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REPROCESSING *VERMONT YANKEE*

Jack Beermann*

Gary Lawson**

When federal agencies conduct informal rulemaking proceedings – rulemakings that are not required by organic statutes to use formal, trial-type procedures – the text of the Administrative Procedure Act (“APA”)¹ imposes very few procedural constraints on the agencies. According to the plain terms of Section 553 of the APA,² an informal rulemaking requires only a relatively sparse notice of proposed rulemaking that contains “the terms or substance of the proposed rule or a description of the subjects and issues involved,”³ an “opportunity to participate in the rule making through submission of written data, views, or arguments *with or without opportunity for oral presentation*,”⁴ and “a concise general statement of the[] basis and purpose”⁵ of any rules adopted. Even these seemingly minimal notice-and-comment (as they are generally called) procedural

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¹ 60 Stat. 237 (1946) (codified as amended at scattered sections of Title V of the United States Code).

² Technically, the reference should be to “section 4 of the APA, which is codified at 5 U.S.C. § 553,” but we follow the standard convention which refers to APA sections by their codification in the United States Code rather than by their section numbers in the original enacted bill.

³ The notice must also contain “(1) a statement of the time, place, and nature of public rule making proceedings” and “(2) reference to the legal authority under which the rule is proposed.” 5 U.S.C. § 553 (b). Nothing in (1) requires that there actually be public rulemaking proceedings; it merely requires the agency to give notice of them if the agency chooses to provide them.

⁴ *Id.* (emphasis added).

⁵ *Id.* § 553(c).

requirements do not apply to “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice,”⁶ rules which the agency has “good cause” to issue without notice-and-comment procedures,⁷ or rules that concern “a military or foreign affairs function . . . or . . . agency management or personnel or . . . public property, loans, grants, benefits, or contracts”⁸ – the latter exception encompassing the overwhelming bulk of the federal budget. In modern times, the occasions for formal, trial-type rulemaking are rare to nonexistent,⁹ so virtually all federal rulemaking is subject to this stark statutory framework—supplemented, of course, by procedures mandated on a case-by-case basis by other statutes, agency regulations, or constitutional law.

Beginning in the late 1960s, however, judges on the D.C. Circuit – with considerable support from the surrounding political and academic communities – decided that the procedures for informal rulemaking provided by the Administrative Procedure Act were inadequate to allow effective legal control of agencies that were widely perceived as vulnerable to industry capture.¹⁰ Accordingly, in the 1960s and 1970s, the

⁶ *Id.* § 553(b)(A).

⁷ *Id.* § 553(b)(B).

⁸ *See id.* § 553(a).

⁹ The APA mandates use of trial-type procedures in rulemakings only when organic statutes require rules to be “made on the record after opportunity for an agency hearing.” *Id.* § 553(c). *See id.* §§ 556-57 (extensively describing the procedures required when organic statutes call for hearings “on the record”). In *United States v. Florida E. Coast Ry.*, 410 U.S. 224 (1973), the Supreme Court effectively held that unless organic statutes specifically state that rules must be made “on the record,” those statutes will be construed to require only the APA’s informal notice-and-comment procedures. As of this moment in time, in the more than 30 years since *Florida East Coast Railway*, no organic rulemaking statute that does not contain the specific words “on the record” has ever been held to require formal rulemaking. The case may well have been wrongly decided, but that is a story for another day.

¹⁰ For background on these developments, see Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 **Chi. Kent L. Rev.** 1039 (1997); Antonin Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and*

lower federal courts essentially re-wrote the APA's notice-and-comment rulemaking provisions to require extensive procedural machinery, including: elaborate notices of proposed rulemaking that disclose to the public all relevant evidence possessed by the agency;¹¹ the use of oral proceedings, cross-examination, and/or discovery when deemed appropriate by the court;¹² comprehensive statements of basis and purpose that respond in technical detail to all important points raised by outside parties during the rulemaking;¹³ and prohibitions on ex parte agency contacts with outside parties,¹⁴ agency predetermination of important issues,¹⁵ and substantial deviations between final rules and proposed rules.¹⁶ The courts also cut back substantially on the scope of the statutory exemptions from APA rulemaking procedures, most notably the exemption for "interpretative rules."¹⁷

For roughly a decade, the Supreme Court watched these developments (if it watched them at all) with apparent disinterest. In 1978, however, the Court spoke loudly and carried a huge club. In *Vermont Yankee Nuclear Power Corp. v. NRDC*,¹⁸ the Court unanimously and stridently chastised the D.C. Circuit for forcing the Nuclear Regulatory

the Supreme Court, 1978 **Sup. Ct. Rev.** 345; Richard B. Stewart, *The Reformation of American Administrative Law*, 88 **Harv. L. Rev.** 1669 (1975).

¹¹ See, e.g., *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 392-93 (D.C. Cir. 1973).

¹² See, e.g., *O'Donnell v. Shaffer*, 491 F.2d 59, 62 (D.C. Cir. 1974).

¹³ See, e.g., *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968).

¹⁴ See, e.g., *HBO, Inc. v. FCC*, 567 F.2d 9, 51-59 (D.C. Cir. 1977).

¹⁵ See, e.g., *Association of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1170 (D.C. Cir. 1979).

¹⁶ See, e.g., *Connecticut Light & Power, Inc. v. NRC*, 673 F.2d 525, 533 (D.C. Cir. 1982).

¹⁷ See, e.g., *Pickus v. U.S. Board of Parole*, 507 F.2d 1107, 1112-13 (D.C. Cir. 1974).

¹⁸ 435 U.S. 519 (1978).

Commission to employ procedures such as discovery and cross-examination in a notice-and-comment rulemaking when no organic statute, regulation, or constitutional provision required it. In sweeping terms, the Court declared that the D.C. Circuit had “seriously misread or misapplied . . . statutory and decisional law cautioning reviewing courts against engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress”¹⁹ and warned the lower court that it “should . . . not stray beyond the judicial province . . . to impose upon the agency its own notion of which procedures are ‘best’ or most likely to further some vague, undefined public good.”²⁰

Vermont Yankee is almost universally regarded as one of the most important administrative law decisions issued by the Supreme Court. And with respect to the issue squarely decided by the Court, the case has had a major doctrinal impact: federal courts today do not feel free to require agencies to use oral hearings and cross-examination in informal rulemakings or adjudications²¹ without grounding in positive law.

For the past three decades, various scholars have been anticipating, and urging, a “*Vermont Yankee II*,” in which the Court would similarly invalidate other administrative law doctrines claimed to be unlawful and/or unwise. Shortly after the *Vermont Yankee* decision, Paul Verkuil was “Waiting for *Vermont Yankee II*” to put an end to rigorous substantive judicial review of agency policy decisions, which he thought raised essentially the same problems of law and policy as did the procedural doctrines rejected

¹⁹ *Id.* at 525.

²⁰ *Id.* at 549.

²¹ This principle has logically been extended to informal adjudications as well. *See Pension Benefit Guaranty Corp. v. LTV*, 496 U.S. 633, 653-55 (1990).

by the Court in *Vermont Yankee*.²² Professor Verkuil has thus far been sorely disappointed: the Court has validated so-called “hard look” substantive review,²³ which continues to this day unabated. More recently, Richard Pierce announced that he too was “Waiting for *Vermont Yankee II*,” this time to overturn the First Circuit’s long-standing presumption that language in organic statutes calling for a “hearing” in agency adjudications triggers the APA’s formal, trial-type adjudicatory procedures.²⁴ Professor Pierce lost the battle but won the war: the First Circuit has recently abandoned this presumption of adjudicatory formality²⁵ – not because of any perceived inconsistency with the *Vermont Yankee* decision but because of a perceived inconsistency with the *Chevron* doctrine,²⁶ which requires courts to defer to reasonable agency constructions of statutes administered by the agencies.²⁷

At the risk of meeting much the same fate as Verkuil, Pierce, Estragon, and Vladimir, we want to join the line of those waiting for a *Vermont Yankee II*. But we have in mind very different targets than did Professors Verkuil and Pierce. These prior calls for a *Vermont Yankee II* were not actually attempts to extend the reasoning and holding

²² Paul R. Verkuil, *Judicial Review of Informal Rulemaking: Waiting for Vermont Yankee II*, 55 **Tul. L. Rev.** 418 (1981).

²³ See *Motor Vehicle Mfrs Ass’n of the United States v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983).

²⁴ Richard J. Pierce, Jr., *Waiting for Vermont Yankee II*, 57 **Admin. L. Rev.** 669 (2005). The First Circuit announced this presumption of adjudicatory formality more or less contemporaneously with the *Vermont Yankee* decision. See *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872 (1st Cir. 1978).

²⁵ See *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12 (1st Cir. 2006).

²⁶ See *id.* at 16-18.

²⁷ See 467 U.S. 837 (1984). For treatments of the development and mechanics of the *Chevron* doctrine, see **Ronald A. Cass, Colin S. Diver & Jack M. Beermann, Administrative Law: Cases and Materials** 124-159 (5th ed. 2006); **Gary Lawson, Federal Administrative Law ---** (4th ed. 2007).

of *Vermont Yankee*. Rather, Professors Verkuil and Pierce were using *Vermont Yankee* as a broad symbol – a metaphor of sorts -- for Supreme Court intervention to reign in undue lower-court interference with agency discretion and autonomy. The reasoning and holding of *Vermont Yankee*, as interpreted according to conventional norms of case analysis, do not go nearly that far. Hard look review and a presumption of adjudicatory formality may or may not be bad ideas, but they are not strictly inconsistent with *Vermont Yankee*. There are, however, a significant number of important administrative law doctrines that do seem to fly squarely in the face of all but the most unreasonably narrow understandings of the *Vermont Yankee* decision. These doctrines, ranging from the prohibitions on agency ex parte contacts and prejudgment in rulemakings to the expanded modern conception of the notice of proposed rulemaking, are all ripe for reconsideration.

In Part I of this article, we revisit *Vermont Yankee* to identify its proper scope. The decision can be read in at least three different ways: broadly to require strict fidelity to the text of the APA in all respects, narrowly to forbid only the very specific practices rejected in the case, or naturally (so we claim) to forbid imposition of any administrative procedures not firmly grounded in some source of positive statutory, regulatory, or constitutional law. Armed with the “natural” reading of *Vermont Yankee*, in Part II we briefly explore the proposals of Professors Verkuil and Pierce for a *Vermont Yankee II* and show that neither proposal actually flows, or even purports to flow, from *Vermont Yankee*, though both proposals can be defended on other grounds. In Part III, we identify a range of administrative law doctrines that seem to us to be either in tension or flatly inconsistent with the natural understanding of *Vermont Yankee*. Some of those doctrines, such as the prohibition on ex parte contacts or agency pre-judgment in informal

rulemakings, could be discarded at little or no cost, while the rejection of others, such as the modern requirements concerning notices of proposed rulemaking and statements of basis and purpose, would send shock waves throughout the administrative law system. Part IV briefly concludes.

I

A brief review of the *Vermont Yankee* decision is necessary in order to pin down its proper scope.²⁸ In 1954, Congress enacted the Atomic Energy Act²⁹ in order to promote and channel the commercial use of nuclear power.³⁰ Under the statute, nuclear power plants must be licensed in order to be built or operated³¹; these licensing proceedings are adjudications under the APA and require a “hearing.”³² In addition, the

²⁸ For more detailed background on the case, see Gillian E. Metzger, *The Story of Vermont Yankee: A Cautionary Tale of Judicial Review and Nuclear Waste*, in **Administrative Law Stories** 124 (Peter L. Strauss, ed. 2006). The *Vermont Yankee* decision actually consolidated two appeals from decisions of the D.C. Circuit. The second case – *Consumers Power Co. v. Aeschliman*, 547 F.2d 622 (D.C. Cir. 1976) – primarily concerned substantive rather than procedural issues and will not be discussed here.

