⁹

The PTAB’s adjudication scheme is worth including in this study because it is a paradigmatic example of a highly tailored and trial-like adjudication scheme. It offers important insight into how even a carefully crafted and detailed adjudication scheme may omit fundamental procedural elements.

3. *Executive Office of Immigration Review.* The Department of Justice (“DOJ”) is an executive agency that administers a number of adjudication programs, the most prominent of which is used to enforce

84. See *supra* note 80 and accompanying text.

85. 35 U.S.C. § 6(a) (2018).

86. Bremer, *Exceptionalism Norm*, *supra* note 1, at 1400.

87. These possible answers cover the water and include “yes,” “no,” and “maybe.” *Id.* at 49.

88. See *supra* note 47; see also ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION, *supra* note 18, at 17 n.65 (discussing these cases).

89. Although the court has not ruled definitely on the question, some of its judges have suggested that PTAB decisions are not sufficiently “formal” to warrant *Chevron* deference. See *Aqua Prods., Inc. v. Matal*, 872 F.3d 1290, 1328 (Fed. Cir. 2017) (en banc) (Moore, J., concurring); *id.* at 1335 (Reyna, J., concurring in part). Other judges on the Federal Circuit, however, would apply *Chevron* to the PTAB’s decisions. *Id.* at 1343 (Taranto, J., dissenting); *id.* at 1358 (Hughes, J., dissenting). Whether *Auer* deference should apply to the PTAB interpretations of its regulations likely warrants reconsideration in light of the Supreme Court’s recent decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

immigration law by making deportation decisions.⁹⁰ This scheme is administered by the Executive Office for Immigration Review (“EOIR”). The hearings are Type B adjudications not conducted under the APA’s adjudication provisions.⁹¹ The officials who preside over the hearings are non-ALJ Immigration Judges (“IJs”).⁹² The IJs’ orders have profound consequences for the named individuals and are crucially important as a matter of national policy.⁹³ Problems with the procedures in these centrally important agency adjudications were a significant motivating factor in the APA’s adoption.⁹⁴ Over the decades, the scheme has continued to experience significant procedural and political problems.⁹⁵ For all of these reasons, it merits inclusion in this cross section of agency adjudication.

4. *Equal Employment Opportunity Commission.* The Equal Employment Opportunity Commission (“EEOC”) is an independent

90. As one scholar has recently argued, deportation proceedings, although prominent, are just one part of immigration enforcement. *See generally* Eisha Jain, *The Interior Structure of Immigration Enforcement*, 167 U. PA. L. REV. 1463 (2019).

91. Shortly after the APA was adopted, the Supreme Court held that deportation proceedings had to be conducted under the APA’s adjudication provisions. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 53 (1950). But Congress legislatively overruled that decision, and the Supreme Court acquiesced. *See Marcello v. Bonds*, 349 U.S. 302, 306–07 (1955). This early episode contributed greatly to the development of adjudication’s exceptionalism norm. *See Bremer, Exceptionalism Norm, supra* note 1, at 1404.

92. *See* Kent Barnett & Russell Wheeler, *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal*, 53 GA. L. REV. 1, 13 (2018); Catherine Y. Kim, *The President’s Immigration Courts*, 68 EMORY L.J. 1, 21 (2018); Walker & Wasserman, *supra* note 83, at 153.

93. *See, e.g.,* Ingrid Eagly, Steven Shafer & Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CALIF. L. REV. 785, 840 (2018) (“These judicial reversals of [the Department of Homeland Security]’s ‘no bond’ decisions reveal that immigration judges play an important role in tempering agency decisions that would otherwise subject families to overdeterrence.”); Kim, *supra* note 92, at 3–4, 20–22 (evaluating the important role of immigration courts and IJs for individuals facing deportation as well as for the development of national policy).

94. *See Wong Yang Sung*, 339 U.S. at 37.

95. *See* Huang v. Gonzales, 453 F.3d 142, 148 (2d Cir. 2006); *Cham v. Att’y Gen.*, 445 F.3d 683, 686 (3d Cir. 2006); LENNI B. BENSON & RUSSELL R. WHEELER, REPORT FOR THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: ENHANCING QUALITY AND TIMELINESS IN IMMIGRATION REMOVAL ADJUDICATION 24–25, 27–29 (2012); Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 611, 624, 627, 632 (2009); Kim, *supra* note 92, at 5–6; Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. REV. 475, 504 (2013); John R.B. Palmer, Stephen W. Yale-Loehr & Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 29–32, 76 (2005); Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 372 (2007).

agency responsible for the administration and enforcement of various federal employment discrimination laws.⁹⁶ Structured as a multimember, bipartisan commission, the agency is composed of five commissioners appointed by the president with the advice and consent of the Senate.⁹⁷ Through its Federal Sector Program, the EEOC conducts voluntary, adversarial hearings of federal employees' discrimination claims against federal agency employers.⁹⁸ The presiding officials in these cases are non-ALJ adjudicators referred to as "Administrative Judges."⁹⁹ The AJs issue decisions that resolve federal employee discrimination claims and may order the federal agency employers to take appropriate action. The employing agencies must either comply with the AJ's decision or appeal to the EEOC. The complaining employee may also appeal to the EEOC and, if unsatisfied with the results of the administrative process, may file a federal employment discrimination action in federal district court.¹⁰⁰

There are a number of good reasons to include the Federal Sector Program, a program unique in several respects, in this cross section of agency adjudication.¹⁰¹ First, the regulatory purpose of the program is important and unique. In addition to offering one avenue for implementing federal nondiscrimination laws, the program is an example of a scheme in which an agency adjudicates one party's claim against another, adverse party.¹⁰² Second, although commonly cited as the foundation for the program, the EEOC's organic statutes do not

96. See 42 U.S.C. § 2000e-4 (2018); 29 C.F.R. § 1601.1 (2019).

97. See 42 U.S.C. § 2000e-4(a).

98. See *EEOCFEDS0002 – Hearing Level – Procedures*, ACUS-STAN. U. ADJUDICATION RES., <http://acus.law.stanford.edu/hearing-level/eecofeds0002-hearing-level-procedures> [https://perma.cc/8RH5-6XD3].

99. See 29 C.F.R. § 1614.108(f); Federal Sector Equal Employment Opportunity, 84 Fed. Reg. 4015, 4017 n.1 (Feb. 14, 2019) (to be codified at 29 C.F.R. pt. 1614); EEOC REPORT, *supra* note 74, at 39.

100. The timeframe for the complainant to file suit in court depends on the timing of the final agency action and may also depend on whether the complainant has filed an appeal with the Commission. See 29 C.F.R. § 1614.407; *Bullock v. Berrien*, 688 F.3d 613, 617–18 (9th Cir. 2012). The EEOC has recently proposed to modify its regulations to clarify that an appeal to the EEOC is optional and not a mandatory condition on the complainant's ability to file a federal action. See Federal Sector Equal Employment Opportunity, 84 Fed. Reg. at 4016.

101. One reason to include the program in this study is its size—the Federal Sector Hearing Program is among the top ten largest adjudication schemes in the federal government. See *supra* Table 1.

102. In one sense, the government is on both sides of this adversarial relationship, as the claimant is a federal employee with a claim against his or her federal agency employer. But the adjudicating agency, i.e., the EEOC, is not a party to the action, so the program is also similar to those through which an agency adjudicates a claim between private parties.

contain the word “hearing” or any other language suggesting that the EEOC must or should carry out its statutory responsibilities through adjudication.¹⁰³ This makes the program especially unique.¹⁰⁴ Third, despite the lack of statutory direction or requirement, the agency has designed substantially trial-like procedures governing the hearings.¹⁰⁵ These procedures include, among other things, rules governing discovery and the production of documents¹⁰⁶ and permitting the use of class actions.¹⁰⁷ The program is thus an excellent example of one in which an agency has used its broad discretion not to *avoid* procedural requirements but to *create* and subject itself to them.¹⁰⁸ Fourth, if a claimant dissatisfied with the outcome of the administrative process goes to court, the suit is an original federal action, not a review of the agency’s action. The AJ’s decision may be entered as part of the evidence, but it is entitled to no deference, and the judicial trial of the claim is conducted *de novo*. Federal Sector hearings thus fall squarely within the APA adjudication provisions’ exemption for agency hearings that involve “a matter subject to a subsequent trial of the law and the facts *de novo* in a court.”¹⁰⁹

5. *Department of Agriculture.* The United States Department of Agriculture (“USDA”) is an executive department created “to acquire and to diffuse among the people of the United States useful information on subjects connected with agriculture, rural development, aquaculture, and human nutrition, in the most general and comprehensive sense of those terms, and to procure, propagate,

103. See, e.g., EEOC REPORT, *supra* note 74, at 23; SAMUEL ESTREICHER & DAVID L. NOLL, LEGISLATION AND THE REGULATORY STATE 479 (2d ed. 2017). The EEOC apparently did not make the initial decision to include hearings in the procedures used to carry out these statutory responsibilities, which it inherited from the Civil Service Commission under a 1978 reorganization. See Major John P. Stimson, *Unscrambling Federal Merit Protection*, 150 MIL. L. REV. 165, 165–66 (1995); Major Michele E. Williams, *Getting the Fox Out of the Chicken Coop: The Movement Towards Final EEOC*, ARMY LAW., Jul. 1999, at 13, 18.

104. Agencies ordinarily adjudicate when a statute authorizes or requires an adjudication program.

105. See EEOC REPORT, *supra* note 74, at 9.

106. 29 C.F.R. § 1614.109(d), (f)(1).

107. *Id.* § 1614.204.

108. The EEOC recently considered whether to convert its AJs to ALJs. See EEOC REPORT, *supra* note 74, at 1; U.S. EQUAL EMP’T OPPORTUNITY COMM’N, STRATEGIC ENFORCEMENT PLAN FY 2013–2016, at 17, <http://www.eeoc.gov/eeoc/plan/sep.cfm> [<https://perma.cc/D44Y-N5T8>]. It ultimately decided against taking that course of action.

109. 5 U.S.C. § 554(a)(1) (2018).

and distribute among the people new and valuable seeds and plants.”¹¹⁰ USDA operates twenty-five adjudication schemes through twenty-one different offices, divisions, and agencies.¹¹¹ A number of USDA’s adjudication schemes are Type A hearings conducted under the APA’s adjudication provisions.¹¹² Many of these programs are grounded in statutes that clearly require APA adjudication by instructing the agency to conduct a “hearing on the record.”¹¹³ In other programs, however, the agency has elected to use Type A procedures in the absence of such a clear statutory requirement.¹¹⁴

USDA also administers several Type B adjudication schemes, including one under the Perishable Agricultural Commodities Act (“PACA”) that will be included in this cross section of agency adjudication.¹¹⁵ This scheme, which is administered by the USDA’s PACA Division, adjudicates commercial disputes between private parties regarding agricultural commodities.¹¹⁶ The decisionmakers in these proceedings are called “examiner[s]” and are attorneys employed in the Office of the USDA General Counsel.¹¹⁷ In this scheme, private parties bring claims for reparations against other private parties. The result of the process is a report and tentative order that may require the charged party to pay a potentially large sum to the

110. 7 U.S.C. § 2201 (2018). This statute, first enacted in 1862, artfully begins by saying: “There shall be at the seat of government a Department of Agriculture, the general design and duties of which shall be.” *Id.*; see An Act To Establish a Department of Agriculture, ch. 72, 12 Stat. 387 (1862) (codified as amended at 7 U.S.C. § 2201 *et seq.*).

111. *Department of Agriculture*, ACUS-STAN. U. ADJUDICATION RES., <http://acus.law.stanford.edu/agency/department-agriculture> [<https://perma.cc/5TBC-3KUK>].

