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## Textualism and the Administrative Procedure Act

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# TEXTUALISM AND THE ADMINISTRATIVE PROCEDURE ACT

*Kristin E. Hickman\** & *Mark R. Thomson\*\**

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## INTRODUCTION

Justice Kagan famously said that “we’re all textualists now.”<sup>1</sup> She exaggerated, of course, but not by much. As she and others have recognized, the Supreme Court today approaches statutory interpretation differently than it did forty or fifty years ago, with substantially more attention paid to statutory text and much less to legislative history or judicial assessments of best policy outcomes.<sup>2</sup> What does the widespread acceptance of textualist methods for statutory interpretation mean for judicial review of the Administrative Procedure Act (APA)?<sup>3</sup>

Textualism and the APA—or at least contemporary understandings of its meaning<sup>4</sup>—seem headed for conflict. Adopted in 1946,<sup>5</sup> long before the rise of the new textualism,<sup>6</sup> the APA is what Larry Solum would describe as textually “underdetermined.”<sup>7</sup> Like the U.S. Constitution, the APA includes some requirements that are quite

1 Harvard Law School, *The 2015 Scalia Lecture | A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE, at 08:28 (Nov. 25, 2015), <https://www.youtube.com/watch?v=dpEtszFT0Tg> [<https://perma.cc/HZ95-8AWG>].

2 See, e.g., *id.* at 08:12 (“Justice Scalia has taught everybody how to do statutory interpretation differently.”); Diarmuid F. O’Scannlain, Remarks, “*We Are All Textualists Now*”: *The Legacy of Justice Antonin Scalia*, 91 ST. JOHN’S L. REV. 303, 304-306 (2017) (describing the judiciary’s transition from purposivist or policy-oriented to textualist interpretation); Jesse D.H. Snyder, *How Textualism Has Changed the Conversation in the Supreme Court*, 48 U. BALT. L. REV. 413, 415 (2019) (“Examining the disparity in methodology at different time periods, the Court—albeit composed differently—no longer appears to be doing the same thing.”).

3 5 U.S.C. §§ 551-59, 701-06 (2018). Unless indicated otherwise, all references in this Essay to statutory provisions are to the APA.

4 A growing body of scholarship approaches APA interpretation using originalist methods, with some scholars arguing that some current administrative law doctrines are inconsistent with the original meaning of the statute. See, e.g., Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 884-95 (2020); Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807, 847-55 (2018); see also Christopher J. Walker & Scott T. MacGuidwin, *Interpreting the Administrative Procedure Act: A Literature Review*, 98 NOTRE DAME L. REV. 1963, 1982-89 (2023) (recognizing the literature on APA originalism). Our discussion of APA doctrine in this Essay focuses on interpretations of the APA that currently govern judicial decisionmaking, irrespective of whether those interpretations coincide with original understandings of the APA’s meaning.

5 Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946).

6 See, e.g., William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990) (situating the rise of the new textualism with the 1980s and particularly, although not exclusively, Justice Scalia’s ascendancy to the Supreme Court in 1986).

7 Lawrence B. Solum, *Disaggregating Chevron*, 82 OHIO ST. L.J. 249, 256-64 (2021) [hereinafter Solum, *Disaggregating*] (describing types of underdeterminacy in the context of statutory interpretation and construction); Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473-75 (1987) (distinguishing legal underdeterminacy from legal determinacy and indeterminacy).

detailed,<sup>8</sup> but many others that rely on terms that are undefined by the statute and sufficiently fuzzy that they seem more conceptual than instructional.<sup>9</sup> Whereas other statutes task agencies with elaborating meaning and resolving details through rules and regulations,<sup>10</sup> the APA is a statute of general applicability, with courts bearing the primary responsibility for its interpretation.<sup>11</sup> Many of the key cases that interpret the APA and provide the foundation for contemporary agency rulemaking were decided by judges who neither claimed to be textualists nor relied on textualist reasoning.<sup>12</sup> They developed standards and requirements to effectuate the APA's terms that, at first blush, may seem hard to square with the APA's text.<sup>13</sup> Others have suggested as much.<sup>14</sup>

Just as the APA is underdetermined, textualism is not monolithic. Judges and scholars who consider themselves textualists coalesce generally around certain definitional premises. One is a certain skepticism, though not necessarily an absolute rejection, of legislative

8 See, e.g., 5 U.S.C. § 556(c) (listing eleven different powers of agency officials presiding over hearings).

9 See, e.g., *id.* § 706(2)(A) (instructing courts to set aside agency actions found to be “arbitrary” or “capricious”).

10 See Kristin E. Hickman, Foreword, *Nondelegation as Constitutional Symbolism*, 89 GEO. WASH. L. REV. 1079, 1096–1118 (2021) (documenting different types of delegations of agency rulemaking power contained in contemporary statutes).

11 *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 138 n.9 (1997) (denying deference to agency's interpretation of the APA because “[t]he APA is not a statute that the [agency] is charged with administering”); HARRY T. EDWARDS & LINDA A. ELLIOTT, *FEDERAL STANDARDS OF REVIEW: REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS* 247 (3d ed. 2018) (“An agency's interpretation of ‘generic statutes that apply to dozens of agencies [such as the APA and FOIA], and for which no agency can claim any particular expertise,’ will be accorded no deference and reviewed *de novo*.” (alteration in original) (quoting *Collins v. Nat'l Transp. Safety Bd.*, 351 F.3d 1246, 1252 (D.C. Cir. 2003))).

12 See, e.g., *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240 (2d Cir. 1977); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973).

13 See Christopher J. Walker, *The Lost World of the Administrative Procedure Act: A Literature Review*, 28 GEO. MASON L. REV. 733, 735 (2021) (observing that the APA's text “bears little resemblance to modern regulatory practice” because the courts have “graft[ed] onto the APA myriad administrative common law doctrines”).

14 See, e.g., Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 882–900 (2007); Richard J. Pierce, Jr., *Waiting for Vermont Yankee III, IV, and V? A Response to Beermann and Lawson*, 75 GEO. WASH. L. REV. 902, 905–07 (2007); see also *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 246–47 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part) (contending the *Portland Cement* data disclosure requirement is at odds with the text of § 553).

history as tool of statutory interpretation.<sup>15</sup> Another holds that judges must enforce the text of clearly written statutes, even if the text seems contrary to statutory goals or claims regarding the enacting legislature's intentions.<sup>16</sup> Statutes are the product of compromises among legislators with competing preferences and goals, and departing from otherwise clear statutory text in favor of broader statutory goals risks upsetting those compromises.<sup>17</sup> Beyond those few areas of broad agreement, however, self-identified textualists diverge frequently, and often quite adamantly. The textualist label represents a range of views rather than a single, unified approach to statutory interpretation.<sup>18</sup> For that matter, depending on how they are written, different statutes may demand—explicitly or implicitly—different textualist approaches.<sup>19</sup> As Tara Leigh Grove has suggested, it matters “which textualism” courts apply.<sup>20</sup>

In recent years, the Supreme Court occasionally has applied a more limited approach to textualist reasoning<sup>21</sup> that, if applied to the APA, could expand the perceived gulf between textualism and existing administrative law doctrine. Our purpose with this Essay is to explore the implications of this trend for APA interpretation, particularly as it might apply to agency rulemaking. We do not purport to address critics of textualism as an interpretive methodology; we speak primarily to those who are persuaded of textualism's merits. We also will not try to resolve all the many disagreements about textualism's variations or the APA's meaning. For that matter, we do not address whether a more limited textualist approach to statutory interpretation might be

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15 See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 369–89 (2012). But see John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 731–37 (1997) (defending certain uses of legislative history in textualist interpretation).

16 See, e.g., SCALIA & GARNER, *supra* note 15, at 57–58; John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2410–17 (2003) [hereinafter Manning, *Absurdity Doctrine*]; Eskridge, *supra* note 6, at 623. But see John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 87 (2006) [hereinafter Manning, *What Divides*] (acknowledging that purposivists also “start—and most of the time end—their inquiry with the semantic meaning of the text”).

17 See, e.g., Manning, *What Divides*, *supra* note 16, at 92; Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 112–13 (2010); Frank H. Easterbrook, *Foreword* to SCALIA & GARNER, *supra* note 15, at xxi, xxii.

18 See, e.g., Tara Leigh Grove, Comment, *Which Textualism?*, 134 HARV. L. REV. 265, 286–88 (2020) (documenting disagreements among textualists over interpretive tools like absurdity doctrine, substantive canons, and clear statement rules).

19 See, e.g., Easterbrook, *supra* note 17, at xxi (“Some texts proclaim that they should be read ‘strictly’ (i.e., narrowly); others demand a broad or general application.”).

20 Grove, *supra* note 18, at 286–88.

21 In the administrative law context, a prime example is *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020), discussed in Section II.C. *infra*.

appropriate for statutes other than the APA. But for judges and scholars inclined to apply textualist reasoning to questions of APA interpretation, our goal is to refute claims that adhering to textualism requires rejecting many or even most longstanding interpretations of APA rulemaking requirements. More normatively, we are concerned that a version of textualism that reduces the APA's provisions, one by one, to their narrowest reading risks eroding APA rulemaking procedures to a degree that cannot possibly be reconciled with congressional intent.<sup>22</sup>

In Part I, we briefly elaborate the arguable conceptual challenges of APA interpretation using textualist methodology. In Part II, we examine a few key instances in which the Supreme Court has contemplated the APA's text. Taking the Court's trend toward a stricter or more limited textualism seriously, in Part III, we highlight several longstanding interpretations of the APA that could be in peril under that version of textualism. We also offer alternative textualist constructions of the APA's provisions that support those same longstanding interpretations. Given space limitations, we focus principally on provisions associated with agency rulemaking and judicial review thereof, leaving other APA interpretive questions for another day. Based on that analysis, we offer concluding thoughts that a more flexible textualism is more appropriate when interpreting the APA.

## I. THE CHALLENGES POSED

Appreciating the difficulties posed by the intersection of textualism and the APA requires at least some independent understanding of at least some of the nuances of each. We take them one at a time, beginning with the APA. We then reflect briefly on the further complication posed by *stare decisis* as textualism and the APA intersect.

### A. *The APA's Textual Underdeterminacy*

In contemplating the exercise of statutory interpretation, Larry Solum categorizes types of statutory text as “determina[nt],” “indetermina[nt],” and “underdetermina[nt].”<sup>23</sup> Text that is

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22 See *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (“Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used . . . .”) (quoting *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.)).

23 Solum, *Disaggregating supra* note 7, at 261.

determinant creates readily discernible bright line rules governing primary behavior.<sup>24</sup> Indeterminant text offers virtually no guidance whatsoever—i.e., “anything goes.”<sup>25</sup> Underdeterminant text provides “some but not all of the legal content of the doctrines associated with a statute and determines some but not all of the applications of the statute to the set of all possible cases.”<sup>26</sup> According to Solum, “[t]rue statutory determinacy and indeterminacy are rare or nonexistent. All or almost all statutes are underdeterminate with respect to at least some cases and issues.”<sup>27</sup> But “underdeterminacy is a matter of degrees” that range from almost indeterminant to almost determinant.<sup>28</sup> In turn, underdeterminacy in statutory text can be categorized by various types. For example, some statutory text is ambiguous, meaning that it “has more than one possible meaning.”<sup>29</sup> Other statutory text is “open textured,” such that it has paradigmatic examples that are obviously covered but also “penumbral cases to which the statute may or may not apply”; the word “reasonable” is an example of a commonly-used, open-textured term.<sup>30</sup> Sometimes statutory underdeterminacy cannot be resolved “because the legislature did not make a choice” but rather merely “kick[ed] the can down the road.”<sup>31</sup> More often, however, statutory underdeterminacy can be resolved by considering text in context.<sup>32</sup>

Some of the APA’s terms and requirements are clear on their face. For example, a notice of proposed rulemaking must include the time and the place of public proceedings,<sup>33</sup> and a final rule must be published or served “not less than 30 days before its effective date” unless one of several listed statutory exceptions applies.<sup>34</sup> Many more of the APA’s terms are open-textured, some classically so. For example, § 553 authorizes agencies to skip public notice and comment procedures when they find those procedures to be “impracticable, unnecessary, or contrary to the public interest.”<sup>35</sup> The 1947 Attorney General’s Manual describing the APA’s provisions offers a few

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24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.* at 262.

30 *Id.*

31 *Id.* at 263.

32 *Id.*

33 5 U.S.C. § 553(b)(1) (2018).

34 *Id.* § 553(d).

35 *Id.* § 553(b)(3)(B).

examples of when those conditions might exist, but courts are left mostly to define those terms for themselves.<sup>36</sup> Similarly—and critically for understanding how courts have interpreted the procedural requirements for notice-and-comment rulemaking—§ 706(2)(A) calls upon reviewing courts to set aside agency actions they find to be “arbitrary” or “capricious.”<sup>37</sup> These words are virtually meaningless when considered facially and in isolation. Taken in context, they communicate some amount of legal content. Regulatory choices made by flipping a coin obviously would be arbitrary and capricious. But real-world examples are rarely quite so stark. Thus, courts are left to decide for themselves not only whether but why a typical agency rule is or is not arbitrary and capricious.

