AGENCY INNOVATION IN *VERMONT YANKEE*'S WHITE SPACE

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I. INTRODUCTION

The literature on "agency discretion" has, with a few notable exceptions,[1] largely focused on substantive policy discretion,[2] not procedural discretion.[3] In this essay, we seek to refocus debate on the latter, which we argue is no less worthy of attention. We do so by defining the parameters of what we call *Vermont Yankee*'s "white

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1. *See, e.g.,* Adrian Vermeule, *Deference and Due Process*, 129 HARV. L. REV. 1890, 1919 (2016) (offering a compelling theoretical justification for judicial deference to agency decisions about procedure); *see also* Thomas O. McGarity, *Substance and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA*, 67 GEO. L.J. 729 (1979) (arguing that formal procedures are not necessary to resolve technical questions related to the regulation of carcinogens).

2. *See, e.g.,* J.B. Ruhl & Kyle Robisch, *Agencies Running from Agency Discretion*, 58 WM. & MARY L. REV. 97 (2016) (exploring agency reluctance to exercise discretion under the Endangered Species Act and the National Environmental Policy Act); Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1 (2014) (discussing agencies' strategic use of existing statutory authority to tackle novel problems). *See also* Ming H. Chen, *Beyond Legality: The Legitimacy of Executive Action in Immigration Law*, 66 SYRACUSE L. REV. 87 (2016) (examining the legitimacy of expansive executive actions under existing immigration statutes); Daniel T. Deacon, *Administrative Forbearance*, 125 YALE L.J. 1548 (2016) (describing congressional delegations of authority permitting an agency to forbear from implementing statutory provisions).

3. Notable exceptions include Elizabeth Magill's work on agencies' discretion to make policy by rulemaking or adjudication, M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383 (2004), and Adrian Vermeule's recent essay exhorting and defending judicial deference to agency procedural choices. *See* Vermeule, *supra* note 1. Vermeule provides a detailed review of existing doctrine on agency freedom to determine what process is due under the Fifth Amendment. *Id.* at 1890–95. Vermeule then defends less-intrusive rationality review for these choices as consistent with both Dworkinian principles of coherence and Elyian ideas about representation-reinforcement. *Id.* at 1911, 1923. Fundamentally, Vermeule's essay focuses on the institutional allocation of authority to determine the outer boundaries of agency procedural discretion that are established by constitutional norms. *Id.* at 1893–95. In this essay, we seek to expand the analysis of agency procedural discretion beyond constitutional bounds to include statutory, executive, and non-legal limits, thereby providing a fuller picture of the phenomenon.

space"—the scope of agency discretion to experiment with procedures within the boundaries established by law (and thus beyond the reach of the courts).[4] Our goal is to begin a conversation about the dimensions of this procedural negative space, in which agencies are free to experiment with new approaches without judicial oversight. We also explore some of the ways in which energy and environmental agencies are innovating within these boundaries.

Process matters. In discussing the *Vermont Yankee* decision, then-Professor Antonin Scalia wrote of "the indissoluble link between procedure and power."[5] Indeed, the power to design process is in many cases the power to dictate, or at least to affect, substantive outcomes. Procedural innovation can therefore be an important tool for agencies seeking to fulfill their statutory mandates.

Part II briefly expands on the scope of the project. Part III then shifts from abstraction to specifics, examining ways in which the Environmental Protection Agency (EPA) and the Federal Energy Regulatory Commission (FERC) have exploited their considerable freedom to experiment with process. Much has been made of the ways in which these agencies are using aging statutory mandates to address modern problems.[6] We note the same trend but propose that focusing on substantive policies tells only part of the story. Energy and environmental agencies are also moving beyond procedural minima to take advantage of, for example, new technologies and developments in organizational theory. These procedural innovations are enabling the agencies to achieve goals more efficiently and effectively and to emphasize aspects of their mandates that they, in their expert judgment, find to be most significant.

Parts IV and V—the heart of the essay—enumerate six categories of limitation on procedural discretion: constitutional, statutory, judicial, executive, administrative (as where an agency limits its

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4. *Vermont Yankee* held that courts may generally not impose procedural requirements on agencies beyond those contained in the APA or their authorizing statutes. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524 (1978) (noting "the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure"). That ruling was recently reaffirmed in the *Mortgage Bankers* case, in which the Supreme Court reversed a line of D.C. Circuit cases requiring agencies to submit revised interpretations of their own rules to notice and comment. Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1206 (2015). In reversing the D.C. Circuit, the Court noted that the D.C. Circuit doctrine "improperly imposes on agencies an obligation beyond the APA's maximum procedural requirements." *Id.* at 1201; *see also* New Life Evangelistic Ctr., Inc. v. Sebelius, 753 F. Supp. 2d 103, 121 (D.D.C. 2010) (noting that "agencies are, of course, free to adopt additional procedures as they see fit").

5. Antonin Scalia, Vermont Yankee*: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 346 (1978).

6. *See, e.g.*, Joel B. Eisen, *FERC's Expansive Authority to Transform the Electric Grid*, 49 U.C. DAVIS L. REV. 1783 (2016) (noting both the history of and new opportunities for assertion of FERC's authority under existing statutes); Freeman & Spence, *supra* note 2; Daniel J. Fiorino, *Streams of Environmental Innovation: Four Decades of EPA Policy Reform*, 44 ENVTL. L. 723 (2014) (describing policy innovations at EPA across four decades).

own discretion), and non-legal. In Part IV, we touch briefly on constitutional considerations, which have been thoroughly explored by Vermeule and others.[7] We then consider how the Administrative Procedure Act (APA) and various other statutes may limit an agency's discretion to adopt innovative procedures. Next, we explore separate requirements imposed by the courts, notwithstanding *Vermont Yankee*'s admonition that courts may not require agencies to adopt procedures beyond those enumerated in the APA. Finally, we turn to procedural constraints originating with the President. In Part V, we argue that the absence of significant legal limitations does not necessarily invite arbitrary procedural decisionmaking. In this Part, we address two types of limitation on procedural discretion that are less well studied: agencies' self-imposed constraints and non-legal constraints. We conclude by inviting additional research into the scope and uses of agency procedural discretion.

II. THE PROCESS/SUBSTANCE DICHOTOMY

To make any argument about the scope of agency procedural discretion it is first necessary to define our terms. When we propose a category of "procedural" discretion, we do not mean to argue that the line between substance and process is always a clear one. However, the categories are at least conceptually distinct and we find that there are enough "easy cases" to preserve the utility of the distinction.