112. See ASIMOW, EVIDENTIARY HEARINGS, *supra* note 24, at 36.

113. In one high-profile program, the statute does not contain the magic words “hearing on the record,” but in a series of cases involving the Equal Access to Justice Act (“EAJA”), several circuits held that the statute nonetheless requires APA adjudication. See *Five Points Rd. Joint Venture v. Johanns*, 542 F.3d 1121, 1125–29 (7th Cir. 2008); *Ageson Grain & Cattle v. U.S. Dep’t of Agric.*, 500 F.3d 1038, 1043–46 (9th Cir. 2007); *Lane v. U.S. Dep’t of Agric.*, 120 F.3d 106, 108–10 (8th Cir. 1997); see also *Bremer, Exceptionalism Norm*, *supra* note 1, at 1385–88 (discussing these cases while exploring how EAJA affects judicial interpretation of 5 U.S.C. § 554(a)). USDA eventually acquiesced. See 7 C.F.R. § 11.4(A) (2019); ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION, *supra* note 18, at 16.

114. See, e.g., 7 U.S.C. § 2149(a) (providing for license suspension or revocation under the Animal Welfare Act).

115. See *USDAPACA0004 – Hearing Level – Procedures*, ACUS-STAN. U. ADJUDICATION RES., <http://acus.law.stanford.edu/hearing-level/usdapaca0004-hearing-level-procedures> [<https://perma.cc/H6HC-5E7M>]. The database information for this program was not verified by the agency and does not include caseload statistics. *Id.*

116. See 7 C.F.R. pt. 47.

117. *Id.* § 47.2(i).

claimant. These are transmitted to the Secretary of Agriculture, along with the record of the proceeding, for review and issuance of a final order.¹¹⁸ The scheme merits inclusion here because it offers a different mixture of characteristics, including a smaller caseload and an adversarial structure involving disputes between purely private parties.

6. *Board of Veterans' Appeals.* The Department of Veterans Affairs ("VA") is an executive department charged with responsibility for "administer[ing] the laws providing benefits and other services to veterans and the[ir] dependents and . . . beneficiaries."¹¹⁹ The Board of Veterans' Appeals ("BVA") is a component of the VA that reviews benefit claims determinations made in the first instance by local VA offices.¹²⁰ The presiding officers are AJs bearing the title of "Veterans Law Judge."¹²¹ The benefits that may be granted or denied through this process include disability, healthcare, and cemetery benefits.¹²² If a veteran is dissatisfied with the Board's decision, he or she may appeal to an Article I court, the U.S. Court of Appeals for Veterans Claims.¹²³ This scheme, which has a long history, is inquisitorial in structure and uniquely paternalistic.¹²⁴ It is included in the study because it is large, central to important matters of the federal government's operation, and affects the rights of persons who may be both vulnerable and owed special solicitude.¹²⁵

C. *Exceptionalism's Effect on Procedures*

What effect does adjudication's exceptionalism norm have on the procedures that are observed across this small but diverse pool of agency adjudication schemes? Rather than providing a detailed discussion of each program's procedures, I offer here a snapshot focusing on the presence or absence of ten important procedural elements. All of these elements have been identified as best practices

118. *Id.* §§ 47.21, .23.

119. 38 U.S.C. § 301(a)–(b) (2018).

120. *Id.* § 301(c)(5).

121. *DOVABENE0001 – Hearing Level – Procedures*, ACUS-STAN. U. ADJUDICATION RES., <http://acus.law.stanford.edu/hearing-level/dovabene0001-hearing-level-procedures> [<https://perma.cc/Q5AL-JEKS>].

122. *Id.*

123. *See* 38 U.S.C. §§ 7251, 7261.

124. ASIMOW, *FEDERAL ADMINISTRATIVE ADJUDICATION*, *supra* note 18, at 178–79.

125. *See id.*

for Type B adjudication.¹²⁶ Nine of the ten have been widely and historically recognized as fundamental to the conduct of a fair adjudication, as evidenced by their inclusion in constitutional protections or in the APA's adjudication provisions. One—the availability of a written-only or paper hearing option—has been identified as important because it protects individual interests and efficiency goals.¹²⁷ The ten elements¹²⁸ include:

- (1) written notice of the proceedings;¹²⁹
- (2) the availability of a written-only or paper hearing option;¹³⁰
- (3) the opportunity to rebut contrary evidence;
- (4) observance of the exclusive record principle, according to which the decision must be based exclusively on matters entered into the record of the hearing;¹³¹
- (5) restrictions on ex parte communications with the decisionmaker;¹³²
- (6) provisions designed to protect against a biased decisionmaker;¹³³
- (7) the use of an AJ or other dedicated adjudicator to preside over the hearing;
- (8) the requirement of a written decision;¹³⁴

126. ACUS Recommendation 2016-4: Evidentiary Hearings Not Required by the Administrative Procedure Act, 81 Fed. Reg. 94,314 (Dec. 23, 2016).

127. See Michael Asimow, *Best Practices for Evidentiary Hearings Outside the Administrative Procedure Act*, 26 GEO. MASON L. REV. 923, 958 (2019) [hereinafter Asimow, *Best Practices*]. The APA itself recognizes that paper hearings are sometimes appropriate, even in formal hearings. See 5 U.S.C. § 556(d).

128. See ACUS Recommendation 2016-4: Evidentiary Hearings Not Required by the Administrative Procedure Act, 81 Fed. Reg. 94,314, 94,316 (Dec. 23, 2016). I have omitted other best practices that do not implicate sufficiently important individual interests, would impose unwarranted burdens on agencies if centrally controlled and standardized, or obviously would be inappropriate in many hearings. These matters include, for example and respectively, electronic filing, discovery rules, and open hearings. See *id.* at 94,315–16.

129. See 5 U.S.C. § 554(b) (2018); *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313–14 (1950).

130. See ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION, *supra* note 18, at 19–20.

131. See 5 U.S.C. § 556(e); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

132. See 5 U.S.C. § 557(d).

133. See *id.* § 556(b); *Goldberg*, 397 U.S. at 271 (“And, of course, an impartial decision maker is essential.”).

134. See 5 U.S.C. § 557(c)(A).

- (9) a right to reconsideration of the initial decision through an appeal within the agency; and
- (10) a complete statement of the core procedural components of the process set out in published regulations.¹³⁵

In this analysis, I recognize that a scheme includes an element only if that element is legally required by statute or regulation or written down in the agency's applicable guidance documents. As a consequence, if an adjudication scheme includes an element as a matter of practice or informal norm, I do not recognize it. This is for two reasons. First, evidence that the element has been observed as a norm or informal practice says nothing of the frequency or consistency with which the element is observed. Second, that the procedural element has not been written down in regulations or guidance suggests that it is discretionary and perhaps that the agency has neglected or undervalued it.

Table 2 summarizes the procedural elements of the selected examples. The goal in providing this cross section is a modest one: to provide a sense of the diversity of adjudication programs and procedures and to offer some context and foundation for assessing the effects of adjudication's exceptionalism norm. It is perhaps already striking, however, how many of the programs lack even these most basic elements. As Table 2 shows, the BVA falls furthest short in the analysis, including only 50 percent of the listed procedures. The programs that fare best are SSA adjudication, because it is conducted under the APA; EEOC Federal Sector hearings, which perhaps ironically would be exempt from the APA; and the USDA's PACA hearings. It bears noting, too, that the procedural elements listed here are defined at a broad level of generality.¹³⁶ Some have argued that despite the great variety in adjudication programs and the details of their attendant procedures, most agencies have gravitated towards similar procedural norms.¹³⁷ There is some truth to this, but the cross-agency similarity emerges only at a very high level of generality.¹³⁸ Such

135. See *id.* § 552(a)(1)(C).

136. This in part reflects the broad definitions in the ACUS recommendation. See Bremer, *Exceptionalism Norm*, *supra* note 1, at 1404–05.

137. See Funk, *The Rise and Purported Demise of Wong Yang Sung*, *supra* note 15, at 891–92.

138. Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513, 537 (2006) [hereinafter Tidmarsh, *Pound's Century*].

modest uniformity is like a mirage, dissipating as soon as one ventures close enough to inspect it.

TABLE 2: SUMMARY OF PROCEDURAL ELEMENTS¹³⁹

	SSA	PTAB	EOIR	EEOC	USDA PACA	BVA
1 Written Notice	Yes	Yes	Yes	Yes	Yes	Yes
2 Written-Only Option	Yes	Yes	No	Yes	Yes	Yes
3 Rebuttal Opportunity	Yes	Yes	Yes	Yes	Yes	Yes
4 Exclusive Record Principle	Yes	Yes	Yes	Yes	No	No
5 Ex Parte Protections	Yes	Some	Some	No	No	No
6 Bias Protection	Yes	No	Some	Yes	Yes	No
7 Use of AJs	Yes	Yes	Yes	Yes	Yes	Yes
8 Written Decision	Yes	Yes	Yes	Yes	Yes	Yes
9 Reconsideration	Yes	No	Yes	Yes	Yes	No
10 Procedural Regulations	Yes	Yes	No	No	Yes	No
TOTAL (Out of 10)	10	7-8	6-8	8	8	5

II. EVALUATING EXCEPTIONALISM

This Part normatively evaluates adjudication's exceptionalism norm. At the core of this analysis is a familiar tension—between uniformity and specialization—that is not unique to administrative adjudication. Courts and scholars have grappled with this tension elsewhere, including in civil procedure¹⁴⁰ and in the debates over

139. See ASIMOW, EVIDENTIARY HEARINGS, *supra* note 24, at 35.

140. See, e.g., Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 319 (2008) [hereinafter Bone, *Making Effective Rules*]; Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME

specialized courts¹⁴¹ and the uniform law movement.¹⁴² This Part draws on that experience, adapting it to the different institutional needs of

L. REV. 693, 693 (1988); Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules,"* 2009 WIS. L. REV. 535, 535 [hereinafter Burbank, *The Dilemmas of "General Rules"*]; Paul D. Carrington, *Making Rules To Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2068 (1989); Z.W. Julius Chen, Note, *Following the Leader: Twombly, Pleading Standards, and Procedural Uniformity*, 108 COLUM. L. REV. 1431, 1432 (2008); Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 731 (1975); Jordan, *Local Rules, supra* note 45, at 415; Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1186 (2005); Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315, 315 (2011); Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States That Have Not Adopted the Federal Rules of Civil Procedure*, 46 VILL. L. REV. 311, 319 (2001); David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 374 (2010); David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 BYU L. REV. 1191, 1191; Note, *The Bar Favors Uniform State and Federal Rules of Civil Procedure*, 18 TEMP. L.Q. 145, 145 (1943) [hereinafter *The Bar Favors Uniform State and Federal Rules*].

