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COMMENT

AIR TRANSPORT ASSOCIATION OF AMERICA v. DEPARTMENT OF TRANSPORTATION: EXCESS BAGGAGE FOR RULES OF AGENCY PROCEDURE

Over the past two centuries, Congress has established administrative agencies as a means to contend with social problems and to regulate specific activities of individuals and businesses.¹ Today, these agencies carry out this function using one or both of two mechanisms: rulemaking and adjudication.² Statutory sources govern the procedure for rulemaking conducted by federal agencies. Primarily, agencies conduct rulemaking in accordance with the manner prescribed by Congress in an agency's enabling statute.³ In

1. The first administrative agencies, established by congressional act in 1789, provided pensions for soldiers wounded in the war and decided the amount of duties payable on imports. KENNETH C. DAVIS, 2 ADMINISTRATIVE LAW TREATISE § 1:7, at 17 (2d ed. 1978); see also BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 1.10, at 20-22 (2d ed. 1984) (discussing the origins of administrative agencies in the United States). It was not until the establishment of the Interstate Commerce Commission in 1887, however, that Congress began to confer upon administrative agencies broad regulatory powers. SCHWARTZ, *supra*, at 21-22 (recognizing this date as "the beginning of our administrative law").

2. At the outset of administrative regulation, agencies relied on adjudication to issue regulatory standards and policy determinations. RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIL, ADMINISTRATIVE LAW AND PROCESS 30-32 (1985) (attributing the success of this "fourth branch of government" to the reliance on an adversary hearing system and the availability of judicial review). Agencies acted in their quasi-judicial function to determine the rights and obligations of specific parties to an action brought by the agency in an adversarial setting. Retrospective in nature, adjudication is governed by due process principles and is binding only on the parties to the action. In contrast, rulemaking developed out of the need for agencies to regulate effectively on a national scale without relying solely on limited enforcement resources. By promulgating rules, the agency acts prospectively, announcing administrative determinations of general applicability. For a basic discussion of the distinction between rulemaking and adjudication, compare *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915) with *Londoner v. City & County of Denver*, 210 U.S. 373 (1908). See also TOM C. CLARK, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947) [hereinafter ATTORNEY GENERAL'S MANUAL], reprinted in GARY J. EDLES & JEROME NELSON, FEDERAL REGULATORY PROCESS: AGENCY PRACTICES & PROCEDURES 393, 407 (2d ed. 1989) (discussing the "dichotomy" created by rulemaking and adjudication).

3. The "enabling" or "authorizing" statute, enacted by Congress, serves many functions. The statute authorizes the creation of an agency and provides a statement of the agency's general purpose. Congress circumscribes the agency's scope of regulatory power in an en-

addition, the Administrative Procedure Act (APA) sets forth requirements that govern generally agency activity.⁴ Thus, absent specific Congressional direction, the APA assures a minimum level of procedural compliance. Congress alone retains the authority to allow lesser procedural conformance with the APA when it empowers a specific agency with rulemaking and adjudicatory authority.⁵

Section 553 of the APA details the procedural requirements that federal agencies must follow when promulgating rules.⁶ Informal rulemaking under the APA⁷ necessitates such actions as notification of proposed rulemaking

abling statute and defines the manner in which an agency may issue guidelines, orders, and rules. In addition, an enabling statute establishes the nature of the relationship between an agency and other branches of government and provides certain controls over agency action through judicial review, Congressional oversight, and executive scrutiny. *See generally* ARTHUR E. BONFIELD & MICHAEL ASIMOW, *STATE AND FEDERAL ADMINISTRATIVE LAW* § 7.2, at 422-23 (1989) (discussing the relationship between administrative agencies and the elected branch of government that defines the scope of the agency's authority).

4. Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 5362, 7521 (1988) (originally enacted as Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946)). Codification of the APA occurred in 1966. Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 378. With the exception of minor changes in terminology and the assignment of new section numbers, the substance of the APA has remained largely intact. *See* William H. Allen, *The Durability of the Administrative Procedure Act*, 72 VA. L. REV. 235, 235 nn.4-5 (1986) (commenting on the purpose of codification and the confusion which the renumbering of the sections introduced).

5. While agencies may and often do employ procedures in addition to those required by the APA, the procedures may not fall below the statutory minima established by the APA. ERNEST GELLHORN & RONALD M. LEVIN, *ADMINISTRATIVE LAW AND PROCESS* 322 (3d ed. 1990).

6. *See generally* 5 U.S.C. § 553. Other sections of the APA concern, for example, adjudication, *id.* §§ 554, 556-57, license applications, *id.* § 558, and judicial review of agency action. *Id.* §§ 701-706. The APA does not, however, prescribe the appropriate procedures for state agencies. State administrative bodies are governed by the statutory scheme enacted by a state's legislature. In addition, the Model State Administrative Procedure Act (MSAPA), originally adopted by the National Conference of Commissioners on Uniform State Laws in 1946 and revised in 1961 and again in 1981, has provided the states with a successful reference point since a number of states have adopted this act either in its entirety or in substantial part. MODEL STATE ADMINISTRATIVE PROCEDURE ACT, 1981 Act, 15 U.L.A. 1 (1990) (original version at 9C U.L.A. 179 (1957); 1961 Act at 15 U.L.A. 137 (1990)). *See* Arthur E. Bonfield, *State Administrative Policy Formulation and the Choice of Lawmaking Methodology*, 42 ADMIN. L. REV. 121, 123 n.5, 135 n.37 (1990) (stating that most states enacted APAs based on the 1961 MSAPA). *See generally* ARTHUR E. BONFIELD, *STATE ADMINISTRATIVE RULEMAKING* 12-16 n.20 (1986) (reviewing the 1946, 1961, and 1981 versions of the Model State Administrative Procedure Act and listing the states that have enacted an APA based to some degree on the original MSAPA or its 1961 revision).

7. Informal rulemaking refers to agency action conducted in compliance with procedures as specified in § 553 of the APA. That section details the procedures for public participation in the rulemaking process through notice and comment. *See infra* note 13. Formal rulemaking, on the other hand, involves procedures typically reserved for adjudication. The language "on the record after opportunity for an agency hearing" in an agency's authorizing statute automatically invokes §§ 556 and 557 of the APA, replacing public participation through no-

by publication in the *Federal Register*,⁸ involvement of the general public through notice and comment,⁹ and adoption of a thirty-day waiting period before a final rule is made effective and implemented.¹⁰ Designed to protect the interests of both the regulated members of the general public¹¹ and the government entity responsible for the regulation of a particular activity, the APA attempts to strike a balance permitting efficient and effective regulation while also protecting due process and such other basic concepts of fairness that a nonrepresentative governmental body might suggest.¹²

tice and comment with the increased opportunities for participation afforded in an administrative hearing. Although formal rulemaking is infrequently used, it has been criticized as "vary[ing] from unnecessarily drawn out proceedings to virtual disasters." Robert W. Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CAL. L. REV. 1276, 1287 (1972); see also PETER L. STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES 155-59 (1989) (describing the courts' reluctance to require formal rulemaking where such proceedings are "notoriously inconvenient . . . given the frequent diffuseness of the issues presented and the large number of parties"). See also *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973), for an introductory discussion on the applicability of formal rulemaking. To accommodate increasing agency activity with the demand for greater public participation without having to resort to the delays and complications of formal rulemaking, legislators and courts have, over the past two decades, begun to explore alternative measures, developing procedures known as "hybrid rulemaking" that combine elements from both ends of the spectrum. GELLHORN & LEVIN, *supra* note 5, at 329-32, 335-36.

8. See 5 U.S.C. § 553(b). The *Federal Register* is a daily governmental publication by which the executive branch informs the public of a wide variety of agency activities, including an agency's intention to change a rule or issue a new rule through a proposed rulemaking. Rules in final form are then published in the *Code of Federal Regulations*. See generally OFFICE OF THE FED. REGISTER, NAT'L ARCHIVES & RECORDS ADMIN., THE FEDERAL REGISTER: WHAT IT IS AND HOW TO USE IT (Robert D. Fox & Ernie Sowada, eds., 1985).

9. 5 U.S.C. § 553(c).

10. *Id.* § 553(d).

11. Agency rulemaking rarely affects all members of society. Rather, the regulations, standards, and rules that an agency issues are generally targeted to a specific group of individuals or businesses engaged in a particular activity. For example, the regulations promulgated by the United States Department of Interior detailing federal supervision of state regulatory programs under the Surface Mining Control and Reclamation Act of 1977 potentially affect citizens' groups, coal mine operators, representatives of the coal industry, and state regulatory agencies. See *National Wildlife Fed'n v. Hodel*, 839 F.2d 694, 702-03 (D.C. Cir. 1988) (concluding that petitioners had standing to challenge revised regulations as issued by the Secretary). Rules frequently affect individuals indirectly, and their scope may not always be readily apparent. See, e.g., *Air Line Pilots Ass'n v. Quesada*, 276 F.2d 892 (2d Cir. 1960) (holding that the agency action imposing mandatory retirement for airline pilots over the age of 60 potentially affected 18,000 licensed pilots under the age of 60 and future airline pilots, not only pilots currently falling within that category).

12. *National Ass'n of Home Health Agencies v. Schweiker*, 690 F.2d 932, 949 (D.C. Cir. 1982), cert. denied, 459 U.S. 1205 (1983). In *Schweiker*, the D.C. Circuit cited two main reasons for the impetus behind the § 553 procedural requirements: "First, 'to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies.' And second, 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.'" *Id.* (footnote omitted) (quoting *Batterton v. Marshall*, 648

Certain types of agency activity, however, relax the tension between agency efficiency and public participation and justify the inclusion in the APA of specific exemptions to the procedural requirements of § 553.¹³ For example, an agency may promulgate interpretations, statements of policy, and procedural rules without notice and comment according to § 553(b)(A) of the APA.¹⁴ These types of rules differ from "substantive"—or "legis-

F.2d 694, 703 (D.C. Cir. 1980) and *Guardian Fed. Sav. & Loan Ass'n v. Federal Sav. & Loan Ins. Corp.*, 589 F.2d 658, 662 (D.C. Cir. 1978)); *see also* *United States Dep't of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1151-52 (5th Cir. 1984) (considering the legislative purposes behind the exemptions of § 553 rulemaking procedures).

13. The text of § 553 provides in relevant part:

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

- (1) a statement of the time, place, and nature of public rule making proceedings;
- (2) reference to the legal authority under which the rule is proposed; and
- (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

- (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
- (2) interpretative rules and statements of policy; or
- (3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 553.

14. *See supra* note 13. Section 553(b)(A) refers only to exempting these rules from "notice," but "comment" under § 553(c) is invoked only when notice is mandated. That is, the introductory phrase to section 553(c) "[a]fter notice required by this section" makes specific reference to the general notice provision under section 553(b), establishing notice as a prerequisite to comment. *See Kast Metals*, 744 F.2d at 1153 n.16; *Pickus v. United States Bd. of Parole*, 507 F.2d 1107, 1112 n.9 (D.C. Cir. 1974).

lative"—rules¹⁵ that have the force of law, effectively imposing new obligations and duties or altering the behavior or status of those within the purview of the proposed rule.¹⁶ Commentators and courts generally refer to the "substantive-procedural" dichotomy when discussing procedural rules, but use the terms "legislative" and "non-legislative" in the context of the APA exemptions for interpretative rules and general statements of policy.¹⁷ In considering the exemptions,¹⁸ Congress viewed the need for encouraging agency activity as greater than the need for public participation.¹⁹ The APA, however, provides no further elaboration on the scope of the terms

15. GELLHORN & LEVIN, *supra* note 5, at 315-20.

16. See *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987). The court here distinguished legislative rules from non-binding agency action, the latter of which "carr[ies] no more weight on judicial review than [its] inherent persuasiveness commands." *Id.* (quoting *Batterton v. Marshall*, 648 F.2d 694, 702 (D.C. Cir. 1980)). While the APA does not define the term "substantive," courts have relied on the interpretation provided in the Attorney General's Manual on the APA recognizing as such all rules "issued by an agency pursuant to statutory authority and which implement the statute." ATTORNEY GENERAL'S MANUAL, *supra* note 2, reprinted in EDLES & NELSON, at 423 n.3. Thus, a clear example of a substantive rulemaking would be the issuance of a regulation by an agency where Congress has mandated such action but deferred to the agency's expertise for precise formulation. As both the APA and its legislative history are silent on the matter of distinguishing between "substantive" and "procedural" rules, courts have attributed much weight to the definition in the Manual. See, e.g., *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979) (citing favorably the interpretation of the Attorney General's Manual). The Supreme Court's reliance on the Manual in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 546 (1978), further attests to the Manual's usefulness. In *Vermont Yankee*, the Manual provided confirmation of Congress' intent that only agencies, not courts, may confer additional rulemaking procedures when deemed necessary. *Id.* Issued by the Justice Department following enactment of the APA, the Manual contains perhaps the closest approximation of congressional intent because of that agency's considerable participation in the legislative process. *Id.*

17. See BENJAMIN W. MINTZ & NANCY G. MILLER, A GUIDE TO FEDERAL AGENCY RULEMAKING 49-50, 52-54 & n.62 (2d ed. 1991). Some courts, however, recognize the terms "substantive" and "legislative" as interchangeable. See, e.g., *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952).

18. Section 553 also provides for situations in which time constraints and other concerns necessitate abbreviated rulemaking. For example, an exemption from the requirement that substantive rules be issued subject to a 30-day postponement of effective date is granted in subsection (d) for emergency rulemaking or for rules which relieve a restriction and therefore require no public adjustment period. 5 U.S.C. § 553(d); see *supra* note 13. While this exemption applies only to a specific requirement under § 553, others remove certain agency activity from § 553 applicability altogether. Such are the exemptions under § 553(a)(1) for agency activity that concerns "a military or foreign affairs function of the United States" and under § 553(a)(2) for "matter[s] relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." 5 U.S.C. § 553(a).

19. *Guardian Fed. Sav. & Loan Ass'n v. Federal Sav. & Loan Ins. Corp.*, 589 F.2d 658, 662 (D.C. Cir. 1978) (citing "effectiveness, efficiency, expedition and reduction in expense" as the basic reasons behind the exceptions to § 553 procedures); see also *American Hosp. Ass'n v. Bowen*, 834 F.2d 1045, 1047 (D.C. Cir. 1987) (explaining that the exemptions were designed to permit agencies to operate with freedom from costly and time consuming procedures).

