# EXPANDING THE BOUNDARIES OF ADMINISTRATIVE CONSTITUTIONALISM: UNDERSTANDING AND ASSESSING AGENCIES' EXPERIMENTATION WITH PROCEDURES

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## I. INTRODUCTION

Emily Bremer and Sharon Jacobs's essay *Agency Innovation in* Vermont Yankee*'s White Space*[1] is the product of a wonderful collaboration of two scholars who have independently established an impressive record of pathbreaking administrative law scholarship. Here, in a brilliant essay, they have tackled a topic that itself will require a full body of literature. My brief comments here are largely musings on how these thought-provoking ideas could potentially be framed and further explored in future work—hopefully by these scholars and others—and other details of agency procedure that might be worthy of further thought.

The essay persuasively identifies a sweeping area of administrative legal space that has received too little attention—agencies' use of a panoply of a variety of rulemaking, enforcement, and other procedures that represent potential fruitful models for further agency experimentation. The authors first note broad latitude for procedural innovation enjoyed by agencies following the *Vermont Yankee* doctrine,[2] in which the Supreme Court substantially limited courts' ability to mandate that agencies follow specific procedures aside from the often bare-bones requirements of the Administrative Procedure Act (APA) and agency enabling statutes.[3] It goes on to frame the many ways in which agencies have since taken advantage of this procedural discretion, noting that the literature, which

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

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

3. Bremer & Jacobs, *supra* note 1.

largely focuses on *substantive* administrative discretion, has inadequately considered this important area.

Bremer and Jacobs define the broad category in which they are operating by relying on Larry Solum's, courts', and the APA's separation of the procedural from the substantive, which largely focuses on whether an agency action affects an individual or group's rights or requires or bars specific action. They rightfully observe that this is a difficult and fuzzy distinction, and that procedures often significantly affect substantive outcomes, but that it is nonetheless a helpful, if rough, dividing line.[4] They then frame up this vast area by placing agency procedural decisions within two subcategories, which are themselves quite broad. These categories include rules that shape agencies' internal actions, such as how agencies vote on orders or other actions or decide whether and how to work with other agencies in reaching a decision.[5] Secondly, Bremer and Jacobs define agencies' external procedures as including "interactions between the public and the agency," such as which and how many parties are consulted prior to a rulemaking.[6] After laying out case studies of meaningful procedural innovations by the Environmental Protection Agency (EPA) and the Federal Energy Regulatory Commission (FERC), the authors ask how, and to what degree, these and other agencies are limited in their innovative procedural pursuits by the formal, legal authorities of the Constitution, Congress, courts, and the Executive.[7] And, building from their previous work, they finally explore less formal avenues of restraint on agencies' procedural innovation, such as reputational effects and the like.[8]

In defining and parsing this massive sphere of administrative procedural innovation, providing concrete case studies from two agencies, and exploring the likely hard and soft barriers at the outer bounds of innovation, Bremer and Jacobs have constructed a useful framework for further analysis. As they and others further explore this area, there seem to be potential alternative frames to consider, as I describe briefly in Part II, and several specific areas that merit more detailed exploration, which I identify in Part III of this response.

4. *Id.* at 525–27.
5. *Id.* at 526.
6. *Id.*
7. *Id.* at 530–31.
8. *Id.* at 538–39.

## II. POSSIBILITIES FOR REFRAMING

In the realm of framing, I wonder whether Bremer and Jacobs's categories of "internal" and "external" agency relations could be further parsed. They define agencies' internal procedures as including rules such as voting structures for the agency—clearly an internal activity—as well as agency collaboration with other agencies and the executive.[9] But often agencies' collaborations themselves have a substantial element that is external to the agency, although not external to the government as a whole. For example, although agencies sometimes choose to collaborate or not, later in the essay Bremer and Jacobs note the executive requirements of sending numerous agency rules to the Office of Management and Budget (OMB) for review.[10] OMB has extensive influence over agencies, requiring them to invest massive time and resources into proving that the benefits of a regulation exceed its costs. And recent congressional and executive pressures have further heightened these requirements. Further, the extensive agency ossification literature documents the judicial and other governmental pressures on agencies that often stymie new and needed rules.[11] Thus, perhaps the internal category might best be defined and analyzed as "internal to the agency" and "internal to the government," with the external category still encompassing only agencies' interactions with the non-governmental "public" at large.