That the APA is underdetermined does not prevent courts from using textualist methods to clarify its meaning. The U.S. Constitution similarly combines occasional precision with often lofty, open-textured, and undefined words and phrases, but that has not precluded textualist analyses of its provisions.<sup>38</sup> As a professor, Antonin Scalia once observed that the APA functions as “a sort of superstatute, or subconstitution, in the field of administrative process.”<sup>39</sup> Like the U.S. Constitution, subconstitutions are unlikely to go into granular detail about the various scenarios to which they might apply. Like the U.S. Constitution, the APA is best understood as providing “a basic framework”<sup>40</sup> to govern “a vast swath of governmental decisionmaking,”<sup>41</sup> and employing capacious language to do so. As with the U.S. Constitution, however, discerning the APA’s meaning through textualist analysis requires more than simply reading individual terms without considering how those terms fit into the

36 See U.S. DEP’T OF JUST., ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30–31 (1947) [hereinafter ATTORNEY GENERAL’S MANUAL].

37 5 U.S.C. § 706(2)(A).

38 See, e.g., Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 28–33 (2000) (describing a “spacious but not unbounded version of constitutional textualism” before applying it to address constitutional uncertainties); John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1705–08 (2004) (describing how textualists approach ambiguous, vague, or open-textured constitutional text).

39 Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 363.

40 *Id.*; see also Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039 (1997) (describing the APA as “a framework statute, not a complete code. Its central provisions are rather spare, and a number of important questions are not covered at all”).

41 Bernick, *supra* note 4, at 808.



statutory system of administrative governance and judicial review that the APA established.<sup>42</sup>

Because the APA applies to so much important government conduct, it was inevitable that its underdetermined parts would at some point need to be given more concrete, particularized meanings. In some instances, the Supreme Court's own resolution of one question regarding APA interpretation, and the reactions of agencies and lower courts thereto, have brought new questions to the fore.<sup>43</sup> Ideally, Congress would have resolved more of the questions about the APA's meaning that have cropped up over the years. On specific occasions, Congress has departed from APA requirements and prescribed different or more detailed procedures for individual agencies.<sup>44</sup> Yet, Congress has not amended the APA's core procedural requirements meaningfully since adopting the statute in 1946, even as time has passed and agency practices have changed.<sup>45</sup> Consequently, courts have been left to construe the APA for themselves, and in that manner guide agency behavior.

Rulemaking under the APA raises a host of issues in this way. Section 553 sets out just four requirements for informal rulemaking with only a minimal amount of detail and, again, some pretty flexible terminology. Section 553(b) requires an agency to publish in the Federal Register a "notice of proposed rule making" that includes "a statement of the time, place, and nature of public rule making proceedings," a "reference to the legal authority under which the rule is proposed," and "either the terms or substance of the proposed rule or a description of the subjects and issues involved."<sup>46</sup> Section 553(c) provides that the agency must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments."<sup>47</sup> Section 553(c) also specifies that any final rules the agency promulgates must include "a concise general statement of

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42 Cf. Amar, *supra* note 38, at 31–32 (rejecting a "narrow view of textualism" that reads constitutional provisions "intratextually" and "braid[ing] arguments from text, history, and structure into an interpretive rope whose strands mutually reinforce").

43 See, e.g., *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224 (1973); see also *infra* Sections II.A.–B. (describing *Florida East Coast Railway* and its aftermath).

44 See, e.g., Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85, 100–01 (2018) (identifying the Magnuson-Moss Act and the Clean Air Act as two statutes that require "hybrid" rulemaking procedures in excess of those required by the APA); MICHAEL ASIMOW, ADMIN. CONF. OF THE U.S., FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT (2019) (documenting procedural variance explicitly or implicitly adopted by Congress for agency adjudications).

45 See Walker, *supra* note 13, at 734 (noting the "lack of significant legislative reform" of the APA).

46 5 U.S.C. § 553(b) (2018).

47 *Id.* § 553(c).

their basis and purpose.”<sup>48</sup> Lastly, § 553(d) requires agencies to publish final rules at least thirty days before they become effective.<sup>49</sup>

Section 553 adds that these procedural requirements do not apply to certain types of rules. According to § 553(a), rules implicating “a military or foreign affairs function of the United States”<sup>50</sup> and “matter[s] relating to agency management or personnel or to public property, loans, grants, benefits, or contracts”<sup>51</sup> are entirely exempt. Section 553(b) similarly exempts “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice”<sup>52</sup> as well as rules for which “the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest,”<sup>53</sup> although procedural rules are subject to the thirty-day publication requirement of § 553(d).

Even as they sketch out a basic set of procedural requirements and exceptions therefrom, these provisions leave many questions unanswered. For example, how detailed or thorough must a notice of proposed rulemaking be in articulating the terms or substance or describing the subjects and issues involved? Likewise with the concise general statement of basis and purpose that is to accompany final regulations? What exactly is an interpretative rule? How do we know when notice and comment are impracticable, unnecessary, or contrary to the public interest? Correspondingly, § 706(2) (A) calls upon courts to set aside agency actions found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>54</sup> What exactly does it mean for a rule adopted through the procedures of § 553 to be arbitrary or capricious?

### B. *Shades of Textualist Reasoning*

As a method of statutory interpretation, textualism encompasses a range of approaches. Under the textualist umbrella, some judges and scholars seem to follow a relatively limited approach that often focuses on individual words, phrases, or provisions in isolation from the larger statutory scheme of which they are a part. Legal scholars have criticized this approach using a variety of monikers, such that embracing any of them carries the risk of bringing along someone else’s baggage. Richard Pierce has described a “hypertextualism” that

48 *Id.*

49 *Id.* § 553(d).

50 *Id.* § 553(a) (1).

51 *Id.* § 553(a) (2).

52 *Id.* § 553(b) (A).

53 *Id.* § 553(b) (B).

54 *Id.* § 706(2) (A).

involves “finding linguistic precision where it does not exist, and relying exclusively on the abstract meaning of a particular word or phrase even when other evidence suggests strongly that Congress intended a result inconsistent with that usage.”<sup>55</sup> Cass Sunstein has observed a certain “literalism” that “stresses the need to interpret statutory terms in accordance with their ordinary, plain meaning to speakers of English.”<sup>56</sup>

Context matters in textualist reasoning. Sunstein has distinguished the literalism he described from a “more contextual” textualism that “emphasizes the need to understand statutory terms taken in their original context, in accordance with then-contemporary understandings of their meaning.”<sup>57</sup> Bill Eskridge likewise has described textualism as more contextual than literal. “The new textualism considers as context dictionaries and grammar books, the whole statute, analogous provisions in other statutes, canons of construction, and the common sense God gave us.”<sup>58</sup> But again, disagreements abound over which context to consider. John Manning has emphasized that the focal point of textualism is not a disregard for context, but rather a preference for a context that is semantic-oriented—i.e., based on “evidence about the way a reasonable person conversant with relevant social and linguistic practices would have used the words” contained in a statute—rather than policy-oriented.<sup>59</sup> Tara Leigh Grove has argued in favor of a “formalistic textualism” that “emphasizes semantic context” and limits interpreters to “only a ‘closed set’ of normative canons,” rather than a more “flexible textualism” that “permits and . . . invite[s] considerable judicial discretion.”<sup>60</sup> Although he generally eschewed legislative history, Justice Scalia’s approach to textualism was also nuanced, first “find[ing] the ordinary meaning of the language in its textual context,” and then “using established canons of construction [to] ask whether there is any clear indication that some permissible meaning other than the ordinary one applies,”<sup>61</sup> except “when the whole context dictates a different conclusion.”<sup>62</sup>

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55 Richard J. Pierce, Jr., *The Supreme Court’s New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 752 (1995).

56 Cass R. Sunstein, *Is Tobacco a Drug? Administrative Agencies as Common Law Courts*, 47 DUKE L.J. 1013, 1017 (1998).

57 Sunstein, *supra* note 56, at 1017.

58 Eskridge, *supra* note 6, at 669.

59 Manning, *What Divides*, *supra* note 16, at 91.

60 Grove, *supra* note 18, at 269 (quoting Manning, *Absurdity Doctrine*, *supra* note 16, at 2474).

61 *Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting).

62 *Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass’n*, 499 U.S. 117, 129 (1991) (suggesting that a linguistic canon like *eiusdem generis* does not apply “when the whole

### C. Which Context?

As discussed in Part III of this Essay, careful consideration of the APA's text in its semantic context can reduce some of supposed conflicts between textualist methods and longstanding interpretations of the APA. Getting to that end requires acknowledging the potential breadth of the words used and considering the APA's provisions collectively as establishing a process for agency rulemaking and judicial review thereof, rather than evaluating particular words, phrases, or requirements independently of one another or otherwise insisting upon a minimalist construction of them.

Still, we must acknowledge that the text of the APA alone often does not yield clear answers. Some of the APA's terms carry no specialized meaning, yet dictionaries are of little help. For example, any ordinary dictionary offers definitions of terms used in §§ 553 and 706, like concise, general, impracticable, unnecessary, arbitrary, and capricious. Yet dictionary definitions of such open-textured terms are not especially helpful in understanding the APA's requirements and limitations for agency rulemaking. The answers to questions regarding the APA's meaning lie elsewhere. Context is required.

Whereas a more limited approach to textualism seems inclined to avoid extrinsic sources of statutory meaning, most modern textualists eschew such constraints for the common-sense reason that, in many instances, "extratextual context is relevant to ascertaining meaning."<sup>63</sup> As John Manning has written, "[i]n their search for context, textualist judges routinely draw interpretive insights from sources outside the statutory text."<sup>64</sup> Many textualists recognize, for example, that statutory terms may be terms of art, and that the details of the relevant art may supply a crucial piece of a statute's interpretive context.<sup>65</sup> As Justice Frankfurter once observed, "if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it."<sup>66</sup>

The APA is replete with legal terms of art, which is unsurprising given its origins. As other scholars have documented, the APA was

context dictates a different conclusion"); accord SCALIA & GARNER, *supra* note 15, at 70; see also Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 546 (1992) (making this point about Justice Scalia's textualism and contending that "[t]o deride this approach as mindless literalism would clearly be a mistake").

63 Mark Greenberg, *Legal Interpretation and Natural Law*, 89 FORDHAM L. REV. 109, 111 (2020).

64 Manning, *supra* note 15, at 702 (footnote omitted).

65 See, e.g., SCALIA & GARNER, *supra* note 15, at 73.

66 Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947).

adopted to both codify and reform then-existing administrative practices and jurisprudence.<sup>67</sup> The legislative drafting process was preceded by a period of extensive study of agency practices and procedures by the Attorney General's Committee on Administrative Procedure.<sup>68</sup> Lawyer-investigators like Kenneth Culp Davis, working for the Committee under the supervision of Walter Gellhorn, interviewed agency officials and practitioners, attended agency proceedings, reviewed administrative and court records, and produced twenty-seven separate monographs documenting the practices of individual agencies and the administration of several important statutes.<sup>69</sup> Drawing from those monographs, the Committee additionally produced a long Final Report that included draft legislation as well as the comments of individual Committee members.<sup>70</sup> Along with pre-APA case law, the monographs and the Committee's Final Report offer critical insights into how the APA's drafters and others knowledgeable about the field "defined, understood, and evaluated" agency practices and administrative law concepts incorporated into the APA's provisions.<sup>71</sup> At a minimum, the history and documentation of the APA's intellectual foundations and its drafting suggest that the APA as a whole ought not to be construed without considering the origins of its many terms of art.

At the same time, looking purely to the origins of the APA's terms only uncovers part of the picture. Much has changed in administrative governance since the APA was adopted in 1946. Some of those changes are the product of statutory and judicial developments outside the APA. For example, from 1946 through at least the end of the twentieth century, the nondelegation doctrine ceased to be a meaningful limitation on Congress's ability to delegate policymaking discretion to agencies.<sup>72</sup> Statutes got longer and more complicated, and delegations to agencies grew in number, breadth, and variety.<sup>73</sup> As

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67 See, e.g., Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377, 400–02 (2021) (documenting the history of the APA's development); Comment, *The Federal Administrative Procedure Act: Codification or Reform?*, 56 YALE L.J. 670, 672–73 (1947); see also McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L., ECON., & ORG. 180, 181–83 (1999) (observing that, "[a]ccording to most legal scholarship, the purpose of the APA was to codify and rationalize existing practice[s]" while arguing that Congress also "refashioned" some practices to accomplish political goals).

68 See, e.g., Bremer, *supra* note 67, at 397–402 (documenting the history of the APA's development).

69 See *id.*

70 See *id.*

71 *Id.*

72 See, e.g., Hickman, *supra* note 10, at 1090–94 (summarizing the evolution of the Supreme Court's nondelegation jurisprudence).