"interpretative" or "procedural," and the task of distinguishing the legislative rule from the non-legislative rule or the substantive rule from the procedural rule has, in the course of litigation, fallen on the judiciary.²⁰

The exemption for rules of "agency organization, procedure, or practice" under § 553(b)(A) of the APA and the inherent ambiguity surrounding the substantive-procedural distinction are currently the subject of considerable controversy. In its recent decision *Air Transport Association of America v. Department of Transportation*,²¹ the United States Court of Appeals for the District of Columbia struggled with the task of defining "procedural." The *Air Transport* case illustrates well the courts' inability to reach an acceptable approach for defining the scope of the § 553(b)(A) exemption and for carving out the court's role in reviewing agency action.²²

This Comment examines the notice-and-comment exemption for agency rules of procedure under § 553(b)(A) of the APA. In light of the ambiguity posed by the statutory language and its legislative history, this Comment reviews the prevailing judicial interpretations governing the scope of the exemption, including the approaches most recently presented by the majority and dissenting opinions in *Air Transport*. Next, this Comment analyzes the different judicial approaches, evaluating their underlying rationale and identifying their significance on the rules at issue in the *Air Transport* case and on rules of procedure generally. This Comment then proposes an alternative response to the issue of defining the term "procedural" based on the cases surveyed and on analogous policies governing a recent court interpretation of the exemption under § 553(b)(A) for interpretative rules. In conclusion, this Comment proposes that the approach articulated by the court in *Air Transport* is sufficiently deficient to render its future prominence unlikely,

20. The legislative history is equally unrevealing. See *infra* notes 31 and 160.

21. 900 F.2d 369 (D.C. Cir. 1990), *vacated*, 111 S. Ct. 944 (1991).

22. Ultimate resolution of the notice-and-comment issue beleaguering rules of procedure, however, was never achieved in *Air Transport*. A troubled history followed the divided Court of Appeals decision. The Supreme Court granted the government's petition for certiorari. 111 S. Ct. 669, *vacated*, 111 S. Ct. 944 (1991). The association, however, filed a motion with the court indicating that neither it nor its members were interested in pursuing its challenge. ATA Supplemental Brief at 11, *Air Transp. Ass'n of Am. v. Department of Transp.*, 900 F.2d 369 (D.C. Cir. 1990) (No. 89-1195). Consequently, the Supreme Court vacated the lower court's order and remanded the case for determination of the issue of mootness. 900 F.2d 369, *vacated*, 111 S. Ct. 944, and *dismissed as moot*, 933 F.2d 1043 (D.C. Cir. 1991) (*per curiam*). In a separate concurrence, Judge Silberman revealed his impatience with the course that the case had taken, reprimanding Air Transport for its "misrepresentations to us, or, in effect, a confession of error to the Supreme Court after *certiorari* was granted." *Id.* at 1043-44 (Silberman, J., concurring). The issue of ripeness had been argued before the Court of Appeals at the outset of the litigation, and the court found in favor of Air Transport holding that the procedural challenge to the rule was a purely legal issue that presented no reason for delaying judicial review. 900 F.2d at 374.

leaving the position advocated by Judge Silberman in the *Air Transport* dissent to prevail.

I. VARIED APPROACHES TO ADDRESSING THE SCOPE OF THE
EXEMPTION FOR RULES OF AGENCY ORGANIZATION,
PROCEDURE, OR PRACTICE

The APA represents the culmination of efforts by the executive and legislative branches of the federal government, as well as private interests, to reform the structure of administrative agencies.²³ Congress sought primarily to introduce uniformity and to secure fairness and administrative impartiality in light of an increasing dependence on federal agency adjudications.²⁴ The Supreme Court of the United States, which had the opportunity to review the history and purposes of the APA shortly after its enactment,²⁵ characterized the APA as a "formula upon which opposing social and political forces have come to rest."²⁶

The legislative history of the APA elaborates on the reasons behind the congressional action prescribing notice-and-comment rulemaking procedures in § 553.²⁷ First, the requirements of a proposed rule's publication and involvement of the public serve to inform and educate the agency, promoting reasoned decisionmaking by agencies that conduct rulemaking activities.²⁸ Second, inviting an exchange between the public and the administrative agencies was designed to introduce safeguards to offset the lack of agency accountability inherent in the administrative scheme.²⁹ As the D.C. Circuit recently acknowledged, "by mandating 'openness, explanation, and

23. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 36-42 (1950); see also DAVIS, *supra* note 1, § 1:7, at 24 (stating that "[t]he major effects of the Act were to satisfy the political will for reform, to improve and strengthen the administrative process, and to preserve the basic limits upon judicial review").

24. *Wong Yang Sung*, 339 U.S. at 36-42.

25. *Id.*

26. *Chrysler Corp. v. Brown*, 441 U.S. 302, 313 (1979) (quoting *Wong Yang Sung*, 339 U.S. at 40).

27. SENATE COMM. ON THE JUDICIARY, 79th Cong., 2d Sess., S. Doc. No. 248 (Comm. Print 1945), reprinted in LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT at 18-20 (1946); see also Peter J. Henning, Note, *An Analysis of the General Statement of Policy Exception to Notice and Comment Procedures*, 73 GEO. L.J. 1007, 1012 (1985) (articulating the policies that support notice and comment as (1) "allow[ing] the agency to test a proposal before the parties directly affected by a rule" and (2) "afford[ing] safeguards to private interests").

28. S. Doc. No. 248, *supra* note 27, at 19-20.

29. *Id.* In *Aiken v. Obledo*, 442 F. Supp. 628 (E.D. Cal. 1977), the court emphasized this objective stating that "[t]he interchange of ideas between the government and its citizenry provides a broader base for intelligent decision-making and promotes greater responsiveness to the needs of the people." *Id.* at 651.

participatory democracy' in the rulemaking process, these procedures assure the legitimacy of administrative norms."³⁰

The legislative history of the APA, however, provides little insight into the envisioned application of the exemption for interpretative rules, rules of procedure, and general statements of policy under § 553.³¹ It nonetheless reveals that the objective of Congress in enacting § 553(b)(A) was to encourage agency promulgation of certain types of rules and to defer to the agency's judgment where public input might impede the effectiveness of the administrative process.³² Congress believed that the availability of judicial review relieved it of the obligation to impose additional procedural burdens where it regarded public participation as ineffective and unnecessary.³³

The ambiguity that courts have encountered when interpreting the exemption provisions in § 553(b)(A) stems from the substantive-procedural distinction alluded to by Congress in its legislative history.³⁴ Yet the real catalyst for the controversy surrounding the distinction can be found in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, in which the Supreme Court expressed disapproval of courts' imposing on agencies their view of acceptable administrative procedures where the APA has delineated minimum compliance standards.³⁵ *Vermont Yankee* mandated a clear distinction between the legal bounds of statutory construction, a traditional

30. *Air Transport Ass'n of Am. v. Department of Transp.*, 900 F.2d 369, 375 (1990) (quoting *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027 (D.C. Cir. 1978)), *vacated*, 111 S. Ct. 944 (1991).

31. See S. Doc. No. 248, *supra* note 27, at 18.

32. *Id.* at 18-19.

33. *Id.* In suggesting the clarification of the word "substantive," the Committee noted that "strictly speaking, it should be unnecessary to provide . . . that procedural or organizational rules are exempted; but the exemption was specified out of an abundance of caution lest it be thought by those unversed in administrative law definitions that they might be included in the notice requirement." *Id.* at 19.

34. See *supra* text accompanying note 16.

35. 435 U.S. 519 (1978). In *Vermont Yankee*, the D.C. Circuit ruled that compliance with APA procedures was insufficient in the rulemaking proceedings initiated by the Atomic Energy Commission. Specifically, the rulemaking at issue in *Vermont Yankee* sought to address the question of what consideration was due to both the environmental effects incident to fuel reprocessing and the disposal of wastes required as a result of that reprocessing. The Supreme Court rejected the lower court's mandate for "a more 'sensitive' application of [the] devices employed" in the rulemaking proceeding. *Id.* at 542. Citing the legislative history of the APA and the Attorney General's Manual, the Court emphatically renounced the interference of the lower court in determining the necessity of additional procedures in administrative rulemaking. Under the APA, deference should be accorded to the Commission's deliberate decision not to make discovery or cross-examination available to the parties in interest. Only in "extremely compelling circumstances" might judicially-engrafted procedures be warranted. *Id.* at 543. The Court remanded the decision to assure compliance with the APA along with the message not to "stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are 'best.'" *Id.* at 549.

function of the judiciary,³⁶ and the impermissible practice of demanding additional procedures beyond those required in the APA.³⁷ Complying with the mandate of *Vermont Yankee*, however, posed substantial difficulties for courts interpreting the scope of the exemption under § 553(b)(A), due largely to the inherent vagueness of the substantive-procedural distinction.³⁸

The ambiguity resulting from the statutory requirements of § 553(b)(A), compounded by the uncertainty over the applicability of the Supreme Court's decision in *Vermont Yankee*, has produced a variety of judicial approaches for determining whether notice and comment is properly required for rules characterized as procedural. In order for agencies to take advantage of the express authority to circumvent the "cumbersome and time-consuming mechanisms of public input,"³⁹ agencies must first assess which of the judicial approaches a court is likely to rely upon and which might ultimately prevail. These approaches include:⁴⁰ (1) the "substantial impact" test, the approach most consistently used in adjudicating § 553(b)(A) applicability and articulated most recently in *United States Department of Labor v. Kast Metals Corp.*;⁴¹ (2) the deviation from the substantial impact test proposed in *Batterton v. Marshall*;⁴² (3) the "encod[ing] a substantive value judgment" inquiry formulated in *American Hospital Association v. Bowen*;⁴³ and finally (4) the dichotomy presented in *Air Transport Association of America v. Department of Transportation* by the majority and dissenting

36. The Supreme Court in *Wong Yang Sung* emphasized that it is the responsibility of the courts "regardless of their views of the wisdom or policy of the [APA] to construe this remedial legislation to eliminate, so far as its text permits, the practices it condemns." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 45 (1950).

37. *Vermont Yankee*, 435 U.S. at 542-43.

38. See, e.g., *Air Transport Ass'n of Am. v. Department of Transp.*, 900 F.2d 369 (D.C. Cir. 1990), *vacated*, 111 S. Ct. 944 (1991); *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037 (D.C. Cir. 1987); *United States Dep't of Labor v. Kast Metals Corp.*, 744 F.2d 1145 (5th Cir. 1984); *Batterton v. Marshall*, 648 F.2d 694 (D.C. Cir. 1980).

39. *Kast Metals*, 744 F.2d at 1152.

40. Not considered here is the view adopted by the Ninth Circuit, which in 1983 rejected the substantial impact test, adhering fast to the explicit acknowledgment of Congress that certain rules were to be exempt from statutory procedures notwithstanding their substantive character. *Rivera v. Becerra*, 714 F.2d 887, 891 (9th Cir. 1983), *cert. denied*, 465 U.S. 1099 (1984); *Southern Cal. Edison Co. v. FERC*, 770 F.2d 779, 783 (9th Cir. 1985). Following the recent departure by the D.C. Circuit in *Cabais v. Egger*, 690 F.2d 234, 238 (D.C. Cir. 1982), whereby the court rejected the substantial impact test for interpretative rules, the Ninth Circuit held that the rules issued by the Federal Energy Regulatory Commission governing the approval of interim rates were properly promulgated without notice and comment as "technical regulation of the form of agency action and proceedings." *Southern Cal. Edison Co.*, 770 F.2d at 783 (quoting *Pickus v. United States Bd. of Parole*, 507 F.2d 1107, 1113 (D.C. Cir. 1974)).

41. 744 F.2d 1145 (5th Cir. 1984).

42. 648 F.2d 694 (D.C. Cir. 1980).

43. 834 F.2d 1037, 1047 (D.C. Cir. 1987).

opinions—the majority identifying “the right to avail oneself of an administrative adjudication”⁴⁴ as crucial; the dissent advancing the inquiry of whether the rulemaking “purports to direct, control, or condition the behavior of those institutions or individuals subject to regulation by the authorizing statute.”⁴⁵

A. *The Substantial Impact Test: United States Department of Labor v. Kast Metals Corp.*

The substantial impact test, first articulated in 1968 in *National Motor Freight Traffic Association v. United States*,⁴⁶ recognizes the need for notice and comment where agency regulations have a substantial impact on designated industries or individuals.⁴⁷ As explained in *United States Department of Labor v. Kast Metals Corp.*, a regulation that “modifies substantive rights and interests” must withstand the scrutiny and proposed alternatives of public input.⁴⁸ Because rules with a substantial impact are at most only “nominally procedural,” invocation of the exemption under § 553(b)(A) for rules of procedure is inappropriate.⁴⁹

Kast Metals presents a recent and thorough illustration of the substantial impact test.⁵⁰ In that case, the United States Court of Appeals for the Fifth Circuit overturned the district court’s determination that the challenged regulation issued by the Occupational Safety and Health Administration (OSHA)⁵¹ required notice and comment because it altered the likelihood and frequency of inspection for employers.⁵² Notwithstanding the conspicuous absence of notice and comment, the court in *Kast Metals* upheld the validity of the OSHA inspection warrant issued to Kast Metals Corporation and ruled that the OSHA regulation setting forth a new administrative scheme

44. 900 F.2d 369, 378 (D.C. Cir. 1990) (emphasis omitted), *vacated*, 111 S. Ct. 669 (1991).

45. *Id.* at 382 (Silberman, J., dissenting).

46. 268 F. Supp. 90, 97 (D.D.C. 1967) (three-judge court), *aff’d per curiam*, 393 U.S. 18 (1968).

47. *United States Dep’t of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1153 (5th Cir. 1984) (quoting *Brown Express, Inc. v. United States*, 607 F.2d 695, 702 (5th Cir. 1979)).

48. *Id.*

49. *Id.*

50. 744 F.2d 1145 (5th Cir. 1984).

51. The Occupational Safety and Health Administration was established pursuant to the Occupational Safety and Health Act of 1970 (OSH Act), Pub. L. No. 91-596, 84 Stat. 1592 (codified as amended at 29 U.S.C. 651-678 (1988 & Supp. II 1990)). Its responsibilities include developing and issuing safety and health regulations for workers in the United States, conducting investigations and inspections to promote and ensure compliance with the OSH Act, and enforcing the OSH Act and the regulations promulgated by OSHA through the issuance of citations and penalties. OFFICE OF THE FEDERAL REGISTER, NAT’L ARCHIVES & RECORDS ADMIN., THE UNITED STATES GOVERNMENT MANUAL 418 (1991).

52. *Kast Metals*, 744 F.2d at 1147-48.

by which the agency selects employers for routine safety and health inspection was procedural within the meaning of the APA.⁵³ In reversing the lower court's decision, however, the court of appeals disagreed with the lower court's application of the facts, but sustained the lower court's use of the substantial impact test.⁵⁴

Agency regulations that require a departure from previous practice are, on the other hand, particularly vulnerable under the substantial impact test.⁵⁵ The *Kast Metals* court, as an example, cited a previous OSHA rule that eliminated an employer's right to a pre-issuance challenge of an inspection warrant in favor of ex parte warrant proceedings.⁵⁶ The "180-degree shift in agency practice" that the rule represented constituted a "substantial impact," mandating notice-and-comment rulemaking procedures.⁵⁷ The court concluded, however, that the OSHA instruction delineating selection for safety inspection "casts not the stone of substantial impact."⁵⁸ A change in inspection methodology without the attendant substantial impact is insufficient to warrant notice and comment.⁵⁹

53. *Id.* The agency implemented the change because it sought a more objective and efficient selection methodology. *Id.* at 1147. The challenged regulation, OSHA instruction CPL 2.25B, selected employers for health inspections by ranking employers according to both the number of hazardous substances involved and data concerning potential employee exposure to those substances. *Id.* at 1147-48 n.1. On the other hand, selection for safety inspections under CPL 2.25B rests on the agency's assessment of a company's lost workdays due to injury or illness in light of national averages. *Id.*

54. *Id.* at 1153. The court in *Kast Metals* first established that the OSHA regulation was, in fact, a rule and thus subject to APA procedural guidelines. *Id.* at 1149-51. Applying the substantial impact test, the court held that the OSHA regulation governing the method of selecting employers for on-site inspections did not sufficiently affect the rights and interests of *Kast Metals Corporation* to render it invalid for promulgation without notice and comment. *Id.* at 1154-56.

