RULES OR RULERS?
THE RISE OF THE UNITARY EXECUTIVE

KATHRYN E. KOVACS*

ABSTRACT

The unitary executive is no longer a theory; it is real. The President operates on the premise that, because all executive power is vested in him, his appointees merely assist him in performing his constitutional duty. The rise of the unitary executive is not a new phenomenon, but it has reached a new pinnacle. This article demonstrates that among the contributing causes to that climb are the judicial rules about rulemaking.

The provisions governing agency rulemaking in the Administrative Procedure Act of 1946 are barebones. Congress intended to leave much to agency discretion, preferring agency decisionmaking to the autocracy recently defeated in Europe. In the 70 years since then, Congress has not revised the APA's rulemaking provisions significantly. In the absence of legislative updating, the courts stepped in and imposed rulemaking requirements that contradict the APA's text and history. Rulemaking has become difficult at least in part due to the increasingly onerous judicial rules about rulemaking. As a consequence, agencies are unable to respond to elections and changed circumstances in a timely and effective manner. In recent years, as Congress and agencies have lost their policymaking agility, the President has stepped in to make key decisions himself.

The judicial rules about rulemaking were well intentioned, but their unintended consequences have reached a frightening extreme. Our nation is moving toward the kind of executive authoritarianism the APA was designed to avoid. The courts should retreat and take refuge in the text and history of the APA until Congress amends it, and Congress should require rulemaking procedures that are effective, but not overly burdensome.

* Professor, Rutgers School of Law. I owe a debt of gratitude to Katie Eyer, John Oberdiek, Charlotte Schneider, Mark Seidenfeld, Chris Walker and participants at the University of Oregon Works in Progress Conference.

CONTENTS

I. INTRODUCTION

The theory of the unitary executive is a theory no longer. The President now operates on the premise that, because the Constitution vests all executive power in him, his appointees merely assist him in performing his constitutional duty to take care that the laws are faithfully executed. Even statutory delegations to a particular officer are read as within the President's authority. The rise of the unitary executive is not a new phenomenon. Each

President exceeds his predecessor's control of the Fourth Branch. "Presidential administration"[1] is morphing into autocracy.[2]

Among the many causes of this devolution is the fact that agencies have lost their policymaking agility. It is commonly accepted that congressional inertia foments presidential policymaking. Agency inertia does as well.[3] Thus, while President Reagan left immigration policy to Congress, President Obama executed immigration policy by redirecting agency enforcement priorities, and President Trump did it by Proclamation.[4] As Congress and federal agencies loosen their grip on policy making, the President picks up the slack.[5]

Agencies are having an increasingly difficult time responding to changing circumstances and changing political realities in a timely and effective manner. A heavy, patchwork quilt of judicially created administrative law now overlays agency functions diminishing their policymaking agility. One thread in that quilt is the judicial rules of rulemaking.

The Administrative Procedure Act of 1946 left rulemaking procedure largely to agency discretion. The requirements were clear and simple and did not inspire much conflict. Members of Congress on both sides of the aisle preferred agency rulemaking to the autocracy recently defeated in Europe. The fear that that kind of government might take hold in the United States inspired the APA.[6]

Times changed. In the 1960s and 1970s, Congress gave agencies the duty to write rules that would have enormous impacts on the economy and people's lives. But Congress did not update the APA. So the courts did it themselves. Courts, however, are institutionally unsuited to balancing the myriad concerns that must be weighed in designing administrative procedure and anticipating the consequences of various alternatives.[7] The courts' attempts to remedy the perceived problems with agency rulemaking had unanticipated consequences. Among other things, those rules have contributed to rulemaking ossification.[8]

My goals in this article are two-fold. First, I will provide a definitive account of why the judicial rules about rulemaking

---

[1] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2310 (2001).

[2] *See infra* Part IV.C.2.

[3] *See infra* Part IV.C.1.

[4] *See infra* text accompanying notes 321–325.

[5] *See infra* text accompanying notes 306–307, 328.

[6] *See infra* Part II.

[7] *See infra* Part IV.A.

[8] *See infra* Part IV.B.

conflict with the text and history of the APA and why that is so problematic. Second, I will expand the discourse on rulemaking ossification by showing that it has contributed to the rise of the unitary executive. I want to pull on one thread in the quilt of judicially created administrative law in the hope that the quilt will begin to unravel and inspire Congress to resume weaving.[9]

Part II of this article builds a foundation in history by telling the story of Section 4 of the APA. The APA followed years of deliberation and debate. It was a monumental compromise, and Congress necessarily left much of the Act vague. The rulemaking provisions, however, are quite clear, and they did not spark much controversy.

Part III explains how the judicial rules about rulemaking contradict the text and history of the APA. The rules requiring agencies to produce a rulemaking record, provide notice of the information considered in drafting a proposed rule, disclose ex parte contacts, and accompany the final rule with a lengthy explication and response to comments not only lack grounding the text, but they contradict Congress's considered and uniform judgment.

Part IV elucidates the unintended consequences of those rules. It begins by explaining the courts' institutional incapacity for fashioning rules of administrative procedure. Then it explains how these rules, despite their well-intentioned origins, have contributed to rulemaking ossification, which in turn has contributed to the devolution from presidential administration to the very autocracy the Greatest Generation[10] designed the APA to avoid.

II. THE APA'S RULEMAKING PROVISIONS

I begin with a detailed statutory history of the APA's rulemaking provisions. As I have explained elsewhere, the importance of that history exceeds that of a typical legislative history; it is critical to understanding the APA. The APA is a superstatute that arose from an exceptional legislative effort.[11] William Eskridge and John Ferejohn established that courts should respect the deliberation underlying superstatutes, taking "the

[9] *Cf.* Jonathan Safran Foer, EXTREMELY LOUD AND INCREDIBLY CLOSE 17 (2005) ("I wanted to pull the thread, unravel the scarf of my silence and start again from the beginning.").

[10] Tom Brokaw, THE GREATEST GENERATION xxx (1998) (dubbing the people who came of age during World War II "the greatest generation any society has ever produced").

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

deliberative process seriously, as having significant normative force," and defer to "the deliberated views of Congress and the President."[12] The APA is an unusual superstatute, however, in that its implementation is not delegated to a single agency. Thus, unlike other superstatutes, no single agency interprets the Act on an ongoing basis, updating its application in a deliberative web with Congress, the President, the courts, and the public.[13] Consequently, unlike other superstatutes, interpretations of the APA may not exceed the scope of the text Congress enacted and the President signed. To determine the scope of the text in turn requires a close examination of the full context and history of each provision of the APA.[14]

The history below shows that, as compared to the rest of the APA, the rulemaking provisions largely were undisputed. When Congress first began to debate administrative reform in the 1930s, the debate focused on adjudication and judicial review. Early on, the only real controversy about rulemaking concerned the burden of requiring agencies to hold public hearings in all rulemakings. That controversy dissipated by the time the Attorney General's Committee issued its report in 1940. Even the conservative minority of that Committee advised against imposing such rigid requirements across the board. Congress left rulemaking procedure largely to agency discretion.

A. Before 1937

Before the APA, agencies employed a "multitudinous variety of procedures" for promulgating rules with "no unifying principle."[15] Though some agencies consulted with interested parties in rulemaking,[16] generally statutes did not specify rulemaking procedures or require notice to interested parties.[17]

---

[12] William N. Eskridge, Jr. & John Ferejohn, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 435–36 (2010).

[13] Kovacs, *supra* note 11, at 1238–39.

[14] *Id.* at 1250–51.

[15] A.H. Feller, *Administrative Law Investigation Comes of Age*, 41 COLUM. L. REV. 589, 595 (1941).

[16] *See* COMM. ON ADMIN. PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 77-8, at 103 (1941) [hereinafter AG'S COMMITTEE REPORT]; JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 310 (2012) (noting that before the APA, some agencies informed the public of rules and guidelines and consulted with interested groups); *see also* TOM C. CLARK, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE

As I have detailed elsewhere,[18] the drive for administrative reform started to gain steam in 1933 when Franklin Delano Roosevelt became president and kicked off the New Deal. The ABA responded by establishing a Special Committee on Administrative Law.[19] That Committee played a "pivotal role" in the development of the APA.[20]

The Committee's early efforts focused on agency adjudication.[21] The Federal Register Act of 1935 implemented the Committee's recommendation that agencies be required to publish their rules in the Federal Register.[22] But it was not until 1937 that the Committee first addressed agency rulemaking procedures.[23] By then the Supreme Court had begun to approve New Deal programs; recession had set in; and President Roosevelt's court-packing plan had failed.[24] "Roosevelt suddenly was not infallible."[25]

At the same time, the liberal faith in agency expertize was giving way to a fear that agencies would become tools of

---

PROCEDURE ACT 31 (1947) [hereinafter AG'S MANUAL] (explaining that federal agencies already "extensively employed" informal rulemaking procedures like "informal hearings (with or without a stenographic transcript), conferences, . . . submission of written views").

[17] *See* AG'S COMMITTEE REPORT, *supra* note 16, at 102; Symposium, *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 511, 520 (1986); 62 REPORT OF THE SIXTIETH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 809 (1937) (Report of the Special Committee on Administrative Law) ("Generally speaking, the practice in this country has not been to issue rules and regulations after notice and hearing of interested parties.").

[18] Kathryn E. Kovacs, *A History of the Military Authority Exception in the Administrative Procedure Act*, 62 ADMIN. L. REV. 673, 683–84 (2010).

[19] George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1569–70 (1996).

[20] Kovacs, *supra* note 18, at 682.

[21] Shepherd, *supra* note 19, at 1573, 1575, 1583 ("The committee had almost completely ignored rulemaking, although it was the category of agency activity by which agencies had the greatest impact.").

[22] PUB. L. NO. 74-220, ch. 417, 49 Stat. 500 (codified as amended at 44 U.S.C. §§ 1501–1511).

[23] Shepherd, *supra* note 19, at 1583.

[24] *Id.* at 1580–82; Kovacs, *supra* note 18, at 683–84.

[25] Shepherd, *supra* note 19, at 1582.

autocracy.[26] As Reuel Schiller explained, by the mid-1930s, Americans were aware of "the true dimensions of European totalitarianism."[27] By the late 1930s, Americans had begun to fear that President Roosevelt would go down the same road.[28] Indeed, those fears even spread to New Deal supporters.[29] "That shift put wind in the sails of administrative reform in Congress."[30]

B. The Walter-Logan Bill

The ABA Committee proposed a bill in 1937 that would have required all agencies to implement "every statute affecting persons or property" through rules.[31] Rulemaking would have to be completed within one year and "after the publication of notice to and hearing interested parties."[32] The Committee chair explained that the proposal was intended "to enable the citizen and his attorney to find out in advance of litigation or in advance of taking action what the administrative officers of the government or of the particular agency understand the law to be."[33] The point was to give "businessmen … more certainty."[34] Requiring agencies to issue rules also would avoid separation of powers problems: "law-making, whether by statute or rules and regulations, is essentially a political function, and to require the courts to legislate from case to case in filling in the details of statutes is to bring them into conflict with the other two political branches of our Government."[35] Lastly, requiring notice and hearings before issuing rules "would be helpful to the government officers" and prevent agencies from exceeding their delegated powers.[36]

---

[26] Kovacs, *supra* note 18, at 683.

[27] Reuel E. Schiller, *Reining in the Administrative State: World War II and the Decline of Expert Administration*, *in* TOTAL WAR AND THE LAW: THE AMERICAN HOME FRONT IN WORLD WAR II 188 (Daniel R. Ernst & Victor Jews eds., 2002); *see also* Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1, 77 (2000).

[28] Schiller, *Reining*, *supra* note 27, at 188–89.

[29] Schiller, *Free Speech*, *supra* note 27, at 85–86; Schiller, *Reining*, *supra* note 27, at 189.

[30] Kovacs, *supra* note 18, at 684.

[31] 62 REPORT OF THE SIXTIETH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 846 (1937).

[32] *Id.*

[33] *Id.* at 263, 813 (Committee report).

[34] *Id.*

[35] *Id.* at 813 (Committee report).

[36] *Id.* at 809–10 (Committee report).

The following year, the Committee urged the ABA Board of Governors to approve its proposal. Among other things, the Committee implied that the Roosevelt administration was starting to resemble the Soviet Union's Marxist dictatorship.[37] "The Committee's critique of the administrative state was suffused with accusations of totalitarianism."[38] The Board of Governors approved the proposal in 1938.[39]

After Congressman Francis Walter and Senator Mills Logan introduced modified versions of the ABA's proposed bill, it came to be known as the Walter-Logan bill.[40] The bill passed both houses of Congress in 1940 with the support of Republicans and conservative Democrats.[41] Among other things, it required agencies to issue rules within one year of the enactment of any new statute.[42] New rules or amendments of existing rules that "fill[ed] in the details of any statute affecting the rights of persons or property" could be issued only following notice and public hearings. Notice had to be published in the Federal Register, state the date of the hearing, and set forth the language of the proposed rule.[43]

---

[37] 63 REPORT OF THE SIXTY-FIRST ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 343 (1938); *see also* Reuel E. Schiller, *The Era of Difference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 422–23 (2007).

[38] Schiller, *Free Speech*, *supra* note 27, at 86.

[39] 63 REPORT OF THE SIXTY-FIRST ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 334 (1938).

[40] *See* Shepherd, *supra* note 19, at 1598; *see also* S. 915, 76th Cong. (1939); H.R. 6324, 76th Cong. (1939).

[41] 86 Cong. Rec. 4742, 13,747–48, 13,815–16 (1940); *see also* Shepherd, *supra* note 19, at 1619, 1622.

[42] H.R. 6324, 76th Cong. § 2(b).

[43] *Id.* § 2(a). In its entirety, section 2(a) provided:

> Hereafter administrative rules and all amendments or modifications or supplements of existing rules implementing or filling in the details of any statute affecting the rights of persons or property shall be issued by the head of the agency and by each independent agency respectively charged with the administration of any statute only after publication of notice and public hearings. Such notice shall be published in the

At the House Judiciary Committee's hearings on the bill, the chair of the ABA Committee, O.R. McGuire, testified in support of the bill, reiterating the Committee's report.[44] Numerous agencies objected that the bill's rulemaking provisions were too ambiguous because the text did not specify the types of regulations covered.[45] Agencies also objected that the public notice and hearing requirement would impose a heavy burden and expense on agencies and prevent them from performing their functions.[46] The Department of Agriculture thought that requirement was "nothing short of fantastic" when applied to statutes that affect numerous individuals.[47] Several agencies believed that public hearings were unnecessary because they could better obtain the expert knowledge they needed through informal conferences or written comments.[48] Others were concerned that opponents of proposed regulations

---

> Federal Register, shall state the date of the public hearing, which shall be not less than ten days after the date of the notice, and shall set forth the language of the rules proposed to be adopted.