73 See *id.* at 1097–98 (documenting the trend).

discussed in Part II below, the Supreme Court issued key decisions interpreting the APA that fundamentally altered both agency practices and judicial review thereof. Given the APA's underdeterminacy, coupled with the courts' role in effectuating the APA's provisions, there can be little doubt that contemporary administrative law doctrine does not precisely reflect the same understandings of statutory terms as in 1946. In other words, pursuing a textualist interpretation of the APA often will not be the same project as pursuing an originalist one.<sup>74</sup>

#### D. *A Statute of Standards Versus Rules*

One of the problems with applying a more limited approach to textualism when interpreting the APA is the potential for turning what is essentially a statute of standards into a statute of rules. To our eyes, viewing the APA's rulemaking provisions as merely adopting a limited collection of relatively undemanding or even bright-line rules mistakes the essence of the APA's text. The APA is a statute of standards, not a statute of rules.

Some of the APA's standards are obvious. For example, the admonition of § 706(2)(A) that courts should set aside agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"<sup>75</sup> is widely recognized as a standard of review.<sup>76</sup> By their very nature, standards of review are attitudinal, suggesting merely how closely the federal courts should scrutinize agency decisionmaking as well as which materials they might consider in doing so.<sup>77</sup> As such, the APA's arbitrary and capricious standard does not have a single, fixed interpretation but rather reflects a collection of different reasons for rejecting agency action.<sup>78</sup>

Other of the APA's standards are less obvious. For example, in theory, the requirement in in § 553(c) that final rules include a "concise and general statement of their basis and purpose" could be read minimally as requiring merely a few sentences summarizing which

74 See Walker & MacGuidwin, *supra* note 4, at 1982–83 (distinguishing APA textualism from APA originalism).

75 5 U.S.C. § 706(2)(A) (2018).

76 See, e.g., EDWARDS & ELLIOTT, *supra* note 11, at 136 (identifying the arbitrary and capricious standard as a standard of review).

77 See, e.g., *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951); EDWARDS & ELLIOTT, *supra* note 11, at 136; 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW* § 1.01 (4th ed. 2010).

78 See EDWARDS & ELLIOTT, *supra* note 11, at 143 (observing that APA § 706(2)(A) "is a catch-all, picking up administrative misconduct not covered by the other more specific paragraphs" (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of the Fed. Rsr. Sys.*, 745 F.2d 677, 683 (D.C. Cir. 1984))).

statutory provisions the rules are implementing.<sup>79</sup> But as we discuss in Part III, the words that in § 553(c) employs are both more capacious and more relative than such a constrained reading. When put together with other language in §§ 553(c) and 706(2)(A), those same words clearly accommodate or even anticipate and require a broader standard. Also, the fuzzy terminology in § 553(b) describing when an agency may claim the good cause exception from notice-and-comment rulemaking procedures—i.e., “impracticable, unnecessary, or contrary to the public interest”<sup>80</sup>—necessarily contemplates a variety of different circumstances for each term. For that matter, it is entirely plausible, if not outright likely, that those terms do not represent mutually exclusive categories in a discrete list but rather representative examples of a broader range of justifications.<sup>81</sup>

Reading the APA’s terms through the lens of a stricter textualism would minimize the scope of the statute’s many standards by claiming specificity where it does not exist and constraining open-ended language to its narrowest possible construction. One wonders if the unspoken goal of such an approach is merely to minimize the procedural burdens on agency action, rather than impose judicial restraint by reducing judicial discretion. Nicholas Bagley has argued against agency procedures imposed by judicial interpretation of the APA “hamstringing the dedicated public servants charged with ensuring everything from safe infant formula to clean drinking water to a fair day’s pay for a fair day’s work.”<sup>82</sup> Meanwhile, Kati Kovacs describes textualism as “long the province of conservatives” and suggests “beat[ing] conservatives at their own game” by using textualist arguments to “undercut longstanding common law rules” regarding APA requirements and cut back procedural obstacles to administrative flexibility.<sup>83</sup>

Textualism is founded at least partly on an ethos of judicial restraint. Dismantling long-held understandings of the APA’s

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79 See 5 U.S.C. § 553(c).

80 *Id.* § 553(b)(3)(B).

81 See, e.g., JARED P. COLE, CONG. RSCH. SERV., R44356, THE GOOD CAUSE EXCEPTION TO NOTICE AND COMMENT RULEMAKING: JUDICIAL REVIEW OF AGENCY ACTION 4–5 (2016); Juan J. Lavilla, *The Good Cause Exemption to Notice and Comment Rulemaking Requirements Under the Administrative Procedure Act*, 3 ADMIN. L.J. 317, 350–51 (1989).

82 Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 346–47 (2019) (quoting Sam Berger, *Trump’s Regulatory Accountability Act Is a License to Kill*, CTR. FOR AM. PROGRESS (May 9, 2017), <https://www.americanprogress.org/article/trumps-regulatory-accountability-act-license-kill/> [<https://perma.cc/8726-BPP4>]).

83 Kathryn E. Kovacs, *Progressive Textualism in Administrative Law*, 118 MICH. L. REV. ONLINE 134, 135, 138, 143 (2019) (describing a project of progressive textualism in constitutional interpretation and advocating the same for administrative law and APA interpretation).

procedural requirements for the sake of adherence to a limited approach to textualist reasoning, without more, does not seem especially restrained.

### *E. The Role of Stare Decisis*

Which brings us to contemplate the role of stare decisis as textualism and the APA intersect. Another troubling aspect of the seeming turn to a more limited textualism for APA interpretation is its potential to undermine longstanding, black-letter administrative law doctrines, creating uncertainty and upheaval in the rulemaking process far beyond that of the status quo. Many or even most of the doctrines at stake have been in place for several decades and have achieved a certain uniformity of acceptance and application among the various federal circuit courts of appeals.<sup>84</sup> One might anticipate that stare decisis would stand in the way of overturning them. Along with Bryan Garner, Justice Scalia contended that stare decisis “is an exception to textualism . . . born not of logic but of necessity.”<sup>85</sup> Moreover, the APA is a statute, and the Supreme Court historically has given greater weight to stare decisis in statutory interpretation.<sup>86</sup>

In the context of APA interpretation, however, two factors complicate the relationship between textualism and stare decisis. First, many or even most of the doctrines at issue are the product of decisions by the circuit courts, not the Supreme Court. Accordingly, a Supreme Court that disagrees with those doctrines, whether for textualist reasons or otherwise, simply is not bound by those circuit court decisions.<sup>87</sup> In her scholarly work, then-Professor Amy Coney Barrett argued that not even the circuit courts should feel bound by circuit precedent.<sup>88</sup>

Second, although most of the Justices continue to embrace stare decisis to some degree as a general matter of judicial policy, that support seems to be waning for some. Justice Kavanaugh has described stare decisis in statutory cases as “comparatively strict” but exempts

84 See *infra* Part III (analyzing examples).

85 SCALIA & GARNER, *supra* note 15, at 411–14.

86 See, e.g., Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 319 (2005) (“The Supreme Court has accorded heightened deference to its statutory precedent for roughly a century.”); Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 730–33 (1999) (documenting the history of statutory stare decisis).

87 See RANDY J. KOZEL, *SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT* 20 (2017).

88 Barrett, *supra* note 86, at 330 (concluding that, as regards statutory stare decisis, “an inferior court ought to pause before simply adopting the Supreme Court’s practice as its own”).



“precedents applying common-law statutes,”<sup>89</sup> which arguably includes the APA.<sup>90</sup> Justice Thomas has proclaimed it the Court’s duty to set aside even longstanding interpretations of statutes if the Court believes them to be “demonstrably erroneous.”<sup>91</sup>

All of that said, as discussed in Part II below, contemporary interpretations of the APA are what they are largely because of two of the Court’s own decisions, one of which fundamentally altered original understandings of the APA’s meaning and effectively discarded a substantial portion of its text for purposes of agency rulemaking. None of the Justices has shown any interest in overturning either of those decisions.

## II. TEXTUALISM AND THE APA AT THE SUPREME COURT

Although the APA is an enormously important statute for contemporary administrative governance, and although the statute leaves open many interpretive questions for judicial resolution, the Supreme Court historically has exhibited little interest in addressing APA procedural questions. Instead, the Court has left most of the interpretive questions left open by the APA’s relatively sparse text to the federal circuit courts of appeals. Nevertheless, the Court has had a profound impact on APA interpretation through pivotal decisions in *United States v. Florida East Coast Railway*<sup>92</sup> in 1973 and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*<sup>93</sup> in 1978. Indeed, many of the current tensions between textualism and longstanding judicial interpretations of the APA can be traced to these two cases, both of which were decided before the ascendance of contemporary textualism.

As described below, the Supreme Court’s decision in *Florida East Coast Railway* set a new trajectory by sharply curtailing the applicability of the APA’s formal rulemaking procedures. With an arguably careless and short-sighted decision in that case, the Court left a procedural void that the circuit courts, required to grapple more frequently with

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89 *Ramos v. Louisiana*, 140 S. Ct. 1390, 1413 & n.2 (2020) (Kavanaugh, J., concurring in part); *cf. Kisor v. Wilkie*, 139 S. Ct. 2400, 2444 (2019) (Gorsuch, J., concurring in the judgment).

90 *See, e.g., Kathryn E. Kovacs, Constraining the Statutory President*, 98 WASH. U. L. REV. 63, 121 (2020) (acknowledging but disagreeing with the Supreme Court’s tendency to “treat[] the APA like a common law statute”); Emily S. Bremer, *The Undemocratic Roots of Agency Rulemaking*, 108 CORNELL L. REV. 69, 81–83 (2022) (describing rulemaking requirements as the product of administrative common law).

91 *Gamble v. United States*, 139 S. Ct. 1960, 1987–88 (2019) (Thomas, J., concurring).

92 410 U.S. 224 (1973).

93 435 U.S. 519 (1978); 1 KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 5.8 (6th ed. 2019).

challenges to agency rulemaking, perhaps unsurprisingly then sought to fill. With an early nod to textualism, the Court's *Vermont Yankee* decision curtailed the circuit courts' creativity in that regard by setting the APA's text as the outer boundary for judicial innovation regarding rulemaking procedure—a hard line the Court has emphasized repeatedly since. Yet, the void left by *Florida East Coast Railway* remained. The result has been a series of judicially developed doctrines governing agency rulemaking that take advantage of the APA's capacious text.<sup>94</sup> These doctrines are not *explicitly articulated* by the statute's text, giving rise to complaints that they are extra-textual.<sup>95</sup> But they are *readily traceable* to the APA's open-ended and interconnected terms.

In a recent case, *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*,<sup>96</sup> the Court applied a limited textualist approach in evaluating an agency's use of interim-final rulemaking. The result may have upended settled understandings of how notice-and-comment rulemaking procedures generally are supposed to work, without indicating clearly that the Court appreciated it was doing so. As a result, the Court's analysis raised as many questions as it answered, but arguably set the stage for further decisions about APA procedural requirements down the road.

#### A. Florida East Coast Railway *Eliminates Formal Rulemaking*

As written, the APA contemplates that agency rulemaking may be formal or informal and prescribes procedures for both.<sup>97</sup> Both formal and informal rulemaking procedures anticipate public notice of proposed rules and an opportunity for interested parties to participate in the rulemaking process.<sup>98</sup> In the case of formal rulemaking, §§ 556 and 557 provides for an oral evidentiary hearing including live witness testimony subject to cross-examination, the submission of written evidence as well, and a transcript of the proceedings, all to generate a record supporting the rule.<sup>99</sup> For informal rulemaking, § 553 requires only the opportunity for written submissions along with the notice of proposed rulemaking and the concise general statement of the rule's basis and purpose.<sup>100</sup>

94 See, e.g., *infra* Part III (offering examples).

95 See generally, e.g., Beermann & Lawson, *supra* note 14; John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113 (1998).

96 140 S. Cl. 2367 (2020).

97 See 5 U.S.C. §§ 553, 556, 557 (2018).

98 See 1 HICKMAN & PIERCE, *supra* note 93, § 5.2.

99 See 5 U.S.C. § 556.

100 See *id.* § 553.

When the APA was enacted, agencies did not adopt many legally binding regulations. When they did, many agencies perceived that they were required to use formal rulemaking procedures contained in §§ 556 and 557.<sup>101</sup> For example, as a result of the Supreme Court's decision in *Interstate Commerce Commission v. Louisville & Nashville Railroad Co.*,<sup>102</sup> which interpreted the Hepburn Act's "full hearing" requirement as including oral hearings with cross-examination of witnesses, the Interstate Commerce Commission (ICC) was of the view that its ratemaking proceedings required formal rulemaking procedures under §§ 556 and 557.<sup>103</sup>

Contemporaneous explanations of the APA reflected this understanding, offering ICC ratemaking as an example of when formal rulemaking procedures must be used.<sup>104</sup> Henry Friendly subsequently noted that "[s]cores of later federal statutes adopted the 'hearing' language of the Hepburn Act, sometimes retaining the adjective 'full,' sometimes not."<sup>105</sup> As early as 1951, Kenneth Culp Davis was of the view that not all agency rulemakings adopting legislative rules required formal rulemaking.<sup>106</sup> Robert Hamilton later suggested that the "great bulk" of legislative rulemaking was informal.<sup>107</sup> At a minimum, however, the applicability of formal rulemaking procedures was thought to be much broader before than after the Supreme Court's 1973 decision in *United States v. Florida East Coast Railway*.<sup>108</sup>

Responding to a perceived shortage in the availability of railroad cars used to transport freight, the ICC had pursued rulemaking with an eye toward requiring railroads to pay a per diem charge for any unloaded freight car that was in a railroad's possession but belonged to another railroad.<sup>109</sup> The relevant statute authorized the ICC to issue

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101 See Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237, 247 (2014) (attributing the "[d]eath" of formal rulemaking to *Florida East Coast Railway*).