55. *Id.* at 1154-56.

56. *Id.* at 1155 (citing *Donovan v. Huffines Steel Co.*, 645 F.2d 288 (5th Cir. 1981), *aff'g mem.* 488 F. Supp. 995 (N.D. Tex. 1979)).

57. *Id.* at 1156.

58. *Id.* at 1153. Throughout the opinion, Judge Goldberg lends his wit to the discussion of the applicability of § 553(b)(A) to the OSHA regulation. *Id.* at 1145 *passim*. Rejecting the company's contention that notice and comment should be required where OSHA is merely engaging in a "rational version of eenie-meenie-minie-moe," the opinion sets the tone for other disgruntled employers bringing similar actions. *Id.* at 1155. In its final utterance, the court states: "[l]et the die be *Kast*." *Id.* at 1156.

59. *Id.* at 1156. The *Kast Metals* court cautions against too readily finding a substantial impact in agency-issued regulations. *Id.* The court held that every agency "proclamation" does not require notice and comment. *Id.* "Words such as 'rule,' 'impact,' 'procedure,' et cetera, must contain within their syllables an alphabetical concatenation: the application of practicality and reasonableness, and the actual on-the-site effect upon the agency as well as upon the employer of whatever has been promulgated." *Id.*

Recognizing the difficulties that accompany the substance-procedure distinction,⁶⁰ the court stated that "the substantial impact test is the primary means by which courts look beyond the label 'procedural' to determine whether a rule is of the type Congress thought appropriate for public participation."⁶¹ However, the court in *Kast Metals* did not rely on the substantial impact test without evaluating emerging viewpoints that question its validity or even reject it outright.⁶²

The *Kast Metals* court began by addressing the conclusion of the United States Court of Appeals for the Ninth Circuit that *Vermont Yankee* precludes imposing notice-and-comment requirements for reasons of substantial impact alone.⁶³ The Ninth Circuit in *Rivera v. Becerra* ruled that the substantial impact approach prevented courts from complying with *Vermont Yankee* because the inquiry presents courts with a subtle invitation to substitute their views of the appropriate level of procedural protection in agency rulemaking.⁶⁴ Rejecting the reasoning of the Ninth Circuit, the court in *Kast Metals* asserted that *Vermont Yankee* does not apply to the purely legal question of determining compliance with APA notice-and-comment procedures.⁶⁵ The court concluded that *Vermont Yankee* speaks to court action imposing additional procedural requirements upon agencies above and beyond those required by the APA once the initial determination of APA compliance has been settled.⁶⁶ The court in *Kast Metals* thus separated the threshold question of § 553 applicability from the concerns voiced in *Ver-*

60. *Id.* at 1152-53. "[T]he distinction between a rule of procedure and one of substance is not black and white." *Id.* at 1152 (citing *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 909 (5th Cir. 1983) and *Batterton v. Marshall*, 648 F.2d 694, 702-03 nn.37-38 (D.C. Cir. 1980)).

61. *Kast Metals*, 744 F.2d at 1153. The court is cognizant of both the problems presented by the substantive-procedural distinction, which it readily acknowledges "def[ies] ready application," as well as the deficiencies of the substantial impact test which "represent[], albeit imperfectly, the judicial attempt to pour content into [its] use." *Id.* at 1154 n.19.

62. *Id.* at 1154 n.19.

63. *Id.* (citing *Rivera v. Becerra*, 714 F.2d 887 (9th Cir. 1983), *cert. denied*, 465 U.S. 1099 (1984)).

64. *Id.* The *Rivera* court posited that *Vermont Yankee* clearly admonished reviewing courts from "engraft[ing] 'their own notions of proper procedures upon agencies' beyond the requirements of section 553." *Rivera*, 714 F.2d at 891 (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 525 (1978)).

65. *Kast Metals*, 744 F.2d at 1154 n.19.

66. *Id.* Compare *Batterton v. Marshall*, 648 F.2d 694, 708-10 (D.C. Cir. 1980) (distinguishing *Vermont Yankee* because it presented no question as to whether the agency employed the statutory minima as prescribed by the APA) with *Association of Nat'l Advertisers v. FTC*, 617 F.2d 611, 636 (D.C. Cir. 1979) (interpreting *Vermont Yankee* as requiring courts to afford agencies "breathing room to comply with the congressional mandate to work their will within the law, to experiment and to innovate in the public interest in an effort, among other things, to relieve the three constitutional branches of some of the more mundane chores of government" (footnote omitted)). See also *supra* note 35.

mont Yankee. The issue before the court in *Kast Metals*—whether OSHA, in promulgating the inspection instructions, had fulfilled its requirements under the APA of providing notice and comment—was therefore a legal task and well within the province of the courts.⁶⁷ Falling outside the scope of the Supreme Court's edict in *Vermont Yankee*, the substantial impact test remains the appropriate legal test for determining the procedural nature of an administrative rule.⁶⁸

The court in *Kast Metals* continued by distinguishing its case from the decision of the D.C. Circuit in *Cabais v. Egger*,⁶⁹ which explicitly rejected the substantial impact test for the purposes of determining the interpretative nature of a rule in evaluating the need for notice and comment under § 553(b)(A).⁷⁰ Noting the *Cabais* court's express intention to limit its holding to interpretative rules under § 553(b)(A),⁷¹ the court in *Kast Metals* adhered instead to the subsequent D.C. Circuit decision *Lamoille Valley Railroad Co. v. ICC*.⁷² *Lamoille Valley* demonstrated the D.C. Circuit's continued intention to rely on the substantial impact test for determining the procedural nature of a rule.⁷³ That decision thus dispelled any ambiguity as to the applicability of *Cabais* to procedural rules and indicated that the substantial impact test, although rejected for interpretative rules, was still alive and well for determining the exempt status of procedural rules.⁷⁴

The underlying grounds for adhering to the well-established, if somewhat unsatisfactory,⁷⁵ substantial impact test persisted, and the desire to act in

67. *Kast Metals*, 744 F.2d at 1154 n.19.

68. *Id.* (stating that the substantial impact test was "no more than the rubric under which courts construe the terms of the APA").

69. 690 F.2d 234 (D.C. Cir. 1982).

70. *Kast Metals*, 744 F.2d at 1154 n.19 (citing *Cabais*, 690 F.2d at 238). Although many cases do not reflect a clear distinction among the exemptions found in § 553(b)(A), the analysis employed for determining the exempt status of each of the three types of rules—(1) interpretative rules, (2) general statements of policy, and (3) rules of agency organization, procedure, or practice—has, in general, developed independently. See GELLHORN & LEVIN, *supra* note 5, at 317; see, e.g., *Batterton v. Marshall*, 648 F.2d 694 (D.C. Cir. 1980) (evaluating agency rulemaking under each of the three possible exemptions); *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037 (D.C. Cir. 1987) (same). *Cabais* illustrates that the evaluation of a rule can differ substantially depending on the type of rule being considered under § 553(b)(A). *Cabais*, 690 F.2d at 238.

71. *Kast Metals*, 744 F.2d at 1154 n.19 (citing *Cabais*, 690 F.2d at 237-38).

72. 711 F.2d 295 (D.C. Cir. 1983).

73. *Id.* at 328. Without addressing its recent departure in *Cabais*, the court in *Lamoille Valley* articulated the appropriate test as whether a rule "jeopardizes the rights and interests of parties." *Id.* (quoting *Batterton*, 648 F.2d at 708).

74. *Kast Metals*, 744 F.2d at 1154 n.19 (citing *Lamoille Valley*, 711 F.2d at 328); see also *infra* text accompanying notes 195-204.

75. The *Kast Metals* court, in discussing the available approaches to defining "procedural," alluded to the difficulties underlying the substantial impact test. *Kast Metals*, 744 F.2d at 1154 n.19. In rejecting the claims of the *Kast Metals* Corporation, the court addressed the

conformance with congressional intent served to uphold the substantial impact test once again.⁷⁶ The *Kast Metals* court, in imposing the substantial impact test, was aware of the competing interests at stake and attempted to secure fairness and accuracy without permitting agencies to resort casually to expedited rulemaking in reliance on one of the available exemptions.⁷⁷ In *Kast Metals*, however, the court found that the OSHA instruction had "no cognizable impact, substantial or otherwise, on any right or interest of Kast."⁷⁸ To require notice and comment for the OSHA regulation would vitiate Congress' intent and, in effect, eliminate the exemption for rules of procedure, for, as the court recognized, "[a]ll agency rules will in some way affect those within the agency's grasp."⁷⁹

B. Looking for an Alternative: Batterton v. Marshall

The D.C. Circuit's recognition in *Kast Metals* that the substantial impact test is not entirely satisfactory as a mechanism for evaluating the substantive-procedural distinction⁸⁰ is typical of many decisions exploring the scope of the exemption under § 553(b)(A).⁸¹ Procedural rules, no matter how in-

potential reach of the substantial impact inquiry and conceded that "[a]ll agency rules will in some way affect those within the agency's grasp." *Id.* at 1156. In contending with this ambiguous area of the substantial impact test, the *Kast Metals* court resorted to an examination of the purposes that underlie the APA exemptions. The court characterized the substantive effect of the OSHA instruction as "derivative" and insufficient to warrant impeding administrative activity by imposing additional rulemaking proceedings. *Id.* "Administrative agencies should not be straightjacketed by rulemaking proceedings so as to thwart the exercise of congressional wisdom." *Id.* at 1156 n.22.

76. *Id.* at 1151-53. The court is aware of the "tension" between agency efficiency and public participation, but seeks to accommodate congressional intent to permit abbreviated rulemaking procedures where the rules "do not merit the administrative burdens of public input proceedings." *Id.* at 1153; see *Batterton*, 648 F.2d at 707 n.73 ("To reach the opposite conclusion would be to hamstring agencies in their efforts to improve their internal procedures regarding the way they conduct their business, and rob them of virtually all flexibility in dealing with increasing workloads." (quoting *Hall v. EEOC*, 456 F. Supp. 695, 702 (N.D. Cal. 1978))).

77. *Kast Metals*, 744 F.2d at 1156; see *National Ass'n of Home Health Agencies v. Schweiker*, 690 F.2d 932, 949 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983) (cautioning courts against freely recognizing exemptions from notice-and-comment requirements). Congress addressed this issue stating that "[n]one of [the] exceptions . . . is to be taken as encouraging agencies not to adopt voluntary public rule making procedures where useful to the agency or beneficial to the public." REPORT OF THE SENATE JUDICIARY COMM. ON THE ADMINISTRATIVE PROCEDURE ACT, S. REP. NO. 752, 79th Cong., 1st Sess. 13 (1945), *reprinted in* S. DOC. NO. 248, 79th Cong., 2d Sess. 199 (1946) (*quoted in Batterton*, 648 F.2d at 701 n.28).

78. *Kast Metals*, 744 F.2d at 1154.

79. *Id.* at 1156. The regulation at issue in *Kast Metals* was held to represent only a minor impact on employers; rather, "[t]he substantive effect of CPL 2.25B is purely derivative: the source of the employers' woes is the OSH Act itself." *Id.*

80. See *supra* note 75 and accompanying text.

81. *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987) (recognizing that "even unambiguously procedural measures affect parties to some degree"); *Neighborhood*

consequential, inevitably affect private parties within their scope in some manner.⁸² In addition, the notion that the substantial impact test served to remove some procedural rules from the scope of the exemption raised the question of the test's validity under *Vermont Yankee*.⁸³ *Batterton v. Marshall*⁸⁴ addressed these concerns and established a shift in emphasis, moving away from the substantial impact inquiry and focusing instead on the future weight of the challenged rule or regulation.⁸⁵

In *Batterton*, the state of Maryland challenged a rulemaking by the Department of Labor (DOL) that modified the method for calculating unemployment rates.⁸⁶ The results of these calculations provided the basis for the allocation of funds under the Comprehensive Employment and Training Act (CETA), a federally-funded program that monitored job training and placement guidance.⁸⁷ The new method, termed the "Balance of State" procedure, used as its source data derived from monthly Census Bureau surveys of sample households, ultimately adjusting the figures to meet the statistics of the entire state.⁸⁸ In contrast, the "Handbook" method, the procedure employed previously by DOL to determine Maryland's need for aid, relied on the reports of state employment security agencies.⁸⁹ When the change in

TV Co. v. FCC, 742 F.2d 629, 638 (D.C. Cir. 1984) (acknowledging that "all procedural requirements may and do occasionally affect substantive rights"); *Rivera v. Becerra*, 714 F.2d 887, 890-91 (9th Cir. 1983) (rejecting substantial impact test for purposes of determining applicability of exemption under the APA); *Cabais v. Egger*, 690 F.2d 234, 237 (D.C. Cir. 1982) (rejecting substantial impact test as a means for distinguishing between interpretative and legislative rules).

82. Courts generally sought to limit the potential reach of the substantial impact test. As one court remarked, a case "which at first blush seems to relate purely to a matter of mechanics, is identified as one that is not free from difficulty, and calls for judgment." *Guardian Fed. Sav. & Loan v. Federal Sav. & Loan Ins. Corp.*, 589 F.2d 658, 668 (D.C. Cir. 1978). Substantial impact, therefore, does not automatically call for notice-and-comment procedures. *Id.*; see also *Bowen*, 834 F.2d at 1046 ("[T]he mere fact that a rule may have a substantial impact 'does not transform it into a legislative rule.'").

83. Courts viewed it as their task to remove procedural rules from the reach of the exemption under § 553(b)(A) when a substantial impact warranted notice-and-comment rulemaking procedures. See, e.g., *Aiken v. Obledo*, 442 F. Supp. 628, 649-50 (E.D. Cal. 1977) (revealing that procedural rules with substantial impact are governed by an "exception to the exemption" under § 553). Judicial action of this nature was specifically rejected by the Supreme Court in *Vermont Yankee*. See *supra* note 35.

84. 648 F.2d 694 (D.C. Cir. 1980).

85. *Id.* at 709 n.83.

86. *Id.* at 696.

87. The Comprehensive Employment and Training Act, Pub. L. No. 95-524, 92 Stat. 1909 (codified as amended at 29 U.S.C. §§ 801-999 (1988)) (repealed 1982).

88. *Batterton*, 648 F.2d at 698.