Here, we start with the definition of "procedural rules" proposed by Larry Solum, who analogizes them to H.L.A. Hart's "secondary rules": those that define institutional powers to make laws and rules (as opposed to primary rules, which require people to do or abstain from doing certain things).[8] This definition distinguishes between the so-called "rules of the legal game"—the rules that apply to actors inside legal institutions—and the rules of conduct that apply to members of the general public.[9] We note that this definition is broad enough to include agency rules of practice that shape the conduct of members of the regulated community and the public, not in their substantive activities, but in their interactions with the agency itself.

We find support for this definition in the APA's distinction between so-called legislative rules and "rules of agency organization, procedure, or practice."[10] In distinguishing between the two,

7. *See supra* note 1.
8. Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 208–09 (2004).
9. *Id.*
10. Administrative Procedure Act, 5 U.S.C. § 553(b)(3)(A) (2012).

the D.C. Circuit employs a "functional analysis" rather than obsessing about labels.[11] The main purpose of the distinction is to ensure "that agencies retain latitude in organizing their *internal* operations."[12] Thus, "the exemption's critical feature is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency."[13]

But let us move from the abstract to the concrete. We subdivide agency "procedures" into two categories of rules. First, such procedures include rules that govern the agency's *internal* operations, including rules governing commission voting, for example, or structuring collaboration with other agencies. We also conclude that such *internal* rules include decisions about how to allocate scarce resources, including but not limited to enforcement prioritization.[14] Second, they include *external* rules to the extent that those rules govern interactions between the public and the agency. Examples here are rules for participation in rulemaking, for submitting license applications, and the like.[15]

Procedural choices are inextricably intertwined with substantive ends. Procedures that increase agency transparency or facilitate public involvement in agency decisionmaking may serve democratic and participatory goals. Procedures that induce additional deliberation or reliance on expert opinion by agency decisionmakers may serve the goal of nonarbitrary government decisionmaking. And procedures that speed up decisionmaking processes may serve efficiency goals. In fact, if you push on any procedural rule, you will

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11. Air Transp. Ass'n of Am. v. Dep't of Transp., 900 F.2d 369, 376 (D.C. Cir. 1990).

12. Batterton v. Marshall, 648 F.2d 694, 707 (D.C. Cir. 1980) (emphasis added).

13. *Id*. Other circuit courts have similar rules. *See, e.g.,* Brown Express, Inc. v. United States, 607 F.2d 695, 702 (5th Cir. 1979) (identifying legislative rules as those that have "a *substantial impact* on the regulated industry, or an important class of the members or the products of that industry"). This definition recalls the *Erie* test for distinguishing between process and substance, most recently articulated in the Supreme Court's decision in *Shady Grove.* Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393, 407 (2010) (stating "[w]hat matters is what the rule itself regulates, and if it governs only the manner and the means by which the litigants' rights are enforced, it is [procedural], but if it alters the rules of decision by which the court will adjudicate those rights,' it is [substantive]").

14. Courts analyzing APA section 553's exception for procedural rules have reached a similar conclusion. *See, e.g.,* Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1057 (D.C. Cir. 1987) (holding that a series of agency directives and manuals defining enforcement strategy of review boards was covered by the exception).

15. When political scientists talk about the congressional manipulation of agency process as a mechanism of control, they sometimes include structural features in that definition. *See, e.g.,* Kathleen Bawn, *Political Control Versus Expertise: Congressional Choices About Administrative Procedures*, 89 AM. POL. SCI. REV. 62, 62 (1995) (including in the definition of procedure such design features as "which agency makes the decision, how the agency is organized, what qualifications are required for key personnel, and how the agency relates to the rest of the bureaucracy"). However, because our perspective is internal to the agency, and because agencies frequently have little to no control over such structural attributes, we do not include them in the discussion here.

find a substantive policy underlying it.[16] This suggests not that the line between procedure and substance is not worth drawing, but that we should be attentive to the substantive consequences of procedural rules. Indeed, that is why procedural discretion matters: process choices not only reflect but further substantive values.[17]

III. PROCEDURAL INNOVATION AT EPA AND FERC

Because of the values it serves and because of its substantive effects, procedural innovation should not be overlooked. And agencies do experiment with procedure, as a series of examples from two key environmental and energy agencies should make plain. We first explore three innovations at the Environmental Protection Agency (EPA), which has tended to exercise its procedural discretion to increase understanding about the agency's activities as well as to expand the impact of its work. Meanwhile, the Federal Energy Regulatory Commission (FERC) has adopted unconventional strategies for improving the quality of its regulatory product.

EPA has been highly innovative when it comes to the agency's public outreach and educational efforts. For example, EPA held "listening sessions" across the country during the roll-out of its proposed Clean Power Plan rule, which imposes greenhouse gas emissions limits on existing power plants.[18] Stakeholders selected for their "expertise in the Clean Air Act standard-setting process" were invited to participate in roundtable discussions to provide feedback on the proposed rule. Transcripts and recordings of the meetings were made available to the public.[19] Such sessions are not legally required, but so long as they do not run afoul of *ex parte* requirements, they do not violate existing law.[20] This additional discussion with stakeholders, above and beyond what is required by the notice-and-comment process in the APA and by other statutes, can improve the substance of final rules as well as generate public buy-in for agency actions.

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16. Relatedly, as the Court noted in *Shady Grove*, most procedural rules do affect federal litigants' substantive rights. *Shady Grove,* 559 U.S. at 407.

17. *See* Frank H. Easterbrook, *Substance and Due* Process, 1982 SUP. CT. REV. 85, 85 (1982) (arguing that procedures that protect against deprivation of a substantive right effectively describe the strength of that right).

18. *Clean Power Plan: Past Listening Sessions*, ENVTL. PROT. AGENCY, https://www.epa.gov/cleanpowerplan/past-listening-sessions (last visited Apr. 18, 2017). The Clean Power Plan, of course, is now tied up in the courts and its fate remains uncertain. Order Granting Application for a Stay at 1, Chamber of Commerce v. EPA (2016) (No. 15A787), https://www.supremecourt.gov/orders/courtorders/020916zr3_hf5m.pdf.

19. *Clean Power Plan*: *Past Listening Sessions*, *supra* note 18.

20. EPA has its own internal rules governing *ex parte* contacts. ENVTL. PROT. AGENCY, "EX PARTE" CONTACTS IN EPA RULEMAKING (1985) (requiring that all comments and any information likely to affect the final decision be placed in the public record).

EPA has also been innovative when it comes to publicizing its rules and programs via the Internet and social media.[21] Such efforts are "procedural" in that they do not alter the substance of EPA's programs, merely the form of their dissemination. And EPA's statutes do not specifically require the agency to engage in such outreach efforts.[22] Annual appropriations acts tend to prohibit EPA from using appropriated funds for propaganda or lobbying purposes, and the agency has sometimes run afoul of these prohibitions in expanding its social media presence.[23] However, other aspects of EPA's campaigns have survived legal scrutiny, including its expenditure of nearly $65,000 on video and graphics to promote its "Waters of the United States" rule that refined EPA jurisdiction over navigable waters.[24] By reaching out to the public on modern technology platforms, EPA is encouraging increasing understanding of its programs as well as promoting civic engagement.

