ADMINISTRATIVE PROCEDURE AND JUDICIAL RESTRAINT

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In his essay *Deference and Due Process*,[1] Professor Adrian Vermeule argues for an innovative approach to procedural due process analysis. He contends that courts should defer to the judgments of administrative agencies on due process issues unless those judgments are "arbitrary" as administrative lawyers use that term.[2] This would be desirable, he says, because agencies are better positioned to prescribe procedural norms than courts are.[3]

Like so much of Vermeule's other work, the essay is imaginative, knowledgeable, and closely argued. He touches on numerous aspects of procedural due process, and in this brief Response I cannot mention — let alone respond to — more than a fraction of his points. I will, however, take up a few of his main themes. I will begin by expressing some sympathy for his policy perspective, although I will also drop a few caveats into the mix. Then I will explain why I suspect that he could have quite a bit of difficulty persuading the courts to refrain from exercising independent judgment when they interpret the Due Process Clause. Finally, I will suggest an alternative perspective on Vermeule's argument that would avoid that particular objection but nevertheless could go a long way toward fulfilling the aspirations of the essay. If his call for giving a wide berth to administrators turns out to resonate with the courts, the best explanation might be that it would reinforce what appears to be existing judicial skepticism about the wisdom of expanded procedural rights.

I. INSTITUTIONAL COMPETENCE

In Part III of his essay, Vermeule sets forth the policy justifications for his proposed deference regime.[4] The proposition that agencies are better positioned than courts to resolve questions of administrative procedure is by no means a new theme in the administrative law literature. For example, in the immediate wake of *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,[5] Professor

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[1] 129 HARV. L. REV. 1890 (2016).

[2] *Id.* at 1895.

[3] *Id.*

[4] *See id.* at 1919–30.

[5] 435 U.S. 519 (1978).

Clark Byse published a comment that praised that opinion for its strong discouragement of judicial procedural innovations that were unsupported by statutory foundations.[6] Byse's argument was based on a premise about institutional roles — that, on principle, procedural choices should fall primarily within the authority of agencies and not courts.[7] In contrast, Vermeule's discussion in Part III of *Deference and Due Process* brings a new level of theoretical sophistication to the issue. His treatment is resolutely pragmatic, explicated without regard to separation of powers or other doctrinal embellishments.

Without trying to summarize Vermeule's entire discussion in that Part, I will attempt to convey its gist. His most telling point is that procedure and substance are closely intertwined.[8] An agency has to design an implementation program that, in the face of limited resources, takes account of both. That task calls for systemic judgments, which a court is not well positioned to oversee through the necessarily episodic process of judicial review. Yet the standard benchmark for procedural due process analysis — the familiar three-factor formula of *Mathews v. Eldridge*[9] — requires empirical investigation of just that sort. Thus, Vermeule says, "judges should recognize — and increasingly have recognized — the possibility that their limited information, episodic perspective, and time constraints together imply that the marginal benefits of judicial intervention in procedural design may be low or even negative as the intensity of intervention increases."[10] He acknowledges the concern that agencies have incentives to favor their own convenience over the procedural interests of private persons, but he responds that these worries rest on overgeneralizations.[11] After all, he notes, agencies themselves have an interest in reaching accurate de-

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[6] Clark Byse, Comment, Vermont Yankee *and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 HARV. L. REV. 1823 (1978). Byse's comment was primarily about rulemaking, which is technically not governed by procedural due process constraints. However, Vermeule explicitly seeks to formulate an analysis that "cuts right across the distinction between rulemaking and adjudication." Vermeule, *supra* note 1, at 1921. Thus, I adopt the same frame of reference.

[7] Byse, *supra* note 6, at 1831–32.

[8] *See* Vermeule, *supra* note 1, at 1920.

[9] 424 U.S. 319, 334–35 (1976) ("[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.").

[10] Vermeule, *supra* note 1, at 1922–23.