102 227 U.S. 88 (1913).

103 See *id.* at 91, 93 (holding prior to the APA's adoption that the "full hearing" requirement in the Hepburn Act required that parties participating in a ratemaking "must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal").

104 See ATTORNEY GENERAL'S MANUAL, *supra* note 36, at 33–34.

105 Henry J. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1272 (1975); see also Robert W. Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CALIF. L. REV. 1276, 1278–1313 (1972) (documenting statutes that clearly or arguably required formal rulemaking procedures).

106 See KENNETH CULP DAVIS, ADMINISTRATIVE LAW § 55 (1951).

107 Hamilton, *supra* note 105, at 1276.

108 410 U.S. 224 (1973).

109 See *id.* at 230–33.

rules and regulations along such lines “after hearing.”<sup>110</sup> After two notices of proposed rulemaking and two oral evidentiary hearings, the ICC issued a third notice with proposed regulatory text but declined to conduct a third oral hearing.<sup>111</sup> The railroads argued that the statutory reference to a hearing required the ICC to use formal rulemaking procedures, including an oral evidentiary hearing, after issuing the third notice.<sup>112</sup>

Section 556(d) allows agencies to forego oral hearings “when a party will not be prejudiced thereby.”<sup>113</sup> Much of the litigation in *Florida East Coast Railway* had focused on whether the ICC’s refusal to hold that third oral hearing actually prejudiced the railroad.<sup>114</sup> The Supreme Court’s decision followed a different line of reasoning in concluding that no additional oral hearings were required. Looking instead to § 553, and building on a stray bit of reasoning from *United States v. Allegheny-Ludlum Steel Corp.* the prior term,<sup>115</sup> the Court noted that § 553 specified that §§ 556 and 557 apply only “[w]hen rules are required by statute to be made *on the record* after opportunity for an agency hearing.”<sup>116</sup> Based on that language, the Court in *Florida East Coast Railway* held that a statute’s mere reference to a “hearing” in conjunction with an authorization to adopt rules and regulations does not require the use of formal rulemaking procedures.<sup>117</sup> Instead, the Court made clear that a statute must be more specific, by either referring expressly to a hearing “on the record” or using analogous language that clearly and unequivocally requires an oral evidentiary

110 Act of May 29, 1917, Pub. L. No. 65-19, 40 Stat. 101.

111 See 31 Fed. Reg. 9240 (July 6, 1966); 32 Fed. Reg. 20,987 (Dec. 29, 1967); 337 I.C.C. 183, 213 (Dec. 12, 1969).

112 See *Fla. E. Coast Ry.*, 410 U.S. at 234; Motion to Affirm of Florida East Coast Railway Co. at 2–3, *United States v. Fla. E. Coast Ry. Co.*, No. 70-279, 410 U.S. 224 (1973); Brief of Appellee, Seaboard Coast Line RR Co. at 10, *United States v. Fla. E. Coast Ry. Co.*, No. 70-279, 410 U.S. 224 (1973).

113 5 U.S.C. § 556(d) (2018).

114 See, e.g., *Fla. E. Coast Ry. Co. v. United States*, 322 F. Supp. 725, 728 (M.D. Fla. 1971) (noting that “[t]he parties agree that what is at issue is the question of what degree of procedural due process accompanies [an ICC] rulemaking proceeding” and identifying § 556(d) as “[t]he pertinent section to the problem at hand”); see also Brief of Appellee, *supra* note 112, at 6 (observing the ICC’s assumption throughout most of the litigation that §§ 556 and 557 applied); Emily S. Bremer, *Blame (or Thank) the Administrative Procedure Act for Florida East Coast Railway*, 97 CHI.-KENT L. REV. 79, 91 (2022) (documenting this history).

115 406 U.S. 742, 756–57 (1972); see Kent Barnett, *How the Supreme Court Derailed Formal Rulemaking*, 85 GEO. WASH. L. REV. ARGUENDO 1, 2–3 (2017) (describing the Court’s interpretation of the APA in *Allegheny-Ludlum* as “*sua sponte*” and “perfunctory, rel[ying] upon unpersuasive authorities, and fail[ing] to account for formal rulemaking’s consistent historical understandings and use”).

116 5 U.S.C. § 553(c) (emphasis added); see also *Fla. E. Coast Ry.*, 410 U.S. at 236–38.

117 See *Fla. E. Coast Ry.*, 410 U.S. at 237–38.

hearing.<sup>118</sup> Statutes using such specific language are vanishingly rare, meaning that many agencies that historically had used formal rulemaking procedures ceased to do so.<sup>119</sup>

Notwithstanding the Supreme Court's literal reading of § 553 in *Florida East Coast Railway*, no one has suggested that the Supreme Court's decision was motivated by a determined adherence to textualist methodology. Kent Barnett has documented a story of profound disinterest on the part of most of the Justices, along with the distraction and diminished capacity of Justice Douglas as the author of the dissenting opinion in *Florida East Coast Railway* and the only Justice with substantial administrative law knowledge on the Court at that time.<sup>120</sup> At the time the case was decided, courts and scholars championed the benefits of rulemaking over adjudication as the superior vehicle for agency policymaking.<sup>121</sup> Formal rulemaking was derided as too procedurally burdensome.<sup>122</sup> Nevertheless, many of today's debates about textualism and APA rulemaking procedures have their origin in the Supreme Court's decision in *Florida East Coast Railway*.

### B. Vermont Yankee as a Textual Outer Boundary

In the aftermath of *Florida East Coast Railway*, agencies turned to informal rulemaking with only written submissions under § 553.<sup>123</sup> The incidence of agency rulemaking grew dramatically, aided not only by the relative ease of informal rulemaking but also the decline of the nondelegation doctrine and the enactment of new statutes expanding agency rulemaking authority.<sup>124</sup> Yet, judicial support in certain cases

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118 See *id.* at 238, 241.

119 See Nielson, *supra* note 101, at 253 ("Nevertheless, it is fair to say that formal rulemaking is mostly dead; it no longer is a foundational part of administrative law."); Beermann & Lawson, *supra* note 14, at 856–57 (describing opportunities for formal rulemaking under §§ 556 and 557 as "rare to nonexistent").

120 Barnett, *supra* note 115, at 12–19.

121 See, e.g., *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 680–84 (D.C. Cir. 1973) (documenting a judicial trend favoring agency rulemaking and reasons therefor).

122 See, e.g., Nielson, *supra* note 101, at 248–51; Robert W. Hamilton, *Rulemaking on a Record by the Food and Drug Administration*, 50 TEX. L. REV. 1132, 1157 (1972).

123 See Nathaniel L. Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721, 734 (1975) (noting that "agencies have begun to explore the outer limits of the *Florida East Coast* doctrine to ascertain the dispensability of trial-type or 'on the record' hearings in ratemaking as well as other proceedings"); Nielson, *supra* note 101, at 238 ("When agencies promulgate regulations today, they almost always do so through informal rulemaking.").

124 See 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 1.6 (3d ed. 1994).

for at least some of the procedures of §§ 556 and 557, like oral hearings with cross-examination of witnesses, had not diminished.<sup>125</sup> Additionally, judicial review of informal rulemakings lacking the detailed administrative records generated by formal rulemaking procedures proved challenging.<sup>126</sup> Thus, on the heels of *Florida East Coast Railway*, the D.C. Circuit in particular engaged in an internal debate over whether and to what extent it could impose procedural requirements on agency rulemaking beyond those explicitly listed in § 553.<sup>127</sup>

The Supreme Court's decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*<sup>128</sup> addressed this very question, and in doing so drew a textual outer boundary for APA interpretation in the rulemaking context (and otherwise). In *Vermont Yankee*, the Nuclear Regulatory Commission (NRC) had adopted a rule addressing several issues associated with the environmental impact of nuclear power plants and their storage and disposition of radioactive waste.<sup>129</sup> In addition to the informal rulemaking procedures of § 553, which its organic statute also required, the NRC additionally and voluntarily held an oral hearing. The hearing was presided over by three of the NRC's members, who were authorized by the NRC to question witnesses. But the NRC did not allow discovery or cross-examination of witnesses by other hearing participants.<sup>130</sup>

The D.C. Circuit declared that the rule the NRC ultimately adopted was arbitrary and capricious, claiming that the NRC lacked adequate support for its rule in the record that it had developed.<sup>131</sup> The court criticized the agency's failure to create "a genuine dialogue" on "the problems involved in waste disposal, including past mistakes, and a forthright assessment of the uncertainties and differences in expert opinion."<sup>132</sup> The court claimed it was not "intrud[ing] on the agency's province by dictating to it which, if any, [procedural] devices

125 See Nielson, *supra* note 101, at 254–55 (documenting examples).

126 See Nathanson, *supra* note 123, at 746–68 (analyzing the difficulty and judicial reactions thereto); cf. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419–20 (1971) (observing the same problem with informal adjudication).

127 See Gillian E. Metzger, *The Story of Vermont Yankee: A Cautionary Tale of Judicial Review and Nuclear Waste*, in *ADMINISTRATIVE LAW STORIES* 126, 146–48 (Peter L. Strauss ed., 2006) (documenting the disagreement between Chief Judge David Bazelon and Judge Harold Leventhal).

128 435 U.S. 519 (1978); 1 HICKMAN & PIERCE, *supra* note 93, § 5.8.

129 See *Vi. Yankee*, 435 U.S. at 527–30; Metzger, *supra* note 127, at 128–33 (describing the subject of the rulemaking at length).

130 See Metzger, *supra* note 127, at 134 (describing the oral hearing procedures followed by the NRC in the *Vermont Yankee* case).

131 *Nat. Res. Def. Council, Inc. v. NRC*, 547 F.2d 633, 655 (D.C. Cir. 1976).

132 See *id.* at 653.

it must adopt to flesh out the record.”<sup>133</sup> Yet, the court commanded the agency to “in one way or another generate a record in which the factual issues are fully developed.”<sup>134</sup> Although far from clear, one common inference from the D.C. Circuit’s reasoning was that some amount of cross-examination of witnesses was expected.<sup>135</sup> While the case was pending, the NRC issued an interim-final rule and indicated that, before finalizing the rule, it would hold oral hearings at which participants could propose questions for the hearing officers to ask the designated witnesses.<sup>136</sup>

In reviewing the case, the Supreme Court concluded that, although “the matter is not entirely free from doubt,” the D.C. Circuit had invalidated the NRC’s rule because of alleged procedural deficiencies.<sup>137</sup> With that understanding, the Supreme Court held that the APA establishes “the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures.”<sup>138</sup> The Court acknowledged that due process or an agency’s departure from its own longstanding procedural rules might in “extremely rare” cases demand that judges impose additional procedures.<sup>139</sup> In general, however, the Court maintained:

Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them. This is not to say necessarily 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.<sup>140</sup>

Since deciding *Vermont Yankee*, the Supreme Court has recognized and endorsed this proposition on other occasions. For example, in applying its requirement that agencies contemporaneously justify their choices—an interpretation adopted in the Court’s *State Farm*<sup>141</sup>

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133 *Id.* at 653.

134 *Id.* at 654.

135 See I HICKMAN & PIERCE, *supra* note 93, § 5.8.

136 Metzger, *supra* note 127, at 153 (citing Uranium Fuel Cycle Impacts from Spent Fuel Reprocessing and Radioactive Waste Management, 42 Fed. Reg. 13,803, 13,805–06 (Mar. 14, 1977)).

137 *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 541 (1978).

138 *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.*, 410 U.S. 224 (1973)).