EPA has also exercised what might be called, in a nod to Daphna Renan, intra-agency power "pooling"[25]: the concentration of various substantive agency authorities to achieve more powerful results. In its "Making a Visible Difference in Communities" program, EPA targets "environmentally overburdened, underserved, and economically distressed areas where the needs [for support] are greatest."[26] The agency then draws on its diverse expertise and authority in, for example, remediation of polluted sites, redevelopment of brownfields, stormwater and waste management, and collection and dissemination of environmental quality data, to mitigate environmental harms in those areas.[27] The focusing of such efforts within a single community to achieve broader health and sustainability goals demonstrates the power of procedural decisions, in this case resource allocation, to support substantive aims.

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21. Elizabeth Porter and Kathryn Watts have written about one aspect of these efforts: the use of visual media to enhance communication. Elizabeth G. Porter & Kathryn A. Watts, *Visual Rulemaking*, 91 N.Y.U. L. REV. 1183 (2016). *See also* Stephen M. Johnson, *#BetterRules: the Appropriate Use of Social Media in Rulemaking*, FLA. ST. U. L. REV. (forthcoming 2017) (discussing the limits legal limits on EPA's use of social media).

22. However, statutory support for these activities may be found in both the National Environmental Education Act of 1990 and in the E-Government Act of 2002. National Environmental Education Act, 20 U.S.C. §§ 5501–5510 (1990); E-Government Act of 2002, 44 U.S.C. §§ 101, 3501, 3601, 41 U.S.C. § 266a.

23. U.S. GOV'T ACCOUNTABILITY OFFICE, B-326944, LETTER TO SENATOR JAMES INHOFE, ENVIRONMENTAL PROTECTION AGENCY—APPLICATION OF PUBLICITY OR PROPAGANDA AND ANTI-LOBBYING PROVISIONS (2015).

24. *Id.* at 2.

25. *See* Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211 (2015) (arguing that presidents can exploit joint agency activities to expand their own powers).

26. *Smart Growth: Making a Visible Difference in Communities*, ENVTL. PROT. AGENCY, https://www.epa.gov/smartgrowth/making-visible-difference-communities (last visited Apr. 18, 2017).

27. *Id.*

EPA is not alone in its procedural innovation. FERC, which unlike EPA operates as an independent commission, is the nation's regulator of wholesale electric energy and natural gas, among other responsibilities. The agency has been in the news over the last several decades for its substantive policy innovations. Perhaps most significantly, it has used existing statutory authority to restructure both wholesale natural gas and electricity sales to more closely resemble a free market.[28] But FERC's procedures, while perhaps less likely to capture the public imagination, are also worthy of regard. This section will describe three innovative procedures at FERC that are deserving of greater attention. The first two are procedures for better ventilation of ideas and strategy early on in agency processes. The last concerns error-correction within the agency prior to legal challenge in court.

First are technical conferences. These are public meetings during which invited panelists make presentations to the commission on topics of the commission's choosing. Such conferences are not required as part of the rulemaking process, either by the APA or under the various energy statutes that FERC implements. The conferences may relate to an ongoing rulemaking or simply to a matter about which the commission desires to know more.[29] The agency will typically issue notice of the technical conference as part of the relevant docket along with a description of the topics to be addressed and questions to frame the discussion. The conferences are open to the public and are frequently made available via webcast and archived for several months.[30]

Technical conferences are a valuable mechanism for both gathering information from stakeholders and for giving those stakeholders insight into policies the agency is considering prior to more formal agency action. For example, technical conferences can provide a forum for discussing priorities in areas of overlapping jurisdiction.[31] In terms of the input participants are afforded, these

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28. *See* Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations, 59 FERC ¶ 61,030 (1993). Promoting Wholesale Competition Through Open Access Nondiscriminatory Transmission Service by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 75 FERC ¶ 61,080 (1996).

29. *See, e.g.* FERC, Technical Conference to Discuss Competitive Transmission Development Rates (Docket No. AD16-18000) (June 27–28, 2016); Technical Conference to Discuss Implementation Issues Under the Public Utility Regulatory Policies Act of 1978 (Docket No. AD16-16-000) (June 29, 2016).

30. Archived webcasts are available at *FERC Live Video & Audio Webcasts and Archives*, FERC, http://ferc.capitolconnection.org/ (last accessed Apr. 18, 2017).

31. *See* Julia E. Sullivan, *The Intersection of Federally Regulated Power Markets and State Energy and Environmental Goals*, 26 FORDHAM ENVTL. L. REV. 474, 475 (2015) (citing Notice of Joint Technical Conference, *Joint Technical Conference on N.Y. Mkts. &*

conferences fall midway between negotiated rulemaking, which involves participants much more actively in rule formation,[32] and EPA's webinar series, which educates participants about preliminary or final rules after those rules are published.

Second, FERC offers pre-filing meetings during which potential parties may review their draft filings with FERC staff prior to submitting them formally to the agency. Parties who may wish to avail themselves of this option include companies submitting rate filings as well as consumers wishing to file a complaint against a utility. Nothing in the agency's governing statutes or rules requires them to offer this service. However, the meetings are useful on both sides. Companies or consumers are able to incorporate changes suggested by the agency that can improve the quality of their filings. And the agency itself can get a better feel for the precise nature of the results sought than they could glean from paper filings alone. Thus, they are better able to process the filings once submitted.[33]

Finally, FERC frequently adds another stage to the standard rulemaking process: rehearings that often result in issuances of revised rules. Both the Federal Power Act and the Natural Gas Act require potential litigants to seek rehearing at the agency before challenging a FERC action in court. But neither statute requires the agency to grant these requests. Over the years, however, FERC has been inclined to grant such petitions so long as they raise plausible questions about an aspect of a rule's validity or desirability. Doing so has become part of the agency culture, and it is common for complex or controversial rulemakings to be issued in successive iterations with titles such as "Rule 719-A," "Rule 719-B," and so on.

Rehearing can be helpful to industry and other parties if it creates greater certainty as to the scope and meaning of the underlying rule. However, the advantages of rehearing do not accrue solely to stakeholders. For the agency, rehearing provides an opportunity to clarify aspects of the underlying rule or to correct mistakes. These clarifications might either avoid litigation or strengthen the agency record so that the rule is more likely to survive a challenge

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Infrastructure, No. AD14-18-000 (F.E.R.C. Sept. 17, 2014) https://www.ferc.gov/EventCalendar/EventDetails.aspx?ID=7531&CalType=& CalendarID=116&Date=11/05/2014&View=Listview, *archived at* http://perma.cc/VS26-TMGQ).

