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ARTICLE

Visions of *Vermont Yankee*

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Abstract. *Vermont Yankee* is having a renaissance that few are noticing. That canonical 1978 case conventionally stands for the proposition that agencies are generally free to fashion their own procedures. Although one might think that today's Supreme Court would view that pro-agency doctrine skeptically, the opposite is true. In the last ten years, many of the Court's conservatives have invoked the principle, and its invocation in the circuit courts has likewise been lopsidedly conservative. Moreover, at both levels, jurists have applied the principle to questions beyond those in *Vermont Yankee*, which addressed only the Administrative Procedure Act's (APA) informal rulemaking procedures. In short, *Vermont Yankee* is a doctrine that conservatives can love and are willing to deploy broadly.

In extending *Vermont Yankee*'s principle to new problems, however, jurists are gesturing at different "visions" of what the principle is and how it should apply more broadly across administrative law. Drawing from recent judicial invocations of *Vermont Yankee*, both at the Supreme Court and in the circuit courts, this Article identifies several of these visions of *Vermont Yankee*, explores their potential broader implications for administrative law; and assesses their consistency with the original *Vermont Yankee* decision and today's prevailing methodological commitments. As the Article shows, some jurists treat *Vermont Yankee* as a common law remedial principle, with potential consequences for doctrines like remand without vacatur and mandamus for agency delay. Others see it as a quasi-constitutional doctrine of judicial restraint that promotes separation of powers values, principally legislative primacy in administration. And still others essentially treat it as a principle of statutory construction for regulatory statutes—a vision that could blunt the effect of *Chevron*'s overruling while also tempering the hardest of hard look review.

Ultimately, this Article defends *Vermont Yankee* as a principle of construction not unlike *Loper Bright*'s recent reaffirmation that courts should respect delegated authority. This vision turns *Vermont Yankee*'s focus away from the APA and instead emphasizes the importance of delegated procedural authority in other regulatory statutes that create and empower agencies. Embracing *Vermont Yankee* as a lesson about construing regulatory statutes may temper current perceptions of judicial anti-administrativism by grounding

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this pro-agency rule in formalist thinking that is consistent with textualism and therefore more likely to promote consistent and ideologically neutral application.

Table of Contents

Introduction

Every student of administrative law learns *Vermont Yankee*.[1] More to the point, they learn the settled rule "that courts are not free to impose upon agencies specific procedural requirements that have no basis" in the Administrative Procedure Act (APA),[2] the central statute in administrative law.[3] That holding upended a settled approach to administrative law that had taken root in the lower federal courts,[4] cementing *Vermont Yankee*'s status as one of the Supreme Court's most important administrative law decisions.[5] As Judge Laurence Silberman once remarked, *Vermont Yankee* supplies a "principle of judicial review" as central to administrative law as *Chevron*'s rule of deference once was.[6]

But unlike its canonical cousin *Chevron*, which has now been laid to rest,[7] *Vermont Yankee* looks like a doctrine on the rise among conservative jurists. After decades of dormancy in which the Supreme Court largely neglected to invoke *Vermont Yankee*'s central principle, the Court in the past several years has deployed *Vermont Yankee* as playing at least some analytical or rhetorical role in important cases involving both rulemakings and adjudications.[8] And

1. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519 (1978).
2. Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 654 (1990) (citing *Vt. Yankee*, 435 U.S. at 524). For illustrations from casebooks, see, for example, ILAN WURMAN, ADMINISTRATIVE LAW: THEORY AND FUNDAMENTALS 130 (2d ed. 2024) (stating that "*Vermont Yankee* put[] a stop" to the D.C. Circuit's "requiring agencies to add procedures that the court believed were necessary to ensure fair, equitable, and rational decisions, even if those procedures were nowhere required by the text of any statute"); and KRISTIN E. HICKMAN, RICHARD J. PIERCE, JR. & CHRISTOPHER J. WALKER, FEDERAL ADMINISTRATIVE LAW: CASES AND MATERIALS 583 (4th ed. 2023) (stating that *Vermont Yankee* "ended [the] practice" of requiring additional procedures when an agency addressed a "particularly controversial and important" issue in a rulemaking proceeding).
3. *See, e.g.*, Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1208 (2015) (describing the APA as "the 'fundamental charter' of the 'Fourth Branch' of the government" (quoting Jack M. Beermann & Gary Lawson, *Reprocessing* Vermont Yankee, 75 GEO. WASH. L. REV. 856, 874 (2007))).
4. *See infra* Part I.A.
5. *See, e.g.*, Beermann & Lawson, *supra* note 3, at 858 (identifying *Vermont Yankee*'s significance for administrative law doctrine); Gillian E. Metzger, *The Story of* Vermont Yankee*: A Cautionary Tale of Judicial Review and Nuclear Waste*, *in* ADMINISTRATIVE LAW STORIES 125, 126 (Peter L. Strauss ed., 2006) (calling *Vermont Yankee* "a milestone in the development of judicial review in the modern regulatory state").
6. *See* UC Health v. NLRB, 803 F.3d 669, 689 (D.C. Cir. 2015) (Silberman, J., dissenting).
7. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2261-62, 2273 (2024) (holding that APA § 706 requires courts to apply independent judgment in judicial review of agency action, overruling the deference framework from *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).
8. *See infra* Part I.D.

Supreme Court justices are not alone. In this same period, lower court judges—especially Republican appointees, and often in separate concurring or dissenting opinions—have used *Vermont Yankee* as a principle applicable to diverse and novel administrative law problems.[9] Despite this renewed judicial interest, however, scholars have not robustly answered Jack Beermann and Gary Lawson's call from eighteen years ago "to rekindle interest in the implications of *Vermont Yankee*."[10]

This Article takes up that call. Given *Vermont Yankee*'s ongoing extension to new contexts and problems, its potential implications are many and varied. Judges of diverse ideological commitments reach for *Vermont Yankee* as a guide in a variety of situations differing from that case's informal rulemaking context, from reviewing non-APA statutory hybrid rulemaking procedures or immigration adjudications;[11] to deciding whether instructions can be given to

9. *See infra* Part I.D, Appendix. Although an imprecise metric, the Article treats a judge's appointment by a Republican as a rough proxy for conservative judicial ideology. *See, e.g.*, Herbert M. Kritzer, *Polarized Justice? Changing Patterns of Decision-Making in the Federal Courts*, 28 KAN. J.L. & PUB. POL'Y 309, 353-54 (2019) (finding that "[a]s was true for the Supreme Court, the increasing conservatism of Republicans on the Court of Appeals is largely a function of who presidents are appointing," with "increasingly conservative appointments" being made "since Nixon").

10. Beermann & Lawson, *supra* note 3, at 860. For some of the dialogue that Beermann and Lawson initially sparked, see generally Paul R. Verkuil, *The Wait Is Over:* Chevron *as the Stealth* Vermont Yankee II, 75 GEO. WASH. L. REV. 921, 921 (2007) [hereinafter Verkuil, *Wait Is Over*] (responding to Beermann and Lawson); and Richard J. Pierce, Jr., *Waiting for* Vermont Yankee III*,* IV*, and* V*? A Response to Beermann and Lawson*, 75 GEO. WASH. L. REV. 902, 910-12 (2007) [hereinafter Pierce, *Response*] (same). Paul Verkuil and Richard Pierce were also among the prominent voices—including two future Supreme Court justices—who made important contributions to the *Vermont Yankee* literature before Beermann and Lawson sought to rekindle interest. For some of these important works, see, for example, Antonin Scalia, Vermont Yankee*: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 375-82 (praising the Court for chiding the D.C. Circuit but questioning the Court's views of the APA given increasing administrative rulemaking); Stephen Breyer, Vermont Yankee *and the Courts' Role in the Nuclear Energy Controversy*, 91 HARV. L. REV. 1833, 1833 (1978) (agreeing with *Vermont Yankee*'s conclusion about additional procedures); Kenneth Culp Davis, *Administrative Common Law and the* Vermont Yankee *Opinion*, 1980 UTAH L. REV. 3, 7-12 (arguing that *Vermont Yankee*'s rejection of administrative common law is contrary to precedent and the APA); Paul R. Verkuil, *Judicial Review of Informal Rulemaking: Waiting for* Vermont Yankee II, 55 TUL. L. REV. 418, 419-21 (1981) [hereinafter Verkuil, Vermont Yankee II] (criticizing hard look review as inconsistent with *Vermont Yankee*); Richard J. Pierce, Jr., *Waiting for* Vermont Yankee II, 57 ADMIN. L. REV. 669, 683-86 (2005) [hereinafter Pierce, Vermont Yankee II] (criticizing the First Circuit's presumption of formal adjudication as inconsistent with *Vermont Yankee*); and John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 187 (1998) (criticizing *Vermont Yankee* as difficult to reconcile with statutory text and, "if anything, too liberal in allowing judicial review of agency procedures").

11. Hybrid rulemaking is when Congress requires more than ordinary APA notice-and-comment procedures but often less than formal APA rulemaking. *See* Aaron L. Nielson,

footnote continued on next page

an agency on remand from judicial review;[12] to determining when and how an agency can withdraw a proposed rule;[13] to applying the Constitution's fundamental allocations of power among the federal government's branches.[14] These applications of *Vermont Yankee* raise important questions: What, if anything, does *Vermont Yankee* teach about how to interpret the APA, including provisions that do not specify procedures at all? Or about procedures contained in statutes other than the APA? Or about limits on judicial power more generally? Answering whether and how to extend *Vermont Yankee*'s central principle to questions like these requires looking beyond the case's deceptively straightforward holding and instead identifying any deeper lessons that are generalizable or applicable to other contexts.[15] This Article undertakes that project by exploring the diverse lessons that jurists and scholars have taken from *Vermont Yankee* and identifying at least three high-level "visions" of what the *Vermont Yankee* principle is and how that principle informs contemporary administrative law issues.[16]

In Defense of Formal Rulemaking, 75 OHIO ST. L.J. 237, 256, 270 (2014) (contrasting formal and hybrid rulemakings and noting that "unlike formal rulemaking, hybrid rulemaking is often agency specific" and "even the most formal forms of hybrid rulemaking" are often "not especially formal"). For recent examples invoking *Vermont Yankee*, see, for example, *Ohio v. EPA*, 144 S. Ct. 2040, 2067-68 (2024) (Barrett, J., dissenting) (reviewing the EPA's compliance with Clean Air Act procedures); and *Calumet Shreveport Refin., L.L.C. v. EPA*, 86 F.4th 1121, 1139 (5th Cir. 2023) (same). Immigration adjudications use "independent, custom-made procedures" rather than the APA. Jill E. Family, *A Lack of Uniformity, Compounded, in Immigration Law*, 98 NOTRE DAME L. REV. 2115, 2117 (2023). For recent examples invoking *Vermont Yankee*, see, for example, *Garland v. Ming Dai*, 141 S. Ct. 1669, 1677 (2021); and *Mejia-Alvarenga v. Garland*, 90 F.4th 348, 355 (5th Cir. 2024).

12. *See* Ctr. for Food Safety v. Regan, 56 F.4th 648, 672-73 (9th Cir. 2022) (Miller, J., concurring in part and dissenting in part).

13. *See* Sanofi Aventis U.S. L.L.C. v. U.S. Dep't of Health & Hum. Servs., 58 F.4th 696, 706 (3d Cir. 2023) (citing Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2385 (2020)); Humane Soc'y of the U.S. v. U.S. Dep't of Agric., 41 F.4th 564, 583-84 (D.C. Cir. 2022) (Rao, J., dissenting).

14. *See, e.g.*, PHH Corp. v. CFPB, 881 F.3d 75, 109 (D.C. Cir. 2018) (en banc).

15. This project is by no means new. Adrian Vermeule has emphasized the importance of distinguishing "the holding of *Vermont Yankee* from its reasoning, which swept far more broadly." Adrian Vermeule, *Deference and Due Process*, 129 HARV. L. REV. 1890, 1912 (2016). As to the "holding," one might say that *Vermont Yankee* supplies a simple rule: Courts generally should not vacate agency action merely because the agency failed to follow a procedure that the APA does not require. This formulation is close to the Supreme Court's own summary, which Beermann and Lawson called the "natural" reading of *Vermont Yankee*. Beermann & Lawson, *supra* note 3, at 871 (citing Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 654 (1990)). But, as Beermann and Lawson observed, there are "at least three plausible readings of *Vermont Yankee*," each with different ramifications. *See id.* at 868.

16. *See infra* Part II.

Ultimately, the Article concludes that the most defensible vision of *Vermont Yankee* is one that treats its principle as a search for—not source of—procedural discretion.[17] Rather than some free-floating background rule of administrative law, *Vermont Yankee* should be understood simply to instruct courts to honor delegated procedural authority when a regulatory statute confers it. This reorientation would provide much needed clarity for when and how *Vermont Yankee*'s principle applies. It would de-emphasize *Vermont Yankee* as a principle for interpreting the APA, thereby removing the doctrine from debates about the scope of remedial authority and other issues for which the opinion itself offers little guidance. And it would remind courts that the scope of an agency's procedural discretion—and, correspondingly, its *obligations*—is a statute-by-statute and agency-by-agency inquiry, a reminder that calls into question *Vermont Yankee*'s reflexive application to hybrid rulemaking or specialized adjudication schemes. To achieve this reorientation, the Article argues that *Vermont Yankee* needs its own *Loper Bright*: Just as the Court replaced *Chevron*'s sweeping instruction to defer with a more context-sensitive search for delegated authority, the Court should likewise clarify that *Vermont Yankee*'s sweeping statement of procedural discretion is a general description of agency authority, not an inflexible command to be applied in all contexts.

The Article proceeds in three parts. Part I is largely descriptive; it recounts the road to *Vermont Yankee*, then critically analyzes the Court's opinion to demonstrate that the case's underlying rationales (and, by extension, its possible downstream applications) are surprisingly difficult to locate.[18] The Article's theoretical contribution comes in Part II, which explores different visions of *Vermont Yankee* that one can discern from a careful analysis of recent case law. These visions variously treat *Vermont Yankee* as reflecting: (1) an administrative common law remedial doctrine counseling against judicial over-proceduralization;[19] (2) a constitutional lesson about the separation of powers that counsels in favor of Congress's shaping of the administrative state;[20] and (3) a principle of statutory construction that might be viewed either as (a) a substantive canon advancing normative or constitutional values or (b) a linguistic canon about respect for congressional delegations similar to what *Loper Bright* preserved from *Chevron*.[21] Part III defends *Vermont Yankee*'s reinvigoration,[22] but then concludes that the most defensible vision of *Vermont Yankee* is one that acts much like *Loper Bright* by focusing courts on the extent

17. *See infra* Part III.

18. *Infra* Part I.

19. *Infra* Part II.A.

20. *Infra* Part II.B.

21. *Infra* Part II.C.

22. *Infra* Part III.A.

of delegated authority that each individual agency holds.[23] This vision fits comfortably with prevailing judicial commitments like formalism and textualism and avoids the central error of freewheeling judicial policymaking that *Vermont Yankee* rejected on practical and constitutional grounds.

I. The *Vermont Yankee* Project

Vermont Yankee is a canonical case delineating the relationship between agencies and reviewing courts. It is also a case drawing renewed interest from jurists, both on the Supreme Court and federal circuit courts. This Part describes what might broadly be called the *Vermont Yankee* project: an effort to remove federal courts from second-guessing certain reasonable agency procedural choices. To illustrate that project's breadth, this Part summarizes the problem to which *Vermont Yankee* reacted; analyzes the Court's rationales for *Vermont Yankee*; and documents the post-*Vermont Yankee* fights among scholars and jurists about what *Vermont Yankee* means and how it should resolve additional perceived problems in administrative law.

A. The Road to *Vermont Yankee*

Despite its centrality to administrative law,[24] the APA is notoriously pithy in its treatment of informal rulemaking.[25] As a textual matter, the process's essential features are simply general notice,[26] an opportunity for public participation and comment,[27] and a final concise and general statement of the rule's basis and purpose.[28] These bare-bones instructions stand in contrast to the APA's more detailed and exacting formal procedures, which impose requirements like oral hearings, cross-examinations, and restrictions on ex parte communications.[29]

Notwithstanding the APA's distinct treatment of formal and informal rulemaking, for many years the federal courts required agencies to provide

23. *Infra* Part III.B.

24. *See, e.g.*, Kovacs, *supra* note 3, at 1208 (recognizing the APA's "quasi-constitutional status").

25. *See, e.g.*, Emily S. Bremer, *The Undemocratic Roots of Agency Rulemaking*, 108 CORNELL L. REV. 69, 79 (2022) ("The APA's procedural requirements for informal rulemaking are minimal, even 'skeletal.'" (quoting Emily S. Bremer & Sharon B. Jacobs, *Agency Innovation in* Vermont Yankee*'s White Space*, 32 J. LAND USE & ENV'T L. 523, 533 (2017))).

26. 5 U.S.C. § 553(b).

27. *Id.* § 553(c).

28. *Id.*

29. *Id.* §§ 556-557.

additional procedures in informal rulemaking. Consider just the D.C. Circuit,[30] which at least as early as 1966 declared itself "read[y] to lay down procedural requirements" even when "no such requirements had been specified by Congress."[31] Although the APA requires only a "[g]eneral notice" of "the terms or substance of the proposed rule or a description of the subjects and issues involved,"[32] the D.C. Circuit required disclosure of certain important documents that supported agency proposals.[33] Although the APA specifies only an "opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation,"[34] the D.C. Circuit held that "basic considerations of fairness" might require "[o]ral submissions" or "cross-examination" even when "not specified by Congress."[35] And although the APA requires only "a concise general statement of [a rule's] basis and purpose,"[36] the D.C. Circuit "caution[ed] against an overly literal reading of the[se] statutory terms" and insisted that agencies disclose "what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did."[37]

Vermont Yankee followed in the footsteps of that style of aggressive judicial review. The case arose under the Atomic Energy Act of 1954,[38] which governs nuclear power plant licensing and empowers the Nuclear Regulatory Commission (NRC) (previously the Atomic Energy Commission[39]) to make "such rules and regulations as may be necessary to carry out" the Act.[40] Because these rules need not be made on the record, black letter administrative law holds that the Commission can proceed via informal

30. I offer the D.C. Circuit as an example because of the extent of its doctrine, but it was by no means alone. *See, e.g.*, United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252 (2d Cir. 1977) (holding that failure to respond to "comments which are of cogent materiality" is "not in keeping with the rational process" expected of agencies, despite the APA's requirement that agencies issue only a concise general statement of basis for a rule).

31. Am. Airlines, Inc. v. Civ. Aeronautics Bd., 359 F.2d 624, 632 (D.C. Cir. 1966).

32. 5 U.S.C. § 553(b)(3).

33. Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 392-93 (D.C. Cir. 1973).

34. 5 U.S.C. § 553(c).

35. O'Donnell v. Shaffer, 491 F.2d 59, 62 (D.C. Cir. 1974)*; see also* Int'l Harvester Co. v. Ruckelshaus, 478 F.2d 615, 649 (D.C. Cir. 1973) (requiring "some opportunity for cross-examination").

36. 5 U.S.C. § 553(c).

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

38. Pub. L. No. 83-703, ch. 1073, sec. 1, 68 Stat. 948 (codified at 42 U.S.C. §§ 2189, 2190, 2201).

39. *See* Vt. Yankee v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 526 n.2 (1978).

40. 42 U.S.C. § 2201(p); *see also id.* § 2239 (licensing authority).

rulemaking under APA § 553.[41] The Commission used those procedures—with some voluntarily undertaken embellishments, like a public hearing—to promulgate a rule addressing how the agency would account for the environmental effects of nuclear waste in cost-benefit analyses for certain nuclear power reactors.[42] These procedures did *not* include discovery or cross-examination.

On petition for review to the D.C. Circuit, aggrieved environmental groups invoked that court's "line of cases indicating that in particular circumstances procedures in excess of the bare minima prescribed by the [APA] may be required" to argue that they were denied "a meaningful opportunity to participate in the proceedings."[43] The D.C. Circuit agreed, holding that the Commission failed to "generate a record in which the factual issues are fully developed," an error that the agency might correct with any number of "procedural devices for creating a genuine dialogue."[44] Not one of those potential devices, though, appears anywhere in APA § 553.[45]

B. The *Vermont Yankee* Opinion

On review of the D.C. Circuit's *Vermont Yankee* decision, a unanimous Supreme Court reversed and sent a strong message about the imposition of judge-made procedures in APA § 553 proceedings. At the outset, the Court carefully clarified that it was addressing "rulemaking procedures in their most pristine sense," i.e., not a matter that one might conceive as "adjudicatory."[46] With that sharp focus established, the Court reiterated the principle (attributed to two prior cases) that "generally speaking," APA § 553 "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures."[47] Thus,

41. *See* United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 237-38 (1973). The informal rulemaking provision, Section 4 of the APA, is codified at 5 U.S.C. § 553; this Article follows the standard practice of referring to APA provisions by their codification. *See generally* Beermann & Lawson, *supra* note 3, at 856 n.2 (adopting the same convention).

42. *See* Beermann & Lawson, *supra* note 3, at 862-63; Duffy, *supra* note 10, at 183.

43. Nat. Res. Def. Council, Inc. v. U.S. Nuclear Regul. Comm'n, 547 F.2d 633, 643 (D.C. Cir. 1976), *rev'd sub nom. Vt. Yankee*, 435 U.S. 519 (1978).

44. *Id.* at 653-54.

45. *See* 5 U.S.C. § 553. The court listed, for example, "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, [or] memoranda explaining methodology." *Nat. Res. Def. Council*, 547 F.2d at 653.

46. *Vt. Yankee*, 435 U.S. at 524 n.1.

47. *Id.* at 524 (first citing United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972); and then citing United States v. Fla. E. Coast. Ry. Co., 410 U.S. 224 (1973)).

although agencies "are free to grant additional procedural rights in the exercise of their discretion," reviewing courts "are generally not free to impose them if the agencies have not chosen to grant them."[48] The Court was quick to caution, however, that "extremely rare" circumstances or "constitutional constraints" might "justify a court in overturning agency action because of a failure to employ procedures beyond those required by the statute."[49]

Although these conclusions are easily stated (thanks to then-Justice William Rehnquist's refusal to bury the lede), how they flow from the Court's supporting rationales poses a greater challenge. On careful examination, *Vermont Yankee* rests on a mix of functionalist, formal textual, normative, and quasi-constitutional bases, with no one piece of the analysis appearing independently dispositive.