141. See, e.g., Lawrence Baum, *Specializing the Federal Courts: Neutral Reforms or Efforts To Shape Judicial Policy?*, 74 JUDICATURE 217, 224 (1991); Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 330 (1991); Sarang Vijay Damle, Note, *Specialize the Judge, Not the Court: A Lesson from the German Constitutional Court*, 91 VA. L. REV. 1267, 1269 (2005); Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 1 (1989); Rochelle C. Dreyfuss, *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 BROOK. L. REV. 1, 3 (1995); John M. Greacen, *Let Us Dispense with the Myth That America Needs or Wants Generalists*, 41 JUDGES J. 45, 45 (2002); Ellen R. Jordan, *Specialized Courts: A Choice?*, 76 NW. U. L. REV. 745, 746 (1981); Alan B. Parker, *Examining Distinctive Jurisprudence in the Federal Circuit: Consequences of a Specialized Court*, 3 AKRON INTELL. PROP. J. 269, 287 (2009); Randall R. Rader, *Specialized Courts: The Legislative Response*, 40 AM. U. L. REV. 1003, 1006 (1991); Arti K. Rai, *Specialized Trial Courts: Concentrating Expertise on Fact*, 17 BERKELEY TECH. L.J. 877, 877 (2002); Diane P. Wood, *Judge of All Trades: Further Thoughts on Specialized Courts*, 99 JUDICATURE 11, 16 (2015); see also Emily S. Bremer & Jonathan R. Siegel, *Clearing the Path to Justice: The Need To Reform 28 U.S.C. § 1500*, 65 ALA. L. REV. 1, 13–15 (2013); Erwin Chemerinsky, *Decision-Makers: In Defense of Courts*, 71 AM. BANKR. L.J. 109, 115 (1997).

142. See, e.g., Kristen David Adams, *The Folly of Uniformity? Lessons from the Restatement Movement*, 33 HOFSTRA L. REV. 423, 424–25 (2004); Edward J. Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 83 IOWA L. REV. 569, 572 (1998); Fred H. Miller, *The Uniform Commercial Code: Will the Experiment Continue?*, 43 MERCER L. REV. 799, 799 (1992); Robert K. Rasmussen, *The Uneasy Case Against the Uniform Commercial Code*, 62 LA. L. REV. 1097, 1104–05 (2002); Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131, 131 (1996); John J. Sampson, *Uniform Family Laws and Model Acts*, 42 FAM. L.Q. 673, 674 (2008); Lawrence Schlam, *Federalism and the Question of Uniform Laws: The Case of Third Party Custody "Standing" Provisions*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 157, 158 (2012). I focus on these issues as they arise in domestic law, but similar issues also arise in international law. See Michael G. Bridge, *Uniformity and Diversity in the Law of International Sale*, 15 PACE INT'L L. REV. 55, 55 (2003); Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2277 (2000).

administrative adjudication.¹⁴³ So adapted, it emerges that the principal costs of adjudication's exceptionalism norm are that it insufficiently protects individual interests and undermines the institutional integrity of the administrative state. Against these costs are arrayed undeniable benefits of specialization that inure at both the programmatic and system-wide levels.¹⁴⁴ These benefits must be acknowledged, and uniformity should be pursued not reflexively but rather intentionally and with sensitivity to context.¹⁴⁵ This Part argues that the exceptionalism norm should be rejected because it suffers from an inverse problem: the reflexive pursuit of specialization without appropriate sensitivity to context or cost.

A. Harm to Individual Interests

A defining characteristic of an adjudication is that it produces orders that are not generally applicable but rather affect the rights or interests of a particular person or entity.¹⁴⁶ For the named individual, the order that emerges from an agency hearing can be very significant: the person may be deported, deprived of needed financial benefits, subject to a significant fine or tax, or denied an essential business license. And a positive outcome of a hearing may be similarly important or life changing. These individually significant effects have systemic importance. Adjudication is a common point of contact between individual citizens and government.¹⁴⁷ And taken together, adjudicatory orders fulfill—or subvert—some of Congress's most profound statutory mandates. It is crucial that the process be just, transparent, and efficient. Failures in individual cases are likely to have profound system-wide consequences.¹⁴⁸

143. For example, concerns about forum shopping and vertical disuniformity, which are central to discussions of uniformity in the *Erie* context, are not implicated in administrative adjudication. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 75 (1938); cf. Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1603 (2008) (“Despite *Erie*'s broad rhetoric, the rationales underlying the Court's hostility to nonuniformity between state and federal general common law, and the forum shopping that resulted, do not apply to conflicts over the meaning of federal law.”).

144. See, e.g., Ribstein & Kobayashi, *supra* note 142, at 137–41 (summarizing the costs and benefits of uniform laws).

145. See Frost, *supra* note 143, at 1579.

146. See *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915); *Londoner v. City & County of Denver*, 210 U.S. 373, 386 (1908).

147. Other very common points of contact would include paying taxes, voting, and use of the Postal Service.

148. As this discussion suggests, there is a connection between individual interests and institutional integrity, although this Part seeks to analyze each separately.

For these reasons, administrative law should be deeply concerned with protecting the rights and interests of the individuals affected by agency adjudications. Do agencies, once largely released from the strictures of uniform, judicially enforceable minimum procedures, discard important procedural protections for the private interests affected by adjudication? One need not take a dim or cynical view of administrative agencies to answer this question in the affirmative. Indeed, recent scholarship casts doubt on the common and all-too-easy supposition that agencies reflexively seek to expand the realm of discretion and correspondingly reduce the reach of legal restrictions that might otherwise constrain their action. In some cases, agencies in fact prefer to be legally bound.¹⁴⁹ There are many examples of how agencies can and do use their discretion to cultivate desirable norms in administration, including with respect to procedural design.¹⁵⁰ Nonetheless, even if individual agencies seek in good faith to tailor adjudication procedures appropriately to suit unique programmatic needs, they may still end up omitting important and necessary procedural elements.

Procedural data from the six example programs identified in Part I suggest that the exceptionalism norm facilitates the omission of important procedural protections in adjudication. It is a broadly accepted principle that *ex parte* communications should not be permitted in an adversarial proceeding in which individual rights are adjudicated. An *ex parte* communication is one that occurs between a judge or adjudicator and one party to an adversarial proceeding

149. See ASIMOW, EVIDENTIARY HEARINGS, *supra* note 24, at 17; Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 860 (2009); J.B. Ruhl & Kyle Robisch, *Agencies Running from Agency Discretion*, 58 WM. & MARY L. REV. 97, 108 (2016) (documenting agency aversion to discretion); Adrian Vermeule, *Deference and Due Process*, 129 HARV. L. REV. 1890, 1924–26 (2016); cf. Aaron L. Nielson, *Optimal Ossification*, 86 GEO. WASH. L. REV. 1209, 1211 (2018) [hereinafter Nielson, *Optimal Ossification*] (arguing that some ossification of the rulemaking process is beneficial precisely because it makes administrative change more difficult and less likely and thereby makes agency commitments more credible).

150. See Emily S. Bremer & Sharon B. Jacobs, *Agency Innovation in Vermont Yankee's White Space*, 32 J. LAND USE & ENVT'L. L. 523, 524 (2017). Examples of agencies using their discretion in good faith to improve administration and administrative procedure are ubiquitous. See, e.g., Emily S. Bremer, *Incorporation by Reference in an Open-Government Age*, 36 HARV. J.L. & PUB. POL'Y 131, 133 (2013) (documenting agency efforts to address issues raised by the incorporation by reference of extrinsic materials in regulations); Dooling, *supra* note 42, at 897–99 (arguing that the APA does not need to be updated to accommodate e-rulemaking, in part due to a positive outlook on agencies' use of discretion). *But see generally* U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-21, FEDERAL RULEMAKING: AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS (2012) (documenting agency efforts to avoid notice-and-comment rulemaking requirements).

outside the presence or knowledge of the other party to the proceeding.¹⁵¹ This norm is broadly and uncontroversially observed in judicial proceedings.¹⁵² The APA's adjudication provisions and the Administrative Conference's best practices for Type B proceedings both prohibit *ex parte* contacts in adjudication.¹⁵³ And yet, as Tables 2 and 3 show, of the six examples included here, only the program conducted under the APA—SSA benefits adjudication—clearly prohibits *ex parte* communications.

TABLE 3: EX PARTE PROTECTIONS INCLUDED?

SSA	PTAB	EOIR	EEOC	USDA PACA	BVA
Yes	Some	Some	No	No	No

Both the PTAB and EOIR have *ex parte* protections for some but not all cases, while the EEOC, USDA PACA, and BVA do not have *ex parte* rules. A broader look at the ACUS–Stanford Database suggests that this is representative of adjudication programs writ large. The omission is widespread. Table 4 illustrates this point.

151. See 5 U.S.C. § 551(14) (2018).

152. The norm, although broadly observed, is not absolute. Federal courts recognize exceptions to the general prohibition on *ex parte* communications, such as to allow certain non-substantive or non-prejudicial communications and to accommodate the possibility of a post-communication disclosure and opportunity to respond. See MODEL CODE OF JUDICIAL CONDUCT R. 2.9 (2011); see also FED. R. CIV. P. 53(b)(2)(B) (providing that an order appointing a master “must state . . . the circumstances, if any, in which the master may communicate *ex parte* with the court or a party”). The administrative “prohibition of *ex parte* contacts emanates from the basic character of adjudication” and is thus informed by the judicial tradition. Edward Rubin, *It's Time To Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 119 (2003).

153. See 5 U.S.C. § 557(d); ACUS Recommendation 2016-4: Evidentiary Hearings Not Required by the Administrative Procedure Act, 81 Fed. Reg. 94,314, 94,315 (Dec. 23, 2016).

TABLE 4: ARE EX PARTE CONTACTS PROHIBITED?¹⁵⁴

	Total #	Yes (All Types of Cases)	Yes (Some Types of Cases)	No	Unknown (No Data Provided)
Hearing Level	364	129 (35.4%)	10 (2.7%)	159 (43.7%)	66 (~18.1%)
Appellate Level	156	69 (44.2%)	1 (0.6%)	37 (23.7%)	49 (~31.4%)
TOTAL	520	198 (38.1%)	11 (2.1)	196 (37.7%)	115 (~22.1%)

It is possible that some of the agencies in the ACUS–Stanford database prohibit ex parte communications in practice despite the apparent lack of such a prohibition in their written rules.¹⁵⁵ It is also possible that closer inspection of individual schemes would reveal that some have good reasons for not observing an ex parte prohibition. For example, prohibiting ex parte communications may not be appropriate in inquisitorial proceedings or proceedings designed to generate broadly applicable norms.¹⁵⁶ It seems unlikely, however, that a reasonable justification is available in nearly 40 percent—and perhaps as much as 60 percent—of adjudication schemes.¹⁵⁷

A complete analysis of adjudication’s exceptionalism norm demands an inquiry that is neither device limited nor agency specific. Rather, it should involve a multi-element, system-wide empirical assessment of exceptionalism’s consequences. The analysis should be “multi-element” in the sense that it should encompass a suite of indispensable procedural elements of sound adjudication, and it should be “system-wide” in the sense that it captures the trends across agencies and adjudication programs.

154. See *Ex Parte Contacts*, ACUS-STAN. U. ADJUDICATION RES., <http://acus.law.stanford.edu/reports/ex-parte-contacts> [<https://perma.cc/P7CJ-N57D>]. Of the 520 programs included here, 176 were verified by the agency. *Id.*

155. See ASIMOW, EVIDENTIARY HEARINGS, *supra* note 24, at 38.

156. Cf. *Sierra Club v. Costle*, 657 F.2d 298, 400 (D.C. Cir. 1981) (“Where agency action resembles judicial action, . . . the insulation of the decisionmaker from ex parte contacts is justified by basic notions of due process to the parties involved. But where agency action involves informal rulemaking of a policymaking sort, the concept of ex parte contacts is of more questionable utility.” (footnotes omitted)).

157. With data unavailable for ~22.1 percent of the schemes, it appears possible that nearly 60 percent of schemes do not have ex parte protections.