[11] *Id.* at 1927–30.

cisions.[12] Thus, they frequently provide voluntarily for hearings that they are not required to provide.[13]

Vermeule might have added that, in some instances, another comparative advantage favoring agencies is that they can educate themselves through notice-and-comment rulemaking proceedings as they develop their procedures. He may have omitted this point because procedural rules are, as a class, exempt from the rulemaking requirements of the Administrative Procedure Act (APA).[14] In fact, however, agencies often resort to notice-and-comment voluntarily when they promulgate procedural rules. When they do, the process of considering and responding to public comments can expose them to additional insights that would not be evident to a reviewing court.

Although Vermeule's assessment of the relative institutional competencies of agencies and judges is a thoughtful critique that deserves serious attention, I can readily think of grounds on which it might be contested. For example, not every procedural due process claim can be described as a challenge to a "system." Sometimes it can involve highly fact-specific circumstances to which the agency has given scant serious reflection, let alone systematic consideration. For example, one due process prerequisite for a fair adjudicative decision is an unbiased decisionmaker,[15] yet the circumstances that would give rise to a claim that the adjudicator prejudged the merits of a controversy resist being reduced to specific strictures. The most prominent case law test is that "an agency official should be disqualified only where 'a disinterested observer may conclude' that the official 'has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.'"[16] This criterion is obviously vague, but some vagueness in this area seems unavoidable.[17]

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[12] *Id.* at 1905.

[13] *Id.* at 1924–25.

[14] *See* 5 U.S.C. § 553(b)(A) (2012). Arguably, the exemption is itself evidence of congressional confidence in agencies as responsible initiators of procedures beyond those required by the APA itself.

[15] Withrow v. Larkin, 421 U.S. 35, 46–47 (1975).

[16] Nuclear Info. & Res. Serv. v. NRC, 509 F.3d 562, 571 (D.C. Cir. 2007) (quoting Cinderella Career & Finishing Sch., Inc. v. FTC, 425 F.2d 583, 591 (D.C. Cir. 1970)).

[17] Although not an administrative law case, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), aptly illustrates the free-form nature of the due process disqualification inquiry. There the Supreme Court held that due process required recusal of a state supreme court justice who had recently been elected after one of the litigants in a pending case had spent large sums promoting the justice's campaign effort. *Id.* at 872. The Court found that the facts of the case presented an unacceptable risk of bias because of the litigant's "significant and disproportionate influence on the electoral outcome," *id.* at 885, coupled with the close "temporal relationship between the campaign contributions, the justice's election, and the pendency of the case," *id.* at 886. In reply, Chief Justice Roberts's dissent listed forty unanswered questions that he said were raised by the Court's holding. *Id.* at 893–98 (Roberts, C.J., dissenting). Even without reading that compendi-

Moreover, generalizations about administrators' temptations to engage in self-dealing are surely not always baseless. It's true, as Vermeule notes, that the administrative law system accepts some risks of self-dealing for the sake of effective regulation — such as the risk of distorted perspectives that may arise when agency heads are allowed to engage in both prosecutorial decisions and adjudicative decisions in the same proceeding.[18] Yet an unconfined "trust agencies" premise would prove too much. Extended to its logical conclusion, it would negate the very idea of administrative law as *law* — that is, as a set of legal *rules*. For example, at least in ordinary cases, due process entitles a party to be given notice that a proceeding has been brought against it and an opportunity to be heard in that proceeding,[19] a right to know the nature of the agency's contentions in the proceeding,[20] and a right to a decision that takes account of the evidence in the record.[21] Courts do not ask, on a case-by-case basis, whether an agency has "offered rational grounds for its procedural choice[]"[22] as to whether these administrative burdens are worth the bother. In most adjudications, these procedural obligations are categorically required. And, of course, the APA contains specific requirements for administrative hearings.[23] The fact that neither Vermeule nor anyone else is calling for wholesale abandonment of principles such as these bespeaks a consensus that some ex ante requirements have their place. The important question is how far the categorical requirements should extend.