[44] *Hearings on H.R. 4236, HR 6198, and H.R. 6324: Bills to Provide for the More Expeditious Settlement of Disputes with the United States, and for Other Purposes Before the Subcomm. No. 4 of the H. Comm. on the Judiciary*, 76th Cong. 23, 24, 26 (1939) (opining that hearings would give agencies and interested parties the benefit of hearing each others' views and make everyone involved "more tolerant and considerate"; insure that agencies stay within the bounds of their statutory authority; and avoid concrete controversies, delays, and separation of powers problems).

[45] *Id*. at 70 (Interior), 77 (Agriculture)

[46] *Id.* at 39 (SEC, the provision for hearings on existing rules might "tie up the work of administrative agencies for months, even years, to come"), 67 (FTC, rules hearings would leave little time for violations in specific cases), 69 (Interior, "lays burdens of almost inestimable magnitude upon the executive branch of the Government"), 70 (Interior, "heavy burden" and "expense"), 102 (War, "tremendous additional burden"), 105 (Treasury, "undue burden"), 109 (FCC, "render impossible the efficient performance" of the agency's functions).

[47] *Id.* at 78 (Agriculture)

[48] *Id*. at 38 (SEC, agencies would not acquire the necessary "detail of expert knowledge" at a hearing), 70 (Interior, the agency could obtain the same results as public hearings by soliciting written comments or having informal consultations), 109 (FCC, public hearings would have "practically … no value," and it was better to proceed by conferences with experts).

could "filibuster" public hearings, preventing agencies from issuing regulations.[49] The War Department minced no words in declaring the bill "gravely subversive…, destructive of efficiency…, obstructive to progress…, and generally disastrous."[50]

In its favorable report, the Senate Judiciary Committee reiterated the ABA Committee's concern about separation of powers. The Committee explained that agencies had failed to exercise their discretion to issue rules interpreting statutes, leaving that task to the courts.[51] Case-by-case interpretation may have been acceptable, the Committee opined, when "agencies were not concerned with present-day economic and social problems."[52] Rules would inform individuals of what the agency believed the statute to mean, provide consistency, and provide "great assistance to the court in reaching a correct interpretation."[53] Yet, although the Committee was willing to force agencies to issue rules,[54] it professed a desire "to leave the administrative agencies as free as possible to function consistent with the supremacy of the law."[55]

The Senate Committee defended the requirement for public notice and hearings, explaining that, in the states and federal agencies that already provided such process, it had "operated to make the rules more reasonable and to reduce litigation to a minimum."[56] The Senate Committee further reasoned that, because agencies were exercising delegated quasi-legislative authority from Congress, they should employ the same procedures as Congress.[57] Finally, the Senate Committee said that public notice and hearings would give agencies the benefit of "the viewpoints and experience" of those who might be affected by the rules and give

---

[49] *Id.* at 70 (Interior), 111 (Federal Power Commission).

[50] *Id.* at 102 (War).

[51] S. Rep. No. 76-442, at 11 (1939). The House Judiciary Committee report parroted the Senate report and added: "This has involved the courts in serious conflicts with administrative agencies and with pressure groups friendly to such agencies." H.R. Rep. No. 76-1149, at 5 (1939).

[52] S. Rep. No. 76-442, at 11.

[53] *Id.*; *see also* H.R. Rep. No. 76-1149, at 5.

[54] The bill was intended to require agencies to issue rules to "fill[] in the details of the statutes" they administered. S. Rep. No. 76-442, at 6.

[55] *Id.* at 14; *see also* H.R. Rep. No. 76-1149, at 8.

[56] S. Rep. No. 76-442, at 12. The House report did not include this discussion.

[57] *Id.*

advance notice of the agency's position to the public and the courts.[58]

The minority of the House Judiciary Committee included a report objecting to the "heavy unnecessary burden" of providing a public hearing before adopting any rule "no matter of how minor a character" and regardless of the suitability of the subject matter for public discussion.[59] Public hearings, the minority believed, would expose agencies to "obstructive and dilatory tactics" and prevent prompt action when needed.[60]

When the Walter-Logan bill hit the floor, members of Congress debated the judicial review provisions extensively, but mentioned rulemaking procedure only a few times.[61] Some members objected to providing public notice and hearings because it would be excessively burdensome.[62] Representative Sabath pointed out that such procedures would be unsuitable for certain types of rules and impractical in situations where prompt rulemaking was needed.[63] Representative Sabath also objected that the bill would "leave the administration of a statute open to obstructive and dilatory tactics on the part of interests who are opposed to its effective enforcement and who might intentionally prolong hearings inordinately."[64] Congressman Cochran opposed the Senate amendment requiring notice of the language of a proposed rule because often agencies hold "informational hearings" to determine if a rulemaking is necessary; "It would defeat the whole purpose of such a hearing if the agency had to issue in advance a proposed draft of a rule."[65] Congressman Bulwinkle thought the bill "might result in ill-considered or hasty regulations, which could be corrected only after hearing and notice procedure, and so ad infinitum."[66] Congressman Walter countered

---

[58] *Id.*

[59] H.R. Rep. No. 76-1149, part 2, at 6.

[60] *Id.*

[61] *See* Shepherd, *supra* note 19, at 1610 ("proponents focused on the benefits of increased judicial review"), 1613 ("Opponents concentrated their arguments on the bill's provision of broader judicial review.").

[62] 86 CONG. REC. 4738–39 (1940).

[63] *Id.* at 4739.

[64] *Id.*; *see also id.* at 4600 (statement of Rep. Ford) (requiring public hearings would mean that "the great and powerful groups … could employ batteries of high-priced lawyers who, by interposing unlimited objections, could thus block all restraint while the rank and file … would be barred from being heard").

[65] *Id.* at 13,808.

[66] *Id.* at 4666.

that if Congress could manage to hold hearings on proposed statutes, "certainly we ought to insist that hearings be held when rules are being considered."[67]

The bill's supporters echoed the ABA's rhetoric. The floor debates were "riddled with comparisons of the administrative state to fascist and communist governments and accusations that agencies were [being] used to advance [Roosevelt's] totalitarian ambitions."[68] Opponents answered "in equally hyperbolic terms."[69]

The Walter Logan bill passed the House by a vote of 282 to 96.[70] Voting in favor were "all but two Republicans, 83% of Southern Democrats, and 41% of Northern Democrats."[71] All voting Republicans and ten conservative Democrats brought the Senate vote to 27 to 25.[72] The House, with many members absent, concurred in the Senate's amendments by a vote of 176 to 51.[73]

President Roosevelt vetoed the bill. He objected that the bill would undermine agency adjudication and drive too many disputes into court, and he thought the bill would have an unacceptable effect on defense functions.[74] The President preferred to await the report of the committee he had asked the Attorney General to form to study administrative reform "before approving any measure in this complicated field."[75] He did not mention rulemaking.

The House failed to override the President's veto when "many conservative Democrats … defected from their coalition with Republicans."[76]

C. The Attorney General's Committee

The Attorney General's Committee on Administrative Procedure submitted its report about a month later.[77] The report

---

[67] *Id.* at 4667.

[68] Schiller, *Free Speech*, *supra* note 27, at 87.

[69] Kovacs, *supra* note 18, at 686.

[70] 86 CONG. REC. 4742, 4743–44 (1940).

[71] Shepherd, *supra* note 19, at 1619.

[72] 86 CONG. REC. 13,747–48 (1940); *see also* Shepherd, *supra* note 19, at 1622.

[73] 86 CONG. REC. 13,815–16 (1940).

[74] Franklin Delano Roosevelt, The President Vetoes the Bill Regulating Administrative Agencies, Note to the House of Representatives, Dec. 18, 1940, *in* THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 616–17, 621 (1941).

[75] *Id.* at 620.

[76] Shepherd, *supra* note 19, at 1630; 86 CONG. REC.13,953 (1940).

[77] AG'S COMMITTEE REPORT, *supra* note 16.

included two proposed bills: one from the liberal majority and one from the conservative minority.[78] In addition, the most conservative member of the committee, Duncan Lawrence Groner, then Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit,[79] submitted a bill "which combined the most restrictive sections of the Walter-Logan bill and the minority bill."[80]

The majority professed a desire to "improve, without rigidifying, the rule-making process by emphasizing the importance of outside participation prior to the issuance of rules."[81] The majority thought it "essential" that the public participate in rulemaking to inform the agency and protect private interests.[82] Yet the majority bill "imposed no additional controls on agency rulemaking."[83] It required agencies to designate someone to "expedite" rulemaking "subject to the control and supervision of the agency" and make their regulations available to the public,[84] but it did not mandate rulemaking or any particular rulemaking procedure.

The minority bill declared a policy that agencies "shall issue rules" through procedures designed to "secur[e] the participation of interested parties" and "shall … prefer … rule making" to case-by-case adjudication.[85] The bill required agencies to issue substantive rules "as rapidly as deemed practicable," but it softened that requirement by specifying that agencies only had to issue rules "so far as applicable or appropriate in view of the legislation and subject matter."[86] Judge Groner's proposal reiterated the policy

[78] *Id.* at 191, 217; *see also* Shepherd, *supra* note 19, at 1632.

[79] Daniel R. Ernst, *Dicey's Disciple on the D.C. Circuit: Judge Harold Stephens and Administrative Law Reform, 1933–1940*, 90 GEO. L.J. 787, 788 (2002); Blake B. Hulnick, *Consumer Crusade: Justice Hugo Black As Senate Investigator*, 24 J.S. LEGAL HIST. 69, 82 n.86 (2016).

[80] Shepherd, *supra* note 19, at 1636; *see also id.* at 1633. Judge Groner's bill became S. 918, 77th Cong. (1941). Shepherd, *supra* note 19, at 1636. The majority and minority bills became S. 675, 77th Cong. (1941), and S. 674, 77th Cong. (1941), respectively. Shepherd, *supra* note 19, at 1636.

[81] AG'S COMMITTEE REPORT, *supra* note 16, at 6.

[82] *Id.* at 103.

[83] Shepherd, *supra* note 19, at 1634.

[84] AG'S COMMITTEE REPORT, *supra* note 16, at 195.

[85] *Id.* at 224–25.

[86] *Id.* at 225–26.

statement and rulemaking requirement, but omitted the softening caveat.[87]

The minority bill required agencies to give notice of proposed rulemaking "whenever practicable," inviting interested parties "to make written suggestions or to participate in rule-making proceedings."[88] The notice had to identify the "issues or scope of the proposed rules … with as much particularity and definiteness as deemed practicable."[89] The bill allowed agencies to give notice by providing "tentative drafts of rules" or "reports or summaries of hearings, investigations, or conferences."[90] Judge Groner's proposal was similar, except that it specified that notice of a proposed rulemaking had to "set forth the substance of the rules proposed to be adopted."[91]

The minority bill authorized agencies to employ, as "deemed appropriate by them," written comments, consultation and conferences, informal hearings, or formal hearings.[92] The minority advised against requiring agencies to use "any one procedure" preferring instead to give them "wide discretion" over rulemaking.[93] Imposing rigid procedural requirements, as the Walter-Logan bill would have, would lead agencies either to avoid rulemaking or to issue "secret rules."[94] In contrast, Judge Groner would have required agencies to provide public hearings "if requested."[95]

By the end of 1941, the United States was at war, and Congress suspended its work on administrative reform. I have explained elsewhere the developments during the war years that "paved the path to the APA."[96] In short, congressional Democrats lost some political power; Roosevelt retreated from the New Deal; and the ABA withdrew from its previously "combative approach."[97] The federal bench had shifted to the left, making judicial review less of a hot button issue on both sides of the aisle.[98] The federal bureaucracy had exploded in size and reached the lives of more individuals through price controls and rationing,

---

[87] S. 918, 77th Cong. §§ 300, 302 (1941).
[88] AG'S COMMITTEE REPORT, *supra* note 16, at 228.
[89] *Id.*
[90] *Id.*
[91] S. 918, 77th Cong. § 303 (1941).
[92] AG'S COMMITTEE REPORT, *supra* note 16, at 228–29.
[93] *Id.* at 229.
[94] *Id.*
[95] S. 918, 77th Cong. § 303 (1941).
[96] Shepherd, *supra* note 19, at 1641.
[97] *Id.* at 1645–46; *see also* Kovacs, *supra* note 18, at 694–96.
[98] Kovacs, *supra* note 18, at 694.

which highlighted the need to rein agencies in.[99] As Americans' faith in expertize continued to wane, "the belief that administrative power could pave the road to totalitarianism gained prominence 'across the political spectrum and even entered mainstream culture.'"[100]

D. The APA of 1946

While Congress focused on the war, the ABA Committee continued its work.[101] The Committee's new chairman, Carl McFarland, had served in the Justice Department in the Roosevelt administration,[102] but he was in the minority on the Attorney General's Committee.[103] As Chair of the ABA Administrative Law Committee, McFarland drafted a new bill designed as a compromise.[104] Senator McCarran and Representative Sumners introduced the ABA's bill shortly after D-Day in 1944.[105] The bill required what we now call notice-and-comment rulemaking. Agencies would have to publish notice of proposed rulemaking including "a description of the subjects and issues involved"; afford interested parties an opportunity to participate through written submissions, conferences or consultations, or informal hearings; give "all relevant matter … full consideration; and publish the agency's "reasons and conclusions." Formal hearings would be held only if another statute required it. [106]

---

[99] *Id.* at 695; *see also* Legislative History at 248 ("war legislation, administration, and congressional investigations brought administrative processes more and more into prominence").

[100] Kovacs, *supra* note 18, at 695 (quoting Schiller, *Free Speech*, *supra* note 27, at 88).

[101] 68 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 147 (1943).

[102] *See* http://archives.law.virginia.edu/person/carl-mcfarland; https://www.justice.gov/enrd/carl-mcfarland.

[103] AG'S COMMITTEE REPORT, *supra* note 16, at 203. *See generally* Ashley Sellers, *Carl McFarland—The Architect of the Federal Administrative Procedure Act*, 16 VA. J. INT'L L. 12 (1975).

[104] 68 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 256 (1943); Shepherd, *supra* note 19, at 1649–50.

[105] S. 2030, 78th Cong. (1944); H.R. 5081, 78th Cong. (1944).

[106] S. 2030, 78th Cong. § 3 (1944).