32. For an overview of negotiated rulemaking, *see* Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255 (1997) (finding that negotiated rulemaking fails to improve agency timeliness or reduce litigation).

33. Information about this process comes from conversations with senior FERC staff. FERC has interpreted these meetings as fully consistent with the agency's Ex Parte Rule, Order 607, 88 FERC ¶ 61,225 (1999), which prohibits only off-the-record communications with decisional employees after the commencement of any contested, "on the record," trial-type proceedings. *See* MidAmerican Energy Holdings Co,, et al., 118 FERC ¶ 61,003, 61,007–10 (2007).

in court. While rehearing is itself costly in terms of time and resources, it may avoid the even greater costs associated with litigation.

None of the innovations discussed in this section are required by law, but neither are they prohibited by it. They were enacted in the discretionary space beyond the law's procedural minima. While no individual process may be radical, collectively these adjustments and innovations can facilitate achievement of an agency's substantive goals over time. But how much room do agencies actually have to innovate in this space? It is to that question that the next Part turns.

IV. THE LEGAL BOUNDARIES OF AGENCY PROCEDURAL DISCRETION

To understand the realm of agency procedural discretion, we must begin by identifying its outer boundaries. These boundaries are established, first and foremost, by the law, which imposes various limitations on the ability of an administrative agency to design its own procedures. There are four key sources of legal limitations on agency procedural discretion: the Constitution, statutes, judicial precedent, and executive edicts. Within these boundaries, administrative agencies are typically afforded substantial latitude to design their own procedures, subject to minimal judicial intervention.

The Constitution is the foundational legal restriction on government action generally, and its minimum requirements apply in the administrative context. Key for our purposes here is the well-established principle that agencies must observe the requirements of constitutional due process in designing administrative procedures.[34] These constitutional requirements are modest, but agencies must consider them in the procedural design process. Agencies may even have an independent duty to "interpret and implement the U.S. Constitution," a phenomenon that has been referred to as "administrative constitutionalism."[35] An agency designing its

34. *See* Mathews v. Eldridge, 424 U.S. 319, 332 (1976); Goldberg v. Kelly, 397 U.S. 254 (1970).

35. Agencies are thus required to "interpret and implement the U.S. Constitution," a phenomenon that has been referred to as "administrative constitutionalism." *See* Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1897 (2013); WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 26–27 (2010); Elizabeth Fisher, *Food Safety Crises as Crises in Administrative Constitutionalism*, 20 HEALTH MATRIX 55 (2010); Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present,* 96 VA. L. REV. 799, 801 (2010); *see also* Bertrall L. Ross II, *Embracing Administrative Constitutionalism*, 95 B.U. L. REV. 519, 529 (2015) ("Agencies' constitutional value judgments, made in the process of interpreting statutes, are what I define as 'administrative constitutionalism.'").

procedures must therefore first consider the minimum requirements imposed by the Fifth Amendment's Due Process Clause.[36] The Due Process Clause applies only if an agency's action threatens to deprive an individual of an interest in life, liberty, or property.[37] In such circumstances, the minimum procedures due to the individual, as well as the timing of those procedures (e.g., pre- or post-deprivation), are determined based on a flexible and context-specific evaluation of the agency action in question.[38] Relatively few administrative disputes are resolved on due process grounds, however, and thus other sources of legal limitation on agency procedural design play a more significant role in shaping agency procedural design and experimentation.[39]

Moving beyond the Constitution, a key source of statutory restriction on agency procedural discretion is the APA. There are two possible interpretations of how the APA affects agency procedural discretion. First, the APA may be understood as a skeletal framework that establishes only minimum procedural requirements against a background norm of agency procedural discretion.[40] So interpreted, the APA establishes only a "floor" for administrative procedures. Agencies are empowered to impose more restrictive, detailed, or additional procedures beyond those contained in the APA, provided that the statutory minimum is observed.[41] Second, the APA might instead be understood as a statute designed to produce procedural uniformity across agencies.[42] Achieving uniformity would require an interpretation of the APA as more restric-

36. *See* U.S. CONST. AMEND. V, § 4. The Due Process Clause is central to our analysis because we are focused on administrative procedure. But administrative constitutionalism occurs under many other constitutional provisions as well. *E.g.*, SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT (2014) (examining how the National Labor Relations Board and the Federal Communications Commission interpreted and implemented the Fifth Amendment's Equal Protection Clause); FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307 (2012) (examining the FCC's scheme for regulating speech, which required the agency to consider limitations imposed by the First Amendment).

37. Ingraham v. Wright, 430 U.S. 651, 672–74 (1977).

38. *See generally* RICHARD J. PERCE, JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIL, ADMINISTRATIVE LAW AND PROCESS § 6.3 (6th ed. 2014).

39. *Id.* at 206.

40. *E.g.*, Citizens Awareness Network, Inc. v. United States, 391 F.3d 338, 349 (1st Cir. 2004) ("The APA lays out only the most skeletal framework for conducting agency adjudications, leaving broad discretion to the affected agencies in formulating detailed procedural rules.").

41. *See, e.g.*, Energy Bar Association, *Report of the Committee on Ethics*, 12 ENERGY L.J. 421, 426 (1991) (explaining that FERC's rules limiting certain types of *ex parte* communications "are more restrictive than under the APA, but this is permissible because the APA establishes a floor, not a ceiling, for prohibited *ex parte* communications").

42. *See, e.g.*, Dickinson v. Zurko, 527 U.S. 150, 155 (1999) ("The APA was meant to bring uniformity to a field full of variation and diversity.").

tive, imposing not only a "floor" but also a "ceiling" for administrative procedures.[43] Under this interpretation, agencies must not only meet the APA's minimum requirements, but their discretion to deviate from the procedures established by the statute would be restricted. It is also possible, of course, that the APA should not be interpreted monolithically, and that some provisions of the APA may be interpreted to establish a floor, while others may be interpreted to establish both a floor and a ceiling.[44]

In recent decades, however, courts and scholars have increasingly understood the APA according to the first approach: as a skeletal framework that leaves substantial latitude for agency procedural innovation.[45] There is some evidence that, at least with respect to certain discrete subjects, this consensus marks a shift away from a contrary view that dominated in the decades immediately following the APA's enactment.[46] For example, such a shift has