1. Functionalist rationales

Start with the Court's functionalist and consequentialist rationales. The Court expressed concern that the D.C. Circuit's approach threatened to make judicial review "unpredictable" in a way that might undermine "all the inherent advantages of informal rulemaking."[50] In this regard, *Vermont Yankee* is motivated in part by consequentialist concerns about predictability (agencies should know what is expected of them) and efficiency (agencies should be able successfully to use informal rulemaking).[51] This focus on practical consequences is not the sort of formalistic textualism that the Court often employs today.[52] Nor was the Court entirely committed to these functionalist points: By leaving open the door to "rare" circumstances that might "justify" procedures beyond APA § 553, the Court left some uncertainty lingering in the air.[53]

2. Statutory rationales

Even when the Court engaged in more formalist reasoning by looking to statutory text, *Vermont Yankee* again deployed an analysis that differs from today's formalistic textualism. Rather than a careful parsing of statutory

48. *Id.*

49. *Id.* at 524, 543.

50. *Id.* at 546-47.

51. *See* Beermann & Lawson, *supra* note 3, at 873.

52. *See* Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 267 (2020) (defining "formalistic textualism" as "an approach that instructs interpreters to carefully parse the statutory language, focusing on semantic context and downplaying policy concerns or the practical (even monumental) consequences of the case").

53. *Vt. Yankee*, 435 U.S. at 524.

language, with emphasis on what an ordinary person might have understood the text to mean at the time of enactment,[54] the Court leaned on prior glosses that it had already placed on the APA.[55] These cases straightforwardly reasoned that, under APA § 553's plain terms,[56] APA § 556's and § 557's formal procedures were required only when statutorily specified.[57] It follows that courts should not require the more formal procedures when the APA does not. That textual analysis, however, says very little about how to construe the informal rulemaking procedures themselves.[58] For example, APA § 553(b) does not say that a notice of proposed rulemaking shall include *only* the enumerated matters,[59] nor does § 553(c) unambiguously say if or when "an opportunity to participate in the rule making" must include an "oral presentation."[60]

To the extent that the Court spoke about statutory meaning beyond applying prior APA precedent, its further analysis was similarly unique to the APA. In rejecting the view that APA § 553 merely sets the procedural floor that courts can require, *Vermont Yankee* cited legislative history specific to the APA;[61] the Attorney General's contemporaneous manual explaining the APA;[62] the context for the APA's enactment, namely that it was a

54. *See* Grove, *supra* note 52, at 267; *cf.* Bostock v. Clayton County, 140 S. Ct. 1731, 1738 (2020) (identifying that common meaning is a touchstone of statutory interpretation).

55. The Natural Resources Defense Council also argued that the National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified as amended in scattered sections of 42 U.S.C.), "permits a court to require procedures beyond those specified" in the APA, an argument the Court rejected under precedent holding "that the only procedural requirements imposed by NEPA are those stated in the plain language of the Act." *Vt. Yankee*, 435 U.S. at 548 (citing Kleppe v. Sierra Club, 427 U.S. 390, 405-06 (1976)).

56. 5 U.S.C. § 553(c) ("When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.").

57. *See* United States v. Fla. E. Coast. Ry. Co., 410 U.S. 224, 237-38 (1973); United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 757 (1972).

58. *Cf.* Kristin E. Hickman & Mark R. Thomson, *Textualism and the Administrative Procedure Act*, 98 NOTRE DAME L. REV. 2071, 2094 (2023) (observing that *Vermont Yankee* "say[s] very little about the specific procedures that the APA does mandate").

59. *See* 5 U.S.C. § 553(b).

60. *Id.* § 553(c). There are certainly formalist responses to those points. *Expressio unius* can tackle the former: APA § 553(b) is a statutory list, so it may lend itself to "the inference that items not mentioned were excluded by deliberate choice, not inadvertence." Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003). Meanwhile, Congress's use of "the agency" as the subject of 553(c) implies discretion for the agency about what an "opportunity to participate" entails. The Court, however, did not articulate these rationales.

61. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 545-46 (1978).

62. *Id.* at 546.

"comprehensive" resolution of "long-continued and hard-fought contentions";[63] and the structural risk that judge-made procedures would swallow the APA's careful division between formal and informal rulemaking.[64] These points are not obviously generalizable to other administrative law statutes, which might provide procedures of their own. That raises the question: Does *Vermont Yankee* apply beyond the APA?

3. Background norms of administrative law

Beyond relying on the APA's text, structure, and context, *Vermont Yankee* also relied on a broader principle about agency freedom to choose. For support, the Court invoked a decades-old, pre-APA "basic tenet of administrative law that agencies should be free to fashion their own rules of procedure."[65] Support for that tenet came in significant part from *FCC v. Schreiber*,[66] which dealt specifically with Congress's broad grant of authority in the Communications Act allowing the Federal Communications Commission (FCC) to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."[67] In discussing the "principle" that agencies should be free to fashion their own rules of procedure, *Schreiber* specifically referred to the FCC's "delegation of broad procedural authority" under this provision and cited other cases with comparable express delegations.[68] Rather

63. *Id.* at 523 (quoting Wong Yang Sung v. McGrath, 339 U.S. 33, 40 (1950)).

64. *Id.* at 547-48.

65. *Id.* at 544.

66. 381 U.S. 279, 289 (1965).

67. *Id.* (quoting 47 U.S.C. § 154(j) (1958)).

68. *Id.* at 290 & n.17. The following examples illustrate how the Court treated express procedural delegations. The Court upheld Tariff Commission proceedings where the Tariff Act provided that the Commission was "authorized to adopt such reasonable procedure[s], rules, and regulations as it may deem necessary." *See* Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 303 (1933) (quoting the Tariff Act of 1922, § 315(c), 42 Stat. 942-43 (repealed 1930)). The Court rejected a challenge to disclosures by the Bituminous Coal Commission where federal law expressly allowed that information "may be published by the Commission." *See* Utah Fuel Co. v. Nat'l Bituminous Coal Comm'n, 306 U.S. 56, 61 (1939) (quoting Act of Apr. 26, 1937, ch. 127, § 10(a), 50 Stat. 88 (repealed 1966)). The Court upheld enforcement of a Department of Labor subpoena where the Secretary had express authority "to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath." *See* Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 503 (1943) (quoting Walsh-Healey Act, § 5, Pub. L. No. 74-846, ch. 881, 49 Stat. 2036 (1936) (codified as amended at 41 U.S.C. § 6506)). Similarly, the Court rejected a lower court's "procedural requirements" that the Civil Aeronautics Board "must follow before an enforcement proceeding is in order," where the Civil Aeronautics Act of 1938, Pub. L. No. 75-706, ch. 601, sec. 1004(b), 52 Stat. 1021 (repealed 1984), provided the Board with relevant authority. *See* Civ. Aeronautics Bd. v. Hermann, 353 U.S. 322, 323-24 (1957) (per curiam). The Court declined to impose "general principles" of estoppel on the NLRB,

footnote continued on next page

than a free-floating tenet, *Schreiber* suggests only that agencies are entitled to discretion when Congress specifically gives it to them—a delegation rationale.[69]

On this view of *Schreiber*, the Commission in *Vermont Yankee* would be entitled to freedom of procedural choice only if the Atomic Energy Act, like the Communications Act, delegated that discretion. And it did: Congress expressly said that the Commission could "make such studies and investigations, obtain such information, and hold such meetings or hearings as the Commission may deem necessary or proper to assist it in exercising any authority provided in this chapter,"[70] which would include its general rulemaking authority.[71] In suggesting that the Commission's rulemaking investigation needed to look different in order to be upheld, the D.C. Circuit arguably flouted not only the APA but also the Atomic Energy Act, which spoke more directly to the Commission's discretion to investigate the issues. Yet, the Court instead framed the Commission's procedural discretion as a basic tenet rather than tying it to a specific legislative delegation.[72] That raises a new question: Is this background norm a legitimate general default rule at all?

4. Quasi-constitutional rationales

One possible source for such a background rule might be *Vermont Yankee*'s subtle constitutional undertones. *Schreiber*, upon which *Vermont Yankee* relied for its "basic tenet" of agency procedural discretion,[73] had built on *FCC v.*

which "has power to fashion its procedure to achieve the Act's purpose to protect employees from unfair labor practices." *See* Wallace Corp. v. NLRB, 323 U.S. 248, 253 (1944) (citing National Labor Relations Act, § 10(a), Pub. L. No. 74-198, 49 Stat. 449, 453 (1935) (codified as amended at 29 U.S.C. § 160) ("The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce," which power "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.")). And closest in time to *Vermont Yankee*, the Court rejected the D.C. Circuit's direction that the Federal Power Commission complete an "evidentiary investigation," Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp., 423 U.S. 326, 327 (1976) (per curiam), where the Natural Gas Act, § 16, Pub. L. No. 75-688, ch. 556, 52 Stat. 821, 830 (1938) (codified at 15 U.S.C. § 717(o)), conferred "power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act."

69. *See Schreiber*, 381 U.S. at 289-90 & n.17 (citing 47 U.S.C. § 154(j)).

70. *See* Atomic Energy Act of 1954, Pub. L. No. 83-703, ch. 1073, sec. 1, 68 Stat. 948 (codified at 42 U.S.C. § 2189, 2190, 2201).

71. 42 U.S.C. § 2201(p).

72. *See* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 544 (1978) (referencing "the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure").

73. *See id.*

Pottsville Broadcasting,[74] another case implicating the FCC's broad statutory delegation of procedural authority. As *Pottsville* had summarized the Communications Act, that "whole law" reflected "recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors."[75] *Schreiber* later reiterated that this congressional purpose informed *Pottsville*'s "upholding" of the FCC's "delegation of broad procedural authority."[76]

At the same time, however, *Pottsville* had drawn on constitutional principles in upholding the FCC's procedural authority. *Pottsville* was decided against the backdrop of a then-recent resolution of a years-long struggle over the constitutionally proper role of Article III courts in administration.[77] As the Court recounted, Congress initially designed judicial review of FCC orders as essentially an extension of the administrative process itself.[78] Within this system, the reviewing court served as "a superior and revising agency" that could substitute its own policy judgments for the FCC's.[79] And this arrangement had not been unique to radio regulation; it appeared in statutes across the early modern administrative state.[80] The Court repeatedly characterized this authority as administrative or legislative—not judicial—and therefore had refused to hear appeals in these matters on constitutional grounds.[81] Only in 1933 did Congress narrow the scope of review to render the courts' role more properly judicial by confining them to questions of law (and not of policy) on closed records.[82] Under this revised scope of review, once an error of law was corrected, the agency reclaimed "the legislative policy committed to its charge."[83]

This backdrop—in which value-laden choices about policy and modes of execution were deemed beyond the proper Article III role—informs important admonishments in *Pottsville* that worked their way into *Vermont Yankee*.

74. 309 U.S. 134 (1940).

75. *Id.* at 138.

76. FCC v. Schreiber, 381 U.S. 279, 290 (1965).

77. *See Pottsville*, 309 U.S. at 144-45*; see also, e.g.*, Adam Crews, *The Executive Power of the Federal Courts*, 56 ARIZ. ST. L.J. 695, 716-20 (2024) (describing this period of administrative law's development).

78. *Pottsville*, 309 U.S. at 144.

79. *Id.* (quoting Fed. Radio Comm'n v. Gen. Elec. Co., 281 U.S. 464, 467 (1930)).

80. *See* Crews, *supra* note 77, at 716-17 (collecting additional examples in patent, trademark, and utilities regulation).

81. *See id.* at 717-18; *Pottsville*, 309 U.S. at 144.

82. *Pottsville*, 309 U.S. at 144-45 (citing Fed. Radio Comm'n v. Nelson Bros. Co., 289 U.S. 266, 276 (1933)).

83. *Id.* at 145.

Pottsville preached caution about "the extent to which Congressional power, exercised through a delegated agency, can be controlled within the limited scope of 'judicial power' conferred by Congress under the Constitution."[84] It also declared that the "vital differentiations between the functions of judicial and administrative tribunals" must be respected or else "courts will stray outside their province."[85] And sandwiched between these teachings, each reflecting concern about courts' proper constitutional roles, is the line that would find its way into *Schreiber* and, later, *Vermont Yankee*: that 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."[86] So, by drawing on *Schreiber*, *Vermont Yankee* contains echoes of the separation of powers, perhaps transforming agency procedural discretion into a "basic tenet" as a matter of constitutional law.[87] But they are echoes at most; *Vermont Yankee* is far from clear in grounding the principle in the Constitution.

* * *

In short, *Vermont Yankee*'s holding that courts should not impose their own views of the "best"[88] procedures might derive from multiple sources. In one way, it reflects a functionalist, normative judgment about best practices of judicial review: Be predictable and do not foreclose effective use of procedures like informal rulemaking.[89] In another, it reflects a fair description of the general state of delegations to agencies as reflected in their organic statutes,[90] but perhaps one that the Court saw as having evolved into a stand-alone background principle of administrative law.[91] In one sense, *Vermont Yankee* can be read to construe the APA, a statute framed and adopted against the backdrop of fights over the administrative state's operation.[92] But in another, its reasoning is an outgrowth of a larger, equally hard-fought and transformative

84. *Id.* at 141.

85. *Id.* at 144.

86. *Id.* at 143.

87. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 544 (1978) (citing FCC v. Schreiber, 381 U.S. 279, 290 (1965) (quoting *Pottsville*, 309 U.S. at 143)).

88. *Id.* at 549.

89. *See supra* notes 50-53 and accompanying text.

90. *See supra* note 68 and accompanying text (cataloguing precedents in which the Court had upheld agency procedural choices by reference to specific, on-point statutory authority).

91. *See supra* notes 66-72 and accompanying text. John Duffy made a similar point in criticizing *Vermont Yankee* as "a common-law decision" deriving "its crucial holding" from *Pottsville* rather than from the APA. *See* Duffy, *supra* note 10, at 182 & n.346.

92. *See supra* notes 54-64 and accompanying text.

battle over the role of courts in our constitutional system of separated powers.[93] So, a question remains: When confronting *Vermont Yankee*'s extension to new areas, which rationales matter?

C. The Push to Clarify *Vermont Yankee*

As just shown, a careful and context-sensitive analysis of *Vermont Yankee*'s reasoning exposes uncertainty about the broader principles that support a rule of agency procedural discretion. Unsurprisingly, then, how to properly understand *Vermont Yankee*—and perhaps extend it to new contexts—is not a new problem.

Early advocates of a robust *Vermont Yankee* principle included Paul Verkuil and Stephen Breyer. They both expressed concern that substantive "hard look" review, under which courts like the D.C. Circuit ensured that agencies had "taken a 'hard look' at the salient problems" and "genuinely engaged in reasoned decision-making,"[94] could not be squared with *Vermont Yankee*.[95] In 1983, however, the Supreme Court embraced a form of hard look review (and rejected a *Vermont Yankee* objection) in its seminal *State Farm* decision.[96] One year later, though, the Court would announce its (in)famous *Chevron* framework for agency deference,[97] which Verkuil later suggested sufficiently "moderated" hard look review to count as an acceptable substitute for an expanded *Vermont Yankee*.[98]

Richard Pierce has similarly pointed to *Vermont Yankee* as a potential solution to perceived problems in administrative law doctrine. In the mid-2000s, Pierce argued that the First Circuit's so-called *Seacoast* presumption "that the use of the ambiguous term 'hearing' in a statute requires an agency to conduct a formal adjudication, including cross-examination," had "adverse effects" identical to those that the Supreme Court held illegitimate in *Vermont Yankee* and based on equally weak legal support.[99] As it happens, *Chevron* soon solved his grievance as well; the First Circuit eventually agreed with Pierce

93. *See supra* notes 77-87 and accompanying text.

94. *See, e.g.*, Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970).

95. *See* Verkuil, Vermont Yankee II, *supra* note 10, at 419-21; Breyer, *supra* note 10, at 1833.

96. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 50-51 (1983) (holding that an agency must offer "a satisfactory explanation" for its action and stating that *Vermont Yankee* is not "a talisman under which any agency decision is by definition unimpeachable").

97. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

98. *See* Verkuil, *Wait Is Over*, *supra* note 10, at 923-24.

99. Pierce, Vermont Yankee II, *supra* note 10, at 673 (discussing *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872 (1st Cir. 1978)).

that "*Vermont Yankee* plus *Chevron*" required abandoning a "presumption in favor of formal adjudication."[100]

Urging a still more robust *Vermont Yankee*, Jack Beermann and Gary Lawson have argued that *Vermont Yankee* implies the invalidity of several lower court administrative law doctrines. When they sought in 2007 "to rekindle interest in the implications of *Vermont Yankee*,"[101] Beermann and Lawson rejected what they saw as an unduly narrow view prevailing in the lower courts: that *Vermont Yankee* addresses only "the specific judicial practices challenged" in that case.[102] Instead, Beermann and Lawson argued that a "better" and more "natural" reading of *Vermont Yankee* would understand the decision "as a call for a return to the original meaning of the APA specifically with respect to agency procedures."[103] They maintained that this reading—a limited embrace of so-called APA originalism[104]—arguably best accounts for the Court's "voluminous language" focused on the APA's settlement of procedural debates as well as the later gloss that the Court itself placed on the case.[105] On this view, Beermann and Lawson argued that *Vermont Yankee*'s logic required abandoning doctrines like the D.C. Circuit's prohibition of ex parte contacts in informal rulemaking;[106] the requirement that agencies approach rulemaking with an open mind;[107] and the logical outgrowth test for the sufficiency of rulemaking notice.[108]

Like Pierce's good fortune with the First Circuit, Beermann and Lawson quickly had some luck moving jurists. In 2008, then-Judge Kavanaugh cited Pierce, Beermann, and Lawson, to question whether the D.C. Circuit's *Portland*

100. *See* Pierce, *Response*, *supra* note 10, at 904 & n.23 (discussing *Dominion Energy Brayton Point, LLC. v. Johnson*, 443 F.3d 12, 15-19 (1st Cir. 2006)).

101. Beermann & Lawson, *supra* note 3, at 860.

102. *Id.* at 872-73.

103. *Id.* at 871 (emphasis omitted). For their parts, Pierce and Verkuil maintained that even Beermann and Lawson's view of *Vermont Yankee* should swallow hard look review because of § 553(c). *See* Pierce, *Response*, *supra* note 10, at 906-07; *see also* Verkuil, *Wait Is Over*, *supra* note 10, at 922 (describing Pierce's argument as "convincing").

104. APA originalism is a mode of interpretation that would apply the APA as it would or should have been construed at its 1946 enactment, whether by reference to the intent of the enacting Congress or to the legal community's contemporaneous understanding of the text. *See, e.g.*, Ronald M. Levin, *The Evolving APA and the Originalist Challenge*, 97 CHI.-KENT L. REV. 7, 29 (2022).

105. Beermann & Lawson, *supra* note 3, at 871 ("*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." (quoting Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 654 (1990))).

106. *Id.* at 883-88.

107. *Id.* at 888-91.

108. *Id.* at 894-900.

Cement doctrine obligating agencies to disclose certain data during informal rulemakings could be reconciled with *Vermont Yankee*.[109] Although merely a single jurist's separate opinion, then-Judge Kavanaugh (already an important administrative law agenda setter) would eventually become Justice Kavanaugh, with even more influence on the law's direction.[110]

D. *Vermont Yankee*'s Judicial Revitalization

Despite these scholarly calls for a more vigorous *Vermont Yankee*, the Supreme Court seemed uninterested for years. After the Court extended *Vermont Yankee*'s principle beyond informal rulemaking and into APA adjudications in 1990,[111] the case underwent something of a dry spell. Following a fleeting citation for an unremarkable proposition buried in the footnotes of a 1993 opinion,[112] *Vermont Yankee* would not feature in a majority opinion again until 2004.[113] Even then, it would be eleven more years before *Vermont Yankee* would do any substantive work to affect a Supreme Court case's outcome.[114] In 2015, though, a cross-ideological majority invoked *Vermont Yankee*'s logic in *Perez v. Mortgage Bankers Association* to reject the D.C. Circuit's *Paralyzed Veterans* doctrine, under which the D.C. Circuit had required agencies to use notice-and-comment procedures when issuing new interpretative rules that deviate significantly from prior interpretations.[115] Regardless whether such a rule made for "wise policy," the Court concluded that it amounted to "a judge-made procedural right" that violated *Vermont*

109. Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 246 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part) (first citing Beermann & Lawson, *supra* note 3, at 894; and then citing RICHARD J. PIERCE, JR. ADMINISTRATIVE LAW TREATISE § 7.3, at 435 (4th ed. 2002)).

110. *Cf.* Levin, *supra* note 104, at 33 (describing Justice Kavanaugh's potential influence on administrative law).

111. *See* Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 653-56 (1990).

112. *See* Darby v. Cisneros, 509 U.S. 137, 148 n.10 (1993) (citing *Vermont Yankee* for the proposition that the Attorney General's 1947 APA manual is "given some deference").

113. *See* Alaska Dep't of Env't Conservation v. EPA, 540 U.S. 461, 483 (2004) (gesturing at the general proposition that agencies can "fashion their own rules of procedure" (quoting Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 544 (1978))).

114. For uses of *Vermont Yankee* in the meantime, see *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004) (citing *Vermont Yankee* for a NEPA-specific proposition); *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63-64 (2004) (citing *Vermont Yankee* to support deferring to the Attorney General's 1947 APA manual); and *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 528 n.8 (2009) (citing *Vermont Yankee* for the proposition that notice-and-comment procedures should not apply in review of adjudicatory orders).

115. 575 U.S. 92, 95, 100, 101-03 (2015). Justice Sotomayor wrote the opinion, joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, Alito (in relevant part), and Kagan. *Id.* at 94.