McCarran and Sumners revised their bill in response to "a volume of further suggestions from every quarter."[107] The only significant difference in the new bill's rulemaking provisions was that in the notice of proposed rulemaking, the revised bill allowed agencies to provide "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[108] The provision regarding rulemaking procedures also was revised slightly to require agencies to give interested parties "an opportunity to participate in the rule making through submission of written data, views, or argument with or without opportunity to present the same orally in any manner."[109]

Following closed door discussions with the Truman administration, the ABA, and others, the Senate Judiciary Committee revised the bill again.[110] A June 1945 Committee print showed the original bill, revisions, explanations, and a summary of comments received.[111] The Committee revised the explanation requirement: instead of requiring agencies to publish their "reasons and conclusions," the new draft required agencies to "incorporate in any rules adopted a concise general statement of their basis and purpose."[112] The ABA had not explained why it chose to use language apparently more suited to adjudication in the rulemaking provisions. Unidentified "private parties" thought the Senate Committee's revision inadequate, but the Committee felt that "a concise general statement of basis and purpose" would explain fully the factual and legal basis for the rule, "as well as the real object or objects sought."[113] As the Committee later explained, the "concise general statement" language required agencies to "analyze and consider all relevant matter presented" and "explain the actual basis and objectives of the rule" "with reasonable fullness."[114] The Attorney General submitted a letter supporting the bill with an appendix analyzing the bill's provisions.[115] The

[107] S. REP. NO. 79-752 (1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, 1944–46, at 190 (1946) [hereinafter LEGISLATIVE HISTORY].

[108] S. 7, 79th Cong. § 4(a) (1945); H.R. 1203, 79th Cong. § 4(a) (1945).

[109] S. 7, 79th Cong. § 4(b) (1945); H.R. 1203, 79th Cong. § 4(b) (1945).

[110] *See* LEGISLATIVE HISTORY, *supra* note 107, at 11, 191; Shepherd, *supra* note 19, at 1656.

[111] LEGISLATIVE HISTORY, *supra* note 107, at 11–44, 191.

[112] *Id.* at 19.

[113] *Id.*

[114] *Id.* at 201.

[115] *Id.* at 223–24.

Attorney General said that the "concise general statement" was "not intended to require an elaborate analysis of rules," but rather was designed to give the public "a general idea of the purpose of, and … basic justification for" the rule.[116]

The House Judiciary Committee held hearings in 1945,[117] but those hearings were "a side show" to the "main act" namely, more private negotiations with the Truman administration and private parties.[118] At the hearings, there was very little discussion of rulemaking at all, much less any significant debate about it.

The bill passed the Senate Judiciary Committee unanimously[119] and the Senate on a voice vote with no debate.[120] The House Judiciary Committee's report was similar to the Senate report for purposes of the discussion here.[121] The bill passed the House Committee unanimously[122] with "corrections and clarifications"[123] and passed the House on voice vote, again with little debate.[124] Republicans did not think the bill went far enough, but they were loath to upset the compromise. "Although flawed, the bill was better than nothing."[125] The Senate concurred in the House amendments on a voice vote,[126] and President Truman signed the bill into law on June 11, 1946.[127]

---

[116] *Id.* at 225; *see also id.* at 20 (Senate Judiciary Committee stating that a "concise general statement" "would seem to achieve all that more elaborate procedure could do effectively"); *id.* at 358–59 (Congressman Walter explaining that notice and comment rulemaking would inform the public of the agency's intentions).

[117] *See Federal Administrative Procedure: Hearings on H.R. 184, H R. 339, H.R. 1117, HR. 1203, H.R. 1206, and HR. 2602 Before the H. Comm. on the Judiciary*, 79th Cong. (1945), *reprinted in* LEGISLATIVE HISTORY, *supra* note 107, at 45.

[118] Shepherd, *supra* note 19, at 1659–60; *see also id.* at 1661; LEGISLATIVE HISTORY, *supra* note 107, at 191, 246.

[119] *See* LEGISLATIVE HISTORY, *supra* note 107, at 187; Shepherd, *supra* note 19, at 1662.

[120] LEGISLATIVE HISTORY, *supra* note 107, at 344; Shepherd, *supra* note 19, at 1666, 1668.

[121] H.R. REP. NO. 79-1980 (1946), *reprinted in* LEGISLATIVE HISTORY, *supra* note 107, at 233.

[122] LEGISLATIVE HISTORY, *supra* note 107, at 347; Shepherd, *supra* note 19, at 1669.

[123] LEGISLATIVE HISTORY, *supra* note 107, at 250.

[124] *Id.* at 406; Shepherd, *supra* note 19, at 1670–74.

[125] Shepherd, *supra* note 19, at 1672.

[126] LEGISLATIVE HISTORY, *supra* note 107, at 423.

[127] Act of June 11, 1946, PUB. L. NO. 79-404, 60 Stat. 237 (1946).

Section 4 of the APA of 1946 requires agencies to publish notice of proposed rulemaking in the Federal Register including "(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved." Interested persons are entitled "to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner." The agency is required to consider "all relevant matter presented" and "incorporate in any rules adopted a concise general statement of their basis and purpose." Formal rulemaking is only required where another statute requires it to be "on the record after opportunity for an agency hearing."[128]

E. Post Script

The APA was a compromise that left both conservatives and liberals disappointed.[129] That compromise was possible because the bill was so ambiguous.[130] Rather than attempt to iron out their differences in the text, the parties tried to create legislative history that would lead the courts to interpret the Act in their favor.[131] A majority of the Senate Judiciary Committee would have preferred to restrict agencies more.[132] Hence, their report "interpreted the bill as imposing strict new controls on agencies."[133] The Attorney General, on the other hand, would have preferred less control of agencies. He interpreted the bill as restating existing law and imposing limited constraints on agencies.[134]

The Attorney General's view has largely prevailed. Following enactment, the Attorney General issued the Attorney General's Manual on the Administrative Procedure Act, in which he

---

[128] *Id.* § 4.

[129] Kovacs, *supra* note 18, at 705; Shepherd, *supra* note 19, at 1674, 1678.

[130] Shepherd, *supra* note 19, at 1665; Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1138 (2009). As the Supreme Court observed: "The Act thus represents a long period of study and strife; it settles long continued and hard fought contentions, and enacts a formula upon which opposing social and political forces have come to rest. It contains many compromises and generalities and, no doubt, some ambiguities." Wong Yang Sung v. McGrath, 339 U.S. 33, 40–41 (1950).

[131] Shepherd, *supra* note 19, at 1665.

[132] *Id.* at 1663.

[133] *Id.*

[134] *Id.* at 1663, 1666.

interpreted the APA section by section.[135] The Supreme Court has given the AG's Manual varying levels of deference over the years.[136]

Unlike many other provisions in the APA, however, the Attorney General's interpretation of the rulemaking provisions did not differ materially from that of congressional conservatives. The Attorney General said that the Act's rulemaking provisions simply were intended to ensure the public an opportunity to participate in rulemaking.[137] The notice of proposed rulemaking could contain either the rule itself, the substance of the rule, or a more general statement, so long as it was "sufficiently informative to assure interested persons an opportunity to participate intelligently in the rule making process."[138] The mode of public participation was left to agency discretion.[139] The Act required agencies to consider "all relevant matter presented," but the Attorney General clarified that agencies were not required to formulate rules based exclusively on "any 'record' made in informal rule making procedings."[140] Rather, agencies also could rely on "materials in its files and the knowledge and experience of the agency."[141] Finally, the Attorney General reiterated his view that the "concise general statement of … basis and purpose" need not contain any "elaborate analysis," but must merely "advise the public of the general basis and purpose of the rules."[142]

III. EXCEEDING THE SCOPE OF THE APA

In *Vermont Yankee Nuclear Power Corp. v. NRDC*, the Supreme Court recognized that the APA left rulemaking procedure "basically … within the discretion of agencies."[143] Section 4

---

[135] AG'S MANUAL, *supra* note 16, at 6, 7.

[136] *See* Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 63 (2004) ("persuasive"); Darby v. Cisneros, 509 U.S. 137, 148 n.10 (1993) (citing Steadman v. SEC, 450 U.S. 91, 102 n.22 (1981)) ("some deference"); Chrysler Corp. v. Brown, 441 U.S. 281, 302 n.31 (1979) ("some weight"); Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 546 (1978) ("some deference"); *see also* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 218 (1988) (Scalia, J., concurring) ("great weight").

[137] AG'S MANUAL, *supra* note 16, at 26.

[138] *Id.* at 29–30.

[139] *Id.* at 31.

[140] *Id.*

[141] *Id.* at 31–32.

[142] *Id.* at 32.

[143] 435 U.S. 519, 524 (1978).

"established the maximum procedural requirements" courts may impose on agencies, unless due process requires more.[144] The Court considered it a "very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure."[145] The congressional reports and the Attorney General's Manual supported the Court's reading.[146] The Court also found "compelling reasons" for its interpretation. Judicial tailoring of agency procedures would make judicial review "totally unpredictable."[147] Agencies would respond to that uncertainty by providing too much procedure, thus negating the advantages of informal rulemaking.[148] The Court also emphasized that in informal rulemaking agencies are not required to produce the kind of record that comes from a formal hearing.[149] "Congress intended that the discretion of the agencies and not that of the courts be exercised in determining when extra procedural devices should be employed."[150] Thus, the DC Circuit exceeded its authority in requiring trial-type procedures in an informal rulemaking.[151]

Nonetheless, federal courts have continued to impose rulemaking requirements that exceed the simple formula in the APA. As Sydney Shapiro and Richard Murphy wrote recently, "the marvelously simple and speedy rulemaking procedures of 1946…bear about as much resemblance to the rulemaking

---

[144] *Id.* at 524, 542.
[145] *Id.* at 544.
[146] *Id.* at 545–46.
[147] *Id.* at 546.
[148] *Id.* at 547.
[149] *Id.* at 547–48.
[150] *Id.* at 546.
[151] *Id.* at 523–24. The Court reinforced *Vermont Yankee* when it adhered to the APA's text in *Darby v. Cisneros*, 509 U.S. 137, 154 (1993) (holding that the APA cabins common law exhaustion doctrine), *Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 280–81 (1994) (invalidating a burden-shifting rule as inconsistent with the APA), *Dickinson v. Zurko*, 527 U.S. 150, 155, 161 (1999) (holding section 559 did not preserve the courts' ability to continue to fashion administrative common law, but merely "grandfathered common-law variations" that were clearly established when the APA was enacted), and *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015) (holding section 553 does not require notice and comment for interpretive rules). *See generally* Kathryn E. Kovacs, *Pixelating Administrative Common Law in* Perez v. Mortgage Bankers Association, 125 YALE L.J. F. 31 (2015).

procedures of 2016 as an acorn does to a mighty seventy-year-old oak."[152]

Some of these judicially created rules about rulemaking are true common law in that they "venture too far afield from statutory text or discernible legislative purpose to count simply as statutory interpretation."[153] Others at least arguably interpret provisions of the APA, albeit quite broadly. The line between common law and broad interpretation is difficult to draw,[154] and it is not necessary to attempt that feat here.[155] Whether these rules about rulemaking are a product of judicial interpretation or judicial creativity, they have contributed to the ossification of federal rulemaking with dangerous consequences. In this part, I demonstrate how these rules contradict the text and history of the APA. I explore the consequences in Part IV.

A. The Rulemaking Record

First, section 553 does not mention anything resembling a record or docket for informal rulemaking; it merely requires agencies to explain the "basis and purpose" of the rule concisely.[156] Jeffrey Lubbers, a leading authority on rulemaking, observed that "[t]he development of the concept of the rulemaking

---

[152] Sidney A. Shapiro & Richard W. Murphy, *Arbitrariness Review Made Reasonable: Structural and Conceptual Reform of the Hard Look*, 92 NOTRE DAME L. REV. 331, 332–33 (2016).

[153] Gillian E. Metzger, *Annual Review of Administrative Law—Foreward: Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1295 (2012); *see also* Jack M. Beermann, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1, 3 (2011) (arguing that common law reflects "a degree of creativity beyond that expected of a court engaged in the construction and application of an authoritative text"); Kenneth Culp Davis, *Administrative Common Law and the* Vermont Yankee *Opinion*, 1980 UTAH L. REV. 3, 3 ("Common law is law that courts have created without interpreting a constitutional or statutory provision."); Kovacs, *supra* note 11, at 1212 ("Common law exceeds the boundaries of any permissible interpretation.").

[154] *See* Kovacs, *supra* note 11, at 1212.

[155] One reason to distinguish between true common law and broad statutory interpretation is that "[s]tatutory precedents … often enjoy a super-strong presumption of correctness." William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L. J. 1361, 1362 (1988).

[156] 5 U.S.C. § 553.

record or file has been one of the most significant changes in informal rulemaking procedure since the APA was enacted."[157]

This development is attributable to other common law doctrines. One is "hard look" review. The traditional deference to agency determinations began to erode with *Citizens to Preserve Overton Park, Inc. v. Volpe*.[158] There the Court held that the Secretary of Transportation's decision to spend federal funds on building a highway through a park in Memphis was subject to "substantial," "thorough, probing, in-depth," "searching and careful" inquiry under the APA.[159] In addition, "[i]n yet another deviation from the traditional APA treatment of informal agency action, *Overton Park* essentially required agencies to produce the kind of record characteristic of formal proceedings."[160] The Supreme Court instructed the lower court to review the decision by examining "the full administrative record that was before the Secretary at the time he made his decision."[161]

Although *Overton Park* did not concern rulemaking, it was "a major influence" in rulemaking cases.[162] In *Overton Park*, the agency lost because the Secretary had given no explanation of how his decision met the relevant statutory constraints.[163] But the D.C. Circuit read the case more broadly.[164] More in-depth review of agency decisions necessitated a more in-depth record for review.[165]

---

[157] Jeffrey S. Lubbers, A GUIDE TO FEDERAL AGENCY RULEMAKING 287 (5th ed. 2012). The rulemaking record includes all notices, materials the agency relied on, and public comments. Section of Administrative Law and Regulatory Practice, American Bar Association, A BLACKLETTER STATEMENT OF FEDERAL ADMINISTRATIVE LAW 28 (2d ed. 2013).

[158] 401 U.S. 402 (1971).

[159] *Id.* at 415, 416.

[160] Patrick M. Garry, *Judicial Review and the "Hard Look" Doctrine*, 7 NEV. L.J. 151, 155 (2006).

[161] *Id.* at 420.

[162] Lubbers, *supra* note 157, at 288–89; *cf.* Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 974–75 (1980) ("There is little doubt, however, that the expectations set forth in *Overton Park* with respect to the administrative record are more appropriate in the informal adjudication setting.").

[163] 401 U.S. at 408, 413, 417, 420.

[164] *See* Scott A. Keller, *Depoliticizing Judicial Review of Agency Rulemaking*, 84 WASH. L. REV. 419, 437 (2009).

