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# Agency-Specific Precedents

Richard E. Levy<sup>\*</sup> & Robert L. Glicksman<sup>\*\*</sup>

## I. Introduction

As a field of legal study and practice, administrative law rests on the premise that legal principles concerning agency structure, administrative process, and judicial review cut across multiple agencies.<sup>1</sup> Administrative law treatises and textbooks largely treat the particular agency in which a case arises as an incidental factor that is not material to the administrative law principle the case represents and assume that the principle articulated applies to all (or almost all) agencies. This premise certainly holds true for iconic administrative law decisions like *Chenery*,<sup>2</sup> *Overton Park*,<sup>3</sup> *Florida East Coast Railway*,<sup>4</sup> *Vermont Yankee*,<sup>5</sup> *State Farm*,<sup>6</sup> and *Chevron*,<sup>7</sup> which are

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\*\* J.B. and Maurice C. Shapiro Professor of Environmental Law, The George Washington University Law School. We thank Christopher Drahozal, John Duffy, Eric Freyfogle, Kristin Hickman, Alex Klass, Leandra Lederman, Richard Pierce, Sid Shapiro, Stephen Ware, Elizabeth Weeks Leonard, and all those who participated in a faculty Works in Progress presentation at The George Washington University Law School for very helpful input on a draft of this Article. Any mistakes are our own.

1. Thus, for example, early works on administrative law focus considerable attention on defining the subject but presuppose that the term designates a meaningful body of law that applies to agencies as such, as distinguished from a system in which each agency is governed solely by a discrete body of law applicable only to it. See, e.g., KENNETH CULP DAVIS, ADMINISTRATIVE LAW TEXT § 1.01 (3d ed. 1972) (“Administrative law is the law concerning the powers and procedures of administrative agencies . . .”); FRANK J. GOODNOW, THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES 1 (1905) (“A function of government called ‘administration’ is being differentiated from the general sphere of governmental activity, and the term ‘administrative law’ is applied to the rules of law which regulate its discharge.”).

2. See *SEC v. Chenery Corp. (Chenery I)*, 318 U.S. 80, 87 (1943) (holding that agency decisions cannot be sustained on the basis of reasons not given by the agency); see also *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 203 (1947) (holding that an agency may adopt a general rule or policy in the course of an adjudication and apply it to past conduct).

3. See *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410, 413–14, 420 (1971) (construing exceptions to the reviewability of agency decisions under the Administrative Procedure Act (APA), discussing APA standards of review, and requiring judicial review to be conducted on the basis of the record before the agency).

4. See *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 241–42 (1973) (holding that formal, on-the-record procedures are not required in rulemaking proceedings under the APA or provisions in the agency’s organic statute requiring a hearing).

5. See *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978) (holding that courts have no power to impose rulemaking procedures beyond those required by the agency’s organic statute, the APA, the agency’s regulations, or due process).

6. See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43–57 (1983) (interpreting the arbitrary-and-capricious standard of review under the APA and applying it to the agency’s decision to rescind previously adopted regulatory requirements).

widely cited and applied. Of course, administrative law doctrine necessarily reflects the interaction between agency-specific law, such as the agency's organic statute, and generally applicable law, such as the Administrative Procedure Act (APA). But the very essence of administrative law as a concept presumes the existence of a body of generally applicable legal principles and doctrines concerning administrative agencies.

In our recent work on an administrative law casebook,<sup>8</sup> however, we observed a phenomenon that we refer to in this Article as "agency-specific precedents." In looking for cases involving a particular agency to illustrate a specific administrative law issue or principle,<sup>9</sup> we noticed that judicial precedents tend to rely most heavily on other cases involving the agency under review, even for generally applicable administrative law principles. As the courts repeated the verbal formulations or doctrinal approaches reflected in those cases, both the articulation and application of the doctrine often began over time to develop their own unique characteristics within the precedents concerning the specific agency. In some cases, these formulations deviated significantly from the conventional understanding of the relevant principles as a matter of "administrative law."

The phenomenon of agency-specific precedents has important descriptive and normative implications for administrative law as a discipline. Descriptively, to the extent that agency-specific precedents deviate from standard administrative law doctrine, they challenge the very foundations of administrative law. To be sure, agencies have differing organic statutes and administer different regulatory and benefit programs, so some degree of variation is implicit in administrative law doctrine. But administrative law assumes the existence of core statutes and principles that apply consistently across agencies. Our observations, however, suggest that the universality of administrative law doctrine may not be as pervasive as is commonly assumed.<sup>10</sup> The proliferation of agency-specific precedents creates anomalies and inconsistencies in some cases and hampers the development of administrative law in others. Nonetheless, because agency statutes and

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7. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (adopting a two-step approach to judicial review of an agency's interpretation of its organic statute in which courts determine whether the statute is clear and, if not, are obliged to defer to permissible agency constructions).

8. ROBERT L. GLICKSMAN & RICHARD E. LEVY, *ADMINISTRATIVE LAW: AGENCY ACTION IN LEGAL CONTEXT* (2010).

9. Because our book focuses on five important and representative federal agencies, we examined the application of basic administrative law principles, such as the procedural requirements for rulemaking or the standards of judicial review, within the context of these particular agencies. The agencies are the Environmental Protection Agency (EPA), the National Labor Relations Board (NLRB), the Social Security Administration (SSA), the Internal Revenue Service (IRS), and the Federal Communications Commission (FCC). We selected these agencies as illustrative models for the application of administrative law doctrine. The book focuses on a different agency in analyzing each of five distinct procedural mechanisms by which agencies adopt law and policy.

10. Analogous issues may arise in other areas of the law as well. See *infra* notes 77, 422 and accompanying text.

programs vary, there may also be advantages to agency-specific precedents, at least in some cases.<sup>11</sup>

Thus, agency-specific precedents raise fundamental questions about the premise that administrative law principles are universal, when and how agency-specific precedents are likely to arise, and what, if anything, should be done about them. The subject of agency-specific precedents has nonetheless gone virtually unnoticed in the administrative law literature. Certainly, we have found no systematic analysis of the existence, origins, and implications of these precedents. This Article begins to fill that gap by calling attention to the phenomenon, exploring its causes, and discussing its implications. Our central thesis is that agency-specific precedents are a manifestation of the “silo effect,” a phrase commonly used in the literature concerning the operation of large organizations to describe the tendency of subdivisions within organizations to develop their own bureaucratic imperatives that create obstacles to information sharing and other forms of cooperation.<sup>12</sup>

The discussion proceeds in four parts. Part I provides general background on the emergence of administrative law as a body of general law applicable to agencies and introduces the concept of the silo effect. Part II presents five case studies of agency-specific precedents involving different agencies and different administrative law doctrines. For each case study, we briefly describe the general administrative law doctrine in the area and then consider how the precedent with respect to the relevant agency deviates from that doctrine. Part III argues that agency-specific precedents are a manifestation of the silo effect and discusses how the dynamics of information costs, the specialized bar, and the process of judicial review tend to produce that effect. Finally, Part IV considers the normative aspects of agency-specific precedents, concluding that while the balance of costs and benefits from agency-specific precedents varies according to the circumstances, greater attention to the phenomenon by practitioners, courts, and scholars would help to break down undesirable agency-specific precedential silos.

## II. Administrative Law as General Law

Although administrative agencies have been with us since the founding,<sup>13</sup> the development of administrative law is largely a twentieth-century phenomenon,<sup>14</sup> with the adoption of the APA as its defining feature.

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11. We explore the costs and benefits of agency-specific precedents further *infra* at notes 380–409 and accompanying text.

12. See *infra* notes 75–88 and accompanying text.

13. See *infra* notes 17–24 and accompanying text.

14. See Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 716 n.56 (1997) (“[T]he establishment of a field of

During this period, the law governing administrative agencies was transformed from a disconnected set of constitutional principles, common law remedies, and organic statutes into a more comprehensive and generally applicable body of jurisprudence concerning the structure, procedures, and judicial review of agencies.<sup>15</sup> Notwithstanding its generally applicable character, however, administrative law must take into account the distinctive provisions of each agency's organic statute and the specific features of the program(s) it administers.<sup>16</sup>

#### A. *The Emergence of Administrative Law*

As Jerry Mashaw has pointed out in an important series of recent articles,<sup>17</sup> administrative agencies have existed ever since the founding.<sup>18</sup> Professor Mashaw's research reveals that during the first couple of decades of the new Republic, "Congress delegated broad policymaking powers to the President and to others, combined policymaking, enforcement, and adjudication in the same administrative hands, [and] created administrative bodies outside of executive departments."<sup>19</sup> Indeed, the Supreme Court issued some important decisions in what we today call administrative law in the nineteenth century.<sup>20</sup> As Mashaw also points out, however, until well

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administrative law is a relatively recent (mid- to late-twentieth century) and still somewhat debated phenomenon."); Arthur T. Vanderbilt, *The Bar and the Public*, 23 A.B.A. J. 871, 873 (1937) ("[I]t is conceded that the growth of administrative law is the outstanding legal phenomenon of the twentieth century . . ."). See generally Richard E. Levy & Sidney A. Shapiro, *Administrative Procedure and the Decline of the Trial*, 51 U. KAN. L. REV. 473 (2003) (discussing the growth of administrative procedures and their displacement of judicial trials); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986) (discussing the history of federal regulation).

15. See *infra* notes 25–36 and accompanying text.

16. See *infra* notes 71–74 and accompanying text.

17. Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256 (2006) [hereinafter Mashaw, *Federalist Foundations*]. The other articles in the series are Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 YALE L.J. 1636 (2007); Jerry L. Mashaw, *Administration and "The Democracy": Administrative Law from Jackson to Lincoln, 1829–1861*, 117 YALE L.J. 1568 (2008); Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362 (2010).

18. Thus, for example, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), has been called "the first great administrative law decision." Thomas W. Merrill, *Marbury v. Madison as the First Great Administrative Law Decision*, 37 J. MARSHALL L. REV. 481, 481 (2004). See generally RICHARD E. LEVY, *THE POWER TO LEGISLATE: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 26–30* (2006) (discussing early delegations of authority and early nondelegation-doctrine decisions of the Supreme Court); *id.* at 26 ("[The First] Congress adopted legislation authorizing the Attorney General, the Secretary of State, and the Secretary of War, acting as an early administrative agency, to grant patents.").

19. Mashaw, *Federalist Foundations*, *supra* note 17, at 1268. Professor Mashaw describes the early years after adoption of the Constitution as a period of "state building." *Id.* at 1266.

20. See, e.g., *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855) (upholding an administrative determination of deficiency in a tax collector's account against the argument that the determination violated the judicial power); *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1813) (upholding a legislative delegation of discretion to the

into the twentieth century, federal judicial remedies for administrative action were primarily confined to common law actions against agency officers or suits challenging the constitutionality of the agencies' organic statutes.<sup>21</sup> As a result, for more than a century after the founding, administrative law "disappear[ed] into common law subjects like torts, contracts, property, and civil procedure or into constitutional law."<sup>22</sup>

Throughout much of this period, a laissez-faire approach to economic and social activity tended to dominate public policy, and reluctance to authorize government intervention into economic matters meant that the administrative state remained relatively small.<sup>23</sup> By the late nineteenth century, however, the social and economic problems created by industrialization spawned the Progressive Movement, which sought an increased role for government and led to the creation of some new federal agencies.<sup>24</sup> The role of agencies increased further during the New Deal when, in response to the Great Depression, Congress created a myriad of new regulatory and benefit programs and created new administrative agencies to implement them.<sup>25</sup> The result was a significant expansion in the role of the federal government in economic and social matters. Although the Supreme Court initially resisted regulatory efforts and invalidated a number of federal programs on various constitutional grounds, in 1937 it changed course abruptly and accommodated the administrative state.<sup>26</sup>

Thus, while administrative agencies and administrative law precedents predated the New Deal shift, that shift ushered in a period of dramatic growth in administrative agencies. That growth, in turn, highlighted the limits of the prior law concerning administrative agencies, which largely consisted of

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President to impose a trade embargo and rejecting the argument that the delegation violated the legislative power).

21. Mashaw, *Federalist Foundations*, *supra* note 17, at 1258.

22. *Id.*

23. *See id.* at 1259 (discussing the minimal levels of administrative action by the federal government in the nineteenth century).

24. *See* Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1, 11 (2001) (positing that "administrative law . . . can be regarded as the product of the Progressive movement").

25. Richard B. Stewart, *Madison's Nightmare*, 57 U. CHI. L. REV. 335, 338–39 (1990) (remarking that the Great Depression spurred the creation of regulatory and welfare programs, which in turn prompted the formation of large administrative bureaucracies to implement the programs).

26. *See* Richard E. Levy, *Escaping Lochner's Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 342–45 (1995) (recounting how the Court's persistent invalidation of state and federal regulatory efforts through the *Lochner* Era abruptly ended in 1937 when the Court began upholding regulatory measures). Although some protest that the modern administrative state is unconstitutional, *see, e.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994) ("The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution."), there seems little doubt that it is here to stay.

common law causes of action and the organic statutes of each agency.<sup>27</sup> To be sure, the Court had developed and applied a few key general administrative law principles derived from separation of powers principles and due process. In *SEC v. Chenery Corp.*, for example, the Court drew on separation of powers concepts to conclude that agency decisions must stand or fall on the basis of the reasons given by the agency and that courts cannot uphold the agency decision on other grounds.<sup>28</sup> Similarly, in *Londoner v. City of Denver*<sup>29</sup> and *Bi-Metallic Investment Co. v. State Board of Equalization*,<sup>30</sup> the Court developed the basic distinction between rulemaking and adjudication and held that due process does not require hearings when agencies adopt rules.<sup>31</sup>

Although other important cases and doctrines emerged during the first half of the twentieth century, the administrative law that governed the New Deal agencies was limited and inadequate. Administrative law scholars began to advocate for procedural reform that was responsive to the emerging science of public administration.<sup>32</sup> At the same time, opponents of the administrative state pushed for legislative reforms to control the burgeoning power of agencies.<sup>33</sup> These forces ultimately culminated in 1946 in the adoption of the APA, which confirmed both the administrative state and broad administrative discretion while establishing generally applicable procedural mandates and judicial-review provisions to constrain the administrative state's operation.<sup>34</sup>

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27. See Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 956 (2000) (describing the initial lack of specific guidelines directing New Deal administrative agencies).

28. *SEC v. Chenery Corp.* (*Chenery I*), 318 U.S. 80, 88 (1943) (“If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment.”).

29. 210 U.S. 373 (1908).

30. 239 U.S. 441 (1915).

31. See *Londoner*, 210 U.S. at 385 (holding that due process requires a hearing before the imposition of a special tax assessment on property owners); *Bi-Metallic*, 239 U.S. at 445–46 (distinguishing *Londoner* and holding that due process does not require a hearing before the imposition of an across-the-board increase in assessed valuation of property).

32. See generally, e.g., Louis L. Jaffe, *The Reform of Federal Administrative Procedure*, 2 PUB. ADMIN. REV. 141 (1942) (supporting governmental measures to preserve procedural fairness); Daniel B. Rodriguez, *Jaffe's Law: An Essay on the Intellectual Underpinnings of Modern Administrative Law Theory*, 72 CHI.-KENT L. REV. 1159 (1997) (describing Jaffe's influence on the development of administrative law).

33. The familiar rallying cry was to describe agencies as the “headless fourth branch of government.” PRESIDENT'S COMM. ON ADMIN. MGMT., REPORT OF THE COMMITTEE WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT 40 (1937). The term lingers. See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1817 (2009) (referring to “the separation-of-powers dilemma posed by the Headless Fourth Branch”).

34. See generally Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219 (1986) (discussing the history and significance of the APA); Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 452–67 (1986) (describing the history of the APA); Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 264–79 (1978) (discussing the development of the APA).

*B. The APA and Administrative Law*

The APA transformed federal administrative law from a loose assortment of constitutional and common law doctrines into a body of law that centered on a single, overarching statute. It established a general statutory framework to govern two key aspects of administrative law: the procedures agencies must follow<sup>35</sup> and the availability and scope of judicial review of agency decisions.<sup>36</sup> The APA is thus at the core of what we may call administrative law even if it interacts with an agency's organic statute in important ways and is supplemented or informed by preexisting doctrines and underlying constitutional principles.

*1. APA Overview.*—The APA's procedural provisions establish two basic modes of agency action—rulemaking and adjudication—and prescribe procedures for each. Consistent with the distinction drawn in *Londoner* and *Bi-Metallic*,<sup>37</sup> the APA contemplates that rulemaking will ordinarily be accomplished through “legislative-type” hearings that involve notice by publication in the Federal Register and the opportunity for submission of written comments but that are not formal, “on the record” proceedings.<sup>38</sup> Nonetheless, the language of the organic statute may trigger formal procedures if it specifies that a hearing on the record is required.<sup>39</sup> In addition, the APA contains a number of exceptions from notice-and-comment requirements, including an exception for “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.”<sup>40</sup> This exception allows an agency to promulgate “nonlegislative” (nonbinding) rules without following any prescribed procedures provided that it publishes them in accordance with § 552.<sup>41</sup>

The APA's procedures for adjudication require personal notice<sup>42</sup> and opportunity for a formal hearing at which a party may appear, present

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35. 5 U.S.C. §§ 551–559 (2006).

36. *Id.* §§ 701–706.

37. *See supra* notes 29–31 and accompanying text.

38. 5 U.S.C. § 553.

39. *See id.* § 553(c) (providing that “[w]hen rules are required by statute to be made on the record after opportunity for an agency hearing,” the formal hearing procedures of §§ 556 and 557 apply). This language has been narrowly construed and formal rulemaking procedures are hardly ever required. *See United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 244–46 (1973) (relying in part on *Londoner* and *Bi-Metallic* to hold that formal rulemaking procedures were not triggered by a statute that required a hearing but did not specify that the hearing must be on the record).

40. 5 U.S.C. § 553(b)(A). Other exceptions include matters relating to the military and foreign affairs, *id.* § 553(a)(1); grants, contracts, and other government benefits, *id.* § 553(a)(2); and an exception for good cause, *id.* § 553(b)(B).

41. *See id.* §§ 552(a)(1)(D), (a)(2)(B)–(C) (requiring agencies to publish substantive rules authorized by law and statements of general policy adopted by the agency in the Federal Register and to make available for public inspection statements of policy not published in the Federal Register as well as administrative staff manuals that affect members of the public).

42. *Id.* § 554(b).



witnesses and evidence, and cross-examine opposing witnesses.<sup>43</sup> If the agency head does not preside over the hearing, it is conducted by an administrative law judge (ALJ) whose independence from the agency is protected by statute<sup>44</sup> and whose decision is normally subject to de novo review by the agency.<sup>45</sup> Although the rules of evidence do not generally apply to APA adjudications,<sup>46</sup> the ALJ's decision must be based on the evidence in the record, and ex parte communications are strictly forbidden.<sup>47</sup> These formal adjudicatory procedures, however, apply only to an "adjudication required by statute to be determined on the record after opportunity for an agency hearing."<sup>48</sup> Although many statutes trigger formal hearings, informal adjudications comprise a great bulk of administrative activity, and the APA is silent on what procedures apply when the organic statute does not trigger formal adjudication.<sup>49</sup>

The APA's judicial-review provisions create a broadly available cause of action for review of agency decisions,<sup>50</sup> closing gaps in the prior system that limited the availability of review to traditional writs such as mandamus and to actions authorized by specific statutory review provisions.<sup>51</sup> Related provisions address the timing of judicial review.<sup>52</sup> While judicial review is generally available, it may be precluded by the agency's organic statute or when an agency action is committed by law to agency discretion.<sup>53</sup> Section 706, which governs the scope of judicial review, authorizes a reviewing court to compel agency action unlawfully withheld or unreasonably delayed or to set aside agency action if it violates one of six standards of review. The most significant standards for administrative law are the generally applicable "arbitrary and capricious" standard of review,<sup>54</sup> the "substantial evidence"

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43. *Id.* § 556(d).

44. *See id.* § 7521(a) (providing that actions to remove, suspend, or reduce the pay of ALJs may be taken by the agency employing the ALJ "only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board").

45. GLICKSMAN & LEVY, *supra* note 8, at 537.

46. ALFRED C. AMAN, JR., *ADMINISTRATIVE LAW AND PROCESS* 257–58 (2d ed. 2006).

47. 5 U.S.C. §§ 556(e), 557(d)(1)(A)–(B).

48. *Id.* § 554(a). The APA creates other exceptions to its adjudicatory procedures. *See id.* (including "proceedings in which decisions rest solely on inspections, tests, or elections" and "the conduct of military or foreign affairs" in a list of exceptions to adjudicatory procedures).

49. AMAN, *supra* note 46, at 241, 435.

50. 5 U.S.C. § 702.

51. *See id.* ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

52. *See id.* § 704 (providing for review of final agency action and requiring exhaustion of administrative remedies in certain contexts).

53. *Id.* § 701(a)(1)–(2).

54. *See id.* § 706(2)(A) (authorizing reversal when an agency decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). Although this provision actually specifies four distinct grounds for reversing an agency, these grounds are seldom, if ever, disaggregated, and the standard is conventionally referred to as the "arbitrary and capricious" standard of review.

standard for factual determinations in formal hearings,<sup>55</sup> and the requirement of consistency with applicable statutes.<sup>56</sup> Section 706 also makes clear that judicial review is to be conducted on the basis of the record produced by the agency and that the reviewing court must consider the record as a whole.<sup>57</sup>

The APA reflects a norm of generality in administrative law. Its procedures and judicial-review provisions strike a balance between agency autonomy and accountability that is intended to apply broadly to all agencies except to the extent that an agency's organic statute provides otherwise.<sup>58</sup> Nonetheless, the APA also allows a certain degree of variation. Some of this variation is built into the APA itself. Agencies have discretion to choose among various modes of action, and the standards of judicial review are relatively vague and open-ended. In addition, variations arise through the APA's interaction with other sources of administrative law, particularly the agency's organic statute.

2. *Other Sources of Administrative Law.*—The main corpus of federal administrative law concerns the interpretation and application of the APA's procedural and judicial-review provisions to a vast array of government entities encompassed within the broad definition of "agency."<sup>59</sup> But the APA interacts in important ways with other sources of administrative law, including underlying constitutional principles concerning separation of powers and due process (and related judicial doctrines), other laws that generally apply to all or many agencies, and agencies' organic statutes.

Administrative law is informed and constrained by the constitutional principles of separation of powers and due process, including the rule of law.<sup>60</sup> Separation of powers and due process constrain the institutional structure and operation of agencies, but doubts about the constitutionality of the

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55. *See id.* § 706(2)(E) (providing for reversal when an agency decision is "unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute").

56. *See id.* § 706 ("To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."); *id.* § 706(2)(C) (providing for reversal when an agency decision is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right").

57. *Id.* § 706.

58. *See id.* § 559 (specifying that the procedural and judicial-review provisions of the APA "do not limit or repeal additional requirements imposed by statute or otherwise recognized by law"). For further discussion, see *infra* notes 71–74 and accompanying text.

59. *See id.* § 551(1) (providing that "'agency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency," with certain specified exceptions).

60. *See generally* Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479 (2010) (describing the interrelationship between constitutional concerns of separation of powers and due process, statutory and regulatory provisions, and judicial decisions as creating a "constitutional common law").

administrative state have largely been erased<sup>61</sup> even if particular administrative arrangements may raise constitutional questions.<sup>62</sup> These principles establish a basic understanding concerning the respective roles of Congress, the President, and the courts in relation to administrative agencies that informs the application of the APA's procedural requirements and judicial-review provisions.<sup>63</sup> In addition, the application of the APA reflects judicial doctrines derived from constitutional understandings such as the *Chenery* principle.<sup>64</sup>

Congress has supplemented the APA with several additional, overarching statutes concerning administrative procedures or judicial review. The Freedom of Information Act (FOIA)<sup>65</sup> and the Government in the Sunshine Act<sup>66</sup> added greater transparency and public access to agency records and proceedings. The Equal Access to Justice Act<sup>67</sup> eases the burden of challenging agency action by permitting litigants in administrative and civil judicial proceedings to recover their attorneys' fees from the government if the government's position is not "substantially justified."<sup>68</sup> In addition, a number of statutes (and executive orders) now require agencies to engage in regulatory impact analysis before adopting major rules or taking other important actions.<sup>69</sup> Notwithstanding these changes, the APA has

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61. See Stuart Minor Benjamin & Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress*, 57 DUKE L.J. 2111, 2144 (2008) (admitting that although many constitutional questions remain unsettled, "the basic legitimacy of the administrative state is no longer in doubt").

62. See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151 (2010) (invalidating removal provisions of the Public Company Accounting Oversight Board, under which members were removable by the SEC only for cause).

63. See, e.g., *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (reasoning that courts must defer to agency constructions of ambiguous statutes because ambiguity reflects a legislative delegation of policy discretion to the agency); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 542–43 (1978) (holding that courts have no power to impose rulemaking procedures beyond those required by the organic statute, the APA, agency regulations, or due process).

64. See *supra* note 2.

65. See 5 U.S.C. § 552 (2006) (strengthening requirements for publication of agency rules and requiring agencies to provide access to agency records and documents unless one of several specific statutory exceptions applies).

66. See *id.* §§ 552b, 557(d) (requiring agency proceedings to be conducted in public sessions and strengthening limitations on *ex parte* communications).

67. Pub. L. No. 96-481, tit. II, 94 Stat. 2325 (1980) (codified as amended in scattered sections of 5, 15, 28, and 42 U.S.C.).

68. See 5 U.S.C. § 504(a)(4) (allowing fees for challenges at the agency level); 28 U.S.C. § 2412(d)(1)(A) (allowing fees in "proceedings for judicial review of agency action").

69. See, e.g., Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601–612 (2006), amended by Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, tit. II, 110 Stat. 857; Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3501–3520 (2006); Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (codified as amended in scattered sections of 2 U.S.C.). These statutes generally require agencies to conduct a cost-benefit analysis and consider the impact of their rules on regulated entities, as does Exec. Order No. 12,866, 3 C.F.R. 638 (1993), reprinted in 5 U.S.C. § 601 (2006). An early example of this approach, used to require consideration of a different set of interests, was the National Environmental Policy Act of 1969, 42

proven resistant to comprehensive reform and remains at the core of federal administrative law.<sup>70</sup>

For present purposes, the most important additional source of administrative law is the agency's organic statute, which interacts with the APA in various ways. Under § 559, the APA's procedural and judicial-review provisions "do not limit or repeal additional requirements imposed by statute or otherwise recognized by law," but a "[s]ubsequent statute may not be held to supersede or modify" those provisions "except to the extent that it does so expressly."<sup>71</sup> Thus, the organic statute may exempt an agency from the APA, but the requirement that the exclusion be "express" is strictly applied and exemptions are rare.<sup>72</sup> On the other hand, the organic statute may impose procedural or judicial-review requirements in addition to those of the APA.<sup>73</sup> The organic statute also interacts with the APA by triggering (or not) its procedural requirements (such as formal rulemaking or adjudication) or implicating one of its exceptions to judicial review.<sup>74</sup>

More fundamentally, the organic statute establishes the agency's substantive mandate, authorizes the agency to take particular kinds of action to fulfill that mandate, and specifies the legal standards for taking such action. In any given administrative law case, the organic statute colors the administrative law issue—it determines what is at stake, dictates the type of action the agency may take to further its statutory mandate, provides the substantive test for determining the propriety of the agency's action, and governs the kinds of evidence or information the agency (or party) will use to justify (or attack) the agency's decision. These distinctive components of agencies' organic statutes limit the universality of administrative law.

Given these interactions, we may conceive of three broad categories of administrative law issues. First, there are some issues, such as the interpretation of the APA's provisions, that we may characterize as "pure" administrative law issues. Second, at the other end of the spectrum, some issues, such as the application of procedural provisions in the agency's organic statute, are "unique" to the agency. Third, there are "compound" issues, such as the application of the APA's substantive-review provisions to

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U.S.C. §§ 4321–4347 (2006), under which federal agencies must prepare an environmental-impact statement to accompany major actions with significant environmental effects.

70. See Ronald M. Levin, *Statutory Reform of the Administrative Process: The American Experience and the Role of the Bar*, 83 WASH. U. L.Q. 1875, 1875–76 (2005) (discussing unsuccessful efforts to revise the APA and suggesting that comprehensive statutory reform of administrative law might be unsuccessful because it is too ambitious and may be viewed as unnecessary).

71. 5 U.S.C. § 559.

72. See, e.g., *Robinette v. Comm'r*, 439 F.3d 455, 460 (8th Cir. 2006) (declining to find an exemption).

73. See GLICKSMAN & LEVY, *supra* note 8, at 294 ("APA provisions are supplemented or superseded by an agency's organic statute.").

74. See *supra* notes 35–57 and accompanying text.

the agency's application of a standard in its organic statute. The extent to which agency-specific precedents are unexpected and problematic depends upon what kind of issue is involved.