For present purposes, however, I will accept Vermeule's basic policy preference at face value, so that I can home in on a different inquiry. He freely recognizes the need for courts to engage in some degree of procedural due process scrutiny in order to offset the potential for agencies to act with bad motivations or distorted judgments.[24] Thus we come to the question of how that scrutiny should be conducted. As he documents in impressive detail, agencies do often apply the *Mathews* test themselves; this typically happens in rulemaking proceedings, when they respond to commentators who argue that a proposed procedural rule would violate due process.[25] The existence of

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um, however, one could have realized that the Court's due process holding could not easily be reduced to simple, easy-to-apply rules.

[18] Vermeule, *supra* note 1, at 1930; *see id.* at 1896–97, 1897 n.43 (citing *Withrow*, 421 U.S. at 58, on this issue).

[19] Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

[20] Morgan v. United States (*Morgan II*), 304 U.S. 1, 18–20 (1938).

[21] *Cinderella Career & Finishing Sch.*, 425 F.2d at 585–89.

[22] Vermeule, *supra* note 1, at 1928.

[23] *See* 5 U.S.C. §§ 554, 556–557 (2012).

[24] Vermeule, *supra* note 1, at 1927–29.

[25] *See id.* at 1891–92.

such determinations raises — but does not answer — the question of what the scope of the courts' review of those determinations should be.

II. DEFERENCE

The primary claim of *Deference and Due Process* is that courts should review an agency's application of the Due Process Clause deferentially rather than independently. Vermeule is a skillful and persuasive advocate, and his argument may ultimately prevail; but I suspect, for several reasons, that he will encounter significant headwinds in his effort to persuade courts of his bold thesis. The departure from tradition that it would require might simply be too great.

In an article I published thirty years ago, I wrote: "[i]f anything in scope-of-review doctrine can be considered settled, it is that courts are the principal authorities on constitutional issues that arise during judicial review of agency action."[26] I went on to note that courts even regularly exercise independent judgment in resolving *fact* questions bearing on constitutional issues.[27] Of course, not all propositions regarding scope of review that were considered "settled" in 1985 are equally settled today, if true at all. On this particular issue, however, a 2015 survey of the case law on scope of review arrived at essentially the same conclusion: "Particularly when exercising an adjudicative function, agencies themselves may consider a wide range of constitutional issues. In reviewing these determinations, courts afford no deference to the agencies' construction of the constitutional principle at stake."[28] This tradition helps to explain, for example, why the Supreme Court felt free to apply its own assessment of the *Mathews* factors to the high-stakes issue of the quality of hearings accorded to detainees at Guantanamo.[29]

This body of doctrine on scope of review is one facet of a far broader phenomenon whereby courts (or at least federal courts) tend to resist incursions on their prerogatives as guardians of the Constitution. Another manifestation of this pattern is the courts' well-known reluctance to acquiesce in any statutory preclusion of constitutional claims against agency action.[30] In the abstract, that reluctance could coexist with a deferential standard of review for resolution of some of those claims, but I wonder whether it is realistic to expect judges to enter-

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[26] Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 47 (1985).

[27] *Id.* at 48 & n.271.

[28] Harold J. Krent, *Judicial Review of Nonstatutory Legal Issues*, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 157, 158 (Michael E. Herz et al. eds., 2d ed. 2015).

[29] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 527–35 (2004) (plurality opinion).

[30] *See, e.g.*, Demore v. Kim, 538 U.S. 510, 517 (2003); Webster v. Doe, 486 U.S. 592, 603 (1988).

tain that possibility. This is not to deny the existence of exceptions such as the political question doctrine, which Vermeule does mention,[31] but procedural due process seems to have little in common with such enclaves of unreviewability.

Vermeule, of course, is well aware that his thesis is unorthodox. He discerns a degree of support for it in the case law, but I read the precedents differently. Some of the opinions he discusses speak primarily of deference to *Congress*.[32] These pronouncements would appear to have more to do with the institutional prerogatives of the legislative branch than with the extent to which courts should second-guess agency officials. On a more directly relevant note, he also points to what he calls a "cryptic" remark in Justice Powell's opinion in *Mathews*: "In assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals."[33] Elsewhere in the essay, however, Vermeule describes this remark as a mere "aside" that does not belie "the pervasive assumption of the opinion . . . that courts should apply the calculus independently."[34] That description strikes me as accurate.