[165] *See* Home Box Office, Inc. v. F.C.C., 567 F.2d 9, 54 (D.C. Cir. 1977) ("As a practical matter, *Overton Park*'s mandate means that the public record must reflect what representations were made

Common law ripeness doctrine also necessitates rulemaking records. In 1946, generally rules were challenged in enforcement actions, which necessarily would generate an administrative or judicial record.[166] In *Abbott Labs. v. Gardner*, the Supreme Court opened the door to pre-enforcement review of "ripe" challenges to rules, there a Food and Drug Administration rule regarding labeling of prescription drugs.[167] Instead of producing a record in the context of a particular enforcement action, pre-enforcement review necessitates the production of a rulemaking record just after the final rule is published. Thus, "reviewing courts responded to *Abbott* by demanding that agencies support rules with increasingly elaborate records."[168]

The need for a rulemaking record was fully established by 1977 when the D.C. Circuit said in *HBO v. FCC* that the rulemaking record must "enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did."[169] The court acknowledged arguments that the APA itself did not require agencies to produce a

---

to an agency so that relevant information supporting or refuting those representations may be brought to the attention of the reviewing courts by persons participating in agency proceedings.").

[166] Lubbers, *supra* note 157, at 288; Nathaniel L. Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721, 755 (1975); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 89 (1995); Paul R. Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 205 (1974).

[167] 387 U.S. 136, 138, 148 (1967); *see also* Lubbers, *supra* note 157, at 407. Since then, Congress has explicitly allowed pre-enforcement review in some contexts. *E.g.*, 15 U.S.C. § 57a(e) (allowing review of certain FTC rules); 28 U.S.C. § 2342 (giving courts of appeals exclusive jurisdiction over petitions for review of certain agency rules); 29 U.S.C. § 655(f) (allowing review of certain occupational safety and health standards); 42 U.S.C. § 7607(b) (prescribing review of certain Clean Air Act rules).

[168] Richard J. Pierce, Jr., *Rulemaking and the Administrative Procedure Act*, 32 TULSA L.J. 185, 192 (1996); *see also* Verkuil, *supra* note 166, at 198, 205 (explaining that when review came after enforcement, "the circumstances surrounding the rule's enactment [were] secondary," but pre-enforcement review "leads to a vigorous judicial scrutiny of the rulemaking model").

[169] 567 F.2d 9, 36 (D.C. Cir. 1977).

record in informal rulemakings.[170] Nonetheless, implicit in the decision to treat rules as "final" for judicial review "is an assumption that an act of reasoned judgment has occurred." If that is so, then there must be "a body of material … with reference to which such judgment was exercised" and against which the court may "test the actions of the [agency] for arbitrariness or inconsistency with delegated authority."[171]

Requiring agencies to produce a record in informal rulemaking, however, contradicts the text of the APA.[172] In contrast to section 553's silence about the record for *informal* rulemaking, it provides that any rulemaking that is "on the record" must adhere to the requirements for *formal* rulemaking in sections 556 and 557.[173] Among other things, section 556 provides that "the exclusive record for decision" in a formal proceeding consists of the "transcript of testimony and exhibits, together with all papers and requests filed in the proceeding."[174] Jeffrey Lubbers suggested that "[t]he power to require submission of a record for judicial review is inherent in the review function."[175] Certainly, courts may require agencies to justify their decisions, and agencies are well advised to produce a robust explanation of a rule's basis and purpose for review. But courts are not authorized effectively to amend the APA to impose a record-keeping requirement across the board.

Requiring rulemaking records also is inconsistent with the history of the APA. The common law in 1946 presumed the existence of facts supporting a rulemaking; the plaintiff challenging the rule bore the burden of alleging specific facts to invalidate the rule.[176] Congress anticipated the need for records in

---

[170] *Id.* at 54 n.118.

[171] *Id.* at 54.

[172] Keller, *supra* note 164, at 443–44; Richard B. Stewart, Vermont Yankee *and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805, 1816 (1978).

[173] 5 U.S.C. § 553(c).

[174] 5 U.S.C. § 556(e); *see also* Garry, *supra* note 160, at 152 ("*Overton Park* effectively required agencies to create a record in their informal procedures and to base their decision on that record—a requirement that under the APA had applied only to formal rulemaking and adjudication.").

[175] Lubbers, *supra* note 157, at 293.

[176] Pac. States Box & Basket Co. v. White, 296 U.S. 176, 185 (1935); *see also* Richard Murphy, *Chenery Unmasked: Reasonable Limits on the Duty to Give Reasons*, 80 U. CIN. L. REV. 817, 818 (2012); Shapiro & Murphy, *supra* note 152, at 333, 337 (pointing out that courts applied this approach into the 1960s).

informal rulemaking.[177] But it chose not to overturn the common law and *require* agencies to produce a record in such proceedings.[178] Indeed, Congress chose the APA over H.R. 339 and H.R. 1117, both of which would have required rulemaking records.[179] Even the minority on the Attorney General's Committee did not support such a requirement.[180] Thus, the

---

[177] H.R. Rep. No. 79-1980, in LEGISLATIVE HISTORY, *supra* note 107, at 259 ("The agency must keep a record and analyze and consider all relevant matter presented prior to the issuance of rules.").

[178] Since then, Congress has imposed rulemaking record requirements in particular circumstances. *See* 15 U.S.C. § 57a(e)(1)(B) (regarding certain FTC rules); 15 U.S.C. § 2060(a) (regarding consumer product safety rules); 15 U.S.C. § 2618(a)(2) (regarding EPA rules on toxic substances); 42 U.S.C. § 7607(d)(2)–(4), (7)(A) (regarding certain Clean Air Act rules); *cf.* 28 U.S.C. § 2112 (authorizing the Supreme Court to issue rules requiring agencies to file administrative records in cases seeking review or enforcement of agency orders).

[179] *See* LEGISLATIVE HISTORY, *supra* note 107, at 140, 148 ("All relevant matter presented shall be recorded or summarized and given full consideration by the agency."). In 1982, the Senate passed a bill that would have required all agencies to "maintain a file for each rule making proceeding … and … a current index to such file." The file would have to be made public with the first publication concerning the rule and would constitute the record for purposes of judicial review. S. 1080, 79th Cong. § 3 (1982), *available at* 128 CONG. REC. 5298 (March 24, 1982). The bill died in the House. *See Regulatory Reform Bill Stalled in House*, 38 CQ ALMANAC 523 (1982), *available at* https://library.cqpress.com/cqalmanac/document.php?id=cqal82-1163389&type=hitlist&num=0.

The E-Government Act requires agencies to keep online "electronic dockets for rulemakings under [5 U.S.C. § 553]." Pub. L. No. 107-347, § 206(d), 116 Stat. 2899, 2916 (2002). That Act, however, does not specify the content of the docket, but merely requires that it include "all submissions" under § 553(c) and "other materials that by agency rule or practice are included in the rulemaking docket under" § 553(c). *Id.*

[180] AG'S COMMITTEE REPORT, *supra* note 16, at 229 (providing in minority bill that if an agency chooses to hold public hearings on a proposed rule, "[r]ecords of such hearings may be kept"). Under the Walter-Logan bill, all rulemaking would have involved a public hearing. H.R. 6324, 76th Cong. § 2(a). Yet, agencies would not have been required to keep a rulemaking record. Rather,

Attorney General's Manual found it "entirely clear … that section 4(b) does not require the formulation of rules upon the exclusive basis of any 'record' made in informal rule making proceedings."[181]

B. Notice of Information Considered

A second area in which the courts have exceeded the terms of the APA concerns the notice of proposed rulemaking. Section 553 simply requires a notice of proposed rulemaking to include "either the terms or substance of the proposed rule or a description of the subjects or issues involved."[182] Yet, federal courts require agencies to provide notice of the information the agency considered in drafting the proposed rule. In *Portland Cement Ass'n v. Ruckelshaus*, the D.C. Circuit said "information should generally be disclosed as to the basis of a proposed rule at the time of issuance."[183] In that case, the court found a "critical defect in the decision-making process" the EPA had used to establish emissions standards for cement plants, namely, the EPA did not release for public comment the location or methodology of its testing.[184] As the court later explained, "An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary."[185] Hence, Jeffrey Lubbers recommends that agencies make available

---

courts reviewing rules simply would have considered any "material and relevant" evidence. *Id.* § 3.

[181] AG'S MANUAL, *supra* note 16, at 31; *see also* Nathaniel L. Nathanson, *Report to the Select Committee on Ex Parte Communications in Informal Rulemaking Proceedings*, 30 ADMIN. L. REV. 377, 388 (1978) (finding "no affirmative support … in the legislative history" for interpreting § 553 to require a rulemaking record, "nor was there any early practice by the agencies to conform with such an interpretation"); Murphy, *supra* note 176, at 839 ("At the time of the APA's adoption, it was widely understood that … this quasi-legislative model of rulemaking did not require creation of a formal record").

[182] 5 U.S.C. § 553.

[183] 486 F.2d 375, 394 (D.C. Cir. 1973).

[184] *Id.* at 392.

[185] Conn. Light & Power Co. v. NRC, 673 F.2d 525, 530–31 (D.C. Cir. 1982) ("it is especially important for the agency to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules"); *accord* United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 25 1 (2d Cir. 1977).

for public comment all information generated before a notice of proposed rulemaking.[186]

As Judge Kavanaugh observed, however, *Portland Cement* doctrine "cannot be squared with the text of § 553."[187] The ABA implicitly acknowledged that *Portland Cement* doctrine is textually ungrounded when it supported codifying the requirement.[188] In *Portland Cement*, the Court tied the requirement to § 553(c) with the observation: "Obviously a prerequisite to the ability to make meaningful comment is to know the basis upon which the rule is proposed."[189] Ronald Levin rejected this weak attempt, commenting that "that interpretation is so far removed from the Act's actual language as to make the line between 'interpretation' and straightforward judicial common law very blurry indeed."[190]

More importantly, *Portland Cement* doctrine tilts the careful balance Congress and the President achieved in the APA in 1946. Congress anticipated that agencies might conduct studies or investigations to formulate the issues in a notice of proposed rulemaking, but it declined to require agencies to release that

---

[186] Lubbers, *supra* note 157, at 277. The Office of Information and Regulatory Affairs (OIRA) made a similar recommendation. Cass R. Sunstein, *Memorandum for the President's Management Council: Increasing Openness in the Rulemaking Process – Improving Electronic Dockets* (May 28, 2010), *available at* https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/inforeg/edocket_final_5-28-2010.pdf.

[187] Am. Radio Relay League v. FCC, 524 F.3d 227, 246 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part and dissenting in part) ("One searches the text of APA § 553 in vain for a requirement that an agency disclose other agency information as part of the notice or later in the rulemaking process."); *see also* Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 894–95 (2007).

[188] American Bar Association Section of Administrative Law and Regulatory Practice, *Comments on H.R. 3010, The Regulatory Accountability Act of 2011*, 64 ADMIN. L. REV. 624, 646 (2012); *see also* 106 A.B.A. ANN. REP. 785–86 (1981). FOIA might require agencies to disclose this information in any event. *See* Matthew S. Brooker, *Taking the Path Less Travelled: FOIA's Impact on the Tension Between the D.C. Circuit and Vermont Yankee*, 102 VA. L. REV. 1101, 1102 (2016).

[189] *Portland Cement*, 486 F.2d at 393 n. 67.

[190] Ronald M. Levin, *The Administrative Law Legacy of Kenneth Culp Davis*, 42 SAN DIEGO L. REV. 315, 328 (2005).

information to the public with the notice.[191] The conservative minority of the Attorney General's Committee would have allowed but not required this.[192] Even the Walter-Logan bill would not have required agencies to include such information in the notice.[193] For courts to impose such a requirement after the fact contradicts Congress's considered judgment and distorts a carefully constructed statute.[194]

C. Disclosure of Ex Parte Contacts

Section 553 says nothing about ex parte contacts in informal rulemaking. In *Sangamon Val. Television Corp. v. U.S.*, however, the D.C. Circuit vacated an FCC rule because a representative of a particular television station discussed the proposed rule with FCC Commissioners after the public comment period had closed and without the knowledge of competing television stations.[195] The court recognized that the proceeding was a rulemaking and not subject to any ban on ex parte communications under the APA. Nonetheless, the court reasoned that the FCC's decision had to be

---

[191] H.R. Rep. No. 79-1980, in LEGISLATIVE HISTORY, *supra* note 107, at 258 ("Summaries and reports may also be issued as aides in securing public comment or suggestions.").

[192] AG'S COMMITTEE REPORT, *supra* note 16, at 228 ("The submission of reports or summaries of hearings, investigations, or conferences, or the publication of tentative drafts of rules, may be utilized as methods of notice of issues in rulemaking.").

[193] *See supra* note 43.

[194] In 1982, the Senate passed a bill that would have required the notice of proposed rulemaking to include:

> a description of any data, methodologies, reports, studies, scientific evaluations, or other similar information on which the agency plans to substantially rely in the rule making, including an identification of each author or source of such information and the purposes for which the agency plans to rely on such information.

S. 1080, 79th Cong. § 3 (1982), *available at* 128 CONG. REC. 5297 (March 24, 1982). The bill died in the House. *See Regulatory Reform Bill Stalled in House*, 38 CQ ALMANAC 523 (1982), *available at* https://library.cqpress.com/cqalmanac/document.php?id=cqal82-1163389&type=hitlist&num=0.

[195] 269 F.2d 221, 224–25 (D.C. Cir. 1959).

"reopened" because it concerned "resolution of conflicting private claims to a valuable privilege."[196]

The court generalized that holding to all rulemaking in *HBO v. FCC* where the court addressed FCC rules and orders concerning the kinds of programs paid television stations could show.[197] During the rulemaking, the FCC had "widespread" ex parte communications with various participants.[198] The record would not suffice for judicial review, the court held, because it did not reveal all of the information that was before the Commission when it made its decision.[199] Even if the Commission had disclosed all of its ex parte contacts, the court continued, the lack of "adversarial discussion among the parties" would still conflict with "fundamental notions of fairness" and "reasoned decisionmaking" and thus necessitate invalidating the decision.[200] Thus, the court concluded that all agency officials and employees involved in rulemaking should refuse to discuss the rulemaking with interested parties.[201] "If ex parte contacts nonetheless occur," the court thought, "any written document or a summary of any oral communication must be placed in the public file … immediately after the communication is received so that interested parties may comment thereon."[202] The court remanded to the FCC to hold an evidentiary hearing "to determine the nature and source of all ex parte pleas" during the rulemaking. [203]

Later that year in *Action for children's Television v. FCC*, a different panel of the D.C. Circuit backed off of *HBO*, opining that ex parte contacts should invalidate a rule only if the contacts materially influenced the agency decision and only where the rulemaking involved competing claims to a valuable privilege, like the *Sangamon Valley* case.[204] But of course one panel of the D.C.

---

[196] *Id.* at 224.

[197] 567 F.2d 9, 17, 35–36 (D.C. Cir. 1977).

[198] *Id.* at 52.

[199] *Id.* at 54.

[200] *Id.* at 55–56.