139 *Id.*

140 *Id.*

141 *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

decision—the Court has invoked *Vermont Yankee* more than once, including in the *State Farm* case itself, for the proposition that courts cannot require agencies to discuss “every alternative device and thought conceivable by the mind of man . . . regardless of how uncommon or unknown that alternative may have been.”<sup>142</sup>

The Court also applied *Vermont Yankee* to define the scope of the interpretative rule exception from § 553(b) rulemaking procedures in *Perez v. Mortgage Bankers Association*.<sup>143</sup> That case concerned a series of interpretations of the Fair Labor Standards Act and regulations thereunder issued by the Administrator of the Department of Labor’s Wage and Hour Division.<sup>144</sup> In particular, an Administrator’s interpretation adopted in 2010 reached a different conclusion from and withdrew an opinion letter issued in 2006, subjecting the respondents to wage and hour requirements from which they had previously been deemed exempt.<sup>145</sup> The D.C. Circuit invalidated the Administrator’s interpretation for lack of notice and comment in light of the *Paralyzed Veterans* doctrine<sup>146</sup> which required agencies to use § 553 notice-and-comment rulemaking to amend or revoke an existing interpretative rule.<sup>147</sup>

Writing for a majority of the Supreme Court, Justice Sotomayor noted that the text of the APA expressly exempts interpretative rules like the Administrator’s interpretation from notice-and-comment rulemaking procedures.<sup>148</sup> She cited *Vermont Yankee* as holding that courts may not impose procedural requirements beyond those commanded by the APA.<sup>149</sup> She then concluded that the *Paralyzed Veterans* doctrine, by requiring notice-and-comment rulemaking for an interpretative rule, “creates just such a judge-made procedural right.”<sup>150</sup>

142 *Id.* at 51 (quoting *Vt. Yankee*, 435 U.S. at 551); see also Dep’t of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1915 (2020) (quoting the same language).

143 575 U.S. 92 (2015).

144 *Id.* at 97–99.

145 *Id.* at 98.

146 *Mortg. Bankers Ass’n v. Harris*, 720 F.3d 966, 967–68 (D.C. Cir. 2013) (citing *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997)), *rev’d*, *Perez*, 575 U.S. 92.

147 *Perez*, 575 U.S. at 95 (describing the *Paralyzed Veterans* doctrine as requiring agencies to “use the APA’s notice-and-comment procedures when it wishes to issue a new interpretation of a regulation that deviates significantly from one the agency has previously adopted”).

148 *Id.* at 100.

149 *Id.* at 102 (quoting *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978)).

150 *Id.*



While these decisions make clear that “courts lack common-law power to require agencies to use procedures not mandated by statutes or the Constitution,”<sup>151</sup> they say very little about the specific procedures that the APA does mandate. Nor have they offered much guidance about how courts more generally should approach reading the APA’s text to evaluate the meaning of particular procedural requirements. In short, the black-letter rule underlying cases like *Vermont Yankee* and *Mortgage Bankers* merely instructs courts to stay within the text without acknowledging the APA’s underdeterminacy. Consequently, although *Vermont Yankee* and its progeny establish a textual line that courts may not cross, the Supreme Court also left the lower courts with a fair amount of latitude in construing the APA’s text.

### C. Little Sisters of the Poor and Interim-Final Rulemaking

The Supreme Court’s most recent APA case could be read a little differently. In the ordinary course, agencies engaging in informal rulemaking begin that statutory process by issuing a notice of proposed rulemaking and requesting comments from the interested public.<sup>152</sup> After considering the comments received, the agency issues final regulations accompanied by a preamble—i.e., the statutory concise general statement.<sup>153</sup> The text of § 553(b) and (c), taken together, plainly anticipate this sequence of events by specifying that the agency must, “[a]fter notice,” offer the interested public “an opportunity to participate in the rule making” and that the agency may issue final rules “[a]fter consideration of the relevant matter presented” through that public participation process.<sup>154</sup> Although the text of § 553 does not say so explicitly, the import is obvious: as a default proposition, legally binding legislative rules should be adopted only after notice and opportunity for public participation, not before, and for good reasons.

As the courts have observed repeatedly, the goals of notice-and-comment rulemaking procedures are “to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies” and to assure “that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions.”<sup>155</sup> One need not resort to cherry-picking

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151 Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 397 (2015).

152 5 U.S.C. § 553(b)–(c) (2018).

153 *Id.* § 553(c).

154 *Id.* (emphasis added).

155 *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987) (citations omitted) (first quoting *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980); and then quoting *Guardian Fed. Sav. & Loan Ass’n v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 662 (D.C.

quotes from legislative history to reach this conclusion. These goals are evident from the text of the statute itself. Why else require notice, public participation, and agency consideration of public feedback?

Section 553(b) contains an important exception from these requirements in cases of good cause. When an agency can validly claim that notice and comment are “impracticable, unnecessary, or contrary to the public interest,” the agency can issue legally binding regulations without those procedures.<sup>156</sup> The APA on its face does not define these terms or even indicate whether they identify separate categories or collectively represent a broader conception of what constitutes good cause.<sup>157</sup> Regardless, the statute requires an agency finding good cause for forgoing notice and comment procedures to “incorporate[] the finding and a brief statement of reasons therefor in the rules issued,”<sup>158</sup> thus ensuring a certain transparency on the part of the agency and an opportunity for courts to evaluate the validity of the agency’s reasoning.<sup>159</sup>

The Supreme Court’s discussion of these provisions in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*<sup>160</sup> raised more questions than it answered. *Little Sisters* concerned longstanding and controversial policy disagreements over the Affordable Care Act, insurance coverage for contraceptives, and religious freedom that overshadowed the procedural aspects of the case.<sup>161</sup> As a secondary matter, however, the Court considered the procedural validity of regulations implementing the Trump administration’s policies

Cir. 1978)); *see also* Chrysler Corp. v. Brown, 441 U.S. 281, 316 (1979) (observing that the goal of notice-and-comment rulemaking is to satisfy “notions of fairness and informed administrative decisionmaking”); Iowa League of Cities v. EPA, 711 F.3d 844, 871 (8th Cir. 2013) (emphasizing goals of transparency and fairness); White v. Shalala, 7 F.3d 296, 303 (2d Cir. 1993) (quoting the same language as *American Hospital Association*); *cf.* United States v. Mead Corp., 533 U.S. 218, 230 (2001) (associating *Chevron* deference with “a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force”).

156 5 U.S.C. § 553(b)(3)(B) (2018).

157 *See supra* note 80 and accompanying text (making this point).

158 5 U.S.C. § 553(b)(3)(B).

159 *See, e.g.*, United States v. Johnson, 632 F.3d 912, 927–29 (5th Cir. 2011) (evaluating an agency’s claim of good cause); Mack Trucks, Inc. v. EPA, 682 F.3d 87, 89 (D.C. Cir. 2012) (same); *Jifry v. FAA*, 370 F.3d 1174, 1179–80 (D.C. Cir. 2004) (same); *Haw. Helicopter Operators Ass’n v. FAA*, 51 F.3d 212, 214 (9th Cir. 1995) (same).

160 140 S. Ct. 2367 (2020).

161 *See generally, e.g.*, Tanner J. Bean & Robin Fretwell Wilson, *The Administrative State as a New Front in the Culture War: Little Sisters of the Poor v. Pennsylvania*, 2020 CATO SUP. CT. REV. 229 (describing the case in these terms); Meghan Downey, *Health Care Coverage, Contraception, and the Court*, REGUL. REV. (Oct. 13, 2020), <https://www.theregreview.org/2020/10/13/downey-health-care-coverage-contraception-court/> [https://perma.cc/25CN-U2HW] (same).

regarding contraceptive coverage.<sup>162</sup> With a strikingly narrow and limited analysis of the APA's text, the Court arguably upended decades of jurisprudence and foundational principles of administrative law.

The *Little Sisters* case concerned a common agency practice known as interim-final rulemaking that, in a sense, alters the order of the rulemaking steps as contemplated by § 553(b) and (c).<sup>163</sup> Even where good cause exists for forgoing notice and comment, agencies often see value in pursuing public participation. It has become common for agencies, when they invoke the good cause exception, to issue the regulations in question as interim-final rules—a label that conveys the legal bindingness of the rules being issued but also signals that the rules in question are temporary pending additional procedures.<sup>164</sup> Either in the preamble to the interim-final rules themselves or in a separate document labeled as a notice of proposed rulemaking, the agency will request comments from the interested public on the content of the interim-final rules. The agency will subsequently replace the interim-final rules with truly final ones that may or may not be identical and will address the comments received in the preamble accompanying the final, replacement rules.<sup>165</sup>

The Administrative Conference of the United States has encouraged interim-final rulemaking as a practice of good governance when an agency finds itself with good cause for forgoing notice and comment before issuing legally binding regulations.<sup>166</sup> But how should the courts perceive the eventual final regulations if the agency's good cause claim is later found to be inadequate or invalid? Some courts have said such a finding does not matter, that an agency's use of postpromulgation notice and comment cures or renders moot whatever procedural flaws the earlier, interim-final rules possessed.<sup>167</sup> Other courts have been less sanguine, expressing concern that allowing agencies to rely on postpromulgation notice and comment to resolve the procedural failings of their interim-final rules will merely encourage agencies to flout the requirements of § 553, knowing that they can rapidly clean up the record and obtain judicial forgiveness

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162 *Little Sisters*, 140 S. Ct. at 2384–86.

163 *See id.* at 2384.

164 *See* Administrative Conference of the United States Recommendation 95-4, Procedures for Noncontroversial and Expedited Rulemaking, 60 Fed. Reg. 43,108, 43,111 (Aug. 18, 1995).

165 *Id.* at 43,111–12 (describing interim-final rulemaking as an agency practice).

166 *See id.*

167 *See, e.g.,* *Salman Ranch, Ltd. v. Comm'r*, 647 F.3d 929, 940 (10th Cir. 2011) (“While the . . . temporary regulations were issued without notice and comment, ‘[n]ow that the regulations have issued in final form [after postpromulgation notice and comment], these arguments are moot.’” (first alteration in original) (quoting *Grapevine Imps., Ltd. v. United States*, 636 F.3d 1368, 1380 (Fed. Cir. 2011))).

should the rules in question be challenged in court.<sup>168</sup> Still other courts have pursued certain middle-path options.<sup>169</sup> One such option has been the “open mind standard,” which calls upon courts to evaluate whether agencies have demonstrated flexibility and consideration of public feedback in pursuing postpromulgation notice and comment, and lets agencies off the hook for a flawed good cause claim if the court is satisfied in this regard.<sup>170</sup> At least some courts, in applying the open mind standard, have anchored it to the flush language at the end of § 706, which calls upon reviewing courts to take “due account . . . of the rule of prejudicial error” in evaluating agencies’ compliance with APA requirements.<sup>171</sup> But not all courts applying the open mind standard have been so fastidious in linking it to the APA’s text.

When good cause for forgoing notice and comment exists, the use of postpromulgation procedures can be a salutary practice. Where good cause is lacking, however, postpromulgation procedures are often a poor substitute for the prepromulgation notice-and-comment process specified in the APA. Although the final rules themselves have gone through a form of notice and opportunity to submit comments, the fact remains that agencies in such cases have provided notice and opportunity for public participation only *after* rather than *before* the agency adopts legally binding regulations. As a practical matter, it is well understood that, the further that agencies go down the road of the rulemaking process, the more committed they are to the

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168 See, e.g., *Burks v. United States*, 633 F.3d 347, 360 n.9 (5th Cir. 2011) (“That the government allowed for notice and comment after the final Regulations were enacted is not an acceptable substitute for pre-promulgation notice and comment.” (citing *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214–15 (5th Cir. 1979))); *Maryland v. EPA*, 530 F.2d 215, 222 (4th Cir. 1975) (“We emphasize again . . . that, in light of the ‘drastic impact’ which compliance with regulations such as this will have, adherence to applicable statutory provisions is necessary.” (quoting *Appalachian Power Co. v. EPA*, 477 F.2d 495, 503 (4th Cir. 1973))), *vacated sub nom.*, *EPA v. Brown*, 431 U.S. 99 (1977); *Wagner Elec. Corp. v. Volpe*, 466 F.2d 1013, 1020 (3d Cir. 1972) (“Section 4(b) of the [APA] requires notice *before* rulemaking, not after. The right of interested persons to petition for the issuance, amendment or repeal of a rule, granted in Section 4(e) of that Act, is neither a substitute for nor an alternative to compliance with the mandatory notice requirements of Section 4(b).”).

169 See, e.g., *United States v. Johnson*, 632 F.3d 912, 931–33 (5th Cir. 2011) (holding that lack of prepromulgation notice and comment amounted to harmless error due to a variety of facts about the development of the interim-final and final rules at issue in that case).

170 See *Advocs. for Highway & Auto Safety v. Fed. Highway Admin.*, 28 F.3d 1288, 1292 (D.C. Cir. 1994) (explaining the open mind standard).