### C. Agency-Specific Precedents and the Silo Effect

Before examining the manifestation of agency-specific precedents in five case studies, we want to link the agency-specific precedents to a phenomenon that is often referred to in business and organizational-management circles as the "silo effect" or "information silos."<sup>75</sup> The isolated silo rising above the plains is an evocative metaphor for the propensity of departments or divisions within a large organization to become isolated, with a resulting failure to communicate and pursue common goals. The silo effect is often treated as a problem of information silos within organizations, but the phenomenon itself is not limited to information and could apply to other aspects of interagency cooperation such as regulatory agendas or jurisdictional turf wars. The silo effect is a very real problem and concern for large organizations and one that is easy to recognize in a variety of organizational settings, including the activities of the federal government.<sup>76</sup>

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75. The origins of the term "silo effect" remain murky although it (like the invention of the Internet, see Patricia A. Broussard, *Now You See It Now You Don't: Addressing the Issue of Websites Which Are "Lost in Space,"* 35 OHIO N.U. L. REV. 155, 163 & n.74 (2009)) has been attributed to Al Gore. See Geoffrey C. Bowker, *Biodiversity Datadiversity*, 30 SOC. STUD. SCI. 643, 646 (2000) ("[T]here are the problems of how to . . . ensure that one's data doesn't rot away in some 'information silo' (in Al Gore's memorable phrase) . . ."). For discussion of the concept of the silo effect or silo thinking, see Jean-luc Chatelain & Daniel B. Garrie, *The Good, The Bad and The Ugly of Electronic Archiving: An Essay on the State of Enterprise Information Management*, 2 J. LEGAL TECH. RISK MGMT. 90, 93 (2007) ("[S]ilo thinking . . . results in archiving projects that lack necessary business and legal features and functionalities because their design and implementation is largely driven by the information technology department without sufficient collegial consultation with functional and legal departments."); Christopher Thorson, Note, *Developments in Banking and Financial Law: Proposals to Reduce Systemic Risk Compared*, 28 REV. BANKING & FIN. L. 458, 460-61 (2009) (discussing a silo mentality "whereby managers do not consider the effects of their operations on other units, and risk managers struggle to develop a coordinated strategy"); Jonathan Tetzlaff, *Risk Management in a Dangerous World: Practical Approaches*, 12 DEPAUL BUS. L.J. 291, 323 n.102 (1999-2000). In describing the silo effect, Tetzlaff has stated,

The "silo effect" is broadly recognized as a barrier to effective use of corporation resources. "[I]n management jargon, "the silo effect" [refers to] operational areas [or] hierarchies within a larger hierarchy, lined up on the organizational chart like silos on the Plains. The boundaries separating one from the other—like the metal walls of a silo—complicate attempts to cooperate across departmental lines."

*Id.* at 323 n.102 (alteration in original) (quoting Kevin Lumsdon, *Why Executive Teams Fail and What to Do*, HOSPS. & HEALTH NETWORKS, Aug. 5, 1995, at 24).

76. The concept is most frequently applied in the context of information systems and management. See, e.g., Chatelain & Garrie, *supra* note 75, at 93 (discussing "silo thinking" in the context of coordinating IT, business, and legal departments within a corporation); Barbara H. Wixom & Hugh J. Watson, *An Empirical Investigation of the Factors Affecting Data Warehousing Success*, 25 MIS Q. 17, 37 (2001) (discussing information silos in connection with information technology and data warehousing). It has also found its way into the literature on business organizations. See, e.g., James Austin & Ezequiel Reficco, *Corporate Social Entrepreneurship*, 11 INT'L J. NOT-FOR-PROFIT L. 86, 87 (2009) (describing business use of cross-functional teams to

1. *The Silo Effect at the Agency Level.*—Although the concept can be and has been applied in various contexts,<sup>77</sup> our focus here is on the silo effect in administrative law and its role in the creation of agency-specific precedents. The tendency of administrative agencies to develop their own bureaucratic imperatives that create obstacles to information sharing and other forms of cooperation is well-known and periodically results in reform efforts designed to break down those barriers. For example, the Department of Homeland Security was created in response to the failure to “connect the dots” before 9/11, a clear example of information silos within various intelligence, military, and law enforcement agencies that contributed to the government’s failure to take effective preventive action.<sup>78</sup> Likewise,

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“work across silos”); Stefan Szymanski, “*Silo*” *Thinking Let Us Down: Actions That Made Sense in Isolation Guaranteed a Financial Crisis When Added Together*, BUS. WEEK, Dec. 28, 2008 (“[T]he coordination failure of the banks reflects a coordination failure inside business schools, a ‘silo,’ mentality in which the value of specifics with strictly limited applicability outweighs the value of a broader wisdom.”); Gillian Tett, *The Dangers of Silo Thinking*, FIN. TIMES, Dec. 14, 2009 (analyzing the effect of silo thinking on the collapse of Lehman Brothers); Tetzlaff, *supra* note 75, at 323 n.102 (discussing the silo effect as a barrier to the effective use of corporate resources).

77. See, e.g., Ava J. Abramowitz, *Implementing New Contracting Relationships to Create Successful Projects for All Parties in the Construction Process*, CONSTRUCTION LAW, Summer 2004, at 44, 46 (describing the pitfalls of silo thinking in the drafting of contracts); Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 529 (2008) (recommending thinking about solutions to constitutional law problems “as part of an integrated field of law permeating the Constitution’s text rather than as distinct silos of doctrine”); Robert E. Spekman et al., Research Note, *An Empirical Investigation into Supply Chain Management: A Perspective on Partnerships*, 28 INT’L J. PHYSICAL DISTRIBUTION & LOGISTICS MGMT. 630, 633 (1998) (discussing a “co-operative” vision of firm organization that “emphasizes the need to integrate functional silos”); *supra* notes 75–76.

78. See OFFICE OF HOMELAND SEC., NATIONAL STRATEGY FOR HOMELAND SECURITY 31–32 (2002) (discussing the proposed integration of federal protection responsibilities under the Department of Homeland Security in order to guard against future terrorist attacks); see also NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 353–56 (2004) (finding that a lack of coordination among American intelligence agencies allowed the 9/11 hijackers to operate in the United States); Robert F. Blomquist, *American National Security Presiprudence*, 26 QUINNIPIAC L. REV. 439, 484–85 (2008) (discussing the poor evaluations the federal government received after 9/11); Michael P. Robotti, *Grasping the Pendulum: Coordination Between Law Enforcement and Intelligence Officers Within the Department of Justice in a Post-“Wall” Era*, 64 N.Y.U. ANN. SURV. AM. L. 751, 782–83 (2009) (describing how the lack of coordination among agencies hindered criminal investigations into two eventual 9/11 hijackers). The poor government response in the disastrous aftermath of Hurricane Katrina also has been attributed in part to a lack of coordination and cooperation among federal, state, and local disaster-relief agencies. See, e.g., Erin Ryan, *Federalism at the Cathedral: Property Rules, Liability Rules, and Inalienability Rules in Tenth Amendment Infrastructure*, 81 U. COLO. L. REV. 1, 75 n.261 (2010) (attributing the poor response to Hurricane Katrina at least partly to “poor coordination between the federal government and the incapacitated state and local governments”); Elizabeth A. Weeks, *Lessons from Katrina: Response Recovery and the Public Health Infrastructure*, 10 DEPAUL J. HEALTH CARE L. 251, 259 (2007) (“Much controversy and the finger pointing and blame-game that followed Katrina stemmed from failure to coordinate local, state, and federal response.”). Similarly, President Richard Nixon created the EPA by executive order to centralize environmental protection efforts occurring in multiple agencies. See Reorganization Plan No. 3 of 1970, 3 C.F.R. 199 (1970), *reprinted as amended in* 42 U.S.C. § 4321 note (2006) (stating that in light of the diffusion of environmental-protection responsibilities across various agencies, “the

centralized regulatory review in the Office of Information and Regulatory Affairs (OIRA) can be understood as an effort to overcome silo thinking within agencies.<sup>79</sup>

Despite the recognition that silo thinking afflicts administrative agencies as well as other large organizations, the implications of this tendency have received little attention in the administrative law literature.<sup>80</sup> We think that this gap in the literature is unfortunate because the silo effect is an important problem for administrative practice and a better understanding of it may provide useful insights for administrative law theory and doctrine. This is particularly true for the problem of agency-specific precedents. Our understanding of the silo effect starts with the premise that it is the product of factors generally recognized in the field of organizational economics, including agency costs, transaction costs, and information costs.<sup>81</sup>

In the broadest sense, the silo effect is an agency-cost problem because it reflects the divergence of interests and incentives between a large organization (the principal) and a particular department or division within it (the agent). All federal administrative agencies are agents of the U.S. government (which in turn is an agent of the people) and are therefore intended to pursue the larger goals of that government such as national security or the protection of public health and welfare. Agencies and agency officials, however, have their own incentives (such as individual advancement or increased power), and they may use the authority delegated to them by Congress to promote their interests or the interests of the agency (such as increased budgets, additional personnel, or expanded authority)<sup>82</sup> in

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present governmental structure for dealing with environmental pollution often defies effective and concerted action”).

79. See, e.g., Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1081 (1986) (justifying centralized Executive Branch review of proposed regulations by an office such as OIRA on the ground that centralized review encourages policy coordination); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 16 (1995) (supporting the maintenance of an executive office such as the Office of Management and Budget that is “entrusted with the job of coordinating modern regulation, promoting sensible priority setting, and ensuring conformity with the President’s basic mission”).

80. By way of contrast, the silo effect is an often-used concept in the public administration literature in the United Kingdom. See, e.g., Steve Bundred, *Solutions to Silos: Joining Up Knowledge*, 26 PUB. MONEY & MGMT. 125, 125 (2006) (discussing silo organization problems within the public sector of the United Kingdom).

81. See, e.g., D. Scott Jones & Judy Cotta, *Lessons from the Field: How One Hospital Combines Quality, Compliance, and Patient Safety*, J. HEALTH CARE COMPLIANCE, Sept.–Oct. 2009, at 53, 54 (noting that silo effects are present in health care organizations and are produced by both agency and information costs incurred in the division of risks along organizational and operational lines); Jason A. Smith, *Training Individuals in Public Health Law*, 36 J.L. MED. & ETHICS 50, 57 (2008) (noting a silo effect in public health law that is caused by transaction costs where “funding is directed to one narrow public health topic or area rather than to building a comprehensive infrastructure of public health law”).

82. These incentives may be personal to the official involved (including interpersonal problems with other officials) or more agency and mission centered, but for our purposes the particular incentives do not matter.

a manner that is contrary to the larger interests of the government as a whole.<sup>83</sup>

The silo effect also reflects the problem of transaction costs.<sup>84</sup> Each agency (or other subdivision) is to some extent separate from other agencies, so the pursuit of larger governmental or organizational goals requires cooperation among them. Achieving this cooperation requires some sort of agreement, however informal, which entails transaction costs arising from negotiation and enforcement of the agreement. Transaction costs are inherent in any relationship involving multiple entities, even entities whose incentives and goals are nearly congruent. As the missions or goals of the parties to any transaction become more distinct, however, transaction costs will increase because an increase in the divergence of the parties' interests reduces the common ground for agreement and enhances the risk of cheating. Thus, the more that agencies have their own unique incentives and objectives (i.e., the greater the agency costs), the more difficult it becomes to negotiate an agreement among them or to monitor compliance with that agreement.<sup>85</sup>

In addition to agency and transaction costs, the silo effect is also a problem of information costs.<sup>86</sup> Information is a valuable commodity that requires resources to produce and maintain and may be especially so within a large organization.<sup>87</sup> When valuable information is generated or maintained by one administrative agency (or other subdivision of a large organization), the agency may have incentives to extract something of value from other agencies in exchange for the information or to act as an information broker in order to enhance its position within the organizational hierarchy. These incentives, which are the result of the agency costs described above, raise the information costs to the rest of the organization. In addition, the exchange of information with other agencies will entail transaction costs that also add to

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83. An obvious example is the interests that agencies have in increasing or preserving their budgets even if the money might be put to more effective use elsewhere. See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 381 (2000) ("The most commonly applied rational choice model, originally developed by William Niskanen, assumes that a policymaking bureaucrat will seek to maximize the size of her agency's budget.").

84. See Robert C. Ellickson, *The Case for Coase and Against "Coaseanism"*, 99 YALE L.J. 611, 614–15 (1989) (summarizing various categories of transaction costs but conceding that a "tidy categorization is probably not possible").

85. In addition, costs of a transaction increase exponentially as the number of parties to the transaction increases, so coordination is especially difficult when multiple agencies are involved.

86. See Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1336 n.45 (2010) (describing different types of information costs and situations where information costs are likely to arise).

87. For a discussion of information markets in large organizations, see THOMAS H. DAVENPORT & LAURENCE PRUSAK, *WORKING KNOWLEDGE: HOW ORGANIZATIONS MANAGE WHAT THEY KNOW* 25–51 (1998). For a discussion of information politics within organizations, see THOMAS H. DAVENPORT, *INFORMATION ECOLOGY: MASTERING THE INFORMATION AND KNOWLEDGE ENVIRONMENT* 67–81 (1997).



the costs of the information. Thus, agency costs and transaction costs tend to create information silos within an organization.<sup>88</sup>

2. *The Silo Effect in Judicial Precedents.*—The manifestation of the silo effect within administrative agencies is easy enough to understand, and the effect's implications for the administrative process are obviously significant and worthy of further exploration. Our focus here, however, is on the relationship between the silo effect and the appearance of agency-specific judicial precedents. It is perhaps not as intuitively apparent why silo thinking should extend to judicial review of agency decision making. Nevertheless, we believe that the same dynamic contributes to the formation of agency-specific judicial precedents concerning the APA and other general administrative law doctrines.

At first glance, one might not expect agency-specific silo effects to appear in judicial decisions because most federal courts, and in particular those that hear most administrative law disputes, are generalist courts.<sup>89</sup> Although the federal courts are divided geographically into districts and circuits and consist of many individual judges, aside from a few specialized tribunals such as those that hear disputes concerning patents<sup>90</sup> or tax liability,<sup>91</sup> these

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88. See, e.g., Darby Dickerson, *Professor Dumbledore's Advice for Law Deans*, 39 U. TOL. L. REV. 269, 282 (2008) (discussing the need to demolish information silos, "which impede communication and collaboration" and "arise when individuals or departments, either intentionally or unintentionally, fail to share information, when communications falter, and when crucial constituencies are ignored"); Linda Roberge et al., *Data Warehouses and Data Mining Tools for the Legal Profession: Using Information Technology to Raise the Standard of Practice*, 52 SYRACUSE L. REV. 1281, 1284 (2002) (referring to "isolated collections of data" as "information silos" and noting that "[t]he greater the number of silos, the harder it becomes to use data related to individual parts of an organization to understand the organization in its entirety").

89. Indeed, one advantage asserted for generalist courts is that they promote a broad view of the law and the propensity for "cross-pollination" among fields. See, e.g., RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 156–57 (1985) ("Judicial specialization would also reduce the cross-pollination of legal ideas."); Lawrence Baum, *Judicial Specialization and the Adjudication of Immigration Cases*, 59 DUKE L.J. 1501, 1532 (2010) ("The generalist quality of federal court judges distinguish them sharply from the specialized administrative judges in the federal executive branch."). Some de facto subject matter specialization may occur across circuits, see Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603, 614 (1989) ("Among the existing regional circuits there is already a de facto division of judicial labor along subject matter lines."), but this de facto specialization would appear to be limited and confined to a few broad areas.

90. See Banks Miller & Brett Curry, *Expertise, Experience, and Ideology on Specialized Courts: The Case of the Court of Appeals for the Federal Circuit*, 43 LAW & SOC'Y REV. 839, 847–48 (2009) (noting that analyzing the validity of a patent requires specialized knowledge—a fact that is underscored by the requirement that attorneys have a technical degree prior to practicing before the U.S. Patent and Trademark Office—and conceptualizing the expertise and experience of Federal Circuit judges in that context).

91. See generally Robert M. Howard, *Comparing the Decision Making of Specialized Courts and General Courts: An Exploration of Tax Decisions*, 26 JUST. SYS. J. 135 (2005) (comparing the outcomes of tax cases in district courts to those of the Tax Court and examining common rationales for the differences).

divisions do not correspond to particular agencies.<sup>92</sup> Thus, the federal courts of appeals and the Supreme Court hear administrative law cases involving many agencies and might be expected to apply general principles of administrative law that are not agency specific.<sup>93</sup> Moreover, we might expect any silo thinking that occurs at the agency level to be counteracted as courts, in reviewing agency decisions, derive the doctrines that are needed to resolve these cases from generally applicable administrative law doctrines with which the courts are experienced and familiar.

Nonetheless, in some areas, precedents concerning particular agencies have emerged that diverge and remain isolated from the larger body of administrative law. In the next Part of the Article, we offer a few examples as case studies of this phenomenon. These case studies (as well as others that we could have examined) suggest not only that judicial review fails to completely negate the silo effect at the agency level but also that some agency-specific precedents are judge made and do not originate with agency-level manifestations of the silo effect. Descriptively, the case studies thus raise the question of why agency-specific precedents arise in the context of judicial review of agency decisions, which we address in Part IV of the Article. Normatively, the case studies raise the question and provide some insight into whether agency-specific precedents are undesirable and what might be done to prevent them, which we address in Part V of the Article.

### III. Case Studies of Agency-Specific Precedents

In this Part we describe five case studies of agency-specific precedents, each involving a different agency and a different area of administrative law. The first two, involving the IRS and the FCC, concern relatively “pure” administrative law issues in which the identity of the agency or the content of its organic statutes should not affect the courts’ understanding of the administrative law doctrine. The second two, involving the SSA and EPA, are compound issues in the sense that the distinctive features of the program or organic statute must be factored into the analysis of the administrative law issue. The final example, involving the NLRB, is both an example of

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92. One notable exception is the United States Court of Appeals for the Federal Circuit, which hears appeals from a limited number of specialized agencies and courts. Thus, as we discuss more fully *infra* at notes 353–78 and accompanying text, we might expect to see a larger number of agency-specific precedents arising in the Federal Circuit.

93. The Court of Appeals for the District of Columbia Circuit is sometimes thought of as a specialized administrative law court because applicable venue provisions permit, and many statutes require, judicial review of agency decisions in that circuit. *See, e.g.*, 42 U.S.C. § 7607(b) (2006) (vesting exclusive jurisdiction in the D.C. Circuit for challenges to “nationally applicable regulations” adopted under the Clean Air Act). Critically for present purposes, however, this specialization is not agency specific because the D.C. Circuit reviews the decisions of many different agencies. If anything, we would expect such administrative law specialization to work against the formation of agency-specific precedents because we would expect the judges of the D.C. Circuit to be more familiar with general administrative law doctrine.

agency-specific precedent and a counterexample—a case in which administrative law doctrine might be better off if a doctrine that was originally perpetuated in an individual agency’s doctrinal silo had remained there. For each case study, we describe the generally applicable administrative law doctrine, discuss how the precedent involving the relevant agency deviates from that doctrine, and offer some observations concerning agency-specific precedents derived from the example under consideration.

A. *Legislative and Nonlegislative Rules in the IRS*

General administrative law doctrine distinguishes between a legislative rule, which has legally binding effects, and a nonlegislative rule, which does not.<sup>94</sup> Two key consequences flow from the characterization of a rule as legislative or nonlegislative. First, § 553 of the APA requires that most legislative rules be promulgated using notice-and-comment procedures.<sup>95</sup> The agency adopting the rule must publish notice in the Federal Register, afford interested parties the opportunity to submit written comments, and provide a statement of basis and purpose that explains the final rule.<sup>96</sup> These requirements do not apply, however, to “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.”<sup>97</sup> Rules adopted without notice and comment under this provision generally are not considered to be legally binding; i.e., they are “nonlegislative” rules.<sup>98</sup> Second, the degree of deference courts afford an agency’s interpretation of a statute differs depending on whether the inter-

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94. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (suggesting that the essential distinction between legislative and nonlegislative rules is that legislative rules “‘affect[] individual rights and obligations,’” and are “‘binding’ or have the ‘force of law’” (quoting *Morton v. Ruiz*, 415 U.S. 199, 232, 235–36 (1974))).

95. 5 U.S.C. § 553 (2006).

96. *Id.* Over the years and through the accumulation of judicial precedents, these procedures have developed into a “paper hearing” in which the agency is required to make all data and information available to the public and respond to significant comments and objections. Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 553–54 (2006).

97. 5 U.S.C. § 553(b)(A).

98. It is clear that general policy statements are not legally binding and that interpretive rules are not legally binding of their own force, but if interpretive rules are valid interpretations of statutes or legislative rules, the underlying statute or rule binds the party. RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW* 74, 77–78 (2008). It is less clear, however, that rules of agency organization, procedure, or practice are nonlegislative because a rule could be binding and still concern organization, procedure, or practice. See *Lopez v. FAA*, 318 F.3d 242, 247–48 (D.C. Cir. 2003) (holding that the court had jurisdiction to determine whether the agency followed its procedural rules in terminating an employee because no other rules provided the employee with protection from the agency’s “otherwise unlimited discretion”); PIERCE, *supra*, at 78–79 (contrasting two court decisions about the validity of specific procedural rules).

pretation is reflected in a legislative or nonlegislative rule.<sup>99</sup> Our first case study involves the adoption of legislative and nonlegislative rules by the IRS where a significant and unfortunate divergence has emerged between the doctrine applicable to that agency's rules and the general administrative law doctrine.

1. *General Administrative Law Doctrine.*—Courts have struggled to define and apply the exceptions to the APA's notice-and-comment requirements for the adoption of legislative rules,<sup>100</sup> but the doctrine is now fairly clear as a matter of general administrative law. Although early cases at times applied a general rule that agencies were required to follow § 553 if a rule would have a “substantial impact,”<sup>101</sup> over time the courts distinguished among the categories of nonlegislative rules and developed distinct approaches for each category:

- An interpretive rule is “issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.”<sup>102</sup> Because agencies can also interpret statutes by means of legislative rules, the courts focus on whether a nominally interpretive rule goes beyond the requirements of the statute or regulation being interpreted to impose a new legal duty on the affected parties.<sup>103</sup>

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99. See PIERCE, *supra* note 98, at 80 (noting that legislative rules are normally subject to review but that it is generally “much more difficult to obtain judicial review of an interpretive rule or policy statement because pronouncements of that type do not have a legally binding effect”).

100. See, e.g., Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 946 (D.C. Cir. 1987) (noting that the doctrine in this area has been described as “tenuous,” “fuzzy,” and “blurred,” and citing cases); Noel v. Chapman, 508 F.2d 1023, 1029–30 (2d Cir. 1975) (describing judicial efforts to distinguish between legislative and nonlegislative rules as “enshrouded in considerable smog”). See generally Robert A. Anthony, “Interpretive” Rules, “Legislative” Rules and “Spurious” Rules: *Lifting the Smog*, 8 ADMIN. L.J. AM. U. 1 (1994) (discussing the confusion that courts have dealt with when deciding whether a rule is legislative or nonlegislative and outlining the relevant inquiries used by the courts); Robert A. Anthony, “Well, You Want the Permit, Don't You?” *Agency Efforts to Make Nonlegislative Documents Bind the Public*, 44 ADMIN. L. REV. 31 (1992) (comparing the rulemaking process and effect of legislative and nonlegislative rules); Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretive Rules*, 52 ADMIN. L. REV. 547 (2000) (drawing a distinction between legislative and interpretive rules and chronicling the courts' techniques of distinguishing between the two).

101. See, e.g., Pharm. Mfrs. Ass'n v. Finch, 307 F. Supp. 858, 863 (D. Del. 1970) (stating that the “basic policy” of § 553 requires that when a regulation “has a substantial impact on the regulated industry . . . notice and opportunity for comment should first be provided”).

102. TOM C. CLARK, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947).

103. In *Miller v. Cal. Speedway Corp.*, 536 F.3d 1020, 1033 (9th Cir. 2008), for example, the court stated that “[i]nterpretive rules merely explain, but do not add to, the substantive law that already exists in the form of a statute or legislative rule,” whereas legislative rules “create rights, impose obligations, or effect a change in existing law pursuant to authority delegated by Congress.” (quoting *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1087 (9th Cir. 2003)); see also *Haas v. Peake*, 525 F.3d 1168, 1195–96 (Fed. Cir. 2008) (stating that while legislative rules “effect a change in existing law or policy or . . . affect individual rights and obligations, interpretive rules

- Policy statements are “statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.”<sup>104</sup> In view of this general understanding of what a policy statement is, courts typically focus on whether a rule is binding on the parties or the agency to determine whether it is exempt from notice-and-comment procedures under this exception.<sup>105</sup>
- The exception for rules of agency organization, procedure, or practice (procedural rules) reflects the familiar but elusive distinction between matters of procedure and those of substance. Application of this exception has proven to be especially difficult for the courts, as illustrated by a series of decisions in the District of Columbia Circuit in which the court struggled to articulate and apply a meaningful definition of that distinction.<sup>106</sup>

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clarify or explain existing law or regulation” and “merely represent[] the agency’s reading of statutes and rules rather than an attempt to make new law or modify existing law”) (internal quotation marks omitted); *Citizens to Save Spencer Cnty. v. U.S. EPA*, 600 F.2d 844, 876 n.153 (D.C. Cir. 1979) (explaining that interpretive rules “simply ‘remind[]’ affected parties of existing duties”).

104. CLARK, *supra* note 102, at 30 n.3.

105. In *Cement Kiln Recycling Coalition v. EPA*, 493 F.3d 207, 216 (D.C. Cir. 2007), for example, the court declared that whether an agency guidance document is a legislative rule or a policy statement “turns on ‘whether the agency action binds private parties or the agency itself with the “force of law,”’” and that an “‘agency pronouncement will be considered binding as a practical matter’ . . . ‘if it either [1] appears on its face to be binding, or [2] is applied by the agency in a way that indicates it is binding.’” (alterations in original) (quoting *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 382–83 (D.C. Cir. 2002)); *see also* *Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1142–43 (9th Cir. 2007) (holding that policy for listing and delisting of endangered species was a legislative rule and not a policy statement because there was no evidence that the agency ever treated it as anything other than legally binding); *Farrell v. Dep’t of the Interior*, 314 F.3d 584, 590 (Fed. Cir. 2002) (“If an agency policy statement is intended to impose obligations or to limit the rights of members of the public, it is subject to the [APA], and, with certain exceptions, must be published in the Federal Register as a regulation.”).

106. *See JEM Broad. Co. v. FCC*, 22 F.3d 320, 328 (D.C. Cir. 1994); *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987); *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980). In *Batterton*, the court held that the exemption for procedural rules “covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency.” 648 F.2d at 707. *Bowen*, however, acknowledged that because “even unambiguously procedural measures affect parties to some degree,” the court’s approach had “shifted focus from asking whether a given procedure has a ‘substantial impact’ on parties . . . to inquiring more broadly whether the agency action also encodes a substantive value judgment or puts a stamp of approval or disapproval on a given type of behavior.” 834 F.2d at 1047. In *JEM Broadcasting*, the court distanced itself from the *Bowen* approach. It rejected JEM’s argument that the FCC’s rules (which provided for the summary dismissal of license applications containing errors) “encod[ed] the substantive value judgment that applications containing minor errors should be sacrificed to promote efficient application processing.” *JEM Broad.*, 22 F.3d at 328. The court emphasized that such reasoning “threatens to swallow the procedural exception to notice and comment, for agency housekeeping rules often embody a judgment about what mechanics and processes are most efficient.” *Id.*

Although nonlegislative rules can be adopted without following notice-and-comment procedures, they do not have legally binding effects.<sup>107</sup> This characteristic of nonlegislative rules limits the manner in which agencies may use them. Most clearly, an agency may not treat nonlegislative rules as legally binding on a party, but an agency may rely on nonlegislative rules to some extent in support of action that is legally binding.<sup>108</sup> For example, an agency may use legislative rules to foreclose factual issues in subsequent adjudications; the party cannot challenge the rule before the agency, and any challenge in court would be limited to the rulemaking record.<sup>109</sup> In contrast, if an agency uses a nonlegislative rule to address factual issues, parties may contest the factual basis for the rule before the agency, and courts will not treat the rule as binding.<sup>110</sup>

Courts afford less deference to agencies' interpretations of their organic statutes embodied in nonlegislative rules than they do to interpretations reflected in legislative rules.<sup>111</sup> Legislative rules are reviewed under the famous two-step test from *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>112</sup> Under that test, (1) if the court determines that the statute is "clear" on the precise question at issue, it "must give effect to the unambiguously expressed intent of Congress," and (2) if the court determines that the statute "is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."<sup>113</sup> Nonlegislative rules, on the other hand, are usually reviewed under the less deferential test from *Skidmore v.*

107. Yoav Dotan, *Making Consistency Consistent*, 57 ADMIN. L. REV. 995, 1034–35 (2005).

108. *See id.* at 1041 n.163 (describing perspectives on agencies' use of nonlegislative rules).

109. *See, e.g.,* Heckler v. Campbell, 461 U.S. 458, 467–68 (1983) (upholding SSA regulations determining the availability of jobs in the national economy for certain categories of disability claimants). Parties can ordinarily challenge the validity of a legislative rule on judicial review of an adjudication in which it is applied, but that review will be on the basis of the rulemaking record. The party cannot introduce new evidence in the adjudicatory record to challenge the rule. Gordon G. Young, *Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged Demise and Actual Status of Overton Park's Requirement of Judicial Review* "On the Record," 10 ADMIN. L.J. AM. U. 179, 195–96 (1996).

110. *See* Allen v. Barnhart, 417 F.3d 396, 407–08 (3d Cir. 2005) ("While the Agency can meet its burden by reference to a Ruling [a nonlegislative rule], as the Supreme Court has held, nonetheless, the claimant should have the opportunity to consider whether it wishes to attempt to undercut the Commissioner's proffer by calling claimant's own expert.").