An empirical assessment of this kind requires two things, both of which are imperiled by the exceptionalism norm itself. First, the assessment requires a metric for assessing the adequacy of adjudication procedures. What procedural elements are necessary and indispensable for a hearing to protect private interests adequately? By definition, adjudication's exceptionalism norm rejects a clearly defined metric, and reasonable disagreements in identifying one are sure to be legion. One touchstone might be the APA's procedural requirements for formal adjudication.¹⁵⁸ Alternatively, one might use the best practices for Type B adjudication that the ACUS has recently adopted.¹⁵⁹ I have used a combination of these, but the exceptionalism norm makes that choice easily contestable. Second, once a metric is identified, actual adjudication procedures must be compared against it.¹⁶⁰ The ACUS–Stanford database is the best source of system-wide information, and it can be supplemented with examples, such as those provided in Part I, or deep-dive examinations, like those that Professor Asimow and I have offered elsewhere.¹⁶¹ Some uncertainty in the analysis is inevitable, however, because the world of adjudication is so vast and varied, and the information about applicable procedures is both diffuse and, once located, frequently incomplete or opaque. The breathtaking variety engendered by exceptionalism shelters the norm from empirical evaluation.

Through this discussion, it begins to emerge that a principal cost of adjudication's exceptionalism norm is that it seriously undermines transparency. This cost manifests in program-specific and system-wide ways. In all of its manifestations, the driving mechanism is the same. By facilitating the widespread development of tailored procedures, adjudication's exceptionalism norm fosters abundant procedural diversity across hundreds of agencies and adjudication programs. This diversity makes it extremely difficult to identify and evaluate

158. See 5 U.S.C. §§ 554, 556–557; Walker & Wasserman, *supra* note 83, at 149.

159. See ACUS Recommendation 2016-4: Evidentiary Hearings Not Required by the Administrative Procedure Act, 81 Fed. Reg. 94,314, 94,315–16 (Dec. 23, 2016).

160. It is difficult to devise better procedural rules in the absence of good information about existing rules and how they work in practice. See Bone, *Making Effective Rules*, *supra* note 140, at 319; Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 842 (1993); Bryant G. Garth, *Observations on an Uncomfortable Relationship: Civil Procedure and Empirical Research*, 49 ALA. L. REV. 103, 103–13 (1997); Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 484–89 (1993).

161. See ASIMOW, EVIDENTIARY HEARINGS, *supra* note 24; Bremer, *Exceptionalism Norm*, *supra* note 1.

adjudication procedures. As previously noted, understanding the procedures used in a single adjudication program is laborious, requiring a careful reading of the particular statutes, regulations, and agency guidance that govern the program. What one learns about the procedures of one adjudication program is rarely applicable to other adjudication programs.¹⁶² As a consequence, studying adjudication on a systemic level is extremely difficult and requires a significant investment of both time and resources.¹⁶³ These difficulties are apparent even in the ACUS–Stanford database, an incredible resource that nonetheless has limitations attributable to the unwieldy universe of adjudication the exceptionalism norm has allowed to flourish. Among these limitations are that the database does not include Type C adjudications,¹⁶⁴ the information can be difficult to interpret because the database necessarily seeks to standardize a broadly diverse universe of information,¹⁶⁵ and much of the information it contains is unverified by the adjudicating agency.¹⁶⁶ In addition, the database will not be updated because it is not reasonably possible for the ACUS—a tiny agency with limited staff and budgetary resources¹⁶⁷—to do the continuous, substantial work that updating would require. Thus, although the database offers an unparalleled, system-wide view of agency adjudication, that view is necessarily a snapshot frozen in time.

162. Cf. O. L. McCaskill, *Against Uniformity, in The Bar Favors Uniform State and Federal Rules*, *supra* note 140, at 148, 148 (arguing that national uniformity in civil procedure stifles improvement by individual states in civil procedure).

163. Thus, for example, it took years for the ACUS to compile its extensive database of adjudication procedures. The agency created several forms to collect the information (a challenge given the diversity under study) and staff then combed through the CFR to complete the forms. *FAQ*, *supra* note 58. “For ‘major’ schemes, as well as some ‘minor’ schemes, [the] forms were sent to agency representatives for review and correction” before being entered into the database, which Stanford University built and hosts. *Id.*

164. See ASIMOW, EVIDENTIARY HEARINGS, *supra* note 24, at 2.

165. See *supra* note 18 and accompanying text.

166. Approximately 61.8 percent (267) of the 432 adjudication schemes included in the database are marked as “not verified” by the agency in question. See *Schemes*, ACUS-STAN. U. ADJUDICATION RES., http://acus.law.stanford.edu/schemes?title=&title_1=&field_is_this_major_adjudication_value=All&field_verified_by_agency_value=0 [https://perma.cc/Q8DV-XBLC] (select “Not verified” label under “Verified by Agency” search filter). As the database FAQs explain: “If a representative from the appropriate agency reviewed the information and returned it to the Administrative Conference, then the information was marked as ‘Verified by Agency’ in the database.” See *FAQ*, *supra* note 58.

167. As of FY2018, the ACUS had an annual appropriation of \$3.1 million. ADMIN. CONFERENCE OF THE U.S., FY 2019 CONGRESSIONAL BUDGET JUSTIFICATION 3 (2018) https://www.acus.gov/sites/default/files/documents/2018_02_08%20FY2019%20Congressional%20Budget%20Justification.pdf [https://perma.cc/6J8L-FK6S].

Moving beyond discrete procedural protections, adjudication's exceptionalism norm also imperils individual interests by expanding the opportunities for substantive policy choices to be made under the guise of procedure. Although there are often sound, neutral reasons for Congress or an agency to tailor procedural rules, these institutions may also use procedural means to manipulate substantive outcomes. For example, when Congress enacted the AIA, it sought to achieve the substantive goals of patent law through its painstaking design of the statutory procedures governing the *inter partes* review process.¹⁶⁸ At least one of the statute's goals was to make it easier, less expensive, and more common for patents to be narrowed or invalidated, a goal that was pursued by tailoring judicial patent-litigation procedures to suit the administrative context. The agency has also more directly used procedural manipulation to effectuate substantive outcomes. In the absence of agency head control over the outcome of PTAB decisions, the PTO director has adopted a practice of "stacking" panels with judges sympathetic to the director's preferred outcome in order to control the substance of decisions that are made on reconsideration.¹⁶⁹ The practice is not unlawful, and it is in a certain sense consistent with Congress's delegation of statutory authority to the agency to achieve certain desired outcomes.¹⁷⁰ Nonetheless, the practice has been controversial.¹⁷¹ To affected individuals, particularly those whose victory is overturned on reconsideration by a stacked panel, it must seem procedurally irregular and substantively unfair.¹⁷²

B. Harm to Institutional Integrity

The use of procedural techniques to manipulate substantive outcomes is also the first of several harms that manifest at the institutional level. Substantive policy sought covertly through the guise of procedure may be less effective, more indirect and inefficient, likelier to produce unintended consequences, more difficult to evaluate, and harder to change when the real policy rationale has not and cannot be forthrightly acknowledged. More profoundly, procedural manipulation undermines democratic accountability in at

168. See Bremer, *Exceptionalism Norm*, *supra* note 1, at 1373.

169. See Walker & Wasserman, *supra* note 83, at 184.

170. The dark side of substantively focused procedural design is discussed in Part II.B.

171. See Saurabh Vishnubhakat, *When Can the Patent Office Intervene in Its Own Cases?*, 73 N.Y.U. ANN. SURV. AM. L. 201, 225–27 (2018); Walker & Wasserman, *supra* note 83, at 184–85.

172. The effects of the practice for institutional integrity are considered in Part II.B.

least one of two senses.¹⁷³ In the first and weaker sense, it allows the agency to avoid responsibility for its actions by making the substantive choice less obvious or obscuring it altogether.¹⁷⁴ Second, it may undermine democratic accountability in a stronger sense that implicates the separation of powers. This occurs when an agency uses procedural choices to covertly pursue substantive ends that were not part of Congress's legislative compromise or that are in tension or outright conflict with the agency's statutory mandate.¹⁷⁵ These problems are not confined to adjudication: even in rulemaking, where agencies are constrained by general administrative law principles, there is evidence that agencies use procedure to evade political oversight and increase the chances of producing the agency's preferred substantive outcome.¹⁷⁶ But adjudication's exceptionalism norm expands the scope of agency procedural discretion and, with it, the opportunities for these machinations.

Even when outcome manipulation is not afoot, exceptionalism makes procedural design and maintenance less efficient and stunts procedural evolution. These serious harms are interrelated. The opacity of adjudication deprives courts, agencies, practitioners, scholars, and policymakers of access to cross-cutting procedural knowledge and precedent. Exceptionalism makes it more difficult for courts to understand adjudication, leading to inefficiencies and errors and incentivizing inattention.¹⁷⁷ Administrative law scholars, as previously noted, rarely study adjudication procedures on a cross-cutting basis. Agency officials and legislative policymakers are unlikely to have or seek access to information about how other agencies administer adjudication programs. The absence of ready access to information about adjudication procedures increases the likelihood that Congress, when creating a new adjudication program, will include unique procedural provisions in the statutory design. The exceptionalism norm emerged from administrative law's failure to

173. See Burbank, *The Dilemmas of "General Rules,"* *supra* note 140, at 537.

174. *Id.*

175. Similar tensions arise when other, non-legislative entities have made procedural changes. *See id.*

176. See generally RACHEL AUGUSTINE POTTER, *BENDING THE RULES: PROCEDURAL POLITICKING IN THE BUREAUCRACY* (2019).

177. Cf. Jennifer Nou, *Regulatory Textualism*, 65 DUKE L.J. 81, 101 (2015) (noting that the D.C. Circuit gains specialized knowledge from reviewing a large volume of agency appeals, but that "agency personnel and procedures are constantly evolving alongside technological or other substantive policy changes, thus mitigating the benefits of specialization over time").

develop general principles governing adjudication. Now established, it is a powerful force against remedying that failure.

The absence of general administrative law principles of adjudication also means that there is little cross-cutting judicial precedent that might provide guidance about the importance, meaning, or application of sound procedural norms. Without a common procedural baseline, judicial precedent addressing the procedural requirements in informal adjudication is sparse.¹⁷⁸ This deprives courts, agencies, and scholars of the kind of robust, cross-cutting doctrinal law that has emerged in informal rulemaking. It makes it even more difficult to translate one agency's experience with innovation into a lesson that can be efficiently exported to other agencies. Some flexibility in procedures can encourage experimentation and promote the development of better procedures over time. But that mechanism requires a common procedural baseline. Without it, judicial review cannot operate effectively to generate and disseminate information and experience across the vast expanse of the modern administrative state. This contributes to the opacity of adjudication procedures at both the program and system-wide levels, encouraging further specialization and siloing.¹⁷⁹

Finally, the exceptionalism norm facilitates neglect of the particular needs of quasi-judicial processes in an administrative context. The APA's adjudication provisions were designed to attend to these needs. Congress's non-APA design for PTAB adjudication illustrates the problems of ignoring them. The APA provides that the "presiding employee[]" in an adjudication must be the agency, an ALJ, or some other official as provided by Congress.¹⁸⁰ The presiding employee issues an initial decision, and "[o]n appeal from or review of

178. This is why administrative law textbooks include cases involving *substantive* review of informal adjudication in order to shed what minimal light is possible on the *procedural* requirements for such proceedings. See, e.g., GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 484–85 (8th ed. 2019) (using *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), as the lead case for discussing procedural requirements in informal adjudication).

179. Cf. Christopher J. Walker, *The Costs of Immigration Exceptionalism*, YALE J. ON REG.: NOTICE & COMMENT (Feb. 9, 2016), <http://yalejreg.com/nc/the-costs-of-immigration-exceptionalism-by-chris-walker> [<https://perma.cc/USC2-QNGG>] ("Because immigration exceptionalism encourages a myopic focus on immigration doctrine and scholarship, immigration scholars sometimes fail to tap into the wealth of knowledge in administrative law (and its regulatory subfields) to search for questions, answers, methodological approaches, and best practices to address systemic problems in immigration administration.").