Vermeule also refers at one point to what he calls a "*Skidmore*" approach, according to which a court would simply ask, while exercising independent judgment, whether the agency's views have "power to persuade."[35] He regards that level of review as being far weaker than what he is proposing. Yet the quoted *Mathews* language could easily be read as reflecting such an approach. As aficionados of scope-of-review doctrinal controversies are aware, the *Skidmore* standard of review resists precise definition and is interpreted by various courts in divergent ways.[36] But its generally understood core is that it calls for a *judicial* decision — a responsibility that is considered compatible with giving appropriate "weight" to agency judgments. Professor Peter Strauss's explanation in a recent essay captures this nuance aptly: "'*Skidmore* weight' addresses the possibility that an agency's view on

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[31] Vermeule, *supra* note 1, at 1899–900.

[32] *Id.* at 1904–06 (discussing Schweiker v. McClure, 456 U.S. 188, 200 (1982), and Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 319–20 (1985)). For a more current example, see *Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring in the judgment) (concluding that a single statutory citation was a constitutionally adequate explanation for denial of a visa application, and finding "additional support [for this] independent conclusion" in the considered judgment of Congress).

[33] Vermeule, *supra* note 1, at 1903 (quoting Mathews v. Eldridge, 424 U.S. 319, 349 (1976)).

[34] *Id.* at 1921–22.

[35] *Id.* at 1901 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[36] *See, e.g.*, Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1251–59 (2007).

a given statutory question may in itself warrant respect by judges who themselves have ultimate interpretive authority."[37]

Similarly, the reported lower court decisions cited by Vermeule contain fleeting language that *sounds* quite deferential to administrators on due process issues. When read in context, however, these cases do not seem to evince any real departure from the independent judgment model. Because a prolonged exegesis of these obscure lower court authorities would probably tax the patience of most readers of this Response, I will focus on a single example. In *Anderson v. White*,[38] the Third Circuit reviewed the adequacy of hearings that a *state* welfare department had provided to fathers whose income tax refunds had been intercepted because they had not fulfilled their child support obligations.[39] The court commented that "the precise choice of hearing procedures is better left to the persons administering [the intercept program] under the flexible balancing test the Supreme Court has prescribed [in *Mathews*]."[40] However, nothing in the opinion suggests that the defendant official — the welfare department head — actually did consider the *Mathews* factors when he designed the challenged hearing procedures. Moreover, the court immediately went on to uphold the procedures on the basis of what sounds like an independent judicial conclusion: "What due process does require is a 'timely and meaningful' hearing. [The official's] Regulatory Memo to the local agencies required such an opportunity for review. Therefore, he has met his constitutional obligation with respect to the hearing aspect of due process."[41] In this light, the seemingly highly deferential language in the Third Circuit's opinion may well have been merely the result of a misplaced modifier. The court probably meant to refer to its *own* belief, formed on the basis of the *Mathews* balancing test, that the choice of procedures rested with the administrators because due process imposed no requirements that were more demanding than the ones already instituted.

Overall, I conclude that the "substantial weight" passage from *Mathews* — and its application in the cases citing it — should be seen as, at most, a hook by which courts *could* move in the direction that Vermeule proposes, not as evidence that they are doing so already.[42]

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[37] Peter L. Strauss, *"Deference" Is Too Confusing — Let's Call Them "*Chevron *Space" and "*Skidmore *Weight*," 112 COLUM. L. REV. 1143, 1145 (2012).

[38] 888 F.2d 985 (3d Cir. 1989).

[39] *Id.* at 986–87.

[40] *Id.* at 994.

[41] *Id.* at 995 (internal citations omitted).