111. *See* Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) (concluding that interpretive rules are not entitled to deference under the two-part *Chevron* test for judicial review of agency statutory interpretations, which is discussed immediately below). A subsequent decision, *Barnhart v. Walton*, 535 U.S. 212 (2002), suggests a multifaceted approach to determine whether *Chevron* applies that might allow *Chevron* application to some nonlegislative rules. *See id.* at 222 (stating that the nature of the legal issue, the expertise of an agency, the importance of the issue to administration of a statute, the complexity of such administration, and an agency's consideration of the issue over time are all factors for analysis). This discussion, however, appears in dicta and does not purport to overturn the holding of *Christensen*. *Id.*

112. 467 U.S. 837, 842–43 (1984).

113. *Id.*

*Swift & Co.*,<sup>114</sup> pursuant to which “[t]he weight of [the agency’s] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”<sup>115</sup>

2. *IRS-Specific Interpretive Regulation Precedents.*—While the administrative law doctrine concerning nonlegislative rules is in some respects fluid and open-ended, the general approach is fairly clear, well established, and broadly applicable to all agencies—except for the IRS. The IRS has distinguished between “legislative regulations” adopted pursuant to a specific grant of rulemaking authority to implement a particular provision of the Internal Revenue Code and “interpretive regulations” adopted pursuant to the Code’s general grant of rulemaking authority.<sup>116</sup> This approach reflects an historical understanding that the general grant of rulemaking authority did not confer the power to adopt legislative rules with the force and effect of law.<sup>117</sup> That understanding, however, has been overtaken by changes in administrative law doctrine under which general grants of rulemaking authority are now ordinarily construed as conferring power to promulgate binding legislative rules.<sup>118</sup> These changes in administrative law doctrine, however, have not penetrated fully into IRS practice or judicial precedents concerning IRS rules and regulations.

As an initial matter, the terminology of legislative and interpretive regulations is confusing and no longer reflects actual IRS practice. The term “regulation” is conventionally understood in administrative law circles as referring to binding legislative rules promulgated under § 553, published as

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114. 323 U.S. 134 (1944).

115. *Id.* at 140.

116. See *Nat’l Muffler Dealers Ass’n v. United States*, 440 U.S. 472, 476–77 (1979); *Dresser Indus. v. Comm’r*, 911 F.2d 1128, 1137–38 (5th Cir. 1990) (distinguishing between “legislative” and “interpretive” Treasury Regulations). The Internal Revenue Code authorizes the Secretary of the Treasury to “prescribe all needful rules and regulations for the enforcement of [the Code].” 26 U.S.C. § 7805(a) (2006). Neither that provision nor any other provision of the Code exempts regulations adopted under § 7805(a) from the APA’s informal rulemaking procedures.

117. This historical understanding appears to have been consistent with general administrative law doctrine until the 1960s when courts began to construe general grants of rulemaking authority as conferring the authority to promulgate legislative rules with binding legal effects. See Kristen E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1564–68 (2006) (arguing that general grants of rulemaking authority were understood as conferring only the authority to adopt nonbinding rules because broad authority to adopt binding legislative rules was thought to violate the nondelegation doctrine); Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 475 (2002) (arguing that under the original drafting convention that prevailed through the 1960s, Congress signaled its intent to confer power to promulgate binding legislative rules by providing that violation of agency rules would be subject to some sanction, such as civil penalties).

118. See Merrill & Watts, *supra* note 117, at 472–73 (discussing how judicial preferences for legislative rulemaking led to the “assumption . . . that facially ambiguous rulemaking grants always include the authority to adopt rules having the force of law”).

regulations in the Federal Register, and codified in the Code of Federal Regulations.<sup>119</sup> Thus, nonlegislative rules, which are not binding, do not constitute regulations as the term is conventionally understood; from an administrative law perspective, an “interpretive regulation” is something of an oxymoron. Indeed, while the term “interpretive” has been retained, IRS “interpretive regulations” are codified in the Code of Federal Regulations alongside legislative regulations; they are phrased as binding rules, and the IRS treats them as having binding effect.<sup>120</sup> This confusion raises two important issues for the courts: (1) the validity of some IRS general authority regulations that have not been adopted using the procedures required by § 553 of the APA and (2) the appropriate standard of review of the substantive validity of those rules.

The procedural issue raised by the IRS practice is whether some interpretive regulations are invalid because the IRS did not follow § 553 procedures. The IRS manual states broadly that “most IRS/Treasury regulations are interpretative, and therefore not subject to the [notice-and-comment rulemaking] provisions of the APA.”<sup>121</sup> Although the IRS also states that it “usually” publishes notice and solicits comments when promulgating interpretive regulations,<sup>122</sup> a recent empirical study of IRS rulemaking concluded that the IRS often does not fully comply with § 553.<sup>123</sup> If the IRS does not comply with § 553, the procedural validity of an interpretive regulation will depend on whether it qualifies as a nonlegislative rule. Thus, insofar as the IRS treats interpretive regulations as binding so as to create new legal duties, those regulations are legislative rules that must follow

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119. STEVEN J. CANN, *ADMINISTRATIVE LAW* 280 (3d ed. 2002) (explaining that only those rules that “go through the 553 quasi-legislative procedure . . . will have the force and effect of law and will be called a . . . regulation”). Regulations adopted using the APA’s formal rulemaking procedures or hybrid procedures under an agency’s organic statute are also binding.

120. See Brief for the Appellant at 32, *Grapevine Imps., Ltd. v. United States*, No. 2008-5090 (Fed. Cir. May 25, 2010), 2010 WL 2416251 (“It is readily apparent that Congress intended that rules and regulations issued under the authority granted by I.R.C. § 7805(a) to enforce the Internal Revenue Code would bind all persons who are subject to the federal tax laws.”). In a passage that reflects the confusion created by the IRS’s terminology, the brief also states that “[t]his reference to regulations having the ‘force of law’ is not confined to legislative regulations, but applies equally to regulations issued pursuant to an agency’s ‘generally conferred authority’ to interpret and enforce the law.” *Id.* at 31–32. The problem with this statement is that in conventional administrative law, only “legislative” rules have the force of law, and, by definition, rules that are not legislative do not have the force of law.

121. I.R.S. Administrative Procedure Act, IRM 32.1.5.4.7.5.1 (Aug. 11, 2004).

122. I.R.S. Overview of Relevant Federal Administrative Law, IRM 32.1.2.3 (Aug. 11, 2004).

123. See Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury’s (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1730 (2007) (concluding after an empirical study of 232 regulatory projects that the “Treasury often fails to adhere to APA rulemaking requirements”); Kristin E. Hickman, *IRB Guidance: The No Man’s Land of Tax Code Interpretation*, 2009 MICH. ST. L. REV. 239, 258–59 (“[T]he proper characterization of Treasury regulations for APA purposes remains in dispute.”).



§ 553 procedures, and the IRS's failure to do so renders the regulations vulnerable to a procedural challenge.<sup>124</sup>

Under general administrative law doctrine, whether the rule was promulgated pursuant to a specific or general grant of rulemaking authority is simply no longer relevant to the question whether it is legislative because general grants of rulemaking authority are now understood to delegate the power to promulgate binding rules creating new rights and duties.<sup>125</sup> Thus, in the context of other agencies, it is clear that regulations issued under a general grant of rulemaking authority are legislative in character and must be adopted using notice-and-comment procedures (absent another applicable exemption in the APA or the agency's organic statute).<sup>126</sup> Moreover, other agencies appear to use notice-and-comment procedures as a matter of course when they adopt binding regulations under general grants of rulemaking authority analogous to the one in the Internal Revenue Code.<sup>127</sup>

The divergence between IRS practice and general administrative law doctrine thus confronts the courts with the question of whether to accommodate the practice or require conformity to generally applicable doctrine. In one relatively early agency-specific precedent, *Redhouse v. Commissioner*,<sup>128</sup> the court appeared to accept the IRS's position that IRS interpretive regulations are exempt from § 553,<sup>129</sup> but more recent cases draw that analysis into

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124. PIERCE, *supra* note 98, at 59.

125. See Hickman, *supra* note 117, at 1566–67 (describing the origins of the distinction between specific and general grants of rulemaking authority as the product of a concern that general grants of authority to promulgate binding rules creating new rights and duties would violate the nondelegation doctrine).

126. See, e.g., *Natural Res. Def. Council, Inc. v. EPA*, 22 F.3d 1125, 1148 (D.C. Cir. 1994) (holding that regulations issued by the EPA under a provision authorizing the Administrator “to prescribe such regulations as are necessary to carry out his functions” are “binding rules” (quoting 42 U.S.C. § 7601 (1994))); *Citizens to Save Spencer Cnty. v. U.S. EPA*, 600 F.2d 844, 873–74 (D.C. Cir. 1979) (treating the same statutory provision referenced in *Natural Resources* as the source of authority to adopt binding regulations).

127. See, e.g., *Russell v. N. Broward Hosp.*, 346 F.3d 1335, 1344–45 (11th Cir. 2003) (discussing the notice-and-comment procedure used by the Department of Labor in adopting a regulation related to the Family Medical Leave Act); *Env'tl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 851 (9th Cir. 2003) (assessing whether § 553 required the EPA to engage in a second round of notice-and-comment procedures in adopting regulations pursuant to a general grant of rulemaking authority); *Smith v. Diffie Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 963 (10th Cir. 2002) (noting that regulations adopted by the Department of Labor under notice-and-comment procedures are binding on the regulated parties unless “arbitrary, capricious, or manifestly contrary” to congressional intent); *Robinson v. Shinseki*, 22 Vet. App. 440, 445 (2009) (holding that regulations created by the Secretary of Veterans Affairs under the notice-and-comment procedures are substantive regulations); cf. *Killeen v. Office of Pers. Mgmt.*, 382 F.3d 1316, 1320 (Fed. Cir. 2004) (recognizing that the agency did not follow notice-and-comment procedures but only because it invoked the APA's good-cause exception).

128. 728 F.2d 1249 (9th Cir. 1984).

129. See *id.* at 1253 (stating that because a regulation was interpretive in character, it did have to meet the thirty-day notice requirement of § 553(d) even though it amended a binding regulation in the Code of Federal Regulations).

question.<sup>130</sup> To this point, the courts have not squarely addressed the issue,<sup>131</sup> but if they apply general administrative law doctrine, some interpretive regulations—including some that have been in place for a long time—may be procedurally invalid.<sup>132</sup> This result would cause considerable uncertainty and might undermine the IRS's enforcement authority or provide a windfall to some taxpayers. Courts might avoid some of these problems, however, if the remedy for failure to follow § 553 is an order precluding the IRS from treating the regulation in question as binding.<sup>133</sup>

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130. See *Am. Med. Ass'n v. United States*, 688 F. Supp. 358, 363–66 (N.D. Ill. 1988) (rejecting the IRS argument that its nonlegislative regulation was exempt from notice-and-comment requirements), *rev'd on other grounds*, 887 F.2d 760 (7th Cir. 1989); see also *Hosp. Corp. of Am. & Subsidiaries v. Comm'r*, 348 F.3d 136, 145 n.3 (6th Cir. 2003) (concluding that because the taxpayer did not “challenge the temporary regulations as violations of the notice and comment requirements for rulemaking,” the court did not need to “reach the issue of whether the Administrative Procedure Act requires notice and comment procedures before Treasury may promulgate temporary interpretive regulations that make substantive choices among permissible statutory interpretations”).

131. See *supra* notes 128–30.

132. It is not unheard of for courts to invalidate important agency regulations years after their adoption for lack of compliance with the APA's notice-and-comment procedures. See, e.g., *Shell Oil Co. v. EPA*, 950 F.2d 741, 752 (D.C. Cir. 1991) (invalidating regulations critical to determining the scope of the EPA's authority to regulate hazardous-waste management under the Resource Conservation and Recovery Act). The court in *Shell Oil* took some of the sting out of the invalidation of the regulations by suggesting that “[i]n light of the dangers that may be posed by a discontinuity in the regulation of hazardous wastes, . . . the agency may wish to consider reenacting the rules, in whole or part, on an interim basis under the ‘good cause’ exemption of 5 U.S.C. § 553(b)(3)(B) pending full notice and opportunity for comment.” *Id.* (citing *Mid-Tex Elec. Coop., Inc. v. FERC*, 822 F.2d 1123, 1131–34 (D.C. Cir. 1987)). The EPA took up the court's suggestion, reissuing the invalidated regulations several months after the court's decision on an interim basis pending notice and comment. Hazardous Waste Management System, 57 Fed. Reg. 7628 (proposed Mar. 3, 1992) (to be codified at 40 C.F.R. pt. 261). Eventually, the EPA readopted the same regulations permanently and the D.C. Circuit rejected a substantive challenge to them, concluding that the regulations were based on a reasonable interpretation by the EPA of key statutory definitions. *Am. Chemistry Council v. EPA*, 337 F.3d 1060, 1065–66 (D.C. Cir. 2003). This example suggests that courts are likely to seek out ways to minimize the kind of disruption that would result from invalidation of IRS interpretive regulations based on procedural violations of the APA. Nevertheless, the EPA's experience is also suggestive in that the court's ultimate endorsement of the regulations came only after nearly a dozen years of uncertainty about the status of the hazardous waste regulations. In addition, the readoption of the rule did not affect doubts about the status of enforcement actions for alleged violations of the regulations that occurred prior to their invalidation in *Shell Oil*. See, e.g., *United States v. Goodner Bros. Aircraft, Inc.*, 966 F.2d 380, 385 (8th Cir. 1992) (setting aside a criminal conviction based on a knowing violation of the invalidated rules on the ground that *Shell Oil* invalidated the rules retroactively from the time of adoption); *Hardin Cnty.*, 1992 WL 175711, at \*5 (EPA 1992) (holding that *Shell Oil* precluded civil as well as criminal enforcement of the invalidated rules).

133. There might be other ways for courts to avoid severe disruptions as a result of the procedural invalidity of interpretive regulations. For example, the interpretation reflected in the regulation could be accepted as an interpretation of a statutory provision or valid regulation, such that the duty arises from a different source but the same legal rule is applied. Or the IRS might be able to issue a temporary regulation with binding legal effect to be followed by a permanent rule adopted using notice and comment. In some cases, the good-cause exception of § 553(b)(3)(B) might permit repromulgation of the rule without notice and comment. See 5 U.S.C. § 553(b)(3)(B) (2006) (providing that notice-and-comment requirements do not apply “when the agency for good

A second issue concerns the standard of substantive review for statutory interpretations embedded in IRS interpretive regulations, for which there is a clear line of agency-specific Supreme Court precedents that deviate from the conventional *Chevron/Skidmore* framework.<sup>134</sup> Under *National Muffler Dealers Ass'n v. United States*,<sup>135</sup> “when a provision of the Internal Revenue Code is ambiguous . . . [the] Court has consistently deferred to the Treasury Department’s interpretive regulations so long as they implement the congressional mandate in some reasonable manner.”<sup>136</sup> In post-*Chevron* cases reviewing interpretive regulations, however, the Supreme Court been inconsistent as to whether *National Muffler* or *Chevron* applies.<sup>137</sup>

Thus, the Supreme Court has left uncertain how the *National Muffler* test for judicial review of IRS interpretive regulations relates to *Chevron* and whether those interpretive regulations should be regarded as legislative rules entitled to *Chevron* deference or its equivalent.<sup>138</sup> Some lower courts treat the *National Muffler* test for review of interpretive regulations as a less deferential test that applies precisely because *Chevron* does not.<sup>139</sup> Others have held that interpretive regulations that were adopted using notice-and-comment procedures are entitled to *Chevron* deference.<sup>140</sup>

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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”).

134. Under generally applicable administrative law doctrine, the degree of deference afforded to statutory interpretations reached in the course of adopting binding regulations should not turn on whether the regulations were adopted under a general or specific grant of rulemaking authority. *See, e.g.,* *Thorson v. Gemini, Inc.*, 205 F.3d 370, 376–80 (8th Cir. 2000) (applying the *Chevron* test to regulations issued by the Department of Labor pursuant to a statute directing the Secretary of Labor to “prescribe such regulations as are necessary to carry out” the Family and Medical Leave Act).

135. 440 U.S. 472, 476 (1979).

136. *Comm’r v. Estate of Hubert*, 520 U.S. 93, 127 (1997) (Scalia, J., dissenting) (internal quotations and citations omitted).

137. *See, e.g., id.* at 129 (failing to mention *Chevron* but citing *National Muffler* for the rule that when an agency’s interpretation of its own regulation is consistent with the text of the statute, that interpretation should be given considerable deference); Hickman, *supra* note 117, at 1579–85 (analyzing the Court’s reliance on *National Muffler* and *Chevron* and concluding that as of 2007, “the Court [had] cited *National Muffler* and *Chevron* each twice in majority opinions, and it [had] cited *National Muffler* three times to *Chevron*’s two in separate concurring or dissenting opinions”).

138. In a subsequent case, *Atl. Mut. Ins. Co. v. Comm’r*, 523 U.S. 382 (1998), the Court seemed to apply the *National Muffler* test as step two of *Chevron*, further confounding the issues because most lower courts understood the test as a less deferential alternative to *Chevron*. *See id.* at 389.

139. *See, e.g.,* *Snowa v. Comm’r*, 123 F.3d 190, 197–200 (4th Cir. 1997) (treating the test for review of interpretive regulations as a less deferential test than *Chevron*, which applies because interpretive regulations are not legislative rules); *Ann Jackson Family Found. v. Comm’r*, 15 F.3d 917, 920 (9th Cir. 1994) (giving less deference to interpretive regulations than to regulations issued with specific statutory authority).

140. *See, e.g.,* *Swallows Holding, Ltd. v. Comm’r*, 515 F.3d 162, 169–70 (3d Cir. 2008); *Estate of Gerson v. Comm’r*, 507 F.3d 435, 437–38 (6th Cir. 2007) (both applying *Chevron* deference to interpretive regulations that were opened for public comment, which the courts viewed as indicative of the IRS’s intent to use delegated lawmaking authority).

The confusion was aptly described by the court in *Bankers Life & Casualty Co. v. United States*:<sup>141</sup>

Determining the level of deference accorded to regulations is more difficult. Initially it may appear that we can resolve the problem by resorting to the APA's distinction between legislative and interpretive regulations . . . . Administrative law scholars usually treat legislative regulations as rules of full legal effect—they create new legal duties binding on the parties and the courts and, therefore, require full notice and comment procedures. Interpretive rules, on the other hand, only clarify existing duties and do not bind; thus, they do not require notice and comment. In the tax world, however, these terms and classifications seem to provide more confusion than clarity. Tax experts refer to specific authority regulations as “legislative” and to general authority regulations as “interpretive.” The confusion arises because the “interpretive” designation does not mesh with the characteristics of the IRS's general authority regulations. While the IRS calls its general authority regulations interpretive, the agency promulgates them according to the same formal procedures it employs for its specific regulations. Moreover, both the specific authority and general authority regulations, create duties and have binding effect.<sup>142</sup>

In *Bankers Life*, the court concluded that the “nonlegislative regulation” at issue was entitled to *Chevron* deference.<sup>143</sup> In doing so, it applied general administrative law doctrine rather than the agency-specific test from *National Muffler*. In addition, the court focused on whether the agency adopted the regulations using notice-and-comment procedures (as it did in that case) and not on whether the IRS relied on a general or specific grant of rulemaking authority as the basis for the regulation.<sup>144</sup> The trend in the lower courts appears to be in the direction of general administrative law (i.e., application of *Chevron*), but it remains unclear whether *Bankers Life* and other cases have shut down this line of agency-specific precedents.<sup>145</sup>

The agency-specific precedents concerning procedural requirements and the standard of review for IRS interpretive regulations illustrate several basic points:

- Agency-specific precedents may arise or persist when agency practices are resistant to changes in general administrative law

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141. 142 F.3d 973 (7th Cir. 1998).

142. *Id.* at 978–79 (citation omitted).

143. *Id.* at 983. For further discussion, see Vorris J. Blankenship, *Determining the Validity of Tax Regulations—Uncertainties Persist*, 107 J. TAX'N 205, 208 (2007) (explaining that *Chevron* and *National Muffler* apply deference using an identical reasonableness standard that only appears to diverge because reasonableness changes along with the circumstances facing each agency); Hickman, *supra* note 117, at 1542 (arguing that tax regulations should be subjected to the same deference test that *Chevron* prescribes for agencies in general).

144. *Bankers Life*, 142 F.3d at 980.

145. *See supra* note 140 and accompanying text.

doctrine. Thus, in this case study, the courts are responding to the operation of the silo effect at the agency level, and the issue is the extent to which we may expect the courts to counteract (or enhance) that effect.

- This case study illustrates some of the potential costs of agency-specific precedents. On the procedural side, agency-specific precedents may countenance the denial of opportunities for notice and comment on rules having the force of law, upsetting the balance of autonomy and accountability contemplated by § 553 of the APA. On the standard of review side, agency-specific precedents cause uncertainty and confusion concerning the applicable legal doctrine, again with implications for the balance of agency autonomy and accountability.
- Breaking down agency-specific precedents may, in some cases, entail significant costs that would not have arisen in the absence of the silo effect. For example, if the courts began invalidating interpretive regulations that did not fully comply with notice-and-comment requirements, it would create many problems that could have been avoided had the IRS followed § 553 requirements in the first place when promulgating binding regulations.
- Agency-specific precedents (and consequently their elimination) may in any given case operate to favor either the agency or the party opposing agency action. Thus, while application of conventional administrative law doctrine to the procedural requirements for interpretive regulations might cause major headaches for the IRS (and be a boon to some taxpayers), application of conventional judicial-review doctrine might result in more deferential review (under the *Chevron* test) for interpretive regulations that do follow § 553.

#### B. *Arbitrary and Capricious Review and the FCC*

The “arbitrary and capricious” standard of review is the baseline standard of judicial review that applies to various forms of agency action and various kinds of agency decisions.<sup>146</sup> Over time, the courts have struggled to articulate an approach to this standard that appropriately balances the need for judicial review to protect the rights of parties and the public against errors and abuse with an appropriate degree of deference to agency expertise that enables the agency to fulfill its assigned policy-making role.<sup>147</sup> Our second case study of agency-specific precedents involves the development of a “reasoned decision making” approach to the application of the arbitrary and capricious standard in the context of decisions involving the FCC and some

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146. 5 U.S.C. § 706(2)(A) (2006).

147. See *infra* notes 150–53 and accompanying text.

other agencies. Unlike the precedents relating to IRS interpretive regulations, the reasoned decision making precedents are not limited to the FCC but rather figure prominently in cases involving some other agencies. Still, the reasoned decision making approach to arbitrary and capricious review that began as a set of precedents applicable to a limited number of agencies has not yet fully percolated into general administrative law doctrine, even though it might be a useful approach in a broader range of contexts.

1. *General Administrative Law Doctrine.*—Under § 706(2)(A) of the APA, a reviewing court may “hold unlawful and set aside agency action” if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>148</sup> Although this provision appears to list four distinct grounds, it is conventionally understood as creating a single standard of review, commonly referred to as the “arbitrary and capricious” standard.<sup>149</sup> Over the years, there has been considerable debate about how much deference to the exercise of administrative discretion this test requires—with some courts and commentators advocating a “hard look” approach in which courts carefully examine the agency’s reasoning and others advocating a more deferential approach.<sup>150</sup> The Supreme Court has sent mixed signals on the issue with some cases indicating a more deferential approach than others<sup>151</sup> (and some providing relatively equal fodder for litigants seeking either deferential or rigorous judicial scrutiny of agency exercises of policy discretion).<sup>152</sup>

The result is that courts commonly quote several formulations of the standard in various combinations. First, in *Citizens to Preserve Overton Park, Inc. v. Volpe*, the Court stated that the standard requires a court to consider whether the decision was based on a consideration [by the agency] of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching

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148. 5 U.S.C. § 706(2)(A).

149. See *supra* note 54 and accompanying text.

150. See PIERCE, *supra* note 98, at 84–85 (giving an example of in-depth judicial scrutiny); Patrick M. Garry, *Judicial Review and the “Hard Look” Doctrine*, 7 NEV. L.J. 151, 151–52 (2006) (explaining the origins of the hard look doctrine); Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 513–14 (1974) (examining one judicial approach to the hard look doctrine); Matthew Warren, *Active Judging: Judicial Philosophy and the Development of the Hard Look Doctrine in the D.C. Circuit*, 90 GEO. L.J. 2599, 2600 (2002) (highlighting the rise of the hard look doctrine in the D.C. Circuit).

151. See Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1052 (1995) (developing a model to explain the indeterminacy of judicial-review standards); *infra* notes 153–56 and accompanying text.

152. See, e.g., *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), discussed *infra* at note 153 and accompanying text.

and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.<sup>153</sup>

Second, in *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*,<sup>154</sup> the Court stated that under the arbitrary and capricious standard of review “[o]ur only task is to determine whether the Commission has considered the relevant factors and articulated a rational connection between the facts found and the choice made.”<sup>155</sup> Finally, in *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*, the Court identified specific factors that are relevant to the assessment of whether the agency acted in an arbitrary and capricious fashion. It explained that

[n]ormally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>156</sup>

Although these statements share a common theme in that they focus on the reasons given by the agency for its decision, the specific formulations are not entirely consistent and, aside from the *State Farm* test, provide little in the way of specifics. They are cited in various combinations without much attention to the differences between them or the possible inconsistent signals they send.<sup>157</sup> And while *State Farm* might be considered to articulate a broadly applicable standard, it is not always cited or applied.<sup>158</sup> More fundamentally, the Court has not articulated an approach that would bring

153. *Id.* at 416 (citations omitted); *see also id.* at 415 (“[T]he generally applicable standards of § 706 require the reviewing court to engage in a substantial inquiry. Certainly, the Secretary’s decision is entitled to a presumption of regularity. . . . But that presumption is not to shield his action from a thorough, probing, in-depth review.” (citations omitted)).

154. 462 U.S. 87 (1983).

155. *Id.* at 105.

156. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

157. *See Utah Envtl. Cong. v. Richmond*, 483 F.3d 1127, 1134 (10th Cir. 2007) (quoting both *Overton Park* and all but the first *State Farm* factor without any further distinguishing analysis or discussion); *Nat’l Ass’n of Home Builders v. Norton*, 340 F.3d 835, 841 (9th Cir. 2003) (quoting both *Baltimore Gas* and the entire *State Farm* test); *Henley v. FDA*, 77 F.3d 616, 620 (2d Cir. 1996) (quoting the entire *State Farm* test and passages from both *Overton Park* and *Baltimore Gas*).

158. *See* Christopher H. Schroeder & Robert L. Glicksman, *Chevron, State Farm, and the EPA in the Courts of Appeals During the 1990s*, 31 ENVTL. L. REP. 10371, 10394–95 (2001) (describing the failure of courts of appeals to cite *State Farm* when reviewing cases that challenge the EPA’s scientific determinations and proposing explanations for this phenomenon); Shapiro & Levy, *supra* note 151, at 1067–68 (reporting the results of a study showing that the Supreme Court has used *State Farm* in applying the arbitrary and capricious standard to an adjudicatory or rulemaking decision in only 15 of the 56 cases surveyed, while circuit courts have used it in only 45 of the 118 cases surveyed).

these diverse formulations under a single umbrella and provide guidance to agencies, affected parties, and reviewing courts.<sup>159</sup>

As we will develop below, however, we believe that in cases involving some agencies, such as the FCC, the courts have hit upon a useful formulation of the arbitrary and capricious standard of review as a requirement of “reasoned decision making.” Both *Baltimore Gas & Electric* and *State Farm* refer to a requirement that the agency decision be the product of reasoned decision making, but the language did not figure prominently in the Court’s general formulations of the arbitrary and capricious standard of review in either case.<sup>160</sup> To the extent that the reasoned decision making approach remains agency specific, it is another example of the silo effect.

2. *Agency-Specific “Reasoned Decision Making” Precedents.*—Our second case study of agency-specific precedents concerns the reasoned decision making approach to judicial review. In cases reviewing decisions by the FCC,<sup>161</sup> the courts (particularly the D.C. Circuit) routinely use this formulation to express the basic requirements of the arbitrary and capricious standard of review.<sup>162</sup> Although the requirement that agencies provide reasons for their decisions is a long-standing feature of judicial review of agency

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159. See J. Lyn Entrikin Goering, *Tailoring Deference to Variety with a Wink and a Nod to Chevron: The Roberts Court and the Amorphous Doctrine of Judicial Review of Agency Interpretations of Law*, 36 J. LEGIS. 18, 69 (2010) (observing that it should not surprise observers that lower courts reach different conclusions than the Supreme Court on essentially the same questions because of the Court’s confusing administrative-deference doctrine).

160. See *State Farm*, 463 U.S. at 52 (“In these cases, the agency’s explanation for rescission of the passive restraint requirement is *not* sufficient to enable us to conclude that the rescission was the product of reasoned decisionmaking.”); *Balt. Gas*, 462 U.S. at 104 (“With these three guides in mind, we find the Commission’s zero-release assumption to be within the bounds of reasoned decisionmaking required by the APA.”). Both cases engage in extended discussion of the general requirement that agencies give reasons for or explain their decisions, but the specific phrase reasoned decision making does not receive any prominence of place in the analysis.

161. See, e.g., *Verizon Tel. Cos. v. FCC*, 374 F.3d 1229, 1235 (D.C. Cir. 2004) (granting the plaintiff’s petition for review after finding that the FCC’s denial of forbearance was not the product of reasoned decision making and was therefore arbitrary and capricious); *Achernar Broad. Co. v. FCC*, 62 F.3d 1441, 1447–49 (D.C. Cir. 1995) (remanding the FCC’s denial of construction permits where there was no evidence that the agency had engaged in reasoned decision making); *Office of Comm’n of the United Church of Christ v. FCC*, 779 F.2d 702, 713–14 (D.C. Cir. 1985) (vacating an FCC order that revised regulations in a way that did not meet the FCC’s stated regulatory goal because the FCC’s rejection of one alternative revision meeting its goal did not evidence a rational decision making process); see also *Nat’l Cable & Telecomms. Ass’n v. Gulf Power Co.*, 534 U.S. 327, 347–61 (2002) (Thomas, J., dissenting) (arguing that the FCC’s assertion of jurisdiction over pole attachments for commingled Internet service should be reversed at step two of *Chevron* because it was not the product of reasoned decision making).