180. 5 U.S.C. § 556(b)(1), (3) (2018). The APA also allows "one or more members of the body which comprises the agency" to preside. *Id.* § 556(b)(2).

the initial decision, the agency has all the powers which it would have in making the initial decision” and may therefore decide the matter differently.¹⁸¹ This preservation of agency-head control recognizes that when an adjudication requires policymaking, the final authority to make the decision should be vested in the head of the agency.¹⁸² The PTAB structure failed to appreciate this unique need of administrative government. Congress created special presiding employees, APJs,¹⁸³ as is expressly permitted by the APA. But their decisions are final—ultimate control is not vested in the head of the agency. This has created two problems. First, deprived of direct final authority, the agency has had to resort to panel stacking, which is inefficient and at least creates the appearance of illegitimacy.¹⁸⁴ Second, the Federal Circuit has recently held that the APJs are principal officers who have been unconstitutionally appointed.¹⁸⁵ If, as the APA contemplates, the APJ’s decisions were initial decisions subject to agency head control, this holding may not have been necessary.¹⁸⁶ In short, two of the biggest administration problems the PTAB is currently facing seemingly could have been avoided if Congress had built upon the APA’s adjudication provisions instead of ignoring them and the institutional interests they were designed to protect.

C. *Capturing the Benefits of Exceptionalism*

Adjudication’s exceptionalism norm also has benefits, the principal one being that it preserves flexibility for Congress and agencies to tailor procedural rules to fit the unique needs of individual programs. As explained in Part I, the world of agency adjudication is both vast and varied. Even if one narrows the focus to adjudication programs that involve an evidentiary hearing—Type A and Type B adjudication in Professor Asimow’s classification—there are hundreds of adjudication programs across the administrative state. And these programs vary along multiple dimensions, including hearing structure, regulatory purpose, caseload volume, issue complexity, judicial review structure, and significance of consequence for affected individuals. By

181. *Id.* § 557(b).

182. *See* Walker & Wasserman, *supra* note 83, at 144.

183. *See supra* note 85 and accompanying text.

184. *See supra* note 169 and accompanying text.

185. *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1335 (Fed. Cir. 2019).

186. Brief Amicus Curiae of Administrative Law Scholars in Support of Neither Party at 7, *Lucia v. Sec. & Exch. Comm’n*, 138 S. Ct. 2044 (2018) (No. 17-130).

definition, the exceptionalism norm means that adjudication programs are mostly insulated from the demands of uniform, cross-cutting procedural requirements. Most are not subject to the APA's requirements and need only meet the modest, highly flexible minimums of constitutional due process. This means that the law leaves maximum room available for the development and use of tailored adjudication procedures.

But the ability to tailor procedures is instrumentally—not intrinsically—valuable. That is, it offers extrinsic benefits that may make it preferable to a regime dominated by uniform, cross-cutting¹⁸⁷ procedural requirements. At the simplest level, tailored procedures may offer greater efficiency within individual programs, as rules can be designed to account for the unique needs of a program or the characteristics of the population or industry that the program serves or regulates. Freedom from uniform requirements also expands the opportunities for procedural innovation in at least two ways. First, it expands the range of options that are available with respect to each discrete element of the process. For instance, in the absence of a cross-cutting prohibition on *ex parte* contacts, an agency that administers a Type B adjudication program can choose whether to prohibit or regulate *ex parte* contacts and also enjoys seemingly unfettered discretion if it chooses to design an *ex parte* prohibition or regulation.¹⁸⁸ Second, the absence of a cross-cutting, uniform minimum prevents lock-in. If an element of the process does not work as initially designed or conditions change after the procedure has been adopted, it will be easier to make the changes necessary to address the problem. Thus, in the substantial space of rulemaking where the APA's *ex parte* provision does not apply, the Federal Communications Commission

187. In the civil procedure literature, “trans-substantive” appears to be the preferred term, but “cross-cutting” is more appropriate in the administrative context. Although uniform administrative procedures are trans-substantive because they apply across various areas of substantive law, they are also “trans-institutional,” because they apply across agencies that vary from one another in terms of size, structure, powers, and purposes. “Cross-cutting” is intended to capture both of these characteristics.

188. In Type A adjudications, the APA's *ex parte* prohibition applies. *See* 5 U.S.C. § 557(d) (2018). In Type B adjudications, the relevant minimum is supplied by constitutional due process, *see supra* notes 22–23 and accompanying text, and Congress and agencies often do not include *ex parte* prohibitions in the Type B procedures, *see* ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION, *supra* note 18, at 66.

(“FCC”) has been able to design and redesign its *ex parte* procedures.¹⁸⁹

In theory, by providing space for institutions to experiment with new and innovative procedures, exceptionalism may have system-wide benefits.¹⁹⁰ Realizing this benefit requires at least three steps. First, the freedom from uniform, cross-cutting requirements must be used to experiment thoughtfully with new and different procedures. Second, the lessons learned through the experiments must be captured. Experience with retrospective rulemaking and pilot projects in substantive areas of regulation suggest that both of these steps are easier to acknowledge than they are to complete.¹⁹¹ These steps of the process may themselves require significant planning and some dedication of resources that might also be needed in other areas.¹⁹² Finally, even if experiments are properly conducted and their lessons adequately captured, systemic benefit further requires both a mechanism and a will to disseminate the knowledge throughout the system. Even if these steps are not perfectly or consistently observed, some systemic benefit may be realized. And the alternative of imposing procedural uniformity might squelch this process, thereby stunting the systemic evolution of better procedures.¹⁹³

But system-wide procedural improvement is only possible if exceptionalism creates the conditions necessary to support it. For reasons that have been previously discussed, this seems unlikely.¹⁹⁴

189. The D.C. Circuit has ruled, controversially, that the APA’s *ex parte* prohibition in § 557(d) applies to certain “quasi-adjudicatory” rulemakings. *See* ESA L. SFERRA-BONISTALLI, EX PARTE COMMUNICATIONS IN INFORMAL RULEMAKING: FINAL REPORT 24–37 (2014), <https://www.acus.gov/sites/default/files/documents/2014-4%20Report.pdf> [https://perma.cc/9V23-ZK4X] (summarizing the D.C. Circuit’s caselaw applying the APA’s *ex parte* provisions in informal rulemaking). In response to these rulings, the FCC adopted procedural regulations governing *ex parte* communications. *See* 47 C.F.R. §§ 1.1200–1216 (2019); Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings, 52 Fed. Reg. 21,051 (June 4, 1987). These were most recently revised in 2011. *See* Commission’s Ex Parte Rules and Other Procedural Rules, 76 Fed. Reg. 24,376 (May 2, 2011).

190. *Cf.* Schlam, *supra* note 142, at 188 (“Uniform laws . . . can have the undesirable effect of disrupting the desirable, natural evolution of an area of substantive law.”).

191. *See, e.g.*, ACUS Recommendation 2014-5: Retrospective Review of Agency Rules, 79 Fed. Reg. 75,114 (Dec. 17, 2014) (recommending that agencies seek to encourage a culture of retrospective review within agencies in order to overcome these challenges); Colleen V. Chien, *Rigorous Policy Pilots: Experimentation in the Administration of the Law*, 104 IOWA L. REV. 2313, 2319 (2019) (challenging the “perceived legal, institutional, and informational barriers to the use of rigorous policy pilots”).

192. *See, e.g.*, ACUS Recommendation 2014-5, 79 Fed. Reg. at 75,114.

193. *See* McCaskill, *supra* note 162, at 148.

194. *See supra* Part II.A–B.

Adjudication's exceptionalism norm wholly rejects a common procedural baseline and produces a profoundly nontransparent system. These conditions are antithetical to procedural evolution.

Another potential systemic benefit of adjudication's exceptionalism norm is that it shifts responsibility for procedural design away from the courts and toward Congress and agencies. To the extent that the norm is grounded in the minimalist nature of constitutional due process requirements, it empowers both Congress and agencies.¹⁹⁵ To the extent that exceptionalism is grounded in legislative and judicial reluctance to require agencies to comply with the APA's adjudication requirements, the more profound shift is toward administrative agencies. In either event, this institutional shift offers several possible derivative benefits. One is to improve democratic accountability as procedural design choices are shifted from unelected judges to Congress, the president, and agencies.¹⁹⁶ Relatedly, it may be more legitimate to vest authority for procedural design in the institutions responsible for creating and administering the various adjudication programs. These institutions may also have a comparative institutional advantage over the courts when it comes to designing adjudication procedures. This benefit may especially accrue with respect to the shift of authority to the agencies, wherein the greatest subject-matter expertise may reside. The agency that administers an adjudication program is likely to have the best information and experience with the industry or populations it regulates or serves and may also have a more thorough understanding of and dedication to the substantive goals that the adjudication program is supposed to serve. Finally, shifting authority away from the courts may prevent or reduce the increased costs and delays that are associated with the judiciary's contribution to the ossification of the informal rulemaking process.¹⁹⁷

195. See Vermeule, *supra* note 149, at 1891.

196. See *id.* at 1894–95; cf. Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 394 (1987) (identifying courts as “the least politically accountable branch of government”).

197. “Ossification” refers to the hypothesis that the accretion of additional requirements, imposed by courts, the Executive, and Congress on the rulemaking process, have slowed down that process and undermined its usefulness. See Richard J. Pierce, Jr., *Seven Ways To Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 71 (1995); 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. 1414, 1417–19 (2012) (describing the ossification literature).

D. Summary and Conclusion

Overall, the benefits of adjudication's exceptionalism norm are outweighed by its costs, particularly when the question is considered in system-wide perspective.¹⁹⁸ On one side of the ledger, individual agencies and programs benefit from the ability to tailor adjudication procedures. But this comes at a significant cost to individual interests and institutional integrity, undermining transparency, efficiency, accountability, and legitimacy in the system as a whole. The potential system-wide benefits of the procedural experimentation facilitated by the exceptionalism norm are unlikely to be realized because the norm itself impedes the dissemination of the useful information that might be generated through experimentation. Moreover, the exceptionalism norm both rejects a uniform metric for assessing the adequacy of adjudication procedures and makes it extremely difficult to get complete and reliable information about actual procedures. All actors in the system—agencies, courts, Congress, practitioners, scholars, and affected individuals—are thereby denied the information needed to understand, evaluate, and improve agency adjudication. The situation should be intolerable in light of the large size, broad scope, and importance of adjudication to individual programs and to the administrative enterprise as a whole.