²⁹ 68 Stat. 919 (1954) (codified as amended at scattered sections of Title 42 of the United States Code).

³⁰ See 42 U.S.C. § 2011 (2000).

³¹ For the first 35 years of the statute, separate licensing proceedings had to be held for construction and operation of nuclear reactors. In 1989, the Nuclear Regulatory Commission by rule created a streamlined procedure for obtaining a “combined” construction/operation license (and also for obtaining approval of site locations and generic reactor designs). See *Early Site Permits; Standard Design Certifications; and Combined Licenses for Nuclear Power Reactors*, 54 Fed. Reg. 15,372 (codified at C.F.R. pts. 2, 50-52 & 170). For an overview of the streamlined procedures, see Neal H. Lewis, *Interpreting the Oracle: Licensing Modifications, Economics, Safety, Politics, and the Future of Nuclear Power in the United States*, 16 **Alb. L.J. Sci. & Tech.** 27 (2005-06).

³² 42 U.S.C. § 2239(a)(1)(A). The degree of procedural formality required by these hearings has been a matter of ongoing controversy. For a recent, if inconclusive, skirmish, see *Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338 (1st Cir. 2004).

Nuclear Regulatory Commission (formerly the Atomic Energy Commission³³) has general authority to “make, promulgate, issue, rescind and amend such rules and regulations as may be necessary to carry out the purposes of this Chapter.”³⁴ This grant of general rulemaking authority neither specifies any procedures for such rulemakings nor requires the rules to be made “on the record,” and it therefore authorizes informal, notice-and-comment rulemaking under the APA.

On December 2, 1966, Vermont Yankee Nuclear Power Corporation applied for a license to construct and operate a nuclear power plant in Vernon, Vermont. More than a year later, the construction license was granted.³⁵ The request for an operating license was the subject of a hearing on August 10, 1971, at which the then-Atomic Energy Commission ruled that it would not consider the environmental effects of the reprocessing or disposal of nuclear wastes generated by the plant (though it *would* consider the environmental effects of transporting the fuel to storage or disposal sites). This decision was affirmed by the agency’s Atomic Safety and Licensing Appeal Board.³⁶

Shortly thereafter, the agency issued a notice of proposed rulemaking to consider a rule “that would specifically deal with the question of consideration of environmental effects associated with the uranium fuel cycle in the individual cost-benefit analyses for

³³ In 1974, the Atomic Energy Commission was abolished, *see* 42 U.S.C. § 5814 (2000), and its regulatory functions were transferred to the Nuclear Regulatory Commission. *See id.* § 5841.

³⁴ *Id.* § 2201p.

³⁵ *See In re Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station)*, 4 A.E.C. 36 (1967).

³⁶ *See In re Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station)*, 4 A.E.C. 930 (1972); *In re Vermont Yankee Corp.*, 5 A.E.C. 297 (1972).

light water cooled nuclear power reactors.”³⁷ As part of the rulemaking, the Commission’s staff prepared an “Environmental Survey of the Nuclear Fuel Cycle,” dated November 6, 1972, which foresaw few if any environmental problems from nuclear waste reprocessing or disposal.³⁸ Perhaps owing to the obvious controversy surrounding nuclear waste, the Commission’s proposal contained two alternatives to be used in all reactor licensing proceedings, one that specified very small values for the environmental effects of fuel reprocessing and disposal and another that specified that fuel reprocessing and disposal would not be taken into account at all, on the theory that the waste from no single power plant contributed measurably to any environmental problem.³⁹ The Commission expressly stated that the rulemaking proceeding would be “informal” and “legislative-type”⁴⁰ with no cross-examination or discovery. Although the text of the APA requires only that the public be given an opportunity to make written submissions, the Commission held a public hearing, inviting interested persons to “attend the hearing and present *oral or written* statements.”⁴¹ The Commission also made available for inspection the staff-generated Environmental Survey of the Nuclear Fuel Cycle,⁴² although the text of section 553 of the APA says nothing about public availability of

³⁷ *Notice of Proposed Rulemaking: Environmental Effects of the Uranium Fuel Cycle*, 37 Fed. Reg. 24,191, 24,191 (Nov. 15, 1972).

³⁸ *See id.* at 24,192.

³⁹ *See id.* at 24,193.

⁴⁰ *Id.*

⁴¹ *Id.* (emphasis added).

⁴² *See id.* (“Copies of . . . [the survey] may be examined at the Commission’s Public Document Room . . . [or] may be obtained upon request”).

agency documents in rulemakings.⁴³ The Commission ultimately adopted a rule that specified small values for the environmental effects of reprocessing and disposal of spent nuclear fuel.⁴⁴

A. *The D.C. Circuit Speaks*

The rule was successfully challenged in the D.C. Circuit by the National Resources Defense Council and other environmental lobbying groups.⁴⁵ The challenge, and the vast bulk of the D.C. Circuit's opinion, focused on the scanty substantive support for the agency's action: the Environmental Survey that formed the basis for the agency's rule was long on conclusions but remarkably short on detail.⁴⁶ The petitioning environmental groups, however, also objected to the absence of cross-examination and discovery, which they argued was necessary in order to reveal the basis for the agency's Environmental Survey. And thereby hangs our tale.

Although the text of the APA seems to provide no support for any such procedural claims in an informal notice-and-comment rulemaking, the petitioners had a strong claim by the standards of mid-1970s D.C. Circuit caselaw. Starting with

⁴³ The Freedom of Information Act, which is technically part of the APA, requires agencies to make rulemaking documents publicly available unless the requested information comes within one of nine stated exceptions. *See* 5 U.S.C. §§ 552(a)(3)(A), 552(b) (2000). But that requirement is independent of any rulemaking proceeding, and our focus is on requirements imposed by Section 553.

⁴⁴ *See Environmental Effects of the Uranium Fuel Cycle*, 39 Fed. Reg. 14,188 (1974).

⁴⁵ *See NRDC Inc. v. NRC*, 547 F.2d 633 (D.C. Cir. 1976).

⁴⁶ *See id.* at 646-53. The agency did a much better job of supporting its decision on its second try. *See Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87 (1983).

*Automotive Parts & Accessories Ass’n v. Boyd*⁴⁷ in 1968, which suggested in dictum that the “concise general statement of . . . basis and purpose” required by Section 553(c) needed to be considerably less concise and general than anyone had previously supposed,⁴⁸ the D.C. Circuit issued a series of decisions that reshaped the informal rulemaking process. The court made it very clear that in order for the agency to show that it had fully “ventilated” the issues,⁴⁹ had taken a “hard look” at the problems before it,⁵⁰ and was not a “seed bed for the weed of industry domination,”⁵¹ procedures beyond those specified in statutes, regulations, or due process might be necessary. According to the D.C. Circuit, notices of proposed rulemaking needed to disclose and make available important documents that underlay the agency’s proposed actions,⁵² and the rulemakings might need to be conducted with a substantial measure of procedural formality. As the court explained in 1974, “basic considerations of fairness may dictate procedural requirements not specified by Congress. Oral submissions may be required even in legislative-type proceedings, and cross-examination may be necessary if critical issues cannot be otherwise resolved.”⁵³

⁴⁷ 407 F.2d 330 (D.C. Cir. 1968).

⁴⁸ See *id* at 338 (“[I]t is appropriate for us . . . to caution against an overly literal reading of the statutory terms ‘concise’ and ‘general.’ These adjectives must be accommodated to the realities of judicial scrutiny, which do not contemplate that the court itself will, by a laborious examination of the record, formulate in the first instance the significant issues faced by the agency and articulate the rationale for their resolution.”).

⁴⁹ The need for “ventilation” of issues was one of the D.C. Circuit’s most consistent themes. See Scalia, *supra* note --, at 355 n.55.

⁵⁰ *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970).

⁵¹ *Walter Holm & Co. v. Hardin*, 449 F.2d 1009, 1016 (D.C. Cir. 1971).

⁵² See *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973).

⁵³ *O’Donnell v. Shaffer*, 491 F.2d 59, 62 (D.C. Cir. 1974).

Against this backdrop, it was not surprising that the “primary argument advanced by the public interest intervenors . . . [in *Vermont Yankee* was] that the decision to preclude ‘discovery or cross-examination’ denied them a meaningful opportunity to participate in the proceedings,”⁵⁴ that the government in *Vermont Yankee* conceded that circumstances sometimes “require additional procedures in ‘legislative-type proceedings,’”⁵⁵ or that the D.C. Circuit in *Vermont Yankee* expressed serious doubts about the adequacy of the agency’s procedures as well as the adequacy of its evidentiary support:

Many procedural devices for creating a genuine dialogue on these issues [of waste reprocessing and disposal] were available to the agency – including informal conferences between intervenors and staff, document discovery, interrogatories, technical advisory committees comprised of outside experts with differing perspectives, limited cross-examination, funding independent research by intervenors, detailed annotation of technical reports, surveys of existing literature, memoranda explaining methodology. We do presume to intrude on the agency’s province by dictating to it which, if any, of these devices it must adopt to flesh out the record. It may be that no combination of the procedures mentioned above will prove adequate, and the agency will be required to develop new procedures. . . . On the other hand, the procedures the agency adopted in this case, if administered in a more sensitive, deliberate manner, might suffice. Whatever techniques the Commission adopts, before it promulgates a rule limiting further consideration of waste disposal and reprocessing issues, it must in one way or another generate a record in which the factual issues are fully developed.⁵⁶

⁵⁴ 547 F.2d at 643.

⁵⁵ *Id.* The petitioners’ claims and the government’s concession in *Vermont Yankee* were explicitly framed in terms of “due process,” *id.* at 643, but the line of cases that led to *Vermont Yankee* had long gone well beyond constitutional requirements. There could, of course, be rulemakings that are so particularized in their impact that they must be considered adjudications for purposes of the Constitution and therefore require whatever procedures are necessary to conform to due process. That has been clear at least since 1908. See *Londoner v. City and County of Denver*, 210 U.S. 373 (1908); *American Airlines, Inc. v. CAB*, 359 F.2d 624 (D.C. Cir. 1966). But the D.C. Circuit’s caselaw from 1968 through *Vermont Yankee* routinely required procedures in *general* rulemakings to which constitutional due process requirements plainly did not apply. See *Bi-Metallic Investment Co. v. State Board of Equalization of Colorado*, 239 U.S. 441 (1915). “Due process,” in other words, was often used – and was clearly used by all parties in *Vermont Yankee* -- as shorthand for appropriate procedures in a generic sense rather than as a term of constitutional law.

⁵⁶ 547 F.2d at 653-54.

The D.C. Circuit’s discussion exposes a fundamental ambiguity concerning the values that the lower courts were pursuing when they required procedures in addition to those specified in the APA and other governing statutes. Was the concern procedural, that the bare bones of § 553 did not create a “genuine dialogue” sufficient to satisfy notions of procedural fairness as applied to the complex and important matters involved in the *Vermont Yankee* rulemaking? Or was it that the “factual issues [were not] fully developed” and thus the agency’s conclusion, without a better record, was substantively inadequate under APA § 706? As we shall see, this ambiguity provided just the opening the Supreme Court needed to weigh in on the propriety of courts imposing their procedural views on agencies and on the connection between procedure and substance in administrative law.