162. A Westlaw search conducted in the ALLFEDS database on March 5, 2010, produced eighty-two cases involving the FCC as a party in which the court referenced the term “reasoned decisionmaking.”



action,<sup>163</sup> we think the reasoned decision making approach is a useful way to focus judicial review, synthesize the various components of the arbitrary and capricious standard of review, and provide guidance. Nonetheless, the reasoned decision making approach as we describe it in this case study is, for the present at least, specific to the FCC and a few other agencies.<sup>164</sup>

The concept of reasoned decision making focuses judicial review on the rationality of the agency's decisional process—i.e., the issue is not whether the agency decision is correct but whether it is the product of a rational decision making process.<sup>165</sup> This focus differs from a more general requirement that agencies provide reasons for their decisions by conveying the understanding that the reasons given must emerge from the decisional process. It thus resonates with the *Chenery* principle that agency decisions must stand or fall based on the reasons given by the agency<sup>166</sup> and the reasoned decision making concept structures the relationship between the court and the agency in appropriate ways.<sup>167</sup> The reasoned decision making formulation also provides a useful way of synthesizing the components of the arbitrary and capricious standard of review so as to provide guidance to courts, parties contemplating challenges to agency decisions, and agencies.

An agency decision represents a policy judgment made in light of applicable statutory (and regulatory) provisions and the information in the administrative record.<sup>168</sup> It thus contains three components. The first component includes the statutory standards and policies that determine the relevant factors for the agency to consider. Thus, an agency decision is arbitrary and capricious if it fails to apply the proper standards or consider the statutorily relevant factors (or considers improper factors).<sup>169</sup> Second, it in-

163. See, e.g., *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 200 (1947) (noting that the Supreme Court had previously remanded *Chenery I* because the Commission's decision was not supported by the reasons it offered).

164. See *infra* note 173 and accompanying text.

165. Thus, for example, a key component of reasoned decision making is a full consideration of the relevant statutory factors. See *Verizon Tel. Cos.*, 374 F.3d at 1235 (holding an FCC ruling was arbitrary because the Commission failed to consider important factors in its decision process); *Achamar Broad. Co.*, 62 F.3d at 1447 (“While agency expertise deserves deference, it deserves deference only when it is exercised; no deference is due when the agency has stopped shy of carefully considering the disputed facts.” (quoting *Cities of Carlisle & Neolo v. FERC*, 741 F.2d 429, 433 (D.C. Cir. 1984))).

166. See *supra* note 28 and accompanying text.

167. It is important for reviewing courts to focus on the reasons rather than the result in recognition of their duty to accept the result even if they disagree with it provided that the agency can offer a reasonable explanation for its decision.

168. See GLICKSMAN & LEVY, *supra* note 8, at 149–50.

169. These are the first two components of the *State Farm* test. See *supra* text accompanying note 156; see also *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983) (stating that the agency must have “considered the relevant factors”); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (stating that an agency decision must be “based on a consideration of the relevant factors”). FCC cases treating agency consideration of relevant statutory factors as a component of reasoned decision making include, among others: *Verizon Tel. Cos.*, 374 F.3d at 1235 (noting that “the Commission denied forbearance without ever considering

volves factual determinations based on evidence in the record, and reasoned decision making implies that factual determinations must be based on adequate evidence in the record and must account for the contrary evidence.<sup>170</sup> Finally, the agency decision incorporates a policy rationale, i.e., a reasoned explanation for why the decision will further the statutory policies in light of the facts.<sup>171</sup> In sum, as stated by Judge Skelly Wright of the D.C. Circuit,

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the requirements of § 10,” which was the section concerning forbearance in the Communications Act of 1934); *Prometheus Radio Project v. FCC*, 373 F.3d 372, 427–28 (3d Cir. 2004) (rejecting a claim that the FCC “failed to consider an important aspect of the problem” when it issued the regulation); *W. Union Int’l, Inc. v. FCC*, 804 F.2d 1280, 1291 (D.C. Cir. 1986) (stating that in evaluating whether a change of agency policy is permissible, “[t]he key is whether the agency changed its policy only after reasoned consideration of relevant factors”).

170. This is the rest of the *State Farm* test. See *supra* note 156 and accompanying text. FCC cases treating adequate evidence in the record as a component of reasoned decision making include, among others: *Alvin Lou Media, Inc. v. FCC*, 571 F.3d 1, 13 (D.C. Cir. 2009) (“[T]he Commission must engage in reasoned decisionmaking and consider the entire record in an adjudicative hearing . . . .”); *Consumer Elec. Ass’n v. FCC*, 347 F.3d 291, 302 (D.C. Cir. 2003) (“The Commission’s analysis of the varying cost estimates was hardly a model of thorough consideration. Nevertheless, our review of the record convinces us that, given the uncertainty of cost projections and the inherent unreliability of all available information, the Commission’s assessment meets the minimum standard for reasoned decisionmaking.”); *Ass’n of Pub.-Safety Commc’ns Officials-Int’l, Inc. v. FCC*, 76 F.3d 395, 396 (D.C. Cir. 1996) (holding that the FCC “based its change in policy on reasoned decisionmaking supported by evidence in the record”); *Celcom Commc’ns Corp. v. FCC*, 789 F.2d 67, 69 (D.C. Cir. 1986) (“We find that the preferences awarded by the Commission were amply supported by record evidence and reflected reasoned decisionmaking.”).

171. See *Balt. Gas*, 462 U.S. at 105 (stating that the agency must “articulate[] a rational connection between the facts found and the choice made”). FCC cases treating a rational explanation for why the decision would promote statutory policies in light of the facts as a component of reasoned decision making include, among others: *M2Z Networks, Inc. v. FCC*, 558 F.3d 554, 560 (D.C. Cir. 2009) (“The FCC named the factor (‘competitive market conditions’), and gave two reasons why the application [for exclusive right to provide wireless broadband Internet access] ‘would appear to compromise’ that factor—namely, by ‘cutting off consideration of a competitive bidding licensing framework and precluding consideration of other potential applicants for this spectrum.’”); *Grid Radio v. FCC*, 278 F.3d 1314, 1322–23 (D.C. Cir. 2002) (upholding the FCC’s imposition of the maximum penalty because the FCC applied the relevant statutory factors to the evidence); *Global Crossing Telecomms., Inc. v. FCC*, 259 F.3d 740, 745–46 (D.C. Cir. 2001) (holding that the FCC “reasonably concluded that certification of compliance, coupled with provisions for complaint and enforcement proceedings, [would] accomplish the statutory purpose of discontinuing payphone subsidies”); *U.S. Telecom Ass’n v. FCC*, 227 F.3d 450, 460 (D.C. Cir. 2000) (“It is well-established that ‘an agency must cogently explain why it has exercised its discretion in a given manner’ and that explanation must be ‘sufficient to enable us to conclude that the [agency’s action] was the product of reasoned decisionmaking.’” (alteration in original) (quoting *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1491 (D.C. Cir. 1995))); *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 3 (D.C. Cir. 2000) (finding a failure to explain why the extension of previous doctrine “made sense in terms of the statute or the Commission’s own regulations”); *Alegria I, Inc. v. FCC*, 905 F.2d 471, 475 (D.C. Cir. 1990) (finding a failure to provide “a carefully reasoned decision in which the policy is adequately explained and its parameters defined so that future applicants will know the rules of the game with which they are expected to comply”); *Comm. to Save WEAM v. FCC*, 808 F.2d 113, 116 (D.C. Cir. 1986) (“Although the Commission may select the factors to be considered in finding the public interest, it must ‘articulate with reasonable clarity its reasons for decision,’ . . . so that a court may ensure that the public interest finding results from ‘reasoned decisionmaking’ . . . .” (citations omitted)); *Neighborhood TV Co. v. FCC*, 742 F.2d 629, 639 (D.C. Cir. 1984) (“In short, the key to the arbitrary and capricious standard is its requirement of reasoned

[t]he parameters of reasoned decisionmaking are readily discernible in the case law. The mandate of the [APA] that a reviewing court set aside agency action found to be “arbitrary, capricious, or an abuse of discretion” . . . requires the court to ensure that the agency’s decision is “rational, has support in the record, and is based on a consideration of relevant factors.”<sup>172</sup>

Nonetheless, the courts have not, to this point, fully synthesized the reasoned decision making approach in the manner we have described, which in our view is unfortunate. To the extent that more widespread application would produce more effective efforts at judicial synthesis, the development of this approach may have been impeded because its application is generally confined to the FCC and a few other agencies, such as the Federal Energy Regulatory Commission (FERC).<sup>173</sup> It is interesting (but perhaps coincidental) that both FERC and the FCC are agencies that engage in

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decisionmaking: we will uphold the Commission’s decision if, but only if, we can discern a reasoned path from the facts and considerations before the Commission to the decision it reached.”).

172. *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407, 422–23 (D.C. Cir. 1983) (Wright, J., dissenting) (quoting 5 U.S.C. § 706(2)(A) (2006); *Telocator Network of Am. v. FCC*, 691 F.2d 525, 537 (D.C. Cir. 1982)). The courts have not always drawn clear dividing lines among the three components of reasoned decision making we have identified, at times referring to more than one of the components or leaving unclear which component of reasoned decision making was at issue. *See, e.g.*, *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1168 (D.C. Cir. 1987) (finding “undisputed omissions in data and methodology” that left the court unable to determine whether the agency’s selected means undercut its ends); *Ventura Broad. Co. v. FCC*, 765 F.2d 184, 189–90 (D.C. Cir. 1985) (stating that in resolving a challenge to the FCC’s selection of a license application based on a comparative evaluation, the court had to make sure “the Commission [had] engaged in reasoned decisionmaking[,] . . . [had] given reasoned consideration to all the material facts and issues, . . . that its factual findings [were] supported by substantial evidence[,] . . . [and that] if the agency depart[ed] from prior policy[,] . . . that it do so only with a reasoned analysis” (citations and internal quotations omitted)); *N.C. Util. Comm’n v. FCC*, 552 F.2d 1036, 1057 (4th Cir. 1977) (stating that the reasoned decision making requirement reflects “basic principles of administrative law” that require agencies such as the FCC “to make necessary supportive findings of fact . . . and to articulate with reasonable clarity its reasons for decision, and identify the significance of crucial facts” (citations and internal quotations omitted)).

173. *See, e.g.*, *Mo. Pub. Serv. Comm’n v. FERC*, 234 F.3d 36, 42 (D.C. Cir. 2000) (“Given that the only record basis on which FERC’s decision could be affirmed is minimized by the Commission itself, we are compelled to remand the case to the Commission so that it can reach a conclusion that is the product of reasoned decisionmaking.”). A Westlaw search conducted in the ALLFEDS database on March 5, 2010, produced 129 cases involving FERC as a party that used the term reasoned decision making. The earliest of these cases was *Tenneco Oil Co. v. FERC*, 571 F.2d 834, 839 (5th Cir. 1978). By way of contrast, similar searches produced no SSA cases and only two IRS cases. Of the five agencies featured in our casebook, the NLRB (37 cases) and EPA (48 cases) fall somewhere in the middle in the sense that the approach is often used but apparently less uniformly and consistently than in judicial review of FCC or FERC decisions. Interestingly, some of the early EPA cases referencing reasoned decision making used the term in connection with requiring agencies to use additional procedures, rather than as a standard of substantive review. *See, e.g.*, *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1262 (9th Cir. 1977) (“Adversarial hearings will be helpful, therefore, in guaranteeing both reasoned decisionmaking and meaningful judicial review.”); *see also Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 876 (1st Cir. 1978) (quoting *Marathon Oil*), *overruled by Dominion Energy Brayton Point, L.L.C. v. Johnson*, 443 F.3d 12 (1st Cir. 2006).

ratemaking and licensing for regulated industries.<sup>174</sup> In the final analysis, we do not wish to overstate the differences between the reasoned decision making approach and other formulations of the arbitrary and capricious standard of review, but we think administrative law would benefit from its further development and more universal application.

The reasoned decision making approach is primarily a phenomenon of the federal courts of appeals, especially the D.C. Circuit, but the approach has also made an appearance in the Supreme Court. Most Supreme Court references to the requirement of reasoned decision making have been in passing, as in *Baltimore Gas & Electric, State Farm*, and (more recently) *FCC v. Fox Television Stations, Inc.*<sup>175</sup> In *Allentown Mack Sales & Service, Inc. v. NLRB*,<sup>176</sup> however, the Court engaged in a more elaborate discussion:

The Administrative Procedure Act, which governs the proceedings of administrative agencies and related judicial review, establishes a scheme of “reasoned decisionmaking.” . . . Not only must an agency’s decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational. Courts enforce this principle with regularity when they set aside agency regulations which, though well within the agencies’ scope of authority, are not supported by the reasons that the agencies adduce. . . . [A]djudication is subject to the requirement of reasoned decisionmaking as well. It is hard to imagine a more violent breach of that requirement than applying a rule of primary conduct or a standard of proof which is in fact different from the rule or standard formally announced. And the consistent repetition of that breach can hardly mend it.

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174. It is possible that the reasoned decision making approach was particularly useful for dealing with ratemaking decisions or that reviewing courts are more likely to look to cases involving similar kinds of agency decisions.

175. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1814 (2009) (“If the Constitution itself demands of agencies no more scientifically certain criteria [of the harmful effects of profanity on children] to comply with the First Amendment, neither does the Administrative Procedure Act to comply with the requirement of reasoned decisionmaking.”). Justice Thomas has also referred to the requirement in concurring and dissenting opinions that were joined by other justices. See *New York v. FERC*, 535 U.S. 1, 36 (2002) (Thomas, J., joined by Scalia and Kennedy, JJ., concurring in part and dissenting in part) (“Here, FERC’s failure to do so prevents us from evaluating whether or not the agency engaged in reasoned decisionmaking when it determined that it was not ‘necessary’ to regulate bundled retail transmission.”); *Nat’l Cable & Telecomms. Ass’n v. Gulf Power Co.*, 534 U.S. 327, 347 (2002) (Thomas, J., joined by Souter, J., concurring in part and dissenting in part) (“Nevertheless, because the FCC failed to engage in reasoned decisionmaking before asserting jurisdiction over attachments transmitting these commingled services, I cannot agree with the Court that the judgment below should be reversed and the FCC’s decision on this point allowed to stand.”).

176. 522 U.S. 359 (1998).

Reasoned decisionmaking, in which the rule announced is the rule applied, promotes sound results, and unreasoned decisionmaking the opposite.<sup>177</sup>

References to the reasoned decision making requirement in NLRB cases appear to have increased since the *Allentown Mack* decision,<sup>178</sup> but it remains to be seen whether the NLRB will simply be added to the few other agencies to which the reasoned decision making version of arbitrary and capricious review has become prominent or whether reasoned decision making will instead become a more universally applicable understanding of the arbitrary and capricious standard of review, regardless of the agency involved.

The agency-specific precedents concerning reasoned decision making differ from the agency-specific precedents concerning IRS interpretive regulations and suggest some further observations:

- While some agency-specific precedents, like those concerning IRS interpretive regulations, originate with the silo effect at the agency level, others, like the reasoned decision making precedents, do not respond to any agency-specific practice.
- The reasoned decision making precedents illustrate another potential cost of agency-specific precedents—the loss of potentially useful administrative law doctrines that either remain limited to the agency to which they were first applied or leak out into the mainstream of administrative law only fitfully. A related cost is that the development of the doctrine itself may be impeded by its limited application.
- Agency-specific precedents may “break down” over time either because the general administrative law doctrine penetrates into the precedential silo (as in the case of the IRS precedents) or because the agency-specific precedents become accepted as generally applicable doctrine (which may be occurring with the reasoned decision making precedents).
- Agency-specific precedents may arise at both the Supreme Court and lower court levels. Nonetheless, Supreme Court decisions have a particular salience that, depending on the circumstances, may help to create agency-specific precedents or to break them down.

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177. *Id.* at 374–75 (citations omitted). Interestingly, the Court’s discussion did not link the particular deficiency—failure to apply the rule announced—to any particular component of arbitrary and capricious review reflected in the Court’s prior statements of the test. We think that reliance on the wrong rule might be characterized as either consideration of an improper factor or as a lack of rationality in the “connection” between the facts found and the ultimate decision.

178. Of the thirty-six NLRB cases other than *Allentown Mack* produced by our Westlaw search, well over half (twenty-one) of the cases referencing the requirement of reasoned decision making come after the decision in *Allentown Mack* and typically cite it.

### C. EPA Docketing Requirements

The proper treatment of *ex parte* communications in notice-and-comment rulemaking has been an important and difficult issue for administrative law doctrine. Because rulemaking involves an across-the-board legislative decision, it is ordinarily assumed that an on-the-record, adjudicatory-type proceeding is not required.<sup>179</sup> Thus, § 553 of the APA does not prohibit *ex parte* communications in notice-and-comment rulemaking and a certain amount of lobbying is to be expected in this sort of quasi-legislative process.<sup>180</sup> Nonetheless, *ex parte* communications may undermine the rulemaking process, be unfair to interested parties, and compromise the record for judicial review.<sup>181</sup> Our third case study concerns the requirement that the EPA must docket for comment any *ex parte* communications of “central relevance” to the rulemaking. Although this agency-specific precedent is a product of the distinctive hybrid rulemaking procedures that apply under the Clean Air Act, applying this approach more broadly might be a salutary development for administrative law.

1. *General Administrative Law Doctrine.*—Under § 553 of the APA, legislative rules must comply with three basic procedural requirements: (1) notice; (2) an opportunity for public comment; and (3) a concise statement of basis and purpose accompanying the final rule.<sup>182</sup> In the 1960s and 1970s, the courts began to develop these procedures into a “paper hearing” process.<sup>183</sup> Interpreting § 553, the courts focused on the opportunity for comment, which allows parties to protect their interests by submitting arguments and information, provides the agency with broad input that improves the quality of the agency rules, and creates the record for agency decision and judicial review.<sup>184</sup> This view of the opportunity for comment implied that notice must be adequate to provide parties the opportunity for effective comment<sup>185</sup> and that the agency’s statement of basis and purpose must reflect consideration of relevant comments.<sup>186</sup>

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179. *See supra* notes 37–38 and accompanying text.

180. *See infra* notes 203–05 and accompanying text.

181. *See infra* notes 193–99 and accompanying text.

182. 5 U.S.C. § 553(b)–(c) (2006).

183. *See supra* notes 95–96 and accompanying text.

184. *See, e.g., E. Ky. Welfare Rights Org. v. Simon*, 506 F.2d 1278, 1293 (D.C. Cir. 1974) (Wright, J., stating reason for voting to grant rehearing en banc) (asserting that comments from disciplines more directly related to health care and poverty could have assisted the IRS in deciding whether to relax hospital obligations to the poor), *vacated*, 426 U.S. 26 (1976); *Texaco, Inc. v. Fed. Power Comm’n*, 412 F.2d 740, 744 (3d Cir. 1969) (“Section 553 was enacted to give the public an opportunity to participate in the rule-making process. It also enables the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated.”).

185. This concept of notice requires agencies to include in the notice of proposed rulemaking critical data and information on which the rule is based and to provide a new notice and additional

In addition to paper hearing requirements grounded (at least ostensibly) in § 553, two kinds of “hybrid” rulemaking procedures that imposed requirements beyond those contained in § 553 emerged in the 1970s.<sup>187</sup> First, some agency organic statutes, such as the Clean Air Act, include so-called hybrid rulemaking procedures that incorporate some elements of formal adjudicatory procedures (such as oral argument or a closed record).<sup>188</sup> Second, in some cases during the 1970s, the lower courts (especially the D.C. Circuit), imposed judge-made procedural requirements that did not originate in either the APA or agency organic statutes.<sup>189</sup> The Supreme Court brought an abrupt halt to such judge-made procedures in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*<sup>190</sup> Thus, rulemaking procedures that do not trigger formal rulemaking under § 556 and § 557 of the APA today are governed by the paper hearing requirements

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opportunity for comment if the final rule differs materially from the proposed rule such that it is not a logical outgrowth of the rule as originally proposed. *See, e.g., S. Terminal Corp. v. EPA*, 504 F.2d 646, 665 (1st Cir. 1974) (upholding a regulation even though the final version was substantially different from the proposed version because the changes were both in character with the original scheme and foreshadowed in the comments such that interested persons were sufficiently alerted to satisfy notice requirements); *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973) (“In order that rule-making proceedings . . . be conducted in [an] orderly fashion, information should generally be disclosed as to the basis of a proposed rule at the time of issuance. If this is not feasible, . . . information that is material to the subject . . . should be disclosed as it becomes available.”); *Int’l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 631–32 (D.C. Cir. 1973) (addressing whether the EPA’s development of a methodology on the basis of submissions made at agency hearings required a new round of notice and comment).

186. *See Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 850 (D.C. Cir. 1972) (stating that the requirement of a concise statement of basis and purpose “is not to be interpreted overliterally” and concluding that while the “regulation before us contains sufficient exposition of the purpose and basis of the regulation as a whole to satisfy this legislative minimum,” certain portions of the rule should be “remanded for the Administrator to supply an implementing statement that will enlighten the court”). For a more recent application of this requirement, see *Cent. & Sw. Servs. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000). This requirement also overlaps with substantive review under the arbitrary and capricious test. *See Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 225 (D.C. Cir. 2007) (“[A]n agency must ‘demonstrate the rationality of its decision-making process by responding to those comments that are relevant and significant.’” (quoting *Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455, 468 (D.C. Cir. 1998))); *U.S. Satellite Broad. Co. v. FCC*, 740 F.2d 1177, 1188 (D.C. Cir. 1984) (requiring the agency to “respond[] in a reasoned manner to significant comments received”).

187. *See generally* Stephen F. Williams, “Hybrid Rulemaking” Under the Administrative Procedure Act: A Legal and Empirical Analysis, 42 U. CHI. L. REV. 401 (1975) (discussing several “judicial decisions that have ordered an agency . . . to afford opponents of a rule substantially greater procedural opportunities than are prescribed by section 553,” creating “a procedural category that might be termed ‘hybrid rulemaking’ or ‘notice-and-comment-plus’”).

188. *See, e.g.,* 42 U.S.C. § 7607(d)(2)–(6) (2006) (requiring the Administrator to “give interested persons an opportunity for the oral presentation of data, views, or arguments” when the agency is promulgating a rule). For further discussion, see *infra* notes 208–11 and accompanying text.

189. *See, e.g.,* Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 348–56 (describing and criticizing decisions of the D.C. Circuit that imposed additional procedural requirements).

190. 435 U.S. 519 (1978).

(which remain intact notwithstanding *Vermont Yankee*<sup>191</sup>) derived from the application of § 553, which may be supplemented or superseded by hybrid procedural requirements in the organic statute.<sup>192</sup>

Although *ex parte* communications are not prohibited by § 553, they present serious problems for paper hearings because they may undermine the opportunity for comment and frustrate the court's ability to engage in meaningful judicial review. In *Sangamon Valley Television Corp. v. United States*,<sup>193</sup> a relatively early decision, the court invalidated a proceeding to allocate a television broadcast license because of improper *ex parte* communications, reasoning that the determination would resolve "conflicting private claims to a valuable privilege, and that basic fairness requires such a proceeding to be carried on in the open."<sup>194</sup> While *Sangamon Valley* was a narrow decision based on the adjudicatory characteristics of the agency action,<sup>195</sup> in *Home Box Office, Inc. v. FCC*,<sup>196</sup> the court effectively announced a *per se* ban on *ex parte* communications in notice-and-comment rulemaking,<sup>197</sup> invalidating an FCC rule that allocated programming between broadcast and cable television networks because of extensive *ex parte* communications.<sup>198</sup> *HBO* was decided just before *Vermont Yankee*, at the

191. See, e.g., *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236–40 (D.C. Cir. 2008) (finding a violation of § 553 when an agency released only redacted versions of studies consisting of staff-prepared scientific data because the redacted portions amounted to "critical factual material" due to the agency's reliance upon them); *Honeywell Int'l, Inc. v. EPA*, 372 F.3d 441, 445 (D.C. Cir. 2004) (stating that the notice of proposed rulemaking "must 'provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully'" (quoting *Fla. Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988))); *Conn. Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530–31 (D.C. Cir. 1982) (holding that notice supplied by an agency must provide the public with an "accurate picture of the reasoning" used by the agency to develop the proposed rule).

192. *United States v. Sunny Cove Citrus Ass'n*, 854 F. Supp. 669, 672–73 (E.D. Cal. 1994).

193. 269 F.2d 221 (D.C. Cir. 1959).

194. *Id.* at 224. The proceeding was to determine which of two communities would be allocated a broadcast frequency and thus which of two competing stations would ultimately receive a license. *Id.* at 223–24.

195. See *id.* at 224 (referencing the FCC's "quasi-judicial powers" in holding that the proceeding in question had to be reopened because "[a]gency action that substantially and prejudicially violates the agency's rules cannot stand").

196. 567 F.2d 9 (D.C. Cir. 1977).

197. In addressing the issue, the court stated,

Once a notice of proposed rulemaking has been issued, . . . any agency official or employee who is or may reasonably be expected to be involved in the decisional process of the rulemaking proceeding, should [refuse to engage in *ex parte* communications]. . . . If *ex parte* contacts nonetheless occur, we think that any written document or a summary of any oral communication must be placed in the public file established for each rulemaking docket immediately after the communication is received so that interested parties may comment thereon.

*Id.* at 57 (citations omitted).

198. The court reasoned that the communications violated the public-comment requirements of § 553 because interested parties had no opportunity to respond to the secret communications, the communications frustrated judicial review by reducing the public record to a "mere sham," and



peak of the D.C. Circuit's willingness to order additional agency procedures, and the court has subsequently distanced itself from the decision.<sup>199</sup>

It is interesting to note that many of these cases involved the FCC, which might suggest that these are agency-specific precedents. In particular, because FCC decisions affecting licenses often have significant adjudicatory elements,<sup>200</sup> ex parte communications may be especially problematic in FCC cases.<sup>201</sup> In addition, the FCC uses a peculiar terminology that tends to reinforce these adjudicatory elements.<sup>202</sup> In any event, these FCC decisions are often cited in cases involving other agencies,<sup>203</sup> and our focus in this case study is not on ex parte communication precedents involving the FCC but on another major decision concerning ex parte communications that involved the EPA.

2. *EPA-Specific Docketing Precedents.*—Administrative law casebooks conventionally focus on another major D.C. Circuit decision as a leading case on ex parte communications: *Sierra Club v. Costle*.<sup>204</sup> The case contains

*Sangamon Valley* applied because cable and broadcast networks were competing for a valuable privilege. *Id.* at 52–59.

199. *See* *Air Transp. Ass'n v. FAA*, 169 F.3d 1, 7 n.5 (D.C. Cir. 1999) (opining that *HBO* “could be thought to be undermined by *Vermont Yankee*”); *Action for Children’s Television v. FCC*, 564 F.2d 458, 474 (D.C. Cir. 1977) (characterizing application of *HBO* to the proceedings being reviewed as “a clear departure from established law when applied to informal rulemaking proceedings”); *see also* *Viacom Int’l Inc. v. FCC*, 672 F.2d 1034, 1044 (2d Cir. 1982) (characterizing *HBO* as limited to “cases involving competing claims for a specific valuable privilege under circumstances similar to adjudication”).

200. Broadcast licensing is necessary because radio waves at similar frequencies interfere with each other, and the broadcast spectrum is therefore finite, which means that broadcast licensing will inherently involve conflicting claims to a valuable privilege.

201. The impropriety of ex parte communications in judicial proceedings is widely recognized and accepted. *See, e.g.,* *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 460 (1978) (stating that ex parte communication between judge and jury is “pregnant with possibilities for error”); *Hereford v. Warren*, 536 F.3d 523, 537 (6th Cir. 2008) (stating that when “a judge holds a bench conference with only one party’s counsel in attendance, the judge is potentially permitting that party to hear secrets which could be wielded to the disadvantage of the other party, or is allowing that party to raise issues before the court without giving the other side an opportunity to argue in opposition”). The APA’s restrictions on ex parte communications in adjudications, 5 U.S.C. § 557(d) (2006), reflect similar concerns in the context of administrative proceedings. Ex parte communications in adjudications not only undermine the rights of opposing parties but also threaten the impartiality of the decision maker. *Cf. Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2262–65 (2009) (reflecting concern over one-sided access to and bias by the Judiciary in holding that due process required recusal of a state court judge from a case in which the president of one of the parties had made “extraordinary” contributions to the judge’s campaign).

202. The FCC often promulgates rules by means of what it refers to as “orders” although the APA defines an “order” as “the whole or a part of a final disposition . . . in a matter other than rule making but including licensing.” 5 U.S.C. § 551(6); *see also id.* § 551(7) (defining “adjudication” as “agency process for the formulation of an order”).

203. *See, e.g.,* *U.S. Lines, Inc. v. Fed. Mar. Comm’n*, 584 F.2d 519, 539–40 (D.C. Cir. 1978) (applying the reasoning of *HBO* to a case involving the Federal Maritime Commission).