The agency external procedural relations category might similarly benefit from additional parsing. Agencies' choices regarding how and when to interact with the public involve very different types of communications with different risks, such as the risk of capture by regulated industry or over-reliance on non-governmental organization (NGO) input without adequate consultation with regulated industry. Indeed, Bremer and Jacobs's case studies show these meaningfully different interactions. In its drafting of the Clean Power Plan (CPP), EPA's extensive voluntary consultations with state governmental officials who work in both the energy and the environmental areas, and its meetings with the public around the United States, represent two very different types of external relations. State governmental officials have their own agendas and

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9. *Id*. at 525–26.

10. *Id*. at 536–37.

11. *See, e.g.*, Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992) (theorizing agencies' inaction as a result of extensive judicial review); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEXAS L. REV. 483 (1997) (questioning the ossification theory); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525 (1997) (exploring in more detail why and how ossification occurs and is a problem).

expertise—scholars like Miriam Seifter[12] explore how organizations of state officials are an independent, often largely unchecked and not-fully-understood lobbying force. And members of the "public" consulted in larger meetings, such as the meetings held in the process of CPP drafting, represent views from individuals and NGOs with distinct agendas, among other interests. Here, scholars like Mark Seidenfeld have detailed how overreliance on these groups, too, can have its dangers, despite the importance of involving the public.[13] For example, members of the public who lack the resources to gather the necessary data to adequately understand the technical aspects of the rule have difficulty constructively participating in agency rulemaking and other activities.[14]

An additional area potentially in need of further categorization and separation is the vast field of agency "procedure" itself. Bremer and Jacobs introduce an incredibly broad range of agency procedural choices both in describing innovation generally and in providing case studies. For example, they describe an EPA program that focuses environmental regulations and enforcement on disadvantaged communities;[15] a choice by FERC to allow rehearings of its orders despite no requirement for FERC to do so;[16] and EPA's conducting extensive meetings around the country when drafting the Clean Power Plan,[17] among other examples. These are all vastly different types of procedures with vastly different implications. For instance, the authors note how FERC's allowance of rehearing of its orders allows for technical corrections and more involvement of regulated parties and other entities in the rulemaking process than would typically occur.[18] Enabling extensive participation in rulemaking is quite different from focusing limited agency resources on particular communities, or hearing from large swaths of the public before and during the rule drafting stage. Categorizing the many types of agency procedures will be quite a difficult task, but the category is so broad that it threatens to be unmanageable. Normative analyses of when and to what extent external entities should police

12. Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953 (2014).

13. *See* Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 WM. & MARY L. REV. 411, 427–445 (2000) (noting problems with citizen participation).

14. *See, e.g.*, Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions*, *Installment Two*, 24 STAN. ENVTL. L.J. 269, 315–316 (2005) (describing the challenge of public interest groups having limited resources but suggesting how to constructively address this challenge).

15. Bremer & Jacobs, *supra* note 1, at 528.

16. *Id.* at 530.

17. *Id.* at 527.

18. *Id.* at 529–30.

agency procedures and which entities should do so, as well as how and why agency procedural innovations occur, would benefit greatly from this categorization.

## III. EXPANDING DISCUSSION OF EXTERNAL CONSTRAINTS ON AGENCY PROCEDURE AND THE OPPORTUNITIES FOR PROCEDURAL EXPERIMENTATION

In addition to considering alternative framing, Bremer and Jacobs provide numerous tantalizing tidbits of ideas that merit detailed discussion in future work. These include, among other potential areas of future discussion: (1) additional normative analysis of courts', Congress's, and the executive's constraints on agency procedures; and (2) expanded analysis of agencies' experimentation with a variety of procedural techniques, in a trend that has some features similar to the federalism literature that addresses state experimentation with subfederal substantive policies.

With respect to external constraints on agencies' procedural innovation, the authors briefly note negotiated rulemaking ("reg-neg") and the extensive literature on that topic—one of the rare instances in which scholars have explored administrative procedures in detail.[19] It would be interesting to see more direct comparison between reg-neg and the many other innovative agency procedures that Bremer and Jacobs identify, and further exploration of whether Congress or other entities should be more involved in policing agency procedures, as they are in the case of reg-neg.