Yankee's holding that APA § 553 establishes the maximum procedures for informal rulemaking.[116]

The Supreme Court's interest in *Vermont Yankee* has continued in the years since. Between 2020 and 2024, four majority opinions and one four-justice dissent have embraced *Vermont Yankee*'s central message about judicial imposition of procedure.[117] In *Little Sisters of Poor Saints Peter & Paul Home v. Pennsylvania*, Justice Thomas (writing for a narrow conservative majority) invoked *Vermont Yankee* to reject (as Beermann and Lawson had urged) the lower court doctrine that required agencies to approach rulemaking with a "flexible and open-minded attitude."[118] That requirement, the Court held, imposed something beyond the APA's "objective criteria" for valid rulemaking.[119] A year later, in *FCC v. Prometheus Radio Project*, Justice Kavanaugh invoked *Vermont Yankee* to reject the suggestion that the FCC needed "perfect empirical or statistical data" to support a predictive judgment, noting that the APA "imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies."[120] Although not quite a repudiation of the D.C. Circuit's *Portland Cement* precedent that he criticized as a circuit judge, one can see something of a relationship—APA § 553 does not address either conducting or disclosing studies.[121] In two later cases, one by Justice Gorsuch and one by Justice Sotomayor, the Court invoked *Vermont Yankee* to reject the imposition of judge-made procedures in non-APA immigration adjudications.[122] And now most recently, Justice Barrett invoked the principle in her four-justice *Ohio v. EPA* dissent, in which she suggested that too aggressive an application of an agency's obligation to respond to significant comments risked "the 'sort of unwarranted judicial examination of perceived procedural shortcomings'" that *Vermont Yankee* forbids.[123]

In the same period (2015 to present) in which the Supreme Court has shown renewed interest in *Vermont Yankee*, a similar trend can be seen in the lower courts among conservative-leaning (or, at least, Republican-appointed)

116. *See id.* at 102.

117. *See* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2385 (2020); FCC v. Prometheus Radio Project, 141 S. Ct. 1150, 1160 (2021); Garland v. Ming Dai, 141 S. Ct. 1669, 1677 (2021); Johnson v. Arteaga-Martinez, 142 S. Ct. 1827, 1834 (2022); Ohio v. EPA, 144 S. Ct. 2040, 2068 (2024) (Barrett, J., dissenting).

118. 140 S. Ct. at 2385; *see* Beermann & Lawson, *supra* note 3, at 888-91.

119. 140 S. Ct. at 2385-86.

120. 141 S. Ct. at 1160.

121. *See* 5 U.S.C. § 553; *supra* note 109 and accompanying text.

122. *See Ming Dai*, 141 S. Ct. at 1674, 1677; *Arteaga-Martinez*, 142 S. Ct. at 1834.

123. 144 S. Ct. 2040, 2068 (2024) (Barrett, J., dissenting) (quoting Vt. Yankee Nuclear Power Corp. v. Nat Res. Def. Council, Inc., 435 U.S. 519, 548 (1978)).

judges.[124] The Appendix identifies the circuit court judges who, following the Supreme Court's 2015 *Mortgage Bankers* decision, affirmatively invoked the *Vermont Yankee* principle in a published opinion for a proposition about the illegitimacy of imposing judge-made procedures on agencies. Of the fifty-one *Vermont Yankee* invocations, twenty-four Republican-appointed judges were responsible for thirty-one of them.[125] By contrast, fourteen Democrat-appointed judges produced twenty invocations, with six of them in low-profile and largely nonideological Federal Circuit cases.[126]

On the conservative side of that ideological breakdown, several of the Republican-appointed judges identified in the Appendix as deploying *Vermont Yankee* might fairly be viewed as especially influential on various metrics. Judge Douglas Ginsburg is a former Supreme Court nominee in his own right,[127] and Judges Consuelo Callahan and Neomi Rao have at different times been considered serious contenders for such a nomination.[128] Judges Ginsburg and Rao, along with Judge Stephanos Bibas, are also currently or formerly regarded as "feeder judges,"[129] meaning they are more likely to send their law clerks on to Supreme Court clerkships, likely indicating justices' perceptions of these judges' qualities.[130] And others—Judges Jennifer Walker Elrod, Steven Menashi, Eric Miller, Eric Murphy, Chad Readler, and Julius Richardson—were recently identified in an empirical study as standouts among circuit

124. *See supra* note 9.

125. *See infra* Appendix.

126. *See id.*

127. *See* Steven V. Roberts, *Ginsburg Withdraws Name as Supreme Court Nominee, Citing Marijuana 'Clamor'*, N.Y. TIMES (Nov. 8, 1987), https://perma.cc/YF34-V4XG.

128. *See* David D. Kirkpatrick & Sheryl Stolberg, *White House Said to Shift List for 2nd Court Seat*, N.Y. TIMES (Sept. 20, 2005), https://perma.cc/7F78-966D (Judge Callahan); Shannon Bream & Bill Mears, *Potential Candidates for Supreme Court Under a Second Donald Trump Term*, FOX NEWS (June 13, 2024, 6:00 AM EDT), https://perma.cc/LQR4-LBSH (Judge Rao).

129. *See* Avalon Zoppo, *These Judges Feed the Most Law Clerks to the U.S. Supreme Court*, NAT'L L.J. (July 19, 2023) (identifying Judges Bibas and Rao), https://perma.cc/9UBC-3DFQ; Lawrence Baum & Cory Ditslear, *Supreme Court Clerkships and "Feeder" Judges*, 31 JUST. SYS. J. 26, 32 (2010) (identifying Judge Ginsburg).

130. *Cf.* Baum & Ditslear, *supra* note 129, at 27 (observing that "justices are very likely to pay attention to judges' identities and use them as indicators of the qualities of candidates for clerkships," allowing them to "simplify their decision-making process by looking to judges with the desired reputations"); Paul Horwitz, *Clerking for Grown-Ups: A Tribute to Judge Ed Carnes*, 69 ALA. L. REV. 663, 673 (2018) (observing that "'feeder judges' . . . may themselves be well-known as leading conservative or liberal judges").

judges for the volume and influence of their judicial opinions or as judicial "mavericks" with low indications of partisan voting.[131]

Also of note, Republican-appointed judges invoked *Vermont Yankee* in separate opinions far more often than Democrat-appointed judges: fifteen compared to one.[132] Given how deeply rooted the *Vermont Yankee* principle is in administrative law, one might expect that a separate writing reflects a suggested application of the principle to new ground beyond what was covered in *Vermont Yankee* itself (and therefore unambiguously binding on the majority). Thus, invocations of *Vermont Yankee* in separate writings might forecast where the principle is moving. After all, concurrences "are the pulse and compass of legal change" that "send important signals both about what the law actually is, and also what it can . . . become,"[133] while dissents identify "flaws . . . in the majority's legal analysis" with "the hope that the Court will mend the error of its ways in a later case."[134]

This all suggests that there is an appetite for extending the *Vermont Yankee* principle, both at the Supreme Court and in the lower courts, and especially among jurists most likely to align ideologically with (and perhaps influence) the current Supreme Court. Moreover, in the aftermath of the Supreme Court's 2023 October Term, the stars may be aligning for *Vermont Yankee* to take on yet more importance. With *Chevron* deference gone, the doctrinal evils that Verkuil and Pierce had previously identified (aggressive hard look review and a presumption in favor of formal adjudications) perhaps once again require a *Vermont Yankee* solution.[135] If administrative law is on the cusp of a *Vermont Yankee* revitalization, the time is ripe to reconsider how *Vermont Yankee* might defensibly be used—especially if there are already divisions about the case's meaning.

131. *See generally* Stephen J. Choi & Mitu Gulati, *How Different Are the Trump Judges?*, 78 VAND. L. REV. EN BANC 1 (2025) (evaluating circuit judges across various empirical metrics). Judges Elrod and Menashi scored high on total number of excess opinions, *id.* at 12, while Judges Murphy and Readler scored high on quality of their opinions measured by cross-partisan favorable citations outside of their own circuits, *id.* at 19. Judges Elrod, Murphy, and Richardson were also notable for their volume of separate opinions (dissents and concurrences), *id.* at 23, while Judge Miller was identified as a notable judicial maverick, *see id.* at 26.

132. *See infra* Appendix.

133. Thomas B. Bennett, Barry Friedman, Andrew D. Martin & Susan Navarro Smelcer, *Divide & Concur: Separate Opinions & Legal Change*, 103 CORNELL L. REV. 817, 820 (2018).

134. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 430 (1986).

135. *See supra* notes 95, 99 and accompanying text.

II. Three Visions of *Vermont Yankee*

Vermont Yankee is more than just a case. As Judge Laurence Silberman once remarked, it reflects a core "principle of judicial review" in administrative law, just as *Chevron* once did.[136] But principles can be tricky things to pin down. *Chevron*, for example, could be "categorized" in multiple ways—rule of decision, standard of review, or canon of construction[137]—and perhaps reflected many doctrines, not just one.[138] So, it should not be surprising that *Vermont Yankee*'s principle might likewise be understood in different ways. Although jurists are not always—or often, for that matter—transparent in articulating their visions of *Vermont Yankee*, a careful study of how they use that case's central principle reveals markedly different understandings of what *Vermont Yankee* teaches or requires.

Using recent judicial writings, both at the Supreme Court and in the circuit courts, this Part identifies three subtle visions of *Vermont Yankee*'s principle. Some jurists treat *Vermont Yankee* as an administrative common law doctrine of remedial restraint; it limits not only what courts can identify as a legal error in an agency proceeding, but also what courts can require of agencies on remand once an error is found.[139] Other jurists, by contrast, embrace *Vermont Yankee*'s constitutional undertones and deploy its principle as a quasi-constitutional rule that Congress, not the judiciary, should have primacy over certain decisions about the executive branch's performance.[140] Finally, other jurists use *Vermont Yankee* as a guide to statutory construction; they view the principle as informing the proper application of vague procedural language in regulatory statutes.[141] Even within this camp, however, there are subtle divisions in how the principle operates: Some treat it more as a substantive canon that advances certain policies and values, while others treat it as a linguistic canon that respects Congress's choices to delegate authority to agencies. In the end, this Article defends that last option—*Vermont Yankee* as linguistic canon—as the most defensible and promising vision.

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136. UC Health v. NLRB, 803 F.3d 669, 689 (D.C. Cir. 2015) (Silberman, J., dissenting).

137. *See* Kristin E. Hickman & R. David Hahn, *Categorizing* Chevron, 81 OHIO ST. L.J. 611, 615 (2020).

138. *See* Lawrence B. Solum, *Disaggregating* Chevron, 82 OHIO ST. L.J. 249, 252 (2021).

139. *See infra* Part II.A.

140. *See infra* Part II.B. This Article uses the concept of "quasi-constitutional" to refer to reliance on constitutional *values* like the separation of powers—by contrast to strict reliance on constitutional text—to inform judicial decision-making. *See generally* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 612 (1992) (using "quasi-constitutional law" to refer to "the reading into statutes of constitutional values").

141. *See infra* Part II.C.

Each of the following Subparts proceeds in three stages. First, each Subpart explains and illustrates one of the visions of *Vermont Yankee* by discussing how jurists have urged the principle's application to a context different from a factual analog to *Vermont Yankee* itself. Next, each Subpart explores some potential ramifications for administrative law if this vision were more broadly adopted or extended. Finally, each Subpart analyzes whether and to what extent these visions are defensible under *Vermont Yankee*'s reasoning and context.

A. Administrative Common Law Principle of Remedial Restraint

Subpart A explores a vision of *Vermont Yankee* as a common law restraint on judicial remedies in administrative law. Whereas *Vermont Yankee* admonished lowers courts about *vacating* agency action, a broader vision of the case's teaching could prevent courts from pursuing other remedies like remand without vacatur or mandamus. Ultimately, however, this vision of *Vermont Yankee* is unsatisfactory in an increasingly formalist world of administrative law, and it would be hard to reconcile with some of *Vermont Yankee*'s underlying policies.

1. Explanation and illustration

At a high level of generality, one might conceive of *Vermont Yankee* as crystalizing (rather than announcing) a background principle of administrative law. When an administrative law doctrine is "too far afield from statutory text or discernible legislative purpose to count simply as statutory interpretation," many view it as part of so-called "administrative common law."[142] Although *Vermont Yankee* applied some statutory reasoning, its "crucial holding"[143]—the general principle that "administrative agencies 'should be free to fashion their own rules of procedure'"[144]—predates not only *Vermont Yankee* but the APA itself. For that reason, John Duffy has argued that *Vermont Yankee*, which is often understood to *reject* judge-made common law,[145] was actually an administrative common law decision that focused too much "on pre-APA case law" and "evaluation of the policy reasons for limiting

142. Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1295 (2012).

143. Duffy, *supra* note 10, at 182.

144. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 543 (1978) (quoting FCC v. Schreiber, 381 U.S. 279, 290 (1965)).

145. *See, e.g.*, Davis, *supra* note 10, at 10 ("The key element of the *Vermont Yankee* opinion is a prohibition, directed to the lower courts, against making common law about rulemaking procedure.").

judicial review of procedural decisions" at the expense of the APA's statutory judicial review provisions.[146]

Post-*Vermont Yankee* practice likewise has flavors of common law. *Vermont Yankee*'s principle of judicial restraint in the face of agency procedural choices is now widespread,[147] with something akin to the simplistic summary of *Vermont Yankee*'s holding recited time and again in judicial opinions, including in cases that do not even implicate the APA's procedures.[148] *Vermont Yankee* has creeped not only beyond informal rulemaking, but beyond the APA. This broad vision of *Vermont Yankee*, which takes seriously that there is a "basic tenet" of agency procedural discretion across statutory contexts,[149] is comparable to what Beermann and Lawson identified as using the case as "a metaphor for reining in unruly lower courts that are over-proceduralizing administrative law."[150]

To the extent that *Vermont Yankee* is truly a background principle of administrative common law, though, it operates in a specific field: remedies. After all, the issue in *Vermont Yankee* was whether a court could vacate agency action as procedurally deficient merely because a court independently concluded that the agency had not followed the court's view of the best procedures.[151] The Court said "no" because an agency's discretionary procedural choices are almost unreviewable.[152] In this context, then, the Supreme Court's statement that federal courts generally should not *review* a discretionary choice functionally meant that courts should not provide a *remedy* even if they disagree with the agency's choice. As that played out in *Vermont Yankee*, a court should not vacate agency action merely because the

146. Duffy, *supra* note 10, at 186-87; *cf., e.g.*, Levin, *supra* note 104, at 20 (observing that *Vermont Yankee* perhaps reflects an "evolutive interpretation of the APA").

147. *See* Levin, *supra* note 104, at 20 (observing that "courts have generally adhered to the letter" of *Vermont Yankee*).

148. For recent examples, see, for example, *Coal. for Renewable Nat. Gas v. EPA*, 108 F.4th 846, 857 (D.C. Cir. 2024) (reviewing the Clean Air Act's hybrid rulemaking procedures); and *Mejia-Alvarenga v. Garland*, 95 F.4th 319, 326 (5th Cir. 2024) (reviewing immigration adjudication procedures).

149. *Vt. Yankee*, 435 U.S. at 544.

150. Beermann & Lawson, *supra* note 3, at 878; *see also, e.g.*, Verkuil, *Wait Is Over*, *supra* note 10, at 921 (agreeing with Beermann and Lawson that Verkuil used "*Vermont Yankee* as 'a metaphor of sorts' for reining in hard-look review" (footnote omitted)).

151. *See Vt. Yankee*, 435 U.S. at 558 ("Administrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as mandated by statute, not simply because the court is unhappy with the result reached." (citation omitted)).

152. And, as John Duffy has observed, this rule of near unreviewability was not rooted in the APA's remedial text. *See* Duffy, *supra* note 10, at 186 n.371 (arguing that "the holding in *Vermont Yankee*—that discretionary procedural choices are almost unreviewable—cannot be justified" under APA § 706 (emphasis omitted)).

court disagrees with the wisdom of procedures the agency followed to reach that action.[153]

Understood as a background principle of remedial restraint in the face of agency choices, though, *Vermont Yankee* could speak more broadly than just about outright vacatur. Today, many prominent voices on the bench and in the academy debate whether the APA authorizes wholesale vacatur of a rule at all.[154] But even accepting that universal vacatur is allowed, some of these same voices have cautioned against its reflexive use rather than tailoring relief using traditional equitable considerations.[155] That tailoring can implicate considerations to which *Vermont Yankee* as remedial doctrine might speak. For example, robust precedent now supports the doctrine of remand without vacatur; sometimes invalidating a rule would be unduly disruptive, such that courts will simply remand to the agency to fix some error without vacating the rule.[156] And courts often elect remand without vacatur only "when equity demands."[157] One factor in this equitable balancing is the risk of "agency

153. *See Vt. Yankee*, 435 U.S. at 558.

154. Justices Thomas, Gorsuch, and Barrett have questioned universal vacatur. *See, e.g.*, United States v. Texas, 143 S. Ct. 1964, 1976-86 (2023) (Gorsuch, J., concurring in the judgment, joined by Thomas & Barrett, JJ.); *cf.* Arizona v. Biden, 40 F.4th 375, 394, 396-97 (6th Cir. 2022) (Sutton, C.J., concurring) (expressing similar views). Justice Kavanaugh, by contrast, has come out in its favor. *See* Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys., 144 S. Ct. 2440, 2460, 2462-63 (2024) (Kavanaugh, J., concurring) (citing Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121, 1131-34 (2020)). For some of the scholarly debate, compare, for example, Ronald M. Levin, *Vacatur, Nationwide Injunctions, and the Evolving APA*, 98 NOTRE DAME L. REV. 1997, 2007-23 (2023) (defending universal vacatur but advocating a flexible approach), with, for example, John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, 37 YALE J. ON REGUL. BULL. 37, 42-43 (2020) (arguing that the APA's "set aside" language in § 706 instructs courts to disregard unlawful orders, not to vacate them as to all persons).

155. *See, e.g.*, *United States v. Texas*, 143 S. Ct. at 1981, 1985-86 (Gorsuch, J., concurring in the judgment) (drawing attention to, for example, *Arizona*, 40 F.4th at 396 (Sutton, C.J., concurring)).

156. *See, e.g.*, Allied Signal, Inc. v. Nuclear Regul. Comm'n, 988 F.2d 146, 150-51, 154 (D.C. Cir. 1993) ("The decision whether to vacate depends on the seriousness of the order's deficiencies . . . and the disruptive consequences of an interim change that may itself be changed." (quotation marks omitted) (quoting International Union, United Mine Workers v. Fed. Mine Safety and Health Admin., 920 F.2d 960, 967 (D.C. Cir. 1990))). *But see, e.g.*, Milk Train, Inc. v. Veneman, 310 F.3d 747, 757 (D.C. Cir. 2002) (Sentelle, J., dissenting) (concluding that remand without vacatur is unlawful under the APA (citing Checkosky v. SEC, 23 F.3d 452, 491 (D.C. Cir. 1994) (per curiam) (Randolph, J., concurring) (same)). For a discussion of remand without vacatur's usual acceptance, see, for example, Levin, note 154 above, at 2021-22.

157. Ctr. for Food Safety v. Regan, 56 F.4th 648, 663 (9th Cir. 2022) (quoting Pollinator Stewardship Council v. EPA (*Pollinator I*), 806 F.3d 520, 532 (9th Cir. 2015))*; see also, e.g.*, Sierra Club v. U.S. EPA, 60 F.4th 1008, 1022 (6th Cir. 2023) (looking to "the overall equities" (quoting Shands Jacksonville Med. Ctr. v. Burwell, 139 F. Supp. 3d 240, 270

footnote continued on next page

indifference" to the legal defect identified on appeal; the agency, having avoided vacatur, might fail to fix the defect that the court found.[158] That concern has prompted some judges "to consider the alternatives to the open-ended remand without vacatur,"[159] such as requiring an agency to take action by a judicially imposed deadline.[160]

If *Vermont Yankee* is a common law principle of remedial restraint, some of these tailored remand procedures may be illegitimate. Consider a recent Ninth Circuit case, *Center for Food Safety v. Regan*, which addressed the EPA's violations of the Endangered Species Act (ESA) when approving a pesticide.[161] The majority concluded that, despite "a strong case for vacatur," remand without vacatur was warranted in part because the court could simply require the EPA to remedy the defects with its order "within 180 days of the mandate being issued."[162] That prompted a partial dissent from Judge Eric Miller, who understood *Vermont Yankee* to prohibit "micromanaging the agency's schedule" by judicially imposing a timeframe in which to act on remand.[163] As the EPA had represented to the court, the agency had a significant "backlog" of pesticides awaiting ESA review.[164] Although Judge Miller was concerned that this backlog would invite indifference to the court's order,[165] a separate concern—filtered through the lens of *Vermont Yankee*—is that an agency is generally entitled "to control its own docket."[166] If a remand without vacatur order has the effect of distorting the agency's docket control choices, one might think that *Vermont Yankee*'s basic tenet of agency procedural choice implies a

(D.D.C. 2015))); Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs, 7781 F.3d 1271, 1289-90 (11th Cir. 2015) (holding that remand without vacatur "is within a reviewing court's equity powers" (quoting Sierra Club v. Van Antwerp, 526 F.3d 1353, 1369 (11th Cir. 2008) (Kravitch, J., concurring in part and dissenting in part))).

158. *See, e.g.*, *In re* Core Commc'ns, Inc., 531 F.3d 849, 862 (D.C. Cir. 2008) (Griffith, J., concurring).

159. *Id.*

160. *See, e.g.*, *id.* at 861 (majority opinion) (directing the FCC "to issue its explanation by November 5, 2008"); A.L. Pharma, Inc. v. Shalala, 62 F.3d 1484, 1492 (D.C. Cir. 1995) (directing that a rule is "vacated automatically" if the FDA fails to offer "an adequate justification" after 90 days); Rodway v. Dep't of Agric., 514 F.2d 809, 818 (D.C. Cir. 1975) (directing the Secretary of Agriculture "to complete [a] new rule-making process within 120 days of the issuance of this opinion").

161. 56 F.4th 648, 652 (9th Cir. 2022).

162. *Id.* at 668 n.15, 669.