B. The Supreme Court Speaks – Very, Very Loudly

The Supreme Court decision was the legal equivalent of a meltdown for the D.C. Circuit and the NRDC. After setting out the fundamental character of the APA and the stark terms of Section 553, the Court said that its prior decisions in *United States v. Allegheny-Ludlum Steel Corp.*⁵⁷ and *United States v. Florida East Coast R. Co.*⁵⁸ “held that generally speaking this section of the Act established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in

⁵⁷ 406 U.S. 742 (1972).

⁵⁸ 410 U.S. 224 (1973).

conducting rulemaking procedures.”⁵⁹ The Court added that it had “for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies”⁶⁰ and that “[a]bsent constitutional constraints or extremely compelling circumstances the ‘administrative agencies “should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.” ’ ”⁶¹

The Court swatted down the NRDC’s claim, which in 1978 had overwhelming support in lower-court case law, that section 553 “merely establishes lower procedural bounds and that a court may routinely require more than the minimum when an agency’s proposed rule addresses complex or technical factual issues or ‘Issues of Great Public Import,’ ”⁶² finding that it had no support in the statute, its legislative history, or prior Supreme Court decisions. To the contrary, said the Court, there is “little doubt that 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.”⁶³

⁵⁹ 435 U.S. at 524. In fact, *Allegheny-Ludlum* and *Florida East Coast R.* said no such thing. They held only (and wrongly) that the requirement in the Esch Car Service Act of 1917, 24 Stat. 379 (codified at 49 U.S.C. § 11122 (2000)), that rules respecting rates for railroad car rentals be set “after hearing” did not trigger formal rulemaking under § 553(c) of the APA. But for the present story, the Court’s understanding of these cases in *Vermont Yankee* is more important than the cases themselves.

⁶⁰ 435 U.S. at 524.

⁶¹ 435 U.S. at 543 (quoting *FCC v. Schreiber*, 381 U.S. 279, 290 (1965), in turn quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940)). The “extremely compelling circumstances” mentioned by the Court were quite clearly cases in which “a totally unjustified departure from well-settled agency procedures of long standing might require judicial correction.” 435 U.S. at 542. This makes excellent sense: if an agency has a long practice of discretionarily granting procedures and then suddenly denies them to a party that is similarly situated to past parties that received those procedures, the agency must at least explain the differential treatment under the arbitrary or capricious standard of section 706(2)(A) of the APA. See 5 U.S.C. § 706(2)(A) (2000) (instructing courts to overturn agency decisions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

⁶² *Id.* at 545.

⁶³ *Id.* at 546.

The Court also identified “compelling reasons for construing [section 553] in this manner.”⁶⁴ If courts “continually review agency proceedings to determine whether the agency employed procedures which were, in the court’s opinion, perfectly tailored,”⁶⁵ and if they conduct such procedural reviews after the rulemaking is over in a kind of “Monday morning quarterbacking,”⁶⁶ the agencies would feel pressure to use extensive procedures in every rulemaking to avoid the threat of reversal. “Not only would this totally disrupt the statutory scheme . . . , but all the inherent advantages of informal rulemaking would be totally lost.”⁶⁷ Furthermore – and, in the Court’s judgment, “perhaps most importantly”⁶⁸ --

The court below uncritically assumed that additional procedures will automatically result in a more adequate record because it will give interested parties more of an opportunity to participate in and contribute to the proceedings. But informal rulemaking need not be based solely on the transcript of a hearing before an agency. . . . Thus, the adequacy of the “record” in this type of proceeding is not correlated directly to the type of procedural devices employed, but rather turns on whether the agency has followed the statutory mandate of the Administrative Procedure Act or other relevant statutes. If the agency is compelled to support the rule . . . with the type of record produced only after a full adjudicatory hearing, it simply will have no choice but to conduct a full adjudicatory hearing prior to promulgating every rule. . . . [T]his sort of unwarranted judicial examination of perceived procedural shortcomings of a rulemaking proceeding can do nothing but seriously interfere with that process prescribed by Congress.⁶⁹

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 547.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 547-48.

“In short,” concluded the Court, “nothing in the APA, NEPA [the National Environmental Policy Act], the circumstances of this case, the nature of the issues being considered, past agency practice, or the statutory mandate under which the Commission operates permitted the court to review and overturn the rulemaking proceeding on the basis of the procedural devices employed (or not employed) by the Commission so long as the Commission employed at least the statutory *minima*, a matter about which there is no doubt in this case.”⁷⁰

C. *So What Did They Say?*

Reading precedent is an art rather than a science. A case’s holding can always be narrowed to its most specific facts (“do not reverse 1974 NRC rulemakings concerning the environmental effects of the nuclear fuel cycle because of the absence of discovery and cross-examination”) or broadly generalized (“never go beyond the narrowest possible interpretation of a statute”). Nonetheless, there are operational norms in the American legal system that place some readings of a case out of bounds and make some plausible readings better than others. There are at least three plausible readings of *Vermont Yankee*, and one of those readings seems pretty clearly to be the most plausible.

The broadest plausible reading of *Vermont Yankee* would take it as call to read the APA according to its original understanding in 1946.⁷¹ There is much language in the

⁷⁰ *Id.* at 548.

⁷¹ The APA has been amended in a few respects, mostly concerning sovereign immunity and the FOIA, but its basic provisions governing agency procedures and judicial review have been essentially unchanged since their enactment.

opinion to support this reading. The opinion begins with a paean to the original statute: “In 1946, Congress enacted the Administrative Procedure Act, which . . . was not only ‘a new, basic and comprehensive regulation of procedures in many agencies,’ but was also a legislative enactment which settled ‘long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest.’ ”⁷² The Court repeatedly emphasized the consistency of its interpretations of the APA over 40 years,⁷³ and the decision is full of references to the intentions and purposes of the enacting Congress.⁷⁴ As then-Professor Scalia noted, by the early 1970s, “it became obvious even to the obtuse . . . that the Supreme Court regarded the APA as a sort of superstatute, or subconstitution, in the field of administrative process: a basic framework that was not lightly to be supplanted or embellished”⁷⁵ The *Vermont Yankee* decision was obviously unhappy with the lower courts’ meddling with the purity of the Act.

On the other hand, the Court’s wrath was directed specifically to the lower courts’ addition of *procedures* not required by some positive source of law. There are many provisions in the APA that do not concern agency procedures. Sections 701-06, for instance, concern the availability, timing, scope, and consequences of judicial review. There was good reason to think in 1978 – and there continues to be good reason to think today – that many of these provisions had been construed in a fashion quite different from their original understanding in 1946. Section 702, for instance, declares that “[a]

⁷² 435 U.S. at 523 (quoting *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950)).

⁷³ See *id.* at 524, 542, 544-45.

⁷⁴ See *id.* at 524-24, 544-45, 548.

⁷⁵ Scalia, *supra* note --, at 363.

person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”⁷⁶ This provision pretty obviously codified the common-law rules for standing in 1946: parties could challenge agency action if they were directly harmed by agency action in a manner traditionally recognized as cognizable by the courts or were authorized to sue by a specific statute expanding the range of acceptable plaintiffs beyond this core.⁷⁷ In 1970, however, the Supreme Court had construed this statute to impose a drastically different, far more inclusive standing regime than would have been contemplated in 1946.⁷⁸ It is doubtful that the Court in *Vermont Yankee* meant to call this doctrine into question, and it is therefore doubtful that the Court meant to call for a categorical return to the 1946 understanding of the APA. Similarly, section 706(2)(A)’s instruction to courts to hold unlawful agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”⁷⁹ was probably intended in 1946 to reflect something like the “rational basis” test in post-1937 substantive due process law.⁸⁰ By 1978, courts were routinely engaging in far more vigorous review of the substance of agency decisionmaking. It is hard to imagine that the Court in *Vermont Yankee* meant to pass judgment on this practice. Indeed, when the Court in *Vermont Yankee* sent the case back to the D.C. Circuit to consider whether the agency’s rule was

⁷⁶ 5 U.S.C. § 702 (2000).

⁷⁷ See **Cass, Diver & Beermann**, *supra* note --, at 270-71; **Lawson**, *supra* note --, at --.

⁷⁸ See *Ass’n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970) (construing section 702 to authorize standing for any complainant “arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question”).

⁷⁹ 5 U.S.C. § 706(2)(A) (2000).

⁸⁰ See **Lawson**, *supra* note --, at --.

substantively justified, the only injunction was that the lower court should not “stray beyond the judicial province to explore the *procedural* format or to impose upon the agency its own notion of which *procedures* are ‘best’ or most likely to further some vague, undefined public good.”⁸¹ There was no mention of the proper standard for substantive review.⁸²

A second, and better, reading of *Vermont Yankee* would thus understand it as a call for a return to the original meaning of the APA *specifically with respect to agency procedures*. This reading is built on the voluminous language in *Vermont Yankee* stressing both the fundamental character of the APA as settling, once and for all, the legally-required procedures agencies must follow, and the importance, to both the framers of the APA and to the *Vermont Yankee* Court, of leaving agencies with discretion to fashion procedures in the absence of specific dictates in positive law. It appears to be the reading endorsed by the Court itself in *Pension Benefit Guaranty Corp. v. LTV*: “*Vermont Yankee* stands for the general proposition that courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA.”⁸³ Indeed, this reading of the opinion is so straightforward that we call it the “natural” reading.

Strictly speaking, of course, this “natural” reading extends somewhat beyond the issues squarely presented by the facts of *Vermont Yankee*. The Court was not called upon to assess a wide range of judicial interpretations of the APA’s procedural provisions; it

⁸¹ 435 U.S. at 549 (emphasis added).

⁸² Indeed, the lack of attention to substantive standards of review was precisely Professor Verkuil’s complaint about the *Vermont Yankee* decision in 1981. See *infra* ---.

⁸³ 496 U.S. 633, 654 (1990).

was called upon only to pass upon the specific practice of requiring agencies to employ procedures such as cross-examination and discovery during informal rulemakings. There are many procedural provisions of the APA that are not directly implicated by this practice. Agencies engaged in legislative rulemaking must issue notices of proposed rulemaking and (if they adopt rules) statements of basis and purpose; the legal requirements for these documents were not strictly at issue in *Vermont Yankee*. Agencies conducting rulemakings must decide to what extent they can engage in ex parte contacts, reach conclusions on certain issues before the rulemaking commences, or determine that rules will be interpretative rather than legislative. All of these matters are, in some important sense, procedural, and none was squarely presented in *Vermont Yankee*. Accordingly, a third, narrower reading of *Vermont Yankee* would take it to forbid courts from requiring agencies to use specific procedures during a rulemaking, after the notice of proposed rulemaking has been published, without specific legal authorization in a statute, regulation, constitutional provision, or (perhaps) long-standing agency practice.

This third reading is in fact essentially the interpretation of *Vermont Yankee* that has prevailed since 1978. We are aware of only one procedural doctrine other than the requirement of procedures not grounded in positive law during an informal agency proceeding that has been held to be inconsistent with *Vermont Yankee*: shortly after the *Vermont Yankee* decision was issued, the lower courts abandoned their practice of deeming substantive rather than interpretative any rules that had a “substantial impact” on the behavior of regulated parties.⁸⁴

⁸⁴ See *Cabais v. Egger*, 690 F.2d 234, 237 (D.C. Cir. 1982). Many courts continue to deem substantive agency rules that have a substantial impact on the behavior of the agencies themselves. See, e.g., *Professionals and Patients for Customized Care v. Shalala*, 56 F.3d 592 (5th Cir. 1995); *United States Telephone Ass’n v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994).