[42] Admittedly, the unreported decision in *Wilson v. SEC*, No. 89-70112, 1990 WL 61994 (9th Cir. May 10, 1990), can be read as rejecting a due process challenge on the basis that the agency's decision was not arbitrary or capricious. *See* Vermeule, *supra* note 1, at 1906. However, aside from being nonprecedential according to the court's rules, *see* 9TH CIR. R. 36-3(a), *Wilson* is am-

On a more theoretical level, Vermeule argues that courts may be more receptive to his thesis than one might at first think. He emphasizes his proposal's coherence or "fit" with parallel developments in administrative law, particularly *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[43] and *Vermont Yankee*. As he explains, although those developments are not technically applicable to constitutional interpretation, their underlying principles or rationales point toward the doctrinal shift he recommends.

This reasoning has force, and I do not mean to dismiss Vermeule's proposal out of hand — particularly since I have accepted, for purposes of this discussion, the policy arguments that he uses to support his proposal. I do think, however, that more than a little judicial skepticism should be anticipated.

Some of the implications of the proposal could be unsettling. It might mean that a court would be required to apply different constitutional rules to comparable agencies — not because the court thinks the two agencies' situations are in fact distinguishable, but rather because it has deferred to the agencies' respective preferences. This pattern in a branch of constitutional law would be unusual, to say the least.

Moreover, the courts would likely be mindful that the proposed deference principle could have unintended ripple effects on related bodies of doctrine. For one thing, courts sometimes rely on the three-factor *Mathews* formula as a tool for deciding due process questions in nonadministrative contexts, such as prejudgment attachment,[44] seizure of real property through civil forfeiture,[45] and the right to appointed counsel in civil contempt proceedings to enforce child support orders.[46] In those contexts, courts naturally rely on independent judgment because there is no administrative body to which they could defer. Thus, judges would sooner or later have to face the possibility of applying the *Mathews* test independently in civil cases but deferentially in administrative cases.

Furthermore, although Vermeule expressly puts to one side the possible implications of his thesis for judicial review of state agencies,[47] the courts would surely wonder about those implications. Indeed, the lion's share of challenges to agency action on procedural due process grounds seem to arise at the state level because applicable statutory

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biguous. The court rejected the petitioner's constitutional attack in two brief paragraphs, *see Wilson*, 1990 WL 61994, at *2, and one cannot be sure whether the court's overall declaration that the agency's action was nonarbitrary was intended to subsume that paragraph.

[43] 467 U.S. 837 (1984).

[44] Connecticut v. Doehr, 501 U.S. 1, 11 (1991).

[45] United States v. James Daniel Good Real Prop., 510 U.S. 43, 53 (1993).

[46] Turner v. Rogers, 131 S. Ct. 2507, 2518 (2011). For additional examples, and some exceptions, see *California* ex rel. *Lockyer v. FERC*, 329 F.3d 700, 709 n.8 (9th Cir. 2003).

[47] Vermeule, *supra* note 1, at 1891 n.9.

safeguards at that level tend to be more uneven than those at the federal level. Could the courts justify interpreting procedural due process differently at the federal level than at the state level? If not, would they want to hold that a *state* agency complies with procedural due process if it can make a reasoned argument for its position, even if the reviewing court, exercising independent judgment, would have balanced the three *Mathews* factors differently?

The common thread that links together the three possible developments that I have just discussed is their potential to add new layers of complexity to our understanding of procedural due process. In other words, although Vermeule can legitimately argue that his proposal would help make public law doctrine *more* coherent in some respects, it also might result in *less* coherence in others. Courts may hesitate to invite that consequence, over and above whatever reservations they may have about Vermeule's proposed incursion on the independent judgment tradition as such.

III. AN ALTERNATIVE ROUTE TO JUDICIAL RESTRAINT

Whether the courts will be receptive to Vermeule's deference proposal remains to be seen. In the event that they are not, however, they may wish to consider an alternative approach that would tend to promote the substance of his position but would avoid challenging the courts' independence in constitutional adjudication. The alternative would be to assert that, as a matter of their *own* constitutional interpretation, courts should, at the margins, strive to read the constitutional due process guarantee with restraint. The preference would be to lean in the direction of leaving most procedural choices to the political branches.