204. 657 F.2d 298 (D.C. Cir. 1981); *see, e.g.,* WILLIAM F. FUNK ET AL., *ADMINISTRATIVE PROCEDURE AND PRACTICE: PROBLEMS AND CASES* 115–23 (4th ed. 2010); GLICKSMAN & LEVY,

an important discussion of ex parte communications within government, including efforts by congressional leaders or White House staff to influence the outcome of rulemaking.<sup>205</sup> In addition, the case articulates a tolerant approach to ex parte communications based on the recognition that lobbying is appropriate and inevitable given the legislative character of rulemaking and the rulemaking process.<sup>206</sup> Nonetheless, the court indicated that written ex parte communications and a summary of oral ex parte communications must be added to the administrative record when they are of “central relevance” to the proceedings so as to ensure an opportunity for public comment.<sup>207</sup>

The latter requirement might be a useful and definitive resolution of the ex parte communication problem in light of paper hearing requirements. Ex parte communications are not prohibited (unless *Sangamon Valley* applies), but if those communications contain important data and information or other considerations that are critical to the agency’s final rulemaking decision, then the material must be made part of the record for public comment. However reasonable this accommodation may be as a matter of general administrative law, however, *Sierra Club v. Costle* was interpreting and applying the hybrid rulemaking provisions of the Clean Air Act, which require the EPA to include information in the notice of proposed rulemaking, docket information accumulated during the rulemaking, and make a decision based solely on the information in the rulemaking docket.<sup>208</sup>

Specifically, one of these provisions requires the EPA to place documents received after the close of the comment period in the docket if the documents are of “central relevance” to the rulemaking.<sup>209</sup> Not unreasonably, the court in *Sierra Club v. Costle* concluded that if the EPA received post-comment-period oral communications of “central relevance,” it had to place a summary of them in the docket as well.<sup>210</sup> Although the court concluded that the EPA need not reopen the comment period in that case, it cautioned that “[i]f, however, documents of central importance upon which EPA intended to rely had been entered on the docket too late for any meaningful public comment prior to promulgation, then both the structure and spirit of [the statutory provision specifying the procedures applicable to rulemakings] would have been violated.”<sup>211</sup>

*Sierra Club* is often treated by administrative law experts as establishing generally applicable rules for the treatment of ex parte communications in

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*supra* note 8, at 373–83 (both including *Sierra Club* in their discussions of ex parte communications).

205. *Sierra Club*, 657 F.2d at 404–10.

206. *Id.* at 400–01.

207. *Id.* at 402–04.

208. 42 U.S.C. § 7607(d)(2)–(6) (2006).

209. *Id.* § 7607(d)(4)(B)(i).

210. *Sierra Club*, 657 F.2d at 402–04.

211. *Id.* at 398.

rulemakings without much attention to the implications of the Clean Air Act's hybrid procedures for the decision in that case.<sup>212</sup> Nonetheless, while courts have cited the case many times for various propositions,<sup>213</sup> especially for its treatment of *ex parte* communications within the Executive Branch<sup>214</sup> and its general attitude toward *ex parte* communications in informal rulemaking,<sup>215</sup> they have not applied the "central relevance" test for inclusion of documents in the rulemaking record except in cases involving the EPA.<sup>216</sup> Further, all but one of the EPA cases referencing the term arose under the Clean Air Act. In the only case that did not, the court refused to apply the docketing requirement precisely because the generally applicable provisions of the APA applied rather than the special procedures of the Clean Air Act.<sup>217</sup>

At first blush, at least, the EPA-specific docketing precedents would seem to be entirely appropriate given the significance of the Clean Air Act's

212. See, e.g., Michael O. Spivey & Jeffrey G. Micklos, *Developing Provider-Sponsored Organization Solvency Standards Through Negotiated Rulemaking*, 51 ADMIN. L. REV. 261, 262 & n.10 (1999) (arguing that "[a] degree of 'negotiation' seems destined to occur in rulemaking within [agencies whose rulemakings involve technical expertise] either on a formal or informal basis" and describing *Sierra Club* as a case "holding that [an] agency . . . accepting documents after publication of [a] proposed rule was not impermissible on [the] condition that [the] agency place[] in [the] docket all documents centrally relevant to [the] rulemaking"); see also Cary Coglianese et al., *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924, 933 n.19 (2009) (citing *Sierra Club* for the proposition that "there is no 'ex parte contacts doctrine' in informal rulemaking"); Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 294 n.136 (2006) (describing *Sierra Club* as a case that "embrac[ed] broad permissibility of *ex parte* contacts between [the] White House and agencies during informal rulemaking"). Some scholars do note the application of special Clean Air Act hybrid rulemaking procedures in *Sierra Club*. See, e.g., J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEXAS L. REV. 1443, 1456 n.42 (2003) ("The Clean Air Act's 'docketing' requirement for all *ex parte* contacts of 'central relevance' is an example of a procedure that must be followed which departs from the traditional [requirements] . . . of the Administrative Procedure Act.").

213. On March 1, 2010, Insta-cite showed 146 cases citing the decision, but many of these references did not concern *ex parte* communications.

214. See, e.g., *Walker v. Pierce*, 665 F. Supp. 831, 839 (N.D. Cal. 1987) (citing *Sierra Club* for the proposition that "an executive agency is entitled to take into account broad administration policies that are not in direct conflict with the applicable governing statute").

215. See, e.g., *Tex. Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 327 (5th Cir. 2001) (relying on *Sierra Club* for the proposition that "*ex parte* contact is not shunned in the administrative agency arena as it is in the judicial context").

216. A Westlaw search in the ALLFEDS database on March 6, 2010 for cases containing the terms *Sierra Club v. Costle* and *central relevance* revealed only thirteen other cases, all of which involved the EPA. *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936 (D.C. Cir. 2004); *Appalachian Power Co. v. EPA*, 135 F.3d 791 (D.C. Cir. 1998); *Bd. of Regents of Univ. of Wash. v. EPA*, 86 F.3d 1214 (D.C. Cir. 1996); *Concerned Citizens of Bridesburg v. U.S. EPA*, 836 F.2d 777 (3d Cir. 1987); *Union Oil Co. U.S. v. EPA*, 821 F.2d 678 (D.C. Cir. 1987); *Natural Res. Def. Council v. Thomas*, 805 F.2d 410 (D.C. Cir. 1986); *Air Pollution Control Dist. v. U.S. EPA*, 739 F.2d 1071 (6th Cir. 1984); *Natural Res. Def. Council v. U.S. EPA*, 725 F.2d 761 (D.C. Cir. 1984); *Small Refiner Lead Phase-Down Task Force v. U.S. EPA*, 705 F.2d 506 (D.C. Cir. 1983); *Duquesne Light Co. v. EPA*, 698 F.2d 456 (D.C. Cir. 1983); *Kennecott Corp. v. EPA*, 684 F.2d 1007 (D.C. Cir. 1982); *Am. Petroleum Inst. v. Costle*, 665 F.2d 1176 (D.C. Cir. 1981); *PPG Indus., Inc. v. Costle*, 659 F.2d 1239 (D.C. Cir. 1981).

217. *Bd. of Regents of Univ. of Wash.*, 86 F.3d at 1222.

hybrid procedures to the court's decision. But the central relevance approach resonates with more generally applicable § 553 paper hearing requirements insofar as failure to disclose ex parte communications of central relevance to the decision means that interested parties have no notice of the information contained in the communications and no opportunity to comment on that information. The central relevance test might therefore be more useful as a broader resolution of the ex parte communication issue in the context of § 553, in the sense that while ex parte communications are not banned by § 553, agencies should docket those comments that are of central relevance to the issues in a rulemaking in a manner that permits meaningful public comment.<sup>218</sup>

There are some decisions not involving the EPA that apply *Sierra Club's* reasoning in a general way. One non-EPA decision has cited *Sierra Club* for the proposition that the “relative significance of an ex parte communication to the eventual agency action is a factor in determining whether disclosure of the communication is required.”<sup>219</sup> Another decision cited the case to establish the principle that “[a]n agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.”<sup>220</sup> But *Sierra*

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218. In some cases, the docketing of information not referenced in the notice of proposed rulemaking may require an extension of the comment period or new notice so as to make comment possible. *See, e.g., Am. Iron & Steel Inst. v. EPA*, 568 F.2d 284, 293 (3d Cir. 1977) (concluding that whether an agency must engage in an additional round of notice and comment turns on whether its original notice would “fairly apprise interested persons of the ‘subjects and issues’ [of the rulemaking]”).

219. *Braniff Master Exec. Council of Air Line Pilots Ass’n Int’l v. Civil Aeronautics Bd.*, 693 F.2d 220, 227 (D.C. Cir. 1982).

220. *Conn. Light & Power Co. v. Nuclear Regulatory Comm’n*, 673 F.2d 525, 530–31 (D.C. Cir. 1982); *cf. Colorado v. U.S. Dep’t of Interior*, 880 F.2d 481, 490 (D.C. Cir. 1989) (citing *Sierra Club* to support the holding that the agency “sufficiently explain[ed] the assumptions and methodology used in preparing the [computer] model” used in formulating regulations governing the valuation of damaged natural resources); *Golding v. United States*, 48 Fed. Cl. 697, 728–29 (2001) (citing *Sierra Club* for the proposition that “[c]ourts also have permitted evidence beyond the record if ‘plaintiff makes a “strong showing of bad faith or improper behavior” that creates “serious doubts about the fundamental integrity” of the administrative action’”) (internal quotations omitted), *aff’d*, 47 Fed. App’x 939 (Fed. Cir. 2002); *Doe v. Rumsfeld*, 341 F. Supp. 2d 1, 13 (D.D.C. 2004) (citing *Sierra Club* to support the statement that “[i]t is clear that when an agency relies on studies or data after the comment period has ended, no meaningful commentary on such data is possible”). Similarly, some courts have cited *Sierra Club* for the generally accepted proposition that an agency need not engage in a second round of notice and comment simply because its final rule differed from its proposed rule, as long as the final rule was a logical outgrowth of the proposal. *See, e.g., Brazos Elec. Power Coop. v. Sw. Power Admin.*, 819 F.2d 537, 543 (5th Cir. 1987) (“[T]he original notice will be deemed sufficient if the final rule is a ‘logical outgrowth’ of the published provisions.”); *Chocolate Mfrs. Ass’n of the U.S. v. Block*, 755 F.2d 1098, 1105 (4th Cir. 1985) (noting that a substantially revised final rule complies with APA procedures if “the changes in the original rule ‘are in character with the original scheme’ and the final rule is a ‘logical outgrowth’ of the notice and comments already given” (citations omitted)); *cf. Am. Fed’n of Labor v. Donovan*, 757 F.2d 330, 338 n.3 (D.C. Cir. 1985) (citing *Sierra Club* for the

*Club*'s specific "central relevance" test remains tied to the Clean Air Act rulemaking context in which it originated.<sup>221</sup>

The EPA docketing precedents may be seen as an example of an administrative law issue that is unique to the agency and at the very least involves a compound issue of general and agency-specific administrative law. As a result, these precedents have distinctive features that differentiate this case study from the IRS and FCC case studies and that suggest some additional observations:

- Agency-specific precedents may be especially likely to arise and persist when distinctive provisions of the agency's organic statute apply insofar as those provisions are unique to the agency. In this respect, courts may be especially likely to confine their precedents to other cases arising under the organic statute.
- While agency-specific precedents that are the product of specific provisions of the organic statute do not apply directly to other agencies, they may reflect generally applicable principles that might be relevant or useful by analogy.<sup>222</sup> Thus, even agency-specific precedents involving unique administrative law provisions may have potential applicability beyond the agency of origination.
- Although it is only one example, the EPA docketing precedents might suggest that the courts attach greater significance to the applicability of a unique provision of the organic statute than do academic commentators. At least it appears that administrative law casebooks and treatises may treat *Sierra Club* as a generally applicable precedent while courts are less inclined to do so.<sup>223</sup>

#### D. *The Treating Physician Rule in the Social Security Administration*

The substantial evidence standard of review applies to factual findings made by agencies in formal APA adjudications as well as under various or-

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proposition that statutory notice requirements do not require an agency to "select a final rule from among the precise proposals under consideration during the comment period").

221. We do not wish to overstate the extent to which the central relevance test for docketing *ex parte* communications differs from the general paper hearing requirements of § 553 that have been applied to require similar kinds of disclosures. Indeed, it is precisely because of the overlap that we think broader application of the central relevance test might be useful—because it is a relatively clear and appropriate test for what material should be docketed for comment.

222. Ultimately, it might not be appropriate for the courts to adopt such a generally applicable requirement if it is not a fair construction of § 553. Nonetheless, if the approach is a sound one, it might be adopted through statutory amendment, or agencies might voluntarily undertake such disclosures in order to foster greater transparency.

223. *See supra* notes 212–17 and accompanying text. This difference in perception makes sense insofar as courts and commentators tend to view administrative law differently. The courts are primarily concerned with identifying and applying the law to resolve a particular case even if the general fabric of administrative law is also a concern. Commentators, however, tend to be more focused on the broader administrative law implications of a case and less concerned with the specific resolution of the particular issue before the court.

ganic statutes.<sup>224</sup> Although the standard applies broadly to all kinds of findings under all kinds of statutes, its core meaning remains the same. Our fourth case study concerns the development of a special rule, known as the “treating physician rule,” for applying the substantial evidence test in the context of disability determinations by the Social Security Administration (SSA). This agency-specific line of precedents originated in the courts in response to an agency practice the courts regarded as improper. It concerns a compound issue in that it reflects distinctive programmatic features, but the underlying justification for the rule appears to be of sufficiently general applicability that its infusion into general administrative law doctrine might be justified.

*1. General Administrative Law Doctrine.*—The substantial evidence standard is conventionally described using language from *Universal Camera Corp. v. NLRB*,<sup>225</sup> which declared that substantial evidence is “more than a mere scintilla” and consists of “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>226</sup> Although the case involved a provision of the National Labor Relations Act,<sup>227</sup> it is broadly cited in cases involving the APA and other statutes incorporating the substantial evidence standard.<sup>228</sup> *Universal Camera* emphasized that then-recent revisions to the standard requiring courts to consider the record “as a whole” directed courts to assume a more significant role when reviewing the NLRB and to consider the evidence against the agency’s finding as well as the evidence supporting it.<sup>229</sup> The Court also addressed the weight to be given to ALJ findings that are reversed by the agency<sup>230</sup> (which has de novo decision-making authority), an issue we will discuss more fully below in connection with the fifth case study.<sup>231</sup>

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224. 5 U.S.C. § 706(2)(E) (2006); *see also, e.g.*, 15 U.S.C. § 2618(c)(1)(B)(i) (2006) (specifying the substantial evidence test as the applicable standard of review for certain rulemakings under the Toxic Substances Control Act); 42 U.S.C. §§ 405(g), 1383(c)(3) (2006) (providing that courts must affirm SSA decisions that are “supported by substantial evidence”).

225. 340 U.S. 474 (1951).

226. *Id.* at 477 (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

227. *See* 29 U.S.C. § 160(e) (2006) (providing that the NLRB’s determinations “with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive”).

228. *See, e.g.*, *Dickinson v. Zurko*, 527 U.S. 150, 152 (1999) (holding that the Federal Circuit must use the substantial evidence standard when reviewing findings of fact by the Patent and Trademark Office); *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 454 (1986) (applying the substantial evidence standard in the context of the Federal Trade Commission Act); *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490 (1981) (considering the substantial evidence standard in the Occupational Safety and Health Administration context); *Siegel v. SEC*, 592 F.3d 147, 156 (D.C. Cir. 2010) (holding that substantial evidence supported the SEC’s finding that Siegel, a broker, violated National Association of Securities Dealers rules).

229. *Universal Camera*, 340 U.S. at 490.

230. *Id.* at 492–97.

231. *See infra* subpart III(E).

The substantial evidence test is much easier to state than it is to apply. In particular, it is difficult to “consider” the evidence contrary to the agency’s finding, which is required, without reweighing the evidence, which the reviewing court is forbidden from doing. This difficulty is especially apparent when it comes to conflicting expert testimony. The agency itself often has expertise in the field and may be expected to evaluate expert testimony accordingly. At the same time, agencies should not be able to reject the expert testimony introduced by parties out of hand and without good reason. To this point, the courts have not developed any generally applicable administrative law doctrine to address this problem, although specialized rules have developed in some fields.

2. *SSA-Specific Treating Physician Precedents.*—One area in which the agency’s treatment of expert testimony has been particularly troublesome is the SSA’s evaluation of medical testimony concerning disability. Notwithstanding the Supreme Court’s optimism that medical testimony and its evaluation are neutral,<sup>232</sup> the SSA’s treatment of such evidence has been the source of ongoing controversy. Typically, disability claimants rely on medical evidence from their treating physicians who usually have treated them over a period of years and are familiar with their conditions.<sup>233</sup> In many cases, however, the SSA (or the state agency making the initial determination) will order an examination with a consulting physician under contract with the SSA (or state agency).<sup>234</sup> Such an examination may be necessary and entirely appropriate to address medical factors not already addressed by medical professionals.

During the 1980s, however, the SSA adopted a series of controversial policies and practices to restrict benefits, and courts became concerned that the SSA was improperly denying benefits to hundreds of thousands of claimants.<sup>235</sup> One practice that received considerable judicial attention was the SSA’s tendency to reject or discount the evidence of the treating physician and rely instead on the opinion of a consulting examiner even though the examiner, whose objectivity might be considered suspect, often had seen the

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232. See *Mathews v. Eldridge*, 424 U.S. 319, 344–45 (1976) (concluding that a risk of error from the lack of a hearing before the termination of disability benefits was slight because determinations were made on the basis of objective medical evidence); *Richardson v. Perales*, 402 U.S. 389, 402–04 (1971) (concluding that reliance on hearsay evidence from medical reports did not violate due process because those reports were “routine, standard, and unbiased”).

233. See RICHARD C. RUSKELL, *SOCIAL SECURITY DISABILITY CLAIMS HANDBOOK* § 1:6 (2010) (recommending that claimants’ representatives, as a “best practice,” obtain statements from treating sources whenever possible).

234. See, e.g., *Richardson*, 402 U.S. at 402–03 (explaining that three of the five reporting physicians were selected by the agency).

235. See Richard E. Levy, *Social Security Disability Determinations: Recommendations for Reform*, 1990 BYU L. REV. 461, 484–502 (discussing controversial SSA policies during the 1980s).

claimant only once for a short time.<sup>236</sup> The courts reacted to this practice by holding that SSA decisions rejecting the treating physician's opinion and relying on a consulting examiner were not supported by substantial evidence.<sup>237</sup> This treating physician rule took various forms in various circuits.<sup>238</sup> After a period of SSA resistance to the rule and rising tensions between the agency and the courts, the SSA adopted regulations prescribing when the opinion of a treating physician will be given "controlling weight."<sup>239</sup>

Although the treating physician rule concerns the "ultimate" factual question of whether a claimant is disabled under the definition of disability found in the Social Security Act and is now governed by regulation, it derives from the general application of the substantial evidence standard of review—expert opinions contrary to the agency's conclusion are part of the "whole record" and cannot be ignored or discounted without adequate reasons. It is therefore generalizable in principle to other agency decisions based on potentially conflicting medical opinions and could apply in modified form to other kinds of factual findings in which conflicting expert testimony is at issue.

By and large, however, the courts have refused to apply the rule in other contexts. In *Black & Decker Disability Plan v. Nord*,<sup>240</sup> for example, the Supreme Court held that the treating physician rule did not apply under the

236. See, e.g., *Stieberger v. Bowen*, 801 F.2d 29, 30–34 (2d Cir. 1986) (describing attempts by the courts to require agencies to respect the opinion of the treating physician who was familiar with the patient and also agency resistance to these attempts).

237. See, e.g., *id.* at 31 (noting the court's adherence to the judicially developed rule that a treating physician's opinion on the subject of medical disability is binding on the fact finder unless contradicted by substantial evidence).

238. The rule in the Second Circuit, for example, was that a treating physician's opinion on the subject of medical disability, i.e., diagnosis and nature and degree of impairment, is: (i) binding on the fact-finder unless contradicted by substantial evidence; and (ii) entitled to some extra weight because the treating physician is usually more familiar with a claimant's medical condition than are other physicians, although resolution of genuine conflicts between the opinion of the treating physician, with its extra weight, and any substantial evidence to the contrary remains the responsibility of the fact-finder.

*Schisler v. Heckler*, 787 F.2d 76, 81 (2d Cir. 1986). Other circuits adopted a similar rule. See, e.g., *Scott v. Heckler*, 770 F.2d 482, 485 (5th Cir. 1985) ("[O]rdinarily the opinions, diagnoses and medical evidence of a treating physician . . . should be accorded considerable weight in determining disability."); *Byron v. Heckler*, 742 F.2d 1232, 1235 (10th Cir. 1984) ("Unless good cause is shown to the contrary, the Secretary must give substantial weight to the testimony of the claimant's treating physician."); *Mitchell v. Schweiker*, 699 F.2d 185, 187 (4th Cir. 1983) ("[T]he Secretary is not bound by the opinion of a . . . treating physician, [but] that opinion is entitled to great weight . . . [and] it may be disregarded only if there is persuasive contradictory evidence.").

239. 20 C.F.R. §§ 404.1527(d), 416.927(d) (2010). Although these regulations allow the SSA broader discretion to reject the treating physician's opinion than cases like *Schisler* did, courts have upheld the regulations. See *Schaal v. Apfel*, 134 F.3d 496, 503–05 (2d Cir. 1998) (noting that the new regulations are less deferential to the treating physician but applying the regulation anyway).

240. 538 U.S. 822 (2003).



Employee Retirement Income Security Act (ERISA).<sup>241</sup> Critically, the Court regarded the treating physician rule to be the product of the SSA's regulation as opposed to a specific application of the substantial evidence standard of review.<sup>242</sup> If the Court had focused on the historical origins of the rule as an application of the substantial evidence standard, the case for applying the rule more broadly would have been much more powerful. Nonetheless, the Court also observed that "critical differences between the Social Security disability program and ERISA benefit plans caution against importing a treating physician rule from the former area into the latter."<sup>243</sup> Similarly, in *White v. Principi*,<sup>244</sup> the Federal Circuit refused to extend the treating physician rule to the context of veterans' benefits.<sup>245</sup> On the other hand, there is some support for applying the rule under Medicare or Medicaid, even if the issue has not been definitively resolved and the trend seems to be away from its application.<sup>246</sup>

Thus, the courts have explicitly declined to extend the treating physician rule beyond the Social Security disability context. This refusal may well be justified by the differences between the programs and statutory or regulatory provisions involved, but the substantial evidence standard of review should mean the same thing under the Social Security Act as it does under the APA or other organic statutes.<sup>247</sup> As *Universal Camera* framed the substantial evidence standard, the question is whether a "reasonable mind might accept"<sup>248</sup> the opinion of a consulting examiner who has had a limited

241. *Id.* at 829.

242. *Id.*

243. *Id.* at 832–33. In particular, the Court emphasized that the SSA's rules arise from the need to administer a comprehensive uniform nationwide program, while ERISA relates to voluntary programs that may vary considerably from employer to employer. *Id.* at 833.

244. 243 F.3d 1378 (Fed. Cir. 2001).

245. *See id.* at 1381 ("[U]nlike the Social Security benefits statutes, the [Veterans Administration] benefits statutes and regulations do not provide any basis for the 'treating physician' rule and, in fact, appear to conflict with such a rule.>").

246. In *Friedman v. Secretary of Department of Health & Human Services*, 819 F.2d 42 (2d Cir. 1987), the court declined to resolve the issue:

Even if we assume that the treating physician rule developed in Social Security disability cases . . . applies in Medicare reimbursement cases, *compare* [Gartmann v. Sec'y of U.S. Dep't of Health & Human Servs., 633 F. Supp. 671, 680 (E.D.N.Y. 1986)] (stating that [the] treating physician rule "may well apply with even greater force in the context of Medicare reimbursement") with [Rendzio v. Sec'y of Health, Ed. & Welfare, 403 F. Supp. 917, 919 (E.D. Mich. 1975)] (noting that "persuasive authority" advises against extending treating physician rule to Medicare determinations), there is insufficient evidence in the instant case to put that rule in issue.

*Id.* at 46. Subsequently, the Second Circuit expressed "disagreement" with *Gartmann*. *See New York ex rel. Bodnar v. Sec'y of Health & Human Servs.*, 903 F.2d 122, 125 (2d Cir. 1990) (rejecting the contention that Medicare "is bound to provide reimbursement when 'dual certification' is made by the attending physician and the [utilization review committee]").

247. *See supra* note 228 and accompanying text.

248. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

opportunity to examine a patient “as adequate to support a conclusion”<sup>249</sup> that the claimant is not disabled, in light of the contrary evidence in the record from a treating physician who has had significantly more involvement with the patient. In the absence of some explanation of why the agency has chosen to credit the opinion of the consulting physician over that of the treating physician, such a conclusion is arguably not supported by substantial evidence on the record considered as a whole. It may be, however, that the courts’ refusal to extend the rule reflects a sense that the rule is the product of judicial mistrust of the SSA rather than a generalizable application of the substantial evidence standard.<sup>250</sup>

The treating physician rule is an example of agency-specific precedents concerning a compound administrative law issue that involves application of a general principle in the context of a distinctive agency program.<sup>251</sup> It suggests some further observations concerning agency-specific precedents:

- Agency-specific precedents may arise as a judicial response to a specific problem confronted by courts in the context of a particular program. Social Security disability determinations frequently required the agency to evaluate conflicting medical evidence from treating physicians and consulting examiners, and courts developed special rules for addressing this recurring question.
- In such cases, the particular administrative context in which the issue arises may justify confining such precedents to the agency of origin, especially if the issue does not arise frequently in other programs or if there are distinctive features of the program at issue that make the rule inappropriate in other contexts. Nonetheless, to the extent that the agency-specific rule reflects the application of generally applicable doctrine, such precedents may be generalizable to other contexts.
- Some agency-specific precedents may be caused or reinforced by judicial concerns respecting a particular agency as opposed to distinctive statutory or programmatic features. These concerns may be an additional factor in the courts’ refusal to extend the precedents to other agencies.<sup>252</sup>

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249. *Id.*

250. See Levy, *supra* note 235, at 506–07 (noting a lack of judicial deference to the SSA’s positions); Richard J. Pierce, Jr., *Legislative Reform of Judicial Review of Agency Actions*, 44 DUKE L.J. 1110, 1115 (1995) (arguing that the substantial increase in reversals of SSA findings was fueled by judges’ displeasure with “what they perceived to be the heartless policies of the Reagan Administration toward disabled people”).

251. The treating physician rule originated as a general application of the substantial evidence standard, but the current rule is the product of agency regulations that provide a distinctive legal basis for the rule.

252. The propriety of judicial adoption of agency-specific rules of administrative law in response to particular concerns about the agency is an important and fundamental question that is

*E. Credibility Determinations at the NLRB*

Our final case study concerns another pure administrative law issue in which the phenomenon of agency-specific precedents has contributed to the survival of a questionable doctrine (like the IRS example), while also helping to limit that questionable doctrine and prevent its spread to other agencies. The administrative law issue is the treatment of credibility determinations by an ALJ when the agency reverses the ALJ's decision. This issue was first addressed in the context of the NLRB, which led to the creation of NLRB-specific precedents on the issue.

*1. General Administrative Law Doctrine.*—In many agency adjudications, an initial hearing is conducted by an ALJ or other hearing officer even though the agency itself retains de novo decisional authority.<sup>253</sup> When the agency reverses the factual findings of the ALJ or hearing officer, the question becomes how a court should treat the conflicting opinions of the ALJ and the agency when it conducts judicial review under the substantial evidence standard. In the *Universal Camera* litigation, this issue befuddled no less a figure than Judge Learned Hand, who concluded that the reviewing court should disregard the hearing officer's findings if they are reversed by the NLRB.<sup>254</sup> The Supreme Court disagreed, holding that the hearing officer's findings were part of the "whole record" that courts must consider when determining whether the NLRB's finding is supported by substantial evidence.<sup>255</sup> This directive has proven to be particularly difficult to apply in relation to ALJ determinations regarding the credibility of witnesses.

In the *Universal Camera* case itself, the critical issue was whether an employee had been fired because of misconduct, as the hearing examiner believed, or because of his union activities, as found by the NLRB.<sup>256</sup> The testimony regarding the events surrounding the discharge was conflicting, with the hearing examiner crediting the employer's witnesses and the NLRB giving heed to those of the employee.<sup>257</sup> In the initial decision, the court of

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beyond the scope of this Article. We simply note here that such factors may explain the persistence of some agency-specific precedents.

253. See *supra* notes 44–45 and accompanying text.

254. *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 752–53 (2d Cir. 1950), *rev'd*, 340 U.S. 474 (1951). Judge Hand reasoned that giving weight to the hearing examiner's determinations would effectively require the Board to defer to the hearing examiner, which was inconsistent with the Board's de novo decisional authority. *Id.* At the time, "hearing examiners" rather than ALJs conducted hearings. Some agencies still conduct relatively formal adjudications subject to substantial evidence review by hearing officers who are not ALJs. For purposes of this discussion, however, the distinction is not material.

255. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 492–97 (1951). The Court concluded that "evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion." *Id.* at 496.

256. *Universal Camera*, 179 F.2d at 750–51.