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43. On this point, institutional context matters. For example, *Vermont Yankee* has been described as holding that the APA's informal rulemaking provisions establish both a floor and a ceiling. *See* David Fontana, *Reforming the Administrative Procedure Act: Democracy Index Rulemaking*, 74 FORDHAM L. REV. 81, 126 (2005). But what is typically meant by this is that the APA's informal rulemaking provisions establish a ceiling from a *judicial* perspective, such that it is inappropriate for the courts to impose upon agencies procedural requirements beyond those found in the statute. Laura Anzie Nelson, *Delineating Deference to Agency Science: Doctrine or Political Ideology?*, 40 ENVTL. L. 1057, 1070 n.90 (2010). From the *administrative* perspective, the APA's informal rulemaking provision establishes only a floor, such that agencies may voluntarily choose to observe additional procedures. *See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 312 (1970) ("In *Vermont Yankee* . . . we held that courts could only in 'extraordinary circumstances' impose procedural requirements on an agency beyond those specified in the APA. It is within an agency's discretion to afford parties more procedure, but it is not the province of the courts to do so."); Admin. Conf. of the U.S., Recommendation 76-3, *Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking*, 41 Fed. Reg. 29,654 (July 19, 1976) (encouraging agencies to voluntarily observe notice and comment procedures beyond those contained in the APA).

44. Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1300 (2012) ("[A] fundamental compromise underlying the APA was that Congress imposed greater procedural rigor and judicial scrutiny only on more formal agency proceedings, leaving less formal proceedings, such as notice and comment rulemakings, subject to minimal constraints."). It is also worth noting that a general understanding of the APA's purpose and operation might emerge only piece-by-piece, as individual provisions addressing distinct subjects are examined by courts and commentators. *See infra* notes 9 and 10 and accompanying text.

45. *See, e.g.*, Climax Molybdenum Co. v. Sec'y of Labor, 703 F.2d 447, 451 (10th Cir. 1983) ("[A]dministrative agencies retain substantial discretion in formulating, interpreting, and applying their own procedural rules." (citing Am. Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 539 (1970)); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1439 (2004) ("The skeletal provisions of the APA that governed informal rulemaking required no elaborate process."); Peter M. Shane, *Federal Policy Making by Consent Decree: An Analysis of Agency and Judicial Discretion*, 1987 U. CHI. LEGAL F. 241, 264 (1987); James V. DeLong, *New Wine for a New Bottle: Judicial Review in the Regulatory State*, 72 VA. L. REV. 399, 445 (1986) ("The APA's judicial review formula has served admirably for forty years, but it provides no more than a skeletal framework for control of agency action.").

46. *But see* Jennifer Nou, *Regulating the Rulemakers: A Proposal for Deliberative Cost-Benefit Analysis*, YALE L. & POL'Y REV. 601, 617 (2008) ("Facilitating implementation, the drafters of the APA were clear that its minimal procedural requirements were not a ceiling but a floor."). There is also some evidence that Congress intended the APA to establish only

occurred in connection with the APA's provision authorizing federal agencies to issue declaratory orders "to terminate a controversy or remove uncertainty."[47] Due to this provision's placement in the section of the APA governing formal adjudication, courts and commentators for many decades took the view that declaratory orders were available only in formal adjudication.[48] Over the last several decades, however, the courts have quietly abandoned this approach, allowing agencies to issue declaratory orders (1) without first conducting a "hearing on the record" and (2) to address matters not subject by statute to formal adjudication under the APA.[49] This change in how the declaratory orders provision is understood has not occurred wholly in isolation, but rather seems to reflect a broader shift in how the APA is understood and applied.[50]

Beyond the APA are other statutes, both trans-substantive and subject-specific, that may also confine agency procedural discretion.[51] Trans-substantive statutes such as the Freedom of Information Act, the Federal Advisory Committee Act, and the Government in the Sunshine Act, for example, limit an agency's ability to shield its deliberations and its written materials from public view.[52] The National Environmental Policy Act (NEPA) requires all federal agencies to assess the effects of actions that may have a significant impact on the human environment.[53] And the Endangered Species Act requires federal agencies to consult with either the Fish and Wildlife Service or the National Oceanic and Atmospheric Administration before taking actions that could jeopardize the continued

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a minimum, but that it expected that courts and not agencies would be the relevant institutional actors establishing requirements above the statutory minimum. *See* Kenneth Culp Davis, *Administrative Common Law and the* Vermont Yankee *Opinion*, 1980 UTAH L. REV. 3, 12 (1980) (explaining that the Senate "must have meant that courts could add to the [APA's minimum] requirements, for a statement that an agency imposes 'requirements' on itself is unnatural.").

47. 5 U.S.C. § 554(e) (2012).

48. *See* TOM C. CLARK, UNITED STATES DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 59 (Reprint ed. 1973); Emily S. Bremer, *The Agency Declaratory Order*, OHIO ST. L.J. 19–24 (forthcoming 2017), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2955214.

49. *See* Weinberger v. Hynson, 412 U.S. 609, 624–25 (1973); Am. Airlines, Inc. v. Dep't of Transp., 202 F.3d 788, 796–97 (5th Cir. 2000); *see also* Admin. Conf. of the U.S., Recommendation 2015-3, *Declaratory Orders*, 80 Fed. Reg. 78,163 (Dec. 16, 2015) (urging agencies to use declaratory orders more frequently and creatively and suggesting best practices and procedures in declaratory proceedings).

50. *See supra* note 46.

51. A commonly cited example is hybrid rulemaking requirements, which Congress has imposed upon individual agencies such as the Federal Trade Commission. *See* Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 STAT. 2183 (Jan. 4, 1975).

52. Freedom of Information Act, 5 U.S.C. § 552 (2012); Government in the Sunshine Act, 5 U.S.C. § 552b (2012).

53. National Environmental Policy Act, 42 U.S.C. § 4321 (2012).

existence of any endangered or threatened species.[54] Agency-specific statutes may also impose restrictions. The Federal Power Act, for example, contains a series of specific requirements governing rate challenges and hearings.[55] And the Clean Air Act requires that specific procedures be followed in the summoning of witnesses to testify in agency proceedings.[56]

These statutory requirements are often understood to operate in a manner similar to the APA, in the sense that they are viewed as establishing procedural floors, not ceilings (except in specific cases where Congress has clearly indicated the converse).[57] The fact that NEPA established a floor rather than a ceiling for procedures to evaluate environmental impacts, for example, may be seen in its compatibility with state environmental assessment statutes (sometimes called mini-NEPAs), some of which go beyond NEPA's own requirements.[58] Like the APA, then, these statutes typically leave agencies free to experiment with procedures that elaborate upon the statutory minima. Furthermore, that Congress has repeatedly enacted these statutes imposing upon individual agencies unique requirements not found in the APA suggests some acceptance or expectation that there will be at least some variation in agency procedures, even for similar activities.[59]

A third source of legal restrictions on agency procedural discretion is judicial precedent. Courts have a significant role in interpreting the APA and other procedural statutes, and two variants of legal restriction on agency procedural discretion may arise from the judiciary's fulfillment of that role. First, judicial precedent may simply interpret and apply statutory requirements in a manner that displaces agency interpretation. Second, and more controversial, is what is termed "administrative common law," which arises when courts create procedural requirements that are not found in applicable statutes.[60] Administrative common law is controversial in part

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54. 16 U.S.C. § 1536 (2012). Agencies must also cooperate to the maximum extent practicable with states before acquiring land or water to preserve endangered or threatened species. *Id.* § 1535.