163. *Id.* at 672-73 (Miller, J., concurring in part and dissenting in part).

164. *Id.* at 672.

165. *Id.*

166. GTE Serv. Corp. v. FCC, 782 F.2d 263, 274 n.12 (D.C. Cir. 1986) (citing Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 543-44 (1978)).

limitation on a court's setting deadlines on remand. Judge Miller's opinion can be read to reflect such a view.[167]

Judge Miller's vision of *Vermont Yankee* is a common law one. He makes no effort to ground his principle in any written source of law, nor does he object that a remand procedure violates any specific provision in the APA, the ESA, or a constitutional provision.[168] Instead, Judge Miller simply takes the Supreme Court's rule—that a court may not "dictat[e] to the agency the methods, procedures, and time dimension of the needed inquiry"—and applies it as a general tenet.[169] Of course, the circuit judge's role is to apply the principles that the Supreme Court articulates. But Judge Miller's reliance on *Vermont Yankee* is an extension (and not merely an application) of the underlying principle. *Vermont Yankee* addressed when agency action warrants vacatur in the first instance due to a judicially perceived procedural defect without a basis in statute.[170] Judge Miller sees the same principle against judicial imposition of procedure as extending to situations in which vacatur is warranted under statute, but a court wants to guide the agency toward remedying the legal defect identified on remand.[171] So, in a common law manner, he takes *Vermont Yankee*'s basic tenet and applies it to a new context—informing the appropriate remedy where vacatur is otherwise warranted—that goes beyond the issue that confronted the Supreme Court.[172] This is an extension of case law, not merely its application, and the extension does not flow from any relevant statutory text.[173]

2. Broader implications

If Judge Miller's implicit point that *Vermont Yankee* constrains the scope of remedial discretion or power is correct, that might affect areas other than

167. *See Ctr. for Food Safety*, 56 F.4th at 672-73 (Miller, J., concurring in part and dissenting in part).

168. *See id.* Although Judge Miller did not invoke it, there *is* a textual argument that remand without vacatur violates APA § 706(2)(A)'s direction to set aside unlawful agency action, see, for example, *Bridgeport Hosp. v. Becerra*, 108 F.4th 882, 890-91 n.6 (D.C. Cir. 2024), although others question that textual argument, *see, e.g.*, Levin, *supra* note 104, at 17-18.

169. *See Ctr. for Food Safety*, 56 F.4th at 672 (Miller, J., concurring in part and dissenting in part) (quoting *Vt. Yankee*, 435 U.S. at 544-45).

170. *See Vt. Yankee*, 435 U.S. at 548.

171. *See Ctr. for Food Safety*, 56 F.4th at 672-73 (Miller, J., concurring in part and dissenting in part).

172. *See id.* (rejecting the legitimacy of "impos[ing] a time limit on the agency" as part of a remand).

173. *See id.* (citing only case law, not a statute, for the rule against "micromanaging the agency's schedule").

remand without vacatur. Whereas remand without vacatur implicates concerns about agency inaction in the face of an identified legal defect in the administrative proceeding, other intrusive remedies address situations in which agencies simply fail to act. A remedial restraint vision of *Vermont Yankee* could also be relevant to those situations.

Suppose that Congress directs an agency to issue a regulation, but the agency fails timely to satisfy the statutory obligation. Aggrieved persons might seek mandamus to compel the agency's action.[174] The D.C. Circuit, as one notable example, analyzes these agency delay claims under a multi-factor framework first articulated in *Telecommunications Research & Action Center v. FCC* (*TRAC*).[175] These six "*TRAC* factors" call for a judicial balancing of considerations like the time the agency has taken, indications of congressional intent about when the agency should act, and the agency's competing priorities.[176]

Consider a recent application of these factors in *In re Public Employees for Environmental Responsibility*.[177] Congress directed the Federal Aviation Administration and National Park Service jointly to regulate commercial sightseeing flights over national parks.[178] Congress set an aspirational deadline; the agencies were told to "make every effort to act" on a two-year timeframe,[179] but inter-agency infighting delayed action.[180] Congress then amended its directive. Rather than impose a harder deadline or sanction the agency's noncompliance, though, Congress authorized the agencies to regulate using voluntary agreements with flight operators instead of using only the rule-like management plans initially authorized.[181] The agencies then prioritized that voluntary approach, albeit still at a slow pace.[182]

Eventually, litigants sought mandamus to compel the agencies to complete their statutory charge within two years.[183] The D.C. Circuit largely obliged.

174. *See* 5 U.S.C. § 706(1) (authorizing a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed"); Norton v. S. Utah Wilderness All., 542 U.S. 55, 63 (2004) (explaining that APA § 706(1) "carried forward the traditional practice" of "judicial review . . . through use of the so-called prerogative writs—principally writs of mandamus").

175. 750 F.2d 70, 80 (D.C. Cir. 1984).

176. *See, e.g.*, *In re* Pub. Emps. for Env't Resp., 957 F.3d 267, 273 (D.C. Cir. 2020) (citing *TRAC*, 750 F.2d at 80).

177. *Id.*

178. *Id.* at 269.

179. *Id.* (quoting 49 U.S.C. § 40128(a)(2)(E)).

180. *Id.* at 270.

181. *Id.*

182. *See id.* at 270-71.

183. *Id.* at 271.

Although Congress had declined to impose a "rigid schedule" for final action, the court chose to enforce its aspirational timeline.[184] Even though the delay largely resulted from intra-branch conflict between agencies directly accountable to an elected President, the court saw Article III mandamus relief as an appropriate tool to "end an interagency turf war."[185] And even though regulating commercial air tours was only a small part of each agency's overall mission, their "legitimate resource-based concerns" merely meant that the court would not order them to complete their work within a fixed two-year deadline, as the petitioners had requested.[186] Instead, the court ordered the agencies to write up a schedule within 120 days, submitted for court approval, outlining how they would bring all outstanding parks into compliance; explain, to the court's satisfaction, why any such schedule would need to take longer than two years; and update the court every ninety days so it could "monitor the agencies' progress."[187]

Mandamus petitions like these arise (and are not infrequently granted) with some regularity—both in the D.C. Circuit and elsewhere.[188] To be sure, the APA allows courts to "compel agency action unlawfully withheld or unreasonably delayed,"[189] and an agency's "failure to act" on rulemaking is reviewable agency action.[190] But when the APA was enacted in 1946, administrative law was largely defined by adjudication, not rulemaking.[191] When agency action is unlawfully withheld from an individual in an adjudicatory context, there may be strong reasons for judicial intervention; the private person may have a protected legal right upon which the agency is

184. *Id.* at 274-76.

185. *Id.* at 274.

186. *Id.* at 275.

187. *Id.* at 275-76.

188. *See, e.g.*, *In re* W. Coal Traffic League, 108 F.4th 905, 907 (D.C. Cir. 2024) (denying a petition to compel a rulemaking or an explanation for discontinuing an inquiry); *In re* La. Pub. Serv. Comm'n, 58 F.4th 191, 192 & n.8, 195 (5th Cir. 2023) (citing *TRAC* and directing the Federal Energy Regulatory Commission to provide within twenty-one days "a meaningful explanation" for delay in a ratemaking proceeding); *In re* Ctr. for Biological Diversity, 53 F.4th 665, 673 (D.C. Cir. 2022) (directing the completion of an ESA determination with status updates every sixty-days to the court); *In re* Nat. Res. Def. Council, Inc., 956 F.3d 1134, 1136, 1138, 1143 (9th Cir. 2020) (applying *TRAC* and directing the EPA to act on a petition to cancel a pesticide registration within ninety days).

189. 5 U.S.C. § 706(1).

190. *Id.* § 551(13).

191. *See, e.g.*, Metzger, *supra* note 5, at 144 ("Only in the late 1960s and early 1970s did [the] use of informal rulemaking become widespread . . . ."); Scalia, *supra* note 10, at 376-78.

infringing.[192] But when a court issues mandamus in a rulemaking context—thereby vindicating publicly owed rather than individual obligations—the values informing remedial discretion may be quite different.

Consider again the national parks example. The D.C. Circuit's directive to develop a plan for regulating the parks (on a deadline created by judicial decree rather than statute) necessarily imposes a procedural requirement on the agencies by subjecting them to judicial supervision of their implementation of congressional policy.[193] By subjecting the agencies' action plan to judicial approval and monitoring, the agencies are left in a state of uncertainty: they might develop a plan in good faith, only to have it rejected, and the court might intervene in unpredictable ways at any stage during its monitoring process. In the national parks example in particular, one possible consequence of the court's directive is that the agencies will pursue coercive regulation by rule (which the government can implement unilaterally) rather than regulation by voluntary agreement with the regulated parties, which Congress authorized even in the face of known delays.[194] So, judicial supervision might push the agencies to proceduralize their approach when more informal methods—which, admittedly, might take longer to achieve[195]—are also available. These consequences stand in some tension with *Vermont Yankee*'s preference for predictability and informality.[196] For these reasons, a defensible

192. Mandamus is one of the traditional bases for judicial review of agency action; it could be used to "compel the performance of a non-discretionary official duty in favor of a private person." John Harrison, *Public Rights, Private Privileges, and Article III*, 54 GA. L. REV. 143, 159 (2019) (pointing to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162 (1803), as an example).

193. *See In re* Pub. Emps. for Env't Resp., 957 F.3d 267, 275-76 (D.C. Cir. 2020).

194. *See supra* notes 181-82 and accompanying text (describing Congress's choice to allow regulation through voluntary agreements alongside regulation via agency-imposed management plan).

195. As the D.C. Circuit noted, "voluntary agreements can't be imposed without operator approval," and the agencies sometimes lacked "leverage to bring everyone to the table." *See In re Pub. Emps.*, 957 F.3d at 270, 271.

196. *Cf.* Beermann & Lawson, *supra* note 3, at 873 (arguing that *Vermont Yankee* reflects the policies that agencies should be able to (1) "predict in advance the level of procedure required" and (2) "employ informal procedures" where allowed). Moreover, the D.C. Circuit's approach to mandamus is arguably in tension with the precedents on which *Vermont Yankee* itself relied: *Vermont Yankee*'s basic tenet of agency procedural discretion traces its roots to *Pottsville*, a case that on its facts cautioned *against* aggressive use of mandamus with respect to agency processes. *See supra* notes 74-87 and accompanying text (discussing *Pottsville*'s indirect influence on *Vermont Yankee*). In *Pottsville*, the D.C. Circuit reversed the FCC's denial of a radio license application, and on remand the FCC reconsidered that application alongside two rival applications. *See* FCC v. Pottsville Broad. Co., 309 U.S. 134, 139-40 (1940). The initial applicant, believing it was entitled to standalone consideration, obtained a writ of mandamus from the D.C. Circuit directing the FCC to abandon its plan to consider all three applications together. *Id.* at 140. The Supreme Court reversed. *Id.* at 143.

extension of *Vermont Yankee* as common law remedial doctrine might require abandoning mandamus in rulemaking delay cases, or at the very least suggest that courts should reconfigure the D.C. Circuit's *TRAC* factors to reflect more sensitivity to *Vermont Yankee*'s underlying policies.

This extension of *Vermont Yankee* as a remedial restraint principle has already shown up in the related area of intra-agency deadlock. Sometimes multimember boards and commissions cannot act because no course of action commands majority support.[197] In one relatively recent case, the D.C. Circuit reviewed the Surface Transportation Board's (STB) decision to terminate a rulemaking proceeding because each Board member preferred a different policy.[198] One judge would have vacated that termination, which would have restored the rulemaking proceeding to the agency's docket until the agency could supply a rational basis for its "choice to give up" in the face of a known policy problem.[199] In short, the agency would be made to deliberate longer. As the majority saw the matter, though, judicial action attempting to break the deadlock implicated *Vermont Yankee*'s principle against imposing new procedures.[200] If the court's concern was the illegitimacy of managing an agency's deliberative procedures in rulemaking, that concern should apply regardless whether a single agency cannot act because of internal disagreement (as with the STB) or two agencies cannot act because of a turf war (as in the national parks example). Simply put, successful rulemaking might falter because of any number of political veto points built into the system. When courts intervene in these situations, their orders will almost necessarily require agencies to undertake procedural steps that they otherwise would not. Insofar as *Vermont Yankee*'s basic tenet is one of agency autonomy from atextual judicial supervision,[201] one might think the case teaches remedial restraint even when courts conclude that prodding rulemaking along would advance "some vague, undefined public good."[202]

3. Assessment

But can a vision of *Vermont Yankee* as an administrative common law principle of remedial restraint be squared with the opinion itself? Perhaps not

197. *E.g.*, W. Coal Traffic League v. Surface Transp. Bd., 998 F.3d 945, 947 (D.C. Cir. 2021) (reviewing a 1-1-1 deadlock); Radio-Television News Dirs. Ass'n v. FCC, 184 F.3d 872, 878 (D.C. Cir. 1999) (reviewing a 2-2 deadlock).

198. *W. Coal Traffic League*, 998 F.3d at 950.

199. *See id.* at 959, 963 (Wilkins, J., dissenting).

200. *See id.* at 951 (majority opinion).

201. *Cf. id.* (emphasizing that the agency "is an organ of a coequal branch of government" such that courts should "respect [its] autonomy").

202. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 549 (1978).

easily. To be sure, part of *Vermont Yankee*'s rationale rests on the background tenet that agencies should be free to fashion their own procedures—a tenet that, on the opinion's surface, looks like an abstract rule gleaned from case law.[203] But as Part I observed, the cases supporting this principle each dealt with challenges to agency procedural choices undertaken with specific grants of statutory authority that generally permitted the agency's choice.[204] To the extent that courts should not second-guess those procedural choices, that restraint reflects respect for congressional authorization, not necessarily for agencies qua agencies. Put differently, the agency autonomy rationale only goes so far without statutory text to back it up.

Vermont Yankee as a common law remedial principle also cannot account for the Court's careful attention to the APA's text and context, which likewise reflect concern with carrying out Congress's chosen scheme for rulemaking. Although *Vermont Yankee* never cites the APA's judicial review provisions,[205] the statutory logic is easily reconstructed: Courts can "set aside agency action" undertaken "without observance of procedure required by law."[206] Adhering to APA § 553's informal rulemaking procedures necessarily observes what the law requires, and therefore APA § 706 does not allow vacatur when an agency checks APA § 553's boxes. To the extent this remedial principle against vacatur perhaps reflects a common law practice,[207] it is a common law that the APA codified and converted into a statutory one through its judicial review provisions.[208]

Nor does a generally applicable background principle of restraint necessarily fit with *Vermont Yankee*'s more functionalist and consequentialist rationales. *Vermont Yankee* promoted the values of predictability and efficiency;[209] like the *Florida East Coast* precedent from which it drew,[210]

203. *See id.* at 543 (quoting FCC v. Schreiber, 381 U.S. 279, 290 (1965)).

204. *See supra* note 68 and accompanying text.

205. Duffy, *supra* note 10, at 186-87.

206. 5 U.S.C. § 706(2).

207. *See* discussion *supra* notes 65-72 and accompanying text. *But see* Levin, *supra* note 104, at 20 (questioning *Vermont Yankee*'s consistency with the history of common law procedural innovations).

208. *Cf., e.g.*, Clark L. Fauver & A. Stuard Young, Jr., *The Administrative Procedure Act and Judicial Review of Agency Actions*, 37 GEO. L.J. 557, 568 (1949) (observing contemporaneously that APA § 706 was "merely declaratory of preexisting law"). To the extent that *Vermont Yankee* might be said to *announce* a common law rule (rather than enforce a statutory one), the common law aspect of the holding is, as John Duffy has demonstrated, the case's insistence that rare but exceptional circumstances might warrant some judicial review of procedural choices notwithstanding the APA's text. *See* Duffy, *supra* note 10, at 187.

209. *See supra* notes 50-53 and accompanying text.

210. *See supra* note 57 and accompanying text.

Vermont Yankee was part of an effort to facilitate effective rulemaking.[211] Despite that pro-agency and pro-rulemaking orientation, treating *Vermont Yankee* as always counseling against judicial imposition of procedure might yield inefficient and anti-agency outcomes. Consider Judge Miller's concern about remand without vacatur: If *Vermont Yankee* limits a court's power to impose procedures on remand—and thereby guard against agency indifference to a judicially identified legal defect—that will channel courts toward remedies like outright vacatur that are arguably even more intrusive by putting the agency back at square one with no rule in place at all. That seems in tension with the pro-rulemaking policies that *Vermont Yankee* sought to advance, and it suggests that the principle cannot be so broad as to eliminate equitable discretion designed to promote effective rulemaking. And if implementing *Vermont Yankee* as common law remedial principle necessarily requires courts to balance *Vermont Yankee*'s principles and policies, then this vision will almost invariably draw courts into the type of ad hoc policy assessment against which *Vermont Yankee* warned.[212] To avoid these tensions, *Vermont Yankee* is perhaps better justified on more formalist terms.

B. Constitutional Separation of Powers

One more formalist possibility is that *Vermont Yankee*'s principle derives from the Constitution. This Subpart explores a vision of *Vermont Yankee* as a quasi-constitutional doctrine enforcing the separation of powers. In explaining the relative roles of Congress and federal courts in managing agency procedures, *Vermont Yankee* perhaps conveys a deeper message about congressional primacy and the role of judicial review, with ramifications that go beyond judicial review of agency rulemaking. Ultimately, however, when *Vermont Yankee* is read in the context of the constitutional fights that informed *Pottsville*, upon which it drew, any defensible constitutional vision of the principle is quite narrow.

1. Explanation and illustration

From a formalist perspective, an important objection to a common law vision of *Vermont Yankee* is that it lacks an anchor in written legal text.[213] One possible textual source for a malleable principle, though, is the Constitution. As Part I showed, *Vermont Yankee* has a constitutional undertone permitting a

211. *See, e.g.*, Levin, *supra* note 104, at 50 (noting that *Florida East Coast* resulted in "streamlining" agencies' internal procedures).

212. *See* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 546-47, 549 (1978).

213. *See* Duffy, *supra* note 10, at 187-88.

vision in which the principle enforces the separation of powers.[214] In drawing from *Pottsville*, *Vermont Yankee* is part of a line of precedent counseling judicial restraint with respect to policy choices that Congress has largely delegated to agencies rather than to courts.[215] And, in recent years, some jurists have used *Vermont Yankee* to emphasize those teachings about judicial modesty and congressional deference in high-stakes separation of powers cases.[216]

To see the emphasis on judicial restraint, consider Judge Stephen Higginson's reliance (in dissent) on *Vermont Yankee* in *Texas v. United States*.[217] This case was a challenge to the Obama administration's Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program for exercising prosecutorial discretion in immigration enforcement.[218] Part of the legal challenge was that DAPA violated the President's constitutional obligation to take care that the law is faithfully executed.[219] In concluding that the case was nonjusticiable, Judge Higginson cited *Vermont Yankee* as teaching that "courts should not truncate the myriad *political* processes whereby most executive intention, good and bad, is ever balanced," but instead should empower Congress to check instances of "executive abdication" of law enforcement.[220]

To unpack the logic: When a court holds that an agency is unlawfully under-enforcing the law, the implication is that the agency should be doing more. This judicially decreed legal duty to enforce runs into a *Vermont Yankee* problem if the effect is dictating action; doing more necessarily requires a procedural undertaking. In this view, perhaps, when *Vermont Yankee* admonishes that "[a]bsent constitutional constraints . . . administrative agencies

214. *See supra* notes 73-87 and accompanying text.

215. *See supra* notes 74-87 and accompanying text. In a different conception of this vision, *Vermont Yankee* is about respecting the executive branch. *Cf.* W. Coal Traffic League v. Surface Transp. Bd., 998 F.3d 945, 951 (D.C. Cir. 2021) (invoking *Vermont Yankee* in more broadly discussing respect for agency autonomy). The Federal Circuit, for example, has invoked *Vermont Yankee* to describe an agency's "inherent authority to adopt procedures" as of the same sort that federal courts enjoy. *See* Royal Brush Mfg. Inc. v. United States, 75 F.4th 1250, 1261 (Fed. Cir. 2023). Any claim about an agency's inherent authority, however, stands in some tension with the bedrock principle of administrative law that "an agency literally has no power to act . . . unless and until Congress confers power upon it." La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986). Moreover, this view is not faithful to *Vermont Yankee*'s focus on judicial humility with respect to policy choices. *See infra* Part II.B.3. This Subpart focuses, instead, on the more defensible vision of *Vermont Yankee* as respecting Congress.

216. *See* PHH Corp. v. CFPB, 881 F.3d 75, 109 (D.C. Cir. 2018) (en banc); Texas v. United States, 787 F.3d 733, 775-76 (5th Cir. 2015) (Higginson, J., dissenting).

217. 787 F.3d at 775.

218. *Id.* at 743-44 (majority opinion).

219. *Id.* at 743.

220. *Id.* at 775-76 (Higginson, J., dissenting) (emphasis added).

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," those "constitutional constraints" refer to more than just judicially enforceable rights claims like due process.[221] It might refer, as well, to Article I mechanisms—like congressional oversight,[222] the power of the purse,[223] and the threat of impeachment[224]—that can legitimately press the executive to action.[225] In that sense, the availability of *political* remedies, which are perhaps better calibrated to weigh the policy consequences of action and inaction, should inform judicial remedial restraint.[226] So, although Judge Higginson (like Judge Miller) embraces *Vermont Yankee* as a principle of remedial restraint, his vision grounds that restraint in structural constitutional considerations about the relative roles of courts and Congress in controlling executive action.[227]

Judge Cornelia Pillard articulated a different Congress-empowering vision when writing for an en banc majority of the D.C. Circuit in *PHH Corp. v.*

221. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 542-43 (1978) (quoting FCC v. Schreiber, 381 U.S. 279, 290 (1965)) (internal quotation marks omitted).

222. *See, e.g.*, Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2031 (2020) (recognizing the unenumerated congressional power to make "inquiries into the administration of existing laws").

223. *See* U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations make by Law . . . .").

224. *See id.* at art. I, § 2, cl. 5 ("The House of Representatives . . . shall have the sole Power of Impeachment."); *id.* at art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments.").