89. *Id.* at 697.

methodology produced a significant reduction of CETA funds, Maryland filed suit in federal district court seeking declaratory and injunctive relief.⁹⁰

In its review of the lower court's decision,⁹¹ the *Batterton* court held that the agency's change in statistical methodology did not qualify for exemption from § 553 notice-and-comment procedures.⁹² Concluding that the change was "hardly a 'routine correction or refinement,'" the court stated that the challenged rulemaking "bears all the earmarks of conclusive agency action, governing the rights and interests of the public."⁹³ Accordingly, any future DOL action designed to alter the means by which CETA disbursements are allocated must be implemented following the notice-and-comment procedures prescribed by the APA.⁹⁴

Rather than evaluating the agency's procedures in light of the substantial impact created by DOL's action, the *Batterton* court approached the issue by considering the "legal status and effect" of the challenged rulemaking in future judicial and administrative proceedings.⁹⁵ The court regarded this characterization of agency action as crucial to a proper evaluation of the applicability of the exemption from notice and comment under § 553(b)(A).⁹⁶ The goals that Congress sought to achieve by imposing the requirements of notice and comment on agencies embarking on the task of

90. *Id.* at 699. In addition to the allegation that DOL's rulemaking violated the prescribed notice-and-comment procedures under the APA, the state also claimed that the agency failed to meet publication requirements under CETA and the Freedom of Information Act and that the "Balance of State" method was arbitrary and capricious. *Id.*

91. The court of appeals reversed the district court's decision, which upheld the agency determination on various grounds including that the changed methodology was not a rule as contemplated by the APA. *Id.* at 699.

92. *Id.* at 711. Although the court found that the issue concerning the specific reduction of CETA funds had been rendered moot where the funds had already been spent and where the state had in fact received additional discretionary DOL funds in excess of the claimed reduction, it was nevertheless able to proceed because Maryland's stated relief was in the form of protection from similar modifications in the future. *Id.* at 699.

93. *Id.* at 710.

94. *Id.* at 711.

95. *Id.* at 700. The court expressly distinguished its analysis from that of the substantial impact test, stating that the "'substantial impact' analysis does not conclude the determination of the legal force of the agency action in future proceedings while assigning the classification of 'legislative rule' does." *Id.* at 709 n.83. Although the court in *Batterton* focused primarily on the legal effect of an agency's activity, it noted that the substantial impact test remains a well-established approach for determining the applicability of the exemption under § 553(b)(A) for rules of procedure: "[W]e find no reason to doubt the continued viability of the 'substantial impact' test, as it simply articulates one of several criteria for evaluating claims of exemption from § 553." *Id.*

96. *Id.* at 699-700. The characterization of agency determinations according to their legal effect contends nicely with the difficulties inherent in the substantive-procedural distinction brought about by agency activity that typically embodies a variety of functions and purposes. *Id.* at 702-03. The *Batterton* court illustrated its point, stating that "[a]gencies give advice, enter contracts, stimulate inventions . . . approve rates . . . alleviate burdens, allocate funds,

rulemaking provided the *Batterton* court with the basis for its approach.⁹⁷ Distinguishing between the “legislative” and “non-legislative” nature of agency action permits reviewing courts to determine whether Congress intended the exemption to apply.⁹⁸ Where an agency is contemplating regulatory provisions that it intends to be legally binding on all affected parties, the protective features of advance notice and public comment are mandated.⁹⁹ In contrast, agency actions issued without such protective features command less deference, serving merely to notify the public of the agency’s policies and understanding of the laws, and to organize better the agency’s daily operations.¹⁰⁰

In addressing the exemption for procedural rules under § 553(b)(A), the court in *Batterton* nevertheless employed language that distinctly resembled the “substantial impact” test.¹⁰¹ The court concluded that since the newly-adopted statistical methodology changed the “one undefined variable in the statutory fund allocation formula,” it is governed by the standards for informal rulemaking as defined in § 553.¹⁰² The consequences of DOL’s action effectively removed this arguably procedural rule from the scope of the exemption.

The *Batterton* court completed its analysis with a discussion of the court’s authority to review agency action in light of recent claims that *Vermont Yankee* precludes courts from imposing procedures beyond those articulated in the APA.¹⁰³ Consistent with its treatment of *Vermont Yankee* in *Kast Metals*, the court rejected the arguments advanced by DOL and held that the warning issued by the Supreme Court in *Vermont Yankee* was directed at courts confronted with the issue of whether sufficient procedures accompanied the rulemaking process when agency compliance with APA requirements had already been established.¹⁰⁴ Because the claim against DOL raised the threshold issue of whether the agency had complied with the notice-and-comment procedures detailed in § 553 of the APA, *Vermont Yan-*

and issue statements guiding the exercise of such functions. Particular actions combine the qualities of interpretative rules, policies, internal procedures, and legislative rules.” *Id.* at 703.

97. *Id.* at 700-04.

98. *Id.* at 704.

99. *Id.* at 701-02.

100. *Id.* at 702 (“Such actions . . . express the agency’s intended course of action, its tentative view of the meaning of a particular statutory term, or internal house-keeping measures organizing agency activities. They do not, however, foreclose alternate courses of action or conclusively affect rights of private parties.”).

101. The court stated that “where the agency action trenches on substantial private rights and interests” and “jeopardizes [those] rights and interest[s],” such action falls outside of the scope of the exemption for rules of agency organization, procedure, or practice. *Id.* at 708.

102. *Id.*

103. *Id.* at 708-09.

104. *Id.* at 709; see also *supra* text accompanying notes 65-68.

kee simply did not apply.¹⁰⁵ The court concluded that construing the statutory exemption from notice-and-comment requirements to determine the procedural sufficiency under the APA of DOL's changed statistical methodology is an entirely appropriate function of the court.¹⁰⁶ Furthermore, by asserting that it did not rely on the substantial impact test, the court did not need to address DOL's contention that the substantial impact test suggests possible inappropriate judicial intervention.¹⁰⁷

C. *Identifying Rules that "Encode a Substantive Value Judgment":*

American Hospital Association v. Bowen

As conceded by the D.C. Circuit in *Batterton*, the substantial impact test continued to enjoy significant support despite its inadequacies.¹⁰⁸ Yet, courts still contended with the problem of determining the degree of substantial impact permitted under the exemption for procedural rules and *Vermont Yankee*.¹⁰⁹ Seeking a more satisfactory approach to defining the scope of the exemptions in § 553(b)(A), *American Hospital Association v. Bowen*¹¹⁰ followed *Batterton*'s lead: "The gradual move away from looking solely into the substantiality of the impact reflects a candid recognition that even unambiguously procedural measures affect parties to some degree."¹¹¹ Drawing from *Batterton*, the court in *American Hospital* emphasized the effect of a rule on the rights and obligations of the regulated public as Congress established in an agency's enabling statute and distinguished these rights and obligations from the incidental effects that any change in agency regulations may produce, regardless of their substantiality.¹¹² Thus, the more pointed question posed by the court in *American Hospital* was "whether the agency action *also* encodes a substantive value judgment or puts a stamp of approval

105. *Id.*

106. *Id.*

107. *Id.* at 709 n.83 (referencing DOL's statement that "the 'substantial impact' test may put a court in the posture of appearing to require procedures beyond those mandated by statute . . . and in that fashion deviate from the implications of *Vermont Yankee*").

108. *See supra* note 95.

109. *See supra* text accompanying notes 63-68 and 103-07.

110. 834 F.2d 1037 (D.C. Cir. 1987), *cited with approval in* *Reeder v. FCC*, 865 F.2d 1298, 1305 (D.C. Cir. 1989) (per curiam).

111. *American Hosp.*, 834 F.2d at 1047; *see also Batterton*, 648 F.2d at 707 ("As Professor Freund explained decades ago, 'even office hours . . . necessarily require conformity on the part of the public.' " (quoting ERNST FREUND, *ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY* 213 (1928))).

112. *American Hosp.*, 834 F.2d at 1047. Quoting from *Batterton*, the court revealed its approach: "A useful articulation of the exemption's critical feature is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which parties present themselves or their viewpoints to the agency." *Id.* (quoting *Batterton*, 648 F.2d at 707).

or disapproval on a given type of behavior.”¹¹³ Under *American Hospital*, therefore, the substantial impact test has a second prong. In the event that a court finds that an agency’s action causes a substantial impact, the court must further determine whether that substantial impact is directly associated with the activities, rights, or obligations that Congress intended to regulate in establishing the agency and its powers.

In *American Hospital*, the court contemplated an array of rules implementing the peer review organization (PRO) program established by Congress in its 1982 amendment to the Medicare Act,¹¹⁴ including three documents that defined the procedures for the private review contractors.¹¹⁵ These documents, by which the Department of Health and Human Services (HHS) detailed such measures as notification of hospitals, random hospital admission reviews, and rigid scrutiny for areas susceptible to abuse,¹¹⁶ were designed to provide the PROs with guidelines for conducting their reviews and to draw attention to situations in which HHS expected review to be the most productive and effective.¹¹⁷

The court in *American Hospital* rejected the American Hospital Association’s (AHA) claim that HHS had promulgated directives implementing the 1982 amendment to the Medicare Act without the notice and comment re-

113. *Id.* (emphasis added).

114. Peer Review Improvement Act of 1982, Pub. L. No. 97-248, § 143, 96 Stat. 382 (1982) (codified as amended at 42 U.S.C. §§ 1320c to 1320c-22 (1988)). This provision was enacted to establish a system that effectively monitors the medical care provided to Medicare recipients and the corresponding reimbursements obtained by the medical providers.

115. *American Hosp.*, 834 F.2d at 1049-1052. The court ruled that three of the directives were procedural and thus exempt from notice and comment under § 553(b)(A). The first of these directives, PRO Manual IM85-2, established a general enforcement plan for the peer review organizations (PROs) that monitor health care providers participating in the Medicare program. *Id.* at 1049. The 70-page document provided for such enforcement standards as requiring PROs to review at least 5% of all hospital admissions, 100% of all medical procedures susceptible to abuse (e.g., unnecessary admissions), and to give notice to hospitals and parties of the reviews being conducted. *Id.* The second procedural directive was PRO Manual IM85-3, which regulated the manner and level of scrutiny that a PRO must devote to reviewing determinations that a patient is no longer eligible for Medicare. *Id.* at 1051. Finally, PRO Program Directive No. 2 established the terms that must be included in the agreement between hospitals and their respective PRO. *Id.* The other documents issued by HHS in connection with its plan to implement the 1982 Amendment and reviewed by the court in *American Hospital* were the Request for Proposals (soliciting proposals from organizations seeking to become PROs) as well as the actual contracts that were to govern the relationship between HHS and the private organizations. *Id.* at 1052-57. The court exempted these documents from notice and comment as well, characterizing them as general policy statements. *Id.* The dissent praised the majority opinion but objected to the court’s refusal to require notice-and-comment procedures for the contract’s stated numerical objectives which the court also identified as general statements of policy. *Id.* at 1058 (Mikva, J., concurring in part and dissenting in part).

116. *Id.* at 1049 (referring to PRO Manual IM85-2).

117. *Id.* at 1050.

quired under § 553 of the APA.¹¹⁸ Premising its decision upon the policy goals behind affording notice and comment, the court sought to further preserve the narrow scope of the exemptions and require agencies to follow notice-and-comment procedures in all but the clearest instances in which the exemptions apply.¹¹⁹ Yet, the challenged regulations in *American Hospital* presented the court with precisely such an instance: the HHS directives constituted "classic *procedural* rules, exempt under that distinctive prong of § 553."¹²⁰

The "encoding a substantive value judgment" language espoused in *American Hospital* sustained *Batterton's* emphasis on preserving the procedural classification, a classification that Congress deliberately created.¹²¹ By focusing only on the interests that are ultimately at stake, namely those established by Congress in an agency's enabling statute,¹²² the court was able to limit the overinclusiveness of the substantial impact test and give effect to the intended purpose of the procedural rule exemption.

The impetus for reworking the substantial impact test was derived in large part from the 1978 Supreme Court decision in *Vermont Yankee*.¹²³ Courts and litigants continued to struggle with *Vermont Yankee's* applicability to court determinations concerning the scope of the exemptions under § 553.¹²⁴

118. *Id.* at 1057.

119. *Id.* at 1044-45. The court in *American Hospital* proceeded by analyzing the challenged directives as possibly invoking the exemption for (1) interpretative rules, (2) statements of general policy, and (3) rules of agency organization, procedure or practice. *Id.* at 1045-48. It reversed the district court ruling in part because that court failed to consider "the more relevant exemption . . . for procedural rules." *Id.* at 1052.

120. *Id.* at 1050.

121. *Batterton's* move away from the substantial impact test reflected a need to limit that test because of the view that courts tend to require notice and comment where a substantial impact was deemed to exist. Recognizing that procedural rules were likely to create some form of burden on private parties and therefore possibly a substantial impact, the *Batterton* court feared that this approach might interfere with Congress' express exemption for procedural rules. *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980) (explaining Congress' specification for agency efficiency in promulgating procedural rules but recognizing that "many merely internal agency practices affect parties outside the agency—often in significant ways"); see also *supra* note 82 and accompanying text.

122. See *Neighborhood TV Co. v. FCC*, 742 F.2d 629, 637 (D.C. Cir. 1984) (holding that the rules designed to govern interim applications for translator licenses pending rulemaking proceedings were procedural notwithstanding the incidental effects of a processing freeze and modified tiered approach to selecting applications for consideration); see also *Kessler v. FCC*, 326 F.2d 673, 680 (D.C. Cir. 1963) ("procedural rules are those dealing with the method of operation utilized by the Commission in the dispatch of its business").

123. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978); see also *supra* note 35.

124. See *Rivera v. Becerra*, 714 F.2d 887, 890 (9th Cir. 1983) (rejecting the substantial impact test in light of Congress' express exemption in § 553 and the Supreme Court's mandate in *Vermont Yankee*), *cert. denied*, 465 U.S. 1099 (1984); *Cabais v. Egger*, 690 F.2d 234, 237 (D.C. Cir. 1982) (interpreting *Vermont Yankee* to prohibit courts from imposing notice and

The Supreme Court, in the following year, considered the fine line between a court's obligation to insist on full compliance with APA procedures and a court's impermissible intrusion when it substitutes what it believes to be adequate procedures.¹²⁵ Articulating a standard by which a court could recognize when it is either disrupting or maintaining this "balance,"¹²⁶ however, became troublesome in light of the ambiguity in defining the term "procedural." In *American Hospital*, the court revealed its intention to define procedural rules as those that "do not themselves alter the rights or interests of parties, although [they] may alter the manner in which parties present themselves or their viewpoints to the agency."¹²⁷

D. One Step Forward or Two Steps Back: Air Transport Association of America v. Department of Transportation

1. The Right to Avail Oneself of an Administrative Adjudication

The *Batterton* and *American Hospital* courts were guided by *Vermont Yankee* and the desire to preserve the express exemption for rules of procedure. These objectives, however, necessarily infringed upon the court's ability to provide procedural protections where it viewed the need for public participation as paramount. Attempting to regain a foothold over this area, the D.C. Circuit formulated yet another approach to resolving the issue of the scope of the exemption under § 553(b)(A) in *Air Transport Association of America v. Department of Transportation*.¹²⁸ Inquiring whether the challenged Rules of Practice "substantially affect civil penalty defendants' 'right to avail [themselves] of an administrative adjudication,' "¹²⁹ the court reasserted its authority to review the scope of the exemption and invalidated the challenged regulatory action for inadequate procedural compliance.¹³⁰

comment based on substantial impact alone). *But see* *Air Transp. Ass'n of Am. v. Department of Transp.*, 900 F.2d 369, 378 n.13 (D.C. Cir. 1990) (noting that *Vermont Yankee* is incorrectly invoked by the dissent because it presupposes compliance with § 553 and its exemption), *vacated*, 111 S. Ct. 944 (1991); *Association of Nat'l Advertisers v. FTC*, 617 F.2d 611, 629 & n.20 (D.C. Cir. 1979) (dismissing plaintiffs' claim that the substantial impact test is no longer valid under *Vermont Yankee*). *See generally* DAVIS, *supra* note 1, § 6:35-6:39, at 216 (questioning the "sweeping dictum" of *Vermont Yankee* in light of subsequent Supreme Court decisions that impose procedural requirements in addition to APA procedures).