[201] *See* Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 537 (2011) ("in [*HBO*], the court effectively announced a per se ban on ex parte communications in notice-and-comment rulemaking").

[202] 567 F.2d at 57.

[203] *Id.* at 58.

[204] 564 F.2d 458, 476, 477. (D.C. Cir. 1977). As Richard Pierce pointed out, this "narrow form" of the prohibition on ex parte contacts reflects due process concerns. Richard J. Pierce, Jr., *Waiting for Vermont Yankee III, IV, and V? A Response to Beermann and Lawson*, 75 GEO. WASH. L. REV. 902, 912 (2007).

Circuit cannot overrule another.[205] The actual holding in *Action for Children's Television* was that *HBO* would not applied retroactively to the case at bar.[206] The Administrative Conference of the United States joined the fray a few months later, opposing a general prohibition on ex parte communications in rulemaking, but recommending that agencies "experiment" with procedures to disclose ex parte communication of "significant information or argument" using techniques appropriate to the circumstances.[207]

The following year, the Supreme Court decided *Vermont Yankee*, throwing *HBO*'s holding on ex parte contacts into doubt.[208] Since then, the D.C. Circuit has continued to criticize the holding in *HBO*,[209] going so far as to say that it has been "sharply limited" and "undermined."[210] But the court has "never expressly disavowed the doctrine."[211] Regardless of its continuing validity, *HBO* and the uncertainty in the law pushed agencies toward documenting ex parte contacts.[212]

---

[205] *See* LaShawn A. v. Barry, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (citing United States v. Caldwell, 543 F.2d 1333, 1370 n.19 (D.C.Cir.1974)).

[206] 564 F.2d at 474. Moreover, *Action for Children's Television* concerned an order in which the FCC declined to adopt a rule. *Id. at* 461 n.1.

[207] Administrative Conference of the United States, Recommendation 77-3 (1977).

[208] *See supra* text accompanying notes 143–151.

[209] *See*, *e.g.*, Sierra Club v. Costle, 657 F.2d 298, 400–2 (D.C. Cir. 1981).

[210] Air Transp. Ass'n of America v. FAA, 169 F.3d 1, 7 n.5 (D.C. Cir. 1999).

[211] Jack M. Beermann & Gary Lawson, *supra* note 187, at 885; *see also* Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1788 (2007) ("[T]he D.C. Circuit has vacillated as to whether a ban on ex parte communications in informal proceedings is consistent with *Overton Park* or at odds with *Vermont Yankee*."); *cf.* Marine Eng'rs' Beneficial Ass'n v. Mar. Admin., 215 F.3d 37, 42–43 (D.C. Cir. 2000) (implying that *HBO* conflicts with *Vermont Yankee*).

[212] *See* Lubbers, *supra* note 157, at 307–9; Richard Murphy, *Enhancing the Role of Public Interest Organizations in Rulemaking Via Pre-Notice Transparency*, 47 WAKE FOREST L. REV. 681, 698 (2012) ("it seems that many agencies are striving to ensure transparency of contacts after some formal, public step has been taken to initiate a rulemaking process").

The prohibition on ex parte communications in *HBO* is entirely inconsistent with the text and history of the APA.[213] Long before Congress began contemplating administrative reform, the Supreme Court held in *Bi-Metallic Investment Co. v. State Board of Equalization* that the judicial model of adjudication does not apply when the government makes general policy.[214] The APA reflects that judgment by providing for notice and comment rulemaking. It is not required to be "on the record"; rather, agencies may rely on information and communications outside the public record.[215] Moreover, in the Government in the Sunshine Act of 1976, Congress added a prohibition on ex parte communications in formal proceedings but not informal rulemaking.[216] "If Congress wanted to forbid or limit ex parte contact in every case of informal rulemaking, it certainly had a perfect opportunity of doing so when it enacted the Government in the Sunshine Act."[217]

D. The Concise General Statement

Section 553 of the APA requires agencies to incorporate in their final rules "a concise general statement of their basis and purpose."[218] "[I]n the hands of judges," however, that statement has "turned out to be not at all concise."[219] Hard-look doctrine is the prime culprit, with pre-enforcement review as its co-conspirator.[220] As Richard Pierce noted, "[a]ny agency that has the

---

[213] *See* Beermann & Lawson, *supra* note 211, at 883–88.

[214] 239 U.S. 441, 445 (1915); *see also* Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1117–18 (1984); Nathanson, *supra* note 181, at 383.

[215] *See supra* text accompanying notes 172–181.

[216] Government in the Sunshine Act, Pub. L. No. 94-409 § 4(a), 90 Stat. 1241 (1976), *codified at* 5 U.S.C. § 557(d)(1).

[217] Action for Children's Television v. FCC, 564 F.2d 458, 474 n.28 (D.C. Cir. 1977); *see also* Nathanson, *supra* note 181, at 390 (opining that the history of the Government in the Sunshine Act "seems to reflect a general consensus that a ban on ex parte communications in § 553 rulemaking proceedings would be undesirable").

[218] 5 U.S.C. § 553(c).

[219] M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1432 (2004); *see also* Auto. Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968) (cautioning against "an overly literal reading of the statutory terms 'concise' and 'general'").

[220] *See* Aaron L. Nielson, *Visualizing Change in Administrative Law*, 49 GA. L. REV. 757, 783 (2015); Richard J. Pierce, Jr., *Which Institution Should Determine Whether an Agency's Explanation of*

temerity to comply with [the] statutory command [for a 'concise general statement'] in any rulemaking that is subjected to judicial review is virtually certain to be reversed through application of the hard-look doctrine."[221]

As enunciated in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, an agency must "articulate a satisfactory explanation for its action."[222] Now, such explanations must be robust.[223] Moreover, agencies cannot rely in court on post hoc explanations,[224] another rule that has no apparent link to the APA's text or history.[225] Thus, "an agency must invest a great deal of time and effort in preparing the statement of basis and purpose if its rule is to withstand close judicial review."[226] Among other things, an agency must explain why it rejected alternatives,[227] "what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did."[228] Agencies must also respond to "significant points raised by the public."[229] That is, the

---

a Tax Decision is Adequate?: A Response to Steve Johnson, 64 DUKE L.J. ONLINE 1, 8–10 (2014); Shapiro & Murphy, *supra* note 152, at 342.

[221] Pierce, *supra* note 204, at 906.

[222] 463 U.S. 29, 43 (1983).

[223] *See* A BLACKLETTER STATEMENT, *supra* note 157, at 29–30.

[224] *State Farm*, 463 U.S. at 43, 50 (applying *SEC v. Chenery*, 332 U.S. 194, 196 (1947), to informal rulemaking); *see also* Murphy, *supra* note 176, at 839–42 (explaining how the Supreme Court in *State Farm* rejected its own precedent and applied the prohibition on post-hoc justifications to informal rulemaking).

[225] Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952, 974 (2007); *see also* Shapiro & Murphy, *supra* note 152, at 334, 362 (arguing that the Supreme Court should allow agencies to rely on post hoc rationales "based on information exposed to outside scrutiny during the notice and comment process").

[226] Lubbers, *supra* note 157, at 341.

[227] Indep. U.S. Tanker Owners Comm. v. Dole, 809 F.2d 847, 852 (D.C. Cir. 1987); Lubbers, *supra* note 157, at 341. Other statutes might require discussion of alternatives. *See* Lubbers, *supra* note 157, at 341.

[228] Auto. Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968).

[229] Home Box Office, Inc. v. F.C.C., 567 F.2d 9, 35–36 (D.C. Cir. 1977); *see also* Action on Smoking and Health v. CAB, 699 F.2d 1209, 1217 (D.C. Cir. 1983).

agency must discuss "points … which, if adopted, would require a change in an agency's proposed rule.[230]

Again, this doctrine is inconsistent with the text and history of the APA.[231] The Walter-Logan bill did not require any statement to accompany a final rule. It gave the D.C. court of appeals exclusive jurisdiction over challenges to rules and limited such challenges to questions of law: claims that the rule was unconstitutional, in conflict with a statute, lacking statutory authority, or in violation of the bill's procedural requirements. The court could take evidence if necessary to answer those questions.[232] Similarly, the AG's Committee minority bill would not have required a statement to accompany a final rule. A rule would either be reviewed "upon contest of its application to particular persons or subjects" or "upon proper application for declaratory judgment," which, like the Walter-Logan bill, would be limited to purely legal questions.[233]

The ABA's post-war proposal would have required agencies to provide "reasons and conclusions" for rules.[234] The Senate Judiciary Committee changed that language to "concise general statement."[235] As explained above, there was little disagreement about that provision. The Senate Committee explained that a "concise general statement" would be adequate to ensure that agencies explained the factual and legal bases for rules and their objects "with reasonable fullness."[236] The Attorney General did not disagree, but took a different tone in opining that a "concise general statement" would not require any "elaborate analysis"; it was just meant to inform the public of the purpose and justification for a rule.[237] When the Supreme Court opened to door to pre-enforcement review under the hard look standard in the 1960s and 1970s, the purpose for the "concise general statement" shifted from

---

[230] *Home Box Office*, 567 F.2d at 35 n.58; *accord* Am. Min. Cong. v. U.S. E.P.A., 965 F.2d 759, 771 (9th Cir. 1992). Other statutes or Executive Orders may require agencies to respond to comments as well. *See* Lubbers, *supra* note 157, at 343–44.

[231] Keller, *supra* note 164, at 443–44.

[232] H.R. 6324, 76th Cong. § 3 (1939).

[233] AG'S COMMITTEE REPORT, *supra* note 16 at 230; *see also id.* at 231 (explaining that any necessary factual development would occur in the agency, not the court). Under the common law, any factual predicate for a rule would be presumed. *See supra* note 176.

[234] S. 2030, 78th Cong. § 3(b) (1944).

[235] *See supra* text accompanying notes 112–116.

[236] LEGISLATIVE HISTORY, *supra* note 107, at 18–19, 223–24.

[237] *Id.* at 225; *see also* AG'S MANUAL, *supra* note 16, at 32.

informing the public to enabling judicial review.[238] Clearly, the courts, in employing the "concise general statement" for that purpose, have far exceeded the Senate's "reasonable fullness" standard.

IV. UNINTENDED CONSEQUENCES

The fact that the judicial rules about rulemaking contradict the text and history of the APA is sufficient to warrant their reversal. But these rules, although well intentioned, have had unintended consequences that have reached a frightening crescendo.

A. Institutional Incompetence

Courts are not well positioned to adjust the benefits and burdens of the regulatory state. In particular, courts should avoid disturbing the balance Congress, the Executive Branch, the ABA, and other interested parties achieved in the APA after years of intensive deliberation.[239]

I have demonstrated elsewhere that administrative common law lacks public deliberation and raises separation of powers and electoral accountability concerns.[240] Administrative common law suffers from a deliberation deficiency because "it is virtually unmoored from public deliberation."[241] Unlike other statutes, no single agency issues binding interpretations of the APA in an ongoing dialogue with the public and the courts.[242] Indeed, Gillian Metzger, administrative common law's best advocate, admits that it is hard "to square with the principle of democratic government" because it is "shielded from public acknowledgment and scrutiny."[243]

Administrative common law also raises distinct separation of powers and electoral accountability concerns. The Constitution assigned to Congress the power to make policy in an effort to avoid tyranny, safeguard liberty, and ensure political

---

[238] *See supra* text accompanying notes 158–171.

[239] *Cf.* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1452 (1992) (suggesting that judges should approach review of rules with caution because "[s]tringent substantive judicial review can frustrate the implementation of congressionally articulated policies.").

[240] Kovacs, *supra* note 11, at 1254–60.

[241] *Id.* at 1257.

[242] *Id.*

[243] Metzger, *supra* note 153, at 1356.

accountability.[244] Thomas Merrill argued that federal common law shifts policymaking power from Congress to the judiciary and erodes electoral accountability and thus legitimacy.[245] That argument would invalidate all federal common law, and thus goes too far.[246] Administrative common law, however, is different because Congress, the Executive Branch, and other interested parties spent so much time and effort building the APA. For the courts to ignore or contradict that exceptional effort raises particular concern.[247] "The Act's history raises the separation-of-powers stakes."[248]

Those concerns extend beyond true common law to interpretations of the APA that clearly contradict the statutory text and history. The quality of public deliberation underlying the APA is not unique, but it is certainly unusual. The APA developed over 17 years, with numerous, voluminous reports, hundreds of pages of hearing transcripts, multiple drafts, and hours and hours of debate.[249] That deliberation led the APA to become a superstatute, deeply entrenched in our law.[250] For the courts to disrespect that deliberation and readjust the balance embodied in the APA raises grave concerns. As William Eskridge and John Ferejohn showed, courts should take the "deliberative process seriously, as having significant normative force," and defer to statutes and policies that reflect substantial republican deliberation.[251]

On a more practical level, generally the courts hear from one agency at a time in one case at a time. Congress, on the other hand, hears from multiple agencies and interest groups and considers varied contexts and approaches to solving problems.[252] Thus, in administrative law, Congress is better situated to determine the most effective approach and anticipate the consequences of its decisions.[253] Nicholas Bagley demonstrated that when a statute

---

[244] Kathryn E. Kovacs, *Scalia's Bargain*, 77 OHIO ST. L.J. 1155, 1191 (2016).

[245] Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 23, 27 (1985).

[246] Kovacs, *supra* note 11, at 1256; Metzger, *supra* note 153, at 1347–48.

[247] Kovacs, *supra* note 151, at 36.

[248] Kovacs, *supra* note 11, at 1257.

[249] *See generally* Shepherd, *supra* note 19.

[250] Kovacs, *supra* note 11, at 1223–37.

[251] Eskridge & Ferejohn, *supra* note 12, at 435–36.

[252] *See* Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1322 (2014); Kovacs, *supra* note 151, at 36.

[253] Bagley, *supra* note 252, at 1322, 1330.

balances "a host of incommensurate values," "[t]he courts have no constitutional authority to revise that judgment and no epistemic basis for thinking they can make a better one."[254] The judicial rules about rulemaking arose from valid concerns, and the courts attempts to remedy those concerns were well intentioned. But the courts could not foresee the wide-ranging effects of their doctrinal shifts.[255]

Clark Byse's words from forty years ago hold true today. He said that judicial intrusion in rulemaking procedure conflicts with "the appropriate institutional roles of court, legislature, and agency in our form of government."[256] It reflects "insensitivity to the concerns of the agency in deploying its resources to conduct its business, undue self-confidence in the assumption that the court's procedural prescription is 'best,' and lack of trust in the political process in failing to recognize that Congress and the agencies do respond to representations by the public and by private interests."[257]

Conflict with the text and history of the APA provides reason enough to abandon the judicial rules about rulemaking. Those rules, however, also have had significant, negative, unintended consequences.