One reason why this third reading of *Vermont Yankee* has prevailed is that the *Vermont Yankee* Court did not comment explicitly on the interpretive method courts should apply to the APA and other statutes that impose procedural requirements on agencies. It did provide some hints, however, in its discussion of the principles and policies underlying its rejection of the lower courts' tendencies to increase procedural formality according to their own notions of policy or fairness. First, the basic principle of *Vermont Yankee* is that Congress and the agencies, and not the federal courts, should decide the appropriate level of procedure for agencies. Second, the Court announced strong policies against unpredictability and overproceduralization. The Court stated that if courts were allowed to ratchet up the level of procedure whenever they thought fairness or policy would be served, "judicial review would be totally unpredictable [a]nd the agencies . . . would undoubtedly adopt full adjudicatory procedures in every instance." A final principle underlying *Vermont Yankee* is that courts conducting substantive judicial review should not expect informal procedures to produce the sort of record that is likely to be produced only through formal procedures.

A faithful reading of *Vermont Yankee* thus points to two principles and to two policies in the interpretation of procedural provisions governing agencies.⁸⁵ On principle, courts should not add to those procedures clearly required by statute either to create a "better" record or because the courts find increased procedure desirable. As to policy, first, the agencies should be able to predict, in advance, the level of procedure required. This means that courts should rely only on explicit provisions of the APA and other applicable statutes and rules and they should read those provisions narrowly,

⁸⁵ See Jack M. Beermann, *Congressional Administration*, 43 *San Diego L. Rev.* 61, 155-56 (2006).

without embellishments that would be difficult to predict. Second, courts should preserve agencies' ability to employ informal procedures where the APA and other statutes and rules allow. Courts should resist the temptation to evaluate all agency proceedings through the normative lens of adjudication.

Thus, despite its seemingly widespread acceptance, this third reading of *Vermont Yankee*, under which courts are free to elaborate on the APA the way they apply the Due Process Clause to impose all sorts of non-textually supportable requirements, is unduly narrow. The Supreme Court granted certiorari in *Vermont Yankee*, and refused to dismiss the writ, because it wanted to make some fairly significant statements about administrative law. Indeed, the Court went quite a bit out of its way to take and hold the case.⁸⁶ Its decision was plainly grounded in a view of the APA's procedural framework as a fundamental charter that courts should not unilaterally alter. The *reason* for the Court's decision – both for the specific outcome and for the fact that the case was decided in the first place – was less the particular requirements of cross-examination and discovery in informal proceedings imposed by the D.C. Circuit than the general principle

⁸⁶ Given the usual norms for the Supreme Court's discretionary docket, the D.C. Circuit's *Vermont Yankee* decision should never have been reviewed. First, and most obviously, the lower court decision seemed to be primarily about the evidentiary basis for the agency's decision. Surely the Supreme Court was not going to grant certiorari to review a fact-bound determination concerning an agency's evidentiary support for a conclusion, even if the judicial determination was clearly wrong (and the lower court decision in *Vermont Yankee* was very far from clearly wrong in this respect). The Solicitor General – over the objection of the agency – opposed the grant of certiorari on precisely this basis. See Metzger, *supra* note --, at 152. Second, the ambiguity in the lower court's decision on whether the agency's error was substantive or procedural counseled against a grant of certiorari. Third, once certiorari had been granted, the agency adopted a new interim rule to deal with the environmental consequences of the nuclear fuel cycle and made clear that it was well on its way to adopting a new permanent rule. See 435 U.S. at 535 n.14. While this may not have, as the NRDC vigorously urged, rendered the case technically moot and therefore beyond the jurisdiction of the federal courts, it certainly made it odd for the Supreme Court to spend time and docket space on a soon-to-be-defunct agency rule. In explaining its refusal to dismiss the writ, the Court wrote that the D.C. Circuit's imposition of rulemaking procedures without statutory, regulatory, or constitutional basis "raises questions of such significance in this area of the law as to warrant our granting certiorari and deciding the case" notwithstanding the imminent demise of the rule at issue. *Id.* at 537 n.14. It was very clear that the Court thought that it had something important to say about administrative law.

embraced by the lower courts that judges could add to the procedures otherwise laid down in positive law. Because the *Vermont Yankee* Court was apparently motivated by norms favoring predictability, informality and flexibility together with its reliance on the original meaning of the APA, the decision should be taken both as a clear rule that courts may not impose procedural requirements on agencies not grounded in the text of the APA or some other applicable statute and as a general injunction to construe the APA's procedural provisions according to their original plain terms. This is, for want of a better phrase, the natural reading of *Vermont Yankee*.

II

Because the language in *Vermont Yankee* is so strong and the tone of the opinion is so harsh, it is very tempting to try to find new applications for whatever principles one can draw from it. Two such attempts to extend *Vermont Yankee*, by Richard Pierce and Paul Verkuil, are especially notable. While the positions urged by these authors are defensible on many grounds, we do not believe that either attempt is – or purports to be – a defensible application of the most plausible reading of *Vermont Yankee*.

A. *Does a Presumption of Formal Adjudication Violate Vermont Yankee?*

The APA mandates the use of formal trial-type proceedings for both rulemakings and adjudications that are “required by statute to be made on the record after opportunity

for an agency hearing.”⁸⁷ The Supreme Court held in two cases in 1972 and 1973 that *rulemaking* statutes that call for a “hearing,” without a specification that the hearing be “on the record,” do not require formal proceedings.⁸⁸ Surprisingly, the Supreme Court has not spoken directly on when an *adjudication* statute requires formal adjudication. In 1978, in *Seacoast Anti-Pollution League v. Costle*,⁸⁹ the First Circuit reasoned that adjudications are more likely than rulemakings to involve particularized fact-finding that lends itself well to quasi-judicial procedures,⁹⁰ and the court accordingly was “willing to presume that, unless a statute otherwise specifies, an *adjudicatory* hearing subject to judicial review must be on the record.”⁹¹ Some courts have agreed with the First Circuit’s presumption of adjudicatory formality.⁹² Other courts have treated adjudicatory statutes much like rulemaking statutes by presuming that the absence of “on the record” language in adjudicatory statutes means that informal proceedings were permissible.⁹³ In

⁸⁷ 5 U.S.C. §§ 553(c), 554 (a) (2000).

⁸⁸ *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972); *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973). To be sure, the Court expressly stated that “the actual words ‘on the record’ and ‘after . . . hearing’ used in § 553 were not words of art, and that other statutory language having the same meaning could trigger the provisions of §§ 556 and 557 in rulemaking proceedings.” 410 U.S. at --. Nonetheless, because the case for formal rulemaking in *Florida East Coast Ry.* was as strong a case as there will ever be without the words “on the record” in the organic statute, lower courts have treated *Florida East Coast Ry.* essentially as a categorical rule that “hearing” language in without a specification that the hearing be “on the record” will never trigger formal APA rulemaking. If any statute that does not contain the words “on the record” has been held to trigger formal rulemaking since 1973, we are unaware of it.

⁸⁹ 572 F.2d 872 (1st Cir. 1978).

⁹⁰ 572 F.2d at 876-77.

⁹¹ *Id.* at 877 (emphasis added).

⁹² *See Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1444 n.12 (D.C. Cir. 1984); *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1261-62 (9th Cir. 1977).

⁹³ *See City of West Chicago v. NRC*, 701 F.2d 632, 641-44 (7th Cir. 1983); *United States Lines v. FMC*, 584 F.2d 519, 536 (D.C. Cir. 1978). This presumption was surely less categorical than the essentially irrebuttable presumption laid down for rulemaking statutes by *Florida East Coast Ry.*

1989, the D.C. Circuit added a new wrinkle to this split in authority by holding that if the language of an organic adjudicatory statute is ambiguous, as will generally be true of language calling for an adjudicatory “hearing” without a specification that it be “on the record,” courts should defer to reasonable agency interpretations of those statutes⁹⁴ under *Chevron U.S.A. v. NRDC*.⁹⁵

In 2005, Professor Richard Pierce urged the Court to issue a “*Vermont Yankee II*” to overturn the First Circuit’s presumption of adjudicatory formality.⁹⁶ According to Professor Pierce, the *Seacoast* doctrine “has precisely the same adverse effects as the practice the Supreme Court held unlawful in *Vermont Yankee*”⁹⁷ by straight-jacketing agencies into employing full trial-type procedures in every adjudication. This is somewhat of an overstatement by Professor Pierce. The First Circuit’s presumption does not suffer from the same level of unpredictability as the pre-*Vermont Yankee* practice in the lower courts regarding rulemaking. The pre-*Vermont Yankee* practice involved a relatively unguided exercise of judicial discretion over how much procedure to require. By contrast, the First Circuit’s presumption is a relatively clear and thus highly predictable rule pointing toward formal procedures in all cases in which an adjudicatory hearing is required.

⁹⁴ Compare *Union of Concerned Scientists*, *supra* note 96, with *United States Lines*, *supra* note 97.

⁹⁵ *Chemical Waste Management, Inc. v. U.S. E.P.A.*, 873 F.2d 1477, 1482 (D.C. Cir. 1989), citing *Chevron*, 467 U.S. 837 (1984). The decision in *Chemical Waste Management* resolved an intra-circuit disagreement over whether all references to “hearings” in adjudication statutes were to formal procedures. The court concluded that it is for the agency to resolve in the first instance, subject to review under *Chevron*.

⁹⁶ Pierce, *supra* note --.

⁹⁷ *Id.* at 677.

Further, Professor Pierce overlooks the aspect of *Vermont Yankee* that the Court deemed “perhaps” most important, the linkage between the sufficiency of the record and the procedures employed. The Supreme Court admonished the D.C. Circuit not to require a record that could only be produced by formal procedures because that would mean that agencies would have no choice but to employ formal procedures in order for their rules to survive substantive review. By contrast, the *Seacoast* doctrine does not link the level of procedure to the sufficiency of the record on review, but appears to be based purely on the First Circuit’s view of the procedural entitlements created by the applicable statutes.

Professor Pierce again overstates his case when he states that the legal support for the First Circuit’s presumption in favor of formal procedures is as weak as the legal support for the pre-*Vermont Yankee* practice in the lower courts. As the Supreme Court’s analysis revealed, the pre-*Vermont Yankee* lower courts had no legal support for their practice of requiring more procedures other than their perception that, due to the importance or complexity of the rulemaking, more procedure would be fairer or create a better record in support of the rules adopted. There was no statute that could plausibly be read as supporting the pre-*Vermont Yankee* practice. The First Circuit, by contrast, has a plausible reading of the statutes involved on its side, buttressed in some cases by legislative history and prior agency practice.

Professor Pierce is correct, however, that the First Circuit’s presumption is in tension with the *Vermont Yankee* Court’s apparent preference for agency flexibility and informality. The *Seacoast* doctrine gives agencies a strong incentive to use formal procedures, perhaps even stronger than did the pre-*Vermont Yankee* practice with regard

to rulemaking. In *Vermont Yankee*, the Supreme Court overstated its case when it said that judicial power to impose whatever procedures seemed appropriate after the rulemaking meant that in all cases agencies “would undoubtedly adopt full adjudicatory procedures.” In fact, even before *Vermont Yankee*, many agencies used less than full adjudicatory procedures in rulemakings even though they were probably aware that there was a chance that a reviewing court would find the procedures employed inadequate. However, the Court’s concern was legitimate that, absent unconstitutionality, courts should not force agencies to employ procedures Congress did not intend to require. Professor Pierce is thus correct that the First Circuit’s presumption likely caused overproceduralization whenever the word “hearing” appeared in a statute when Congress may not have intended formal procedures.