225. *See United States v. Texas*, 787 F.3d at 775-76 (Higginson, J., dissenting) (quoting *Vt. Yankee*, 435 U.S. at 543-44).

226. *See, e.g.*, Matthew S. Brooker & Michael A. Livermore, *Centralizing Congressional Oversight*, 32 J.L. & POL. 261, 265 (2017) (observing that some normative defenses of congressional oversight of agency action are premised on "constitutional design" and others on "the particular value of legislative policy judgment").

227. Judge Miller, by contrast, deployed *Vermont Yankee* as informing the choices a court can or should make once the court is convinced, as a threshold matter, that it has jurisdiction. *See supra* notes 163-73 and accompanying text. In this sense, one might conceive of these different visions as playing out on two axes: the principle's *source* (common law or written text) and its *effect* (a tool to discern an agency's obligation or a rule of judicial restraint). Judges Higginson and Miller converge on one effect (remedial restraint) while diverging on the reason (whether the courts lack power under the Constitution versus whether courts should refrain from overreaching with the power they have under remedial common law). Judge Higginson's use of *Vermont Yankee* to inform justiciability (i.e., judicial power) aligns him somewhat with the D.C. Circuit's *Western Coal Traffic League* decision. *See supra* notes 197-201 and accompanying text. There, using an agency autonomy rationale, the court ultimately concluded that the case was not redressable (and thereby outside of the Article III judicial power) because the court could not "issue an order to break the deadlock." 998 F.3d at 950-51.

CFPB.[228] Before the Supreme Court held in *Seila Law* that the Bureau of Consumer Financial Protection's (CFPB) director must be removable at will by the President,[229] the D.C. Circuit concluded the opposite.[230] One argument in the D.C. Circuit case was that for-cause removal protection for principal officers was available only in the narrow context of multi-member independent agencies.[231] Essentially, in the absence of robust presidential accountability, permissible independent agencies must have design features that promote or facilitate "deliberation, gradualism, or inaction"—all of which multi-member leadership is more likely on balance to provide.[232] Judge Pillard rejected this argument in part by reference to *Vermont Yankee*: Whether to create a single-director or multi-member agency implicates "policy determinations" for Congress because "countless structural options . . . might be theorized as promoting more or less thorough deliberation within agencies," but courts' "judgments of contested empirical questions about institutional design are not grounds for deeming such choices constitutionally compelled."[233] As she saw it, judicial second-guessing of institutional design would "stray beyond the judicial province" by dictating a procedural format.[234]

Judge Pillard's vision of *Vermont Yankee* generalizes that case's teaching about discrete matters (a single rulemaking) to a principle about agency operations overall. Agency processes extend beyond just what the APA regulates; before anyone cares about the nitty-gritty of informal rulemaking, there must first be a decision to turn the agency's attention to that matter. And, of course, an agency might abandon a proposed discretionary regulatory undertaking at any stage, a process likewise unregulated by the APA.[235] The procedures that lead to these choices—what to regulate, how to do it, when, and so forth—will be shaped by the agency's institutional design. Whether a rulemaking can begin because one official greenlights it or only when a majority of a multi-member panel does is a procedural question. If one takes seriously that courts "stray beyond the judicial province" when they impose their views of the "best" procedures upon agencies, then one might think that the Constitution allocates decisions about the "best" institutional design

228. 881 F.3d 75 (D.C. Cir. 2018) (en banc) (majority opinion).

229. *See* Seila Law L.L.C. v. CFPB, 140 S. Ct. 2183, 2192 (2020).

230. *PHH Corp.*, 881 F.3d at 77.

231. *Id.* at 107-08.

232. *Id.* at 108.

233. *Id.* at 109.

234. *See id.* (quoting Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 549 (1978)).

235. *See, e.g.*, Sanofi Aventis U.S. L.L.C. v. U.S. Dep't of Health & Human Servs., 58 F.4th 696, 706 (3d Cir. 2023) (declining to police an agency's withdrawal of proposed rules).

choices—which will in turn influence on-the-ground procedure—to Congress.[236]

2. Broader implications

A vision of *Vermont Yankee* that centers Congress—and not the judiciary—in policing the means of law execution aligns the *Vermont Yankee* principle (which the current Supreme Court appears to favor) with separation of powers views that the current Supreme Court rejects.[237] In this constitutional vision, *Vermont Yankee*'s importance principally lies in its rejection of judicial aggrandizement.[238] That theme is part of the broader *Vermont Yankee* narrative. In the lead-up to *Vermont Yankee*, the D.C. Circuit (and other circuit courts) had centered themselves in policing how agencies executed policy decisions that Congress assigned to the executive branch.[239] *Vermont Yankee* rejected that vision and embraced a narrower judicial role.

Unsurprisingly, alignment of *Vermont Yankee* with progressive thinking on structural questions is most easily seen in removal cases, like the D.C. Circuit's CFPB decision. Judge Pillard's invocation of *Vermont Yankee* as counseling deference to Congress on institutional design is comparable to the liquidation rationale on which Justice Elena Kagan would later rely in her *Seila Law* partial dissent.[240] For Justice Kagan, Article I's Necessary and Proper Clause assigns institutional design choices in the first instance to Congress;[241]

236. *See Vt. Yankee*, 435 U.S. at 549.

237. *Compare* sources cited *supra* notes 115-23 (chronicling the Court's recent *Vermont Yankee* invocations), *with, e.g.*, Robert L. Glicksman & Richard E. Levy, *The New Separation of Powers Formalism and Administrative Adjudication*, 90 GEO. WASH. L. REV. 1088, 1095 (2022) (chronicling "the current resurgence of separation of powers formalism"). Some scholars have argued that current doctrine treating the separation of powers "as a legal principle of interbranch entitlements secured by judicial enforcement," is a "juristocratic counterrevolution" to the earlier "*republican* separation of powers," which instead relied on "representative institutions using political negotiation, statecraft, and the check of public opinion" to define the separation of powers. *See* Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2028-29 (2022). Thus, a contrary vision of the separation of powers would recenter the Constitution's Necessary and Proper Clause in prescribing the powers of the branches, thereby reempowering political actors at the expense of judges. *Id.* at 2030.

238. By "judicial aggrandizement," I am referring to "norms that reinforce the judiciary's role as the final arbiter of political disputes at the expense of other governing institutions." *See* Allen C. Sumrall & Beau J. Baumann, *Clarifying Judicial Aggrandizement*, 172 U. PA. L. REV. ONLINE 24, 38 (2024).

239. *See supra* Part I.A.

240. Seila Law L.L.C. v. CFPB, 140 S. Ct. 2183, 2229-33 (2020) (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

241. *See id.* at 2227 (citing U.S. CONST. art. I, § 8, cl. 18).

the judiciary's assessment of any design choice's propriety is properly informed by the course of political practice;[242] and, where that practice "supports wide latitude for Congress," courts should not interfere.[243] In her reliance on *Vermont Yankee*, Judge Pillard engages a similar line of reasoning: Bare judicial policy assessments (of which *Vermont Yankee* disapproved) are insufficient to overcome Congress's first-instance judgments.[244]

Obviously, this vision of *Vermont Yankee* did not carry the day in *Seila Law*. That suggests, as a practical matter, limits on how far a functionalist quasi-constitutional vision of *Vermont Yankee* can go under the current formalist Supreme Court. Those limits, however, do not mean that *Vermont Yankee* has no utility in advancing judicial restraint on separation of powers questions. A constitutional vision of *Vermont Yankee* more aligned to Judge Higginson's view of remedial restraint where Congress is well-situated to enforce its own expectations similarly recenters Congress in debates about executive branch enforcement.[245] This view might bolster objections to judicial intervention into rulemaking via mandamus, previously discussed in the context of *Vermont Yankee* as common law.[246] When Congress directs an agency to make rules, and the agency delays in fulfilling its obligation, the most important structural question is *which institution* is best equipped to compel compliance. Judge Higginson's constitutional vision of *Vermont Yankee* reminds courts that there are political levers that Congress can pull, such as oversight. For example, an agency called before Congress to answer for its rulemaking failure might point to competing demands on its attention and limits on its resources—factors that the D.C. Circuit also considers when deciding whether to issue mandamus.[247] One might think that Congress is better situated to judge whether factors like these should excuse strict compliance with its own directions. In this sense, even if *Vermont Yankee*'s more policy-laden rationales do not necessarily foreclose mandamus to compel rulemaking, some of its constitutional undertones might.

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242. *See id.* at 2226, 2229, 2231.

243. *Id.* at 2229.

244. *Compare* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 549 (1978) (stating that courts 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"), *with* PHH Corp. v. CFPB, 881 F.3d 75, 109 (D.C. Cir. 2018) (en banc) (stating that "design choice . . . implicates policy determinations that we must leave to Congress").

245. *See supra* notes 218-27 and accompanying text.

246. *See supra* notes 176-87 and accompanying text.

247. *See* Telecomm. Rsch. & Action Ctr. v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984) ("[T]he court should consider the effect of expediting delayed action on agency activities of a higher or competing priority.").

3. Assessment

The biggest problem with a quasi-constitutional vision of *Vermont Yankee*, however, is that it does not always properly account for the real constitutional issues in that case. When read through the lens of *Pottsville* (from which the central principle of agency procedural discretion derives),[248] *Vermont Yankee* reinforces only two narrow and unremarkable constitutional points. First, the judiciary must be sensitive about intrusions in the prerogatives of other branches, including by respecting the policy choices properly left to politically accountable actors.[249] And second, Congress can define required procedures within the scope of its Article I authority.[250] Neither of these points are revolutionary, nor is *Vermont Yankee* their source. Rather, insofar as *Vermont Yankee* has anything to say about separation of powers, its outcome and reasoning are informed by these much older principles, both of which played more important roles in *Pottsville*.

Start with the restraint principle. *Pottsville* was decided after a lengthy, contested constitutional settlement about the role of courts in administration.[251] For years, judicial review in many administrative contexts had operated merely as one phase of an overall regulatory process, with reviewing courts authorized to substitute their own policy judgments for the agency's.[252] The Supreme Court repeatedly rejected this revising authority as "legislative"[253] or "administrative,"[254] while earlier describing any "right to control, to correct, to reverse, and to dictate the procedure and action of executive officers" as "not judicial" but "administrative, executive, and political in its nature."[255] In the New Deal period, the constitutional settlement reached was that courts could legitimately address "questions of law" but not those of policy, including "the wisdom or expediency of the administrative action."[256]

248. *See supra* notes 73-87 and accompanying text.

249. *Cf.* FCC v. Pottsville Broad. Co., 309 U.S. 134, 144 (1940) ("Unless these vital differentiations between the functions of judicial and administrative tribunals are observed, courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine.").

250. *Cf. id.* at 141 (admonishing that "due observance" must be maintained for Congress's "power to regulate commerce" even as "exercised through a delegated agency").

251. *See supra* notes 78-87 and accompanying text (discussing the shift from judicial revising authority).

252. *See* Crews, *supra* note 80, at 716-18 (discussing this history); Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 993-95 (2011) (same).

253. Keller v. Potomac Elec. Power Co., 261 U.S. 428, 444 (1923).

254. Postum Cereal Co. v. Cal. Fig Nut Co., 272 U.S. 693, 700 (1927).

255. Craig v. Leitensdorfer, 123 U.S. 189, 211 (1887).

256. Fed. Radio Comm'n v. Nelson Bros. Bond & Mortg. Co., 289 U.S. 266, 276-77 (1933).

This constitutional debate was all about "contamination of judicial authority" by "drawing federal courts into matters regarded as being the province of the other branches of government."[257] That was quintessentially a separation of powers concern, and one with deep roots in American legal thought.[258] In *Pottsville*, the Court drew on this history to bolster its conclusion that "vital differentiations between the functions of judicial and administrative tribunals [be] observed," including that 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."[259] That conclusion worked its way into *Schreiber* before becoming part of *Vermont Yankee*'s critical holding.[260]

Read in this light, Judge Higginson's constitutional vision of *Vermont Yankee* is defensible. To say that something is not justiciable is to say that it is beyond the judicial power's reach.[261] For Judge Higginson, the executive branch's chosen level of immigration enforcement is a question of politics and policy, not one of law, which places it in Congress's domain, not a court's.[262] Judicial invalidation of an executive policy of under-enforcement might be viewed as seeking "to control . . . and to dictate the procedure and action of executive officers," which nineteenth century legal thought saw as "not judicial" but "political in its nature."[263] That same principle resonates through *Vermont Yankee*'s directive that courts should "not stray beyond the judicial province to explore the procedural format or . . . impose upon the agency [their] own notion of which procedures are 'best' or most likely to further some vague, undefined public good."[264] Some procedural choices require the type of political judgments that the Constitution removed from the judicial department.

At the same time, the D.C. Circuit's effort to make *Vermont Yankee* relevant to institutional design seems less plausible. No doubt, *Vermont Yankee* taught

257. Merrill, *supra* note 252, at 990, 995.

258. For example, the Founders were influenced by thinkers like Montesquieu who rejected a role for judges in public law, *see* Crews, *supra* note 80, at 728-29 & n.222, and at the Constitutional Convention there were powerful objections to a judicial role that would "mix considerations of policy with considerations of law." MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 46 (2020).

259. FCC v. Pottsville Broad. Co., 309 U.S. 134, 142-46 (1940).

260. *See supra* note 74 and accompanying text.

261. *See, e.g.*, TransUnion L.L.C. v. Ramirez, 141 S. Ct. 2190, 2203, 2207 (2021) (stating that justiciability doctrines enforce the separation of powers).

262. *See* Texas v. United States, 787 F.3d 733, 775-76 (5th Cir. 2015) (Higginson, J., dissenting) (emphasizing "political processes" in assessing whether "executive abdication" is "renunciatory of Congress").

263. Craig v. Leitensdorfer, 123 U.S. 189, 211 (1887).

264. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 549 (1978).

deference to Congress; the Court drew on textual and legislative history clues to effectuate congressional policy, which the Court understood to reflect a political settlement about the extent of required procedures.[265] But here again, *Vermont Yankee*'s reliance on *Pottsville* suggests an important limitation. In setting the outer bounds of judicial authority, *Pottsville* explained that "due observance" must be maintained for Congress's "power to regulate commerce" even when "exercised through a delegated agency."[266] Congress's use of its interstate commerce power to delegate regulation of the airwaves was unambiguously lawful under existing doctrine.[267] The principle of legislative deference is simply the unremarkable proposition that *lawful* congressional choices are controlling on the courts.

This limitation underscores the problem of importing *Vermont Yankee* into separation of powers doctrine as broadly counseling legislative deference. When Congress designs an agency (even one that will regulate interstate commerce), its institutional design power—directing how to "carry[] into Execution" the underlying policy—comes from the Necessary and Proper Clause.[268] A Necessary and Proper Clause inquiry, as even the dissenters in *Seila Law* recognized, can present difficult questions about whether history, tradition, and political practice permit Congress's choice.[269] In a case about *whether* an institutional design choice is valid, *Vermont Yankee*—which teaches respect only for valid legislation—is largely inapt. Once a court determines that an institutional design is valid, however, *Vermont Yankee* can defensibly be read to counsel against judicial intervention to correct the foreseeable consequences of the design choice. Thus, one might plausibly invoke *Vermont Yankee* to conclude that under-enforcement by a unitary officer or deadlock among a multi-member board or commission are judicially unreviewable;[270] Congress presumably understood the risk of designing its institutions to permit these outcomes, and *Vermont Yankee* teaches that courts should not attempt to

265. *Id.* at 545-48.

266. FCC v. Pottsville Broad. Co., 309 U.S. 134, 141 (1940).

267. *See* U.S. CONST. art. I, § 8, cl. 3; Fed. Radio Comm'n v. Nelson Bros. Bond & Mortg. Co., 289 U.S. 266, 279 (1933) ("No question is presented as to the power of the Congress, in its regulation of interstate commerce, to regulate radio communications.").

268. U.S. CONST. art. I, § 8, cl. 18; *cf., e.g.*, Bowie & Renan, *supra* note 237, at 2029-30 (emphasizing the Necessary and Proper Clause's appropriate centrality to the separation of powers); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 2005 (2011) (similar).

269. *See* Seila Law L.L.C. v. CFPB, 140 S. Ct. 2183, 2228 (2020) (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

270. *See, e.g.*, W. Coal Traffic League v. Surface Transp. Bd., 998 F.3d 945, 950-51 (D.C. Cir. 2021) (multi-member board deadlock); Texas v. United States, 787 F.3d 733, 775-76 (5th Cir. 2015) (Higginson, J., dissenting) (under-enforcement of immigration policy).

mitigate those risks based on bare judicial assessment that some other course of action would be better.[271]

In short, *Vermont Yankee* is informed by and advances certain constitutional values, and the *Vermont Yankee* principle has constitutional undertones insofar as it grows from cases like *Pottsville*. As a constitutional rule of decision, though, its utility is narrow. The *Vermont Yankee* principle may well inform the use of judicial power to control the executive branch (Judge Higginson's vision of remedial restraint, with potential ramifications for mandamus to compel rulemaking),[272] but it says less of consequence about the judiciary's proper deference to Congress on questions like removability (the D.C. Circuit's vision).[273]

C. Principle of Statutory Construction

A final vision treats *Vermont Yankee* as a lesson about the construction of administrative statutes. This vision is most evident when a jurist deploys *Vermont Yankee* in statutory contexts beyond the APA, such as when a court construes statutory hybrid rulemaking provisions or a non-APA adjudication regime like immigration.[274] This vision of *Vermont Yankee*, however, presents conceptual challenges. As scholars have long recognized, *Vermont Yankee* says very little about how to interpret the APA,[275] nor does it endorse a single interpretative method for statutes regulating agency procedure.[276] As this Subpart argues, though, the *Vermont Yankee* principle might plausibly translate into either of two rules of construction: (1) a substantive canon for narrowly construing agency procedural obligations or (2) a linguistically grounded rule of "respect" for congressional delegation that is comparable to the new *Loper Bright* regime for substantive agency choices.

1. Explanation and illustration

The two alternative principle-of-construction visions just mentioned can perhaps be seen in how different jurists deploy *Vermont Yankee* in cases

271. *Cf.* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 549 (1978) (admonishing courts to "not stray beyond the judicial province to explore the procedural format or to impose upon the agency [their] own notion of which procedures are 'best' or most likely to further some vague, undefined public good").

272. *See supra* notes 245-47 and accompanying text.

273. *See supra* notes 228-36 and accompanying text.

274. *See, e.g.*, *supra* notes 11-14 and accompanying text (illustrating judicial extension of *Vermont Yankee* to procedures outside the APA, including to non-APA immigration adjudications).

275. *See, e.g.*, Hickman & Thomson, *supra* note 58, at 2094.

276. *See, e.g.*, Beermann & Lawson, *supra* note 3, at 872.

implicating statutory language beyond APA § 553, the provision on which *Vermont Yankee* itself focused. This Subpart C.1 is subdivided to discuss (a) illustrative cases that seem to use the *Vermont Yankee* principle as a substantive canon of construction; and (b) illustrative cases that seem to use it as a linguistic canon.

a. Substantive canon of construction

Start by considering how *Vermont Yankee* might apply to APA contexts other than § 553's rulemaking procedures. For example, at what point in the rulemaking process does something become a "rule"? The APA defines the concept of a "rule" at § 551 (rather than § 553), but not helpfully;[277] the definition is so "at odds with ordinary usage"[278] that some, like then-Professor Antonin Scalia, have urged "benign disregard" for it.[279] If there is one part of the definition that is unobjectionable, though, it is that nothing is a rule unless it is "an agency statement."[280] That raises the question: When has an agency spoken?

The D.C. Circuit only recently addressed that issue when confronting the common practice of a regulatory freeze, when an incoming presidential administration hits pause on all pending rules initiated by the outgoing administration.[281] Apart from the APA's requirements, the Federal Register Act requires agencies to transmit their rules to the Office of the Federal Register (OFR) for public inspection and final publication.[282] The D.C. Circuit has now held that if regulatory text has been released for public inspection with the OFR then it has crossed the line and become a rule,[283] regardless whether the OFR has completed publication in the Federal Register.[284]

Judge Neomi Rao dissented, partially invoking *Vermont Yankee* to maintain that a rule becomes final only upon publication.[285] Although the Federal Register Act governs that publication process,[286] it does not speak to prepublication withdrawal of rules.[287] That statutory gap has been filled with a

277. 5 U.S.C. § 551(4).

278. Levin, *supra* note 104, at 13-14.

279. Scalia, *supra* note 10, at 383.

280. 5 U.S.C. § 551(4).

281. Humane Soc'y of U.S. v. U.S. Dep't of Agric., 41 F.4th 564, 565, 568 (D.C. Cir. 2022).

282. 44 U.S.C. § 1503.

283. *Humane Soc'y*, 41 F.4th at 575.

284. *Id.* at 570.

285. *Id.* at 578, 583 (Rao, J., dissenting) (citing 5 U.S.C. § 552(a)(1)).

286. *Id.* at 580 (citing 44 U.S.C. §§ 1502-05).

287. *Id.* at 582-83.

rule allowing agency withdrawal after public inspection but before final publication.[288] Judge Rao concluded that "the principles of *Vermont Yankee*"[289] should prevent the court from "impos[ing] a previously unknown procedural requirement on every federal agency by prohibiting the modification or withdrawal of rules after public inspection despite the fact that not a single law or regulation requires this result."[290] In other words, if the OFR regulation allows withdrawal until the point of publication, then the APA should not be construed to "effectively invalidate[] this regulation *sub silentio*" by deeming a withdrawable rule (for Federal Register Act purposes) to be a final one that must be repealed using a new round of notice-and-comment rulemaking (for APA purposes).[291]

One can think about Judge Rao's application of *Vermont Yankee* in two ways. From the perspective of the Federal Register Act, statutory silence about withdrawal might imply the illegitimacy of a judge-made rule that effectively prevents such withdrawal. This would employ *Vermont Yankee* as akin to a clear statement rule; all procedural requirements bearing on the validity of an agency's action should be authorized by Congress (either directly in statute or adopted via delegated rulemaking authority). Silence is not for the courts to fill via construction. Alternatively, from the perspective of the APA, one might see Judge Rao's use of *Vermont Yankee* as a rule of strict construction: Where statutory language has a range of permissible meanings, courts should select the one that leaves the agency with the greatest procedural freedom. On this perspective, *Vermont Yankee* counsels in favor of a construing "agency statement" in APA § 551's definition of "rule" as a statement *published in the Federal Register*,[292] as that construction has the effect of allowing the agency to withdraw the rule other than via a new round of rulemaking for the greatest period and therefore most promotes the agency's procedural flexibility.[293]

This latter view—*Vermont Yankee* as strict construction—is arguably at play in other decisions that reach beyond the APA altogether. Consider a recent hybrid rulemaking example from the Fifth Circuit. The Clean Air Act's hybrid rulemaking procedures require the EPA to work "in consultation with the Secretary of Energy" when acting on certain petitions under the Renewable Fuel Standards program.[294] Certain petitioners argued that this consultation must be "meaningful," so the Department of Energy must

288. *Id.* at 583 (citing 1 C.F.R. § 18.13).