It would be a mistake, however, to simplistically conclude that adjudication's exceptionalism norm should be discarded in favor of rigid procedural uniformity. Complete uniformity in adjudication

198. There are several different metrics for evaluating a procedural system. Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 919 (1999). Some have argued that protection for individual rights should outweigh efficiency. See Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 305–06 (2004); cf. Louis Kaplow & Steven Shavell, *Fairness Versus Welfare: Notes on the Pareto Principle, Preferences, and Distributive Justice*, 32 J. LEGAL STUD. 331, 331 (2003) (“[W]e advance the thesis that social policies, notably, legal rules, should be selected entirely with regard to their effects on the well-being of individuals.”). I have used a cost-benefit approach to evaluating adjudication procedures in this piece, as I have done in previous work. See Bremer, *Designing the Decider*, *supra* note 23, at 81; Bremer, *Exceptionalism Norm*, *supra* note 1, at 1356. This approach is consistent with the “fact-intensive cost-benefit analysis” the Supreme Court has used to evaluate what procedures are required to satisfy constitutional due process. Parkin, *supra* note 28, at 1119; see *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). It is also consistent with the broader acceptance in administrative law of cost-benefit analysis as a useful analytical tool. See, e.g., Richard B. Stewart, Essay, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 444 (2003) (noting that cost-benefit analysis has “become widely accepted” in regulatory administration); Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1059, 1060 (2000) (explaining the traditional economic justifications for cost-benefit analysis and suggesting that it “is best defended as a means of overcoming predictable problems in individual and social cognition”).

procedures is neither desirable nor achievable. As the cross section provided in Part I demonstrates, adjudication programs are highly variable and have different needs and goals. Some variation or tailoring in procedures is needed to accommodate these differences and facilitate more efficient and effective administration of adjudication programs. In addition, procedure is not costless, nor does it necessarily provide valuable protection in all circumstances. This recognition is part of what has led the Supreme Court to take a flexible, balancing approach to determining what constitutional due process requires.¹⁹⁹ Courts and scholars have mostly preferred, in the context of non-APA adjudication, to leave that analysis to politically accountable institutions and particularly to the agencies themselves.²⁰⁰ But this delegation of a highly flexible analysis to agencies has significantly contributed to adjudication's exceptionalism norm and to the atomization of adjudication procedures throughout the administrative state. One need not think that absolute uniformity is desirable to acknowledge that the experiment in radical disuniformity has failed.

A more productive approach would recognize that uniformity and specialization are not mutually exclusive goals but rather values that should be thoughtfully balanced in any system of legal rules. The literature and experience in other areas of the law attest to this. As Professor Amanda Frost has persuasively argued, lawyers have sometimes wrongly treated uniformity as a self-evident good, unthinkingly pursuing it at any cost.²⁰¹ Administrative law has made the inverse error in the context of adjudication procedures. Institutions and actors throughout the system—courts, agencies, the executive, Congress, and scholars—have operated as if specialization is a self-evident good to be unthinkingly pursued at any cost. The result is adjudication's exceptionalism norm. By definition, this norm prioritizes specialization and rejects all attempts to establish or enforce cross-cutting, uniform procedures in agency adjudication.

Administrative law should discard adjudication's exceptionalism norm in favor of a regime designed to balance uniformity and specialization. The next Part turns to the questions of what such a regime might look like and how it can be achieved.

199. See *Mathews*, 424 U.S. at 335.

200. See, e.g., Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739, 793–96 (1976); Vermeule, *supra* note 149, at 1891.

201. Frost, *supra* note 143, at 1579.

III. TOWARD A REMEDY

Further complicating this analysis is the availability of two distinct but overlapping possible remedies: the enforcement of minimum procedural requirements and the pursuit of broader uniformity. This Part argues in favor of a solution at the intersection of these possibilities. As in rulemaking procedures, a balance between uniformity and specialization can best be struck by requiring uniform minimum procedural requirements that all agencies are required to observe in adjudication. But these minimums should be relatively limited, only protecting the most fundamental individual and institutional interests implicated in adjudicatory hearings across the vast expanse of the administrative state. Decades of agency experience and ACUS's extensive study of the present state of agency adjudication suggest that these minimum requirements should apply in evidentiary hearings.²⁰² The APA's adjudication provisions offer an excellent starting point for determining the content of these minimum procedural requirements, although some amendments might be appropriate to reflect the lessons learned over the many decades since the APA was enacted. Finally, administrative law's standard narrative offers a sound template for addressing the question of which institution should be responsible for enforcing the suggested regime. As in rulemaking and judicial review, this should be a three-branch effort. Congress should enact a statute clarifying that the APA's requirements—potentially with amendments—apply to all evidentiary hearings conducted in agency adjudication programs. The courts should enforce these provisions uniformly across all agencies, over time developing a body of judicial precedent that will provide broadly useful guidance interpreting the requirements. Finally, agencies should use their discretion to innovate beyond the minimum requirements, fine-tuning the balance between uniformity and specialization in adjudication procedures.

A. *The Overarching Structure*

The first step toward remedying the harms of adjudication's exceptionalism norm is to identify an overarching procedural structure capable of striking a better balance between uniformity and specialization in agency adjudication. Striking such a balance requires the application of uniform, cross-cutting procedural minimums

202. See ASIMOW, EVIDENTIARY HEARINGS, *supra* note 24, at 4.

designed to allow an appropriate degree of tailoring and innovation to suit the genuine needs of different adjudication programs. The goal should be to improve transparency and protect reasonable individual expectations of procedural justice by specifying minimum requirements that apply across adjudication programs. These minimum requirements should be designed and enforced in a way that produces a clear and stable definition of what “adjudication” is and how it is conducted. At the same time, the regime should be designed to accommodate the agencies’ traditional authority to tailor procedures beyond the applicable statutory minimums.²⁰³ First, this means that the procedural requirements should not address nonessential matters that do not need to be uniformly addressed. It also means the regime should tolerate and even encourage agencies to thoughtfully tailor their procedural rules beyond the applicable minimums.²⁰⁴

This overarching structure should be familiar: it is a structure similar to the one that governs notice-and-comment rulemaking. Although rulemaking is not without its problems, it offers a reasonable template for improving the balance between uniformity and exceptionalism in adjudication. In informal rulemaking, there is sufficient uniformity and clarity in the applicable cross-cutting minimum requirements to define what “rulemaking” is and to specify how it must be conducted.²⁰⁵ This clarity makes the work of all branches easier and more efficient. Congress can grant an agency new regulatory responsibility without having to design a wholly new procedural regime for the required rulemaking. The agency knows just what procedures it must follow and has access to a body of judicial precedent that will answer many of its questions about how to interpret the APA. It can spend less time fashioning new procedures from whole cloth or figuring out how to adhere to a wholly new procedure established by statute and can spend more time fulfilling its substantive statutory mandate. At the same time, it can use its procedural discretion to tailor the

203. See *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978).

204. This encouragement could be accomplished by judicial recognition of agency procedural discretion beyond the applicable procedural minima, *see id.*, as well as through more proactive means through institutions such as ACUS, *see, e.g.*, ACUS Recommendation 2016-4: Evidentiary Hearings Not Required by the Administrative Procedure Act, 81 Fed. Reg. 94,314 (Dec. 23, 2016); ADMIN. CONFERENCE OF THE U.S., MODEL ADJUDICATION RULES (2018) [hereinafter ACUS MODEL ADJUDICATION RULES], https://www.acus.gov/sites/default/files/documents/Model%20Adjudication%20Rules%209.13.18%20ACUS_0.pdf [https://perma.cc/2QEB-5GHV].

205. See Bremer, *Exceptionalism Norm*, *supra* note 1, at 1362.

process beyond the minimums. Regulatory parties and third-party beneficiaries of the rulemaking know what to expect of the rulemaking process and, even if the agency tailors that process somewhat, it remains clear how best to convey information and arguments to the agency. A court, on judicial review of the agency's final rule, will find itself in familiar procedural territory, allowing the judges to fairly and efficiently adjudicate procedural challenges and reserving time and energy for more substantive concerns. Establishing a similar regime in adjudication would convey like benefits to all branches of government and to individuals who appear before agencies, whether as representatives or otherwise.

To establish a similar regime in adjudication, it would be necessary to identify the category of adjudications that would be subject to the minimum requirements. This could be a difficult task. Administrative law has long operated under the assumption that the APA already makes such a clear distinction, subjecting "formal" adjudication to its minimum procedural requirements while leaving agencies to determine the procedures that will apply in "informal" adjudication.²⁰⁶ In making this determination, agencies need only comply with the modest and flexible demands of constitutional due process.²⁰⁷ In fact, the formal–informal dichotomy is both unstable and misleading.²⁰⁸ In practice, there has emerged a large middle category of adjudications that are classified as "informal" because they are not subject to the APA's adjudication provisions, but which nonetheless entail evidentiary hearings conducted according to tailored procedures that are as or more "formal," in the colloquial sense of trial-like, than the APA's procedures.²⁰⁹ If the APA's original formal–informal division has not succeeded, does that suggest that it is not possible to develop a clear, stable classification of the hearings that should be subject to uniform, minimum procedural requirements?

Decades of agency experience in adjudication fortunately offer an answer to this question: the procedural minimums should apply to evidentiary hearings conducted by administrative agencies. The careful work that ACUS and Professor Asimow have done cataloging agency

206. See 5 U.S.C. § 554(a) (2018).

207. See *supra* notes 22–23 and accompanying text.

208. See ASIMOW, EVIDENTIARY HEARINGS, *supra* note 24, at 3; Bremer, *Exceptionalism Norm*, *supra* note 1, at 1381–82.

209. ASIMOW, EVIDENTIARY HEARINGS, *supra* note 24, at 3.

adjudication programs suggests that this approach would accord with the existing reality of adjudication.

B. The Minimum Requirements

Within this proposed overarching structure of adjudication procedures, what minimum requirements should apply? As an initial and perhaps all-too-obvious matter, the uniformity sought by the proposed regime would be exclusively procedural and would not reach the substantive principles that agencies enforce through adjudication.²¹⁰ The minimum requirements should be designed to protect the most fundamental individual rights affected by agency adjudication. At least with respect to such rights, minimum procedural requirements would prevent Congress and agencies from using procedural manipulation to achieve substantive policy goals. If the procedures are confined to protecting the most important individual interests—for example, the rights to notice of the proceedings, to an impartial decisionmaker, to present or rebut evidence, to a written decision, and to appeal—the result should not be objectionable. Individual interests so fundamental should not be sacrificed because of a desire to achieve through procedure what cannot be achieved directly through the substantive law. Adjudication's exceptionalism norm has allowed too much latitude for such trade-offs. The consequence is that seemingly practical and relatively harmless tactics in one regime can easily be used in other programs with more objectionable consequences. For example, the PTAB has been criticized for using its procedural discretion to stack panels to achieve results in individual cases that are desirable as a matter of substantive patent law.²¹¹ In the context of immigration adjudication, however, a similarly expansive understanding of agency procedural discretion can be used to undermine an immigrant's right to an impartial decisionmaker. The consequences here are manifestly more serious: deportation back to a country where the immigrant may face anything from undesirable living conditions to the possibility or even probability of a violent

210. Cf. Burbank, *The Dilemmas of "General Rules," supra* note 140, at 542 n.30 ("As Professor Bone maintains, the common view that procedure was independent of substantive law 'implied that procedural rules could and should be general in nature and "trans-substantive."'") (quoting Bone, *Making Effective Rules, supra* note 140, at 324)).

211. See *supra* notes 169–72 and accompanying text. The difficulty for PTAB could be addressed by observing the APA's provision for agency head control over final adjudication decisions. Such control may have the added benefit of curing the recently identified constitutional problem with APJ appointments.

death. The question of what protection should be afforded to the most fundamental of rights in adjudication should be made on a system-wide basis, based on information about the wide range of possibilities, and at least comparatively isolated from the political pressures exerted by substantive regulatory concerns.