125. *Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979).

126. *Id.*

127. *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987) (quoting *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980)); *see also* *Neighborhood TV Co. v. FCC*, 742 F.2d 629, 637 (D.C. Cir. 1984) (relying on the same language in its examination of the substantive-procedural distinction).

128. 900 F.2d 369, 372 (D.C. Cir. 1990), *vacated*, 111 S. Ct. 944 (1991).

129. *Id.* (quoting *National Motor Freight Traffic Ass'n v. United States*, 268 F. Supp. 90, 96 (D.D.C. 1967), *aff'd*, 393 U.S. 18 (1968)).

130. *See infra* text accompanying notes 158-61.

Judge Edwards, writing for the majority in *Air Transport*, invalidated rules promulgated without notice and comment by the Federal Aviation Administration (FAA).¹³¹ The regulations at issue in *Air Transport*¹³² provided for the manner in which the FAA was to prosecute violations of the Federal Aviation Act under the expanded enforcement authority granted by Congress in its Civil Penalty Assessment Demonstration Program legislation.¹³³ As the agency explained, the Rules of Practice embodied "the procedures utilized to enforce the FAA's substantive aviation safety regulations in the smaller civil penalty cases."¹³⁴ The regulations served to bring its existing procedural rules into conformance with the more formal, trial-like procedures of notice and hearing under § 554 of the APA, which Congress explicitly required for all civil penalty actions.¹³⁵ No longer required to submit findings to the United States Attorney for prosecution of civil penalty

131. *Air Transport*, 900 F.2d at 381.

132. 53 Fed. Reg. 34646-65, 34656 (Sept. 7, 1988) (codified at 14 C.F.R. Part 13, Subpart G).

133. Airport and Airway Safety and Capacity Expansion Act of 1987, Pub. L. No. 100-223, Title II, § 204(g) 101 Stat. 1486, 1520-21 (December 30, 1987) (codified as amended at 49 U.S.C. § 1475 (1988 & Supp. II 1990)) (amending the Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1557). Increasing the enforcement power of the FAA under the Federal Aviation Act, the Act enabled the agency to assess civil penalties and to conduct administrative adjudications for violations of the Federal Aviation Act as well as rules, regulations, and orders issued by the FAA. 49 U.S.C. § 1475(a). Civil penalty actions in excess of \$50,000, however, would remain in the hands of the United States Attorney for prosecution in United States district courts. *Id.* at § 1475(c). The amendment required the agency to establish a Civil Penalty Assessment Demonstration Program to monitor the amendment's effectiveness over a two-year period and to report its findings to Congress within that time. Pub. L. No. 100-223, § 204(i)(2) (1987) (uncodified). Subsequent to the enactment, the FAA promulgated the Rules of Practice for FAA Civil Penalty Actions which articulate the detailed procedures for civil penalty adjudications. Rules of Practice for FAA Civil Penalty Actions, 14 C.F.R. § 13 (1988). Congress determined the appropriate level of formality governing such proceedings in the 1987 legislation which prescribed a hearing on the record as established in § 554 of the APA. The Air Transport Association challenged these Rules of Practice in the *Air Transport* case, and the Court of Appeals as a result held them invalid in its review of the final rule.

134. Brief for the Respondents at 3, *Air Transport*, 900 F.2d 369 (D.C. Cir. 1990) (No. 89-1195) (emphasis omitted).

135. Section 1475(d)(1) provides that "[a] civil penalty may be assessed under this section only after notice and opportunity for a hearing on the record in accordance with section 554 [of the APA]." 49 U.S.C. § 1475 (d)(1). The legislative history reveals the purposes behind this requirement:

First, the requirement is intended to advise the FAA of the appropriate level of procedural formality and attention to the rights of those assessed civil penalties under this demonstration program. Secondly, this requirement is intended to provide reasonable assurance to the potential subjects of such civil penalties that their due process rights are not compromised.

Brief for Petitioner at 20, *Air Transport*, 900 F.2d 369 (D.C. Cir. 1990) (No. 89-1195) (quoting H.R. CONF. REP. NO. 484, 100th Cong., 1st Sess. 81 (1987), reprinted in 1987 U.S.C.C.A.N. 2656).

actions under \$50,000,¹³⁶ the FAA published the Rules of Practice in their final form and for immediate adoption on September 7, 1988, announcing the inadequacy of its existing rules and the temporary nature of the enforcement authority as grounds for proceeding without the notice-and-comment period.¹³⁷ Governing such aspects of the civil penalty action as filing of the complaint, service of documents, discovery, evidence, record, and appeals, the Rules of Practice encompass the necessary and available agency procedures once a party charged with a violation has requested a hearing.¹³⁸

Representing the interests of private airlines, the Air Transport Association of America (Air Transport or Association) challenged the Rules of Practice following notice of final agency action in the *Federal Register*.¹³⁹ Air Transport claimed that the rules imposed a significant hardship on its members currently engaged in litigating actions before the FAA.¹⁴⁰ Citing numerous instances where the Rules favor the agency, the Association argued that no equivalent beneficial features were afforded to parties defending

136. As reported by the Department of Transportation, the Civil Penalty Assessment Demonstration Program:

gives the FAA statutory authority which will better enable [it] to prosecute airlines which cut corners on maintenance, to prosecute general aviation pilots who fly through restricted areas and risk not only their own lives, but more importantly, the lives of many, many others; and to prosecute those who violate airport security laws.

... We as passengers do not see the myriad of hoses, switches, [and] other equipment which must work perfectly for the planes to get off the ground, to perform flawlessly in flight, and then to land safely. This amendment provides an incentive for airlines to ensure that these systems are maintained at the highest of standards.

Brief for the Respondents at 5-6, *Air Transport*, 900 F.2d 369 (D.C. Cir. 1990) (No. 89-1195) (quoting 133 CONG. REC. S15293-94 (daily ed. October 28, 1987) (statement of Sen. Wilson)).

137. 53 Fed. Reg. 34653. The Civil Penalty Assessment Demonstration Program granted the FAA increased prosecutorial power for a limited two-year period taking effect on December 31, 1987. 49 U.S.C. § 1475(d)(4) (1988 & Supp. II 1990).

138. 53 Fed. Reg. 34655-65. Following receipt of notice of proposed civil penalty, the individual charged has three options as to how to proceed: (1) pay the amount of the penalty upon which the FAA will issue a civil penalty order; (2) engage in informal settlement proceedings with the FAA; or (3) request a hearing before an administrative law judge. *Id.* at 34654-55 (codified at 14 C.F.R. § 13.16(e)-(l)).

139. Brief for Petitioner at 20, *Air Transport*, 900 F.2d 369 (D.C. Cir. 1990) (No. 89-1195). The claims of the Association were also the subject of a hearing held before the Subcommittee on Aviation in 1989 where members of the aviation community and experts in the field of administrative law testified concerning the FAA Rules of Practice and the "consternation . . . over what some others think of perhaps as a dry procedural issue." *The Civil Penalty Assessment Demonstration Program of the Federal Aviation Administration: Hearing Before the Subcomm. on Aviation of the House Committee on Public Works and Transportation*, 101st Cong., 1st Sess. 137 (1989) (statement of Robert J. Aaronson, President, Air Transport Association of America).

140. Brief for Petitioner at 3, *Air Transport*, 900 F.2d 369 (D.C. Cir. 1990) (No. 89-1195) (citing the harmful publicity and the exorbitant costs of defending against alleged violations as its impetus for seeking to suspend administrative adjudications pending judicial review of the final rule).

against cited violations.¹⁴¹ In the words of the Association, the Rules of Practice "create[d] unparalleled bias in favor of the agency in litigation of penalty cases."¹⁴² Contending that the interests of the public require procedural conformance with § 553, the Association argued that the burdens that the rules impose on defending parties would subject airlines to a greater likelihood of an increased penalty assessment, resulting in sufficient prejudice to warrant the imposition of public participation through notice-and-comment procedures.¹⁴³ Thus, in addition to substantive claims that the rules violated due process rights and the FAA's enabling statute, the Association sought to compel compliance with the required notice-and-comment procedures of § 553.¹⁴⁴ The agency defended its action by characterizing the Rules of Practice as procedural and by advancing its post-promulgation consideration of industry comment.¹⁴⁵

The court in *Air Transport* recognized the inadequacies of a substantive-procedural distinction¹⁴⁶ and adhered to a line of cases employing a "functional analysis" instead.¹⁴⁷ Focusing on the fact that the challenged procedures implicate the defendant's rights in a civil penalty hearing, the court

141. Air Transport challenged eight provisions specifically: (1) issuance of an Order of Civil Penalty prior to a hearing under 14 C.F.R. §§ 13.16(h), 13.202 (1988); (2) lack of separation of investigatory and adjudicatory functions under § 13.203; (3) unequal use of formal admissions under § 13.220(1)(3); (4) disparate use of opinion testimony under § 13.227; (5) unequal protection from hearsay testimony under § 13.227; (6) limitation on relevant factual evidence not directly related to the incident or violation under § 13.227; (7) prohibition on written arguments during or after the hearing including motions and proposed findings of fact and conclusions of law under § 13.231; (8) special accountability of administrative law judges following any reduction of civil penalty under § 13.232. See Brief for Petitioner at 20-43, *Air Transport*, 900 F.2d 369 (D.C. Cir. 1990) (No. 89-1195).

142. *Id.* at 20.

143. *Id.* at 46-48. The Association analogized the Rules of Practice to the "formalized criteria adopted by an agency to determine whether claims for relief are meritorious" as stated in *Pickus*. *Id.* at 47 (quoting *Pickus v. United States Bd. of Parole*, 507 F.2d 1107, 1113 (D.C. Cir. 1974)).

144. *Id.* at 47 (Challenging the rules on the grounds of noncompliance with due process, APA minimum requirements, and the agency's authorizing statute, Air Transport claimed that public participation in the form of notice and comment was essential where "[t]he Rule was specifically designed to influence penalty decisions"). *Id.*

145. Brief for the Respondents at 45-49, *Air Transport*, 900 F.2d 369 (D.C. Cir. 1990) (No. 89-1195). The FAA also submitted § 553(b)(B), exempting agency action from notice and comment where "good cause" is indicated, as justification for proceeding without standard rulemaking procedures. *Id.* at 49; see also *supra* note 13.

146. See *supra* text accompanying note 33.

147. *Air Transp. Ass'n of Am. v. Department of Transp.*, 900 F.2d 369, 375-76 (D.C. Cir. 1990), *vacated*, 111 S. Ct. 944 (1991). The "functional analysis" upon which the *Air Transport* court relied focuses on the nature of the resulting consequences of agency action, such as when opportunities are foreclosed or entitlements jeopardized. *Id.* (citing *Reeder v. FCC*, 865 F.2d 1298, 1305 (D.C. Cir. 1989) (*per curiam*); *Batterton v. Marshall*, 648 F.2d 694, 707-08 (D.C. Cir. 1980); *Pickus v. United States Bd. of Parole*, 507 F.2d 1107, 1113 (D.C. Cir. 1974)).

held that “[t]he Penalty Rules . . . affect the entire range of adjudicatory rights guaranteed by the due process clause, the APA and [the Demonstration Program]—matters far too important to be withdrawn from public deliberation.”¹⁴⁸ The majority relied heavily on prior law requiring notice and comment for agency action that disrupts the availability of administrative hearings and cited the court’s holding in *National Motor Freight Traffic Association v. United States* as controlling.¹⁴⁹ The nature of the rules alone and their potential consequences provide the relevant inquiry for determining whether the exemption from informal rulemaking procedures under § 553(b)(A) applies.¹⁵⁰ The court thus narrowly construed the exemption for rules of procedure, removing from its scope all rules that pertain to a party’s right to an administrative hearing.¹⁵¹

The court in *Air Transport* reasoned that because the FAA Rules of Practice were directed at the administrative hearings in which the agency imposes civil penalties for aviation safety violations,¹⁵² courts must use particular care in discerning the validity of the challenged rulemaking.¹⁵³ An agency can easily manipulate procedures such as the Rules of Practice, leaving the defendant in a vulnerable position.¹⁵⁴ Considering this potential for bias, the court explained that “the FAA made discretionary—indeed, in many cases, highly contentious—choices concerning what process civil penalty defendants are due.”¹⁵⁵ Interpreting *American Hospital* to preclude this type of administrative action without the procedural precautions of public participation, the court likened the FAA regulations to those that “encode[] a substantive value judgment.”¹⁵⁶ The court did, however, recognize the exemption for procedural rules as a valuable means of accomplishing organizational matters within an agency, but limited the use of the exemption to “housekeeping measure[s].”¹⁵⁷

148. *Air Transport*, 900 F.2d at 377.

149. 900 F.2d 369 *passim*. The court even adopted the language of *National Motor Freight* as the essential inquiry for determining § 553(b)(A) applicability. See, e.g., *id.* at 372, 376-77, 381 (quoting *National Motor Freight Traffic Ass’n v. United States*, 268 F. Supp. 90 (D.D.C. 1967) (three-judge court), *aff’d*, 393 U.S. 18 (1968)).

150. See, e.g., *id.* at 377.

151. *Id.* at 378.

152. See *supra* note 133.

153. *Air Transport*, 900 F.2d at 376 (citing *National Ass’n of Home Health Agencies v. Schweiker*, 690 F.2d 932, 949 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983); *Brown Express, Inc. v. United States*, 607 F.2d 695, 702-03 (5th Cir. 1979)).

154. The *Air Transport* court was careful to note in expressing its astonishment over FAA’s choices concerning the Rules of Practice that it in no way questioned the legality of those choices. *Id.* at 376 n.8.

155. *Id.*

156. *Id.* (construing *American Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987)).

157. *Id.* (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 310 (1979)).