289. *Id.* at 584 n.9.

290. *Id.* at 584.

291. *Id.* at 583.

292. *See* 5 U.S.C. § 551(4).

293. *See id.* § 551(5) (defining "rule making" to include "repealing a rule").

294. 42 U.S.C. § 7545(o)(9)(B)(ii).

independently advise on certain determinations.[295] That's not an absurd claim. After all, judicial doctrine is replete with the gloss that the public's opportunity to comment in the APA's informal rulemaking process must be "meaningful."[296] But in curtly rejecting that argument in the Clean Air Act context, Judge Jerry Smith wrote that the panel "decline[d] to graft extra-textual procedural requirements onto that consultation requirement," with a simple citation to *Vermont Yankee*.[297] From a range of possible ways to give effect to "consultation," the court felt compelled to select the one giving the EPA the greatest procedural freedom.

As employed in cases like these, the *Vermont Yankee* principle operates as a canon of *construction*, the process of determining statutory text's legal effect as opposed to its communicative content.[298] In the preceding example, knowing what the word "consultation" means does not answer many remaining questions. For present purposes, stipulate that a "consultation" is merely the act of discussing. Can that consultation be unilateral, like a mere advisement of what is coming? Or must it be bilateral, with an opportunity for an exchange of views? Or must it be genuinely "meaningful," perhaps requiring not just an opportunity for an exchange, but an actual discourse? A court can give effect to the communicative content—the act of discussing—by adopting any of the three possibilities. The same is true of the "agency statement" problem with which Judge Rao grappled;[299] "statement" requires communication by the agency, but that linguistic content does not answer questions like where, or by what means, the communication must be made. On Judge Rao's vision, *Vermont Yankee* operates as construction because it informs that second choice; within the universe of legal rules that the text can bear linguistically, it guides jurists to the option providing the most flexibility to the agency.

This approach also makes *Vermont Yankee* a *substantive*, rather than linguistic, canon. Whereas linguistic canons seek to decipher the intent behind text, a substantive canon promotes policies external to the statute.[300] And those policies can derive from different sources, like bare normative judgments (e.g., "fairness") or the promotion of constitutional values (e.g., the separation of

295. Calumet Shreveport Refining, L.L.C. v. U.S. EPA, 86 F.4th 1121, 1139 (5th Cir. 2023).

296. *See, e.g.*, Am. Med. Ass'n v. Reno, 57 F.3d 1129, 1132 (D.C. Cir. 1995) (stating that APA § 553 notice must "allow for meaningful and informed comment"); *cf.* Gerber v. Norton, 294 F.3d 173, 179 (D.C. Cir. 2002) (citing APA case law for the proposition that "opportunity for public comment" under the ESA "must be a meaningful opportunity").

297. *Calumet*, 86 F.4th at 1139.

298. *See* Solum, *supra* note 138, at 257.

299. 5 U.S.C. § 551(4).

300. *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 117-21 (2010).

powers).[301] When a jurist employs *Vermont Yankee* to put a narrowing gloss on statutory text, or to require a clear statement from Congress, that jurist is not looking for the text's most plausible meaning.[302] Rather, the jurist is advancing the policies that *Vermont Yankee* embodies, including perhaps either or both of flexibility for agencies (a normative aim) or judicial restraint (a normative or quasi-constitutional aim).

To the extent that *Vermont Yankee* as canon of construction enforces separation of powers concerns, its evolution looks comparable to the major questions doctrine. Under that administrative law doctrine, courts disfavor reading "oblique or elliptical language" as conferring "[e]xtraordinary grants of regulatory authority" even though there is "a colorable textual basis" for doing so.[303] Although derived from ordinary statutory interpretation cases,[304] on some jurists' views the doctrine is now justified by the need "to protect the Constitution's separation of powers."[305] But whereas the major questions doctrine perhaps does so by *policing* congressional delegations of substantive authority to agencies,[306] *Vermont Yankee*'s principle *protects* those delegations by preventing judicial intrusions into agency procedures.

b. Linguistic canon respecting delegation

This delegation-protecting role, however, raises a new question: Is there really a need for a special substantive canon to protect delegations of procedural discretion? Perhaps not, if *Vermont Yankee* instead operates as a linguistic canon that effectuates congressional intent through sensitivity to congressional preferences for procedural flexibility.[307]

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301. *See id.* at 124.

302. As then-Professor Amy Coney Barrett explained: "Substantive canons are in significant tension with textualism" because "their application can require a judge to adopt something other than the most textually plausible meaning of a statute." *Id.* at 123-24. Clear-statement rules, as one might also envision *Vermont Yankee*, are among the universe of substantive canons. *See id.* at 122-23 (collecting examples); Brian G. Slocum & Kevin Tobia, *The Linguistic and Substantive Canons*, 137 HARV. L. REV. F. 70, 70-71 (2023) (calling "clear statement rules" the "strongest substantive canons").

303. West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).

304. *See id.* at 2607-09.

305. *Id.* at 2617 (Gorsuch, J., concurring).

306. *Cf.* U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., concurring) (rooting the doctrine in "a separation of powers-based presumption against the delegation of major lawmaking authority from Congress to the Executive Branch").

307. *Cf.* Biden v. Nebraska, 143 S. Ct. 2355, 2378 (2023) (Barrett, J., concurring) (justifying the major questions doctrine not as protecting the separation of powers but as a textualist interpretive principle drawing on context); Heating, Air Conditioning & Refrigeration Distribs. Int'l v. EPA, 71 F.4th 59, 67-68 (D.C. Cir. 2023) (contrasting a constitutional

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To see the delegation rationale for *Vermont Yankee*, consider Judge Jennifer Walker Elrod's recent opinion for the Fifth Circuit in *Mejia-Alvarenga v. Garland*.[308] The case concerned whether the Board of Immigration Appeals (BIA) violated the law when it allowed a single BIA member to render a decision without referral to a three-member panel.[309] After resolving that question in the negative on a separate ground, the court went out of its way to specify an alternative holding, drawn from *Vermont Yankee*, that "because Congress has given the BIA the responsibility to conduct its own proceedings," it should be free to fashion its own rules of procedure.[310] Under this rationale, "when Congress entrusts executive agencies with the responsibility to conduct their own proceedings," it "intends" to delegate procedural discretion to the agency.[311] This view of *Vermont Yankee* operates as a form of *Chevron*-like deference. Rather than channel courts to one narrow construction of procedural language, statutory context instead suggests that Congress was happy for the agency to select from among a range of permissible approaches.[312] If that is in fact Congress's instruction, then courts are bound to respect it.

Interestingly, this *Chevron*-like approach is perhaps also illustrated in *Vermont Yankee*'s recent invocation by Justice Gorsuch, a leading *Chevron*

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major questions doctrine with "a more modest intuition about how we use language"). To revisit an earlier illustration, to the extent one sees the different visions of *Vermont Yankee* as falling along two axes—source and effect—the canon of construction visions converge on one effect (using *Vermont Yankee* as a tool to understand an agency's obligations) that differs from that which Judges Miller and Higginson identify (remedial restraint). *See supra* note 227. But the substantive and linguistic canon approaches diverge along the source axis; the substantive approach draws from more abstract principles (like "fairness" or the idea of "separation of powers"), whereas the linguistic approach grounds the effect in specific statutory text. *See supra* notes 300-02 and accompanying text.

308. 95 F.4th 319, 326 (5th Cir. 2024).

309. *Id.* at 326-27.

310. *Id.* at 326.

311. *Id.* (alteration omitted).

312. *Compare id.* ("As the Supreme Court has stated, when Congress entrusts executive agencies with the responsibility to conduct their own proceedings—as it has done in the immigration context—it 'intend[s] that the discretion of [these] agencies and not that of the courts be exercised in determining' whether to provide procedural rights beyond those that Congress expressly granted in the authorizing statute." (alterations in original) (quoting Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 546 (1978))), *with* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 843-44 (1984) (stating that, when Congress provides a "delegation" to an agency, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency").

critic.[313] In *Garland v. Ming Dai*, he wrote for a unanimous Court to reject a line of Ninth Circuit precedent under which that court would, in the absence of an express adverse credibility determination by immigration officials, assume that an alien's factual contentions are credible.[314] Citing *Vermont Yankee*, Justice Gorsuch wrote that "[n]othing in the [Immigration and Nationality Act (INA)] contemplates anything like the embellishment the Ninth Circuit has adopted," and "it is long since settled that a reviewing court is 'generally not free to impose' additional judge-made procedural requirements on agencies that Congress has not prescribed and the Constitution does not compel."[315] In the pages that followed, the Court unpacked—by reference to statutory text, history, and broader legal context—why the INA does not require the Ninth Circuit's approach.[316] The Court then emphasized that the BIA can implicitly make adverse credibility determinations, but the Ninth Circuit's rule had the effect of improperly requiring the BIA to "incant 'magic words' like 'incredible' or 'rebutted,'" which amounted to judicially imposed procedure.[317] By narrowing the agency's procedural freedom without a basis in text, the Ninth Circuit's rule had a *Vermont Yankee* problem.

Ming Dai's analysis again looks somewhat like an application of the familiar *Chevron* framework, albeit by citation to *Vermont Yankee*.[318] The Court initially asks the same question as *Chevron*: Does the relevant statute speak clearly to the precise question of how an adverse credibility determination must be made?[319] After using traditional tools of interpretation to conclude

313. For Justice Gorsuch's criticism of *Chevron*, see, for example, *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2275-76, 2281-89 (2024) (Gorsuch, J., concurring).

314. 141 S. Ct. 1669, 1676-77 (2021). This Article uses the term "alien" because that is the technical term used in the relevant statute and opinion. *See id.*

315. *Id.* at 1677 (quoting *Vt. Yankee*, 435 U.S. at 524).

316. *Id.* at 1677-78.

317. *Id.* at 1679.

318. In recent work analyzing *Ming Dai*'s broader effects on immigration adjudication, Aadhithi Padmanabhan observes that some lower court judges read *Ming Dai* as scaling back hard look review in quasi-procedural contexts. *See* Aadhithi Padmanabhan, *Abandoning Deportation Adjudication*, 77 STAN. L. REV. (forthcoming June 2025) (manuscript at 33-34), https://perma.cc/KT3E-78P3. Our two framings of *Ming Dai* reflect the recurring conceptual difficulty in separating substantive, arbitrary-and-capricious hard look review from *Chevron*'s review framework. *Cf.* Judulang v. Holder, 565 U.S. 42, 52-53 n.7 (2011) (observing that *Chevron* and arbitrary and capricious review ultimately make similar assessments); Verkuil, *Wait Is Over*, *supra* note 10, at 923-34 (observing that *Chevron* and hard look review each reflect judgments about the appropriate roles of courts and the political branches in determining policy).

319. *Compare Ming Dai*, 141 S. Ct. at 1677 (identifying that the absence of on-point statutory language could not be squared with the result that the lower court reached), *with* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue."), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

that it does not,[320] the Court emphasizes that any approach that makes an adverse credibility determination (whether explicitly or implicitly made) "reasonably discernible" should be sufficient on judicial review.[321] So, in the absence of specific congressional instruction, there is a zone of reasonable methods by which an agency might resolve a credibility dispute, and a reviewing court need not conclude that the agency selected the best of those options in order to sustain the agency's order.[322]

Viewed as a doctrine of respect for congressional delegations, *Vermont Yankee* aligns with the Court's recent *Loper Bright* decision.[323] In overruling *Chevron*'s deference framework, the Court rejected *Chevron*'s premise that all statutory silences or ambiguities are presumptively implicit delegations to agencies.[324] At the same time, the Court reaffirmed the judicial obligation "to independently identify and respect . . . delegations of authority" when Congress enacts them,[325] a project that, pre-*Chevron*, courts had undertaken "on a 'statute-by-statute basis.'"[326] As discussed in Part I, both *Vermont Yankee* and many cases on which it drew involved express delegations of procedural authority.[327] These are the easy cases; sometimes the scope of agency discretion during rulemaking or adjudication is not just about the APA but about agency-specific grants of authority in organic statutes or elsewhere in law.

But what about *implicit* delegations—situations in which courts understand Congress to have preferred agency discretion, even without expressly saying as much?[328] Their continued legitimacy looks alive and well in the *Vermont Yankee* case law. As the immigration examples illustrate, even conservative jurists instinctively conclude, in the absence of express instructions, that the statutory scheme's comprehensiveness implies a zone of reasonable discretion for the agency. This respect for implied delegations of procedural authority also makes conceptual sense in ways that do not conflict with *Loper Bright*. Just as one might think (as the major questions doctrine holds) that Congress would

320. *See Ming Dai*, 141 S. Ct. at 1677-78.

321. *Id.* at 1679.

322. *See Chevron*, 467 U.S. at 843 n.11 ("The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached . . . .").

323. *See Loper Bright*,144 S. Ct at 2272-73.

324. *Id.* at 2265.

325. *Id.* at 2268.

326. *Id.* at 2263 (quoting Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516).

327. *See supra* notes 68-71 and accompanying text.

328. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit.").

have spoken clearly if it meant to delegate extraordinary substantive power,[329] one might also think that a statute's "daily administration" is among the "interstitial matters" Congress meant to give to an agency, even if only silently.[330] Or, put differently, "Congress had no particular intent on the subject" because it was of such little consequence and therefore "meant to leave its resolution to the agency."[331] Congress does not need to say so expressly because, to borrow from *Loper Bright*, "some things go without saying."[332]

This logic reflects Jonathan Adler's view of a "delegation doctrine," a framework for enforcing the bedrock principle that agencies possess only the power that Congress affirmatively gives to them.[333] But, as Adler argues, delegations of authority operate on a continuum, and so should a court's assessment of them: "The weight of evidence necessary to support an asserted delegation should be proportional to the breadth, scope, and novelty of the delegated power claimed."[334] Thus, "the more expansive, unusual, or unprecedented the authority the agency seeks to exercise, the greater the necessary showing must be."[335] Under this framework, one might think that many day-to-day procedural choices are of such little consequence that their delegations are easily found or inferred, as with the inference the Court has implicitly accepted about immigration law.[336]

To be sure, reasonable jurists will disagree about when to identify an implicit delegation of procedural authority.[337] Immigration adjudication itself

329. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).

330. *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986).

331. *See* Scalia, *supra* note 326, at 516.

332. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2261-62 n.4 (2024) (quoting Bond v. United States, 572 U.S. 844, 857 (2014) (internal quotation marks omitted)).

333. *See* Johnathan H. Adler, *The Delegation Doctrine*, 12 HARV. J. L. & PUB. POL'Y, Summer 2024 at 1, 2.

334. Jonathan H. Adler, West Virginia v. EPA*: Some Answers about Major Questions*, 21 CATO SUP. CT. REV. 37, 60 (2022).

335. Adler, *supra* note 333, at 2.

336. Where delegation of procedural discretion is implicit, rather than express, there is perhaps a parallel to the doctrine of implied field preemption. Some statutory schemes—like immigration—are so comprehensive that courts infer Congress's intent to displace all state law. *See* Arizona v. United States, 567 U.S. 387, 399 (2012). Similarly, the Court has long looked at certain comprehensive regulatory schemes and concluded "explicitly *and by implication*" that they conferred procedural discretion. *See* FCC v. Pottsville Broad. Co., 309 U.S. 134, 138 (1940) (emphasis added). Identifying the legal effect of a scheme's comprehensiveness is more art than science, but it is not foreign to the interpretative project.

337. Consider *Ming Dai*, in which the Court rejected a doctrine for judicial review of credibility determinations. *See supra* notes 314-22 and accompanying text. Although the Court did not see the procedure at issue as so central to the statutory scheme that

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is an easy example of the problem. On the one hand, one might argue that when the entire point of the regulatory scheme is to guide the agency in processing individuals through an adjudicatory system, Congress would be more concerned with procedure than it would be in other contexts, like granting more general rulemaking authority. That should cut against implied procedural discretion. On the other hand, one might also plausibly think that Congress tolerates more discretion for the government in immigration contexts because aliens are a disfavored and politically unpowerful group unlikely to have won important concessions in the legislative process. Either intuition is perhaps fair, but neither seems true beyond reasonable dispute. Just because some interpretative problems might be difficult, however, does not mean that interpreters should shy away from the focal point for modern statutory interpretation: effectuating the legislature's will.[338]

To provide more objective interpretative grounds for decision, though, one might also think that *Vermont Yankee*'s canonical statement of the "basic tenet" of procedural discretion makes the project of inferring delegated authority easier.[339] One might reasonably conclude that any administrative statute enacted after *Vermont Yankee* was decided in 1978 plausibly confers at least some implicit delegation of procedural authority based largely on the conventional legal fiction that Congress legislates against the backdrop of Supreme Court doctrine.[340] On this view, when *Vermont Yankee* leaves open the door for "extremely compelling circumstances" to override the general principle of agency discretion[341]—an exception that formalists have criticized[342]—the legal community could perhaps understand that to refer only to specific statutory contexts under which a default assumption of implicit delegation does not hold.

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stringent hard look review should apply, Aadhithi Padmanabhan has made a case for the importance of more robust judicial review. *See* Padmanabhan, *supra* note 318, at 29-31.

338. *See, e.g.*, Barrett, *supra* note 300, at 112-13 (identifying as "conventional" among both textualists and purposivists the "view that federal courts function as the faithful agents of Congress").

339. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 544 (1978).

340. Conventional statutory interpretation often assumes that Congress legislates against the backdrop of existing law and various unexpressed presumptions (like, perhaps, the *Vermont Yankee* principle). *See* Parker Drilling Mgmt. Servs., Ltd. v. Newton, 139 S. Ct. 1881, 1890 (2019) (existing law as background); Bond v. United States, 572 U.S. 844, 857 (2014) (unexpressed presumptions as background).

341. *Vt. Yankee*, 435 U.S. at 543.

342. Duffy, *supra* note 10, at 187-88.

2. Broader implications

Embracing *Vermont Yankee* as an approach to statutory construction—either as a substantive canon or a linguistic tool—might have important mitigating effects in a world without *Chevron*. Recall, for example, Richard Pierce's objection to the First Circuit's *Seacoast* presumption in favor of formal adjudication, which the First Circuit abandoned when it later held that *Chevron* deference applies to statutes using the ambiguous term "hearing."[343] Although the First Circuit's initial gloss on the word "hearing" is textually plausible, such that *Chevron* was perhaps necessary to channel a reviewing court toward deference to an agency,[344] *Vermont Yankee* can do the same work if it operates as a principle of statutory construction. Viewed as a substantive canon of construction, various normative values consistent with *Vermont Yankee*'s spirit and rhetoric—including the preferences for informality and flexibility—would justify construing the term "hearing" narrowly, rather than as requiring formal procedures.[345] Alternatively, if taken as a linguistic canon of respect for delegated authority, the same result is perhaps often obtained. Some statutes will have express delegations of procedural discretion that, given their plain meaning, allow an agency to select the procedures it thinks best.[346] At the same time, *any* statute's assignment to an agency to conduct hearings is some indication that Congress intended for interstitial matters—like the submerged procedural formalities—to be delegated, as courts seem to infer in immigration cases. So, Pierce may have been right all along that *Vermont Yankee* is sufficient to overcome *Seacoast*.[347]

Paul Verkuil, too, might welcome a vision of *Vermont Yankee* that can discipline hard look review the way *Chevron* had.[348] One criticism of hard look review is that it imposes on agencies "an open-ended duty" to address every statutory decisional factor to a reviewing court's satisfaction, such that "any court that dislikes a rule can find fatal gaps and defects in any agency's reasoning . . . ."[349] A vision of *Vermont Yankee* as a pro-agency tool of construction might call for a softer look when review occurs downstream of hybrid rulemaking procedures contained outside of the APA.

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343. *See supra* notes 99-100 and accompanying text.

344. *See* Beermann & Lawson, *supra* note 3, at 878-79.

345. *Cf. id.* at 877 (agreeing with Pierce that the *Seacoast* presumption is "in tension" with *Vermont Yankee*'s "apparent preference" for these values).

346. *See, e.g.*, 47 U.S.C. § 154(j) ("The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.").

347. *See* Pierce, Vermont Yankee II, *supra* note 10, at 673, 677-78.

348. *See supra* notes 95-98 and accompanying text.