257. *Id.* at 751.

appeals upheld the NLRB, but on remand from the Supreme Court it concluded that, once it factored in the hearing examiner's findings regarding credibility, the NLRB's decision was not supported by substantial evidence on the record as a whole.<sup>258</sup> The court of appeals emphasized that the NLRB had an insufficient basis for rejecting the hearing examiner's demeanor-based credibility determinations.<sup>259</sup> In an influential concurring opinion, Judge Frank drew a distinction between "testimonial" and "derivative" inferences.<sup>260</sup> Under this approach, an examiner's finding "binds" the agency if it is a demeanor-based credibility determination, notwithstanding the statutory authority of the agency to decide the case de novo.<sup>261</sup>

Shortly after the decision on remand in *Universal Camera*, the D.C. Circuit applied this approach in *Allentown Broadcasting Corp. v. FCC*,<sup>262</sup> only to be reversed by the Supreme Court.<sup>263</sup> The Supreme Court disapproved of the appellate court's "understanding that the Examiner's findings based on demeanor of a witness are not to be overruled by a Board without a 'very substantial preponderance in the testimony as recorded,'" and after expressly referencing the decision on remand in *Universal Camera*, the Court stated flatly, "We think this attitude goes too far."<sup>264</sup> Although *Allentown* involved the FCC rather than the NLRB, the Court seems to have articulated a generally applicable principle (not confined to FCC cases) for the application of the substantial evidence standard of review when the agency reverses a hearing officer who observed the witnesses' demeanor. In any event, the Court's express disapproval of the decision on remand in *Universal Camera* ought to have ended that approach in at least the NLRB context.

2. *NLRB-Specific Credibility Rules*.—Notwithstanding the Supreme Court's opinion in *Allentown Broadcasting*, the *Universal Camera* approach resurfaced in NLRB cases, eventually leading to an influential decision, *Penasquitos Village, Inc. v. NLRB*.<sup>265</sup> In *Penasquitos*, the Ninth Circuit declared that "evidence in the record which, when taken alone, may amount

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258. *NLRB v. Universal Camera Corp.*, 190 F.2d 429, 430–31 (2d Cir. 1951).

259. *See id.* at 431 (noting that the Board must give at least some regard to the examiner's findings given that the examiner and not the Board heard the witnesses' testimony and could judge credibility).

260. *Id.* at 432 (Frank, J., concurring) (stating that an examiner's finding "binds the Board only to the extent that it is a 'testimonial inference,' or 'primary inference,' i.e., an inference that a fact to which a witness orally testified is an actual fact because that witness so testified and because observation of the witness induces a belief in that testimony" but that the Board "is not bound by the examiner's 'secondary inferences,' or 'derivative inferences,' i.e., facts to which no witness orally testified but which the examiner inferred from facts orally testified by witnesses whom the examiner believed").

261. *Id.*

262. 222 F.2d 781, 785–86 (D.C. Cir. 1954), *rev'd*, 349 U.S. 358 (1955).

263. *FCC v. Allentown Broad. Corp.*, 349 U.S. 358 (1955).

264. *Id.* at 364 (citation omitted).

265. 565 F.2d 1074 (9th Cir. 1977).

to ‘substantial evidence’ and therefore support the Board’s decision, will often be insufficient when the trial examiner has, on the basis of the witnesses’ demeanor, made credibility determinations contrary to the Board’s position.”<sup>266</sup> Although the court indicated that an ALJ’s “determinations of credibility based on demeanor” are not “conclusive on the Board,” it nonetheless stated broadly that “the special deference deservedly afforded the administrative law judge’s factual determinations based on testimonial inferences will weigh heavily in our review of a contrary finding by the Board.”<sup>267</sup> *Penasquitos Village* has been frequently cited, and although most of the cases according special deference to testimonial inferences by ALJs or hearing officers involve the NLRB, that approach has been extended to other agencies.<sup>268</sup>

This approach is problematic for two reasons. First, notwithstanding the court’s disclaimer that an ALJ’s demeanor-based credibility determinations are not “conclusive,” in practice this approach treats them as very nearly so.<sup>269</sup> In *Jackson v. Veterans Administration*, for example, the court refused to permit the agency to reject a hearing officer’s testimonial inferences on one issue even though it was clear from the hearing officer’s treatment of another issue that his credibility determinations were unreliable and possibly biased.<sup>270</sup> This sort of result is simply inconsistent with the vesting of deci-

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266. *Id.* at 1078.

267. *Id.* at 1079; *see also* *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 872–73 (6th Cir. 1995) (quoting *Penasquitos Village*, 565 F.2d at 1079).

268. *See, e.g.*, *Haebe v. Dep’t of Justice*, 288 F.3d 1288, 1299–1300 (Fed. Cir. 2002); *Paredes-Urrestarazu v. U.S. Immigration & Naturalization Serv.*, 36 F.3d 801, 818–19 (9th Cir. 1994); *Pogue v. U.S. Dep’t of Labor*, 940 F.2d 1287, 1289 (9th Cir. 1991); *Jackson v. Veterans Admin.*, 768 F.2d 1325, 1331 (Fed. Cir. 1985); *Boise Cascade Corp. v. Sec’y of Labor & Occupational Safety & Health Review Comm’n*, 694 F.2d 584, 589 (9th Cir. 1982) (all citing to *Penasquitos Village*). Agencies such as the Federal Aviation Administration have specifically endorsed the doctrine. *See, e.g.*, *Zoltanski v. FAA*, 372 F.3d 1195, 1201 (10th Cir. 2004) (upholding an approach giving special deference to an ALJ who has heard testimony directly instead of to the reviewing Administrator).

269. *See, e.g.*, *Haebe*, 288 F.3d at 1300 (noting that “with respect to conflicting determinations concerning demeanor-based credibility, the administrative judge ‘is without question the better judge of who to believe’” (quoting *Jackson*, 768 F.2d at 1332)); *Kimm v. Dep’t of Treasury*, 61 F.3d 888, 892 (Fed. Cir. 1995) (noting that an appellate court will not sustain the rejection of an administrative law judge’s findings based on the demeanor of a witness unless the agency has “articulated sound reasons” for doing so). In particular, it is nearly impossible to rehabilitate discredited testimony in the absence of some strong corroborating evidence, which means that when the case comes down to conflicting accounts of two witnesses, the agency is effectively precluded from reversing the ALJ or hearing examiner.

270. *Jackson*, 768 F.2d at 1328. The case involved several alleged incidents of sexual harassment involving the same supervisor and employee, and the ALJ credited the supervisor and discredited the employee on all of the allegations. *Id.* at 1327–29. The Merit Systems Protection Board, however, credited the complaining employee. *Id.* With regard to one incident, the court affirmed the Board because other witnesses confirmed the complainant’s account. *Id.* at 1332. On the other instances, however, the court ruled that the Board was not at liberty to reject the hearing examiner’s demeanor-based credibility determinations. *Id.* Insofar as the hearing examiner had credited the alleged harasser’s testimony on one incident despite contrary evidence from other witnesses confirming the complainant’s account of the events, it is hard to see why the examiner’s

sional responsibility in the agency (not the hearing officer) and the statutory provisions for de novo determination of the facts by the agency. Second, notwithstanding its prevalence in the folklore of the legal system, the notion that demeanor provides a particularly useful tool for determining credibility is simply not borne out by the empirical evidence.<sup>271</sup> Whatever advantages the observation of witnesses may present, they should not prevent an agency from reversing the demeanor-based inferences of a hearing officer or ALJ if the agency offers a reasonable explanation for doing so and there is substantial evidence in the record to support the ultimate agency determination.

The testimonial-inference cases are at once illustrative of potential problems with agency-specific precedents and a potential caution against incorporating agency-specific precedents into the general body of administrative law. This case study suggests several additional observations:

- It may be unclear whether agency-specific precedents respond to any distinctive features of an agency statute or program. In this case study, the treatment of ALJ credibility determinations would appear to involve a pure administrative law issue that cuts across all agency adjudications, but it may also respond to some unexpressed concerns about the NLRB.<sup>272</sup>
- Agency-specific precedents may contribute to the survival or reemergence of a doctrine that has been rejected in other contexts. The treatment of ALJ demeanor-based credibility determinations as effectively binding on the agency was rejected by the Supreme Court in a case involving the FCC but reinvigorated in subsequent NLRB cases that did not cite the FCC decision.
- In some instances, agency-specific precedents may help to contain or prevent the spread of a “bad” administrative law doctrine. Thus, to the extent that one believes that *Penasquitos* articulates an erroneous or misguided doctrine, it would be best if this particular doctrine remained confined to as few agencies as possible.<sup>273</sup>

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blanket acceptance of the supervisor’s testimony and rejection of the employee’s testimony should receive any special respect with regard to other disputed events.

271. See Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1075 (1991) (“According to the empirical evidence, ordinary people cannot make effective use of demeanor in deciding whether to believe a witness. On the contrary, there is some evidence that the observation of demeanor diminishes rather than enhances the accuracy of credibility judgments.”).

272. One possible explanation, for example, might be judicial concerns that the Board—which is composed of political appointees and might be agenda driven—is less likely than ALJs to engage in neutral fact-finding. See GLICKSMAN & LEVY, *supra* note 8, at 472–73 (describing abrupt shifts in Board policy that often accompany changes in the Board’s composition).

273. The same point might also be made with respect to the judge-made treating physician rule, which might be criticized as an instance of judicial overreaching.

#### IV. Agency-Specific Precedents and the Silo Effect

As a general matter, we think our case studies, while anecdotal, are not isolated instances and that the phenomenon of agency-specific precedents is real and worthy of further investigation.<sup>274</sup> Of course, core administrative law principles and iconic cases are applied broadly, sometimes precisely because the Court intended them to be definitive, generally applicable doctrinal pronouncements.<sup>275</sup> Our case studies suggest, however, that agency-specific precedents concerning agency procedures and judicial review arise in various areas with respect to various agencies.<sup>276</sup> In this Part, we explore the causes of the development and persistence of agency-specific precedents while suggesting that the phenomenon cannot be fully explained by specific features of agency organic statutes or distinctive aspects of the agency programs or practices. We posit that information costs also create incentives among practitioners and judges who favor reliance on precedents that involve the same agency as the one involved in the dispute in question; i.e., agency-specific precedents are a product of the silo effect.

##### A. *Agency-Specific Statutes, Programs, and Practices*

In some of our case studies, agency-specific precedents reflected agency-specific statutes (or regulations), distinctive programmatic features, or judicial reactions to a particular agency's practices. For a variety of reasons, we might expect judicial precedents to be agency specific in such circumstances. Nonetheless, agency-specific statutes, programs, and practices do not provide a complete explanation for agency-specific precedents.

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274. See, e.g., Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2081 (2009) (observing that “[r]eviewing courts [in cases involving the NLRB] tend to cite only other NLRB cases, many of them predating important developments in the contemporary law of judicial review” and that, as a result, the Board is “isolated from those developments in administrative law that apply to agency adjudications”). A full assessment of the extent of silo thinking and the related phenomenon of agency-specific precedents requires more comprehensive and empirical analysis than we were able to conduct in preparing this Article. We intend to pursue those inquiries in future research.

275. *Vermont Yankee* and *Chevron*, for example, were apparently intended to send a broad message to the lower courts concerning questions of administrative procedure and statutory interpretation, respectively. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (“[T]he principle of deference to administrative interpretations ‘has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies.’” (quoting *United States v. Shimer*, 367 U.S. 374, 382 (1961))); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978) (stating that reviewing courts “generally” may not impose added procedural requirements on an agency).

276. Although we do not contend that agency-specific precedents are so widespread as to undermine the existence or utility of a body of general administrative law, our observations suggest that it is unwise to take for granted that a given administrative law principle is universally applied.

The “central relevance” test for docketing *ex parte* communications in EPA rulemaking is an agency-specific precedent that can be traced directly to the hybrid rulemaking provisions of the Clean Air Act.<sup>277</sup> It is hardly surprising that, in cases arising under this sort of agency-specific statute, courts would rely most heavily on other cases involving the same statute and agency. Nor is it surprising that courts would be hesitant to transplant into the APA a test derived from the language of agency-specific hybrid procedures that reflect a congressional decision to require greater procedural formality or accountability than is required under § 553.<sup>278</sup> In other areas, however, it may not be material that a case arises under the organic statute as opposed to the APA. For example, substantial evidence review of SSA and NLRB adjudications arises under the agencies’ respective organic statutes, not the APA, but the substantial evidence standard is understood to mean the same thing under all three statutes.<sup>279</sup>

Even when a generally applicable administrative law statute or principle is involved, agency-specific precedents may arise from distinctive features of the program administered by the agency. This point is illustrated by the development of the treating physician rule, which arose as a response to the particular circumstances of the disability-determination process.<sup>280</sup> Distinctive programmatic features (such as the nonadversarial character of disability hearings<sup>281</sup>) may have agency-specific implications for the application of general administrative law doctrine. In addition, a particular problem or issue (such as the weight accorded a treating physician’s opinion) may arise with great frequency under an agency-specific program. Ultimately, the courts may choose to accommodate agency-specific programmatic features

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277. See *supra* notes 204–23 and accompanying text.

278. See 1 CHARLES H. KOCH, ADMINISTRATIVE LAW AND PRACTICE § 4:35 (3d ed. 2010) (describing Congress’s refusal to enact a general hybrid procedural requirement in the APA, despite its adoption of hybrid procedures in specific statutes).

279. See, e.g., *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (describing the substantial evidence standard under the Wagner Act as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion”); *Pennaco Energy, Inc. v. U.S. Dep’t of Interior*, 377 F.3d 1147, 1156 (10th Cir. 2004) (stating that the substantial evidence standard under the APA requires “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion” (citation omitted)); *Cannon v. Apfel*, 213 F.3d 970, 974 (7th Cir. 2000) (explaining the substantial evidence standard in SSA cases as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion” (citations omitted)).

280. See *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 829, 832–33 (2003) (explaining that the treating physician rule imposed by the Ninth Circuit “was originally developed by Courts of Appeals as a means to control disability determinations by administrative law judges under the Social Security Act” and that “critical differences between the Social Security disability program and ERISA benefit plans caution against importing a treating physician rule from the former area into the latter”).

281. See, e.g., *Grogan v. Barnhart*, 399 F.3d 1257, 1263–64 (10th Cir. 2005) (“Generally, the burden to prove disability in a social security case is on the claimant, . . . but a social security disability hearing is nonadversarial . . .” (citation omitted)).



or develop agency-specific doctrines to address what the courts consider to be peculiar and improper agency practices.<sup>282</sup>

In some instances, agency-specific precedents may respond to agency practices that do not have their foundations in either statutes (or regulations) or distinctive programmatic features. The IRS's practice concerning interpretive regulations, for example, does not respond to any agency-specific statute concerning nonlegislative rules.<sup>283</sup> Likewise, while the IRS's program (assessment and collection of taxes) has many distinctive features, there is no apparent link between those features and the administrative law doctrine concerning legislative and nonlegislative rules.<sup>284</sup> Thus, the emergence of this distinctive IRS practice concerning interpretive regulations may be an example of the silo effect at work at the agency level. The emergence of such agency-specific practices and judicial precedents accommodating them may be especially likely when, as in the case of the IRS, a longstanding agency practice (particularly one that predates the APA) persists in the face of changes in general administrative law doctrine.<sup>285</sup>

While agency-specific statutes, programs, and practices may explain many agency-specific precedents, our case studies suggest that they are not a complete explanation. Some agency-specific precedents, such as the reasoned decision making precedents involving the FCC and the NLRB precedents concerning credibility determinations, arise with respect to relatively "pure" administrative law issues and do not appear to respond to any agency-specific statute, program, or practice.<sup>286</sup> Even when agency-

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282. Thus, the treating physician rule originated as an SSA-specific application of the substantial evidence test that responded to perceived bias against claimants in the assessment of treating physicians' and consulting examiners' opinions. See *Murray v. Heckler*, 722 F.2d 499, 501 (9th Cir. 1983) (noting the increasing number of circuits adopting the treating physician rule). Subsequently, however, the SSA adopted a regulation specifically addressing the issue, which was accepted by the courts, thus accommodating the (reformed) SSA practice. 20 C.F.R. § 404.1527(d)(2) (2010). It is also worth noting that once the regulation was adopted, the treating physician rule may have been converted into an agency-specific precedent that derives from an agency-specific legal source. Thus for example, *Black & Decker* treated the rule as the product of the regulation rather than as a product of the substantial evidence test. See *Black & Decker*, 58 U.S. at 832–33.

283. That the IRS's organic statute contains both specific and general grants of rulemaking authority does not distinguish it from many other agencies.

284. See *supra* subpart III(A).

285. The courts may carry forward such preexisting agency-specific precedents out of concern for disrupting settled practices and expectations. This may explain courts' continued use of the *National Muffler* test for review of IRS interpretive regulations. The *National Muffler* test originated in cases decided before the adoption of the APA, see *Nat'l Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 477 (1979) (citing *Helvering v. Winmill*, 305 U.S. 79, 83 (1938)), and persists notwithstanding the adoption of the supposedly universal *Chevron* test for statutory interpretation. See, e.g., Mark E. Berg, *Judicial Deference to Tax Regulations: A Reconsideration in Light of National Cable, Swallows Holding, and Other Developments*, 61 TAX LAW. 481, 498 (2008) (noting that "the Supreme Court in post-*Chevron* tax cases involving the validity of section 7805(a) regulations has tended to ignore *Chevron* . . . , leaving the lower courts in a muddle on this point" and citing cases in which the Court relied on *National Muffler* without citing *Chevron*).

286. See *supra* subparts III(B), (E).

specific features play a role in the development of agency-specific precedents, moreover, additional considerations may contribute to their development and persistence. As we explain below, we believe that agency-specific precedents are a manifestation of the silo effect—a kind of information silo—that arises because of the informational dynamic of the judicial process.<sup>287</sup>

### *B. Precedents as Information Silos*

Our analysis begins with the premise that precedents are a kind of information. Significant costs are associated with finding, analyzing, and applying judicial precedents.<sup>288</sup> The value of precedents, conversely, is reflected in their influence on or support for the outcome of judicial proceedings to review agency action in the direction favored by the person relying on them.<sup>289</sup> To the extent that precedents are used to argue for a given outcome, much of their value to a party depends on whether any given precedent and its reasoning support the party's position, although awareness of contrary precedents is also essential. Holding result and rationale constant, the value of a precedent depends on other factors such as the level of the court and the degree of factual and legal similarity between cases.

If precedents are understood as valuable information, it is not surprising that precedential silos might arise.<sup>290</sup> The question is why the silos arise in the form of agency-specific precedents. We might expect agencies to develop administrative practices or procedures that deviate from general administrative law doctrine because their organizational structure creates the agency, transaction, and information costs that would foster the silo effect along agency lines.<sup>291</sup> But most federal courts that engage in judicial review of agency action are courts of general jurisdiction whose judicial-review functions are not confined to particular agencies.<sup>292</sup> Thus, the organizational structure of the courts does not replicate the structure of agencies in a way that we would expect to foster agency-specific precedential silos.

Of course, some courts that review the decisions of some agencies are specialized, especially certain Article I courts such as the Tax Court and the

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287. See *supra* notes 75–93 and accompanying text.

288. See Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789, 817 (2002) (explaining the high information costs associated with learning the law).

289. Here the focus is on litigation. Precedents may also provide valuable information about the likely legal consequences of a given course of action, which can be used to provide guidance to clients in deciding whether and how to act.

290. There can be enormous resistance to the dissemination of knowledge because the possession of knowledge and the exercise of administrative power intertwine. The possession of valuable information gives the individual or organization power, creating disincentives to the sharing of that information.

291. In some other countries, courts are specialized by subject matter in ways that confine their jurisdiction (at least in some cases) to particular agencies. See *infra* note 296.

292. See *supra* notes 89–92 and accompanying text.

Court of Appeals for Veterans Claims.<sup>293</sup> In keeping with the role of agency costs in the creation of the silo effect, we would expect these specialized courts to be more prone to the development of agency-specific precedents that reduce information costs to the court and increase the weight and durability of the court's precedents.<sup>294</sup> To the extent that the Federal Circuit reviews decisions arising in a relatively small number of specialized agencies and courts, we might expect similar incentives to foster agency-specific precedents in that court's jurisprudence.<sup>295</sup> This sort of specialization among courts conducting judicial review is the exception, however, and generalist courts (including the federal district courts, the regional circuit courts of appeals, and the Supreme Court) have jurisdiction over the judicial review of most agency decisions.<sup>296</sup>

Insofar as courts in the United States are organized primarily along geographic lines, we might expect precedential silos to arise geographically. Thus, for example, the silo effect may help to explain why state courts develop their own distinctive lines of common law doctrine and why they may be reluctant to change that doctrine to conform to that of other states. Similar factors are likely at work within circuits.<sup>297</sup> In terms of information costs, judges within a circuit are likely to be more familiar with the precedent of that circuit, so reliance on those precedents reduces information costs. In terms of agency costs, judges within a circuit may place extra value on adherence to circuit precedent because it increases the durability and impact of that court's decisions, and they may tend to devalue geographic uniformity because its benefits fall primarily to others (i.e., these benefits are positive externalities).<sup>298</sup>

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293. 26 U.S.C. § 7442 (2006); 38 U.S.C. § 7252 (2006).

294. See *supra* note 87 and accompanying text.

295. For discussion of the Federal Circuit's limited and specialized jurisdiction, see generally Rochelle Cooper Dreyfuss, *The Federal Circuit: A Continuing Experiment in Specialization*, 54 CASE W. RES. L. REV. 769 (2004); Miller & Curry, *supra* note 90.

296. In contrast, the courts in some other countries are specialized by subject matter. In Germany, for example, judges in courts of generalized jurisdiction typically specialize by subject matter, and there are separate court hierarchies for labor, tax, social security, and general administrative law matters. Daniel J. Meador, *Appellate Subject Matter Organization: The German Design from an American Perspective*, 5 HASTINGS INT'L & COMP. L. REV. 27, 31–34, 45 (1981).

297. Nonetheless, we might expect fewer geographic-silo precedents among the federal circuits on questions of federal law than among states on questions of state law. First, the federal courts are construing the same statute or constitutional provision while state courts are often dealing with state-specific sources of law. Second, federal courts are likely to place a higher value on uniformity—an important national interest—than state courts. Finally, there are more states than circuits, which means there are more opportunities for state courts to deviate from the general practice of sister states.

298. The durability and impact of a precedent affect the extent to which it sets the law in accordance with the judge's ideological preferences and may enhance the authoring judge's judicial reputation and influence. See Shapiro & Levy, *supra* note 151, at 1055–56 (discussing why judges may “gain utility from influencing public events in accordance with their worldview”). An additional factor may also be a desire to promote collegiality insofar as judges work most closely with other judges in the same circuit. Following the decisions of other judges in the same circuit

Our point here, however, is not to explore the implications of the silo effect for intercircuit uniformity (although that too is worthy of exploration) but rather to note that from an organizational economics perspective, we would not expect agency-specific precedents to be the result of the silo effect produced by the organizational structure of the Judiciary. The agency-specific precedents in our case studies involve agencies whose decisions are reviewed by generalist courts (although the IRS cases usually involve initial review in a specialized court<sup>299</sup>). And some of the agency-specific precedents we identify originated in the Judiciary<sup>300</sup> and thus cannot be explained in terms of the persistence of silo effects that originated at the agency level. It is possible that a kind of informal specialization occurs within a court, particularly within the courts of appeals, even though cases are assigned randomly to panels. The panel itself decides which judge will write the opinion, and there may well be a natural tendency for opinions involving a given agency to be assigned to a judge who already has some familiarity with the agency.<sup>301</sup> We doubt, however, that this sort of informal specialization offers a complete explanation for agency-specific precedents.

The natural question that remains, then, is why agency-specific precedential silos would be common notwithstanding the organizational structure of the Judiciary. As we develop in the following subpart, we think the critical factor is the judicial-review process itself, in which the courts rely heavily on the attorneys representing the parties as providers of information regarding precedents.

### C. Attorney Specialization and Agency-Specific Precedents

Our adversarial system of adjudication places most of the information costs of finding, analyzing, and applying precedents on the parties litigating

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will promote collegiality and failing to do so may have collegiality costs. Conversely, rejecting circuit precedent in order to foster geographic uniformity promotes the rationalization of standards, reducing the transaction and information costs for those who must comply with the law in multiple jurisdictions but offering little direct benefit to the judges on the circuit (although deviation from precedents in other circuits might damage a judge's reputation for craft).

299. Depending on the circumstances this may be either the Tax Court (an Article I Court) or the Court of Claims (now an Article III Court), but some tax cases may also originate in federal district court.

300. *See supra* subparts III(B)–(D).

301. One article, for example, recently noted

the unusual degree to which Justice Blackmun anchored the Court's treatment of tax law during his twenty-four terms. Although all Justices bring distinctive professional backgrounds and experiences to the Court, Blackmun's role as a tax law expert—one who practiced in the area for over two decades and also wrote articles and taught courses on the subject—may help account for his exceptional role in this specialized field.

James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 DUKE L.J. 1231, 1300 (2009) (citations omitted).

the case rather than on the courts.<sup>302</sup> Parties, through their attorneys, provide information to the courts by submitting briefs with arguments and authorities. In deciding a case, courts naturally start with the cases relied on by the parties, which minimizes judicial information costs.<sup>303</sup> Thus, to the extent that the structure of the part of the legal profession that litigates cases involving judicial review of agency decisions affects the kinds of information provided to the courts, it will also affect the courts' information costs.

*1. Attorney Specialization and Information Costs.*—Many agencies oversee very complex and technical regulatory and benefit programs that result in frequent litigation.<sup>304</sup> These conditions often make attorney specialization desirable and lead to the development of a specialized bar.<sup>305</sup> In the agencies that are the focus of our case studies—the IRS, FCC, EPA, SSA, and NLRB—specialization is the norm.<sup>306</sup> It is true that some attorneys may have a broader administrative law practice or even be specialists in general administrative law, but the organizational structure of the administrative law bar tends toward specialization by agency. This specialization occurs not only in the private bar but also within the government, at least to the extent that agencies are represented by agency attorneys or by attorneys in specialized divisions of the Department of Justice.<sup>307</sup> Attorney specialization

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302. See John H. Langbein, *Judging Foreign Judges Badly: Nose Counting Isn't Enough*, JUDGES' J., Fall 1979, at 4, 4 (criticizing a comparison of U.S. and European investments in judicial resources for its failure to consider the broader, active role of judges in nonadversarial civil law systems). See generally John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985) (comparing the respective roles of lawyers and judges in the American and German legal systems).

303. See Bruce L. Hay & Kathryn E. Spier, *Burdens of Proof in Civil Litigation: An Economic Perspective*, 26 J. LEGAL STUD. 413, 429 (1997) (noting that courts operating under the adversary system rely on the parties to gather and present evidence).

304. See, e.g., U.S. SEC. & EXCH. COMM'N, FY 2010 CONGRESSIONAL JUSTIFICATION 16 (2009), available at <http://www.sec.gov/about/secfy10congbudjust.pdf> (reporting that at least 574 enforcement cases were filed by the SEC each fiscal year between 2005 and 2008).

305. Cf. John V. Tunney & Jane Lakes Frank, *Federal Roles in Lawyer Reform*, 27 STAN. L. REV. 333, 341 (1975) (“The concept of the lawyer-generalist, equipped to handle any and all legal tasks, has become an anachronism as laws and regulations have increased in numbers and complexity.”).

306. Specialization may be more or less dominant in different fields. Tax attorneys, for example, are almost always highly specialized while specialization may be less common in cases involving the SSA, where claimants are often represented by attorneys for legal aid or general practitioners. Nonetheless, specialized Social Security disability firms are increasingly common. See, e.g., Jennifer L. Erkulwater, *The Judicial Transformation of Social Security Disability: The Case of Mental Disorders and Childhood Disability*, 8 CONN. INS. L.J. 401, 424 (2002) (discussing the emergence of “[n]umerous boutique law firms specializing in Social Security cases and organizations defending disabled claimants”).

307. See, e.g., Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CALIF. L. REV. 255, 293–96 (1994) (describing the various entities responsible for representing the FCC in court). Centralized litigating authority may produce some tension between the agency and the Department of Justice or the Solicitor General's Office. See generally Devins, *supra* (analyzing the allocation of litigating authority within the federal government); Todd Lochner, Note, *The Relationship Between the Office of Solicitor General and*

affects the information costs of finding and analyzing administrative law decisions in ways that foster the silo effect.

One important factor that contributes to specialization is information costs.<sup>308</sup> Generalist practitioners incur significant information costs in becoming familiar with the statutes, regulations, precedents, and other sources of law and policy for any given agency or agency program. When attorneys specialize, they invest resources to become familiar with the law involving the agency, significantly lowering the marginal information costs within their area of expertise. Because resources are devoted to the area of specialization, however, specialists will devote relatively fewer resources to learning the statutes, regulations, precedents, and other sources of law and policy dealing with other agencies. Thus, we might expect specialized attorneys to rely most heavily on precedents involving a particular agency even for pure administrative law issues, including the application of the APA.

Well-trained attorneys, even specialists, are of course capable of doing the research required to determine how the courts treat the same or analogous questions when dealing with the decisions of other agencies. But the specialist may have limited incentives to search for precedents involving other agencies. This sort of research adds significantly to the information costs of finding and using administrative law doctrine. To specialists in a particular field, the cases involving the agency are familiar, and the costs of finding and applying those precedents are relatively small. Moving beyond the familiar world of the specific agency opens up a much larger set of precedents that must be combed for favorable or unfavorable doctrine. It is easy enough to conduct a broader Westlaw or Lexis search that identifies a number of cases with potentially useful doctrine, but it is something else entirely to review those cases and identify useful doctrine.<sup>309</sup> In addition, dealing with cases involving a different agency may entail mastering a different organic statute or understanding the novel (to the specialist attorney) context in which unfamiliar agencies operate.<sup>310</sup>

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*the Independent Agencies: A Reevaluation*, 79 VA. L. REV. 549 (1993) (arguing for greater litigating autonomy for independent agencies).