171 See, e.g., *United States v. Reynolds*, 710 F.3d 498, 514, 518–20 (3d Cir. 2013) (quoting 5 U.S.C. § 706 (2018)) (reviewing for prejudicial error by considering whether agency kept an open mind).

regulations they have drafted, and the less likely they are to make changes in response to comments received.<sup>172</sup> Consequently, the assumption and concern is that parties who might otherwise be interested in commenting will see a request for postpromulgation comments as insincere, designed to placate potential reviewing courts, so those parties will be discouraged from participating.<sup>173</sup> Lest anyone think interim-final rulemaking is an infrequent occurrence, a 2012 GAO study documented that roughly fourteen percent of the 568 major agency rules adopted over an eight-year period were issued with only postpromulgation notice and comment procedures.<sup>174</sup>

In the *Little Sisters* case, after several years of rulemaking and litigation over Affordable Care Act contraceptive coverage, the responsible agencies adopted expanded conscience waivers using legally binding interim-final rules and asserting good cause for forgoing notice-and-comment rulemaking.<sup>175</sup> The agencies asked for comments in conjunction with the interim-final rules—in this instance, in the preamble to the interim-final rules themselves rather than in a separate notice of proposed rulemaking.<sup>176</sup> And the agencies ostensibly took those comments into account when replacing the interim-final rules with final ones, although the final rules did not make many changes.<sup>177</sup> The Third Circuit subsequently held that the

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172 See Kristin E. Hickman & Mark Thomson, *Open Minds and Harmless Errors: Judicial Review of Postpromulgation Notice and Comment*, 101 CORNELL L. REV. 261, 287 (2016) (making this argument).

173 *Id.* at 296–97.

174 U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-21, FEDERAL RULEMAKING: AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS 43 tbl.6 (2012), <http://www.gao.gov/assets/660/651052.pdf> [<https://perma.cc/RVU9-87D5>]. According to the study, 123 of the 568 major rules studied were issued without prepromulgation notice and comment. *Id.* at 5, 8. Agencies requested public comments after promulgation for 77 of those 123 major rules (or 14% of the 568 major rules studied) and followed up with new final rules for 51 of those 77 major rules (or 9% of the 568 major rules studied). *Id.* at 24–26.

175 See Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792, 47,792, 47,813–14 (Oct. 13, 2017) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,838, 47,850, 47,856 (Oct. 13, 2017) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147).

176 Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. at 47,814; Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. at 47,838.

177 See Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,536, 57,542–45 (Nov. 15, 2018) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care

agencies' grounds for claiming good cause were lacking, and thus that the interim-final rules were procedurally invalid.<sup>178</sup> The agencies maintained that their final rules satisfied APA procedural requirements because the public had received notice and an opportunity to comment in adopting the final rules.<sup>179</sup> According to the agencies, the fact that notice and the opportunity for public participation came after rather than before the public was bound to follow the rules was irrelevant.<sup>180</sup>

The agencies justified their action in ways that were more particularized to the case at bar. First, the agencies claimed that the Affordable Care Act specifically authorized the use of interim-final rules—which it did, unlike most statutes.<sup>181</sup> Second, the agencies claimed good cause for forgoing prepromulgation notice and comment, which may or may not have satisfied APA requirements.<sup>182</sup> The Third Circuit did not think so. Applying the open mind standard, that court further rejected the final rule for the agencies' failure to make changes in response to postpromulgation comments received.<sup>183</sup> Justice Thomas's opinion for the Court in *Little Sisters* completely ignored the first of these arguments. Regarding the second, he declared in a footnote simply that addressing the agencies' good cause claim was unnecessary given the Court's conclusions regarding the procedural validity of interim-final rulemaking.<sup>184</sup>

Those conclusions swept broadly. Indeed, Justice Thomas's opinion for the Court comes quite close to a full-throated endorsement of interim-final rulemaking (i.e., binding rules first and last) as procedurally equivalent to the more standard notice-and-comment rulemaking process (i.e., notice only first and binding rules later). The opinion reduced the challengers' complaint to being about the *labels* of the interim-final rules rather than their *binding effect* or their *timing* relative to public participation.

Respondents point to the fact that the 2018 final rules were preceded by a document entitled "Interim Final Rules with Request for Comments," not

Act, 83 Fed. Reg. 57,592, 57,598–603 (Nov. 15, 2018) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147).

178 *Pennsylvania v. President U.S.*, 930 F.3d 543, 568–69 (3d Cir. 2019).

179 *Id.* at 568.

180 *Id.*

181 *See, e.g.*, Brief for the Petitioners at 38–41, *Trump v. Pennsylvania*, 140 S. Ct. 2367 (2020) (No. 19-454); 42 U.S.C. § 300gg-92 (2018) ("The Secretary may promulgate any interim final rules as the Secretary determines are appropriate to carry out this subchapter.").

182 *See Little Sisters*, 140 S. Ct. at 2386 n.14.; Brief for the Petitioners, *supra* note 180, at 41–42.

183 *See Pennsylvania*, 930 F.3d at 568–69.

184 *See Little Sisters*, 140 S. Ct. at 2386 n.14.

a document entitled “General Notice of Proposed Rulemaking.” They claim that since this was insufficient to satisfy § 553(b)’s requirement, the final rules were procedurally invalid. Respondents are incorrect. Formal labels aside, the rules contained all of the elements of a notice of proposed rulemaking as required by the APA.

The APA requires that the notice of proposed rulemaking contain “reference to the legal authority under which the rule is proposed” and “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” § 553(b) (2)–(3). The request for comments in the 2017 IFRs readily satisfies these requirements. That request detailed the Departments’ view that they had legal authority under the ACA to promulgate both exemptions, as well as authority under RFRA to promulgate the religious exemption. And respondents do not—and cannot—argue that the IFRs failed to air the relevant issues with sufficient detail for respondents to understand the Departments’ position. Thus, the APA notice requirements were satisfied.<sup>185</sup>

Turning to the agency’s alleged lack of open-mindedness regarding public comments received in response to the interim-final rules, the Court declared the open mind standard in conflict with the Court’s *Vermont Yankee* decision, saying that the agency had “satisfied the APA’s objective criteria” and that the courts could require no more.<sup>186</sup> In doing so, the Court more or less declared the use of interim-final rules *categorically* to be nonprejudicial so long as they are sufficiently thorough in their explanation of the agency’s thinking.

Even assuming that the APA requires an agency to publish a document entitled “notice of proposed rulemaking” when the agency moves from an IFR to a final rule, there was no “prejudicial error” here. § 706. We have previously noted that the rule of prejudicial error is treated as an “administrative law . . . harmless error rule.” Here, the Departments issued an IFR that explained its position in fulsome detail and “provide[d] the public with an opportunity to comment on whether [the] regulations . . . should be made permanent or subject to modification.”<sup>187</sup>

Read maximally, the opinion of the Court in *Little Sisters* suggests two things, more or less. First, so long as the agency at some point in the rulemaking process provides the information required by § 553(b) and includes language inviting public comments, the order in which the steps outlined in § 553(b) and (c) occur is unimportant. The opinion construes the notice requirements and temporal references in § 553(b) and (c) in a manner that is quite literal. The implication of the Court’s language is that, provided the agency checks the boxes of the information the APA expressly lists as required of a notice, minimally construed, then the notice is adequate. So long as the

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185 *Id.* at 2384–85 (citations omitted).

186 *Id.* at 2385–86.

187 *Id.* at 2385 (alterations in original) (emphasis added) (internal citations omitted).

agency invites and accepts comments, it matters not what the agency does with them. The presence or absence of good cause for disregarding the proper ordering of the steps in the first instance likewise is irrelevant. And, although it is true that the concept of open-mindedness is not mentioned anywhere in the APA's text, the Court offered no alternative explanation of its understanding prejudicial error in the context of agency rulemaking.

Second, and perhaps relatedly, the Court's opinion in *Little Sisters* suggested that the primary function of the APA's rulemaking procedures is facilitating communication *from* the agency *to* the public regarding what the agency is thinking, with only minimal regard for the importance of communication in the other direction. The Court seems at least implicitly to have embraced a vision of agency rulemaking procedures that focuses principally on notice *to* the public rather than collaboration and engagement *with* the public. Justifying its reasoning, the Court contended that "the object" of notice and comment "'is one of fair notice,' and respondents certainly had such notice here."<sup>188</sup> Interestingly, the Court made no reference whatsoever to the role of public *participation* in notice-and-comment rulemaking.

Certainly, an interpretation of § 553 that minimizes the significance of participation would lead to greater efficiency in agency rulemaking. As the lower courts have construed the APA over the past fifty years, notice-and-comment rulemaking has become procedurally cumbersome and time-consuming.<sup>189</sup> Agencies often have regarded the APA's procedural requirements as obstacles to accomplishing what they regard as worthy regulatory goals. But *efficient* is not necessarily the same thing as *effective*. Regardless, one question raised by the Supreme Court's strict-and-narrow approach to interim-final rulemaking is whether and to what extent the Court might extend similar reasoning to other longstanding doctrines of administrative law that, like the open mind standard, are not expressly mentioned by name in the APA's text.

Perhaps we ought to pause before ascribing quite so much consequence to the reasoning of the Court's opinion in *Little Sisters* regarding interim-final rulemaking. It is apparent from the opinions as well as the oral argument transcript that Justice Thomas and his colleagues were focused more on religious freedom aspects of the case, with the procedural question being something of an afterthought. This is not to suggest that lower courts are free to disregard the Court's words regarding interim-final rulemaking altogether. Rather, it is to

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188 *Id.* at 2385 (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007)) (internal citation omitted).

189 See David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 283 (2010).



acknowledge that the Court might not have considered fully the ramifications of its statements in *Little Sisters* and, consequently, might be inclined to cabin the scope of that reasoning in a future case presenting different facts.

Moreover, the rulemaking in *Little Sisters* was somewhat atypical in that both the case and the interim-final rules that prompted it were preceded by an extensive history of high-profile rulemaking and litigation over contraceptive coverage. Unlike in many other instances of interim-final rulemaking, the public had been afforded the opportunity to participate in rulemaking and otherwise engage the relevant agencies regarding conscience waivers on several occasions before the agencies issued the interim-final rules. As a result, it was clear that the agencies had the benefit of a full range of perspectives on the conscience waiver issue when making their choices and drafting regulatory text. In other words, the Court has plenty of room to distinguish the circumstances of a more conventional interim-final rule and to limit the reach of the *Little Sisters* decision in a future case. Uncabined, however, the Court's approach to interpreting the APA in the *Little Sisters* case raises significant concerns about how the Court might approach a number of other familiar, longstanding, and important APA interpretations.

### III. ADMINISTRATIVE LAW DOCTRINES AT RISK

Many of the key decisions that established the APA interpretations that govern contemporary rulemaking and judicial review thereof were decided in the 1970s and early 1980s, when most judges were not textualists and textualist reasoning was at best sporadically applied. Many of the principles and understandings of black-letter administrative law that have shaped administrative practice for roughly forty years may be in tension with textualism. Or maybe not.

#### A. *Notice and the Logical Outgrowth Test*

What makes a notice adequate? Since shortly after the Supreme Court decided *Florida East Coast Railway*, the federal circuit courts have applied a standard known as the logical outgrowth test to evaluate the adequacy of a notice.<sup>190</sup> The logical outgrowth test asks whether an agency's final rule was so different from its notice of proposed rulemaking that interested parties could not have anticipated the content of the final rule, and thus were denied the opportunity to

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<sup>190</sup> See, e.g., Phillip M. Kannan, *The Logical Outgrowth Doctrine in Rulemaking*, 48 ADMIN. L. REV. 213, 216–17 (1996) (tracing the logical outgrowth test to *South Terminal Corporation v. EPA*, 504 F.2d 646 (1st Cir. 1974)).

address that content in submitting comments regarding the proposal.<sup>191</sup>

Perhaps because courts typically speak of the logical outgrowth test as assessing the adequacy of a notice of proposed rulemaking, courts sometimes link the logical outgrowth test to § 553(b), which describes the elements that notices of proposed rulemaking must contain.<sup>192</sup> Section 553(b) calls for notices of proposed rulemaking to include three things: “(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.”<sup>193</sup>

The “logical outgrowth” term is not included anywhere in that text. Section 553 also offers no other explicit statements about just how closely a notice of proposed rulemaking must foreshadow the final regulations an agency adopts. Read literally and in isolation, the § 553(b) notice requirements seem rather sparse. Certainly, early notices were rather short in explaining what the rulemaking would address. For example, the notices of proposed rulemaking published in the rulemaking at issue in the *Florida East Coast Railway* case—three of them over a four-year period—*collectively* ran a mere three or so pages in the Federal Register, with only the last of them including actual regulatory text.<sup>194</sup> The notices of proposed rulemaking for the notorious Food and Drug Administration peanut butter rulemaking—and again, there were three of them—were even shorter, although in this instance all included the draft regulation.<sup>195</sup> That brevity in practice might seem incompatible with the logical outgrowth test.

191 See, e.g., *Mia-Dade Cnty. v. EPA*, 529 F.3d 1049, 1058–59 (11th Cir. 2008) (describing the logical outgrowth test and citing cases).

192 See, e.g., *Agape Church, Inc. v. FCC*, 738 F.3d 397, 411 (D.C. Cir. 2013); *Mia-Dade Cnty.*, 529 F.3d at 1058–59.

193 5 U.S.C. § 553(b)(1)–(3) (2018).