The *Air Transport* formulation sought to put an end to the uncertainty left unaddressed by *Vermont Yankee* and to reaffirm the court's function of review over administrative agencies, in particular when a defendant's adjudicatory rights are implicated.¹⁵⁸ In response to the dissenting view in *Air Transport*, which advocated the procedural nature of the penalty rules, the court noted only briefly that reliance on *Vermont Yankee* is misplaced where the issue is confined to determining compliance with the APA.¹⁵⁹ Furthermore, congressional intent can only be properly observed when courts scrutinize the procedural adequacy of regulatory activity that affects the rights of the regulated public, unlike the more arbitrary procedural-substantive distinction, which focuses on "classes of rights."¹⁶⁰ In other words, the majority contends that looking at the degree of substantial impact is altogether inappropriate and that only internal agency procedures of no conceivable interest to the public fall within the ambit of the exemption for rules of agency organization, procedure, or practice. The *Air Transport* court's rejection of the substantive-procedural distinction represents a significant departure from previous case law, which generally acknowledged the

158. See *supra* note 35.

159. *Air Transport*, 900 F.2d at 378 n.13. Judge Edwards noted that *Vermont Yankee* and its mandate to reviewing courts to refrain from imposing procedural requirements not listed in the APA were inapplicable where such a court has the obligation of assessing compliance with APA requirements. See also *supra* text accompanying notes 103-04. "Section 553 of the APA expressly directs agencies to engage in notice and comment rulemaking; the issue in this case is whether the FAA had any ground to disregard this procedural obligation." *Air Transport*, 900 F.2d at 378 n.13 (emphasis omitted).

160. *Id.* at 378 (citing *American Hosp.*, 834 F.2d at 1041, 1047). Judge Edwards stated for the majority that "[t]he characterizations 'substantive' and 'procedural'—no more here than elsewhere in the law—do not guide inexorably to the right result, nor do they really advance the inquiry very far." *Id.* (quoting *National Motor Freight Traffic Ass'n v. United States*, 268 F. Supp. 90, 96 (D.D.C. 1967) (three-judge court), *aff'd*, 393 U.S. 18 (1968)). The court further reasoned that the substantive-procedural distinction misses the point, for the exemption under § 553 refers not only to rules of procedure, but rather, to rules of organization, procedure, or practice collectively. *Id.* But see *National Motor Freight*, 268 F. Supp. at 96, for a discussion of the origin of the substantive-procedural distinction. In *National Motor Freight*, the court traced the term "substantive" to the Attorney General's Manual on the Administrative Procedure Act which defined that term in its discussion of the applicability of § 553 informal rulemaking procedures:

Substantive rules—rules . . . issued by an agency pursuant to statutory authority and which implement the statute, as, for example, the proxy rules issued by the Securities and Exchange Commission pursuant to section 14 of the Securities Exchange Act of 1934 Such rules have the force and effect of law.

Id. at 97 (quoting the ATTORNEY GENERAL'S MANUAL, *supra* note 2, at 423 n.3); see also *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-03 & nn.31-32 (1979) (relying on the Attorney General's Manual); *id.* at 301 ("The central distinction among agency regulations found in the APA is that between 'substantive rules' on the one hand and 'interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice' on the other.").

difficulties inherent in the substantive-procedural distinction, but nevertheless adhered consistently to its basic mandate.¹⁶¹

2. *The Primary Conduct Test*

In sharp contrast, Judge Silberman's dissenting opinion admonished the majority for dispensing with the statutory mandate to distinguish between substantive and procedural rules.¹⁶² To effectuate congressional intent, Judge Silberman suggested that the penalty rules be upheld because they bear on the procedures to be followed in civil penalty hearings rather than on aviation safety directly.¹⁶³ The dissent further reasoned that the Supreme Court in *Vermont Yankee* clearly cautioned reviewing courts against imposing procedural protections in addition to those required under the APA.¹⁶⁴

The dissent found force in the contention that courts are not at leisure to disregard the substantive-procedural distinction upon which the APA exemption rests.¹⁶⁵ "Congress . . . made that difference critical, and we are therefore obliged to implement a viable distinction between 'procedural' rules and those that are substantive."¹⁶⁶ The viable distinction that Judge Silberman formulated assigns to the term "substantive" all rules that affect primary conduct and designates all those at the periphery as "procedural."¹⁶⁷ Accordingly, the inquiry must be whether "a given regulation

161. See, e.g., *Neighborhood TV Co. v. FCC*, 742 F.2d 629, 637 (D.C. Cir. 1984) (stating that "[c]ourts have not had an easy time deciding whether particular agency rules were 'procedural' or 'substantive'"); *United States Dep't of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1152 (5th Cir. 1984) (conceding that "the distinction between a rule of procedure and one of substance is not black and white"); *Batterton v. Marshall*, 648 F.2d 694, 701-03 (D.C. Cir. 1980) (comparing substantive and non-binding rules while acknowledging that infinite variations of agency activity defy neat characterization); *Brown Express, Inc. v. United States*, 607 F.2d 695, 701 (5th Cir. 1979) (finding that the terms "substantive" and "procedural" "are legal conclusions which depend upon their settings for definition"); *Aiken v. Obledo*, 442 F. Supp. 628, 649 (E.D. Cal. 1977) (holding that the collateral contact rule issued by the United States Department of Agriculture "does not squarely fall within either the 'procedural' or the 'substantive' categories [sic]"); *Pharmaceutical Mfrs. Ass'n v. Finch*, 307 F. Supp. 858, 863 (D. Del. 1970) (stating that "[a]ttempting to provide a facile semantic distinction . . . does little to clarify whether the regulations here involved are subject to the notice and comment provisions . . . of the [APA]").

162. *Air Transport*, 900 F.2d at 381 (Silberman, J., dissenting).

163. *Id.* at 382 (stating that the Rules of Practice fit within the exemption under § 553(b)(A) because they "deal with enforcement or adjudication of claims of violations of the substantive norm but . . . do not *purport* to affect the substantive norm").

164. *Id.* at 383 (citing generally *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978)).

165. *Id.* at 381.

166. *Id.*

167. *Id.* at 382 (citing *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164 (1967)). "Primary conduct" has also been used in contending with the difficulties surrounding the substantive-procedural distinction embodied in the *Erie* Doctrine based on the landmark case of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Most notably, Justice Harlan employed the term "pri-

purports to direct, control, or condition the behavior of those institutions or individuals subject to regulation by the authorizing statute" thereby rendering it substantive in nature and subject to notice-and-comment rulemaking procedures.¹⁶⁸ As for the FAA Rules of Practice, these exemplify "by ample measure" the type of rules that a court should classify as procedural and therefore sustain, even if promulgated without the notice and comment delineated in § 553.¹⁶⁹

Judge Silberman, relying on *American Hospital*, conceded that agency activity may not always fall neatly into the categories of "substantive" or "procedural."¹⁷⁰ The decision in *American Hospital* managed to isolate successfully the procedural nature of the challenged rulemaking even though the PRO directives were likely to cause hospitals to experience increased costs and treat certain medical procedures with reluctance.¹⁷¹ Only rulemaking activity that implicates directly the subject matter of the congressional act—here, the safety standards prescribed by Congress in the Federal Aviation Act and its amendments—must fall within the substantive arena obligating careful collaboration with interested members of the public.¹⁷² The dissent concluded that enforcement schemes and systems for adjudicating claims should remain in the procedural arena and should not be removed merely because regulated parties seek to protect the status quo.¹⁷³ Judge Silberman criticized the majority for its concern with sorting out the "important" rules for purposes of determining the applicability of notice and comment. Congress by its exemption deemed the informal rulemaking procedures unnecessary for certain rules, not because of their lack of importance, but because agency effectiveness and efficiency superseded the need for procedural protections.¹⁷⁴

mary conduct" in his concurring opinion in *Hannah v. Plumer*, 380 U.S. 460, 477 (1965) (Harlan, J., concurring), as a gloss on the substantive-procedural distinction. See also EUGENE F. SCOLES & PETER HAY, *CONFLICT OF LAWS* § 3-36, at 110 (1982), for a discussion of the *Erie* Doctrine. See generally John H. Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974) (discussing the *Erie* line of cases and attributing the continued importance of the *Erie* Doctrine in part to Justice Harlan's concurrence in *Hannah v. Plumer*).

168. *Air Transport*, 900 F.2d at 382.

169. *Id.* at 381.

170. *Id.* at 383. See *supra* text accompanying notes 108-27.

171. *Id.*

172. *Id.* By comparison, the substantial impact test as applied in *Kast Metals* looks to see only whether a given regulation "goes beyond formality and substantially affects the rights of those over whom the agency exercises authority." *Pickus v. United States Board of Parole*, 507 F.2d 1107, 1113 (D.C. Cir. 1974); see *supra* text accompanying notes 46-79.

173. *Air Transport*, 900 F.2d at 382.

174. *Id.*; see also *supra* notes 31-33 and accompanying text.

II. THE EFFECT OF THE *AIR TRANSPORT* RULING ON THE EXEMPTION FOR RULES OF AGENCY ORGANIZATION, PROCEDURE, OR PRACTICE

The *Air Transport* decision left in its wake considerable uncertainty as to the appropriate method for determining the scope of § 553(b)(A).¹⁷⁵ The decision imposes an even greater task on agencies which must now consider the validity of conflicting approaches if they wish to determine whether the notice-and-comment requirements of § 553 apply.¹⁷⁶ Agencies, in an attempt to avoid the consequences of judicial review and the potential invalidation of their rulemaking, will likely promulgate procedural rules with the full panoply of prescribed procedures under the APA.¹⁷⁷ This reaction is contrary to Congressional intent, which by explicit exemptions sought to encourage agency action in certain areas where the need for notice and comment was considered to be dispensable.¹⁷⁸

Judge Silberman aptly characterized the source of the ambiguity surrounding the exemption for rules of agency organization, procedure, or practice in his description of agency rulemaking as a "continuum" on which some rules clearly find themselves at either the substantive or the procedural end.¹⁷⁹ This approach categorizes as "substantive" those rules that directly affect the activity over which Congress granted the agency regulatory authority, in direct contrast to "procedural" rules, which govern subsidiary agency activity such as the enforcement or adjudication of claims.¹⁸⁰ However, as the Rules of Practice challenged in *Air Transport* demonstrate, many

175. The *Air Transport* decision, although subsequently vacated and dismissed, revealed the controversy surrounding the issue and the uncertainty with which agencies must contend. See, e.g., Tracy C. Hauser, Survey, *The Administrative Procedure Act, Procedural Rule Exception to the Notice and Comment Requirement—A Survey of Cases*, 5 ADMIN. L.J. AM. U. 519, 550 (1991).

176. See *supra* text accompanying notes 41-45; Jeffrey S. Lubbers & Nancy G. Miller, *The APA Procedural Rule Exemption: Looking For a Way to Clear the Air*, 6 ADMIN. L.J. AM. U. 481, 489-93 (1992) (responding to the Hauser Article and arguing that Judge Silberman's "primary conduct" test represents "an improvement on the tests that currently exist" and that agencies should voluntarily engage in notice-and-comment procedures for procedural rules where attendant costs do not outweigh the benefits).

177. The court in *Batterton v. Marshall*, 648 F.2d 694 (D.C. Cir. 1980), suggested that simply the appearance of "fair consideration" and the desire to reduce the amount of litigation provide a considerable incentive for using notice-and-comment procedures. *Id.* at 701 n.28.

178. *Id.* at 704 (announcing that "[e]xemptions should be recognized only where the need for public participation is overcome by good cause to suspend it, or where the need is too small to warrant it"); see also *supra* text accompanying notes 32-33.

179. *Air Transp. Ass'n of Am. v. Department of Transp.*, 900 F.2d 369, 382 (D.C. Cir. 1990) (Silberman, J., dissenting), *vacated*, 111 S. Ct. 944 (1991); see also EDLES & NELSON, *supra* note 2, at 66-67 ("The likelihood that a regulation will pass muster as 'procedural' is in direct proportion to its insignificance").

180. *Air Transport*, 900 F.2d at 382.

rules do not fit at either end of the continuum, and, because of their contentious nature, fall into an ambiguous area where the two characteristics overlap.¹⁸¹ While none of the judicial approaches conclusively resolves the ambiguity surrounding procedural rules, the approach articulated in *American Hospital*, excluding from the notice-and-comment exemption those rules which "also encode[] a substantive value judgment," proposes the more reasonable solution to defining the scope of § 553(b)(A).¹⁸²

The substantial impact test, as the precursor to the *American Hospital* formulation, remains a valuable source of insight for making sense of the exemption under § 553(b)(A) and the substantive-procedural distinction which governs that exemption for rules of procedure.¹⁸³ While the substantial impact test remains important to the substantive-procedural distinction, it has not managed to escape entirely unscathed. "[T]he continued viability of the 'substantial impact' test, as it simply articulates one of several criteria for evaluating claims of exemption from § 553" was recognized by the D.C. Circuit in *Batterton*.¹⁸⁴ Yet the *Batterton* court relied on an alternative method for making sense of the substantive-procedural distinction, looking rather to the judicial weight to be accorded agency action under the exemption.¹⁸⁵ By classifying rules as legislative and non-legislative, the *Batterton* court emphasized "the legal force of the agency action in future proceedings."¹⁸⁶ Notice-and-comment procedures elevate legislative rules and make them less susceptible to criticism and legal action.¹⁸⁷ Only if promulgated in a manner that a court deems "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" will the notice-and-comment regulation be set aside.¹⁸⁸ On the other hand, non-legislative rules, such as rules of procedure, gather force over time, acquiring precedential value only upon surviving judicial scrutiny, and at the outset "carry no more weight on judi-

181. *Id.*

182. See *supra* text accompanying notes 108-27.

183. *Batterton v. Marshall*, 648 F.2d 694, 708-09 n.83 (D.C. Cir. 1980), cited with approval in *Cabais v. Egger*, 690 F.2d 234, 237 (D.C. Cir. 1982) (evaluating the impact of *Vermont Yankee* on the substantial impact test).

184. *Batterton*, 648 F.2d at 708-09 n.83.

185. See *supra* text accompanying notes 111-12.

186. *Batterton*, 648 F.2d at 708-09 n.83 (citing *Joseph v. United States Civil Serv. Comm'n*, 554 F.2d 1140, 1154 n.26 (D.C. Cir. 1977)).

187. *Guardian Fed. Sav. & Loan Ass'n v. Federal Sav. & Loan Ins. Corp.*, 589 F.2d 658, 662 (D.C. Cir. 1978). The court in *Guardian Federal* discussed the underlying policy reasons of § 553 stating that "[p]ublic rulemaking procedures increase the likelihood of administrative responsiveness to the needs and concerns of those affected. And the procedure for public participation tends to promote acquiescence in the result even when objections remain as to substance." *Id.*, quoted in *American Postal Workers Union v. United States Postal Serv.*, 707 F.2d 548, 565 (D.C. Cir. 1983), cert. denied, 465 U.S. 1100 (1984).