B. Stifling Agency Policy Making

1. Rulemaking Ossification

The judicially created rules about rulemaking have contributed to the "ossification" of rulemaking.[258] Ossification literally refers to the process of creating bone. In this context, it refers to the increasing time and resources needed to issue a rule.[259] There is some debate about the extent to which rulemaking has become

---

[254] *Id.* at 1330.

[255] *Cf.* Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AMER. SOC. REV. 894, 900 (1936) ("situations which demand … immediate action of some sort, will usually involve ignorance of certain aspects of the situation and will bring about unexpected results").

[256] Clark Byse, *Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 HARV. L. REV. 1823, 1831–32 (1978).

[257] *Id.*

[258] *See* McGarity, *supra* note 239, at 1386.

[259] Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493, 1494 (2012).

ossified.[260] I have no doubt, however, that rulemaking is time and resource intensive, sufficiently so that it dissuades agencies from undertaking the effort and presidents from relying on it.[261]

Of course, other factors contribute to rulemaking ossification, including the requirements of Executive Orders and other statutes,[262] as well as agency mismanagement.[263] Richard Murphy observed that "[t]he result of all of these encrustations on the rulemaking process is that significant legislative rulemaking via notice-and-comment rulemaking, which was once easy and supposed to be so, is now a complex, time-consuming, resource-intensive procedural maze."[264]

---

[260] *Compare id. with* 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 (2012).

[261] Aaron L. Nielson, *Sticky Regulations*, __ U. CHI. L. REV. __, (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2950732, at 3 ("nearly everyone agrees that those same procedures give rise to ossification make it harder for agencies to regulate); *see also id.* at 28 (stating that the ossification thesis is "common ground among many administrative law scholars); Lynn E. Blais & Wendy E. Wagner, *Emerging Science, Adaptive Regulation, and the Problem of Rulemaking Ruts*, 86 TEX. L. REV. 1701, 1709 (2008) ("the conclusion that agencies are regulating too little and too slowly seems hard to dispute"); *A Review of Regulatory Reform Proposals, Hearing Before the Committee on Homeland Security and Government Affairs*, 114th Cong. (2015) (statement of Sidney A. Shapiro), available at https://www.hsgac.senate.gov/hearings/a-review-of-regulatory-reform-proposals, at 7 ("the regulatory process has become so ossified by needless or duplicative procedures and analyses that larger rulemakings commonly require several years—possibly more than a decade—to complete"); Shapiro & Murphy, *supra* note 152, at 354 (pronouncing as "beyond reasonable controversy the observations that much rulemaking is resource intensive and that "agencies are commonly starved for resources").

[262] *See* Lubbers, *supra* note 157, at 12, 16–30, 129–63; Richard Murphy, *supra* note 212, at 687; Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 FLA. ST. L. REV. 533 (2000).

[263] *See* McGarity, *supra* note 239, at 1437–38.

[264] Murphy, *supra* note 212, at 687–88.

Most proponents of the ossification thesis, however, attribute it "primarily to the courts."[265] Richard Pierce believes that hard look doctrine is "the most important factor"[266] and that *Abbott Labs*' authorization of pre-enforcement review "played a major role leading to ossification of rulemaking."[267] The extent to which those doctrines contribute to rulemaking ossification is unclear, but clearly they contribute to some degree. The arguments I present here could apply to these judicially created rules about judicial review as well. But that inquiry raises additional concerns and complexities that warrant separate treatment. In any event, I take it as beyond debate that the judicial rules about rulemaking also increase the burden of rulemaking.[268] And any contribution to that burden is too much, particularly when it comes from the courts and contradicts the APA.

2. Rules About Rulemaking

Among the judicial rules about rulemaking, the prime culprit may be judicial enhancement of the "concise general statement" requirement, which flowed in large part from pre-enforcement review under the hard look doctrine.[269] In the 1960s and 1970s, the federal government morphed, and we entered the "age of rulemaking."[270] New agencies implemented policy through

---

[265] Pierce, *supra* note 259, at 1494; *see also* Pierce, *supra* note 166, at 65.

[266] Pierce, *supra* note 204, at 920; *see also* Blais & Wagner, *supra* note 261, at 1705–6 ("most scholars agree that the predominant culprit is … probing judicial scrutiny").

[267] Pierce, *supra* note 166, at 89. Pierce concludes that eliminating pre-enforcement review is "too high a price to pay to obtain a modest step toward deossification of rulemaking." *Id.* at 93. While the ossification thesis is more or less accepted, "there is no general consensus that the costs of ossification outweigh the benefits of close and sustained judicial oversight." Blais & Wagner, *supra* note 261, at 1709.

[268] *See* McGarity, *supra* note 239, at 1400-01; Nielson, *supra* note 261, at 10-11; Shapiro & Murphy, *supra* note 152, at 332-33, 339-42; Alec Anthony Webley, *Seeing through a Preamble, Darkly: Administrative Verbosity in an Age of Populism and 'Fake News'*, __ ADMIN. L. REV. __ (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3014162, at 9.

[269] *See infra* text accompanying note 220.

[270] Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 544 (1989); *see also* Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139,

informal rulemakings "that would have a sweeping impact across the American economy."[271] Scholars began to appreciate that rulemaking generally is easier and more participatory than adjudication, and it enables avoidance of agency capture.[272] The courts' responses to these developments, though well intentioned to support judicial review and enhance accountability, fairness, and accuracy, resulted at least in part from the mistaken application of adjudicative principles to rulemaking.[273]

The augmentation of the "concise general statement" requirement is a case in point. Requiring agencies to explain their rules thoroughly improves accuracy and "demonstrate[s] responsiveness to commenters, which arguably enhances accountability, fairness, and thus legitimacy."[274] The result, however, is that rulemaking preambles are getting longer, independent of the length of the rule text.[275] As it gets easier to submit comments, the agency's burden of processing and responding to those comments grows.[276] Thomas McGarity said that the "modest obligation" to provide a "concise general statement" "has blossomed" and invited abuse by regulated entities "who hire consultants and lawyers to pick apart the agencies'

1159 (2001); Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 688 (2016).

[271] Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 755 (1996); *see also* Bruff, *supra* note 270, at 544; Shapiro & Murphy, *supra* note 152, at 338 (pointing out that the EPA's first regulation establishing air quality standards under the Clean Air Act was accompanied by a one-page explanation); Peter M. Shane, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 146 (2009).

[272] Strauss, *supra* note 271, at 755–56; *see also* Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, 57 LAW & CONTEMP. PROBS. 185, 185–86 (1994) ("Regulatory reform movements in the 1960s emphasized rulemaking and extolled its virtues of efficiency, fairness, and political accountability.").

[273] Beermann & Lawson, *supra* note 211, at 901; Nielson, *supra* note 261, at 11; Shapiro & Murphy, *supra* note 152, at 335; Strauss, *supra* note 271, at 757 ("To some extent, these and other developments were the product of mistaken judicial analogies between the newly important rulemakings and what were for judges the more familiar forms of adjudicative action.").

[274] Shapiro & Murphy, *supra* note 152, at 349.

[275] Webley, *supra* note 268, at 34, 35, 39.

[276] Nielson, *supra* note 261, at 11.

preambles and background documents and launch blunderbuss attacks on every detail of the legal and technical bases for the agencies' rules."[277]

No doubt, Alec Webley is correct in supposing "that agencies would make rules faster if they did not have to respond to unlimited information coming in with a preamble of tremendous length."[278] I also have no doubt that, if courts are to review agency rulemakings, agencies must provide some sort of explanation. But judicial distortion of Congress's considered judgment in the APA has had unintended and unfortunate consequences.[279]

Closely related to the blossoming preamble is the need to produce a rulemaking record. This requirement too grew out of pre-enforcement review under the hard look standard, and it too serves laudable goals: it "allows the public to fully assess and effectively comment on the agency's proposed rule" and "ensures that the reviewing court can evaluate the propriety of the agency's rulemaking process and of the final rule."[280] But it too has contributed to the burden of rulemaking.[281] Aside from the hours of staff time required to produce a record one must add the

[277] McGarity, *supra* note 239, at 1400; *see also* Pierce, *supra* note 220, at 10; Shapiro & Murphy, *supra* note 152, at 351.

[278] Webley, *supra* note 268, at 9; *see also* Nicholas R. Parrillo, *Federal Agency Guidance: An Institutional Perspective* 146 (draft Sept. 18, 2017), *available at* https://www.acus.gov/sites/default/files/documents/parrillo-agency-guidance-draft-report.pdf.

[279] *See* Shapiro & Murphy, *supra* note 152, at 336 ("the courts' transformation of rulemaking has undermined agency effectiveness in significant and unnecessary ways, necessitating a rebalancing of administrative law values").

[280] *See* Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629, 641 (2017); *see also* Beermann & Lawson, *supra* note 211, at 900; Charles H. Koch, Jr. & Richard Murphy, 1 ADMIN. L. & PRAC. § 4:44 (3d ed. 2018) ("The rulemaking record serves three major purposes. First the record provides the body of information necessary to participate in the rulemaking. Second the record is the body of information the agency relies on in promulgating its final rule. Third the record provides support for the final rule at judicial review.").

[281] *See* Shapiro & Murphy, *supra* note 152, at 341. *But see* William Funk, *Rationality Review of State Administrative Rulemaking*, 43 ADMIN. L. REV. 147, 167 (1991) (opining that "as a procedural requirement, the need for a record for rulemakings imposes minimal burdens on agencies").

payments to contractors[282] as well as increased litigation.[283] Again, judicial review necessitates some sort of record, but the courts should respect the deliberation embodied in the APA and leave judgments about balancing the benefits and burdens of rulemaking procedure to Congress.

Providing notice of the information considered in drafting a notice of proposed rulemaking should not overburden agencies in most cases. And certainly, as the Attorney General's Manual states, agencies must provide notice that is "sufficiently informative to allow an opportunity to participate intelligently in the rulemaking process."[284] As Sydney Shapiro and Richard Murphy explained, enhanced notice requirements improve both the fairness of the rulemaking process and the quality of the final product.[285] They also help to provide a "foundation for a serious adversarial critique" of agency rules.[286]

But moving from the EPA's obvious abuse in *Portland Cement* to an across-the-board judicial rule was unjustified. In some circumstances, requiring such notice will overburden the agency, inundate the public, and provide hypertechnical grounds for seeking remands.[287] Perhaps more importantly, this requirement blurs the line between formal rulemaking—in which the agency's decision is limited to the record—and informal

---

[282] *See* Paul R. Verkuil, *The Wait Is over: Chevron As the Stealth Vermont Yankee II*, 75 GEO. WASH. L. REV. 921, 928 (2007) ("The use of consultants to prepare rules for review has become a common practice.").

[283] *Cf.* Jennifer Nou & Edward H. Stiglitz, *Strategic Rulemaking Disclosure*, 89 S. CAL. L. REV. 733, 745 (2016) (arguing that the risk of litigation arising from the rulemaking record pressures agencies to shift their information gathering to before the public comment period).

[284] AG'S MANUAL, *supra* note 16, at 30; *see also* Nielson, *supra* note 261, at 10–11.

[285] Shapiro & Murphy, *supra* note 152, at 349.

[286] *Id.* at 340; *see also* Beermann & Lawson, *supra* note 211, at 900; Walker, *supra* note 280, at 640.

[287] *Cf.* Richard J. Pierce, Jr., *Waiting for Vermont Yankee III, IV, and V? A Response to Beermann and Lawson*, 75 GEO. WASH. L. REV. 902, 917 (2007) ("Of course, the requirement to disclose the studies and other data sources on which the agency proposes to rely must be limited in ways that avoid imposing large unnecessary burdens on the informal rulemaking process."); Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1331–32 (2010) (detailing the downsides of information overload).

rulemaking—in which it is not.[288] The courts should not have taken it on themselves to amend the APA in this manner.

Similarly, the rule requiring disclosure of ex parte contacts was inspired by a desire to ensure that agencies act in the best interest of the public, rather than that of regulated industries, and that the public discussion in rulemaking not be "reduced to a sham."[289] It too resulted from application of adjudicative principles to rulemaking.[290] As a practical matter, it does not seem like a big deal, but requiring it in all cases imposes yet another burden that may become unwieldy in some circumstances. Moreover, requiring disclosure of ex parte contacts in rulemaking actually may hinder dialogue with regulated parties and the public and thus undermine regulatory legitimacy.[291] Standing alone, each of these judicial rules about rulemaking may seem reasonable, but taken together, they impose a significant burden on agency rulemaking.

3. Subregulatory Policy

The difficulty of rulemaking pushes agencies to make policy through subregulatory means.[292] The conservative minority of the Attorney General's Committee anticipated that if rulemaking were made too difficult, "rules will either not be made or policy will be driven underground, as it were, and remain inarticulate or secret."[293] The minority did not anticipate that agencies would find other ways to communicate their policy decisions such as

---

[288] Richard B. Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805, 1816 (1978).

[289] *See* Home Box Office v. FCC, 567 F.2d 9, 53, 54 (D.C. Cir. 1977); *see also id.* at 56 (finding secrecy inconsistent with "fundamental notions of fairness"); Murphy, *supra* note 212, at 694–95.

[290] *See Home Box Office*, 567 F.2d at 55 (expressing a desire to ensure "adversarial critique" of the agency); Beermann & Lawson, *supra* note 211, at 884.

[291] *See* Sierra Club v. Costle, 657 F.2d 298, 400–401 (D.C. Cir. 1981) (criticizing *HBO v. FCC*); *see also* Murphy, *supra* note 212, at 696–97.

[292] Blais & Wagner, *supra* note 261, at 1705; Stephen M. Johnson, *Ossification's Demise? An Empirical Analysis of EPA Rulemaking from 2001–2005*, 38 ENVTL. L. 767, 778 (2008); Mashaw, *supra* note 272, at 186; McGarity, *supra* note 239, at 1386; Parrillo, *supra* note 278, at 31–32.

[293] AG'S COMMITTEE REPORT, *supra* note 16, at 225.

memoranda, manuals, handbooks, letters, and litigating positions.[294]

Such subregulatory policy is an attractive alternative to rulemaking because it is less time- and resource-intensive. It is faster and more flexible. It dispels uncertainty within an agency and gives regulated parties increased predictability without the burden of rulemaking.[295]

Subregulatory policy is limited, however, insofar as it cannot carry the force of law.[296] When an agency attempts to make such policies binding or if the policies are binding as a practical matter, courts fault the agency for not going through notice and comment rulemaking.[297] If instead agencies permit "ad hoc departures" from subregulatory policies—as they must if their policies are truly non-binding—they often face "criticism and antagonism" from industry, NGOs, the media, and Congress because individualized departures may carry an implication of impropriety.[298] Maintaining "principled flexibility" in implementing subregulatory policy is expensive and "logistically challenging."[299] Agencies end up unable to respond to elections or changing circumstances in a timely and effective manner.[300]

4. Congressional Ossification

Ideally, Congress would make key policy decisions following serious deliberation. Congress is capable of such action and

---

[294] *Cf.* Parrillo, *supra* note 278, at 186 ("Guidance consists of agency statements of general applicability, not binding on members of the public, that advise the public of the manner in which the agency proposes to exercise a discretionary power or of the agency's construction of the statutes and legislative rules it administers.").