This concept may at first sound like a separation of powers notion (resembling, for example, the critique in Byse's article mentioned above), but that is not what I mean. Rather, my suggestion is that — whether or not one favors judicial restraint regarding procedural due process on institutional grounds — the functional considerations that lie at the heart of Vermeule's analysis do point in the general direction of such restraint. If anything, his institutional competence arguments would seem to have particular force in the due process context as compared with other contexts. Constitutional holdings, by their nature, are especially hard to modify or overturn when experience casts doubt on their wisdom.[48]

How much would my suggested alternative differ from the deferential regime that Vermeule's essay seeks to promote? In practice, per-

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[48] This is a familiar point in the due process literature. *See, e.g.*, Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267, 1299–303 (1975).

haps not very much. In the first place, judicial restraint in the deployment of procedural due process would tend to induce litigants to frame procedural challenges in statutory terms rather than constitutional terms. Statutory questions are precisely the kind of issue for which the *Chevron* doctrine is designed, and so the deference principles associated with that case would come into play. The courts have never heeded the suggestion made by some commentators[49] that procedural issues, as such, should be exempt from *Chevron* deference. Vermeule makes this point in connection with *Dominion Energy Brayton Point, LLC v. Johnson*[50] and other cases that have addressed the specific problem of determining whether a regulatory statute triggers the formal adjudication provisions of the APA.[51] His observation is valid as far as it goes, but courts routinely apply *Chevron* to other statutory procedural issues as well.[52]

More fundamentally, today's courts do not seem particularly eager to expand procedural rights in administrative adjudication, and the reasons for this reluctance do not seem limited to deference. One telling indication of this judicial attitude is *Dominion Energy* itself. In that case, the First Circuit upheld Environmental Protection Agency rules under which a dispute over the terms of a Clean Water Act (CWA) discharge permit could be resolved without a formal adjudicative hearing. According to the APA, the agency would have had to hold such a hearing only if the adjudication were "required by statute to be determined *on the record* after opportunity for an agency hearing,"[53] and the court concluded that the simple requirement of a "public hearing" in the CWA did not meet this criterion.[54] In so holding, the court overruled an earlier decision, *Seacoast Anti-Pollution League v. Costle*,[55] which had declared that a statutory requirement of a hearing presumptively implies that the hearing should be on the record.[56]

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[49] *See, e.g.*, Melissa M. Berry, *Beyond* Chevron*'s Domain: Agency Interpretations of Statutory Procedural Provisions*, 30 SEATTLE U. L. REV. 541, 584–94 (2007).

[50] 443 F.3d 12 (1st Cir. 2006).

[51] Vermeule, *supra* note 1, at 1915–16.

[52] *See, e.g.*, Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817, 826 (2013); Shalala v. Ill. Council on Long Term Care, 529 U.S. 1, 21 (2000); Your Home Visiting Nurse Servs., Inc. v. Shalala, 525 U.S. 449, 453 (1999); Lattab v. Ashcroft, 384 F.3d 8, 17–20 (1st Cir. 2004); Envirocare of Utah, Inc. v. NRC, 194 F.3d 72, 75–79 (D.C. Cir. 1999). In *Edelman v. Lynchburg College*, 535 U.S. 106 (2002), the Court declined to decide whether procedural rules can qualify for *Chevron* deference even if they were adopted without notice and comment (as the APA allows). *Id.* at 114. However, prior case law had generally concluded that they can. *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 850 & n.90 (2001); *see also id.* at 905–06 (endorsing that conclusion).

[53] 5 U.S.C. § 554(a) (2012) (emphasis added).

[54] *Dominion Energy*, 443 F.3d at 16–18.

[55] 572 F.2d 872 (1st Cir. 1978).