The question really boils down to whether the *Seacost* doctrine is a correct understanding of Congress’s use of the word “hearing” in numerous adjudication statutes. Here, Professor Pierce argues forcefully that while the doctrine might have been “defensible until the Supreme Court issued its 1984 opinion in *Chevron*,”⁹⁸ in the post-*Chevron* era, any presumptions of adjudicatory formality or informality in the absence of clear statutory specification of procedures must give way to a presumption in favor of the agencies’ reasonable constructions of their organic statutes.⁹⁹

It is clear that Professor Pierce is not really arguing that the *Seacoast* doctrine is strictly inconsistent with *Vermont Yankee*. The key decision for Professor Pierce is *Chevron*: he agrees with the D.C. Circuit in *Chemical Waste Mgmt.* that *Chevron*

⁹⁸ *Id.* at 681.

⁹⁹ *See id.* at 681-82.

compels deference to the agency's choice of procedural formats when the organic statute is ambiguous about the kind of adjudicatory "hearing" that is required. His real complaint is not that the First Circuit ignored *Vermont Yankee* but that it ignored *Chevron*. He is using *Vermont Yankee* essentially as a metaphor for reigning in unruly lower courts that are overproceduralizing administrative law rather than arguing directly from precedent.

Of course, if Professor Pierce is correct, then courts that adhere to the *Seacoast* presumption when agencies construe the relevant statute differently are, in essence, imposing procedures not mandated by statute, which is precisely the practice against which *Vermont Yankee* warned. But the same can be said about every instance in which an agency misinterprets a procedural provision of a statute or constitution. One does not need *Vermont Yankee* in order to tell courts not to misinterpret the law, nor can *Vermont Yankee* plausibly be read as a general injunction against judicial error concerning agency procedure. *Vermont Yankee* was targeted at judicial imposition of procedures simply because judges decided that they were a good idea. Accordingly, in our view, procedural mistakes violate *Vermont Yankee* when they are not based on an honest reading of some source of positive law. We recognize that honest but clearly wrong procedural rulings may create many of the practical problems noted by *Vermont Yankee*. In some cases, they may represent subtle but stubborn judicial refusal to obey *Vermont Yankee*. But unless they abandon plausible readings of positive legal materials to impose procedures, they do not violate *Vermont Yankee* as we understand it.

Professor Pierce may or may not be right about the applicability of *Chevron* to agency adjudicatory statutes,¹⁰⁰ and he accordingly may or may not be right about the merits of the *Seacoast* doctrine, but nothing about this debate implicates the principles of *Vermont Yankee*.

Shortly after Professor Pierce's article was published, the First Circuit, in apparent agreement with the D.C. Circuit, adopted precisely the position that he urged, holding that *Chevron* requires deference to reasonable agency interpretations of ambiguous statutes containing hearing requirements for adjudications.¹⁰¹ The court did not mention *Vermont Yankee*; its decision to reject (or limit) *Seacoast* turned solely on the view that a new Supreme Court opinion applying *Chevron*¹⁰² required it to "reexamine pre-*Chevron* precedents through a *Chevron* lens."¹⁰³ Professor Pierce thus

¹⁰⁰ *Chevron* applies only to statutes that an agency "administers." 467 U.S. at 842. Agencies do not *administer*, in this specialized sense, every statute that they *apply*. See **Lawson**, *supra* note --, at --. If hearing provisions in organic statutes are the kinds of statutes that agencies "administer" under *Chevron*, then Professor Pierce and the D.C. Circuit are correct: courts should defer to reasonable agency views about whether those statutes do or do not trigger the formal adjudicatory procedures of the APA. The problem is that application of a hearing requirement in an organic statute where the organic statute does not specify what procedures must be followed means that some other statute such as the APA, which is clearly not "administered" by the agency, must be referred to in order to decide exactly what procedures are required. While we take no firm position on whether those provisions are the sorts of statutes that agencies can be said to "administer" for purposes of *Chevron*, the better view to us is that agencies administer hearing provisions in organic statutes insofar as they tell us which provisions of the APA (and other applicable statutes) apply, but agencies do not administer the adjudication provisions of the APA (and other applicable statutes) so that agency decisions on what is actually required by the APA (and other applicable statutes) do not receive *Chevron* deference. We recognize that this line may sometimes be difficult to draw.

¹⁰¹ *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12 (1st Cir. 2006).

¹⁰² *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Services*, 125 S. Ct. 2688 (2005).

¹⁰³ 443 F.3d at 17 (citing *Brand X*).

got his “*Chevron II*” (albeit from a lower court) rather than his “*Vermont Yankee II*” -- which we suspect is what he really wanted all along.¹⁰⁴

B. *Does Hard-Look Review Violate Vermont Yankee?*

Section 706(2)(A) of the APA instructs reviewing courts to set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹⁰⁵ In the absence of a more specific directive in the APA, an organic statute, or caselaw, this provision provides a general standard of review applicable to all agency action that is subject to judicial review.

Since the late 1960s, courts concerned about industry capture of administrative agencies have used this provision to require agencies in rulemakings explicitly to articulate all of the key issues of fact, law, and policy raised in the proceedings, to spell out the steps in the agency’s reasoning process in considerable detail, to address the major concerns raised by commenting parties during the rulemaking, and generally to show the court and the public that the agency has “really taken a ‘hard look’ at the salient problems, and has . . . genuinely engaged in reasoned decision-making.”¹⁰⁶ Review under this “hard-look” doctrine is generally quite rigorous and imposes a substantial burden on both agencies and courts.

¹⁰⁴ In fact, without *Chevron*, perhaps Professor Pierce would have gotten a *Florida East Coast Ry. II*, extending that case’s reading of “hearing” in rulemaking statutes as referring to informal procedures to adjudication statutes.

¹⁰⁵ 5 U.S.C. § 706(2)(A) (2000).

¹⁰⁶ *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970).

Criticisms of this relatively intrusive form of substantive judicial review abound.¹⁰⁷ In 1981, Paul Verkuil expressed disappointment that the Supreme Court had not used *Vermont Yankee* as a vehicle to clarify the appropriate scope of judicial review, and he urged a *Vermont Yankee II* that would add to the Court's procedural decision "a substantive one, modifying the expansive scope of review standard that allows reviewing courts to build a record in informal proceedings. If the Court fails to add a second decision to *Vermont Yankee*, it will have done very little to establish the primacy of agency control over the rulemaking process."¹⁰⁸

Professor Verkuil expressly was not claiming that *Vermont Yankee* by itself, as a doctrinal matter, called into question the validity of hard-look review. To the contrary, he thought that a sequel to *Vermont Yankee* was necessary in order to restore to agencies some of the discretion that, in his judgment, the lower courts had wrongly taken away during the 1968-78 expansion of the scope of substantive judicial review.¹⁰⁹ For Professor Verkuil, a *Vermont Yankee II* would not be an application or extension of principles already contained in the original *Vermont Yankee* decision but instead a

¹⁰⁷ See, e.g., Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 **Va. L. Rev.** 1243 (1999); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 **Tex. L. Rev.** 525 (1997). For a defense of hard look judicial review, see Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 **Tex. L. Rev.** 483 (1997); Mark Seidenfeld, *Hard Look Review in a World of Techno-Bureaucratic Decisionmaking: A Reply to Professor McGarity*, 75 **Tex. L. Rev.** 559 (1997). For a suggestion that the debate may be about less than meets the eye, see William S. Jordan, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Intefere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 **Nw. U.L. Rev.** 393 (2000).

¹⁰⁸ Verkuil, *supra* note --, at 419.

¹⁰⁹ See *id.* at 418 ("No matter how many times one reads the case, the Court's discussion of the appropriate standards for judicial review of rulemaking remains inadequate. The conclusion is inescapable that *Vermont Yankee* can live up to its reputation as a watershed decision only if it is followed by a second decision that resolves the complicated issue of the appropriate scope of review of informal rulemaking.").

decision comparable in scope and tone to *Vermont Yankee* aimed at a quite different target.

Nonetheless, there clearly can be some tension between *Vermont Yankee*, understood purely as a decision about procedures, and modern hard-look review. If courts use the need for careful substantive review as an excuse to force agencies to employ certain procedures in order to build a record (by saying, for example, that any record that does not subject certain information to discovery and cross-examination is by virtue of that fact substantively inadequate to support an agency decision), hard-look review can provide a vehicle for doing an end-run around *Vermont Yankee*'s direct prohibition on judicial creation of procedures without grounding in positive law. If agencies cannot create a record that would survive substantive review while employing the informal procedures specified in the APA, then they will have no choice but to increase the level of procedure. There are obviously distinct echoes here of the *Vermont Yankee* Court's concern with increased procedures in the name of creating a better substantive record in support of agency rules.

But while hard look review may or may not be a correct or even plausible interpretation of section 706(2)(A) – a point on which the authors are not necessarily in full agreement -- we are not convinced that hard look review violates *Vermont Yankee*. Hard look review does not necessarily force agencies to adopt any specific procedures. As the Court recognized in *Pension Benefit Guaranty Corp. v. LTV*,¹¹⁰ hard look review “imposes a general ‘procedural’ requirement of sorts by mandating that an agency take whatever steps it needs to provide an explanation that will enable the court to evaluate the

¹¹⁰ 496 U.S. 633 (1990).

agency's rationale at the time of decision,"¹¹¹ but as long as the agency rather than the court gets to determine how best to satisfy that substantive obligation, *Vermont Yankee* is not necessarily implicated. Hard look review is not unpredictable, it does not deny to agencies the flexibility Congress intended, and if courts apply hard look review in a manner that is sensitive to the *Vermont Yankee* problem, agencies will not be pushed into procedures not mandated by law. *Vermont Yankee* and hard look review can peacefully co-exist.

III

If the essential holding of *Vermont Yankee* is that courts should not impose procedural requirements on federal agencies without at least an arguable grounding in positive law, there is a wide range of contemporary doctrines that are likely, and in some cases clear, violations of this principle. A true *Vermont Yankee II* would reconsider some of these doctrines.

A. Ex Parte Contacts in Informal Rulemaking

Perhaps the clearest example of a doctrine that flouts *Vermont Yankee* is the judicial prohibition on ex parte communication with or by an agency during informal rulemakings. The APA defines an ex parte communication as "an oral or written communication not on the public record with respect to which reasonable prior notice to

¹¹¹ *Id.* at 654.

all parties is not given, but it shall not include requests for status reports on any matter or proceeding not covered by this subchapter.”¹¹² In formal rulemakings or adjudications – that is, proceedings that are required by organic statutes to be conducted “on the record after opportunity for an agency hearing” – section 557 of the APA contains extensive and detailed prohibitions on ex parte contacts between “any interested person outside the agency” and any agency personnel who “may reasonably be expected to be involved in the decisional process of the proceeding.”¹¹³ The provision effectively requires any relevant communication regarding a matter before the agency in a formal proceeding to be placed in the public record, which section 556 in turn establishes as the exclusive basis for a proper agency decision in such proceedings.¹¹⁴ By stark contrast, the APA contains no prohibition on ex parte communications in informal proceedings.

Nonetheless, for nearly half a century, the D.C. Circuit has sought to limit ex parte contacts in at least some informal rulemakings. In 1959, the court, egged on by the Department of Justice, found that ex parte contacts in an FCC rulemaking to assign television channels violated “basic fairness [which] requires such a proceeding to be carried on in the open,”¹¹⁵ and the court ordered the proceeding reopened. Nearly two decades later, in *Home Box Office, Inc. v. FCC*,¹¹⁶ the D.C. Circuit reaffirmed and

¹¹² 5 U.S.C. § 551(14) (2000).

¹¹³ *Id.* §j 557(d).

¹¹⁴ *Id.* § 556(e) (“The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title”). The agency is allowed to take official notice of facts not in the public record, but only if each party has “an opportunity to show the contrary.”