55. *See, e.g.,* 16 U.S.C. § 824e(a) (2012) (requiring commission to fix by order the time and place of a rate hearing and specify the issues to be adjudicated).

56. 42 U.S.C. § 7607 (2012).

57. *See, e.g.*, Richard Cordray, *Forward: Consumer Protection in the Financial Marketplace*, 9 HARV. L. & POL'Y REV. 307, 309 (2015) ("We believe that the seemingly formulaic processes laid out in the APA and the [Dodd-Frank Act] merely create a floor on collaboration and public input, not a ceiling.").

58. *See* Council on Envtl. Quality, *State NEPA* Contacts, DEP'T OF ENERGY, https://energy.gov/sites/prod/files/2013/09/f2/States_NEPA_Like_22June2013.pdf (last visited Apr. 18, 2017) (listing contacts for states with NEPA-like planning requirements at).

59. *See* Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 572 (2011).

60. *See* Emily S. Bremer, *The Unwritten Administrative Constitution*, 66 FLA. L. REV. 1215, 1244–48 (2014); Jack M. Beermann, *Common Law and Statute Law in Administrative*

because it appears to be in tension with the principle established by the Supreme Court in *Vermont Yankee* (and recently reaffirmed in *Mortgage Bankers Association*) that courts should not impose upon agencies procedures beyond those required by statute.[61] In *Vermont Yankee*, as discussed above, the Court found "little doubt that Congress intended that the discretion of the *agencies* and not that of the courts be exercised in determining when extra procedural devices should be employed."[62]

Then-Professor Scalia's critique of the opinion notwithstanding,[63] *Vermont Yankee*'s central holding has stood the test of time. Yet, some administrative common law is consistent with *Vermont Yankee*. This is because the Court acknowledged that the general principle does not "necessarily [mean] that there are no circumstances which would ever justify a court in overturning agency action because of a failure to employ procedures beyond those required by the statute. But such circumstances, if they exist, are extremely rare."[64] Much administrative common law nonetheless operates beyond this narrow exception. Indeed, it is widely recognized that, despite *Vermont Yankee*, the courts have imposed a variety of additional requirements on informal rulemaking.[65] This is often referred to as a judicial gloss on the APA,[66] and it has been lamented as a significant contributing factor to the "ossification" of that process.[67]

Fourth and finally, executive edicts may also impose legal limitations on agency procedural discretion. There are a number of executive orders that impose procedural requirements on agency

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Law, 63 ADMIN. L. REV. 1 (2011); *see also* Metzger, *supra* note 44, at 1295 ("By administrative common law, I am referring to administrative law doctrines and requirements that are largely judicially created, as opposed to those specified by Congress, the President, or individual agencies.").

61. Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1207 (2015); Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524 (1978).

62. 435 U.S. at 546.

63. Scalia, *supra* note 5 (criticizing the decision's apparent reverence for the APA as the "Magna Carta" of administrative procedure and offering historical, doctrinal, and institutional reasons for permitting courts to require additional agency process).

64. *Vermont Yankee*, 435 U.S. at 524.

65. The necessity of judicial imposition of these requirements was evident to some at the time of the Supreme Court's decision. *See* Richard B. Stewart, Vermont Yankee *and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805, 1816 (1978).

66. *See, e.g.,* Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 2 n.1, (2009) (referring to the D.C. Circuit's "hard look" review as a judicial gloss on the meaning of the APA's arbitrary and capricious test); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383 (2004) (noting the importance of the judicial gloss on the APA for courts reviewing agency action); Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1039 (1997) (claiming that "the judicial gloss on the APA has taken on a large significance over time").

67. *See* Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 65–66 (1995).

action, often in the context of rulemaking.[68] For example, Executive Order 13,132 requires agencies to consider the potential effects on federalism when they are drafting regulations.[69] More famously, Executive Order 12,866 requires agencies to conduct benefit-cost analysis for economically significant regulations.[70] Other controls on agency procedures are exerted through the Office of Management and Budget (OMB), which is located within the Executive Office of the President.[71] One such control is the review of significant proposed and final rules conducted by the Office of Information and Regulatory Affairs. This review may substantially influence individual agencies' rulemaking processes.[72] Finally, the president's budget process may also limit agency procedural discretion.[73]

Over the decades, there has been a shift towards broader recognition of the agencies' authority to establish their own procedures.[74] As an initial matter, agencies have a significant role in interpreting the laws that establish the boundaries of their procedural discretion. For example, the practical reality is that administrative agencies are usually the first and often the last arbiters of what process is due under the Constitution. This is because such administrative constitutionalism is frequently not subject to judicial review and, when the courts do review it, they are often deferential to the agent's judgment.[75] Courts have similarly adopted a deferential stance towards agency interpretations of statutes they are authorized to administer.[76] This includes recognition that *Chevron* deference applies to an agency's interpretation of its own statutory "jurisdiction."[77]

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68. *See generally* Admin. Conf. of the U.S., Recommendation 2012-1, *Regulatory Analysis Requirements*, 77 Fed. Reg. 47,800, 47,801–02 (Aug. 10, 2012) (discussing various regulatory analysis requirements imposed by statute and executive order).

69. Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 10, 1999); *see* Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521 (2012); Admin. Conf. of the U.S., Recommendation 2010-1, *Agency Procedures for Considering Preemption of State Law*, 76 Fed. Reg. 81 (Jan. 3, 2011).

70. *See, e.g.*, Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

71. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2247 (2001).

72. *See* GOV'T ACCOUNTABILITY OFFICE, GAO-03-929, OMB'S ROLE IN REVIEWS OF AGENCIES' DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS (2003), http://www.gao.gov/new.items/d03929.pdf.

73. *See* Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182 (2016).

74. *See, e.g.*, Vermeule, *supra* note 1, at 1911–19 (analyzing three streams of precedent in which courts have been deferential to agencies' procedural judgments).

75. *See id.* at 1891–92; *see also* Freeman & Spence, *supra* note 2 and accompanying text.