188. *Batterton*, 648 F.2d at 702 (quoting the APA, 5 U.S.C. § 706(2)(A)(1976)); see generally DAVIS, *supra* note 1, § 6:6.

cial review than their inherent persuasiveness commands.”¹⁸⁹ The *Batterton* court was thus able to resolve some of the problems of the substantial impact test raised since *Vermont Yankee*.¹⁹⁰

Additional decisions revealed the courts’ reluctance to rely on the substantial impact test. The Ninth Circuit rejected the test as the appropriate inquiry governing issues of exemption for rules of procedure,¹⁹¹ but the D.C. Circuit’s decision in *Cabais* had a more lasting effect when it discarded the test as the method for ascertaining a rule’s interpretative status.¹⁹² An interpretative rule announces “what the administrative officer thinks the statute or regulation means.”¹⁹³ Courts do not evaluate these interpretative rules under § 553(b)(A) according to the substantial impact of the agency interpretation, but rather according to an agency’s intent to issue a legislative rule and the presence of “gaps” requiring interstitial rulemaking in conjunction with notice and comment.¹⁹⁴

The D.C. Circuit abandoned the substantial impact test in the context of interpretative rules based on its recognition that, by their very nature, such rules may “vitally affect private interests.”¹⁹⁵ In *Cabais*, the court justified its decision to forego notice and comment, even in the presence of a substantial impact, by stating that “strict adherence to the letter of the APA with-

189. *Batterton*, 648 F.2d at 702 (citation omitted).

190. See *supra* text accompanying notes 95-107.

191. See *supra* text accompanying notes 63-64.

192. See *supra* text accompanying note 69. The substantial impact test continues to apply to general statements of policy, also exempted under section 553(b)(A) from notice-and-comment procedures.

193. *Brown Express, Inc. v. United States*, 607 F.2d 695, 700 (5th Cir. 1979) (quoting *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952)). Relying on *Gibson Wine*, the court in *American Hospital* summarized the difference between interpretative rules which “explain ambiguous terms in legislative enactments” and legislative rules “which create law, usually implementary to an existing law.” *American Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987).

194. *American Postal Workers Union v. United States Postal Serv.*, 707 F.2d 548, 559 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984) (characterizing rule which calculates retirement benefits as interpretative although it reduces substantially the amount of benefits received by 113,000 postal workers); see also *Rivera v. Becerra*, 714 F.2d 887, 891 (9th Cir. 1983) (rejecting substantial impact test for rules interpreting pension offset rules); *Cabais v. Egger*, 690 F.2d 234, 237-38 (D.C. Cir. 1982) (concluding that rule requiring offset of pension income by unemployment benefits is interpretative). The substantial impact test, however, did at one time predominate in the determination of exemption for interpretative rules as a means of effectuating the goals of § 553 notice and comment. See, e.g., *Pharmaceutical Mfrs. Ass’n v. Finch*, 307 F. Supp. 858, 863 (D. Del. 1970) (invalidating retroactive regulations that required additional evidence for the approval of marketed drug products because of the substantial impact on pharmaceutical companies).

195. *Cabais*, 690 F.2d at 237. Not all circuits have arrived at the same conclusion as the District of Columbia Circuit. See, e.g., *American Bancorporation v. Board of Governors of Fed. Reserve Sys.*, 509 F.2d 29, 33 (8th Cir. 1974) (regarding the challenged rule’s impact as the crucial inquiry in determining its substantive or interpretative nature).

out reference to 'elementary fairness' " is paramount where Congress expressly designated interpretative rules for expedited rulemaking.¹⁹⁶ The alternative methods for obtaining relief tend to mitigate the harshness of the rule espoused by the *Cabais* court.¹⁹⁷ Injured parties, the court explained, can seek judicial relief from the adverse effects of interpretative rules in related enforcement proceedings.¹⁹⁸ Furthermore, courts in such enforcement proceedings generally do not grant the deference that accompanies notice-and-comment rulemaking to interpretative rules where an agency has opted to forego public input in favor of immediate promulgation and accelerated effectiveness.¹⁹⁹ These reasons provided ample justification for the *Cabais* court to adopt the more lenient test for interpretative rules, notwithstanding the precedent that supports the substantial impact test.

The courts, however, were not inclined to follow the same approach for rules of agency procedure.²⁰⁰ *Lamoille Valley*, a subsequent decision by the D.C. Circuit, continued to rely on the substantial impact test for analyzing the substantive-procedural distinction.²⁰¹ Following that decision, other courts reasserted the substantial impact test as a strong influence in cases concerning rules of agency procedure.²⁰² The "encod[ing] a substantive value judgment" language of *American Hospital* basically preserved the substantial impact test, although it broadened the inquiry to avoid losing the exemption entirely.²⁰³ For as the court in that case recognized, under the

196. *Cabais*, 690 F.2d at 237-38 n.6. (citing Independent Broker-Dealers Trade Ass'n v. SEC, 442 F.2d 132, 144 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 828 (1971)).

197. See *Cabais*, 690 F.2d at 237-38 n.6; see also *supra* note 33 and accompanying text.

198. *Id.* For example, in the context of the FAA Rules of Practice, the FAA argued that the issue of the validity of its rulemaking was premature. *Air Transp. Ass'n of Am. v. Department of Transp.*, 900 F.2d 369, 374 (D.C. Cir. 1990), *vacated*, 111 S. Ct. 944 (1991). Rather, the appropriate opportunity for challenging the rules adheres when the agency has applied the rules in a specific enforcement proceeding. *Id.*

199. *Cabais*, 690 F.2d at 237-38 n.6. Courts may defer to agencies but are not constrained to adopt the challenged agency interpretation. *American Postal Workers Union v. United States Postal Serv.*, 707 F.2d 548, 561 (D.C. Cir. 1983).

200. See, e.g., *Air Transport*, 900 F.2d at 375 (substantial effect on civil penalty defendants' rights implicates notice and comment); *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987) (substantial impact test provides basis for new formulation); *United States Dep't of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1154 n.19 (5th Cir. 1984) (substantial impact test applies to procedural rules); *Lamoille Valley R.R. v. ICC*, 711 F.2d 295, 328 (D.C. Cir. 1983) (substantive consequences determine eligibility for exemption).

201. *Lamoille Valley*, 711 F.2d at 328. The court stated the test without acknowledging the *Cabais* decision or its reasoning. *Id.* This suggests considerable independence between interpretative rules and rules of agency organization, procedure, or practice for the purpose of evaluating the applicability of the exemption provision.

202. See cases cited *supra* note 200.

203. *American Hosp.*, 834 F.2d at 1047. The *American Hospital* court elaborated on the substantial impact inquiry, acknowledging the fact "that even unambiguously procedural measures affect parties to some degree," and curbed the tendency of the substantial impact test

substantial impact test, procedural rules will likely not qualify for the exemption under § 553(b)(A) because of their inevitable impact.²⁰⁴ The *American Hospital* test, like the decision in *Cabais* rejecting the substantial impact test for interpretative rules, rested upon the notion that rules under the exemption are likely to affect substantially the interests of private parties.²⁰⁵

The *American Hospital* decision illustrates the D.C. Circuit's move away from the substantial impact test.²⁰⁶ Concluding that the claims of the challenging party were not legitimate where the concern for a greater likelihood of discovering excessive reimbursements was exactly that which the Medicare amendment sought to achieve, the court brought the HHS documents within the scope of the exemption for procedural rules despite the substantial impact that the complaining hospitals anticipated.²⁰⁷ But only the broadened inquiry of whether the challenged procedural rule "also encodes a substantive value judgment or puts a stamp of approval or disapproval on a given type of behavior" serves to bring the PRO manuals within the scope of the exemption, since it was undisputed that hospitals inside the PRO territories would perceive the effect of heightened scrutiny under the modified enforcement scheme.²⁰⁸ The *American Hospital* formulation thus effectively limited the substantial impact test and its potential reach, placing the procedural directives promulgated by HHS within the express exemption that Congress deemed appropriate.

Like the PRO directives in *American Hospital*, the FAA Rules of Practice challenged in *Air Transport* speak to the procedures accompanying the FAA's enforcement scheme. Whereas *American Hospital* dealt with rules governing the investigatory and supervisory aspects of enforcement,²⁰⁹ the *Air Transport* rules provide the procedures for the hearing stage of a civil penalty action. The FAA Rules of Practice do not alter the standards of safety compliance, and thus indirectly the behavior of the member airlines of the Air Transport Association, the crucial "substantive value judgment"

to impose indiscriminately notice and comment on procedural rules. *Id.* See *supra* text accompanying note 113.

204. *American Hosp.*, 834 F.2d at 1047.

205. *Cabais v. Egger*, 690 F.2d 234, 237 (D.C. Cir. 1982) ("Interpretative and substantive rules may both vitally affect private interests . . .").

206. See *supra* text accompanying note 111.

207. *American Hosp.*, 834 F.2d at 1051. The court conceded that Manual IM85-2 might burden health care providers with the unconditional compliance that increased enforcement suggests, but it went so far as to qualify that claim as "patently illegitimate" for objecting to measures which expose violations of the Medicare Act. *Id.*

208. See *id.* at 1047, 1051 (characterizing the effects of the HHS enforcement scheme as "incidental mechanical burdens").

209. See *supra* note 115 and accompanying text.

called for in *American Hospital*.²¹⁰ As suggested by the court in *Cabais*, the Air Transport Association has other means of seeking redress.²¹¹ Judicial review after an administrative adjudication concerning specific violations of the Federal Aviation Act or its enabling regulations provides disgruntled parties with the valuable safeguard needed to protect against inadequacies resulting from abbreviated rulemaking.²¹² Furthermore, rules promulgated without notice and comment are not entitled to special deference from reviewing courts.²¹³ These alternative protections served as justification for abandoning the substantial impact test for interpretative rules and should be equally significant in the context of procedural rules.

For these reasons, the FAA Rules of Practice would likely survive the *American Hospital* inquiry, a result contrary to the *Air Transport* decision itself.²¹⁴ While the *Air Transport* case continues to carry precedential value,²¹⁵ the methodology it uses to determine the procedural weight of the Rules of Practice is sufficiently flawed to render future prominence unlikely. The significantly narrower construction of § 553(b)(A) formulated by the *Air Transport* majority, focusing on whether the rules "substantially affect civil penalty defendants' 'right to avail [themselves] of an administrative adjudication,' "²¹⁶ rests on an early articulation of the D.C. Circuit in *National Motor Freight*. In *National Motor Freight*, the decision by the Interstate Commerce Commission (ICC) to resolve the claims of reparations for past illegal rates by means of informal settlement had "palpable effects" upon other industry members and embodied precisely the type of action that would benefit from the information gathered in a notice-and-comment type rulemaking.²¹⁷ Yet, the agency action in *National Motor Freight* differed

210. In *American Hospital*, the "incidental inconveniences" imposed by the first PRO Manual constituted minor burdens that do not justify the imposition of notice-and-comment procedures. *American Hosp.*, 834 F.2d at 1051. Similarly, the PRO Manual IM85-3 and the Program Directive No. 2 "neither change[] the standard of PRO review, nor impose[] anything greater than incidental mechanical burdens on regulated hospitals." *Id.*

211. See *supra* text accompanying notes 197-99.

212. Judicial review of final decisions and orders of penalty assessment issued by the FAA is contemplated in the Demonstration Program itself. See 14 C.F.R. § 13.235 (1992).

213. As stated by the *Batterton* court in its comparison of legislative rules with their counterpart, "non-binding agency statements carry no more weight on judicial review than their inherent persuasiveness commands." *Batterton v. Marshall*, 648 F.2d 694, 702 (D.C. Cir. 1980) (citing *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976)).

214. See *supra* text accompanying note 130.

215. See Hauser, *supra* note 175, at 550.

216. *Air Transp. Ass'n of Am. v. Department of Transp.*, 900 F.2d 369, 372 (D.C. Cir. 1990), *vacated*, 111 S. Ct. 944 (1991) (citing *National Motor Freight Ass'n v. United States*, 268 F. Supp. 90 (D.D.C. 1967) (three-judge court), *aff'd*, 393 U.S. 18 (1968)); see *supra* notes 146-51 and accompanying text.

217. *National Motor Freight*, 268 F. Supp. at 96.

significantly from the action in *Air Transport*, and one must carefully consider Judge Edward's complete reliance on that decision.²¹⁸

While both decisions concern the adjudicatory rights of regulated parties, the court in *National Motor Freight* justified its decision to invalidate the rulemaking largely on the absence of any Congressional direction to establish the challenged informal settlement procedures.²¹⁹ The legislative act that prompted the ICC rulemaking specified the need for a judicial remedy for aggrieved parties and expressly restricted the agency from initiating prosecutorial action.²²⁰ By contrast, the FAA was "under . . . injunction from Congress" to promulgate the Rules of Practice.²²¹ The Civil Penalty Assessment Demonstration Program explicitly required the FAA to render all penalty assessments "only after notice and opportunity for a hearing on the record in accordance with [§] 554" of the APA.²²² Courts have generally distinguished between rules whereby "an agency is merely explicating Congress' desires from those . . . in which [an] agency is adding substantive content of its own."²²³ The established authority by which the FAA promulgated the Rules of Practice and the specifically prescribed objective

218. Judge Silberman in his dissent questioned the majority's reliance on the "old and now discredited district court case." *Air Transport*, 900 F.2d at 383 (Silberman, J., dissenting). Furthermore, *National Motor Freight* received only a summary affirmation by the Supreme Court, rendering its reasoning suspect. *Id.* In general, courts are less inclined to overrule a decision that has been affirmed by an opinion that discusses the merits. Under *Anderson v. Celebrezze*, 460 U.S. 780 (1983), "[a] summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment." *Id.* at 785 n.5, quoted in *Air Transport*, 900 F.2d at 383 (Silberman, J., dissenting); see also *Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974) (limiting the precedential value of summary affirmances). The dissent in *Air Transport* therefore dismissed the majority's faithful alignment with the reasoning advanced in *National Motor Freight*. *Air Transport*, 900 F.2d at 383 (Silberman, J., dissenting).

219. *National Motor Freight*, 268 F. Supp. at 96 (stating that "[t]he Commission was . . . under no injunction from Congress" to establish informal settlement procedures).

220. *Id.* at 92-93.

221. *Id.* at 96. The dissent emphasized this factual distinction in discrediting the majority's reliance on *National Motor Freight*. *Air Transport*, 900 F.2d at 384 n.3. Judge Silberman noted this disparity between the administrative scheme of informal settlements established in *National Motor Freight* and the Rules of Practice developed by the FAA in *Air Transport*, but placed primary emphasis in his decision on the dubious precedential value of the *National Motor Freight* decision. *Id.*

222. 49 U.S.C. § 1475(d)(1) (1988 & Supp. II 1990). Other limitations established by Congress in the Demonstration Program allowed the FAA to assess civil penalties only on actions initiated after December 30, 1987, not in excess of \$50,000, and only for a one-and-a-half year period. *Id.* at § 1475(d)(2)-(4); see also *supra* note 133.