¹¹⁵ *Sangamon Valley Television Corp. v. US*, 269 F.2d 221, 224 (D.C. Cir. 1959).

¹¹⁶ 567 F.2d 9 (D.C. Cir. 1977).

extended this doctrine.¹¹⁷ The court worried “that the final shape of the rules we are reviewing here may have been by compromise among the contending industry forces, rather than by exercise of the independent discretion in the public interest the Communications Act vests in individual commissioners.”¹¹⁸ From this, the court observed that “[e]ven the possibility that there is one administrative record for the public and this court and another for the Commission and those ‘in the know’ is intolerable. . . . [T]he public record must reflect what representations were made to an agency so that the relevant information supporting or refuting those representations may be brought to the attention of the reviewing courts.”¹¹⁹ While recognizing that “informal contacts between agencies and the public are the ‘bread and butter’ of the process of administration and are completely appropriate so long as they do not frustrate judicial review or raise serious concerns of fairness,”¹²⁰ the court held that “once a notice of proposed rulemaking has been issued . . . any agency official or employee who is or may reasonably be expected to be involved in the decisional process . . . should ‘refus[e] to discuss matters relating to the disposition of a [rulemaking proceeding] with any interested private party . . .’ ”¹²¹ The court went on to require that if ex parte contacts occur, any documents involved or written summaries of any oral communications received should be placed on the public rulemaking record.¹²² This regime is very difficult to distinguish from the careful

¹¹⁷ *See id.* at 51-58.

¹¹⁸ *Id.* at 53.

¹¹⁹ *Id.* at 54.

¹²⁰ *Id.* at 57.

¹²¹ *Id.* (quoting Executive Order No. 11920, § 4).

¹²² *Id.*

regulation of ex parte contacts in *formal* rulemakings and adjudications specified by the APA in section 557.

In subsequent years, the D.C. Circuit has effectively limited its judicially-created prohibition on ex parte contacts to informal rulemakings that have some of the look and feel of adjudications – that is, that resolve conflicting claims among identifiable claimants rather than establish general policy.¹²³ The court has not applied the doctrine to contacts with Congress and the President.¹²⁴ The court has even held, citing *Vermont Yankee*, that ex parte contacts cannot be judicially forbidden in informal *adjudications* in the absence of statutory, regulatory, or constitutional authority:

Although the APA prohibits *ex parte* contacts in an adjudication or rulemaking “required by statute to be made on the record after opportunity for an agency hearing,” there is no such requirement applicable to the MarAd’s review of an application under § 9. In the absence of such a statutory command, of course, “[a]gencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them.” *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978). Here the agency has not granted anyone the right to be free of *ex parte* communication.¹²⁵

This would seem *a fortiori* to rule out any judicially-imposed prohibition in informal rulemakings. Indeed, one set of commentators has said that the *Home Box Office* doctrine “has been construed narrowly by subsequent courts to the point of virtual

¹²³ See *Iowa State Commerce Comm’n v. Office of the Federal Inspector of the Alaska Natural Gas Transp. Sys.*, 730 F.2d 1566, 1576 (D.C. Cir. 1984); *Sierra Club v. Costle*, 657 F.2d 298, 401-02 (D.C. Cir. 1981).

¹²⁴ See *Sierra Club v. Costle*, 657 F.2d at 404-10.

¹²⁵ *District No. 1, Pacific Coast Dist., Maritime Engineers’ Beneficial Assoc. v. Maritime Admin.*, 215 F.3d 37, 42-43 (D.C. Cir. 2000).

obsolescence as a judicial precedent.”¹²⁶ Nonetheless, the D.C. Circuit has never expressly disavowed the doctrine, and it continues to be the subject of active academic commentary.¹²⁷

There is no plausible basis in the APA for prohibiting ex parte contacts during informal proceedings. To the contrary, the carefully delineated prohibitions on such contacts in formal proceedings, coupled with the absence of any remotely comparable provisions for informal proceedings, renders any such claim frivolous. Organic statutes or agency regulations could, of course, forbid or limit ex parte contacts in rulemakings in specific cases, but the D.C. Circuit’s doctrine purports to be general law rather than something peculiar to FCC statutes or regulations. Nor can one ground the doctrine in the requirements of substantive review, as *Home Box Office* seemed to suggest. This would be precisely the sort of use of substantive review to require specific agency procedures that *Vermont Yankee* forbids. *Vermont Yankee* firmly rejected the notion that a court may require additional procedures to ensure an adequate record, stating that “the adequacy of the ‘record’ in this type of proceeding is not correlated directly to the type of procedural devices employed, but rather turns on whether the agency has followed the statutory mandate of the Administrative Procedure Act or other relevant statutes.”¹²⁸

This means that courts should not use standards of substantive review to add to the

¹²⁶ Cary Coglianese, Richard Zeckhauser & Edward Parson, *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 **Minn. L. Rev.** 277, 323 n.170 (2004).

¹²⁷ See, e.g., Patrick M. Garry, *The Unannounced Revolution: How the Court Has Indirectly Effected a Shift in the Separation of Powers*, 57 **Ala. L. Rev.** 689, 709 (2006); Edward Rubin, *It’s Time to Make the Administrative Procedure Act Administrative*, 89 **Cornell L. Rev.** 95, 119-20 (2003).

¹²⁸ 435 U.S. at 547.

specific requirements contained in the procedural provisions of the APA or other sources of positive law.

To be sure, one can imagine certain instances in which procedural due process might, as a matter of constitutional law, restrict ex parte contacts in rulemakings. Normally, the procedural due process protections we associate with adjudicatory hearings do not apply to agency rulemakings, no more than they apply to actions of legislators; that has been the understood import of *Bi-Metallic Investment Co. v. State Board of Equalization of Colorado*¹²⁹ for nearly a century. *Vermont Yankee* acknowledged that “even in a rule-making proceeding[,] when an agency is making a ‘“quasi-judicial”’ determination by which a very small number of persons are ‘“exceptionally affected, in each case upon individual grounds,”’ in some circumstances additional procedures may be required in order to afford the aggrieved individuals due process.”¹³⁰ Thus, there can be proceedings that are statutorily defined as rulemakings but that count as adjudications for purposes of constitutional due process.¹³¹ Consider, for example, a ratemaking proceeding that is automatically defined as rulemaking by the APA¹³² but that only sets a rate for one firm’s shipment of one product to one customer on one occasion. Regardless of how the APA defines that action for statutory purposes, it is quite conceivable (though perhaps not inevitable) that the Constitution would regard it as specific enough to fall

¹²⁹ 239 U.S. 441 (1915).

¹³⁰ 435 U.S. at 542 (quoting *Florida East Coast Railway*, 410 U.S. at 242, 245, in turn quoting *Bi-Metallic*, 239 U.S. at 446).

¹³¹ Agency adjudications are uncontroversially subject to procedural due process requirements. On the constitutional distinction between rulemaking and adjudication, see *Florida East Coast Ry.*, 410 U.S. at 244-46.

¹³² See 5 U.S.C. § 551 (2000) (“‘rule’ . . . includes the approval or prescription for the future of rates”).

within due process protections, and it is also quite conceivable (though also perhaps not inevitable) that due process in those circumstances might forbid or limit ex parte contacts.¹³³

If the D.C. Circuit's prohibition on ex parte contacts in informal rulemakings was grounded in procedural due process, it would not violate *Vermont Yankee*. But despite the decisions narrowing the doctrine to rulemakings involving relatively specific claims,¹³⁴ nothing suggests that the D.C. Circuit means to limit its doctrine only to those rulemakings that actually count as adjudications for constitutional purposes. There is no way, for example, that the rulemaking proceeding in *Home Box Office*, which involved broad regulation of cable and subscription television programming, could conceivably fall on the "adjudication" rather than "rulemaking" side for constitutional purposes.

Judicial limitations on ex parte contacts in informal rulemakings, which effectively require agencies to place such contacts on some kind of public record, are precisely the sorts of procedural interventions against which *Vermont Yankee* warned, and not only because the addition of procedures not clearly specified by statute is involved. The rule against ex parte communications violates *Vermont Yankee*'s underlying policies. First, it is highly unpredictable. The D.C. Circuit cannot seem to agree on whether it applies all the time, or only to competing claims to a valuable privilege or some such thing. Second, because it is unpredictable, it tends toward overproceduralization under which no agency rulemaking is safe unless the agency

¹³³ There is no clear way to determine in the abstract precisely what constitutes "due process of law," as it depends heavily on particular facts and contexts. See Gary Lawson, Katharine Ferguson & Guillermo A. Montero, "*Oh Lord, Please Don't Let Me Be Misunderstood!*": Rediscovering the *Mathews v. Eldridge* and *Penn Central Frameworks*, 81 *Notre Dame L. Rev.* 1, 8-23 (2005).

¹³⁴ See *supra* note --.

enforces a ban on ex parte contacts. Third, it links the sufficiency of the record to the procedures employed when it expresses the concern that there will be a secret record, available only to those privy to the ex parte communications that occurred. Finally, it violates the fundamental principle underlying *Vermont Yankee*, that courts have no business imposing statutes not clearly required by law. Unless the limitations on ex parte contacts can find some grounding in due process or specific organic statutes or regulations, they are a flagrant violation of the principles and holding of *Vermont Yankee*.

C. Agency Bias and Prejudgment of Issues

One of the most basic principles of adjudication is that the adjudicator is supposed to be unbiased and have an open mind. A proceeding in which the judge is biased or has pre-judged the issues violates procedural due process.¹³⁵ The same constitutional principles apply to administrative adjudication.¹³⁶ In addition, section 556 of the APA specifically provides that in *formal* proceedings “[o]n the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision of the case.”¹³⁷ On prejudgment, it is grounds for disqualification of an administrative adjudicator if he or she “has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.”¹³⁸

¹³⁵ See *Tumey v. Ohio*, 273 U.S. 510 (1927).

¹³⁶ See *Gibson v. Berryhill*, 411 U.S. 564 (1973).

¹³⁷ 5 U.S.C. § 556(b) (2000).

¹³⁸ *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970).

Legislative prejudgment is unlikely to violate the Constitution, the APA or any other applicable statute. There is no constitutional requirement that legislators have an open mind. Quite to the contrary, legislators are often elected precisely because the voters believe that they are unalterably close-minded on at least some important questions. Open-mindedness in legislators shades very easily into waffling or flip-flopping, which are neither always expected nor desired qualities. When agencies make rules, they behave more like legislators than like judges. Unless the rulemaking is so particularized that it crosses the constitutional line into adjudication,¹³⁹ procedural due process does not require open-mindedness in administrative rulemaking. Nor does the APA require open-mindedness in informal rulemaking; there is no provision for disqualification of agency decisionmakers for prejudgment in section 553.

The D.C. Circuit has nonetheless said, in a decision that post-dates *Vermont Yankee*, that administrative rulemakers must recuse themselves “when there has been a clear and convincing showing that the Department member has an unalterably closed mind on matters critical to the disposition of the proceeding.”¹⁴⁰ Although this standard is meant to be more lenient than the standard that applies to administrative adjudicators (or agency personnel in formal rulemakings), it is unclear where courts get the authority to impose recusal requirements at all in informal rulemakings. That authority does not come from the APA.¹⁴¹ Nor does it come from the Constitution if we are talking about rulemakings that are sufficiently general to fall under *Bi-Metallic* (which is almost all

¹³⁹ See *supra* --.

¹⁴⁰ Ass’n of Nat’l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1170 (D.C. Cir. 1979).

¹⁴¹ Accord: Rubin, *supra* note --, at 119.

real-world rulemakings). If there is no requirement of open-mindedness in organic statutes or agency regulations, the judicial creation of such a requirement seems to be precisely the sort of procedural invention forbidden by *Vermont Yankee*.