76. For example, unless a statute uses the magical words "hearing on the record," a court is likely to defer to an agency's reasonable interpretation of its own statute as not requiring formal adjudication under the APA. *See* Dominion Energy Brayton Point, LLC v. Johnson, 443 F.3d 12 (1st Cir. 2006).

77. *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1868 (2013).

V. NON-LEGAL LIMITS ON AGENCY PROCEDURAL DISCRETION

The absence of any *legal* restriction on agency action might be interpreted, wrongly, to indicate that an agency has limitless or unfettered authority to act.[78] In practice, there are a variety of non-legal restrictions on agency procedural discretion, including agency self-regulation, structural constraints, reputational constraints, and professional constraints.[79] In the absence of significant legal restrictions on agency procedural innovation, these "soft" constraints play a larger role in defining *Vermont Yankee*'s white space.

The first category of constraints includes those that are self-imposed or self-regulatory. Elizabeth Magill defines a self-regulatory activity as an agency action "to limit its own discretion when no source of authority (such as a statute) requires the agency to act."[80] Agencies may themselves adopt rules *ex ante* that constrain their ability to innovate procedurally.[81] For example, the Food and Drug Administration adopted guidelines for the issuance of guidance documents—in essence, guidance for guidance—that were later codified pursuant to the Food and Drug Administration Modernization Act of 1997.[82] And FERC has limited its ability to exercise enforcement discretion by issuing a policy statement on civil penalty guidelines.[83] In some cases, even less formal agency conventions might limit the agency's ability to shift its practices without warning.[84]

Beyond self-imposed rules, three additional categories of constraint limit agency freedom to innovate procedurally: *collaborative* constraints*, reputational* constraints*,* and *professional* constraints.

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78. *See, e.g.*, Styria v. Morgan, 186 U.S. 1, 9 (1902) ("The establishment of a clearly defined rule of action would be the end of *discretion*, and yet discretion should not be a word for arbitrary will or inconsiderate action.").

79. For an argument that the President, too, is bound by such non-legal constraints, *see* ADRIAN VERMEULE & ERIC POSNER, THE EXECUTIVE UNBOUND (2010) (citing the reelection constraint, in particular, as cabining executive authority).

80. *See* Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 861 (2009) (explaining why agencies might engage in self-limiting behavior). While Magill identifies "extra" procedures as forms of self-regulation, it is crucial to understand that procedure can be used to expand agency power as well as to limit it. *See, e.g.,* Renan, *supra* note 25.

81. Emily Hammond and David Markell have written of the promise of "inside-out" legitimacy, or the ability of administrative process to substitute for judicial review in legitimating administrative action. Emily Hammond & David Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENVTL. L. REV. 313, 327–28 (2013).

82. Food & Drug Admin., Administrative Practice and Procedures Good Guidance Practices 65 Fed. Reg. 56,468 (Sept. 19, 2000).

83. FERC, Revised Policy Statement on Penalty Guidelines, 132 FERC ¶ 61,216 (Sept. 17, 2010).

84. *See* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 548 (1978) (stating that past agency practice permited the court to review and overturn the rulemaking proceeding).

First are *collaborative* constraints. When agencies operate in shared regulatory space, they may be subject to structural constraints on their procedural discretion. Shared regulatory space is created when Congress delegates to more than one agency power to undertake the same or similar functions or otherwise to operate within a single, larger area of regulatory responsibility.[85] Joint agency authority may limit agency discretion, including the discretion to innovate procedurally. This is partly due to the necessity for agencies to coordinate their activities in shared regulatory space, such as through joint rulemaking, interagency agreements, and agency consultation agreements.[86] When the task at hand is to determine the best or most prudent action (and not just to identify the outer limits of permissible action), disagreement among agencies that share authority may impose a real limitation.[87]

In the energy and environmental space, consider EPA's implementation of its Mercury and Air Toxics Standard (limiting the emission of toxic air pollutants from existing power plants) to allow certain power plants extra time to comply.[88] Although nothing in the Clean Air Act required it to do so, EPA adopted a strategy, laid down in a policy memorandum,[89] of consulting with FERC reliability experts before deciding whether to grant an extension request. While it did not acknowledge expressly that failure to consult

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85. *See* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012).

86. *See generally* Admin. Conf. of the U.S., Recommendation 2012-5, *Improving Coordination of Related Agency Responsibilities*, 77 Fed. Reg., 47,810 (Aug. 10, 2012) (recommending procedures and best practices for using these and other approaches to improving agency coordination in shared regulatory space).

87. One example arises in connection with the selection, appointment, and supervision of Administrative Law Judges (ALJs). Here, one agency (such as the Social Security Administration) has statutory authority to administer an adjudicatory program, while another agency (the Office of Personal Management (OPM)) has statutory authority to regulate the selection, appointment, and supervision of the ALJs who will preside over the hearings within that adjudicatory program. This division of authority is intended to preserve the independence of ALJs by introducing into administrative adjudication some separation of functions. *See* 5 U.S.C. §§ 1104(a), 1302(a), 1305, 3105, 3304, 3323(b), 3344, 4301(2)(D), 5372, and 7521 (2012); *see generally* VANESSA K. BURROWS, CONG. RESEARCH SERV., ADMINISTRATIVE LAW JUDGES: AN OVERVIEW (2010); Jeffrey S. Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 109, 111 (1981). OPM's fulfillment of its statutory responsibility constrains the adjudicatory agency's discretion to appoint and control its ALJs. *See* OFFICE OF THE CHAIRMAN, ADMIN. CONF. OF THE U.S., EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: EVALUATING THE STATUS AND PLACEMENT OF ADJUDICATORS IN THE FEDERAL SECTOR HEARING PROGRAM 27–32 (March 31, 2014) [hereinafter EEOC REPORT], https://www.acus.gov/report/equal-employment-opportunity-commission-evaluating-status-and-placement-adjudicators-federal.

88. National Emission Standards for Hazardous Air Pollutants for Source Categories, 49 C.F.R. § 63 (2017). *See* Michigan v. Envtl. Prot. Agency, 135 S. Ct. 2699 (2015).

89. Envtl. Prot. Agency, The Environmental Protection Agency's Enforcement Response Policy For Use of Clean Air Section 113(a) Administrative Orders In Relation To Electric Reliability And The Mercury and Air Toxics Standard (Dec. 16, 2011), https://www.epa.gov/sites/production/files/documents/mats-erp.pdf.

with FERC on reliability might lead to inter-agency friction,[90] the implication was clear.