308. See *supra* notes 86–88 and accompanying text.

309. We experienced this difference firsthand in the work on our book. When we searched for a case to illustrate a given administrative law issue, confining the search to one of our five agencies—or even all five of them at once—generally produced a manageable number of cases. In contrast, more general searches tended to produce an unmanageable number of cases, many of which were far less relevant to the issues that concerned us.

310. To the extent the attorney is being paid on an hourly basis, there may be financial incentives to undertake the more extensive search and analysis of precedents involving other agencies. In such cases, the costs are ultimately borne by the client in the form of higher fees. The client's willingness to pay, however, is likely to constrain the attorney's decision. In view of these considerations, we might expect that reliance on agency-specific precedents is more likely when the amount at stake is relatively small and, conversely, that more comprehensive research will be undertaken for major cases with a lot at stake. See *infra* notes 345–46 and accompanying text.

We do not mean to overstate the costs of finding out about general administrative law—for which various secondary sources gather and organize the leading cases<sup>311</sup>—but expending the resources to look beyond the agency-specific precedents concerning administrative law issues only makes sense if the benefits of doing so outweigh the costs.<sup>312</sup> As noted above, for a practitioner litigating against an agency, the value of a precedent depends on its ability to influence the outcome.<sup>313</sup> In this context, that influence depends on the extent to which the application of the general administrative law doctrine rather than the agency-specific precedent would materially affect the outcome, which must be discounted by the likelihood that the court would apply the general administrative law doctrine.

The degree to which administrative law doctrines materially affect the outcome of a case varies considerably. For many administrative law cases, particularly those articulating and applying a standard of judicial review, the administrative law doctrine may be secondary and unlikely to influence the outcome.<sup>314</sup> In such a case, there is no reason to move beyond the familiar agency-specific precedents that may be cited to the courts in formulaic fashion. Of course, in some cases the administrative law doctrine does matter. When the agency-specific precedents are unfavorable, there may be incentives to seek more favorable precedents involving other agencies, especially if there is a lot at stake.<sup>315</sup>

Even if they might favorably affect the outcome of the case, precedents from other agencies will be of little value if (as in the treating physician rule case study<sup>316</sup>) courts refuse to rely on them. Practitioners and judges alike are steeped in the methods of common law reasoning in which the force of a precedent is greater when it arises in a similar legal context.<sup>317</sup> Thus,

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311. *E.g.*, PIERCE, *supra* note 98.

312. Over time, however, we might expect specialists who work with an agency to acquire greater familiarity with general administrative law doctrine, which could awaken them to the possibilities presented by moving outside agency-specific precedents and reduce the information costs of doing so. *See infra* notes 417–20 and accompanying text.

313. *See supra* note 289 and accompanying text.

314. In *Dickinson v. Zurko*, 527 U.S. 150 (1999), the Supreme Court observed that the difference between two nominally different standards of judicial review “is a subtle one—so fine that (apart from the present case) we have failed to uncover a single instance in which a reviewing court conceded that use of one standard rather than the other would in fact have produced a different outcome.” *Id.* at 162–63. For further discussion of *Zurko*, see *infra* notes 357–78 and accompanying text.

315. Conversely, when precedents involving the agency are favorable, information about negative precedents outside the agency may also be valuable because the opposing party may bring them to the court’s attention and the attorney must be prepared to address them.

316. *See supra* notes 238–46 and accompanying text.

317. *See, e.g.*, *Hart v. Massanari*, 266 F.3d 1155, 1172 (9th Cir. 2001) (discussing the role of precedent in the American legal system and specifically how factual and contextual differences may affect a court’s adherence to a particular precedent); *cf.* Hayden C. Covington, *The American Doctrine of Stare Decisis*, 24 TEXAS L. REV. 190, 190 (1946) (discussing the historical development of stare decisis and the criticism of its inflexible use).

precedents involving the same agency will naturally have an increased salience and weight,<sup>318</sup> and reliance on cases involving a different agency may be a risky proposition, especially if that agency has distinctive statutory or programmatic features. For these reasons, even generalist attorneys may tend to focus on cases involving the same agency simply because such cases would seem to be the most relevant from a precedential standpoint.

One potential countervailing factor is the role played by the Department of Justice and the Solicitor General's office, both of which often conduct litigation on behalf of agencies and have an institutional interest in promoting uniformity of doctrine that the private bar and agency attorneys lack.<sup>319</sup> Thus, we might expect generalist lawyers representing the government to invoke general administrative law doctrine, which would tend to force a specialist representing private parties to respond in kind.<sup>320</sup> Although these considerations will ameliorate the effects of specialization to some extent, agencies are often represented by agency attorneys or specialized attorneys within the Department of Justice.<sup>321</sup> In the final analysis, we believe that practitioner specialization affects marginal information costs so as to induce the creation and maintenance of silo effects because the marginal costs of finding and analyzing agency-specific precedents are small, while the costs of moving beyond the agency may be significantly greater and the marginal benefits of doing so are typically relatively small.

2. *Judicial Information Costs.*—The silo effect produced by attorney specialization has a significant impact on the information costs of courts engaged in judicial review. As noted previously, the adversarial system relies primarily on the parties to research the law and present it to the courts.<sup>322</sup> Thus, if agencies and practitioners do not research or present precedents extending beyond the agencies they know, the information costs of finding and applying more generally applicable administrative law doctrine are passed along to courts. Under these circumstances, courts also have incentives to rely more heavily on agency-specific precedents, especially when they are

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318. Of course, other factors will also influence the weight of such precedents, including the level of the court that decided the case. Thus, for example, Supreme Court decisions have especially significant weight and may be more likely to break down an agency-specific line of cases. See *infra* notes 343–47 and accompanying text.

319. Indeed, one common argument for Solicitor General control over government litigation is that it tends to promote uniformity in federal law. As one former Solicitor General put it, “[The agencies’] preoccupation is with the immediate result, or at least their purview is likely limited to their particular work. The Solicitor General must seek a broad perspective of the total law business of the United States, not merely the program of any single agency.” Simon E. Sobeloff, *Attorney for the Government: The Work of the Solicitor General’s Office*, 41 A.B.A. J. 229, 231 (1955).

320. Thus, even when agency-specific precedents favor their position, specialized practitioners must be sufficiently familiar with general administrative law doctrine so as to anticipate and respond to unfavorable precedents involving other agencies.

321. See *supra* note 307 and accompanying text.

322. See *supra* note 302 and accompanying text.



burdened with heavy caseloads that put a premium on expeditious resolution of individual cases. These incentives interact with other factors that may contribute to or dampen the silo effect within administrative law precedents.

In assessing judicial incentives, we must first ask what judges reviewing administrative law decisions value—an issue that has received considerable attention in the literature.<sup>323</sup> In general terms, we may posit that judges value “craft” and their reputation for craft, “outcomes” that are consistent with their ideology, and “leisure” (by which we mean time that may be devoted to more highly valued uses).<sup>324</sup> The cost of researching and analyzing (or having clerks or research attorneys do so) is a type of leisure cost in the sense that it is time that cannot be spent on other activities.<sup>325</sup> We should not overstate these costs because federal judges may be familiar with general administrative law doctrine and have resources available to conduct the necessary research, but the information costs are nonetheless real.

While the information costs to judges from finding and using precedents beyond the specific agency are a species of leisure (or opportunity) costs, the benefit to judges depends on the extent to which doing so will improve a judge’s craft (and reputation for craft) or enable the judge to achieve a preferred outcome.<sup>326</sup> From a craft perspective, the norms of the profession determine the appropriateness of reliance on precedent.<sup>327</sup> While broad citation to and familiarity with generally applicable administrative law may signify a high level of craft, craft norms may also call for giving greater weight to agency-specific precedents. To the extent that agency-specific statutes or programmatic features are involved, it may be improper to apply general administrative law doctrine to an agency or to extend an agency-specific precedent to other agencies.<sup>328</sup> Even as to general administrative law questions, a court is likely to view a case involving the same agency as more

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323. See, e.g., Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SMU L. REV. 469, 496–97 (1998) (discussing how the possibility of further appeals affects judicial incentives for appellate judges); Shapiro & Levy, *supra* note 151, at 1055–58 (describing how judicial-review incentives may affect standards of review). See generally FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* (2007) (discussing various models of and empirical data concerning judicial decision-making behavior); CASS R. SUNSTEIN ET AL., *ARE JUDGES POLITICAL?* (2006) (discussing the extent to which ideological and political considerations influence judicial decisions).

324. Shapiro & Levy, *supra* note 151, at 1054–58.

325. In this sense, it is also an opportunity cost. Cf. *id.* at 1056 (observing that “social choice scholars posit that judges seek to reduce their work and expand their leisure time”).

326. See *id.* at 1057 (suggesting that judges generally do not seek to “reduce their workload” at the expense of craft or outcome incentives).

327. *Id.* at 1054 (explaining that judges gain professional respect based on how craft oriented they are).

328. See *supra* notes 277–87 and accompanying text. Note, however, that addressing the relationship between general administrative law and an agency-specific precedent might improve the craft of an opinion (or enhance the judge’s reputation for craft).

authoritative (all other things being equal) than one involving a different agency.<sup>329</sup>

From an ideological perspective, the value of applying general administrative law principles rather than agency-specific precedents to resolve a dispute or of applying an agency-specific precedent to another agency will depend on the ability of those general principles to affect the outcome in a favorable direction.<sup>330</sup> In this respect, the incentives of judges are very similar to those of practitioners—ideological value would depend on how outcome determinative the administrative law question is and how likely it is that the court will rely on the precedent. On the latter point, of course, a judge controls whether he or she will rely on precedents from other agencies while practitioners can only guess. But judicial reliance on precedents from other agencies is constrained because lower court judges must be concerned about the possibility of reversal on appeal, and judges on collegial courts must be concerned about their ability to persuade others to join their opinions.<sup>331</sup>

3. *Judicial Structure and Precedential Silos.*—The extent to which information costs will tend to create and sustain agency-specific precedents is affected by the nature and level of the court crafting or applying administrative law doctrine.<sup>332</sup> Most clearly, specialization within the courts would tend to strongly reinforce the silo effect created by attorney specialization. Specialized courts that review the decision of a single agency (or a few agencies), such as the Tax Court or the Court of Federal Claims, would be prone to the silo effect in their own right. The costs of relying on their own decisions, which will be familiar, are minimal while looking beyond those precedents might entail significant costs. In addition to the information costs, the specialized court would also have an institutional interest

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329. See, e.g., Berg, *supra* note 285, at 498–99 (explaining that courts have more consistently applied the tax-specific *National Muffler* standard when reviewing IRS decisions than the generally applicable *Chevron* standard).

330. See Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2156–57 (1998) (suggesting that empirical evidence demonstrates that judges often “decide cases according to their political proclivities” and then choose their sources accordingly).

331. See *id.* at 2175 (describing minority judges on appellate courts as “whistleblowers” that keep the majority’s ideological propensities in check); Drahozal, *supra* note 323, at 483–85 (explaining how the institutional characteristics of different courts affect judicial incentives).

332. This issue is suggested, for example, by the reasoned decision making silo, see *supra* notes 161–78 and accompanying text, where the reasoned decision making approach was developed primarily by the courts of appeals (notwithstanding some casual references in Supreme Court decisions) but where a more developed application of the approach by the Supreme Court may contribute to a breaking down of the silo and the generalization of the doctrine.

in relying on its own precedents so as to promote their weight and durability.<sup>333</sup>

As discussed previously, federal courts of appeals are, for the most part, generalist courts.<sup>334</sup> Depending on the specific agency and statutory framework, courts of appeals may conduct (1) direct review of an agency decision;<sup>335</sup> (2) review of the decision of a specialized court (which may be an Article III or Article I court);<sup>336</sup> or (3) review of a decision of a federal district court of general jurisdiction.<sup>337</sup> We might expect that in some cases, agency-specific precedents may be passed along from a specialized court to an appellate court,<sup>338</sup> especially if the appellate court has a relatively narrow jurisdiction.<sup>339</sup> Although the federal district courts are not specialized, their review of agency decisions tends to concentrate on only a few agencies because review of many agencies is channeled directly to the courts of appeals.<sup>340</sup> If funneling of particular agency decisions to district courts produces agency-specific precedents at that level,<sup>341</sup> these precedents may be passed along to the courts of appeals as well. On the other hand, in most cases the appellate court's jurisdiction extends to review of a wide variety of federal agencies, and the court is more likely to know about and apply general administrative law doctrine.<sup>342</sup>

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333. See *supra* note 298 and accompanying text. The weight and durability of precedents increase their ideological value and may enhance the author's craft reputation. Viewed institutionally, a court therefore has an interest in promoting the weight and durability of its precedents that goes beyond the particular outcome of a case.

334. See *supra* note 89 and accompanying text.

335. See, e.g., *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 840–41 (1984) (noting that the respondents filed their petition for review of EPA regulations directly with the court of appeals).

336. See, e.g., *Robinette v. Comm'r*, 439 F.3d 455, 456 (8th Cir. 2006) (reviewing a ruling from the Tax Court).

337. See, e.g., *Inv. Annuity, Inc. v. Blumenthal*, 609 F.2d 1, 2 (D.C. Cir. 1979) (reviewing the decision of the district court for the District of Columbia).

338. The lower, specialized court is likely to cite disproportionately cases involving the agency whose practices are regularly brought before the court, and the appellate court may be most familiar with its own cases dealing with the agency. Thus, the costs for the appellate court of engaging in a search for a broader range of precedents may be significant. If the standard of the appellate court's review of the lower court's decision is deferential, the chances are even smaller that the appellate court will displace agency-specific precedents with more general administrative law doctrine.

339. Thus, we might expect agency-specific precedents to be especially common in the Federal Circuit, which has a relatively narrow jurisdiction involving a few specialized lower courts. See *infra* notes 353–78 and accompanying text.

340. See, e.g., 15 U.S.C. § 78y(a) (2006) (providing for direct court of appeals review of SEC orders).

341. This propensity might be further reinforced by the labor-intensive nature of managing litigation and trials, which limits the resources available to district courts for researching precedents.

342. See, e.g., *Robinette v. Comm'r*, 439 F.3d 455, 459–61 (8th Cir. 2006) (holding that the Tax Court had improperly looked beyond the administrative record when reviewing IRS decisions on discretionary relief in “collection due process hearings”). The specialized lower court would be obligated to follow the appellate court's application of general administrative law principles.

Although there are some examples of agency-specific precedents arising at the Supreme Court level,<sup>343</sup> in general we might expect that the Supreme Court is more likely than lower courts to reach beyond a given agency for administrative law principles. First, the government is represented by the Solicitor General, the kind of generalist lawyer whose knowledge and interest are more likely to focus on the broader administrative law.<sup>344</sup> Second, the parties have greater incentives to look beyond the agency-specific precedents because Supreme Court cases typically involve important matters, so the potential benefits of useful precedents from other agencies are great.<sup>345</sup> Third, precedents involving other agencies are likely to be more valuable because Supreme Court precedents on point are relatively rare.<sup>346</sup> Finally, judging by the extensive research typically reflected in modern Supreme Court decisions, the Court seems to have the resources and incentives to engage in research that extends beyond the confines of the particular agency whose actions are at issue.<sup>347</sup>

How a Supreme Court decision is likely to affect the existence of agency-specific precedents going forward represents a different question. On the one hand, given the weight and prominence of Supreme Court precedents, it would seem more likely that parties, agencies, and courts would find and apply Supreme Court precedents on general administrative law doctrine even if those decisions involve agencies other than those that are parties to the litigation.<sup>348</sup> Although the Supreme Court may intend a decision to apply broadly, it is also possible that a Supreme Court decision involving a given agency will contribute to the development of agency-specific precedents involving that agency because parties, the agency, and

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343. For example, the *National Muffler* approach to judicial review of IRS interpretive regulations appears to have been originated and perpetuated by the Supreme Court while lower courts have struggled to reconcile that test with conventional administrative law. See *supra* notes 134–45 and accompanying text.

344. This interest would not be relevant, of course, if agency-specific statutes, programs, or practices justified departures from generally applicable administrative law doctrine.

345. PAUL M. COLLINS JR., *FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING* 63 (2008).

346. There are fewer Supreme Court precedents to choose from, and cases that make it to the Supreme Court often involve novel and disputed questions. If there are few cases involving an agency, and none is directly on point, it will normally be necessary to look to precedents involving other agencies to resolve administrative law questions. On the other hand, where relevant precedents involving the agency do exist, the Court might be especially likely to rely on them.

347. The extensive nature of the research reflected in Supreme Court decisions may derive in part from the more extensive information provided by parties and amici who are willing to invest the resources to present precedents and other information to the Court. In addition, the members of the Court have more clerks who work on fewer cases than most lower court judges do, making the opportunity costs of covering the waterfront of administrative law precedents easier to bear.

348. For example, administrative law treatises provide fairly comprehensive coverage of significant Supreme Court decisions applying administrative law doctrines but cannot be equally comprehensive concerning the much larger universe of courts of appeals decisions.

the courts return consistently to that case and ignore other decisions (even Supreme Court decisions) on the same issue that involve other agencies.<sup>349</sup>

The foregoing discussion suggests a final point about agency-specific precedents—they are not static. While some agency-specific precedents respond to distinctive features of the agency or to an authoritative pronouncement (perhaps in a Supreme Court decision) involving the agency, we also suspect that many agency-specific precedents take root in routine reliance on formulations of administrative law doctrine in cases involving the same agency or in run-of-the-mill cases in which the formulation of administrative law doctrine is unlikely to affect the outcome. Regardless of its origins, a particular formulation is picked up and repeated in multiple cases, gathering weight, becoming a standard formulation for the agency, and taking on a life of its own, without much attention to whether the agency-specific formulation deviates from the general administrative law doctrine. The stronger the agency-specific precedent and the more it deviates from standard administrative law doctrine, however, the more visible and significant it becomes and the more likely it is that practitioners and courts will have the incentives to break it down.

#### *D. The Dynamics of Agency-Specific Precedential Silos*

In summary, this provisional understanding allows us to hazard some predictions about when the silo effect is most likely to contribute to the formation and persistence of agency-specific precedents.<sup>350</sup> We would expect agency-specific precedents to arise with the greatest frequency and have the greatest durability when there are agency-specific sources of administrative law, distinctive programmatic features, or specific agency practices. In the absence of such agency-specific statutes, programs, or practices, we might expect agency-specific precedents to arise with some frequency if litigation involving the agency tends to be conducted by a specialized bar that does not engage in general administrative law practice.<sup>351</sup> The extent to which judicial decisions are likely to reinforce and create precedential silos, as opposed to

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349. The testimonial-inference silo in the NLRB illustrates this possibility. Courts kept returning to the *Universal Camera* decision (albeit the lower court opinion after remand from the Supreme Court), even after that approach was repudiated by the Supreme Court in a case involving the FCC. See *supra* notes 262–71 and accompanying text. Another illustration is the persistence of the *National Muffler* test for judicial review of IRS interpretive regulations notwithstanding the later adoption of the *Chevron* test and related doctrines. See *supra* notes 134–45 and accompanying text.

350. These hypotheses are subject to empirical verification or refutation, and we intend to follow up the analysis in this Article with that kind of empirical research to determine the frequency and locus of agency-specific precedents.

351. In such instances, attorneys are likely to provide to the courts primarily precedents concerning the agency involved, which in turn makes it likely that courts will rely primarily on those precedents. These conditions prevailed for all of the agencies featured in our case studies.

breaking them down, depends on the extent to which the court is specialized and the level of the court.<sup>352</sup>

Thus, we would predict that agency-specific precedents would be an especially common phenomenon in cases decided by the Federal Circuit, which reviews a few specialized agencies (some with distinctive statutes or programs) that are typically served by a specialized bar—often on appeal from review by a specialized lower court.<sup>353</sup> For example, decisions of the United States Patent and Trademark Office (PTO) might generate a considerable body of agency-specific precedents. Most private patent attorneys are specialized and work largely in the patent area or at least the intellectual property field.<sup>354</sup> Patent attorneys even have to pass a special bar examination to qualify for practice in the area.<sup>355</sup> Likewise, the attorneys who work for the agency are likely to specialize. Further, Congress has vested the Federal Circuit with exclusive jurisdiction to review decisions by the PTO's Board of Patent Appeals and Interferences concerning patent applications and interferences.<sup>356</sup>

The Supreme Court's decision in *Dickinson v. Zurko*<sup>357</sup> illustrates how several of these factors may combine to create agency-specific precedents relating to the PTO as well as the Supreme Court's potential role in displacing agency-specific doctrine in favor of conformity to general administrative law doctrine.<sup>358</sup> The issue in *Zurko* was whether the

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352. For example, we might expect numerous precedential silos to exist in the Tax Court, which is highly specialized and at a relatively low level. We would expect generalist courts of appeals to break down these silos to a certain degree, but the specialization of the tax bar and any deference given to Tax Court decisions may tend to perpetuate them even in the courts of appeals.

353. For example, veterans benefit claims are initially determined by a specialized agency, reviewed by a specialized Article I court, and then subject to limited review by the Federal Circuit, and claimant representatives tend to be highly specialized (and are not always lawyers). See generally Richard E. Levy, *Of Two Minds: Charitable and Social Insurance Models in the Veterans Benefits System*, 13 KAN. J.L. & PUB. POL'Y 303 (2004) (discussing the history and design of the veterans benefit system).

354. In addition, the PTO was created ninety-seven years before Congress created the Interstate Commerce Commission, which is often regarded as the first independent federal agency, see Mashaw, *Federalist Foundations*, *supra* note 17, at 1260, so that many of its practices and the administrative law precedents they generated predated the enactment of the APA.

355. F. Russell Denton, *Plumb Lines Instead of a Wrecking Ball: A Model for Recalibrating Patent Scope*, 16 J. INTEL. PROP. L. 1, 29 (2008).

356. 28 U.S.C. § 1295(a)(4)(A) (2006).

357. 527 U.S. 150 (1999).

358. One pair of observers has noted that “the inattention to administrative law principles has long been a striking feature of the patent system. In contrast to commentators and practitioners in other technically complex areas . . . the patent law community has tended to pay little attention to administrative law.” Stuart Minor Benjamin & Arti K. Rai, *Who's Afraid of the APA? What the Patent System Can Learn from Administrative Law*, 95 GEO. L.J. 269, 270 (2007). Another example of agency-specific precedents involving the PTO relates to the burden of proving unpatentability, which the courts have placed on the PTO. See Sean B. Seymore, *Heightened Enablement in the Unpredictable Arts*, 56 UCLA L. REV. 127, 139 (2008) (stating that even when the PTO can make a prima facie case for unpatentability, it retains the burden of proving

substantial evidence standard from § 706(2)(E) of the APA applies when the Federal Circuit reviews the PTO's findings of fact. The Federal Circuit held that the "clearly erroneous" standard normally applicable to appellate court review of trial court findings applied to review of the PTO's findings of fact rather than the APA's substantial evidence standard of review.<sup>359</sup> Insofar as the clearly erroneous standard of review is conventionally understood as being less deferential than the substantial evidence standard, the Federal Circuit may have had an institutional interest in maintaining this agency-specific precedent so as to increase its ability to overturn PTO findings.

The Federal Circuit relied on § 559 of the APA, which provides that the APA does "not limit or repeal additional requirements . . . recognized by law."<sup>360</sup> According to the court, when Congress adopted the APA in 1946, the Court of Customs and Patent Appeals (CCPA), the predecessor to the Federal Circuit, applied the "clearly erroneous" standard.<sup>361</sup> Thus, the court concluded that the "special tradition of strict review consequently amounted to an 'additional requirement' that under § 559 trumps the requirements imposed by § 706."<sup>362</sup> This reasoning illustrates the potential role of administrative law predating the APA's adoption to persist in ways that contribute to the creation and retention of agency-specific precedents. The Solicitor General, however, argued for generally applicable administrative law doctrine in the form of judicial review using the APA standards.<sup>363</sup>

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unpatentability). This allocation of the burden of proof to the agency would appear to lack any foundation in general administrative law doctrine, *see In re Piasecki*, 745 F.2d 1468, 1471–72 (Fed. Cir. 1984) (describing the "uncertain" origins of this allocation of the burden of proof), and is arguably inconsistent with *Vermont Yankee*. For further discussion, see generally John M. Golden, *The Federal Circuit and the D.C. Circuit: Comparative Trials of Two Semi-specialized Courts*, 78 GEO. WASH. L. REV. 553 (2010) (referencing recent reversals of the Federal Circuit by the Supreme Court in the field of patent law but suggesting that a similar experience of the D.C. Circuit in the field of administrative law suggests that such Supreme Court intervention is neither unusual nor particularly problematic).

359. *Zurko*, 527 U.S. at 153.

360. 5 U.S.C. § 559 (2006).

361. *Zurko*, 527 U.S. at 154.

362. *Id.* The Solicitor General's brief on behalf of the PTO, however, interpreted the pre-APA case law as establishing a standard of judicial review of PTO decisions that did not differ in any significant way from the APA's standards. *See* Brief for the Petitioner, *Dickinson v. Zurko*, 527 U.S. 150 (1999) (No. 98-377), 1998 WL 886731 at \*32 (stating that the prior decisions of the CCPA on which the Federal Circuit relied in *Zurko* "did not adopt any clear standard of review different from that prescribed by the APA"). The Supreme Court apparently accepted that characterization. *See Zurko*, 527 U.S. at 161 ("[W]e cannot agree with the Federal Circuit that in 1946, when Congress enacted the APA, the CCPA 'recognized' the use of a stricter court/court, rather than a less strict court/agency, review standard for PTO decisions."). Thus, any deviation between the standards of review under § 706 of the APA and the clearly erroneous standard endorsed by the Federal Circuit developed after the enactment of the APA in the course of subsequent CCPA and Federal Circuit review of PTO decisions over time.

363. Specifically, the Solicitor General's brief asserted that the APA was in effect a statutory restatement designed to "codify" the "general practice" of administrative law at the time of the Act's adoption, "while eliding deviations from the norm." Brief for the Petitioner, *supra* note 362, at \*29 (emphasis removed). The Solicitor General further asserted that the effect of a statutory restatement such as the APA was "to eliminate anomalies, not to preserve them" and that

The Supreme Court rejected the Federal Circuit's reasoning, emphasizing "the importance of maintaining a uniform approach to judicial review of administrative action."<sup>364</sup> Citing the portion of § 559 that provides that "[n]o subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly,"<sup>365</sup> the Court concluded that § 559's clause saving pre-APA law applies only when the "[e]xistence of the additional requirement [is] clear."<sup>366</sup> Combing through decades worth of CCPA precedents, the Court held that the use of the clearly erroneous standard to review PTO findings of fact was not sufficiently clear when the APA was adopted to qualify as an "additional requiremen[t] . . . recognized by law" for purposes of § 559.<sup>367</sup>

The Court also found unpersuasive several policy arguments that the Federal Circuit made in support of its agency-specific approach to judicial review of PTO factual findings.<sup>368</sup> The Federal Circuit Court asserted that changing its application of the "clearly erroneous" standard would "undermine[] the public's confidence" in the patent system and conflict with principles of stare decisis.<sup>369</sup> Similarly, amici argued before the Supreme Court that it was better that the law remained settled than that it be settled correctly.<sup>370</sup> The Court responded that, regardless of how the CCPA and Federal Circuit had treated the issue, the Supreme Court itself had not yet settled the matter.<sup>371</sup> Further, adoption of the Federal Circuit's expansive interpretation of the § 559 exception for pre-APA law would establish a

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notwithstanding the novel analysis advanced by the court of appeals in this case . . . nothing in the history or general purposes of the APA suggests that Congress intended the first sentence of what is now Section 559 to preserve whatever standards of review courts, including the Federal Circuit's predecessors, may have been applying in reviewing administrative decisions before the adoption of the Act.

*Id.* at \*29–30.

364. *Zurko*, 527 U.S. at 154; *see also* *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 489 (1951) (stating that the legislative intent in enacting the APA was to promote uniform standards of judicial review of administrative actions); 92 Cong. Rec. 5654 (1946) (statement of Rep. Francis E. Walter) (explaining when courts could review administrative agency decisions under the APA and what standards of review should apply).

365. *Zurko*, 527 U.S. at 155 (alteration in original). The Solicitor General's brief argued that this language "indicates an intention that the rules and standards explicitly set out in the [APA] should establish a common and permanent framework for administrative action—not one subject to casual or inferred variation." Brief for the Petitioner, *supra* note 362, at \*24. Similarly, the brief objected to the "unjustified[] anomaly of subjecting the determinations of one federal agency to a different standard of judicial review than that applied to those of every other agency whose decisions are similarly subject to APA review." *Id.* at \*36.

366. *Zurko*, 527 U.S. at 155.

367. *Id.* at 161 (alterations in original).

368. *Id.* at 161–65.

369. *In re Zurko*, 142 F.3d 1447, 1458 (Fed. Cir. 1998), *rev'd sub nom.* *Dickinson v. Zurko*, 527 U.S. 150 (1999).

370. *Zurko*, 527 U.S. at 162.