194 See Notice of Proposed Rulemaking, Incentive Per Diem Charges, 31 Fed. Reg. 9240 (July 6, 1966) (running approximately three-quarters of a page, with no proposed regulatory text); Notice of Proposed Rulemaking, Incentive Per Diem Charges for 1968, 32 Fed. Reg. 20,987 (Dec. 29, 1967) (running approximately one-half of a page, with no proposed regulatory text); Notice of Proposed Rulemaking, Incentive Per Diem Charges—1968, 34 Fed. Reg. 20,438 (Dec. 31, 1969) (running roughly one and one-half pages, including the text of the proposed regulations).

195 See Notice of Proposed Rulemaking, Nut Food Products; Definitions and Standards of Identity, 24 Fed. Reg. 5391 (July 2, 1959) (running approximately one-third of a page, including the proposed regulatory text); Notice of Proposed Rulemaking, Nut Products; Definitions and Standards of Identity, 26 Fed. Reg. 11,209 (Nov. 18, 1961) (running approximately one-half of a page, including the text of the proposed regulations); Notice of Proposed Rulemaking, Peanut Butter; Definitions and Standards of Identity, 29 Fed. Reg. 15,173 (Nov. 10, 1964) (running approximately one-half of a page, including the text of the

On the other hand, § 553(b) does not specify in either direction just how brief, or how extensive and detailed, a notice should be in articulating a proposed rule's terms, substance, subjects, or issues. In other words, brevity is neither explicit nor even necessarily assumed by the text of § 553(b). And § 553(b) does not exist in isolation. Notwithstanding that the logical outgrowth test speaks to the adequacy of a notice, courts and commentators have recognized the doctrine as driven less as much by the text of § 553(c) as it is by § 553(b).<sup>196</sup>

Section 553(c) requires that, “[a]fter notice,” agencies “give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments.”<sup>197</sup> Some courts and commentators speak of this requirement as giving the public an opportunity to submit comments only in response to proposed regulations,<sup>198</sup> but that description reflects a minimalist reading of the statute's text. To comment is to make observations or remarks expressing an opinion or attitude.<sup>199</sup> By comparison, to participate—the statutory term—is to take part, become involved, or share in the decision-making process, which suggests a greater degree of engagement between interested parties and agencies.<sup>200</sup> Courts describing the logical outgrowth test observe that interested parties

proposed regulations); *see also* Angie M. Boyce, “When Does It Stop Being Peanut Butter?: FDA Food Standards of Identity, Ruth Desmond, and the Shifting Politics of Consumer Activism, 1960s–1970s,” 57 *TECH. & CULTURE* 54, 62–73 (2016) (telling the story of the FDA's efforts for more than ten years to adopt a rule mandating the peanut content in peanut butter).

196 *See, e.g.*, *Council Tree Commc'ns, Inc. v. FCC*, 619 F.3d 235, 249 (3d Cir. 2010); *Env't Integrity Project v. EPA*, 425 F.3d 992, 996–98 (D.C. Cir. 2005); *cf.* Stephen F. Williams, “Hybrid Rulemaking” Under the Administrative Procedure Act: A Legal and Empirical Analysis, 42 *U. CHI. L. REV.* 401, 412 (1975) (acknowledging arguments that “in some circumstances the 553(b)(3) notice should set forth not only the proposed regulation but also a statement of its factual premises and methodology, sufficiently detailed to permit objectors to make a meaningful use of their section 553(c) ‘opportunity to participate’”).

197 5 U.S.C. § 553(c) (2018); *see also* *Mia-Dade Cnty.*, 529 F.3d at 1058–59 (specifically mentioning § 553(c) in conjunction with the logical outgrowth test).

198 *See, e.g.*, *Nat'l Black Media Coal. v. FCC*, 791 F.2d 1016, 1022 (2d Cir. 1986); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983); Richard B. Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 *HARV. L. REV.* 1805, 1812 (1978).

199 *Comment*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/comment> [<https://perma.cc/242L-HHMX>].

200 *Participate*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/participate> [<https://perma.cc/2GHK-4JA5>]; *Participate*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/participate> [<https://perma.cc/S6MV-Y2FY>]; *Participate*, DICTIONARY.COM, <https://www.dictionary.com/browse/participate> [<https://perma.cc/Y7VP-U9CR>].

cannot effectively take part in the rulemaking process if they are unaware of the agency's intentions.<sup>201</sup>

Moreover, prior to *Florida East Coast Railway*, agencies more commonly followed formal rulemaking procedures, meaning that § 553(b) and (c) would have been read in conjunction with §§ 556 and 557. As noted above, those provisions generally required oral hearings with witness testimony, cross-examination of witnesses, the submission of documentary evidence, and the creation of a written hearing transcript to construct a record that courts could review.<sup>202</sup> To the extent that the logical outgrowth test is an interpretation of § 553(c), that provision makes clear that its terms—including the opportunity to participate requirement—do not apply to formal rulemaking. The brevity of notice preambles prior to *Florida East Coast Railway* may be attributable in part to the anticipation and understanding that oral hearings would provide additional disclosure of the agency's deliberations regarding the rules' content, giving interested parties the opportunity to respond in real time, and the transcript would document that additional, if less formal, notice.

Gary Lawson and Jack Beermann have explained why, in a post-*Florida East Coast Railway* world, something like the logical outgrowth test is necessary for the public participation requirement of § 553(c) to have meaning.

For a notice requirement of any kind to make sense, there must be something to control the degree of difference between the proposed rule and the final rule. Otherwise, agencies could hide their true proposal from public scrutiny by proposing something completely unrelated to what they intended to promulgate as a final rule. In these circumstances, interested parties would not have the opportunity to participate in rulemaking proceedings because they would not know that their interests are at stake, and the agency might lose the value of potentially informative input.<sup>203</sup>

Of course, as Lawson and Beermann also have acknowledged, the logical outgrowth test might run afoul of the APA's text "if courts require too strict a connection between original proposals and final results."<sup>204</sup> Yet, a strong argument exists that, when read in context, a more modest version of the logical outgrowth doctrine is not only compatible with the third notice requirement in § 553(b) but essential

201 See, e.g., *Citizens Telecomms. Co. of Minn., LLC v. FCC*, 901 F.3d 991, 1005 (8th Cir. 2018); *Shell Oil Co. v. EPA*, 950 F.2d 741, 750–51 (D.C. Cir. 1991); *Am. Med. Ass'n v. United States*, 887 F.2d 760, 767–68 (7th Cir. 1989).

202 5 U.S.C. §§ 556–57 (2018).

203 Beermann & Lawson, *supra* note 14, at 895.

204 *Id.*

to effectuate the “opportunity to participate” phrasing of § 553(c).<sup>205</sup> This interpretation recognizes that allowing a person the chance to submit comments regarding a proposed rule that is totally unrelated to the one an agency plans to finalize is no different from denying that person of notice and the opportunity to participate in the rulemaking altogether.

### B. *Data Disclosure and the Portland Cement Doctrine*

Like the logical outgrowth rule, the *Portland Cement* doctrine purports to construe the notice and opportunity to participate requirements in § 553(b) and (c).<sup>206</sup> Under this doctrine, an agency must disclose the technical data or studies on which it relied in formulating proposed rules and, relatedly, must give interested parties sufficient time to comment meaningfully on those data or studies—i.e., by identifying them in the notice of proposed rulemaking.<sup>207</sup>

The *Portland Cement* doctrine has long been defended as a logical interpretation of the notice and comment requirements of § 553.<sup>208</sup> Under this theory, as with the logical outgrowth doctrine, the obvious import of the § 553(b) notice requirement is to facilitate the § 553(c) opportunity to participate by enabling interested members of the public to file meaningful comments criticizing (or supporting) the agency’s proposal. Again, the text as well as the sequence of the procedures mandated by § 553 makes this clear.

Analysis of the data on which an agency relied in drafting proposed regulations may reveal major problems in measurement, sampling, methodology, or statistical validity. Upon receiving and considering such criticism, the agency may be persuaded to modify its proposal. Interested parties cannot analyze and comment intelligently on data that is unavailable to them or that they do not know exists. If that data is not made available to interested parties before the opportunity to participate is offered—i.e., in the notice of proposed rulemaking—then the opportunity to participate may as well not exist

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205 See, e.g., *Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259–60 (D.C. Cir. 2005).

206 See *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008); *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973).

207 *Portland Cement*, 486 F.2d at 393 (“It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, [to a] critical degree, is known only to the agency.”).

208 See, e.g., *Ass’n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 745 F.2d 677, 684–85 (D.C. Cir. 1984); see also *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) (reasoning that “[t]o suppress meaningful comment by failure to disclose the basic data relied upon is akin to rejecting comment altogether”); 1 HICKMAN & PIERCE, *supra* note 93, § 5.3 (making this point).

at all. It is for this reason that access to the data that purportedly supports a proposed rule is critical to the opportunity for public participation that § 553(c) requires, and thus must be among the details—the “terms,” “substance,” “subjects,” or “issues”—to be included in the notice according to § 553(b)(3).<sup>209</sup> Or, as the D.C. Circuit explained in more colorful terms, “To allow an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport.”<sup>210</sup>

Adhering to this rationale but also taking into account the requirement of § 706 that courts take account of the rule of prejudicial error, courts have tended to limit the *Portland Cement* doctrine’s application to cases where the information not disclosed is central to the validity of the agency’s proposed rule, where the interested parties lacked timely access to it, and where the lack of access to the information actually inhibited interested parties from raising questions and concerns about the rule timely.<sup>211</sup> Since neither § 553 nor § 706 is precise in this regard, the exact contours of these limitations are fuzzy. Nevertheless, subject to those limitations, courts across the country have been applying the *Portland Cement* doctrine as well as the limitations to its scope for half a century.<sup>212</sup>

Even more than the logical outgrowth rule, the *Portland Cement* doctrine has been described as “so far removed from the Act’s actual language as to make the line between ‘interpretation’ and straightforward judicial common law very blurry indeed.”<sup>213</sup> At the D.C. Circuit, then-Judge Brett Kavanaugh maintained that “the *Portland Cement* doctrine cannot be squared with the text of § 553 of

209 See 5 U.S.C. § 553(b)(3) (2018).

210 *Conn. Light & Power Co. v. NRC*, 673 F.2d 525, 530 (D.C. Cir. 1982).

211 See, e.g., *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014) (“Perhaps because of the possible tension between *Vermont Yankee* and our critical material doctrine, we have more carefully examined whether a failure to disclose such material actually harmed a petitioner.”); *Am. Radio Relay League, Inc.*, 524 F.3d at 240 (accepting the view that “the *Portland Cement* doctrine should be limited to *studies on which the agency actually relies* to support its final rule” (quoting I RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 7.3, at 437 (4th ed. 2002))); *Air Prods. & Chems., Inc. v. FERC*, 650 F.2d 687, 697 (5th Cir. 1981) (“A caveat placed upon this rule is that the mere fact that an agency has looked beyond the record without opportunity to a party for rebuttal does not invalidate its action unless substantial prejudice is shown to result.”).

212 See, e.g., *N.S. Food Prods. Corp.*, 568 F.2d at 252; *The Bunker Hill Co. v. EPA*, 572 F.2d 1286, 1303 n.38 (9th Cir. 1977).

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

the APA.”<sup>214</sup> Critics of *Portland Cement* argue that the APA’s provisions regarding notices of proposed rulemaking are express and detailed about what such notices must include, but say nothing explicit about the agency disclosing any of the evidence on which it relied.<sup>215</sup> That textual silence, goes the argument, shows the *Portland Cement* doctrine to be a case where courts, rather than Congress or the agencies, exercised “the power to decide on proper agency procedures,” which, the commentators say, flatly contravenes *Vermont Yankee*.<sup>216</sup>

Although a few prominent judges have expressed sympathy for those arguments,<sup>217</sup> they have not carried the day in any federal circuit court of appeals. The *Portland Cement* doctrine thus remains the law, and not without some merit. The words used in §§ 553(b)(3) and 553(c) are capacious enough to accommodate the *Portland Cement* doctrine. In an increasingly data-driven society and government,<sup>218</sup> declining to give interested parties the opportunity to evaluate the studies or other data underpinning a rulemaking often will be the best—and sometimes maybe the only—tool by which the public may identify for an agency the perceived deficiencies in a proposed rule, and thus participate meaningfully in the rulemaking process.

### C. *The Arbitrary and Capricious Standard and Hard Look Review*

Among the longstanding yet still somewhat controversial constructions of the APA is the doctrine of hard look review,<sup>219</sup> which requires courts reviewing administrative action for arbitrariness to take a “hard look” at the agency’s purported justification for the action to ensure that the agency “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”<sup>220</sup>

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214 *Am. Radio Relay League, Inc.*, 524 F.3d at 246 (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part).

215 *See, e.g.*, Beermann & Lawson, *supra* note 14, at 893–95.

216 *Id.* at 894.

217 *See Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014) (Silberman, J., joined by Garland, C.J. & Srinivasan, J.).

218 *See, e.g., Memorandum on Restoring Trust in Government Through Scientific Integrity and Evidence-Based Policymaking*, THE WHITE HOUSE (Jan. 27, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/memorandum-on-restoring-trust-in-government-through-scientific-integrity-and-evidence-based-policymaking/> [https://perma.cc/Y4HH-ETLX].