Even where the agency has itself adopted no formal or informal limits on its ability to innovate procedurally, *reputational* concerns may counsel restraint. Daniel Carpenter has argued that agencies act with their reputations in mind with a goal of preserving a maximum of power and authority over the longer term. [91] And one of us has argued elsewhere that agencies sometimes exercise Bickelian "passive virtues"—restraint in the face of discretion—due to fear of reputational consequence.[92] For example, if an agency believes that holding too many public meetings on a given topic (say climate change), would subject it to unwanted scrutiny by the political branches, it may limit such meetings even where it would be well within its authority to hold them. Strategic agencies will look beyond particular decisions to the best way to conserve authority and discretion in the longer term.[93]

Finally, *professional* constraints limit agency procedural decisions. One understanding of "discretion" is, as the Supreme Court has explained, "the absence of a hard and fast rule" that would deprive an agency of a choice of how to act.[94] But "discretion" can also mean the exercise of sound judgment in decisionmaking.[95] Although discretion may be unconstrained by the law, courts, or other non-legal constraints, therefore, it is still constrained by good judgment.[96] An individual agency's professional culture and norms

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90. *See id.* at 2 (noting only that it elected to consult with FERC "in light of the complexity of the electric system").

91. *See* DAN CARPENTER, REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA (2010) (arguing that the FDA's awareness of its reputation has shaped its operations over the years).

92. Sharon B. Jacobs, *The Administrative State's Passive Virtues*, 66 ADMIN. L. REV. 565 (2014).

93. *Id.* at 569.

94. 2 Langnes v. Green, 282 U.S. 531 (1931) (citing The Steamship Styria v. Morgan, 186 U.S. 1, 9 (1902)).

95. For adoption of this meaning in case law, *see, e.g.*, Langnes v. Green, 282 U.S. 531, 541 (1931) ("When invoked as a guide to judicial action, it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result."); *see also* Styria v. Morgan, 186 U.S. 1, 9 (1902) (quoting dictionary definitions of "discretion" to make the point that its exercise entails the application of reason and sound judgment). *See also Discretion*, MERRIAM-WEBSTER COLLEGIATE DICTIONARY (11th ed. 2003), http://www.merriam-webster.com/dictionary/discretion (last visited Apr. 18, 2017) (defining discretion as, among other things, "the quality of having or showing discernment or good judgment" and the "ability to make responsible decisions").

96. For this reason, even in areas in which agencies possess significant procedural discretion, successfully encouraging agencies to innovate requires giving those agencies comfort that innovation is lawful and within the scope of their discretion. *See, e.g.,* Admin. Conf. of the U.S., Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, 76 Fed. Reg. 48,789, 48,790 ("With respect to the issues addressed in this recommendation, the APA contains sufficient flexibility to support e-Rulemaking and does not need to be amended for these purposes at the present time. Although the primary goal of this recommendation is to

may also limit procedural experimentation beyond what is optional. Certain agencies have made headlines for their innovative cultures, but others can be conservative in their procedural choices.[97] Even at relatively innovative agencies, fidelity to established modes of operation can serve to limit experimental overreach.[98]

VI. CONCLUSION

Agency procedural innovation is a regular feature of today's bureaucracy. And it takes place largely without judicial supervision. Even for those who fear too much agency autonomy, however, there is little cause for alarm. Notwithstanding the considerable white space left by *Vermont Yankee* and other legal constraints, agencies' discretion to adopt new procedures is still circumscribed. Because of the non-legal constraints identified in the previous section, we believe that we are unlikely to see procedural experimentation descending into arbitrariness.

The interdependence of substance and procedure cuts in favor of recognizing broad agency procedural discretion. How an administrative system is designed will have a significant impact on whether, how, and in what way a substantive statutory mandate is fulfilled.[99] To restrict an agency's procedural discretion may often have the effect of restricting its substantive authority. This may be especially so in light of the resource constraints under which agencies must operate. Procedural design requires the exercise of expert judgment regarding how best to optimize available resources and prioritize competing statutory commands.[100] Agencies are better situated than courts to make these judgments, in part because they have more complete, systemic information about the industry or subject they regulate and the way that various administrative approaches may work (or not) in that context.[101] This comparative institutional advantage provides further justification for courts, Congress, and

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dispel some of the legal uncertainty agencies face in e-Rulemaking, where the Conference finds that a practice is not only legally defensible, but also sound policy, it recommends that agencies use it.").

97. P'SHIP FOR PUB. SERV., 2014 BEST PLACES TO WORK IN THE FEDERAL GOVERNMENT ANALYSIS 2 (2015) (performing an assessment of innovation at federal government agencies and concluding that six agencies had a "disproportionately high impact" on the overall innovation score). In this survey, less than a third of federal employees who were looking for ways to be more innovative felt that creativity and innovation were rewarded. *Id.*

98. *See* John. D. Dilulio, Jr., *Principled Agents: The Cultural Bases of Behavior in a Federal Government Bureaucracy*, 4 J. PUB. ADMIN. RESEARCH & THEORY 277 (1994) (arguing for the relevance of agency culture in shaping bureaucratic action).

99. *See* Vermeule, *supra* note 1, at 1921.

100. *Id.*

101. *Id.* at 1922.

the executive to embrace a background norm of agency procedural discretion.[102]

On the other hand, embracing agency procedural discretion may further contribute to the proliferation of a wide diversity of administrative procedures throughout the administrative state. While experimentation can lead to discovery of more effective, efficient governmental tools, it may also undermine uniformity and transparency, making it harder for courts, Congress, and the public to understand how the administrative state as a whole operates. Although an agency may have superior information about its own activities and regulatory space, it lacks a broader systemic perspective across agencies. This downside to broad agency procedural discretion, however, can be addressed through means other than increased judicial enforcement of uniformity. Attention to cross-agency procedural issues may help to break down the silo effect and enable agencies to consider broader systemic considerations as they design their own procedures. This may be accomplished through scholarly attention to systemic procedural issues, as well as through executive action to facilitate cross-pollination of procedural best practices across agencies.[103] These activities can help to reduce unnecessary and harmful variation. They can also offer efficiencies by identifying procedures that have been successfully tested by one agency and can be used equally successfully by other agencies faced with similar issues.

One major downside of the dearth of judicial oversight in this area, however, is that procedural innovation has received limited scholarly attention. We think that is a mistake. Research that offers a systemic, cross-agency perspective will enable the sharing of valuable procedural innovations across agencies. By identifying procedures that have been successfully tested by one agency, and can be used equally successfully by other agencies faced with similar issues, scholarship can help agencies capitalize on the promise of procedural innovation while promoting a degree of uniformity across agency practice that enables greater public understanding of and access to federal administration.

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102. Judicial deference to agency decisionmaking is often justified on the basis of the "expertise-based comparative institutional advantage" of agencies. *See* Richard J. Pierce, Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515, 517 (2011).

103. The Administrative Conference of the United States is an institution well-designed and positioned to fulfill this role. *See* 5 U.S.C. §§ 591–96 (2012).