[295] *Id.* at 7, 30–31; *see also* Stephen M. Johnson, *In Defense of the Short Cut*, 60 U. KAN. L. REV. 495, 507–08 (2012).

[296] Parrillo, *supra* note 278, at 23.

[297] *E.g.*, Agricultural Retailers Ass'n v. Dept. of Labor, 837 F.3d 60, 65 (D.C. Cir. 2016); General Elec. Co. v. EPA, 290 F.3d 377, 384 (D.C. Cir. 2002).

[298] Parrillo, *supra* note 278, at 98.

[299] *Id.* at 107.

[300] I assume that many of the recent agency attempts to change policy quickly will fail in the courts. *See* Clean Air Council v. Pruitt, 862 F.3d 1, 4 (D.C. Cir. 2017); Coral Davenport, *Trump's Environmental Rollbacks Were Fast. It Could Get Messy in Court*, N.Y. TIMES (Jan. 31, 2018), https://www.nytimes.com/2018/01/31/climate/trump-zinke-environmental-rollback.html.

deliberation "even in periods of divided government and partisan acrimony."[301] More often, however, Congress fails to prescribe policy. Even when Congress manages to Act, it often does so with insufficient deliberation.

One might thank the federal courts for keeping administrative law up to date in the face of congressional inaction.[302] But the courts' willingness to make law has enabled Congress's inaction. Instead of making Congress's decisions for Congress, the courts should make decisions that inspire Congress to deliberate. William Eskridge and John Ferejohn refer to this as "deliberation-inducing" review.[303] The courts should try to reverse congressional inertia, they argued, and "jump-start the political process by forcing a fundamental normative discussion."[304]

The courts have not followed Eskridge and Ferejohn's advice in administrative law. Thus, more often than not, Congress abdicates its responsibility to make key policy decisions. At the same time, it has become increasingly difficult for agencies to pick up the slack through rulemaking.[305] In *INS v. Chadha*, the Supreme Court observed that each branch of government exerts hydraulic pressure "to exceed the outer limits of its power."[306] By the same token, when a branch of government does not exercise its power, it creates a decisional vacuum into which one of the other branches

---

[301] Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1460 (2014); *see also* Kovacs, *supra* note 11, at 1258–59.

[302] *See, e.g.*, Metzger, *supra* note 153, at 1322, 1329, 1331.

[303] Eskridge & Ferejohn, *supra* note 12, at 289, 436.

[304] *Id.* at 56; *see also* Kovacs, *supra* note 11, at 1249.

[305] Agencies might turn to adjudication instead. *See* Brian J. Shearer, *Outfoxing Alaska Hunters: How Arbitrary and Capricious Review of Changing Regulatory Interpretations Can More Efficiently Police Agency Discretion*, 62 AM. U. L. REV. 167, 170 (2012); Michael A. Livermore, *Reviving Environmental Protection: Preference-Directed Regulation and Regulatory Ossification*, 25 VA. ENVTL. L.J. 311, 338 (2007). The apparatus required for case-by-case decisionmaking may impose even more of a burden than rulemaking. *See* Bruff, *supra* note 270, at 454.

[306] 462 U.S. 919, 951 (1983); *see also* Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 689 (1978) (critiquing the "hydraulic' model" in which "[t]he fluid nature and scope of each branch's functions expand to fit circumstances until they reach the limit set by a competing branch's function").

gets drawn. When neither Congress nor agencies make policy efficiently, the President naturally fills the void.[307]

C. Fomenting the Unitary Executive

1. Presidential Direct Action[308]

The burden of rulemaking makes agencies less able to respond to elections and other changes in circumstances, which drives the President to make key decisions himself. Sometimes the President orders an agency head to take a certain action;[309] other times he takes action himself.[310] Recent examples of the latter include President Trump's Proclamation banning immigration from certain countries,[311] his Executive Order rescinding federal climate change policies,[312] his Executive Order requiring that two regulations be

[307] The courts may step in as well. *See* Jud Mathews, *Presidential Administration in the Obama Era*, draft at 3, *available at* https://ssrn.com/abstract=2927494 (arguing that new Supreme Court administrative law doctrines seek to "hold the line on executive branch aggrandizement"); Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 3, 38 (2017) ("the most common response to these fears of unaccountable and aggrandized executive power is an assertion of a greater role for Article III courts").

[308] The term "direct action" comes from Phillip J. Cooper, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION 4 (2d ed. 2014).

[309] *See generally* Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006).

[310] *See generally* Cary Coglianese, *The Emptiness of Decisional Limits: Reconceiving Presidential Control of the Administrative State*, 69 ADMIN. L. REV. 43 (2017); Cooper, *supra* note 308 (providing an exhaustive analysis of the many forms of executive direct action including executive orders, memoranda, and proclamations).

[311] Exec. Order No. 13,769 § 3(c) (2017); *see also* Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. REG. __ (forthcoming), draft at 30.

[312] Exec. Order No. 13,783 (2017); *see also* Mashaw & Berke, *supra* note 311, at 52.

repealed for every one promulgated,[313] and his Tweet banning transgendered people from serving in the military.[314]

Clearly, there are other reasons for this phenomenon: among them, the President's desire to take political credit or, on the flip side, his recognition that, whatever the outcome, he will be saddled with the political blame.[315] The American public seems to equate the Executive Branch with the Fourth Branch.[316] This phenomenon, however, cuts both ways. The President may be inclined to make policy decisions himself so that he can take the credit if the outcome is politically popular, but he may prefer to leave policymaking to his subordinates so that he can distance himself if the outcome is not politically popular.[317]

The President also may feel the need to make policy himself because Congress's capacity for legislating has atrophied.[318]

---

[313] Exec. Order No. 13,771 (2017); *see also* Mashaw & Berke, *supra* note 311, at 70.

[314] *See* Abby Phillip, Thomas Gibbons-Neff, & Mike DeBonis, *Trump announces that he will ban transgender people from serving in the military*, THE WASHINGTON POST (July 26, 2017), https://www.washingtonpost.com/world/national-security/trump-announces-that-he-will-ban-transgender-people-from-serving-in-the-military/2017/07/26/6415371e-723a-11e7-803f-a6c989606ac7_story.html?utm_term=.76454357e11f.

[315] Daniel A. Farber, *Presidential Administration Under Trump* 23 (2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015591 (envisioning a "feedback cycle in which presidents take control of major agency decisions, fortifying the public's tendency to assign blame to the president for unpopular outcomes, which in turn strengthens the pressure on the president to assert control"); *see also* Cary Coglianese and Kristin Firth, *Separation of Powers Legitimacy: An Empirical Inquiry into Norms About Power*, 164 U. PA. L. REV. 1869, 1900 (2016) (finding that people are more likely to blame the President for poor agency outcomes than they are to credit him for positive agency outcomes); Cooper, *supra* note 308, at 65, 95; Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2310 (2001); Stack, *supra* note 309, at 264, 317.

[316] Mashaw & Berke, *supra* note 311, at 41.

[317] *Cf.* Cooper, *supra* note 308, at 107 (pointing out that presidential direct action "often makes the White House a lightning rod for criticism").

[318] *Id.* at 79, 395; Kagan, *supra* note 315, at 2310; Mashaw & Berke, *supra* note 311, at 57; Mathews, *supra* note 307, at 13–14;

Moreover, a President can only rely on Congress to make policy when the President's party controls both houses, which has been rare since World War II.[319] When Congress is held by the opposing party, it may try to stymie the President's agenda.[320] "The more the demands on the President for policy leadership increase and the less he can meet them through legislation, the greater his incentive to tap the alternate source of supply deriving from his position as head of the federal bureaucracy."[321]

Rulemaking ossification also has contributed to the rise of presidential direct action. As Phillip Cooper explained, presidents may use executive direct action to avoid lugubrious congressional procedures or "to avoid the sometimes equally time-consuming administrative procedure," particularly rulemaking.[322] Indeed, agencies may ask the President to establish policy himself to avoid the burden of rulemaking and to make it more difficult for adversaries to challenge the policy in court.[323]

President Trump may not have made immigration policy by presidential fiat if the Department of Homeland Security could issue a rule more quickly. He could have left the matter to a friendly majority in Congress, as President Reagan did.[324] Or he could have taken credit for the policy change like President Obama did—by making a Rose Garden announcement of a policy, which

---

Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805, 856–57 (2017).

[319] Kagan, *supra* note 315, at 2311.

[320] Stack, *supra* note 309, at 321 (citing Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 688–715 (2000)); *see also* Cooper, *supra* note 308, at 143–45, 388 (demonstrating the use of presidential direct action to circumvent Congress); Kagan, *supra* note 315, at 2250 (tying presidential administration to the "re-emergence of divided government").

[321] Kagan, *supra* note 315, at 2312. There may be many other inspirations for executive direct action as well. *See* Cooper, *supra* note 308, at 66 ("paying political debts, demonstrating action for a constituency, responding to political adversaries, or sending political signals"), 138–39.

[322] Cooper, *supra* note 308, at 85.

[323] *Id.* ("There is nothing new about the practice of generating executive orders from outside the White House."). Cooper recognized the irony that rulemaking ossification may inspire presidential direct action, yet presidential direct action has contributed to rulemaking ossification. *Id.* at 86, 108–9.

[324] Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3445 (1986).

later would be encapsulated in a secretarial memorandum.[325] Instead, Trump issued a Proclamation banning immigration from certain countries immediately.[326] Trump's desire for fast results explains his decision to change policy himself without going through agency processes.[327]

In the absence of empirical data, it is fair to assume that, if rulemaking were quicker and easier, the President would be less inclined to rule by decree. In the very least, the pressure on the President to make policy himself would decrease. If we are willing to accept that congressional inertia has contributed to the rise of the unitary executive, we must accept that agency inertia has as well. In a hydraulic system of government, power, "like water, has to go somewhere."[328]

2. From Nixon to Trump

Presidential direct action is not a new phenomenon.[329]

> American history provides myriad examples of presidential interpretations of the faithful execution duty that can either delight or dismay the observer. Lincoln's Emancipation Proclamation stands at the apex…. At the nadir sit actions such as Jackson's Indian removal, Andrew Johnson's conduct of Reconstruction, and

---

[325] https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf; *see also* Mashaw & Berke, *supra* note 311, at 22–23.

[326] Exec. Order No. 13,769 § 3(c) (2017).

[327] *Cf.* Cooper, *supra* note 308, at 386 (explaining that presidents often take direct action because they believe traditional approaches will be too slow).

[328] Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 Tex. L. Rev. 1705, 1708 (1999) ("Our account, then, is 'hydraulic' in two senses. First, we think political money, like water, has to go somewhere. It never really disappears into thin air. Second, we think political money, like water, is part of a broader ecosystem. Understanding why it flows where it does and what functions it serves when it gets there requires thinking about the system as a whole.").

[329] Cooper, *supra* note 308, at 20 ("Rule by presidential decree has been the subject of serious controversy since the administration of George Washington, and the debates continue.").

> Franklin Roosevelt's wartime internment of Japanese Americans.[330]

Presidential direction of agency rulemaking, however, has increased over the past several decades.[331]

Harold Bruff credits President Nixon with the first foray into presidential management of agency rulemaking with his "Quality of Life" review, which in practice targeted EPA regulations.[332] President Ford initiated fiscal impact review with Inflation Impact Statements.[333] President Carter continued the trend by creating the Regulatory Analysis Review Group to review analyses of proposed rules. He also created the Regulatory Council to publish a semi-annual synopsis of major regulations under development.[334]

Within a month of his inauguration, President Reagan empowered the Office of Management and Budget with review of proposed regulations.[335] He followed up four years later by giving OMB the authority to review agency statements of their "policies, goals, and objectives for the coming year" for consistency with administration policy.[336] By the end of the Reagan administration, OMB regulatory review had "achieved a tentative acceptance in the executive branch."[337] George H.W. Bush followed in Reagan's footsteps, adding the antiregulatory Council on Competitiveness to his arsenal.[338]

---

[330] Harold H. Bruff, *The President's Faithful Execution Duty*, 87 U. COLO. L. REV. 1107, 1125–26 (2016); *see also* Cooper, *supra* note 308, at 9; Kagan, *supra* note 315, at 2291.

[331] *See* Cooper, *supra* note 308, at 118 (arguing that each President learns the tools of executive direct action from his predecessors and adapts those tools to new uses).

[332] Bruff, *supra* note 270, at 545, 546–47.

[333] *Id.* at 547.

[334] *Id.* at 548–49; *see also* Shane, *supra* note 271, at 148–49 (discussing increasing presidential oversight of agencies in the Nixon, Ford, and Carter administrations).

[335] Exec. Order No. 12,291 (1981); *see also* Bruff, *supra* note 270, at 549–50; Watts, *supra* note 270, at 689–90. Congress had created the Office of Information and Regulatory Affairs the prior year. Paperwork Reduction Act, Pub. L. No. 96-511 § 2, 94 Stat. 2812, 2814 (1980), *codified at* 44 U.S.C. § 3503.

[336] Exec. Order 12,498 § 1 (1985); *see also* Bruff, *supra* note 270, at 551; Shane, *supra* note 271, at 150–51.

[337] Bruff, *supra* note 270, at 562.

[338] Cooper, *supra* note 308, at 136–38.

"[P]residential control of administration, in critical respects, expanded dramatically during the Clinton years."[339] Clinton controlled agencies through "formal directives" that "set the terms of administrative action and prevent[ed] deviation from his proposed course."[340] His executive orders went further than prior Presidents by "implicitly suggest[ing] that the President had ultimate power to direct an agency's rulemaking decisions."[341] He also publicly appropriated agency actions as his own.[342]

President George W. Bush continued issuing directives to agencies and used signing statements as well "to build a unified executive branch under the undisputed control of the president."[343] He also required each agency to employ a presidentially appointed Regulatory Policy Officer to approve all rulemaking before it began.[344] In addition, he controlled agencies covertly, in particular by working "behind the scenes … to influence agencies' scientific findings."[345]

Presidential control of the administrative state reached a new high under President Obama.[346] Like George W. Bush, Obama's efforts were both covert and "splashed across the headlines."[347] Among other things, Obama employed more White House "czars"—policy advisors who lack Senate confirmation—than any

---

[339] Kagan, *supra* note 315, at 2248; *see also* Shane, *supra* note 271, at 153.