371. *Id.*



precedent “that itself could prove disruptive by too readily permitting other agencies to depart from uniform APA requirements.”<sup>372</sup>

The Court also discounted the Federal Circuit’s expertise as a reason for departing from normal APA scope-of-review principles. The Court noted the importance of the Federal Circuit’s capacity to examine PTO factual findings “through the lens of patent-related experience—and properly so, for the Federal Circuit is a specialized court.”<sup>373</sup> It added, however, that this “comparative expertise, by enabling the Circuit better to understand the basis for the PTO’s finding of fact, may play a more important role in assuring proper review than would a theoretically somewhat stricter standard.”<sup>374</sup> Finally, the Federal Circuit reasoned that application of the clearly erroneous standard would promote better fact-finding by the PTO because the PTO would have incentives to create more complete administrative records to survive judicial review under the more rigorous standard.<sup>375</sup> The Supreme Court found this rationale unpersuasive because neither the Federal Circuit nor the amici supporting its approach was able to provide a cogent explanation of “why direct review of the PTO’s patent denials demands a stricter fact-related review standard than is applicable to other agencies.”<sup>376</sup> Instead, the Court concluded that “Congress has set forth the appropriate standard in the APA.”<sup>377</sup>

Thus, the congruence of several of the factors we noted above contributed to the Federal Circuit’s creation of a PTO-specific standard of judicial review of agency fact-findings. Yet, as we also suggest may commonly occur, the Supreme Court, supported by the arguments of the Solicitor General, leveled the administrative law landscape by insisting that the Federal Circuit adhere to generally applicable APA-generated administrative law norms.<sup>378</sup> The policy discussion in *Zurko*, however, raises another important set of questions surrounding the phenomenon of agency-

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372. *Id.*

373. *Id.* at 163.

374. *Id.*

375. *In re Zurko*, 142 F.3d 1447, 1458 (Fed. Cir. 1998), *rev’d sub nom.* *Dickinson v. Zurko*, 527 U.S. 150 (1999).

376. *Zurko*, 527 U.S. at 165.

377. *Id.*

378. It is worth noting, however, that the concern over the standard of review may have been much ado about nothing. Although the Federal Circuit’s original decision in the case indicated that the application of the clearly erroneous rather than the substantial evidence standard of review made a difference to the outcome, *see In re Zurko*, 142 F.3d at 1449 (“Concluding that the outcome of this appeal turns on the standard of review used by this court to review board fact finding, we accepted the Commissioner’s suggestion that we rehear the appeal in banc . . .”), the Supreme Court observed that the difference between the two standards “is a subtle one—so fine that (apart from the present case) we have failed to uncover a single instance in which a reviewing court conceded that use of one standard rather than the other would in fact have produced a different outcome.” *Zurko*, 527 U.S. at 162–63. Notwithstanding its earlier pronouncement, however, on remand from the Supreme Court the Federal Circuit reached the same result under the substantial evidence standard after all. *In re Zurko*, 258 F.3d 1379, 1381 (Fed. Cir. 2001).

specific precedents—their normative implications. We address those implications in the following Part.

## V. Normative Implications

If agency-specific precedents are a manifestation of the silo effect, the question becomes what, if anything, to do about the dynamic that generates those precedents. The Supreme Court's decision in *Zurko* emphasized the desirability of a uniform and consistent administrative law doctrine and rejected policy arguments in favor of departures from generally applicable doctrine.<sup>379</sup> This analysis reflects the normative assumption that generally applicable administrative law doctrine is a good thing and that agency-specific departures from it are not. If the Court is right, the related question arises as to what can be done about the prevalence of agency-specific precedents.

### A. *The Costs and Benefits of Agency-Specific Precedents*

While *Zurko* extols the virtues of consistency in administrative law, the benefits of consistency must be assessed in light of the countervailing costs (i.e., the potential benefits of agency-specific precedents). The relative balance of costs and benefits—and thus whether agency-specific precedents are a “good” or “bad” thing—depends on a number of factors, including statutory provisions, legal uncertainty, and optimization of administrative law doctrine. Our analysis of these factors suggests that while some agency-specific precedents may be justified, others clearly are not.

1. *Statutory Provisions.*—Broadly speaking, administrative law doctrine represents a balance between two competing sets of concerns. On the one hand, Congress creates expert administrative agencies and gives them authority to implement regulatory and benefit programs to further a public purpose.<sup>380</sup> These considerations warrant giving agencies the autonomy and flexibility they need to fulfill their statutory mandates. On the other hand, agency action can have significant adverse consequences for affected parties (including both regulated entities and regulatory beneficiaries), and safeguards are necessary to ensure accountability and protect against error and abuse. Administrative law doctrine reflects an ongoing balance between these competing concerns, and applicable statutory provisions represent a binding congressional judgment concerning that balance.<sup>381</sup>

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379. See *supra* notes 364–78 and accompanying text.

380. Critics of the modern regulatory state may well argue that such public purposes are smoke screens for laws that redistribute wealth in favor of concentrated, politically powerful interests, but administrative law is founded on the assumption that regulatory and benefit programs are intended to fulfill a public purpose.

381. This point assumes, of course, that the balance struck is within constitutional parameters.

The APA's procedural requirements and judicial-review provisions thus represent a particular balance between agency autonomy and accountability. As the Supreme Court emphasized in *Zurko*, Congress intended for this balance to apply broadly to all administrative agencies.<sup>382</sup> But the goal of universality is not absolute, and the APA also is designed to permit flexibility and variation across agencies. Its generally applicable provisions may be supplemented or superseded by the organic statute (as in the case of hybrid procedures), which would thus represent a congressional determination that an exception to general applicability should be made, presumably to strike a different balance of autonomy and accountability.<sup>383</sup> In addition, even when the APA does apply, it allows for considerable flexibility. Agencies have broad discretion to choose among various modes of action and applicable procedures while the APA's standards of review are stated in terms that are broad enough to encompass a variety of different formulations.<sup>384</sup>

In view of these legislative balances, whether agency-specific precedents are legally justified depends on the extent to which distinctive features of the agency justify deviation or variation from the consistent and universal application of the APA and other generally applicable administrative law. Unfounded deviations from generally applicable APA provisions, as in *Zurko*, are improper. They upset the congressional balance of autonomy and accountability and undermine the legislative goal of universality without justification. Agency-specific precedents might, however, be justified by agency-specific statutes, programs, or practices.

The specific provisions of organic statutes present the strongest legal justification for agency-specific precedents and may even compel them. The APA expressly accommodates such agency-specific statutes, which therefore represent a valid basis for refusing to apply the APA's generally applicable provisions.<sup>385</sup> More fundamentally, provisions such as the hybrid rulemaking procedures of the Clean Air Act strike a different legislative balance between autonomy and accountability.<sup>386</sup> Even in such situations, however, the distinctive provisions of the organic statutes operate in relation to and may be informed by the broader fabric of administrative law, and conversely,

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382. See *Zurko*, 527 U.S. at 155 ("The APA was meant to bring uniformity to a field full of variation and diversity."). Thus § 551 defines "agency" broadly, and § 559 indicates that the APA applies in the absence of a clear statutory mandate to the contrary. 5 U.S.C. §§ 551, 559 (2006).

383. See, e.g., 42 U.S.C. § 7607(d)(1) (2006) (providing that the APA does not apply to EPA rulemakings under the Clean Air Act except as expressly provided in that Act).

384. See, e.g., *Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338, 349 (1st Cir. 2004) ("The APA lays out only the most skeletal framework for conducting agency adjudications, leaving broad discretion to the affected agencies in formulating detailed procedural rules." (citing *Am. Trucking Ass'n, Inc. v. United States*, 627 F.2d 1313, 1321 (D.C. Cir. 1980))).

385. See *supra* notes 71–73 and accompanying text.

386. See *supra* notes 209–11 and accompanying text; *supra* note 383. On the other hand, as in the case of the Clean Air Act's substantial evidence standard of review, provisions of the organic statute may not differ materially from the APA standard. In such cases, agency-specific precedents may not be justified.

agency-specific precedents that derive from specific provisions of the organic statute may contain general principles that can be usefully incorporated into general administrative law doctrine.

In the absence of such agency-specific statutory provisions, agency-specific programs present less powerful justifications for agency-specific precedents. In such cases, the APA applies and any accommodations must be consistent with the APA's provisions and concerned with preserving uniformity in its application. Nonetheless, programmatic features may justify variation in the application of the APA. Borrowing the terminology of equal protection theory, it makes sense to apply the same administrative law to "similarly situated" agencies, but if the agencies are not similarly situated, differences in treatment may be justified.<sup>387</sup> For any given agency program, the extent to which its distinctive features justify an agency-specific precedent may be unclear or a matter of opinion. It may also be difficult to separate the administrative law issue from the application of the organic statute. Both problems are well illustrated by the treating physician rule, which may or may not be justified as a response to an agency practice in the treatment of medical opinions.<sup>388</sup>

Agency-specific practices present the most problematic case for agency-specific precedents, which may deviate from generally applicable administrative law so as to either accommodate the agency practice or prevent it. There seems to be little legal justification for inconsistent application of general administrative law doctrine (and certainly no basis for declining to apply the APA) to accommodate an aberrational agency practice such as the IRS's view that § 553 procedures are not required for "interpretive regulations."<sup>389</sup> Nonetheless, particularly if the practice is a longstanding one, refusing to accommodate it may upset settled expectations and create problems for the agency or the public. Likewise, courts are not authorized to deviate from the APA in order to block or control an agency-specific practice of which they disapprove,<sup>390</sup> but there may be some room within the APA, particularly the standards of review, for agency-specific responses. The question remains whether this sort of agency-specific

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387. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (holding that all persons similarly situated must be treated alike under the law); Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1407–08 (2010) (characterizing equal protection law as requiring that similarly situated individuals be treated alike); Timothy Zick, *Angry White Males: The Equal Protection Clause and "Classes of One,"* 89 KY. L.J. 69, 99 (2000) (recounting the history of equal protection theory as continuously interpreting equal protection law as requiring the equal treatment of similarly situated individuals).

388. See *supra* notes 232–50 and accompanying text. The rule originated as an application of the substantial evidence test but was eventually codified (as modified) by an SSA regulation, and its propriety was a matter of some disagreement.

389. See *supra* notes 121–33 and accompanying text.

390. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978).

precedent unduly departs from the congressional balance between agency autonomy and the protection of affected parties or unnecessarily and improperly sacrifices consistency in the application of the APA—both of which may be a matter of disagreement.

2. *Legal Uncertainty*.—A second important factor in assessing the costs and benefits of agency-specific precedents is legal uncertainty and the resulting transaction costs for private parties, agencies, and courts.<sup>391</sup> For private parties, legal uncertainty increases information costs, requires additional planning, and creates risk. For agencies, legal uncertainty may increase information and planning costs, undermine compliance and enforcement, and distort agency policy.<sup>392</sup> For courts, legal uncertainty leads to litigation and makes settlement more difficult because parties may entertain substantially different assessments of the likely outcome of litigation.<sup>393</sup> While it is therefore clear that legal uncertainty is to be avoided when possible, it is less clear which way this consideration cuts in relation to agency-specific precedents.

*Zurko* assumes that consistent application of administrative law doctrine across agencies promotes legal certainty,<sup>394</sup> which may ordinarily be the case. To the extent that the law varies from agency to agency, the costs associated with correctly ascertaining the applicable doctrine increase. Agency-specific precedents may also create uncertainty as to how the courts will treat them in relation to general administrative law. In some instances, the uncertainty arises from the possible application of general administrative law to the agency, as in *Zurko* and IRS procedural regulations.<sup>395</sup> The proliferation and persistence of agency-specific precedents also creates uncertainty for broader administrative law because the applicability of general administrative law principles is then unreliable.<sup>396</sup>

At the same time, however, there are countervailing problems of uncertainty that would arise from the elimination of agency-specific precedents. Most obviously, to the extent that agency-specific precedents are

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391. In contrast, perhaps legal scholars may benefit from legal uncertainty insofar as it gives us more to write about and increases the value of our work. ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 93 (5th ed. 2008).

392. See *supra* section IV(C)(1). See generally Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974) (arguing that vagueness-related uncertainty about legal obligations results in inefficient outcomes).

393. On the other hand, legal uncertainty may permit an outcome-oriented judge to reach a desired result.

394. See *Dickinson v. Zurko*, 527 U.S. 150, 154–55 (1999) (requiring clear evidence of legislative intent for a departure from a uniform approach to judicial review of administrative action).

395. See *supra* note 358 and accompanying text; *supra* notes 116–45 and accompanying text.

396. This uncertainty is twofold. First, agency-specific precedents involving another agency might be applied. Second, the prevalence of agency-specific precedents might encourage the court to craft an agency-specific rule of its own rather than apply general administrative law doctrine.

longstanding and well established, their elimination may upset settled expectations and create considerable uncertainty. This would be the case, for example, if IRS procedural regulations were invalidated for failure to follow § 553 procedures. Even in the absence of such reliance interests, legal certainty is also a function of the specificity of rules insofar as more specific rules are more certain and predictable in application.<sup>397</sup> There will often be a trade-off between a rule's universality and its specificity—universal applicability requires greater flexibility because more specific rules are not easily adapted and applied to varied circumstances.<sup>398</sup>

3. *Optimization of Doctrine.*—A third factor relevant to the costs and benefits of agency-specific precedents is their substantive merit. Of course, this consideration overlaps with the first two factors because the substantive merit of an administrative law rule is to some extent dependent on whether it comports with the statute and promotes legal certainty, but many other factors may ultimately affect the substantive merit of an administrative law rule. Our focus here is not how to weigh these factors but the extent to which agency-specific precedents may increase or diminish the likelihood that administrative law will reflect the optimal administrative law rule, however defined.<sup>399</sup> To facilitate analysis of this question, we posit that precedent operates as a kind of judicial marketplace of ideas in which desirable and useful precedents take hold and are followed while undesirable ones eventually wither and die or are overruled.<sup>400</sup> The question becomes the extent to which agency-specific precedents impair or facilitate this marketplace of ideas.

In general terms, agency-specific precedents would seem to impair the operation of this marketplace of judicial ideas. First and most directly, as discussed in Part III, agency-specific precedents are a reflection of information costs, and imperfect information is a well-recognized type of market defect.<sup>401</sup> To the extent that courts do not consider potentially applicable

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397. See Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823, 841 (1972) (explaining the tendency to prefer specific legal rules to general legal principles and the concurrent tension between reliability and flexibility).

398. Again, the treating physician rule provides a useful illustration insofar as it is much more specific than any general formulation of the “substantial evidence” standard of review but could not easily be applied to other agencies (except perhaps those evaluating similar medical evidence).

399. To provide a simple illustration, if the Supreme Court was correct in *Vermont Yankee* that adding further procedures in rulemaking will not improve agency decisions, the rule against imposing additional procedures is clearly superior to one that permits such imposition. Requiring additional procedures would interfere with agency autonomy without increasing accountability, which is a suboptimal result regardless of whether one values autonomy or accountability more highly.

400. This assumes, of course, that if presented with a choice, courts are more likely to choose the superior administrative doctrine.

401. See Levy, *supra* note 26, at 346 n.72 (describing imperfect information as an example of a market defect).

precedents, they are less likely to choose the optimal precedent.<sup>402</sup> Thus, agency-specific precedents may perpetuate erroneous decisions or condone problematic administrative practices. They may also deprive the general body of administrative law of useful developments and doctrines.<sup>403</sup> Second, and perhaps less clearly, the marketplace of ideas may operate less effectively within an agency-specific precedential silo because there are fewer precedents from which to choose and fewer decisions developing them.<sup>404</sup>

But there may also be benefits from agency-specific precedents, which create a kind of agency federalism with similar advantages.<sup>405</sup> Most clearly, because each agency is unique—and derives its authority from unique statutory provisions with disparate goals and means for achieving them—optimization of administrative law doctrine may require tailoring to particular circumstances.<sup>406</sup> Likewise, agency-specific precedents may function as a kind of laboratory of administrative law experimentation<sup>407</sup> in which variations in judicial approaches among agencies allow for doctrinal innovations, the best of which eventually find their way into general administrative law. Thus, for example, the reasoned decision making precedents were initially developed in a few agency-specific lines of precedent but may be filtering into broader doctrine over time.<sup>408</sup> Conversely, agency-specific precedents may help to prevent the spread of bad doctrine by confining unfortunate precedents to a single agency.<sup>409</sup>

This discussion leaves us with no clear normative conclusions for the content of administrative law. It is reasonably plain that agency-specific precedents are at least sometimes undesirable, but that may be in the eye of the beholder in any given case. As we discuss in the following subpart, what

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402. In some cases, switching from agency-specific precedents to general administrative law doctrine might be suboptimal because the rule reflected in the agency-specific precedents is a superior rule. Nonetheless, this possibility is not a justification for refusing to consider general administrative law. Indeed, if the agency-specific precedents are truly superior (as we think the reasoned decision making precedents are), the optimal result would be to adopt the agency-specific precedent as the general rule. While it is possible that a court might replace an optimal agency-specific precedent with an inferior general doctrine, more information about available precedents is, over time, likely to improve the content of the law.

403. See *supra* subpart IV(B).

404. In economic markets, the analogy would be to lack of competitive conditions (i.e., an insufficient number of buyers or sellers). This factor may have impeded the development of the reasoned decision making approach. See *supra* note 173 and accompanying text.

405. Cf. Bruce E. Cain & Roger G. Noll, *Malleable Constitutions: Reflections on State Constitutional Reform*, 87 TEXAS L. REV. 1517, 1534 (2009) (identifying the ability to learn from the experiences of state innovators as an argument in favor of the American system of federalism).

406. Thus, for example, it is not immediately apparent that the balance between autonomy and control should be the same for every agency.

407. Cf. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

408. See *supra* notes 161–78 and accompanying text.

409. See *supra* text accompanying notes 265–73.

to do about “bad” lines of agency-specific precedents is even less clear, although we have some preliminary thoughts.

*B. Responses to Agency-Specific Precedents*

It is unlikely that the adverse consequences of the creation and maintenance of agency-specific precedents can be addressed through changes to the content of administrative law, such as new procedural requirements or judicial-review provisions, which appear to be ill suited to address either the causes or effects of agency-specific precedents. It would be difficult if not impossible to craft a generally applicable procedure or review provision that would effectively target only “undesirable” agency-specific precedents. Solutions aimed at the information costs that contribute to the silo effect and to agency-specific precedents are most likely to have some possibility of success. In this connection, it seems to us that the identification of the phenomenon of agency-specific precedents presents some normative implications for judges, academics, and practitioners in administrative law fields.

For administrative law generalists—such as those of us who write administrative law textbooks, treatises, or articles on overarching administrative law issues—the existence of agency-specific precedents should make us wary of assuming that an administrative law precedent, however generalizable, is necessarily accepted and applied in other administrative law contexts. Instead, a particular doctrine may remain in the silo of a given agency. Even when an administrative law precedent is generalizable to most agencies, we must be aware that a particular agency may have generated its own unique agency-specific precedents that deviate from the generally applicable administrative law doctrine.

Generalist attorneys within the government are especially well situated to address the problem of agency-specific precedents, particularly attorneys within the Solicitor General’s office. As our analysis suggests and *Dickinson v. Zurko* illustrates,<sup>410</sup> the Supreme Court has the authority and information to break down agency-specific precedents. In light of the Office of the Solicitor General’s special role in Supreme Court litigation, it has the opportunity to address agency-specific precedents in two ways.<sup>411</sup> First, as “gatekeeper” for agency litigation at the Supreme Court level, the Solicitor General can refrain from arguing in support of agency-specific precedents.<sup>412</sup> Second, because the Court often pays attention to the Solicitor General’s views on whether to

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410. See *supra* notes 357–78 and accompanying text.

411. See generally Devins, *supra* note 307 (discussing the role of the Solicitor General’s Office in representing agencies before the Supreme Court).

412. This suggestion has implications for the ongoing debate over the proper role of centralized litigating authority and its potential for interference with agency policy. See *supra* note 307. We take no position on this debate other than to suggest that the problem of agency-specific precedents is a factor to take into account when assessing the balance of competing considerations.



grant certiorari<sup>413</sup> (and perhaps on the merits as well), the Solicitor General can encourage the Court to take cases in order to break down agency-specific precedential silos.

For agencies, the key point is to be aware of the possibility that the “administrative law” with which they are familiar does not conform to the generally accepted doctrine.<sup>414</sup> This possibility may suggest that it would be wise for the agency to take steps to conform its practices and procedures to generally applicable legal doctrine in order to reduce the risk that important policies and practices will be vulnerable to challenge. Even longstanding practices (such as the IRS’s interpretive regulations) may be something of a ticking time bomb<sup>415</sup> that could go off whenever a party makes the right argument to a receptive court. Agencies might also benefit substantively from the application of general administrative law doctrine when it is more favorable to their position (as in *Zurko* where the Supreme Court adopted a general administrative law approach to judicial review that made it more difficult for reviewing courts to reverse agency factual determinations).<sup>416</sup>

Specialists who focus on a particular agency and regulatory or benefit program should be aware that general administrative law principles may provide new avenues and arguments for challenging agency action that appears safe from attack under applicable agency-specific precedents (or the possibility that generally applicable administrative law doctrine might be used to defend agency action that is vulnerable under agency-specific precedents).<sup>417</sup> This possibility suggests that it is important for practitioners who specialize in an area that involves a single agency to develop some familiarity with the general principles of administrative law, at least to the point at which they might recognize the possibility that aspects of the doctrine concerning their agency are anomalous.<sup>418</sup> In some cases,

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413. See George F. Fraley, III, Note, *Is the Fox Watching the Henhouse?: The Administration’s Control of FEC Litigation Through the Solicitor General*, 9 ADMIN. L.J. AM. U. 1215, 1229 (1996) (“While the Supreme Court grants certiorari to less than five percent of the petitions filed in any given year, the success rate of petitions from the Solicitor General’s office is consistently near seventy-five percent.”).

414. As in the case of the IRS interpretive regulation silo, this divergence may present an opportunity for practitioners who want to challenge agency action or a risk for the agency whose practices do not conform to the conventional understanding.

415. As we indicate above, the courts may take steps to reduce the disruption likely to flow from invalidation of doctrine that results from silo thinking by agencies or the elimination of agency-specific precedents in the courts. See *supra* note 132.

416. Alternatively, the agency might benefit from the extension of agency-specific precedents involving another agency. See *supra* notes 357–78 and accompanying text.

417. This statement reflects the assumption that private practitioners ordinarily represent parties whose position is adverse to that of the agency, but the general point is also true if a party’s position is aligned with the agency. If so, generally applicable administrative law or agency-specific precedents involving another agency may help practitioners defend the agency position (or present potential problems for the defense of the agency’s position).

418. Practitioners may also wish to be aware of agency-specific precedents involving other agencies, the extension of which might be beneficial to their position.

consultation with experts in general administrative law may be desirable, at least when clients have a lot at stake in their challenge to an administrative decision so that the information costs involved may be outweighed by the benefits resulting from elimination of a line of agency-specific precedents.

More broadly, perhaps, the phenomenon of agency-specific precedents suggests that collaboration between administrative law generalists and specialists who focus on particular agencies may be highly productive. Most administrative law generalists also have developed some specialized expertise in at least one substantive field involving a particular agency or agencies.<sup>419</sup> But it is not possible for them to be specialists in every field that has an administrative agency and therefore an administrative law component. Similarly, specialists in a substantive field such as labor law, environmental law, or tax law also must have some knowledge of administrative law, although they typically focus on the administrative law that applies to their agency.<sup>420</sup> Collaboration between generalists and specialists, whether in practice or in academia, offers the best hope of identifying and eliminating undesirable silo thinking and agency-specific precedents in administrative law and also of facilitating the movement of beneficial agency-specific precedents into the administrative law mainstream.

### C. *Beyond Administrative Law*

Although our focus has been on agency-specific precedents, we think the phenomenon of precedential silos and our analysis of it has application in other fields as well. As indicated above, some scholars have noted the presence of silo thinking in fields as disparate as contract and constitutional law.<sup>421</sup> Similarly, pockets of legal doctrine that do not conform to norms and principles that are intended to apply broadly seem to exist in other areas. For example, courts have at times applied the rules of civil procedure differently depending on the parties (which may be administrative agencies) or the subject involved, even in situations in which the textual foundation for carving out special treatment is not obvious.<sup>422</sup>

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419. Cf. Cass R. Sunstein, *In Defense of the Hard Look: Judicial Activism and Administrative Law*, 7 HARV. J.L. & PUB. POL'Y 51, 58 (1984) (discussing how judicial activism has prompted specialization, moving away from the generalist approach).

420. Cf. Richard J. Lazarus, *Thirty Years of Environmental Protection Law in the Supreme Court*, 17 PACE ENVTL. L. REV. 1, 14 (1999) (describing as unfortunate, the view of some of the Supreme Court Justices that "environmental law has become no more than a subspecies of administrative law, raising no special issues or concerns worthy of distinct treatment as a substantive area of law").

421. See *supra* note 77.

422. See, e.g., Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 65 (2010) ("Although the Federal Rules of Civil Procedure are trans-substantive, they have a greater detrimental effect on certain substantive claims. . . . [A] plausibility pleading standard . . . makes it more difficult for potentially meritorious civil rights claims alleging

Indeed, some of the same forces that produce agency-specific precedents may contribute to these aberrational doctrinal pockets of civil procedure. In particular, we might expect aberrational doctrinal pockets in civil procedure to arise in fields that involve a highly specialized subject matter and practicing bar such as intellectual property law.<sup>423</sup> Likewise, the Supreme Court has played the same role in civil procedure cases as it has in administrative law cases such as *Zurko*<sup>424</sup> by reversing context-specific rules crafted by specialized courts such as the Federal Circuit and requiring the lower courts to adhere to generally applicable procedural norms.<sup>425</sup> The potential causes and normative implications of those context-specific precedents also seem to provide fertile topics for further investigation and analysis.<sup>426</sup>

## VI. Conclusion

Our central goal in this Article has been to identify the phenomenon of agency-specific precedents in administrative law and to begin a conversation about its implications. While we do not have comprehensive empirical data to support our claim that the phenomenon exists, we think our five case studies, as well as other examples referenced at various points in the Article, provide solid anecdotal evidence that agency-specific precedents are reasonably common. Certainly, the evidence is strong enough to justify more

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intentional discrimination to survive dismissal.”); Suzette M. Malveaux, *Is It the “Real Thing”? How Coke’s One-Way Binding Arbitration May Bridge the Divide Between Litigation and Arbitration*, 2009 J. DISP. RESOL. 77, 91 (“[D]espite the transsubstantive nature of the Federal Rules of Civil Procedure, the courts’ application of such rules has historically not been evenhanded.”). See generally Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-trans-substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2081–84 (1989) (examining why the Rules were drafted with a principle of flexibility); Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718, 725 (1975) (noting that the trans-substantive character of the Federal Rules is based on the premise that “procedure [should be] generalized across substantive lines” and not “confined to cases of [a] particular description” (citation omitted)).

423. See, e.g., Benjamin W. Cheesbro, Note, *A Pirate’s Treasure?: Heightened Pleadings Standards for Copyright Infringement Complaints After Bell Atlantic Corp. v. Twombly*, 16 J. INTELL. PROP. L. 241, 255 (2009) (“Despite the wide acceptance that the Federal Rules of Civil Procedure are transsubstantive, many practical remnants of the earlier Copyright Rules are still extant at the trial court level during the pleading stage.”).

424. See *supra* notes 357–78 and accompanying text.

425. See, e.g., *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 393–94 (2006) (rejecting the Federal Circuit’s alteration of the generally applicable test for the availability of civil injunctive relief—which requires a showing of the inadequacy of plaintiff’s monetary remedies and a balancing of hardships between the parties, court, and public—in patent cases).

426. Other factors may also be at work in these contexts, however, such as the courts’ preference or antipathy for particular kinds of claims. See, e.g., Judith Olans Brown et al., *Some Thoughts About Social Perception and Employment Discrimination Law: A Modest Proposal for Reopening the Judicial Dialogue*, 46 EMORY L.J. 1487, 1490 (1997) (“The growing number of summary judgments and directed verdicts in favor of defendants in Title VII cases indicates judicial antipathy for finding that employer behavior has been motivated by racial prejudice.”).

careful examination and analysis, which we expect to undertake in future projects.

If we are right and agency-specific precedents are common, the phenomenon raises a host of significant implications for administrative law. We have offered a preliminary assessment of the causes of agency-specific precedent and possible normative responses. Agency-specific statutes, programs, and practices may explain and justify many agency-specific precedents, but the phenomenon cannot be completely explained in those terms—other factors must account for the creation and durability of some agency-specific precedents. We believe that the information costs of finding and presenting or considering precedents create a silo effect that contributes to the creation and durability of agency-specific precedents.

The normative implications of the phenomenon are very difficult to assess because there are so many factors and variations involved. Whether an agency-specific precedent undermines or furthers the congressional balance of agency autonomy and accountability or improperly deviates from the general principle of uniformity depends on the particular context and will often be open to debate. The implications of agency-specific precedents for legal uncertainty and the optimization of administrative law doctrine are likewise difficult to assess. Nonetheless, it seems to us reasonably plain that, in some instances at least, agency-specific precedents are unjustified departures from generally applicable doctrine that create legal uncertainty and undermine the optimization of administrative law doctrine.

If this conclusion is correct, the next question is what to do about it. At this point, we do not advocate any systemic response, in part because it is so difficult to say whether agency-specific precedents are justified or desirable in any given case. Ultimately, insofar as agency-specific precedents relate to information costs, the best response may be the development of more information. Greater awareness of and attention to the phenomenon of agency-specific precedents may help to reduce information costs for practitioners and courts, combating the silo effect. Thus, we hope that others active in the field of administrative law, whether specialists or generalists, will find the concept of agency-specific precedential silos to be of interest and that this Article will help to engender a broader conversation about agency-specific precedents and their implications.