In the limited space available to them in an essay, Bremer and Jacobs do briefly normatively explore whether courts, as opposed to Congress, are better than agencies at deciding on procedures—such as where to focus energies in light of "competing statutory demands"—and they conclude that agencies are better situated to do this. But further exploration of Congress's role here, and whether Congress should step in more as a procedural referee, could be fruitful. For example, it seems that Congress, through the Federal Advisory Committee Act[20] and other statutes, placed relatively detailed procedural requirements on agencies that engage in reg-neg because through this process agencies rely heavily on regulated

19. *See, e.g.*, Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255 (1998); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997); Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003); Jeffrey S. Lubbers, *Enhancing the Use of Negotiated Rulemaking by the U.S. Department of Education*, *in* RECALIBRATING REGULATION OF COLLEGES AND UNIVERSITIES: REPORT OF THE TASK FORCE ON FEDERAL REGULATION OF HIGHER EDUCATION 90 (2015), http://www.help.senate.gov/imo/media/Regulations_Task_Force_Report_2015_FINAL.pdf.

20. 5 U.S.C. §§ 561–570a (2000).

stakeholders to suggest the content of proposed rules. Although this is beneficial because regulatory targets are often most familiar with the technical aspects of a regulated activity, and the feasibility of various rules, there could be a heightened risk of undue influence in rulemaking by those with the most to gain or lose from the rules. Procedural safeguards help to protect against capture or capture-like problems. But are similar congressionally-crafted safeguards needed when agencies act in the white space explored by Bremer and Jacobs? For example, the authors note that FERC sometimes chooses to invite experts to make presentations to the commissions through a process that does not amount to reg-neg but has similar elements. In cases where FERC relies heavily on experts who are themselves the actors regulated by FERC, does this present a much different scenario from reg-neg?

Along similar lines, it could be interesting to explore in more detail why Congress has chosen to limit agency procedural discretion in a few areas beyond reg-neg, such as the Freedom of Information Act and Government in the Sunshine Act mentioned by the authors. Additionally, Bremer and Jacobs identify other statutes that require agencies to follow specific procedures when making decisions in defined substantive areas (agency consultation with the Fish and Wildlife Service, and the National Environmental Policy Act (NEPA)). NEPA, in particular, has huge impacts on agencies, requiring years of detailed studies and data gathering.[21] Why did Congress focus on these cross-cutting areas, and procedures within more defined areas, while leaving broader agency procedural discretion elsewhere? In light of the many procedural innovations noted by the authors, *should* Congress be more involved in monitoring particular agencies or procedures in particular substantive areas (like environmental areas), given that agencies often self-select procedures that can have profound impacts on those they regulate?

Another theme seemingly implied by the authors, but one that would require reams of scholarship, is the overall concept of agencies innovating in a broad range of procedural areas. In a way, a variety of agencies experimenting with a variety of procedures has similarities to the federalism literature on state experimentation with substantive policies ("the laboratory of the states").[22] Further exploration of when and why agency experimentation with procedures is beneficial, how agencies could better learn lessons

21. *See, e.g.*, COUNCIL ON ENVTL. QUALITY, THE NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS iii (1997), https://www.blm.gov/or/regulations/files/nepa25fn.pdf; Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 917–919 (2002).

22. *See* Hannah J. Wiseman, *Regulatory Islands*, 89 N.Y.U. L. REV. 1661 (2014).

from other agencies' innovations, and how the positive and negative results of procedural experimentation could best be measured and documented to provide future lessons would be quite interesting. The literature on agencies' experimentation with substantive policy could be similarly helpful.[23]

## V. CONCLUSION

In the limited space available to them, Bremer and Jacobs have offered a tantalizingly rich introduction to what promises to be a wonderful new line of administrative scholarship. Their description of agencies' procedural innovations, as well as the case studies they provide, suggest bountiful possibilities for additional analysis and numerous case studies in fields well beyond the environmental and energy realms. I hope that they and others will continue to work on this interesting and promising subject.

23. *See, e.g.*, Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53 (2011) (exploring agency experimentation).