[340] Kagan, *supra* note 315, at 2249, *see also id.* at 2285, 2290, 2293. President Reagan issued 9 such directives; Clinton issued 107. *Id.* at 2294. "Presidential Memoranda" differ from Executive Orders only insofar as the former do not meet the legal requirements of the latter, such as numbering and publishing. JB Ruhl, *Topic Modeling the President*, __ G.W. L. REV. __ (forthcoming), draft at 7–8.

[341] Farber, *supra* note 315, at 21; *see also* Kagan, *supra* note 315, at 2288–89; Watts, *supra* note 270, at 690–91.

[342] Kagan, *supra* note 315, at 2249, 2299.

[343] Cooper, *supra* note 308, at 332; *see also* Mashaw & Berke, *supra* note 311, at 13.

[344] Shane, *supra* note 271, at 157; Watts, *supra* note 270, at 693–94.

[345] Watts, *supra* note 270, at 685, 693, 695–98; *see also* Shane, *supra* note 271, at 157.

[346] Watts, *supra* note 270, at 698; *see also* Coglianese, *supra* note 310, at 47–49.

[347] Mathews, *supra* note 307, at 6; *see also* Watts, *supra* note 270, at 685, 698.

prior President,[348] thus extending "presidential control beyond episodic directive authority."[349] He also "publicly appropriate[d] agency decisions to an unprecedented degree"[350] with the new twist of announcing policies on blogs or websites instead of in formal statements.[351]

The current administration again has taken presidential direct action to a new level.[352] Daniel Farber concluded that although "the Trump Administration does not seem to be entirely sui generis," it differs from its predecessors "in degree if not in kind." For example, instead of using policy czars in the White House, President Trump inserted "political aides" who reported directly to the White House in at least 16 agencies.[353] Unitary executive theory is a theory no longer.[354] President Trump operates on the premise that all executive power is vested in him alone, regardless of statutory delegations to the contrary.[355] The presidency has become what the APA was designed to avoid.[356]

---

[348] Mashaw & Berke, *supra* note 311, at 61–62; Watts, *supra* note 270, at 704.

[349] Mashaw & Berke, *supra* note 311, at 21.

[350] Watts, *supra* note 270, at 703; *see also* Mathews, *supra* note 307, at 7.

[351] Cooper, *supra* note 308, at 175.

[352] Farber, *supra* note 315, at 4.

[353] *Id.* at 18; Mashaw & Berke, *supra* note 311, at 77, 80.

[354] *See generally* Farber, *supra* note 315 (critiquing Kagan's *Presidential Administration*); Mashaw & Berke, *supra* note 311 (same).

[355] *Cf.* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 596 (1994) ("the Constitution establishes that the President exclusively controls the power to execute all federal laws, and therefore it must be the case that all inferior executive officers act in his stead"); Saikrishna B. Prakash, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991, 991–94 (1993) (similar); Shane, *supra* note 271, at 34, 37, 145 (explaining unitary executive theory).

[356] Kathryn Watts argues that presidential control of agencies has both "positive and negative attributes." Watts, *supra* note 270, at 706. No doubt, she is correct, but since she wrote that, the negatives have come to outweigh the positives.

3. Rules, Not Rulers

Putting aside the question of whether such presidential direct action is constitutional,[357] it has serious downsides. Elena Kagan defended presidential administration on the grounds that the President is more democratically accountable than agencies both because he provides an "electoral link between the public and the bureaucracy" and because he "enhances transparency."[358] She further argued that presidential administration is effective because it lends consistency and dynamism to the process.[359] The President provides more coherent, less factional leadership than Congress.[360] His national constituency makes his decisions less parochial, and he acts more decisively and applies general principles across a range of issues.[361]

But the President often makes his decisions in a black box with little to no transparency, much less public participation or deliberation.[362] The President has no obligation to solicit feedback from effected parties to hone his policy and no obligation to reveal who influenced his decision or what information he considered in reaching it.[363] To the contrary, presidents often assert executive privilege to keep their involvement out of the public eye.[364]

---

[357] *See* Kagan, *supra* note 315, at 2326. I also put aside the pros and cons of regulatory review in OIRA, focusing instead on policymaking by the President himself.

[358] *Id.* at 2331–32.

[359] *Id.* at 2339.

[360] *Id.* at 2349.

[361] Farber, *supra* note 315, at 25 (citing Kagan, *supra* note 315, at 2332, 2335, 2339); *see also* Watts, *supra* note 270, at 706 (arguing that presidential control can inject coherence and accountability).

[362] *See* Cooper, *supra* note 308, at 109 (detailing the differences between presidential direct action and rulemaking and stating that executive orders "are usually not the result of an open process, provide little or no procedural regularity, and involve limited participation"); Lisa Heinzerling, A Pen, A Phone, and the U.S. Code, 103 GEO L.J. ONLINE 59, 64 (2016); Renan, *supra* note 318, at 896 (pointing out that in the executive branch, legal conclusions can change in secret, without "public notice or democratic feedback"); Watts, *supra* note 270, at 711–16 (comparing decisions made by G.W. Bush and Obama).

[363] Mashaw & Berke, *supra* note 311, at 15–16, 88.

[364] *Id.* at 15–16.

Rulemaking, on the other hand, entails more transparency, public participation, and deliberation.[365] Jerry Mashaw and David Berke posit that rulemaking may be "the most open and deliberative of any processes in American federal governance."[366] The APA obligates agencies to share their proposals, solicit public input, and consider before promulgating a final policy.[367] Presidential involvement in rulemaking short circuits that deliberative process.[368] Peter Shane demonstrated that presidential administration "breeds an insularity, defensiveness, and even arrogance within the executive branch that undermines sound decision making, discounts the rule of law, and attenuates the role of authentic deliberation in shaping political outcomes."[369]

Kagan argued that presidential administration might open the decisionmaking process to a broader array of interests because the President has a national constituency.[370] Mashaw and Berke, however, were far more realistic in their observation that presidential administration "tends by its very nature to limit the actors who are engaged in policy discussions and conceal the real motivations and considerations behind the administrative policies."[371] Moreover, "any president necessarily has limited individual bandwidth"[372] and cannot possibly spend as much time on a rule as agency officials can. Indeed, in the current administration, the President sometimes makes policy on Twitter without consulting his cabinet officers.[373]

---

[365] *See id.* at 88.

[366] *Id.* at 89.

[367] 5 U.S.C. § 553.

[368] Mashaw & Berke, *supra* note 311, at 89; Shane, *supra* note 271, at 183.

[369] Shane, *supra* note 271, at 25; *see also* Mashaw & Berke, *supra* note 311, at 31 (detailing the lack of deliberation in Trump's travel ban).

[370] Kagan, *supra* note 315, at 2360–61.

[371] Mashaw & Berke, *supra* note 311, at 89; *see also* Bruff, *supra* note 330, at 1113 ("Presidents normally respond to elite groups that either support them or can cause trouble by opposing them in Congress, not to those at the fringes of society.").

[372] Farber, *supra* note 315, at 15.

[373] *See id.* at 17; Defendants' Supplemental Submission, James Madison Project v. Dept. of Justice, No. 1:17-cv-00144-APM ("the government is treating the President's statements … —whether by tweet, speech or interview—as official statements of the President of the United States"), *available at https://assets.documentcloud.org/documents/4200037/Trump-Twitter-20171113.pdf.*

Kagan argued that the President's national constituency makes him more responsive to "the preferences of the general public, rather than merely parochial interests."[374] Absent presidential involvement, she argued, the rulemaking process has only a "tenuous connection to national majoritarian preferences."[375] Kathryn Watts agreed that political control justifies the existence of the Fourth Branch and can enhance accountability.[376]

The presidential accountability argument, however, "exalts a one-time electoral majority (perhaps only in the Electoral College) as the sole touchstone of democratic legitimacy over the pluralist and deliberative processes of standard administrative action."[377] The fact that the President need not win a majority of the vote to be elected (or reelected) further undermines his potential democratic accountability.[378] Mashaw and Berke observed that "[c]urrying favor with particular constituencies and avoiding political backlash are in some sense tied to electoral accountability."[379] But neither lends sufficient accountability to support Kagan's normative case for presidential administration.[380] Moreover, presidential electoral accountability depends on transparency, which is sorely lacking in presidential direct action.[381] Agencies, on the other hand, answer to Congress and the courts to a far greater extent than the President, and their political heads may be removed from office far more easily than the President. This makes them in effect more accountable than the President himself and more likely to make

---

[374] Kagan, *supra* note 315, at 2335.

[375] *Id.* at 2336.

[376] Watts, *supra* note 270, at 724–25.

[377] Mashaw & Berke, *supra* note 311, at 93.

[378] Shane, *supra* note 271, at 180; *cf.* Farber, *supra* note 315, at 34 (arguing that receiving less than a majority of the vote undermines arguments for deference to the President's views); Webley, *supra* note 268, at 46 (arguing that "the occasional interventions of a single individual living in a palace subject to election once every four years by a relatively small subset of the population seems a far cry from the kind of direct popular participation that would signify 'people's rule' in a strong sense").

[379] Mashaw & Berke, *supra* note 311, at 43–44.

[380] *Id.*; *see also* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 493–94 (2003) (questioning the normative value of majoritarianism); Shane, *supra* note 271, at 161 (opining that there is no reason to believe that the President will reflect majoritarian preferences on policy issues more than his appointees).

[381] *See* Mashaw & Berke, *supra* note 311, at 87.

decisions consistent with the "array of political forces embodied in a statute."[382]

Furthermore, the President lacks the expertise of agencies.[383] Kagan's endorsement of presidential administration hinged on the President's respect for expertise.[384] Daniel Farber observed, though, that "there are clear reasons for concern about Trump's respect for expertise, whether in agencies or elsewhere."[385] Absent that respect, politics supplants expertise, undermining the purpose for and benefits of administrative agencies.[386]

Kathryn Watts contended that "expertise forcing"—trying to force regulators to base decisions on "apolitical, technocratic" grounds—is "misguided."[387] She argued that agency rulemaking cannot be isolated from political influence, nor should we want it to be.[388] Expertise forcing may "sweep policy choices under the rug" or, worse, inspire agency officials to bend the facts to reach their desired policy outcomes.[389] The crux of Watts's argument is that presidential influence in rulemaking should not exceed the permissible boundaries of the agency's statutory authority.[390] To keep presidential influence in bounds, she advocates doctrines that incentivize agencies to reveal presidential influence in rulemaking.[391]

Watts's point is well taken, but recent events inspire a second look. There are many other ways for the first three branches of government to control the fourth that do not resemble autocracy to the same degree as direct presidential control of agency decisionmaking.[392] Agencies are not simply tools of the President, and the transparency on which her normative argument depends is unfortunately not forthcoming.

---

[382] Shane, *supra* note 271, at 163.

[383] *See* Farber, *supra* note 315, at 5, 14.

[384] Kagan, *supra* note 315, at 2356.

[385] Farber, *supra* note 315, at 28; *see also id.* at 3.

[386] *See* Shane, *supra* note 271, at 164; *cf.* Renan, *supra* note 318, at 880–81 ("the relationship between administrative judgment and presidential politics has become more porous").

[387] Watts, *supra* note 270, at 720.

[388] *Id.* at 724.

[389] *Id.* at 725.

[390] *Id.* at 731.

[391] *Id.* at 735–40.

[392] Appointments and removal, the budget, advancing legislative and litigation priorities, congressional inquiries, and judicial review come to mind. *See* Mashaw & Berke, *supra* note 311, at 6.

Moreover, "White House intervention in rulemaking has at times induced agencies to exceed their statutory powers or to ignore the permissible fact and policy bases for regulations that are contained in administrative records."[393] Daphna Renan argued that "considerations of legality and considerations of politics or policy are no longer institutionally distinct and sequential inside the executive; they are intermingled."[394] In the rulemaking arena, this intermingling of law and politics could well lead to arbitrary, capricious, or unlawful agency actions.

Kagan acknowledged this danger, but thought that judicial review would provide an adequate backstop.[395] She contended that *Franklin v. Massachusetts'* holding that the President is not an "agency" under the APA should not apply when the President "steps into the shoes of an agency head."[396] Even if that distinction were upheld, however, and enabled APA suits against the President, applying the rulemaking provisions of the APA to the President would be another battle.[397] Unless the President is obligated to consider a multiplicity of public views in an open decisionmaking process, he should not be engaged in the quasi-legislative function of rulemaking.

V. CONCLUSION

The APA needs updating; it has been forty years since the last significant amendment. One might laud the courts for stepping into the breach left by Congress's inaction. But allowing the courts to update the statute enables congressional inaction, further exacerbating the problem. Moreover, courts are ill equipped to weigh the many competing considerations underlying rules of administrative procedure. They are structurally unsuited to foreseeing the consequences of the rules they establish for agencies. Thus, judicial updating of the APA inevitably has had unanticipated consequences. Among other things, the judicial rules about rulemaking have contributed to rulemaking ossification.

---

[393] Bruff, *supra* note 330, at 1121; *see also* Heinzerling, *supra* note 362, at 63; Lisa Heinzerling, *The Legal Problems (So Far) of Trump's Deregulatory Binge* at 3, 7–8 (2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3049004 (detailing the illegality of many Trump administration rule delays); Kagan, *supra* note 315, at 2394.

[394] Renan, *supra* note 318, at 835 (emphasis omitted).

[395] Kagan, *supra* note 315, at 2349–50.

[396] *Id.* at 2351.

[397] *Cf.* Shane, *supra* note 271, at 29 (explaining judicial reluctance to interfere with presidential direct action).

Rulemaking has become enormously time and resource intensive, making it difficult for agencies to make policy quickly and efficiently.

Many of the judicial rules about rulemaking are good and should be codified in some form,[398] but they should be debated thoroughly, and the overall burden on rulemaking procedure should be reduced. The courts should back off of rules that burden rulemaking and stick to the text of the APA until Congress amends it. Similarly, Congress and the President should be careful not to make rulemaking too difficult.[399]

If agencies, like Congress, continue to lose their policymaking agility, the President increasingly will fill the gap and make policy himself, coming closer and closer to true authoritarianism. The further we get from the text of the APA, the further we fall into the trap the Greatest Generation designed the APA to avoid.

Eliminating the judicial rules about rulemaking will not solve the problem of rulemaking ossification entirely, much less prevent authoritarianism from taking hold. But it is a modest step in the right direction. I have demonstrated that the judicial rules about rulemaking are inconsistent with the APA's text and history and have had unforeseen negative consequences. They are merely one thread in the quilt of court-made administrative law. Pulling on that thread, however, may help to unravel the whole quilt.

[398] *See* Walker, *supra* note 280.

[399] Shapiro, *supra* note 261, at 16 ("Congress should consider ways that it can reinvigorate agencies, enabling them to carry out their statutory missions of protecting people and the environment in a more timely and effective manner").