The simplest course would be to use the minimum procedural requirements that are established by the APA's adjudication provisions. Concerns about agency adjudication were a primary motivating factor in the APA's adoption,²¹² and the compromise ultimately struck in the statute deserves to be given full effect. The APA's procedures are also relatively minimal, as compared against the range of procedures that agencies can and do use in adjudication.²¹³ Because the APA's procedures are already enacted, it would be relatively easy to enforce them. This would obviate the need to start from scratch and pursue a new and sure to be equally fierce compromise.²¹⁴

But it may make sense to make modest revisions to the APA's adjudication provisions. Decades of agency experience offer a wealth of information about the needs of adjudicating agencies, as well as indications as to what derailed the APA's initial promise in this important realm. Practical difficulties and costs associated with the use of ALJs appear to be principal causes of the APA's failure.²¹⁵ Much of the problem here can be attributed to the agencies' dissatisfaction with the Office of Personnel Management's ("OPM") ALJ examination, registry, and other aspects of its management of the ALJ program.²¹⁶ A recent executive order has significantly reduced OPM's role.²¹⁷ It is

212. See *Wong Yang Sung v. McGrath*, 339 U.S. 33, 36–41 (1950); Lubbers, *supra* note 19, at 65.

213. Compare 5 U.S.C. § 554 (2018), with ACUS Recommendation 2016-4: Evidentiary Hearings Not Required by the Administrative Procedure Act, 81 Fed. Reg. 94,314, 94,315–16 (Dec. 23, 2016).

214. See Shepherd, *supra* note 5, at 1559–60.

215. See Funk, *The Rise and Purported Demise of Wong Yang Sung*, *supra* note 15, at 893; William Funk, *Slip Slidin' Away: The Erosion of APA Adjudication*, 122 PENN ST. L. REV. 141, 142 (2017) [hereinafter Funk, *Slip Slidin' Away*]; Lubbers, *supra* note 19, at 72–74.

216. See generally VANESSA K. BURROWS, CONG. RESEARCH SERV., RL34607, ADMINISTRATIVE LAW JUDGES: AN OVERVIEW (2010) (documenting the history of problems with OPM's management of the ALJ certification and selection process); see also EEOC REPORT, *supra* note 74, at 3 ("If the Commission decided to use ALJs instead of AJs, it would have to accept the attendant limitations on its authority over the compensation and tenure of its adjudicators.").

217. See Exec. Order No. 13,843, 3 C.F.R. §§ 844, 845–46 (2019). OPM is currently revising its ALJ regulations, so there is some uncertainty as to what role it will have moving forward. See

possible that this change may make agencies more amenable to adjudicating under the APA, although ALJs will remain more costly under the new regime.²¹⁸ On another note, the regime would operate better if the APA's definition of "adjudication" or "hearing on the record" was amended and clarified.²¹⁹ This could help to ensure that the APA's procedures are enforced in the proceedings in which Congress intends for them to apply.

C. *The Institutional Question*

If minimum procedures are to be imposed upon adjudication programs across the federal government, which institution should be responsible for the project? Several routes to reform are possible: voluntary agency action, unilateral judicial decree, or legislative action. This Section evaluates these options, each of which has advantages and disadvantages. It concludes that the best route forward would involve all the institutions of government. As in other areas of the administrative state's unwritten constitution, the development and enforcement of procedural minimums in adjudication should be an interbranch endeavor.²²⁰

Perhaps the easiest course would be to encourage administrative agencies to use the significant procedural discretion afforded by the exceptionalism norm to adopt minimum procedures and related best practices in individual adjudication programs. The Administrative Conference has already undertaken several projects in this vein. In 1993, the Administrative Conference produced a set of *Model Adjudication Rules*²²¹ that various agencies have consulted in

generally OPM, Fact Sheet: Administrative Law Judges (ALJ) Positions, <https://www.opm.gov/services-for-agencies/administrative-law-judges/fact-sheet-administrative-law-judge-alj-positions-posted.pdf> [https://perma.cc/W7MV-TP9S] (Aug. 8, 2019) (explaining OPM's role with respect to ALJ positions following the issuance of the executive order and until the agency adopts new regulations). As of April 14, 2020, OPM has not proposed new ALJ regulations.

218. See EEOC REPORT, *supra* note 74, at 43–44. ALJs are paid on a special pay scale that is generally higher than the General Schedule pay scale. *Id.* at app. D. The costs of using ALJs may thus be quite a bit higher than the costs of using non-ALJ adjudicators. See *id.* at 46.

219. See, e.g., ASIMOW, EVIDENTIARY HEARINGS, *supra* note 24, at 7 (discussing the "gray area" under current definitions). Scholars have argued that the APA's definitions have other problems too. See, e.g., Ronald M. Levin, *The Case for (Finally) Fixing the APA's Definition of "Rule,"* 56 ADMIN. L. REV. 1077, 1079 (2004).

220. See Bremer, *Unwritten Administrative Constitution*, *supra* note 2, at 1250–52.

221. ADMIN. CONFERENCE OF THE U.S., PROJECT REPORT: MODEL ADJUDICATION RULES (1993), <https://www.acus.gov/sites/default/files/documents/1993-model-adjudication-rules.pdf> [https://perma.cc/KUW3-BTWP].

developing adjudication procedures.²²² It revised these rules in 2018.²²³ In addition, the Conference's study of federal adjudication programs has produced several recommendations, including one that identifies best practices for agency adjudication.²²⁴ The principal advantage of this approach is that it requires neither legislative nor judicial action to be implemented.²²⁵ This approach would also retain adjudication's exceptionalism norm, and it would necessarily be more incremental. Although it may improve adjudication procedures in various, discrete respects, it is not likely to address the systemic costs of exceptionalism. Procedural change would be most unlikely in the areas where it is most needed—that is, where there is significant political pressure to relax individual protections in the name of substantive policy goals. The transparency problems created by exceptionalism would not be remedied by this approach, nor would a foundation be provided for the development of a cross-cutting, widely accessible body of judicial precedent interpreting procedural minimums. The procedural experimentation and improvement that measured uniformity could bring would likely not materialize.

A second route to reform would be for the courts to enforce the APA's adjudication provisions, particularly the triggering language of § 554, more strictly.²²⁶ This could be done as a purely statutory matter or the Supreme Court could revive the never-overruled *Wong Yang Sung* doctrine, according to which the APA's adjudication provisions define the constitutional minimum for due process in agency adjudication.²²⁷ This approach has more advantages than the first option: It would give effect to the APA's initial compromise, thereby fulfilling its superstatute promises and bringing adjudication in line

222. See, e.g., 77 Fed. Reg. 39,057, 39,058, 39,063, 39,067 (June 29, 2012) (Consumer Financial Protection Bureau); 83 Fed. Reg. 18,866, 18,872 (Apr. 29, 1996) (Federal Highway Administration).

223. ACUS MODEL ADJUDICATION RULES, *supra* note 204.

224. E.g., ACUS Recommendation 2016-4: Evidentiary Hearings Not Required by the Administrative Procedure Act, 81 Fed. Reg. 94,314, 94,315–16 (Dec. 23, 2016).

225. An adjudicating agency can develop its procedures with minimal public involvement since both procedural regulations and guidance are exempt from the APA's notice-and-comment rulemaking requirements. See 5 U.S.C. § 553(b)(A) (2018) (“[T]his subsection does not apply . . . to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice . . .”). This may undercut the proposition that vesting procedural design choices in the agency necessarily advances democratic accountability.

226. See ASIMOW, EVIDENTIARY HEARINGS, *supra* note 24, at 7.

227. See *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49–50 (1950); Funk, *The Rise and Purported Demise of Wong Yang Sung*, *supra* note 15, at 894; Kovacs, *supra* note 4, at 1236–37.

with the standard narrative of administrative law that is well established in rulemaking and judicial review.²²⁸ It would also move the needle sharply away from the exceptionalism norm, improving the balance between uniformity and specialization. Agencies would be required, in a judicially enforceable way, to adhere to the APA's uniform requirements, and many of the benefits of uniformity would thereby be achieved. One potential problem, however, is that courts might underenforce the APA, finding it inapplicable in many of the programs that involve evidentiary hearings. Another disadvantage is that the courts must take the APA as it stands and could not make any needed or desired modifications to its procedures. Even if courts were authorized to modify the APA, they are institutionally ill-suited to do so.²²⁹

A third route to reform runs through the legislature. Over the years, a number of scholars and experts have encouraged Congress to reform the APA's adjudication provisions. For example, the ABA has frequently urged Congress to take legislative action to promote uniformity in administrative adjudication through greater observance of the APA's adjudication provisions. Some resolutions have urged agency-specific legislation to impose the APA's procedures on discrete adjudicatory programs.²³⁰ Other resolutions have contemplated broader legislative reform. In July 2000, the ABA adopted Resolution 113, which asked Congress to amend the APA to ensure that the observance of the APA's adjudication provisions would be required absent express exception in all future agency-specific statutes contemplating an opportunity for an adjudicatory hearing.²³¹ And in

228. Cf. Kovacs, *supra* note 4, at 1248 (“[S]uperstatute theory supports stricter adherence to the text of the APA and allegiance to the compromises encoded in that text.”).

229. Courts are “ill equipped to gather the range of empirical data, and lack[] the practical experience, that should be brought to bear on the questions of policy, procedural and substantive,” and “[i]ndividual litigation under Article III is even more obviously inadequate for the policy choices implicated in considering standards for the adequacy of pleadings on a transsubstantive basis.” Burbank, *The Dilemmas of “General Rules,” supra* note 140, at 537.

230. See, e.g., AM. BAR ASS'N, RESOLUTION 124 (2011) [hereinafter RESOLUTION 124], https://www.americanbar.org/content/dam/aba/directories/policy/2011_am_124.pdf [<https://perma.cc/5QFW-V7D2>] (urging Congress to require EEOC to observe APA-formal procedures in employment discrimination hearings).

231. AM. BAR ASS'N, RESOLUTION 113 (2000), https://www.americanbar.org/content/dam/aba/administrative/administrative_law_judiciary/resolution_113.pdf [<https://perma.cc/W7HK-9XBS>]. ABA resolutions are typically developed by the organization's various sections, each of which has a particular subject matter as its specialty. The sections produce a report analyzing the issues and prepares a draft resolution. In the absence of objections from other sections of the ABA, the draft resolution and report are sent to the House of Delegates for

February 2005, the ABA adopted Resolution 114, which adopted Professor Asimow's classification scheme for administrative adjudication²³² and urged Congress to modernize the APA to extend certain "fair hearings provisions" of the APA to all Type A and Type B adjudications and to give preference to the use of ALJs to preside over evidentiary hearings conducted by administrative agencies.²³³ In total, the ABA has adopted a half dozen resolutions promoting APA adjudication since 1983.²³⁴ Over the years, scholars have similarly urged Congress to take action to legislatively enforce the APA's promise of uniform norms and minimum procedures in administrative adjudication.²³⁵

As with the other reform alternatives, the legislative route offers both advantages and disadvantages. One advantage is that it offers the possibility of a single, potentially comprehensive solution. Although it is often difficult to get Congress to act, recent interest in APA modernization²³⁶ may suggest that legislative reform has a greater chance of success now than it did in the past. On the other hand, recent APA reform efforts have mostly focused on the more salient contexts of rulemaking and judicial review of agency action.²³⁷ As ever, recent bills have largely neglected adjudication.²³⁸ The extraordinary diversity

consideration, debate, and a vote at meetings held semi-annually. Most of the resolutions discussed here were prepared through the ABA's Section of Administrative Law and Regulatory Practice.

232. See Asimow, *The Spreading Umbrella*, *supra* note 19, at 1004.

233. AM. BAR ASS'N, RESOLUTION 114 (2005) [hereinafter RESOLUTION 114], https://www.americanbar.org/content/dam/aba/directories/policy/2005_my_114.authcheckdam.pdf [<https://perma.cc/4U5U-C65F>].

234. See RESOLUTION 124, *supra* note 230 (noting resolutions adopted in 1983, 1989, 1998, 2000, 2005, and 2011).

235. See, e.g., Asimow, *The Spreading Umbrella*, *supra* note 19, at 1008–09; Funk, *Slip Slidin' Away*, *supra* note 215, at 182; Lubbers, *supra* note 19, at 76–80; Whiteside, *supra* note 19, at 373–79.