The only possible statutory basis for a requirement of open-mindedness in APA informal rulemaking is the specification that “after considering the relevant matter presented” the agency must include a “concise general statement” of the basis and purpose of any rules adopted.¹⁴² While this provision strikes us as focused more on the establishment of the concise general statement requirement, it implies that the agency should consider the comments received. An administrator with a closed mind, it can be argued, does not actually consider comments contrary to her position, except perhaps as an inconvenience along the way to implementing her position. This, however, is the sort of indirect reasoning that *Vermont Yankee* should be understood to reject as contrary to its principle and policies. As a matter of principle, courts should not prescribe a standard for prejudgment disqualification where Congress has not spoken. As a matter of policy, this sort of reasoning is likely to render the APA highly unpredictable and encourage overproceduralization.

The rule requiring open-mindedness is not, it should be noted, a serious violation of *Vermont Yankee* because it is less open-ended than the general pre-*Vermont Yankee* practice of fine-tuning procedure to each rulemaking. Further, the “unalterably closed mind” standard is so difficult to prove that it is highly unlikely that any violation will ever be found.¹⁴³ However, it suffers from a somewhat unrelated flaw that underscores

¹⁴² 5 U.S.C. § 553 (2000).

¹⁴³ In the *National Advertisers* case itself, FTC Chairman Michael Pertschuk, who was held to have a sufficiently open mind to participate in a rulemaking on advertising aimed at children, pretty clearly

the importance of leaving it to Congress to prescribe the procedures applicable to agency action. It tends to undermine, in an unhealthy manner, the legitimacy of the political process of appointing agency officials. Agency officials are appointed by the President to help bring the President's program to fruition. The President should be able to appoint the most close-minded agency officials imaginable if that helps the President carry out the administration's program on which the President was elected. Rulemakings are often preceded by years of information gathering, informal discussions, studies, and thought. Much of the time, agencies initiate rulemakings knowing precisely where they want the rulemaking to go. *Vermont Yankee* clearly validates this practice.

Bias is another matter. Bias exists when the decisionmaker him or herself has something to gain or lose from the decision, ranging from pure monetary gains or losses such as the commissions formerly earned by some judges from fines they imposed to less tangible gains when a judge is related to or friendly with a party or their lawyer. We do not tolerate bias in formal adjudication. Due process and court rules typically require recusal when a judge, for example, owns shares in a corporation involved in a case or when a judge's relative or friend is a party or lawyer in the case. On the other hand, we tolerate an enormous amount of bias in the legislative arena. Lawmakers typically vote on their own salaries, on provisions of tax law that apply to them, and on spending and regulatory measures that impact directly on their reelection prospects.

indicated that he was absolutely committed to regulating advertising of sugared cereals aimed at children and that he would vote to impose the strictest rule for which he could get a majority at the commission. In the most revealing communication he had on the matter, he wrote to the FDA Administrator that "we do not have to prove the health consequences of sugared cereals. What we have to prove is that there is a substantial health controversy[.]" What he was saying is that he would act so long as the record would survive judicial review regardless of whether a preponderance of the evidence on the record actually supported the agency decision. This does not impress us as the writing of a person with an open mind.

This dichotomy exists to a great extent in administrative law. As noted above, the APA specifies that agency adjudicators are subject to disqualification for bias. The APA says nothing about disqualification of rulemaking officials for bias. As a constitutional matter, the Supreme Court has found bias where adjudicators have a direct or indirect financial interest in the outcome of an agency adjudication,¹⁴⁴ but it has not suggested that bias is a problem in rulemakings. Ethics rules, which have been strengthened in recent decades, may have something to say about administrators participating in rulemakings in which they have a financial or other interest, but the law has not identified bias as a problem in rulemakings that courts should remedy.

D. Notice of Proposed Rulemaking

Subject to exceptions for various kinds of rules and subjects, section 553 of the APA requires agencies to publish “[g]eneral notice of proposed rulemaking” before adopting a rule.¹⁴⁵ The notice of proposed rulemaking “shall include – (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the

¹⁴⁴ *Tumey v. Ohio*, 273 U.S. 510 (1927); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Gibson v. Berryhill*, 411 U.S. 564 (1973). *Gibson* is the most interesting case because it involves the indirect financial interest of competitors using an administrative agency to stamp out one segment of their competition. The Alabama Optometric Association, a group open only to independent optometrists, had filed complaints alleging that optometrists employed by corporations were engaged in “unprofessional conduct.” The Court ruled that the Alabama Board of Optometry could not adjudicate these complaints because the Board was composed solely of independent optometrists. Interestingly, a prejudgment allegation was also advanced, based on the fact that the Board had filed suit in Alabama state court seeking to enjoin the corporate practice of optometry. The Court did not reach this allegation, perhaps because a ruling that filing suit amounts to unconstitutional prejudgment would threaten the integration of functions that exists in many agencies, in which a single body acts as prosecutor, legislator and adjudicator.

¹⁴⁵ 5 U.S.C. § 553(b) (2000).

proposed rule or a description of the subjects and issues involved.” As late as the mid-1960s, it was commonplace for notices of proposed rulemaking simply to describe, in very brief terms, the sorts of issues that the agency was exploring, to call for information, and to avoid specifying any proposed rule until the rulemaking process was complete.¹⁴⁶ This is entirely consistent with the text of the APA, which requires publication of *either* the “terms . . . of the proposed rule” *or* the “substance of the proposed rule” *or* “a description of the subjects and issues involved.”

As anyone can see by flipping through a random copy of the *Federal Register*, notices of proposed rulemaking today bear little resemblance to the sparse documents commonplace before the late 1960s. A typical notice of proposed rulemaking today contains extensive background on the agency’s activity prior to issuing the notice, a summary of the evidence in the agency’s possession and what it hopes to acquire during the rulemaking, and a proposed rule, perhaps in several different variations. The notion that an agency could issue a notice of proposed rulemaking that simply announces a general subject and calls for information is unthinkable.¹⁴⁷

Post-1968 caselaw, all emanating from the lower courts, has totally transformed the meager requirements for notices of proposed rulemaking contained in section 553 into

¹⁴⁶ For an illustration, involving one of the most important transportation initiatives of the 1960s, see **Lawson**, *supra* note --, at --.

¹⁴⁷ Consider the then-controversial Executive Order 12,291 promulgated by the Reagan Administration in 1981, *see* 46 Fed. Reg. 13193 (1981), which required agencies to consider the costs and benefits of major rules. The Order called upon agencies to prepare a Regulatory Impact Analysis for each major rule that the agency intended to propose or issue and to submit that analysis to the Director of the Office of Management and Budget. The clear assumption behind the order was that all significant agency action would involve clearly formulated proposed rules. When he started teaching in 1988, Professor Lawson called someone that he knew who worked in OMB performing regulatory review and asked what would happen under the Order if an agency issued a notice of proposed rulemaking that did *not* specify any particular rule but simply announced (as notices of proposed rulemaking routinely did before the late 1960s) the intention to study a certain issue or subject. The response was something to the effect of “Well, of course no one ever does that.”

an elaborate set of legal mandates. First, agencies must disclose in their notices all of the critical evidence and reasoning that underlies their proposals so that interested parties can comment fully upon the information in the agency's possession.¹⁴⁸ As the D.C. Circuit has explained:

The APA requires an agency to provide notice of a proposed rule, an opportunity for comment, and a statement of the basis and purpose of the final rule adopted. These requirements, which serve important purposes of agency accountability and reasoned decision-making, impose a significant duty on the agency. Notice of a proposed rule must include sufficient detail on its content and basis in law and evidence to allow for meaningful and informed comment: “the Administrative Procedure Act requires the agency to make available to the public, in a form that allows for meaningful comment, the data the agency used to develop the proposed rule.” *Engine Mfrs. Ass’n v. EPA*, 20 F.3d 1177, 1181 (D.C. Cir. 1994); *see also Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir. 1982) (“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.”); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 55 (D.C. Cir. 1977) (proposed rule must provide sufficient information to permit informed “adversarial critique”).¹⁴⁹

Second, if agencies come across critical new information during the course of the rulemaking, they may not be able to rely on that information in formulating a rule without initiating a new notice in which the additional information is subjected to public comment, though courts are loathe to require “perpetual cycles of new notice and comment periods”¹⁵⁰ and accordingly will not require new information to be subject to comment unless it is dramatically and qualitatively different from information available at the start of the rulemaking.¹⁵¹ Third, any rule adopted by the agency must be a “logical outgrowth” of the original proposals in the notice of proposed rulemaking, so

¹⁴⁸ *See Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 392-93 (D.C. Cir. 1973).

¹⁴⁹ *American Medical Ass’n v. Reno*, 57 F.3d 1129, 1132-33 (D.C. Cir. 1995).

¹⁵⁰ *Ass’n of Battery Recyclers v. EPA*, 208 F.3d 1047, 1058 (D.C. Cir. 2000).

¹⁵¹ *See, e.g., Building Industry Ass’n of Superior California v. Norton*, 247 F.3d 1241 (D.C. Cir. 2001).

that any final rule is adequately flagged by the original notice.¹⁵² Thus, “if the final rule materially alters the issues involved in the rulemaking or . . . ‘substantially departs from the terms or substance of the proposed rule,’ the notice is inadequate.”¹⁵³ This last requirement essentially forces agencies to put forth a concrete proposal for a rule in the original notice (so that the final rule can be compared to the original proposal) and strongly encourages agencies to put forward a menu of concrete proposals in the original notice (to increase the chances that any final rule will be a logical outgrowth of something contained in the notice). The overall result is to turn the notice of proposed rulemaking into something akin to proposed findings of fact and conclusions of law. Notices can easily run tens of tiny-typed pages in the *Federal Register* and incorporate by reference hundreds or thousands of pages of supporting documentation.

All three of these court-imposed requirements for notices of proposed rulemaking seem very hard to square with *Vermont Yankee*. The most obvious violator is the requirement that agencies disclose the data and reasoning that led to the promulgation of a notice of proposed rulemaking in the first place. There is nothing in the bare text of section 553 that could remotely give rise to such a requirement, making this a violation of the basic principle of *Vermont Yankee* that Congress and the agencies, but not the courts, have the power to decide on proper agency procedures. Some organic statutes affirmatively require this sort of disclosure,¹⁵⁴ but in the absence of specific statutory or

¹⁵² See Phillip M. Kannan, *The Logical Outgrowth Doctrine in Rulemaking*, 48 **Admin. L. Rev.** 213 (1996).

¹⁵³ *Chocolate Mfr. Ass’n of U.S. v. Block*, 755 F.2d 1098, 1105 (4th Cir. 1985) (quoting *Rowell v. Andrus*, 631 F.2d 699, 702 n.2 (10th Cir. 1980)).

¹⁵⁴ See, e.g., 42 U.S.C. § 7607(d)(3) (2000) (specifying rulemaking procedures under the Clean Air Act Amendments of 1977 that include detailed disclosures of information at the start of the rulemaking process).

regulatory mandates, it is very difficult to see where courts get the legal authority to add procedural requirements to section 553. Agency disclosure of data may very well be good policy to facilitate informed public comment, but *Vermont Yankee* does not allow courts to impose procedures because they are good policy. For the same reasons, there does not seem to be any general legal basis, divorced from specific requirements in specific organic statutes or regulations, for making agencies initiate a new round of notice and comment when they intend to rely on information discovered after the notice of proposed rulemaking was filed.