349. Pierce, *Response*, *supra* note 10, at 905.

Consider the Court's recent decision in *Ohio v. EPA*, which concerned whether to grant a stay of new EPA air quality standards.[350] The Clean Air Act supplies hybrid rulemaking provisions for these standards, one of which requires that rules "be accompanied by a response to each of the significant comments . . . submitted in written or oral presentations during the comment period."[351] In determining whether the petitioners were likely to succeed on the merits of their arbitrary-and-capricious challenge to the EPA's rules, one point of disagreement between the majority and the dissent was the agency's compliance with this requirement.[352] In the majority's view, the EPA failed to respond to significant comments when it "offered no reasoned response" to the concern that, as the mix of states subject to federal standards changed, "the point at which emissions-control measures maximize cost-effective downwind air-quality improvements" might also shift.[353] That failure, in turn, meant that the EPA likely "ignored 'an important aspect of the problem' before it" and therefore flunked *State Farm*'s hard look review.[354]

Justice Barrett disagreed. Her four-justice dissent linked the importance of a problem (for hard look purposes) to the significance of the comments (for procedural purposes), and she proceeded to construe the concept of a "significant" comment narrowly to dismiss the importance of the issue upon which the majority seized.[355] In Justice Barrett's view, the obligation to respond to significant comments should be construed as "not 'particularly demanding,'" with no need to respond to comments that are purely speculative and disclose no factual or policy basis—a standard the comments relied upon by the majority did not meet.[356] Justice Barrett concluded that any more rigorous obligation would amount to "the 'sort of unwarranted judicial examination of perceived procedural shortcomings' that might 'seriously interfere with that process prescribed by Congress'" in violation of *Vermont Yankee*.[357] And although merely a dissent at the Supreme Court, Justice Barrett's approach to

350. 144 S. Ct. 2040, 2048, 2052 (2024).

351. 42 U.S.C. § 7607(d)(6)(B).

352. *Compare Ohio v. EPA*, 144 S. Ct. at 2054 (faulting the EPA for offering "no reasoned response" to a "concern" raised during the comment period), *with id.* at 2067-68 (Barrett, J., dissenting) (concluding that the concern raised did not qualify as "significant").

353. *Id.* at 2054 (majority opinion).

354. *Id.* (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

355. *Id.* at 2067-68 (Barrett, J., dissenting).

356. *Id.* at 2067 (quoting Public Citizen v. FAA 988 F.2d 186, 197 (D.C. Cir. 1993)).

357. *Id.* at 2068 (quoting Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 548 (1978)).

narrowly interpreting these hybrid rulemaking procedures has found a more receptive audience at the D.C. Circuit.[358]

Justice Barrett's *Ohio v. EPA* dissent illustrates the type of statutory approach that can temper the hardest of hard look reviews. If a court must decide what counts as a "significant comment" requiring a reasoned response,[359] one might defensibly construe that concept narrowly either by reference to a background principle of agency procedural discretion (a substantive canon rationale) or by understanding the statute as delegating to the agency a zone of reasonable discretion about where to draw the line between significant comments and insignificant ones (a "delegation doctrine"[360] rationale).[361] Either way, *Vermont Yankee* as a tool to discipline statutory analysis might make hard look review less open-ended and freewheeling by narrowing the universe of gaps or omissions in reasoning that warrant vacating agency action.

3. Assessment

When compared to competing visions, *Vermont Yankee* as a principle of construction—whether substantive or linguistic—is more easily defensible on the opinion's terms. To be sure, one formalist criticism of *Vermont Yankee* is that its principle derives primarily from pre-APA case law and ignores the APA's judicial review provision by holding open the door to too much judicial review of procedure in a hazy set of exceptional cases.[362] In that regard, one might view the case as less than purely textualist. Although the opinion as a self-contained legal document lends itself to those criticisms, reading *Vermont Yankee* in the broader context of the authorities it cites provides ample support for understanding the principle of agency discretion as textually grounded.

As previously discussed, *Vermont Yankee*'s central principle of agency procedural discretion derives from prior statements in *Schreiber* and *Pottsville*.[363] Both decisions addressed the lawfulness of FCC action taken under

358. *See* Coal. for Renew. Nat. Gas v. EPA, 108 F.4th 846, 857 (D.C. Cir. 2024) (rejecting, by citation to *Vermont Yankee*, 435 U.S. at 548, an argument for the EPA "to provide a detailed explanation or factual record support[]" in the statement of basis and purpose required under 42 U.S.C. § 7607(d)(3)).

359. 42 U.S.C. § 7607(d)(6)(B).

360. *See* Adler, *supra* note 333, at 2.

361. Other inputs, too, might inform the statutory analysis, and I take no position whether Justice Barrett's invocation of *Vermont Yankee* landed her at the best answer. My point is simply the methodological observation that she employed *Vermont Yankee* to narrow a statutory obligation and avoid a *State Farm* problem.

362. *See* Duffy, *supra* note 10, at 187-88.

363. *See supra* notes 66-78 and accompanying text.

a facially broad delegation of procedural discretion written into the Communications Act.[364] And when the Court observed that it had "upheld this principle in a variety of applications,"[365] many such precedents had likewise applied statutory language by its terms to uphold an agency's chosen procedures.[366] Against this backdrop, the Court upheld the NRC's decision to use APA § 553 procedures, with some embellishments, where that agency likewise had a broad grant of procedural authority in the Atomic Energy Act.[367] So on its facts, if not in its unambiguous analysis, the statutory logic is plain: Congress gave the Commission general rulemaking power,[368] plus express discretion to "make such studies and investigations, obtain such information, and hold such meetings or hearings as the Commission may deem necessary or proper to assist it in exercising any authority provided . . . ."[369] The choice of rulemaking procedure was for the Commission, not the courts, because that was what Congress said—not strictly in the APA, but in the Atomic Energy Act.

This rationale better supports the delegation vision than the substantive canon one. No doubt, *Vermont Yankee* uses language consistent with a strict construction of the APA in light of policy values like predictability and the facilitation of informal procedures when they are allowed.[370] But at the same time, *Vermont Yankee* addressed a situation with no plausible textual hook for the procedures the D.C. Circuit sought to impose.[371] How to address plausible readings of the APA's text is largely unaddressed because there was no plausible basis at all for what the D.C. Circuit did. Because the 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 is hard to find anything more than "hints" about which policies and values—either individually or in sum—are sufficient to justify a rule of strict construction.[372] So distilling a generally applicable substantive canon from *Vermont Yankee* is

364. *See id.*

365. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 544 (1978).

366. *See supra* note 68 and accompanying text.

367. *See supra* notes 70-71 and accompanying text.

368. Atomic Energy Act of 1954, ch. 14, § 161(p), 68 Stat. 948 (codified at 42 U.S.C. § 2201(p)).

369. *Id.* § 161(c) (codified at 42 U.S.C. § 2201(c)).

370. *See* Beermann & Lawson, *supra* note 3, at 873 (observing these "two policies" in interpreting agency procedural provisions).

371. *See id.* at 864 (finding "no support" for the procedural claims in *Vermont Yankee* in "the text of the APA," but only in "mid-1970s D.C. Circuit case law").

372. *Id.* at 872.

less plausible when compared to a delegation rationale,[373] which stands for the unremarkable proposition that courts should respect Congress's wishes when it expressly or implicitly authorizes procedural discretion, as it had done in the Atomic Energy Act.

III. Embracing *Vermont Yankee*

Part II concluded that the most defensible vision of *Vermont Yankee*'s broader role in administrative law is as a linguistic canon about the scope of authority delegated to specific agencies: Courts should identify, construe, and honor congressional delegations of procedural authority. When those delegations are express, as they were in cases like *Schreiber* and *Vermont Yankee*, courts should apply the specific language by its terms. In situations where the delegation is merely implied, however, the scope of delegated authority should vary in light of specific statutory contexts and with the breadth, scope, and novelty of the procedural choice. If this requires clarifying *Vermont Yankee*'s principle, though, is that project worth pursuing?

This Part addresses that normative question and defends a reinvigoration of *Vermont Yankee* as a linguistic principle of respect for delegated authority similar to what the Court recently recognized in *Loper Bright*. Subpart A explains why renewed judicial interest in *Vermont Yankee* might be desirable as a counternarrative to the perception that contemporary formalist jurists are anti-administration. Subpart B argues that the Supreme Court should clarify *Vermont Yankee*'s principle of procedural deference the same way that it recently clarified the law of deference on substantive authority in *Loper Bright*. Such a clarification could promote *Vermont Yankee*'s neutral application and perhaps prevent the *Vermont Yankee* principle from creating or exacerbating undesirable outcomes in various areas of administrative law.

A. *Vermont Yankee* and Anti-Administrativism

As an initial matter, a robust *Vermont Yankee* principle could be a unifying cross-ideological project that runs counter to the conventional narrative that today's formalist Supreme Court is "anti-administrativist" and aggrandizes judicial power.[374] Regardless of one's views on the *doctrinal* piece of the Court's

373. *Cf. id.* at 868, 869-71 (suggesting that, even if *Vermont Yankee* can be "broadly generalized" to say "never go beyond the narrowest possible interpretation of a statute," the "operational norms" in American law make that a less plausible reading).

374. *See, e.g.*, Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 3-4 (2017) (coining "anti-administrativism" as a concept applicable to the Supreme Court's recent administrative law doctrine). For recent accusations, see, for example, *SEC v. Jarkesy*, 144 S. Ct. 2117, 2175 (2024) (Sotomayor, J., dissenting) (characterizing the majority opinion as "a power
footnote continued on next page

formalist turn, the *rhetorical* piece—exemplified by claims about the "danger"[375] of the "vast and unaccountable administrative apparatus"[376]—threatens administrative legitimacy.[377] Embracing *Vermont Yankee* is a small way to turn down some of the ideological heat. As a doctrine pressed into the administrative law canon by then-Justice Rehnquist; deployed of late by each of Justices Thomas, Gorsuch, Kavanaugh, and Barrett;[378] and thriving among circuit court conservatives,[379] *Vermont Yankee* is an ideal candidate to signal rhetorical support for agencies.

Beyond rhetorical value, *Vermont Yankee* is an attractive candidate for this legitimacy project because, in administrative law, legitimacy almost always goes hand in hand with proceduralism.[380] But proceduralism does not always advance what often matters most to the public: a sense that the government is doing its job capably, responsively, and fairly.[381] Proceduralism can instead eat up resources, hinder goal achievement, and elevate legalism over policy expertise.[382] A doctrine that constrains the urge to over-proceduralize might advance legitimacy in the sense of freeing government to get things done.[383] And this can be a cross-ideological project; by favoring the status quo, proceduralism impedes both progressive desire for active government and libertarian desire to pare government back.[384]

Of course, this means that *Vermont Yankee*'s utility in bolstering administrative law's legitimacy requires its neutral application. Administrative

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grab" and "[j]udicial aggrandizement"); and Steve Vladek, *Opinion: The Most Aggressive Restructuring of Government in Almost 90 Years*, CNN (updated July 2, 2024, 5:51 PM EDT), https://perma.cc/G2LM-P9W9 (citing *Loper Bright* among decisions "giv[ing] ever more power to courts—to decide which actions by the executive branch are permissible").

375. City of Arlington v. FCC, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

376. Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 91 (2015) (Thomas, J., concurring in the judgment).

377. *See, e.g.*, Brian D. Feinstein, *Legitimizing Agencies*, 91 U. CHI. L. REV. 919, 921-22 (2024) (identifying judicial criticism of the administrative state as "good reason" to focus on bolstering the administrative state's legitimacy).

378. *See supra* notes 117-23 and accompanying text.

379. *See supra* notes 124-32 and accompanying text.

380. *See* Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 371 (2019) ("Too often, legitimacy is little more than shorthand for the judgment that it's always best to be procedurally scrupulous.").

381. *See id.* at 379 (quoting Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1842 (2015)).

382. *See id.* at 379-80.

383. *Cf.* Gluck et al., *supra* note 381, at 1842 (discussing "the legitimacy of *government getting its work done*").

384. Bagley, *supra* note 380, at 363.

law is not built on a "politicized master principle,"[385] and *Vermont Yankee* itself—a unanimous, cross-ideological decision—admonished lower courts against reexamining "policy questions . . . under the guise of judicial review of agency action."[386] To maintain that ideological neutrality, the *Vermont Yankee* principle should not unfailingly favor conservative or progressive causes. Yet, recent invocations at the Supreme Court have involved clearing the way for a Trump administration healthcare policy,[387] a Republican-majority FCC broadcast media policy,[388] and a policy making it easier to deny immigration relief.[389] When Justice Barrett invoked the doctrine in defense of a Biden EPA policy,[390] her conservative colleagues were unmoved. From a cynical perspective, one might think the Court will prefer an under-theorized *Vermont Yankee* that leaves room to maneuver, allowing it to deploy *Vermont Yankee* when useful and ignore the principle otherwise.[391]

This is why aligning *Vermont Yankee* with *Loper Bright* by grounding the principle in statutory text is so important to the legitimacy project. By explicitly rooting *Vermont Yankee* in deeper methodological principles to which the current Court (and other *Vermont Yankee*-friendly jurists) are committed,[392] it might become harder to resist *Vermont Yankee*'s pull even when that clears the way for policies with which conservatives disagree.[393]

385. Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 401, 471 (2015).

386. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 558 (1978).

387. *See* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2373, 2385-86 (2020) (reviewing religious exemptions for contraceptive coverage).

388. *See* FCC v. Prometheus Radio Project, 141 S. Ct. 1150, 1154, 1160 (2021) (reviewing repeal of media ownership rules).

389. *See* Garland v. Ming Dai, 141 S. Ct. 1669, 1674-77 (2021) (rejecting an onerous adverse credibility rule).

390. *See* Ohio v. EPA, 144 S. Ct. 2040, 2068 (2024) (Barrett, J., dissenting).

391. *Cf.* Levin, *supra* note 104, at 22 (describing *Vermont Yankee* as at best "a weak canon of APA interpretation" deployed in such a manner).

392. *See, e.g.*, Grove, *supra* note 52, at 265 (noting textualism's "considerable prominence within the federal judiciary").

393. Some might call this naïve, but traditionally conservative methodologies like textualism have delivered important progressive victories. *See, e.g.*, Katie Eyer, *Textualism and Progressive Social Movements*, U. CHI. L. REV. ONLINE, Mar. 2024, at *1, *18-19 (identifying *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), and "a number of less well-known examples"). Thus, some progressives already openly cheer textualism's arrival to administrative law. *See, e.g.*, Kathryn E. Kovacs, *Progressive Textualism in Administrative Law*, 118 MICH. L. REV. ONLINE 134, 148 (2019) (urging progressives to "claim the APA" and observing that "a progressive textualist approach to interpreting the APA" would "lighten the procedural load on federal agencies"); Christopher J. Walker & Scott T. MacGuidwin, *Interpreting the Administrative Procedure Act: A Literature Review*, 98 NOTRE DAME L. REV. 1963, 1979-82 (2022) (describing the emergence of progressive APA textualism).

Recasting *Vermont Yankee* as a formalist, textualist principle—one that emphasizes statutory language over policy concerns or practical consequences—is the way forward.[394]

B. A Formalist *Vermont Yankee* Principle

1. *Vermont Yankee* and textualism

Although not always viewed as a perfect fit with the APA's text,[395] *Vermont Yankee* has been understood as at least consistent with a textualist, rather than common law, commitment.[396] Nevertheless, *Vermont Yankee*—which predates contemporary textualism's ascendency[397]—offered little methodological guidance for interpreting the APA or other statutes,[398] and so has spent much of its life confined to APA § 553.[399] Understanding *Vermont Yankee* as a principle of delegated authority fills this methodological gap in a way that is broadly consistent with textualism, with today's formalist administrative law, and with *Vermont Yankee*'s creep beyond the APA.

Although the APA is the cornerstone of modern administrative law, the administrative state is a web of statutes governing a range of agencies.[400] These statutes sometimes provide procedures beyond the APA or supplant it

394. *Cf.* Grove, *supra* note 52, at 303-04 (arguing that a "formalistic textualism" that emphasizes statutory text over policy and practical concerns is more likely to cabin judicial discretion and result in votes against a jurist's ideological priors).

395. *See supra* note 362 and accompanying text.

396. *See, e.g.*, Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 890 (2020) ("The standard textualist arguments about legislation striking a compromise and encouraging interpreters to respect the means the legislature chose to advance its ends can readily apply to the intricate procedural scheme Congress chose when it crafted the APA." (footnote omitted)). *But see* Levin, *supra* note 104, at 20 (noting that "defenders of administrative common law have long criticized" *Vermont Yankee* and that "[t]he Court's disparagement of procedural holdings rooted in administrative common law seems inconsistent with § 559 of the APA").

397. Hickman & Thomson, *supra* note 58, at 2086.

398. *See, e.g.*, *id.* at 2094 (arguing that *Vermont Yankee* "merely instructs courts to stay within the text without acknowledging the APA's underdeterminacy" and without offering "much guidance about how courts more generally should approach reading the APA's text"); Beermann & Lawson, *supra* note 3, at 872 ("*Vermont Yankee* . . . did not comment explicitly on the interpretive method courts should apply to the APA and other statutes that impose procedural requirements on agencies.").

399. *See, e.g.*, Pojanowski, *supra* note 396, at 890 (observing that "courts have mostly confined *Vermont Yankee*'s principle to comment procedures in informal rulemaking"); Beermann & Lawson, *supra* note 3, at 872 (similar).

400. *See, e.g.*, Kovacs, *supra* note 3, at 1208 ("Although agency-specific statutes now abound, the APA is still the 'fundamental charter' of the 'Fourth Branch' of the government.").

altogether.[401] When courts have applied *Vermont Yankee*'s principle beyond the APA, they have done so without a theory for that extension.[402] But *Loper Bright* gives the answer: "When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court . . . is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits."[403] That is no less true for delegated discretion about procedure than for delegated discretion to give meaning to statutory terms or to fill up a statute's details.[404] And, as Part II argued, that is consistent with *Vermont Yankee*'s facts and context: Given the NRC's broad, express grant of procedural discretion in the Atomic Energy Act, *Vermont Yankee* was just the latest in the long line of cases in which the Court had enforced statutory grants of discretionary procedural authority by their terms.[405] So, understanding that *Vermont Yankee* rests on the APA's interplay with *other* statutes that empower agencies takes a more holistic look at the entire corpus of text that underlies modern administration.

Applying *Vermont Yankee* as a principle of delegated authority, rather than as a substantive canon, also better aligns with textualist commitments. As then-Professor Amy Coney Barrett argued, substantive canons are in significant tension with textualism when they require a judge to adopt something other than the most textually plausible reading of a statute.[406] Textualism aims to make courts the faithful agents of Congress by giving effect to the objective meaning of the words that Congress chose.[407] If *Vermont Yankee* is a canon of narrow construction rooted in values other than faithful agency to objectified congressional intent—whether those values are constitutional concerns about separation of powers, or policy-motivated

401. *See, e.g.*, *supra* note 11 and accompanying text (discussing hybrid rulemaking and immigration adjudications).

402. *Cf.* Beermann & Lawson, *supra* note 3, at 872 (observing "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"). Note that, for example, the Supreme Court's recent invocations of *Vermont Yankee* in immigration cases have not addressed how or why a decision applying the APA applies to the INA. *Cf.* Johnson v. Arteaga-Martinez, 596 U.S. 573, 582 (2022); Garland v. Ming Dai, 141 S. Ct. 1669, 1677 (2021).

403. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024).

404. *See id.*

405. *See supra* notes 364-69 and accompanying text.

406. Barrett, *supra* note 300, at 123-24.

407. *See id.* at 112-13 (describing the faithful agency commitment); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 17 (Amy Gutmann ed., new ed. 2018) (arguing that textualism pursues "objectified" legislative intent).

concerns about predictability and efficiency—its path to broad acceptance is more treacherous because the canon can operate as a backdoor for individual normative preferences. The principle that courts should respect Congress's grants of procedural discretion when they exist is a linguistically grounded justification more likely to have broad formalist appeal.[408]

2. A *Loper Bright* for *Vermont Yankee*

What *Vermont Yankee* needs, then, is its own *Loper Bright*: a case that goes back to first principles and sharpens focus on the central judicial task of effectuating congressional intent.[409] In *Loper Bright*, the Court discarded the longstanding *Chevron* framework for deference to agencies on the scope of their substantive powers.[410] In doing so, the Court criticized *Chevron*'s failure to engage with the relevant APA provisions that guide judicial review and its departure from longstanding methods of interpretation in favor of a sweeping claim about deference.[411] The proper approach, the Court emphasized, was to ascertain and to apply the delegations of authority provided in specific statutes.[412]

Certain parallels between *Chevron* and *Vermont Yankee* are striking—and perhaps highlight the need for *Vermont Yankee*'s own *Loper Bright*. Just as *Chevron* failed to square its broad rule of deference with APA § 706's framework for judicial review,[413] *Vermont Yankee* likewise failed to ground its principle—presumptive procedural discretion, except in a hazy category of "extremely compelling circumstances"[414]—in the APA's relevant judicial review

408. In making this claim, I am treating textualism and formalism somewhat interchangeably; both prefer rule-based approaches, and textualism further prefers rules that focus on the words a legislature enacted. *See* Barrett, *supra* note 300, at 117, 121 (observing textualism's affinity for linguistic-grounded rules); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 373-74 & n.80 (2005) (observing textualism's broader preference for rules); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 77 (2000) (identifying rule-bound approaches as formalist). Moreover, a vision of *Vermont Yankee* as resting on congressional delegation fits comfortably with what Jeffrey Pojanowski has called the current formalist Court's era of "neoclassical administrative law," or an approach that distinguishes questions of law from those of policy, elevates the judiciary's role on the legal side, and gives due deference to agencies on the procedural and policymaking side. Pojanowski, *supra* note 396, at 883.

409. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024).

410. *Id.* at 2273.

411. *Id.* at 2261-66.

412. *Id.* at 2263 ("When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits.").

413. *See id.* at 2265.

414. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 543 (1978).

language.[415] Just as *Chevron* could easily have been resolved by applying express and on-point substantive authority in the Clean Air Act (rather than a sweeping claim about implicit delegations),[416] *Vermont Yankee* could easily have been resolved by reference to the express and on-point delegation of procedural authority in the Atomic Energy Act (rather than a sweeping claim about agency freedom of procedural choice).[417] And just as *Chevron*'s broad claims led to deep confusion about the doctrine's application,[418] so too *Vermont Yankee*'s broad tenet of procedural freedom is now poised to cause mischief of its own as it spreads beyond the APA.[419]

What should a *Loper Bright* for *Vermont Yankee* do? For one, it should draw on John Duffy's work and clarify that the role of a reviewing court under the APA is to identify whether an agency procedure was "without observance of procedure required by law."[420] Then, it should clarify that this review requires attention to the specific scope of procedural discretion granted to the agency, as for example *Schreiber* and *Pottsville* had done in expressly citing 47 U.S.C. § 154(j).[421] And third, without disturbing specific prior cases applying *Vermont Yankee*,[422] it should clarify that the Court's prior applications should be understood as using all the ordinary tools of statutory interpretation, not having been driven by some master principle of agency procedural discretion. Thus, for example, *Ming Dai* can come out the same way with respect to the precise statutory question at issue without its invocation of *Vermont Yankee* teaching some grander lesson about how to

415. *See* Duffy *supra* note 10, at 186-87.