223. *Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726, 728 (E.D. Va. 1988) (quoting *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987), *aff'd*, 885 F.2d 866 (4th Cir. 1989)).

that these were designed to meet, only detract from the significance accorded *National Motor Freight* by the majority opinion.²²⁴

Perhaps more troubling is the effort of the majority in *Air Transport* to establish different levels of scrutiny for determining the applicability of the exemption based on the type of procedural rule that is being questioned. Recognizing the continued validity of the *American Hospital* decision, the court in *Air Transport* commented that "the public has no legitimate interest in influencing an agency's 'discretionary deployment of enforcement resources,' . . . a classic 'internal' matter essential to how an agency constitutes itself."²²⁵ The court stated that, similar to the enforcement directives in *American Hospital*, agency rules that somehow particularize the manner in which private parties apply for benefits also qualify as internal agency operations exempt from notice and comment.²²⁶ Thus, the *Air Transport* court reasoned that the decision by the D.C. Circuit to sustain the abbreviated rulemaking procedures contested in *Neighborhood TV Co. v. FCC*²²⁷ was not inconsistent with its decision.²²⁸ In *Neighborhood TV*, the rules concerned interim measures governing the processing of license applications while the agency, the Federal Communications Commission, contemplated a change in policy concerning low power television stations.²²⁹ Although the interim procedures mandated a processing freeze for certain applications,²³⁰ they "did not affect any component of a party's statutory or constitutional right to avail himself of an administrative adjudication."²³¹ However, the *Air Transport* court was unable to demonstrate adequately its proposed distinction between a rulemaking that implicates enforcement strategies or benefit application procedures and a rulemaking that alters a party's adjudicatory rights. As *Batterton* revealed, the Department of Labor's adoption of a new methodology for calculating unemployment rates can have impermissible consequences on the benefits received.²³² *Air Transport's* "bright line test" focusing on rules that encumber adjudicatory rights is in-

224. See *Association of Nat'l Advertisers v. FTC*, 617 F.2d 611, 629 n.20 (D.C. Cir. 1979) (Skelly, C.J., concurring in result only) (distinguishing *National Motor Freight* because that procedural challenge did not involve a rule which sought "to follow congressionally prescribed procedures" and judicial review was "limited or non-existent").

225. *Air Transport Ass'n of Am. v. Department of Transp.*, 900 F.2d 369, 377 (D.C. Cir. 1990), *vacated*, 111 S. Ct. 944 (1991) (quoting *American Hosp.*, 834 F.2d at 1057 (citation omitted)).

226. *Id.*

227. 742 F.2d 629, 637 (D.C. Cir. 1984).

228. *Air Transport*, 900 F.2d at 377.

229. *Neighborhood TV*, 742 F.2d at 631-34.

230. *Id.* at 632.

231. *Air Transport*, 900 F.2d at 377.

232. *Batterton v. Marshall*, 648 F.2d 694, 708 (D.C. Cir. 1980); see *supra* text accompanying notes 91-94.

consistent with the language of the exemption provision of § 553, which alludes to no such interpretation.²³³ Whereas the Rules of Practice in *Air Transport* represent such rules, affecting the manner in which administrative civil penalty trials themselves are brought, they no more than other enforcement practices or disbursement schemes suggest the importance of notice-and-comment procedures, no matter how appealing the assurance of fundamental fairness and thoughtful deliberation derived from public participation may be.²³⁴ Neither the language of the APA nor the judicial interpretations that have followed support this ambitious effort to separate rules that detail procedures for an administrative adjudication from agency action that governs enforcement schemes, license applications, or rate calculations.

The dissenting opinion in *Air Transport* revealed an approach that is far more consistent with the judicial trend of retreating from the substantial impact test and moving in the direction of furthering congressional intent concerning the promulgation of procedural rules.²³⁵ The "substantial impact" that Judge Silberman proposed as appropriate for notice-and-comment rulemaking is the impact perceived from any rule that affects the conduct of private parties as contemplated by the authorizing statute and its regulations.²³⁶ The standard recommended by Judge Silberman does not validate the Association's argument that the rules infringe on basic notions of fairness and due process rights. This issue is appropriately addressed as "an entirely separate matter which can be raised in a concrete setting."²³⁷ Imposing one's views on whether procedural rulemaking would be more satis-

233. See *supra* note 13.

234. Elsewhere in the law, courts have had to attend to the substantive-procedural distinction in determining the validity of rules that govern adjudicatory matters. In *re Gailey, Inc.* contemplated the definition of "procedural" to ascertain the validity of a retroactivity provision. In *re Gailey, Inc.*, 119 B.R. 504, 510 (Bankr. W.D. Pa. 1990). The court concluded that "if it . . . merely prescribes a method for enforcing [substantive rights] or for obtaining redress for a grievance," the provision will be upheld as procedural. *Id.*; see also *Masino v. Outboard Marine Corp.*, 88 F.R.D. 251, 255 (E.D. Pa. 1980) (holding "majority verdict rule" to be procedural in determining the appropriate law to be applied in diversity suit because it "prescribe[s] the manner in which . . . rights and responsibilities may be exercised and enforced in a court"), *aff'd*, 652 F.2d 330 (3d Cir.), *cert. denied*, 454 U.S. 655 (1981).

235. See discussion *supra* part I.B-C.

236. See *Air Transp. Ass'n of Am. v. Department of Transp.*, 900 F.2d 369, 382 (D.C. Cir. 1990) (Silberman, J., dissenting), *vacated*, 111 S. Ct. 944 (1991) (articulating that rules with a substantial impact "purport to direct, control, or condition the behavior" of private parties); see also *supra* text accompanying note 172.

237. *Air Transport*, 900 F.2d at 382. Judge Silberman believes that where aggrieved parties have an opportunity to contest the procedural validity of an agency's action in a related adjudication initiated by the agency at a later time, congressional intent to promote agency activity by exempting informal rulemaking procedures must prevail over the benefits obtained from public participation. See also *supra* text accompanying notes 196-99.

factory if accompanied by notice and comment is entirely inappropriate where Congress has addressed the matter.²³⁸

Judge Silberman's dissent demonstrates an attempt to formulate the *American Hospital* inquiry in different terms. The objective of this formulation is to articulate more clearly what is at the core of the substantive-procedural distinction: exposing regulation that affects primary conduct to the procedural safeguards of notice and comment. The dissent underscores the deficiencies of the majority opinion and remains faithful to congressional intent by allowing the exemption to accommodate more than simply the most "insignificant rules."²³⁹

III. COMMENT: TO WHAT EXTENT SHOULD THE COURTS PERMIT AGENCIES TO PROMULGATE PROCEDURAL RULES WITHOUT NOTICE AND COMMENT AS CONTEMPLATED IN § 553(b)(A) OF THE APA?

The reasons that prompted the D.C. Circuit in *Cabais* to abandon the longstanding substantial impact test for interpretative rules suggest that rules of procedure might also benefit from a similar upheaval.²⁴⁰ Citing *Vermont Yankee*, the *Cabais* court concluded that the substantial impact test was insufficiently accurate to distinguish properly between interpretative and legislative rulemaking for purposes of determining the applicability of the exemption under § 553(b)(A).²⁴¹ As in *Batterton*, the court recognized the test as "one of several criteria" which comprise the exemption inquiry, but explicitly rejected its validity as the primary means for settling the issue of that exemption's scope because of its tendency towards overinclusiveness.²⁴² Interpretative rules will invariably render explanations that private parties will find undesirable and intolerable for the burdens that they impose.²⁴³ Curiously enough, the court in *Cabais* noted that the substantial impact test may still be applicable to statements of general policy under § 553(b)(A) and agency action governed by "good cause" under § 553(b)(B), but refrained from making any comment concerning the procedural rule exemption.²⁴⁴ Ultimately, what guided the *Cabais* court in its decision was "strict adherence to the letter of the APA," the availability of alternative judicial reme-

238. *Air Transport*, 900 F.2d at 383.

239. *Id.*

240. See *Cabais v. Egger*, 690 F.2d 234, 237 (D.C. Cir. 1982); *supra* text accompanying notes 69-74 and 191-99.

241. *Cabais*, 690 F.2d at 237 (citing *Batterton v. Marshall*, 648 F.2d 694, 709 n.83 (D.C. Cir. 1980)); see also *supra* note 35.

242. *Cabais*, 690 F.2d at 237.

243. See *id.*; see also *supra* note 195 and accompanying text.

244. *Cabais*, 690 F.2d at 237.

dies for aggrieved parties, and the judicial weight that courts will assign to abbreviated administrative rulemaking.²⁴⁵

These considerations have led courts to question previous adherence to the substantial impact test for the purpose of evaluating the substantive-procedural distinction. As illustrated by the *American Hospital* decision, courts successfully contend with the broad reach of the substantial impact test by inquiring further whether the agency action affects interests beyond the scope of the enabling act and its regulations.²⁴⁶ The *Batterton* court noted the inadequacies of the substantial impact test and instead relied on the judicial deference that notice-and-comment rulemaking invokes in contrast to abbreviated procedures.²⁴⁷ Finally, the *Air Transport* dissent recognized the failing of the courts in imposing the significant burdens of notice and comment where alternative avenues for redress provide adequate relief.²⁴⁸

The role of the challenged agency regulation to the enabling statute is also significant in the determination of the exemption's applicability. Disregarded by the *Air Transport* court, this criterion seeks to establish whether the authorizing congressional act suggested a need for the agency action. As the dissent in *Air Transport* recognized, Congress specifically called for administrative adjudications in accordance with § 554 of the APA, thereby requiring the FAA to implement rules in order to comply with that standard.²⁴⁹ Unlike the factual circumstances in *National Motor Freight*, which provided no such congressional backing,²⁵⁰ the Demonstration Program in *Air Transport* gave the court no reason to doubt the authority supporting the Rules of Practice.²⁵¹ Additionally, the *Air Transport* rules did not constitute gap-filling measures, rising to the level of substantive rulemaking, for Congress nowhere, either explicitly or implicitly, mandated that the agency employ its expertise in detailing specific statutory provisions.²⁵²

The considerations that guided the *Cabais* court in its decision for interpretative rules are equally relevant and insightful when considering procedural rules. Congress, in creating the exemption, established that the promulgation of procedural rules should be governed by different concerns which supersede the benefits of public participation.²⁵³ Encouraging agency

245. *Id.* at 237 n.6.

246. *See supra* text accompanying notes 112-13.

247. *See supra* notes 95-100 and accompanying text.

248. *See Air Transport Ass'n of Am. v. Department of Transp.*, 900 F.2d 369, 382 (D.C. Cir. 1990) (Silberman, J., dissenting), *vacated*, 111 S. Ct. 944 (1991); *see also supra* text accompanying note 237.

249. *Air Transport*, 900 F.2d at 384 n.3.

250. *See supra* notes 218-20 and accompanying text.

251. *See supra* notes 132-35, 221-22 and accompanying text.

252. *See supra* text accompanying note 223; *see also supra* text accompanying note 194.

253. *See supra* notes 31-33 and accompanying text.

action and thereby promoting efficiency and effectiveness were the objectives that Congress sought to achieve.²⁵⁴ Courts should be less reluctant to recognize the validity of procedural rules and should permit the corresponding exemption to coexist with notice-and-comment rulemaking where alternative safeguards exist and the agency is acting pursuant to congressional mandate.

IV. CONCLUSION

Past decisions addressing the exemption for rules of agency organization, procedure, or practice demonstrate the elusiveness of a bright line test that allows for easy characterization of rulemaking activity and defines in clear terms the scope of the exemption under § 553(b)(A) of the APA. Because of the explicit congressional mandate to exempt such rules, courts must address the ambiguity of the exemption rather than simply adopt the position that rules of procedure, because of the inherent impact on members of the general public, be accompanied by notice and opportunity for comment.²⁵⁵ *Air Transport* portrays the "idiosyncratic" nature of past court decisions that confront the substantive-procedural distinction for rules of procedure under § 553.²⁵⁶ The *Air Transport* court's efforts to arrive at a "facile semantic distinction,"²⁵⁷ however, stand on shaky ground. Largely ignoring the significant observations made over the past decade in decisions interpreting the exemption provision, the court in *Air Transport* imposed strict notice-and-comment compliance for procedural rules such as the FAA Rules of Practice.

Agencies presently embarking on rulemaking under the exemption of § 553(b)(A) must anticipate the likelihood of increased scrutiny where adjudicatory procedures are involved and a party's right to an administrative hearing is implicated. While the imposition of notice-and-comment procedures in such instances arguably represents the judicially engrafted procedures that *Vermont Yankee* so firmly criticized, it will ultimately only serve

254. See *supra* text accompanying note 174.

255. The Administrative Conference of the United States (ACUS) has in the past recommended the elimination of the exemptions under § 553 in favor of public participation, thereby allowing some procedural rules to remain exempt under § 553(a)(2) as "matters of agency management and personnel." Recommendation 69-8, "Elimination of Certain Exemptions from the APA Rulemaking Requirements," 1 C.F.R. § 305.69-8 (1992); Recommendation 76-5, "Interpretative Rules of General Applicability and Statements of General Policy," 1 C.F.R. § 305.76-5 (1992); Recommendation 83-2, "The 'Good Cause' Exemption from APA Rulemaking Requirements," 1 C.F.R. § 305.83-2 (1992). Similarly, the states have generally restricted exempting procedural rulemaking from statutory purposes except for matters of internal management, an equivalent to the § 553(a)(2) provision.

256. *American Hosp. Ass'n v. Bowen*, 834 F. 2d 1037, 1047 (D.C. Cir. 1987).

257. *Pharmaceutical Mfrs. Ass'n v. Finch*, 307 F. Supp. 858, 863 (D. Del. 1970).

to impede the efficient and effective operation of administrative agencies. Agencies wishing to avoid preliminary procedural challenges have no choice but to engage in notice-and-comment procedures—and the accompanying expense and inconvenience—in order to secure the judicial deference that such legislative rules command. There are many reasons why an agency may choose to adopt procedures for public participation,²⁵⁸ but the explicit exemption in § 553(b)(A) should prevent courts from making that judgment on behalf of agencies and narrowing the scope of the exemption's intended application.

When an agency promulgates procedural rules in direct response to Congressional legislation, the presence of alternative safeguards should caution against imposing notice-and-comment procedures. The Rules of Practice in *Air Transport* present no exigent circumstances that might warrant the more stringent approach taken by that court. As revealed in the *Air Transport* dissent, the tenuous reasoning on which the majority decision rests provides little basis for abandoning the approach articulated in *American Hospital*. Both practical in its application and faithful to Congressional intent, the *American Hospital* inquiry and its focus on the impact of procedural rules on the ultimate rights and obligations as established by Congress poses the more appealing solution to the elusive substantive-procedural distinction.

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258. The *Batterton* court in its discussion of legislative and non-legislative rules noted the incidental benefit of "giv[ing] the public a sense of fair consideration" in addition to that of avoiding litigation. *Batterton v. Marshall*, 648 F.2d 694, 701 n.28 (D.C. Cir. 1980) (citing *Guardian Fed. Sav. Ass'n & Loan v. Federal Sav. & Loan Ins. Corp.*, 589 F.2d 658, 669 (D.C. Cir. 1978)).