The requirement that final rules be a “logical outgrowth” of the original notice of proposed rulemaking is a frequent source of litigation and poses a subtler *Vermont Yankee* problem than some of the other practices that we have examined. For a notice requirement of any kind to make sense, there must be something to control the degree of difference between the proposed rule and the final rule. Otherwise, agencies could hide their true proposal from public scrutiny by proposing something completely unrelated to what they intended to promulgate as a final rule. In these circumstances, interested parties might not have the opportunity to participate in rulemaking proceedings because they will not know that their interests are at stake, and the agency might lose the value of potentially informative input. On the other hand, if courts require too strict a connection between original proposals and final results, agencies will be discouraged from making substantial changes to the original proposal based on the comments received. Section 553 sets forth procedures for “Rule *Making*” rather than “Rule *Adoption*”; it would be perverse to make it difficult for agencies to learn from a rulemaking proceeding and adjust its actions on the basis of information and arguments put forward by interested

parties. The legal standard governing the adequacy of notice must be sensitive to these concerns.

The language of section 553 gives little guidance on how much change is appropriate between the proposal and the final rule. Section 553 requires notice of either the terms or substance of the proposed rule or a description of the subjects and issues involved. The references to the “*proposed* rule” or the “subjects and issues *involved*” does provide some statutory basis for requiring at least a minimal connection between the agency’s notice and actions; the agency cannot publish some fictional rule that the agency does not intend to adopt under any circumstances or present one set of subjects and then adopt rules concerning something that was not really “involved” in the rulemaking.¹⁵⁵ But section 553 also implicitly requires that the agency consider the “relevant matter presented” before adopting its final rule. It is implicit in the nature of this process that the agency is free to decide not to adopt the proposed rule or any rule at all or to adopt a different method of accomplishing the goals of the proposal that was suggested by the comments received. Because the statute permits the agency to provide notice only of the “subjects and issues involved” if the agency so chooses, our view is that the best understanding is that no new notice and comment is required if the final rule is within the subjects and issues involved in the proposal, even if the direction of the final rule is substantially different from the direction suggested by the notice.

This is a much looser standard than the logical outgrowth test that has been applied by the courts. For example, consider the notice that was found deficient in

¹⁵⁵ For a good example of an agency adopting a rule that was not remotely foreshadowed by the notice of proposed rulemaking, see *MCI Telecommunications Corp. v. FCC*, 57 F.3d 1136 (D.C. Cir. 1995).

Chocolate Mfrs. Ass’n of U.S. v. Block.¹⁵⁶ The case involved a rule specifying the foods that could be purchased with WIC Coupons, a form of welfare provided by the Department of Agriculture to pregnant women and women with small children. The rule included a preamble discussing issues concerning the fat, salt, and sugar content of foods and also the list of foods proposed to be covered by the program. The preamble’s discussion of the sugar issue focused on cereals marketed for children and on sugar in juice, but the notice also invited comments “in favor of or in objection to the proposed regulations.”¹⁵⁷

On its face, the notice met both methods of fulfilling section 553’s notice requirement -- it contained the text of the proposed rule and the subjects (foods allowed under the WIC program) and issues (nutrition) involved in the rulemaking. Nonetheless, after flavored milk was removed from the list of allowed foods based on dozens of comments expressing concern about its sugar content, the Court of Appeals for the Fourth Circuit ruled that the notice was deficient and that in order to remove flavored milk, the agency should have provided additional notice and opportunity for comment. The court reasoned that the preamble’s focus on sugar in cereal and juice, coupled with the silent inclusion of flavored milk in the proposed list of eligible foods, led readers of the notice to believe that flavored milk’s inclusion on the list was not open to question. In the court’s words, “neither CMA nor the public in general could have had any indication from the history of the WIC Program or any other food distribution programs that flavored milk was not part of the acceptable diet for women and children . . . [I]t cannot be said that the ultimate changes in the proposed rule were in character with the original

¹⁵⁶ 755 F.2d 1098 (4th Cir. 1985).

¹⁵⁷ *Id.* at 1101.

scheme or a logical outgrowth of the notice.”¹⁵⁸ Even more forcefully, the court concluded that the “process was ill-served by the misleading or inadequate notice concerning the permissibility of chocolate flavored milk in the WIC Program and ‘does not serve the policy underlying the notice requirement.’ ”¹⁵⁹ The policy that was ill-served was the policy in favor of allowing interested parties to comment on proposed rules. In the court’s view, the Chocolate Manufacturers Association did not have an opportunity to comment on the proposed rule because it would not have expected that its product was being considered for deletion from the list.

Because the final rule without flavored milk on the list of approved WIC foods was still within the same subjects and issues as the notice, the agency did not violate section 553 by deleting flavored milk without going through a second round of notice and comment. Contrary to the Court of Appeals’ view, the Chocolate Manufacturers had an adequate opportunity to comment. Anyone whose product appeared on the proposal was invited by the notice itself to submit comments in favor of retaining their product on the list. Everyone knew or should have known that there was the possibility that negative comments could convince the agency to take any product off of the list. There was nothing whatsoever misleading about the notice, and it was unfair of the Court of Appeals to characterize the notice as such.

The transformation of the notice requirement is perhaps most clearly illustrated by the evolution of the “logical outgrowth” test’s verbal formulation in the *Chocolate Manufacturers* opinion. Initially, the court explained that other courts have required that

¹⁵⁸ *Id.* at 1106-07.

¹⁵⁹ *Id.* at 1107.

the final rule is a logical outgrowth “of the notice *and comments* already given.”¹⁶⁰ Later in the opinion, the court condemns the rule as not “a logical outgrowth of the notice.”¹⁶¹ Prior formulations (and current formulations as well) usually state that the final rule must be a logical outgrowth of the notice and comments. The final rule barring flavored milk was certainly a logical outgrowth of the notice (putting flavored milk on the list) and the comments (urging the agency to delete flavored milk). The court had to omit “comments” from the formulation of the logical outgrowth test to make its analysis even moderately plausible. It is a vastly different thing to require the final rule to be the logical outgrowth of the original notice rather than the logical outgrowth of the notice and the comments received on that notice. Under this formulation, it was impossible for the agency to remove any foods from the list except perhaps those that were mentioned in the preamble, because “no” would never be a logical outgrowth of “yes” although you might wonder why dozens of commentators were so illogical that they thought that the invitation to comment on the rule as a whole included urging the agency to remove flavored milk from the list. Applying the logical outgrowth test without reference to the comments provoked by the original notice dramatically restricts agencies’ abilities to make changes between notice and rule without providing a second notice and conducting an additional period of comment. This transforms the logical outgrowth test from a requirement that agencies stay within the bounds of the notice and comments received to a requirement that agencies predict, in the initial notice, all of the possible directions in which the comments may lead.

¹⁶⁰ *Id.* at 1105 (quoting *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 642 (1st Cir. 1979)).

¹⁶¹ *Id.* at 1107.

Because some standard of connectedness between the notice and final rule is necessary to enforce the APA's notice requirement, finding a *Vermont Yankee* violation here is a bit trickier than in situations wholly lacking statutory support. Nonetheless, it is clear that overly strict application of the notice requirement in this fashion is inconsistent with the text of section 553, the policies underlying that section, and with *Vermont Yankee* as well. Section 553 creates a loose, legislative process under which the agency should be able to adjust its rule in reaction to the comments received. It has become very time consuming to engage in rulemaking, and the agency should not worry that every change it makes between the proposal and the final rule is likely to lead to reversal on judicial review for lack of proper notice. The process can be highly unpredictable, forcing agencies to grapple with just how much change is allowed before a court will declare that the final rule is a material alteration and no longer a logical outgrowth of the proposal. This gives agencies a strong incentive to overproceduralize by issuing, as we see today, highly detailed proposed rules with voluminous supporting material, and by conducting additional comment periods whenever a significant change is warranted by the comments. Raising the cost of making adjustments based on comments gives agencies an incentive either to ignore the comments, which is contrary to the whole premise of legislative rulemaking, or to conduct a second round of notice and comment whenever it wants to make a change, which is contrary to Congress's intent in establishing the informal process embodied in section 553, as recognized by the Court in *Vermont Yankee*.

Why have courts so dramatically altered the APA's requirements for notices of proposed rulemaking? The answer is not difficult to find, and indicates a violation of

Vermont Yankee's rejection of the quest for a better record as a basis for ratcheting up procedural requirements. Hard look review requires courts to make sure that agencies considered all of the important problems and issues posed by the subject of the rulemaking, properly acknowledged uncertainty where appropriate, moved plausibly from premises to conclusions, and took seriously its statutory mandate rather than pandering to special interests. In order to assess whether the agency carried out this task, courts must be able to identify the important problems, issues, uncertainties, and premises and must be able to distinguish plausible reasoning from smokescreens. In an even moderately complex rulemaking involving the kinds of technical subjects that are now typical fare, this is a daunting task for generalist judges and their inexperienced law clerks. Courts have fashioned the procedural devices in informal rulemaking largely to facilitate the building of a record that will enable the courts to engage in a "thorough, probing, in-depth"¹⁶² review that is "searching and careful."¹⁶³ The best way for courts to tell whether agencies are trying to snow them with technical mumbo-jumbo rather than seriously addressing problems is to have outside parties with substantial expertise carefully study the agency's reasoning and data. That process works most effectively if the agencies must disclose their reasoning and data at the beginning of the rulemaking process and thereby subject it to public scrutiny. The court-imposed requirements for the notice of proposed rulemaking are neatly tailored to perform this record-building function.

¹⁶² *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971).

¹⁶³ *Id.* at 416.

This kind of procedural tailoring in the name of promoting substantive review, however, is precisely the practice that *Vermont Yankee* warned against. It may very well be true that hard look review is most effective when the notice of proposed rulemaking sets up an adversarial process and each step in the agency's progress towards a final rule gets run through a gauntlet of interested parties. This practice may also find support in more general notions of procedural fairness. A number of organic statutes expressly adopt this model and specifically require the procedural devices imposed by modern law. But section 553 of the APA does not, and if *Vermont Yankee* forbids courts from imposing procedures on agencies without a legal basis (as it clearly does), courts cannot refashion the notice of proposed rulemaking to suit their purposes or notions of procedural fairness. If courts want to engage in hard look review, they will need to do so within the procedural mechanisms specified by Congress. They cannot force agencies to make their job easier.

IV

The potential *Vermont Yankee* violations that we have identified have an important feature in common: they all apply a judicial model to what Congress conceived of as a legislative process. The concept of *ex parte* contacts is a distinctly judicial one, with the underlying idea being that all parties to an adjudication should be invited to participate in all stages of the process. By contrast, in a legislative process, there are no parties as such, and private discussions out of the public view are the norm rather than the exception. The requirements that a decision-maker maintain an open mind and not have

an interest in the outcome of a matter are also derived from the ideal of blind justice in adjudicatory proceedings. Legislators, by contrast, are often elected to pursue a strong ideological platform, as is the President who appoints like-minded officials to agencies. In a legislative process, people are generally aware that their interests may be affected, but they are not entitled to the sort of targeted notice that is required before they can be subjected to an order in an adjudicatory process.

It should not be surprising that courts on judicial review have imposed concepts developed in adjudicatory proceedings on the legislative rulemaking process. Judges, of course, must believe that they have developed a good process in the realm of adjudication. *Vermont Yankee*, however, told judges not to import those concepts into the rulemaking arena. Unless *Vermont Yankee* is to be one of those “rare opinions in which a unanimous Supreme Court speaks with little or no authority,”¹⁶⁴ we need a *Vermont Yankee II* to drive the point home.

¹⁶⁴ Kenneth Culp Davis, *Administrative Common Law and the Vermont Yankee Opinion*, 1980 **Utah L. Rev.** 3, 17.