416. As John Duffy has argued, the precise question in *Chevron* was subject to an express delegation of substantive authority (§ 301(a)(1) of the Clean Air Act) that obviated the need for any implicit delegation, political accountability, or policy expertise rationales; what always should have mattered was simply the delegation in the statute. *See* John F. Duffy, Chevron*, De Novo: Delegation, Not Deference*, 31 GEO. MASON L. REV. 541, 547 (2024).

417. *See supra* notes 363-69 and accompanying text.

418. A few years before *Loper Bright*, Kristin Hickman and R. David Hahn documented deep "disagreement over exactly what kind of legal doctrine *Chevron* is." Hickman & Hahn, *supra* note 137, at 615. Although they argued for framing it as a standard of review, they acknowledged that some "judicial applications of *Chevron*" instead treated it as a rule of decision dictating pro-government outcomes or as a canon of statutory interpretation. *See id.* at 615, 617.

419. *See, e.g.*, discussion *supra* note 318 (discussing Padmanabhan's argument that certain jurists use *Ming Dai*'s invocation of *Vermont Yankee* to soften hard look review in immigration cases).

420. *See* Duffy, *supra* note 10, at 185-87 (discussing 5 U.S.C. § 706(2)(D)).

421. FCC v. Schreiber, 381 U.S. 279, 289 (1965); FCC v. Pottsville Broad. Co., 309 U.S. 134, 138 (1940) (citing § 4(j) of the Communications Act, codified at 47 U.S.C. § 154(j)).

422. *Cf.* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (declining to "call into question prior cases that relied on the *Chevron* framework").

interpret the entirety of the INA. The question is always what scope of discretion Congress granted an agency in a specific context.

Each of these moves can fairly be implemented as a clarification of existing doctrine. To be sure, *Vermont Yankee* did not walk through a delegation rationale by citing the relevant grant of authority in the Atomic Energy Act and applying it by its terms.[423] But the cases on which *Vermont Yankee* built its principle *did* engage in that type of analysis.[424] Insofar as *Vermont Yankee* frames itself as simply carrying on the project of those cases, one can fairly infer that the Court saw *Vermont Yankee* as fitting neatly with their approach.[425] Moreover, recharacterizing *Vermont Yankee* as a delegation case in retrospect is comparable to the project the Court undertook in rejecting *Chevron*. *Loper Bright* moved doctrine in that direction by highlighting the centrality of congressional delegations of discretion.[426] But whereas the *Chevron* framework had morphed into such a beast that the Court perhaps needed the word "overruled" to send the right message,[427] *Vermont Yankee* is sufficiently under-theorized that a gentler reorientation—especially one that simply aligns *Vermont Yankee* with the same basic method as *Loper Bright*—should suffice.

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423. *See supra* notes 70-72 and accompanying text.

424. *See* sources cited *supra* notes 66, 68 & 74. On this score, one might also fairly characterize the D.C. Circuit's original sin in *Vermont Yankee* as its failure to deploy its own precedents with sufficient sensitivity to variations in statutes. For example, the D.C. Circuit's *Vermont Yankee* opinion cited extensively to *International Harvester v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973), a case arising under the Clean Air Act. *See* Nat. Res. Def. Council, Inc. v. U.S. Nuclear Regul. Comm'n, 547 F.2d 633, 643 nn.23 & 25, 644 nn.29-30, 645 n.32, 654 n.58 (D.C. Cir. 1976), *rev'd sub nom.* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519 (1978). As Gillian Metzger has noted, *International Harvester* and other leading D.C. Circuit cases requiring procedures beyond APA § 553 (such as *Portland Cement*) could in theory have been limited to the Clean Air Act context—which imposed its own detailed procedural requirements—rather than reflexively applied to other statutory schemes. *See* Metzger, *supra* note 5, at 148.

425. Just consider the relevant express delegations from *Schreiber* and *Vermont Yankee*. *Compare* 47 U.S.C. § 154(j) (broadly authorizing the FCC to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice"), *with* 42 U.S.C. § 2201(c) (broadly authorizing the NRC to "make such studies and investigations, obtain such information, and hold such meetings or hearings as the Commission may deem necessary or proper to assist it in exercising any authority provided in this chapter").

426. *See Loper Bright*, 144 S. Ct. at 2263.

427. *Id.* at 2273; *see also id.* at 2268-70 (documenting the "many refinements" that became a "byzantine set of preconditions and exceptions" that did "little to rehabilitate *Chevron*"); Hickman & Hahn, *supra* note 137, at 615-18 (identifying confusion around *Chevron* as a legal doctrine).

3. Some benefits of *Vermont Yankee* formalism

How would a *Loper Bright*-style clarification of *Vermont Yankee* affect existing doctrine? For one, it would prevent some of the potentially undesirable consequences that follow from competing visions. Consider, for example, Judge Miller's objection to remanding a matter to the agency with a deadline for action.[428] If *Vermont Yankee* is recast as a doctrine instructing a reviewing court to respect the scope of an agency's procedural discretion under its authorizing legislation, then *Vermont Yankee*'s broader language about agency procedural discretion does not obviously apply to how a court construes the scope of its own remedial authority under APA § 706. To the extent that *Vermont Yankee* matters, its policies might inform remedial discretion, but it should not be understood to command rigid outcomes. So, too, a formalist *Vermont Yankee* would not necessarily swallow mandamus to compel delayed rulemaking, although a stronger focus on the presence or absence of a hard statutory deadline (rather than an aspirational one) may need to be weighed more heavily in determining when relief is appropriate.[429]

Recasting *Vermont Yankee* as resting principally on statutory discretion located outside the APA also clarifies what scholars have long observed: *Vermont Yankee* does not say much about the right approach to interpreting the APA.[430] And once *Vermont Yankee* is oriented away from operating like a substantive canon, jurists should stop deploying it as relevant to a host of open questions that the APA presents, including what qualifies as a "rule."[431] In short, a formalist, delegation-focused vision of *Vermont Yankee* clarifies that the case is not about the APA much at all; it is mostly about respecting the regulatory authority given to agencies by their organic or other statutes. To the extent that doctrines like the logical outgrowth test and modern hard look review have plausible textual bases in the APA, *Vermont Yankee* is largely inapt when it comes to determining whether to gloss the APA in a way that permits or forbids those doctrines. And when courts consider non-APA statutory contexts, like hybrid rulemaking schemes or the immigration adjudication system, they should likewise resist the urge to blindly construe language narrowly in favor of procedural discretion as opposed to asking the harder, more context specific question: How much discretion did Congress intend to give *this agency* on *this question*?

Finally, formalizing *Vermont Yankee* could have real promise for providing results that appeal to progressives, not just conservatives. Consider

428. *See supra* Part II.A.1.

429. *Cf. supra* notes 193-96 and accompanying text (discussing whether the D.C. Circuit's *TRAC* factors should be more sensitive to the policies of *Vermont Yankee*).

430. *See* sources cited *supra* note 398.

431. 5 U.S.C. § 551(4)*; see supra* notes 281-93 and accompanying text.

immigration adjudication. In the circuit courts, conservative jurists have frequently followed *Ming Dai*'s lead by invoking *Vermont Yankee* to sustain denials of immigration relief.[432] Often, however, jurists might be reaching for *Vermont Yankee* as a common law principle, a substantive canon, or even a mere framing device; a claim of inadequate procedure might instinctively lead some judges to be skeptical because *Vermont Yankee* floats in the background. Recasting *Vermont Yankee* as a delegation case might advance pro-immigrant causes by giving advocates new tools for maneuvering around *Vermont Yankee*. They can point out that, if deployed as a substantive canon, *Vermont Yankee* is hard to square with contemporary textualism.[433] And, in some contexts, they can push back against the reflexive urge to assume that Congress implicitly delegated procedural freedom to the agency. After all, when a significant point of the INA is to craft "independent, custom-made procedures" for adjudicating immigration claims,[434] there might be situations in which an alien is making a claim that strikes at the heart of something Congress would care about rather than something merely interstitial and for which delegation is more easily inferred.[435] So, just because a case like *Ming Dai* falls on the interstitial side of the line does not mean that *all* claims for more procedure do, at least absent a more affirmative grant of statutory discretion.

Conclusion

Despite its canonical status, *Vermont Yankee*'s principle against judicial imposition of procedures without a basis in statute continues to puzzle. Courts

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432. For a more detailed account of *Ming Dai*'s effects in the circuit courts, see Padmanabhan, note 318 above, at 33-43. For recent immigration cases in which conservative jurists have invoked the *Vermont Yankee* principle, see, for example, *Mejia-Alvarenga v. Garland*, 90 F.4th 348, 355 (5th Cir. 2024) (Elrod, J.); *Lopez v. Garland*, 60 F.4th 1208, 1212 (9th Cir. 2023) (Miller, J.); *Ud Din v. Garland*, 72 F.4th 411, 425 (2d Cir. 2023) (Raggi, J.); *Sosa v. Garland*, 77 F.4th 1246, 1257 (9th Cir. 2023) (Callahan, J., dissenting from the denial of rehearing en banc); *Palucho v. Garland*, 49 F.4th 532, 538 (6th Cir. 2022) (Murphy, J.); *Miranda v. Garland*, 34 F.4th 338, 367 (4th Cir. 2022) (Richardson, J., concurring in part, dissenting in part, and concurring in the judgment); *Ojo v. Garland*, 25 F.4th 152, 177 (2d Cir. 2022) (Menashi, J., dissenting); *Abubaker Abushagif v. Garland*, 15 F.4th 323, 332 (5th Cir. 2021) (Smith, J.); and *Goncalves Pontes v. Barr*, 938 F.3d 1, 6 (1st Cir. 2019) (Selya, J.).

433. *See supra* notes 406-08 and accompanying text.

434. Family, *supra* note 11, at 2117.

435. *Cf. supra* notes 330-34 and accompanying text (discussing the concept of delegation as a continuum). And, of course, *Vermont Yankee*'s reflective extension to immigration is also in some tension with *Vermont Yankee*'s great care to emphasize that it was about "rulemaking procedures in their most pristine sense," i.e., not a matter that one might conceive as "adjudicatory." Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524 n.1 (1978).

reach for and deploy this principle, which became canonical as applied to APA § 553's informal rulemaking procedures, to answer an array of remedial, constitutional, and statutory questions well beyond the APA. These diverse visions of *Vermont Yankee*'s role in administrative law highlight questions that have persisted since that case was first decided: Where does this principle come from, and what does it really instruct courts to do?

The best answer, however, is surprisingly simple: *Vermont Yankee* is best understood not primarily as a policy- or values-driven common law doctrine or substantive canon, nor an expression of deep constitutional principles, nor even a guide for reading and applying the APA. Instead, *Vermont Yankee* should be understood to reflect that Congress often grants procedural discretion to an agency, either explicitly or implicitly, and those grants of discretion must be respected if courts are to behave as Congress's faithful agents. So, courts should honor specific grants of procedural authority and discretion when they exist, but they should not fall back on *Vermont Yankee* to defer when a specific statutory scheme or provision lacks indicia of delegated procedural authority. In advancing these formalist values, *Vermont Yankee* is refreshingly comparable to *Loper Bright* and an easy fit for the Supreme Court's prevailing approach to administrative law.

Appendix: Recent Substantive Invocations of *Vermont Yankee*

This Appendix catalogues published, circuit-level, substantive invocations of the *Vermont Yankee* principle beginning with the Supreme Court's 2015 *Mortgage Bankers* decision and ending on October 13, 2024.[436] For purposes of this Appendix, a "substantive" invocation is one reflecting the authoring judge's embrace, extension, or purported adherence to the canonical *Vermont Yankee* principle that courts should not impose upon agencies procedures not grounded in positive law. Thus, the Appendix excludes citations to *Vermont Yankee* that: (1) explain only why the opinion does *not* flout *Vermont Yankee*;[437] (2) are specific to NEPA;[438] or (3) are for secondary principles, like the role of the Attorney General's manual in interpreting the APA.[439]

Republican-Appointed Circuit Judges			
Judge	**President**	**Cases**	**Citations**
Bibas	Trump	1	Sanofi Aventis U.S. L.L.C. v. U.S. Dep't of Health & Hum. Servs., 58 F.4th 696, 706 (3d Cir. 2023)
Bybee	G.W. Bush	3	League of United Latin Am. Citizens v. Regan, 996 F.3d 673, 705 (9th Cir. 2021) (Bybee, J., dissenting); City & Cnty. of S.F. v. USCIS, 944 F.3d 773, 809 (9th Cir. 2019) (Bybee, J., concurring, perplexed and perturbed); ASSE Int'l, Inc. v. Kerry, 803 F.3d 1059, 1075 (9th Cir. 2015)
Callahan	G.W. Bush	1	Sosa v. Garland, 77 F.4th 1246, 1257 (9th Cir. 2023) (Callahan, J., dissenting from the denial of rehearing en banc)[440]

436. This is not the same as merely cataloguing citations to *Vermont Yankee* itself. In compiling this Appendix, I endeavored to include cases that invoke the principle even by citation to a post-*Vermont Yankee* case that restates the rule of agency discretion. Some citations may have fallen through the cracks, and this Appendix may be incomplete.

437. *See, e.g.*, Nat. Res. Def. Council v. U.S. EPA, 38 F.4th 34, 61 n.20 (9th Cir. 2022); Clean Wis. v. EPA, 964 F.3d 1145, 1176 (D.C. Cir. 2020) (per curiam).

438. *See, e.g.*, Wild Wilderness v. Allen, 871 F.3d 719, 726-27 (9th Cir. 2017).

439. *See, e.g.*, Am. Fed'n of Gov't Emps. v. FLRA, 99 F.4th 585, 595 n.13 (D.C. Cir. 2024).

440. Judge Callahan criticized "creating a new, judicially imposed procedural rule governing the analysis of asylum applications," *Sosa*, 77 F.4th at 1257 (dissenting from the denial of rehearing en banc), which a separate opinion understood as invoking *Vermont Yankee*. *Id.* at 1251 n.3 (M. Smith, J., concurring in the denial of rehearing en banc). Consistent with the view that conservative jurists are most likely to embrace a

footnote continued on next page

Elrod	G.W. Bush	1	Mejia-Alvarenga v. Garland, 90 F.4th 348, 355 (5th Cir. 2024)
Ginsburg	Reagan	1	GPA Midstream Ass'n v. U.S. Dep't of Transp., 67 F.4th 1188, 1196 (D.C. Cir. 2023)
Menashi	Trump	1	Ojo v. Garland, 25 F.4th 152, 177 (2d Cir. 2022) (Menashi, J., dissenting)
Miller	Trump	2	Lopez v. Garland, 60 F.4th 1208, 1212 (9th Cir. 2023); Ctr. for Food Safety v. Regan, 56 F.4th 648, 672-73 (9th Cir. 2022) (Miller, J., concurring in part and dissenting in part)
Murphy	Trump	2	Palucho v. Garland, 49 F.4th 532, 538 (6th Cir. 2022); Calcutt v. FDIC, 37 F.4th 293, 340 (6th Cir. 2022) (Murphy, J., dissenting), *rev'd*, 598 U.S. 623 (2023) (per curiam)
Nelson	Trump	1	Los Padres ForestWatch v. U.S. Forest Serv., 25 F.4th 649, 666 (9th Cir. 2022) (Nelson, J., dissenting)
Parker	G.W. Bush	1	N.Y. State Dep't of Env't Conservation v. FERC, 991 F.3d 439, 451 (2d Cir. 2021)
Quattlebaum	Trump	1	Kirk v. Comm'r of Soc. Sec. Admin., 987 F.3d 314, 339 (4th Cir. 2021) (Quattlebaum, J., dissenting)
Raggi	G.W. Bush	2	Ud Din v. Garland, 72 F.4th 411, 425 (2d Cir. 2023); New York v. FERC, 783 F.3d 946, 955-56 (2d Cir. 2015)
Rao	Trump	2	AFL-CIO v. NLRB, 57 F.4th 1023, 1052-53 (D.C. Cir. 2023) (Rao, J., concurring in the judgment in part and dissenting in part); Humane Soc'y of the U.S. v. U.S. Dep't of Agric., 41 F.4th 564, 583-84 (D.C. Cir. 2022) (Rao, J., dissenting)
Readler	Trump	1	Moats v. Comm'r of Soc. Sec., 42 F.4th 558, 565 (6th Cir. 2022) (Readler, J., concurring)

renewed *Vermont Yankee*, Judges Ikuta (G.W. Bush), Nelson (Trump), Bumatay (Trump), and VanDyke (Trump) joined Judge Callahan. *See id.* at 1256 (Callahan, J., dissenting from the denial of rehearing en banc).

Richardson	Trump	1	Miranda v. Garland, 34 F.4th 338, 367 (4th Cir. 2022) (Richardson, J., concurring in part, dissenting in part, and concurring in the judgment)
Rogers	G.W. Bush	1	Hicks v. Comm'r of Soc. Sec., 909 F.3d 786, 826 (6th Cir. 2018) (Rogers, J., dissenting)
Scirica	Reagan	1	Prometheus Radio Project v. FCC, 939 F.3d 567, 594 n.2 (3d Cir. 2019) (Scirica, J., concurring in part and dissenting in part), *vacated*, 846 F. App'x 88 (3d Cir. 2021)
Sentelle	Reagan	1	La. Pub. Serv. Comm'n v. FERC, 20 F.4th 1, 7 (D.C. Cir. 2021)
Selya	Reagan	1	Goncalves Pontes v. Barr, 938 F.3d 1, 6 (1st Cir. 2019)
Silberman	Reagan	1	W. Coal Traffic League v. Surface Transp. Bd., 998 F.3d 945, 951 (D.C. Cir. 2021)
J. Smith	Reagan	2	Calumet Shreveport Refining, L.L.C. v. U.S. EPA, 86 F.4th 1121, 1139 (5th Cir. 2023); Abubaker Abushagif v. Garland, 15 F.4th 323, 332 (5th Cir. 2021)
M. Smith	G.W. Bush	1	Or. Nat. Desert Ass'n v. U.S. Forest Serv., 957 F.3d 1024, 1034 (9th Cir. 2020)
Tallman	Clinton[441]	1	Flathead-Lolo-Bitterroot Citizen Task Force v. Montana, 98 F.4th 1180, 1201 (9th Cir. 2024) (Tallman, J., concurring in part and dissenting in part)
Torruella	Reagan	1	City of Taunton, Mass. v. U.S. EPA, 895 F.3d 120, 132-33 (1st Cir. 2018)
Democrat-Appointed Circuit Judges			
Judge	**President**	**Cases**	**Citations**
Briscoe	Clinton	2	Renewable Fuels Ass'n v. U.S. EPA, 948 F.3d 1206, 1242 (10th Cir. 2020); Audubon Soc'y of Greater Denver v. U.S. Army Corps of Eng'rs, 908 F.3d 593, 607 n.8 (10th Cir. 2018)

441. President Clinton appointed Judge Tallman, a Republican, as part of a Senate deal, and he is generally regarded as part of the Ninth Circuit's conservative bloc. *See, e.g.*, Arthur D. Hellman, *Liberalism Triumphant? Ideology and the* En Banc *Process in the Ninth Circuit Court of Appeals*, 31 WM. & MARY BILL RTS. J. 1, 34 (2022). This Appendix therefore treats him as a Republican appointee.

Dyk	Clinton	1	Royal Brush Mfg., Inc. v. United States, 75 F.4th 1250, 1261 (Fed. Cir. 2023)
Edwards	Carter	2	China Telecom (Ams.) Corp. v. FCC, 57 F.4th 256, 265 (D.C. Cir. 2022); Clarian Health W., L.L.C. v. Hargan, 878 F.3d 346, 348 (D.C. Cir. 2017)
Higginson	Obama	1	Texas v. United States, 787 F.3d 733, 775 (5th Cir. 2015) (Higginson, J., dissenting)
Hughes	Obama	1	M S Int'l, Inc. v. United States, 32 F.4th 1145, 1153 (Fed. Cir. 2022)
Lynch	Clinton	2	Housatonic River Initiative. v. U.S. EPA, New England Region, 75 F.4th 248, 267 (1st Cir. 2023); Silva v. Garland, 27 F.4th 95, 112 (1st Cir. 2022)
Millett	Obama	1	Coal. for Renewable Nat. Gas v. EPA, 108 F.4th 846, 857 (D.C. Cir. 2024)
Moritz	Obama	1	Ctr. for Biological Diversity v. U.S. EPA, 82 F.4th 959, 965 (10th Cir. 2023)
Pillard	Obama	2	Brennan v. Dickson, 45 F.4th 48, 66 (D.C. Cir. 2022); PHH Corp. v. CFPB, 881 F.3d 75, 109 (D.C. Cir. 2018) (en banc)
Stranch	Obama	1	Hernandez-Perez v. Whitaker, 911 F.3d 305, 313 (6th Cir. 2018)
Taranto	Obama	1	Mid Continent Steel & Wire, Inc. v. United States, 941 F.3d 530, 541 (Fed. Cir. 2019)
Thomas	Clinton	1	MPS Merch. Servs., Inc. v. FERC, 836 F.3d 1155, 1170 (9th Cir. 2016)
Wallach	Obama	3	Veterans Just. Grp., L.L.C. v. Sec'y of Veterans Affs., 818 F.3d 1336, 1351 (Fed. Cir. 2016); Nan Ya Plastics Corp. v. United States, 810 F.3d 1333, 1345 (Fed. Cir. 2016); JBF RAK L.L.C. v. United States, 790 F.3d 1358, 1367 (Fed. Cir. 2015)
Wilkins	Obama	1	Nat'l Mall Tours of Wash., Inc. v. U.S. Dep't of Interior, 862 F.3d 35, 40 (D.C. Cir. 2017)