[56] *Id.* at 877–78. *Seacoast* had derived its presumption from the well-respected ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 42–43 (1947). This pre-

In *Dominion Energy* the court concluded that *Chevron* had rendered this rationale obsolete.[57] Although the court acknowledged that *Chevron* does not apply to interpretations of the APA, it insisted that its holding was based on the CWA, not the APA.[58]

As commentators have pointed out, this line of reasoning was strained, because the outcome depended on interpretation of *both* statutes.[59] Whether the agency could construe the CWA so as to overcome any pro-hearing presumption may have warranted *Chevron* deference, but the question of whether to discern the presumption in the first place was surely an APA issue. Thus, despite the First Circuit's protestations to the contrary, the best explanation for the court's rejection of formal adjudication obligations in *Dominion Energy* may be that the court believed that such procedure was unnecessary for the type of adjudication involved there.[60]

Other judicial developments can be interpreted in a similar light. For example, doubts about the benefits of formal adjudication probably help to explain why the early case of *Wong Yang Sung v. McGrath*,[61] which interpreted the APA as requiring formal APA adjudication of every case in which due process requires an evidentiary hearing,[62] has met with a completely inhospitable reception in modern decisions.[63] Moreover, the formal adjudication process itself has periodically been interpreted more restrictively than many lawyers would have expected.[64] And, perhaps most importantly, the extension of *Vermont Yankee* principles to adjudication in *Pension Benefit Guaranty Corp. v. The LTV Corp.*[65] seems directly attributable to the Court's

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sumption is one of the very few interpretations in the Manual that tend to disfavor the Attorney General's client agencies on a debatable issue. This fact suggests a strong likelihood that the interpretation corresponded to the intentions of the Act's authors (who included Justice Department lawyers).

57 *Dominion Energy*, 443 F.3d at 16–17.

58 *Id.* at 18.

59 *See, e.g.*, Cooley R. Howarth, Jr., *Restoring the Applicability of the APA's Adjudicatory Procedures*, 56 ADMIN. L. REV. 1043, 1052 (2004) (criticizing a similar earlier case, Chem. Waste Mgmt., Inc. v. EPA, 873 F.2d 477 (D.C. Cir. 1989), on this basis).

60 *See generally* Gary J. Edles, *An APA-Default Presumption for Administrative Hearings: Some Thoughts on "Ossifying" the Adjudication Process*, 55 ADMIN. L. REV. 787, 815–16 (2003) (explaining why formal adjudication has fallen out of favor in many administrative contexts).

61 339 U.S. 33 (1950).

62 *Id.* at 49–51.

63 William Funk, *The Rise and Purported Demise of* Wong Yang Sung, 58 ADMIN. L. REV. 881, 881 (2006).

64 *See* Citizens Awareness Network, Inc. v. United States, 391 F.3d 338, 350, 353–54 (1st Cir. 2004) (upholding stringent curbs on rights to discovery and cross-examination); *see also* Sierra Ass'n for Env't v. FERC, 744 F.2d 661, 664 (9th Cir. 1984) (rejecting claim that agency's limitation on cross-examination violated the APA).

65 496 U.S. 633 (1990).

reservations about judicial activism in this area of administrative procedure.[66]

I do not propose to debate whether the courts' recent track record is *better* explained as deriving from judges' own opinions about procedural rights than from deference to agency judgment. Motivations for judicial decisions are generally impenetrable from the outside, and they are often mixed. Suffice it to say that these rulings suggest that if Vermeule's deference proposal does not find support in the courts, the alternative sketched above might have greater success.

IV. CONCLUSION

I do not mean to paint too monolithic a portrait of the precedents. Challenges to agency action on procedural grounds do sometimes succeed.[67] Still, the overall trend seems to be that courts are continuing to limit the scope of procedural due process in order to accommodate the developing needs of the regulatory state. Regardless of whether courts will prove receptive to Vermeule's specific deference proposal, *Deference and Due Process* presents a wealth of insights about how to think about this trend.

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[66] *See* Ronald M. Levin, *The Administrative Law Legacy of Kenneth Culp Davis*, 42 SAN DIEGO L. REV. 315, 346 & n.177 (2005) (casting doubt on the Court's more formalist explanation for this holding).

[67] In addition to cases cited elsewhere in this Response, see, for example, Ballard v. Comm'r, 544 U.S. 40 (2005); and Pres. of Los Olivos v. U.S. Dep't of Interior, 635 F. Supp. 2d 1076 (C.D. Cal. 2008).