236. See, e.g., RESOLUTION 114, *supra* note 233; Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629 (2017) [hereinafter Walker, *Modernizing the APA*].

237. See Walker, *Modernizing the APA*, *supra* note 236, at 638–70.

238. See, e.g., Midnight Rules Relief Act of 2017, S. 34, 115th Cong. (2017); Midnight Rules Relief Act of 2017, H.R. 21, 115th Cong. (2017); One In, One Out Act, H.R. 674, 115th Cong. (2017); RED Tape Act of 2017, S. 56, 115th Cong. (2017); Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. (2017); Regulations from the Executive in Need of Scrutiny Act of 2017, S. 21, 115th Cong. (2017); Regulations from the Executive in Need of Scrutiny Act of 2017, H.R. 26, 115th Cong. (2017); Sunshine for Regulatory Decrees and Settlements Act of 2017, S. 119, 115th Cong. (2017); Sunshine for Regulations and Regulatory Decrees and Settlements Act of 2017, H.R. 469, 115th Cong. (2017).

among adjudicatory agencies and programs makes the problem unwieldy and deprives the effort of a cohesive group of interests that might act together to enact the needed legislation.²³⁹ In short, the very problem in need of legislative solution—exceptionalism—may make that solution less likely. Even if Congress enacted a well-designed bill, the reform effort could flounder subsequently. There would be the danger that courts might nullify it by interpreting it in an overly narrow way that would preserve the status quo.²⁴⁰ There would also be the danger that Congress could undermine the effort by continuing to do what it has done since the APA's passage: ignore the default rules in favor of creating unique adjudicatory procedures tailored to suit the needs of individual agencies and regulatory programs.²⁴¹

The best approach to remedying the harms of adjudication's exceptionalism norm might also be the most difficult to achieve: an interbranch effort to bring adjudication in line with administrative law's standard narrative.²⁴² In this ideal world, Congress would statutorily clarify the APA's definition of "adjudication," at least by specifying that the APA's procedures apply to evidentiary hearings in agency adjudication.²⁴³ In so doing, it would also consider tweaking the APA's procedures to address problems that might interfere with the success of the reinvigorated statutory mandate. As in rulemaking, the minimum requirements could be confined to the hearing stage of the process. Agencies could then be afforded broad discretion in the pre- and post-hearing stages, subject to limited provisions governing appeals and final decisionmaking authority.²⁴⁴ The courts would

239. See Bremer, *Designing the Decider*, *supra* note 23, at 84.

240. Cf. Andrew Hessick, *Legislative Efforts To Overturn Chevron*, YALE J. ON REG.: NOTICE & COMMENT (Mar. 19, 2016), <https://yalejreg.com/nc/legislative-efforts-to-overturn-chevron-by-andy-hessick> [<https://perma.cc/EKR5-MWSB>] ("If *Chevron* deference were abolished, many judges would likely find other ways to defer to agencies.").

241. See, e.g., *Marcello v. Bonds*, 349 U.S. 302, 306 (1955).

242. See Bremer, *Unwritten Administrative Constitution*, *supra* note 2, at 1257; cf. Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 918 (2020) ("[T]he development and rise of the Fourth Branch was a three-branch enterprise. . . . [A]ny durable return to [original constitutional norms] will also have to be a three-branch project . . .").

243. A more elaborate approach, which has some precedent in state APAs, would be to define several classes of adjudications, specifying minimum procedures tailored to suit each class. See Arthur Earl Bonfield, *The Federal APA and State Administrative Law*, 72 VA. L. REV. 297, 320–25 (1986).

244. ACUS is currently studying intra-agency appeals processes in adjudication. Asimow, *Best Practices*, *supra* note 127, at 960–64; *Agency Appellate Systems*, ADMIN. CONF. U.S., <https://www.acus.gov/research-projects/agency-appellate-systems> [<https://perma.cc/T7GH-G286>];

interpret the statutory provisions, affording no deference to individual agencies' non-expert interpretation of the APA and enforcing the APA's minimum procedural requirements uniformly across agencies.²⁴⁵ Over time, the courts would develop a body of precedent interpreting these minimum procedural requirements while also endeavoring not to impose procedures that Congress has not required.²⁴⁶ Agencies would scrupulously observe the statutory requirements and use procedural discretion to thoughtfully tailor procedures beyond the minimums in a manner that will satisfy any unique programmatic needs.²⁴⁷

Abandoning the exceptionalism norm in favor of this approach would produce a better balance between uniformity and specialization in adjudication procedures. It would also conform adjudication to the standard narrative of administrative law that presently governs rulemaking and judicial review.

IV. OBJECTIONS

This Article has argued against a broad and powerful status quo, urging that administrative law should reject a pervasive norm of exceptionalism that emerged through the conduct of all three branches of government and has prevailed over hundreds of adjudication programs for many decades. Of course, there are reasons why this norm emerged and has proven durable. And there are reasons why well-informed and well-intentioned people may object to its abandonment. This Part identifies some of these objections and offers some response to them. More could—and should—be said. Recognizing that reality, this Part is intended to provoke further discussion.

First, some may object that adjudication programs are so varied that the application of minimum procedures would be at best ill-advised and at worst harmful or impossible. As demonstrated in Part I,

see also Walker & Wasserman, *supra* note 83, at 174–78 (discussing the APA's direction that final decisionmaking authority in adjudication will be vested in the agency head).

245. *See* Kovacs, *supra* note 4, at 1244. Judicial review is necessary because “the lack of a single appellate authority to iron out idiosyncratic interpretations of the uniform rules would make the uniformity more theoretical than real.” Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1786 (1992).

246. *See* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524 (1978).

247. *Cf.* Tidmarsh, *Pound's Century*, *supra* note 138, at 539 n.119 (highlighting how a discretionary scheme permits wide variation of procedures in practice).

there is broad diversity across adjudication programs and the agencies that administer them. This first appears to be an environment not readily susceptible to successful governance through uniform procedural rules. The example set by agency rulemaking, however, offers a compelling counterpoint. There are vast differences across agencies that conduct rulemakings—in terms of the structures of the regulating agencies, the subjects and scope of the regulatory programs, the characteristics of the affected industries, and the salience of the issues to the public.²⁴⁸ And yet agency rulemaking is conducted in accord with a core set of uniform, cross-cutting procedural requirements that have been broadly internalized by all institutions within the federal government. These minimum requirements offer uniformity that benefits the system while preserving flexibility for agencies to tailor procedures to suit the needs of individual rulemakings. They have provided a foundation for development of a robust body of administrative common law and a sophisticated regime of executive review. Indeed, by focusing attention on procedural commonality, the administrative law of rulemaking may actually help to downplay the differences across regulatory agencies and programs. In contrast, adjudication's exceptionalism norm obscures points of commonality and emphasizes difference. A concerted effort to forge a workable and uniform adjudication procedure with sufficient flexibility to accommodate genuine programmatic needs could help to reverse this unfortunate circumstance, benefiting agencies, the public, and the administrative state as a whole.

Another objection may be that the APA's formal procedures are too onerous and would impede efficient administration in adjudication programs.²⁴⁹ Relatedly, the proposed remedy would result in the kind of ossification that has impaired the notice-and-comment rulemaking process.²⁵⁰ The first variant of this objection seems unlikely given that most Type B agencies observe procedures that are as or more formal than the ones that the APA requires. Moreover, as Part I.C demonstrated, the exceptionalism norm facilitates widespread failures to observe fundamental procedures necessary to protect individual rights and institutional integrity. Given these significant harms, the

248. See, e.g., POTTER, *supra* note 176, at 15–16.

249. See ASIMOW, *FEDERAL ADMINISTRATIVE ADJUDICATION*, *supra* note 18, at 18; Gary J. Edles, *An APA-Default Presumption for Administrative Hearings: Some Thoughts on "Ossifying" the Adjudication Process*, 55 ADMIN. L. REV. 787, 814 (2003).

250. See *supra* note 197.

proponents of exceptionalism should carry the burden of demonstrating that the norm's benefits are worth its costs. But the exceptionalism norm has emerged in piecemeal fashion over many decades without such a systemwide plan or defense. The second variant of this objection requires more careful consideration, but it may be that rulemaking, a process through which broad policies are developed, will prove more susceptible to ossification than adjudication, a process through which those broad policies are brought to bear on individual cases. Even if ossification occurred to some degree, that might be acceptable. Procedure is never costless, and the right question is always whether the costs of the provided procedures are worth the benefits. Finally, it bears noting even in the rulemaking context, some do not accept the ossification thesis²⁵¹ and others view the phenomenon as beneficial.²⁵²

A third difficulty is that there are hundreds of adjudication programs throughout the federal government that are currently conducted according to tailored procedures,²⁵³ and some may argue that it would be impractical or impossible to impose a new procedural regime on all of these programs. This is a genuine challenge, but one that sounds in practicality and not principle. One way to address it would be to take the path the ABA has recommended: to apply the new regime only to new programs on a prospective basis. This option is superficially attractive but would not address the problems this Article has identified. The pressure exerted by retaining exceptionalism in the vast majority of programs would seem likely to imperil the prospective compromise. More importantly, there are always costs associated with legal change.²⁵⁴ Here, the costs are worth the change. And over time, for the reasons articulated above, the costs would dissipate and be replaced by the benefits of increased uniformity.

Finally, other fields, most notably civil procedure, have recently seen a push towards greater specialization,²⁵⁵ and some may therefore

251. *E.g.*, Yackee & Yackee, *supra* note 197, at 1421 (“[E]vidence that ossification is either a serious or widespread problem is mixed and relatively weak.”).

252. *E.g.*, Nielson, *Optimal Ossification*, *supra* note 149, at 1231 (“In short, delay—but not too much delay—can be good for purposes of legitimacy.”).

253. *See supra* note 18 and accompanying text.

254. Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789, 793 (2002).

255. *E.g.*, Tidmarsh, *Pound's Century*, *supra* note 138, at 539 n.119 (“State procedural variation is wide, and apparently increasing.”); Samuel L. Bray, *The Parable of the Forms*, 93 ST. JOHN'S L. REV. (forthcoming 2020) (manuscript at 4),

wonder why administrative adjudication should abandon its exceptionalism norm just as other fields are seeing the benefits of a more specialized approach. The answer comes back to the earlier point that uniformity and specialization are values that must be properly balanced. Civil procedure is a field that has historically been dominated by uniformity. That civil procedure scholars are currently more open to shifting the balance a bit further in the direction of specialization says nothing of what the balance is—or should be—in administrative adjudication.

CONCLUSION

Over the decades since the APA was enacted, adjudication has followed its own course of development, straying far afield from the unwritten constitutional order that has evolved in the realms of rulemaking and judicial review. It has come to be ruled by an inverse and paradoxical norm of exceptionalism. This norm maximizes specialization and rejects uniformity, converting what should be a balance of core values into a zero-sum game. This has defeated the APA's quest to ensure adequate minimum procedures in evidentiary hearings before administrative agencies. But the problem is both deeper and broader than the APA's failure. Adjudication's exceptionalism norm imperils individual rights, undermines transparency, stunts procedural evolution, interferes with both democratic and legal accountability, and corrodes legitimacy in a realm that is both vast and immensely important to the administrative enterprise. The norm should be abandoned in favor of a new regime designed to properly balance uniformity and specialization. This will require an interbranch effort to deliver on the fierce compromise worked out in the APA that agency adjudications should be subject to minimum procedural requirements. This may be a daunting task, but it will be well worth the undertaking.