219 *See* Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 *YALE L.J.* 2, 29 (2009) (“[S]cholars have spent inordinate amounts of time debating hard look review and criticizing it on a variety of grounds.”).

220 *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

The Supreme Court has grounded the doctrine in the text of § 706(2)(A), which requires courts to ensure that contested agency actions are not “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>221</sup> Building on developments in the lower courts, the Supreme Court embraced the doctrine of hard look review to give legal content to vague terms like “arbitrary” and “capricious,” and scholars have defended it on that ground.<sup>222</sup>

Of course, the phrase “hard look review” is not included anywhere in the APA’s text. Section § 706(2)(A) also does not define what it means for agency action to be arbitrary and capricious. The concept clearly comes from pre-APA caselaw, but changes in agency rulemaking practices have altered that jurisprudential understanding over time.<sup>223</sup>

Supporters of some version of hard look review posit that not only is it normatively desirable, but that some form of it is arguably required by the APA’s judicial review provisions, including but not limited to § 706(2)(A).<sup>224</sup> For example, when statutes grant agencies broad discretion to adopt legally binding rules and regulations to accomplish statutory goals, “[i]t is hard to see how courts could fulfill their responsibility to require agencies to act within statutory boundaries,”<sup>225</sup> as § 706(2)(C) requires,<sup>226</sup> “without requiring agencies to explain the relationship between their action, the decisional standards in their statutes, and the data on which they base their predictions concerning the effects of their action.”<sup>227</sup> Notwithstanding disagreement over the full extent of the explanation that the APA, and thus the courts, ought to require of agencies, the APA’s express provisions requiring judicial review of agency action thus seem to presuppose at least some expectation that an agency justify its discretionary choices.

Critics of hard look review are not convinced. Many of their objections concern hard look review in practice, rather than as a matter of APA interpretation. For instance, some scholars have observed that the doctrine imposes massive burdens on agencies’

221 See *id.* at 41 (quoting 5 U.S.C. § 706(2)(A) (1982)).

222 See, e.g., M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1418 (2004); Sydney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 423.

223 See Reeve Bull & Jerry Ellig, *Judicial Review of Regulatory Impact Analysis: Why Not the Best?*, 69 ADMIN. L. REV. 725, 756–57 (2017); Shapiro & Levy, *supra* note 222, at 419–22.

224 See *Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (1976) (Leventhal, J., concurring statement).

225 2 HICKMAN & PIERCE, *supra* note 93, § 11.1, at 1164.

226 5 U.S.C. § 706(2)(C) (2018) (calling on courts to set aside agency action that is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right”).

227 2 HICKMAN & PIERCE, *supra* note 93, § 11.1, at 1164.



rulemaking procedures.<sup>228</sup> To improve the likelihood of their rules surviving hard look review, agencies frequently feel compelled to compile highly developed and detailed rulemaking records documenting every aspect of their decision-making processes.<sup>229</sup> Those records routinely run hundreds of pages—which, the critics point out, seems inconsistent with the “concise general statement of . . . basis and purpose” explicitly contemplated in § 553(c).<sup>230</sup>

When considered in isolation, words like “concise” and “general” seem to suggest a certain brevity. One dictionary defines concise as “expressing or covering much in few words; brief in form but comprehensive in scope; succinct; terse.”<sup>231</sup> General, meanwhile, is defined as “relating to, determined by, or concerned with main elements rather than limited details.”<sup>232</sup> Courts have not found concerns about lengthy preambles persuasive. The D.C. Circuit, for example, long ago “caution[ed] against an overly literal reading of the statutory terms ‘concise’ and ‘general,’” explaining that “[t]hese adjectives must be accommodated to the realities of judicial scrutiny.”<sup>233</sup>

In actual application, “concise” and “general” are relative terms. If the underlying administrative record compiled by the agency consists of many thousands of pages of public comments, studies, and other data, then a preamble that runs a few hundred pages is concise by comparison. When regulations and their associated comments are detailed and technical, then a few paragraphs or pages dedicated to summarizing their content will almost certainly be general by comparison. In other words, the requirement of § 553 that statements of basis and purpose be concise and general does not automatically mean that such statements must be short.

Understood this way, the doctrine of hard look review is more than just an attempt to give content to open-textured terms like

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228 See Richard J. Pierce Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995); Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1385 (1992); see also Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1425–28 (2012) (discussing various functionalist scholars’ views on judicial ossification).

229 Note, *Rationalizing Hard Look Review After the Fact*, 122 HARV. L. REV. 1909, 1915–16 (2009).

230 5 U.S.C. § 553(c); see also *supra* notes 197–218, 242–43 and accompanying text (discussing judicial interpretations of § 553(c)).

231 See *Concise*, DICTIONARY.COM, <https://www.dictionary.com/browse/concise> [<https://perma.cc/KJ2M-ZAUU>].

232 See *General*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/general> [<https://perma.cc/Q4YA-LQPE>].

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

“arbitrary” and “capricious.” It is also an attempt to construe and harmonize the § 553(c) statement of basis and purpose with the APA’s provisions governing judicial review.

The Supreme Court has repeatedly invoked *State Farm* and hard look review in recent terms,<sup>234</sup> which suggests the Justices may be less inclined to discard that doctrine than perhaps they are some others. Nevertheless, academic commenters have long debated whether hard look review violates *Vermont Yankee’s* admonition against imposing procedural burdens beyond the APA’s text, raising questions about whether Justices employing a more limited version of textualism might consider interpreting the APA as precluding hard look review.<sup>235</sup>

#### D. Preambles and Addressing Significant Comments

As already discussed, § 553(c) provides that, “[a]fter consideration of the relevant matter presented” to the agency in the form of the “written data, views, or arguments” received from having given interested parties an “opportunity to participate” in a rulemaking, “the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.”<sup>236</sup> Again, when considered in isolation, words like “concise” and “general” seem to suggest short preambles. But as already explained, the assumption that the use of those words in § 553(c) means that preambles must be brief is flawed.<sup>237</sup>

Explanatory preambles likely have gotten longer over the years for several reasons, not all of them related to judicial review. First, as Congress has adopted longer and more complicated statutes and has given agencies more expansive rulemaking power for the purpose of implementing and administering those statutes,<sup>238</sup> agency regulations

234 See, e.g., *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016); *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015); *Judulang v. Holder*, 565 U.S. 42, 45 (2011).

235 See, e.g., 5 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 29:1 (2d ed. 1984); Pierce, *supra* note 14, at 906; see also Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 394–95 (1986) (intimating only an especially weak version of reasonableness review is consistent with § 706(2)(A)); Paul R. Verkuil, *Judicial Review of Informal Rulemaking: Waiting for Vermont Yankee II*, 55 TUL. L. REV. 418, 420–24 (1981) (calling for the Court to apply *Vermont Yankee* to reject the D.C. Circuit’s version of hard look review prior to the Court’s *State Farm* decision). But see, e.g., Beermann & Lawson, *supra* note 14, at 880–82 (contending that hard look review is not inconsistent with *Vermont Yankee*).

236 5 U.S.C. § 533(c) (2018).

237 See *supra* notes 231–33 and accompanying text.

238 See Hickman, *supra* note 10, at 1097–98 (documenting this trend).

have gotten longer and more complicated as well.<sup>239</sup> It stands to reason that even a concise and general explanation of the purpose of a set of regulations will be longer if the regulations themselves are longer and more complicated. Second, Executive Order 12,866 requires agencies to assess the benefits and costs of proposed rules and regulations and to submit significant regulatory actions to the Office of Information and Regulatory Affairs (OIRA) for review of that benefit/cost analysis.<sup>240</sup> As analysis responsive to Executive Order 12,866 is summarized in explanatory preambles, it adds significantly to their length. Third, as described above, the doctrine of hard look review, which interprets the § 706(2)(A) arbitrary and capricious standard as requiring agencies contemporaneously to justify their discretionary choices, has prompted agencies to expand their preambles as well.<sup>241</sup>

Another contributor to lengthier preambles undoubtedly is the judicial interpretation of § 553(c) as requiring agencies to demonstrate that they have considered the comments received by responding to all significant comments—or, to use the phrase one sometimes sees, all “comments which are of cogent materiality”<sup>242</sup>—in the explanatory preamble to the final regulations.<sup>243</sup> Nothing in the APA’s text states outright that an agency must respond to all significant comments, any more than the APA’s text specifies that agencies must comply with the logical outgrowth standard, disclose the data and studies upon which they rely, or contemporaneously justify their regulatory choices. Nevertheless, as with these other requirements, courts have anchored the expectation that agencies respond to significant comments to § 553(c).<sup>244</sup> Requiring an agency to respond

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239 See, e.g., Anthony Moffa, *Word Limited: An Empirical Analysis of the Relationship Between the Length, Resiliency, and Impact of Federal Regulations*, 20 NEV. L.J. 733, 734–35 (2020).

240 Exec. Order 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

241 See *supra* notes 229–30 and accompanying text.

242 *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) (using this phrase); see also *Nat’l Wildlife Fed’n v. Costle*, 629 F.2d 118, 134 (D.C. Cir. 1980) (quoting *N.S. Food Prods.*, 568 F.2d at 252).

243 See, e.g., *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 96 (2015) (describing “respond[ing] to significant comments received during the period for public comment” as one of the steps required of notice-and-comment rulemaking); *Altera Corp. & Subsidiaries v. Comm’r*, 926 F.3d 1061, 1080 (9th Cir. 2019) (“An agency must consider and respond to significant comments received during the period for public comment.”) (quoting *Perez*, 575 U.S. at 96); *PPG Indus., Inc. v. Costle*, 630 F.2d 462, 466 (6th Cir. 1980) (“EPA is required to give reasoned responses to all significant comments in a rulemaking proceeding.”) (citing 5 U.S.C. § 553(c) (1976)).

244 See, e.g., *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 692 (Fed. Cir. 2000), *overruled by Nat’l Org. of Veterans’ Advocs, Inc. v. Sec’y of Veterans Affs.*, 981 F.3d 1360 (Fed. Cir. 2020); *Reyblatt v. NRC*, 105 F.3d 715, 722 (D.C. Cir. 1997); *PPG Indus.*, 630 F.2d at 466.

to significant comments in the preamble to final regulations offers proof to a reviewing court that the agency has considered, rather than merely received and ignored, comments submitted in response to a notice of proposed rulemaking—thus effectuating the requirement of § 553(c) that interested parties be given the opportunity to *participate*, rather than merely *comment*.<sup>245</sup> Responding to significant comments also facilitates hard look review under § 706(2)(A) by documenting the various elements of reasoned decisionmaking cited by the Supreme Court in *State Farm* and its progeny. Indeed, these different aspects of §§ 553(c) and 706(2)(A) enjoy a symbiotic relationship.<sup>246</sup> If the arbitrary and capricious standard anticipates that courts will engage in reasoned decisionmaking as evidenced by justifying their discretionary choices, one way of identifying which issues in a rulemaking matter and which choices are discretionary is by examining the significant comments received and the agency's response thereto.

### CONCLUSION

Rulemaking under the APA is demanding and time consuming. Admirers of administrative governance, and sometimes critics as well, complain that judicial review has made notice-and-comment rulemaking too burdensome. Other factors have contributed to the complexity of notice-and-comment rulemaking as well, but judicial interpretations of APA rulemaking requirements have done their part.

Of course, rulemaking still is more efficient than legislation for getting things done, even if rulemaking requires time and resources to accomplish, if for no other reason than because the sheer number of agencies and the rule drafters they employ can accomplish more than Congress is able to do on its own. Further, empirical analysis suggests that only a small number of high-profile rulemakings reflect the sort of lengthy delays from procedural requirements about which critics of notice-and-comment rulemaking complain.<sup>247</sup> For all that proponents of those rulemakings might want them to be finalized more quickly, others may be happy to have the protection of more procedures and greater transparency in at least some of those instances.

To the extent one considers existing APA interpretations to represent a problem, however, we suggest that a limited textualist approach to interpreting the APA is not the solution. What textualism requires is not a limited, narrow, or strict interpretation, nor a

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245 See 5 U.S.C. § 553(c) (2018); see also *supra* note 200 and accompanying text (noting the comparative breath of the word “participate”).

246 1 HICKMAN & PIERCE, *supra* note 93, § 5.4.

247 See, e.g., Yackee & Yackee, *supra* note 228, at 1421–22.

purposefully broad interpretation, but rather a fair interpretation of statutory text—one that lets the text itself guide the endeavor.<sup>248</sup> With its underdetermined requirements and ambiguous and open-textured terms, with the interactivity of its provisions, and with changes in the context of administrative governance over time (including limitations imposed by the Supreme Court's own precedents), the text of the APA readily lends itself to many of the interpretations the courts have adopted. Let Congress reform the APA as it will, but the Supreme Court should not be in a hurry to use textualism as an excuse to dismantle the status quo.

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248 See SCALIA & GARNER, *supra* note 15, at 355–56.