Texas Law Review

FEBRUARY 2011 VOL. 89 NO. 3 PAGES 499 TO 753

Texas Law Review (ISSN 0040-4411) is published seven times a year—November, December, February, March, April, May, and June. The annual subscription price is $47.00 except as follows: Texas residents pay $50.88 and foreign subscribers pay $55.00. All publication rights are owned by the Texas Law Review Association. *Texas Law Review* is published under license by The University of Texas at Austin School of Law, P.O. Box 8670, Austin, Texas 78713. Periodicals Postage Paid at Austin, Texas, and at additional mailing offices.

POSTMASTER: Send address changes to The University of Texas at Austin School of Law, P.O. Box 8670, Austin, Texas 78713.

Complete sets and single issues are available from WILLIAM S. HEIN & CO., INC., 1285 Main St., Buffalo, NY 14209-1987. Phone: 1-800-828-7571.

Single issues in the current volume may be purchased from the *Texas Law Review* Publications Office for $15.00 per copy plus shipping. Texas residents, please add applicable sales tax.

The *Texas Law Review* is pleased to consider unsolicited manuscripts for publication but regrets that it cannot return them. Please submit a single-spaced manuscript, printed on one side only, with footnotes rather than endnotes. Citations should conform with the *The Greenbook: Texas Rules of Form* (12th ed. 2010) and *The Bluebook: A Uniform System of Citation* (19th ed. 2010). Except when content suggests otherwise, the *Texas Law Review* follows the guidelines set forth in the *Texas Law Review Manual on Usage & Style* (11th ed. 2008), *The Chicago Manual of Style* (15th ed. 2003), and Bryan A. Garner, *A Dictionary of Modern Legal Usage* (2d ed. 1995).

Editorial Offices: *Texas Law Review*
727 East Dean Keeton Street, Austin, Texas 78705
(512) 232-1280 Fax (512) 471-3282
tlr@law.utexas.edu
http://www.texaslrev.com

THE UNIVERSITY OF TEXAS SCHOOL OF LAW

ADMINISTRATIVE OFFICERS

LAWRENCE G. SAGER, B.A., LL.B.; *Dean, John Jeffers Research Chair in Law, Alice Jane Drysdale Sheffield Regents Chair.*
MECHELE DICKERSON, B.A., J.D.; *Associate Dean for Academic Affairs, Arthur L. Moller Chair in Bankruptcy Law and Practice.*
ALEXANDRA W. ALBRIGHT, B.A., J.D.; *Associate Dean for Administrative Services, Senior Lecturer.*
EDEN E. HARRINGTON, B.A., J.D.; *Assist. Dean for Clinical Ed. & Public Serv., Dir. of William Wayne Justice Ctr. for Public Interest Law.*
KIMBERLY L. BIAR, B.B.A.; *Assistant Dean for Financial Affairs, Certified Public Accountant.*
CARLA COOPER, B.A., M.A., Ph.D.; *Assistant Dean for Alumni Relations and Development.*
MICHAEL J. ESPOSITO, B.A., J.D., M.B.A.; *Assistant Dean for Continuing Legal Education.*
KIRSTON FORTUNE, B.F.A.; *Assistant Dean for Communications.*
MICHAEL HARVEY; *Assistant Dean for Technology.*
MONICA K. INGRAM, B.A., J.D.; *Assistant Dean for Admissions and Financial Aid.*
DAVID A. MONTOYA, B.A., J.D.; *Assistant Dean for Career Services.*
LESLIE OSTER, A.B., J.D.; *Assistant Dean for Strategic Planning, Senior Lecturer.*
REYMUNDO RAMOS, B.A.; *Assistant Dean for Student Affairs.*

FACULTY EMERITI

HANS W. BAADE, A.B., J.D., LL.B., LL.M.; *Hugh Lamar Stone Chair Emeritus in Civil Law.*
RICHARD V. BARNDT, B.S.L., LL.B.; *Professor Emeritus.*
WILLIAM W. GIBSON, JR., B.A., LL.B.; *Sylvan Lang Professor Emeritus in Law of Trusts.*
ROBERT W. HAMILTON, A.B., J.D.; *Minerva House Drysdale Regents Chair Emeritus.*
DOUGLAS LAYCOCK, B.A., J.D.; *Alice McKean Young Regents Chair Emeritus.*
J. L. LEBOWITZ, A.B., J.D., LL.M.; *Joseph C. Hutcheson Professor Emeritus.*
JOHN T. RATLIFF, JR., B.A., LL.B.; *Ben Gardner Sewell Professor Emeritus in Civil Trial Advocacy.*
JOHN F. SUTTON, JR., J.D.; *A.W. Walker Centennial Chair Emeritus.*
JAMES M. TREECE, B.A., J.D., M.A.; *Charles I. Francis Professor Emeritus in Law.*
RUSSELL J. WEINTRAUB, B.A., J.D.; *Ben H. & Kitty King Powell Chair Emeritus in Business and Commercial Law.*

PROFESSORS

JEFFREY B. ABRAMSON, B.A., J.D., Ph.D.; *Professor of Law and Government.*
DAVID E. ADELMAN, B.A., Ph.D., J.D.; *Harry Reasoner Regents Chair in Law.*
DAVID A. ANDERSON, A.B., J.D.; *Fred and Emily Marshall Wulff Centennial Chair in Law.*
MARK L. ASCHER, B.A., M.A., J.D., LL.M.; *Joseph D. Jamail Centennial Chair in Law.*
RONEN AVRAHAM, M.B.A., LL.B., LL.M., S.J.D.; *Thomas Shelton Maxey Professor in Law.*
LYNN A. BAKER, B.A., B.A., J.D.; *Frederick M. Baron Chair in Law, Co-Director of Center on Lawyers, Civil Justice, and the Media.*
MITCHELL N. BERMAN, A.B., M.A., J.D.; *Richard Dale Endowed Chair in Law.*
BARBARA A. BINTLIFF, M.A., J.D.; *Joseph C. Hutcheson Professor in Law.*
LYNN E. BLAIS, A.B., J.D.; *Leroy G. Denman, Jr. Regents Professor in Real Property Law.*
ROBERT G. BONE, B.A., J.D.; *G. Rollie White Teaching Excellence Chair in Law.*
OREN BRACHA, LL.B., S.J.D.; *Howrey LLP and Arnold, White, & Durkee Centennial Professor.*
NORMA V. CANTU, B.A., J.D.; *Professor of Law and Education.*
LOFTUS C. CARSON, II, B.S., M. Pub. Aff., M.B.A., J.D.; *Ronald D. Krist Professor.*
ROBERT M. CHESNEY, B.S., J.D.; *Charles I. Francis Professor in Law.*
MICHAEL J. CHURGIN, A.B., J.D.; *Raybourne Thompson Centennial Professor.*
JANE M. COHEN, B.A., J.D.; *Edward Clark Centennial Professor.*
FRANK B. CROSS, B.A., J.D.; *Herbert D. Kelleher Centennial Professor of Business Law.*
WILLIAM H. CUNNINGHAM, B.A., M.B.A., Ph.D.; *James L. Bayless Chair for Free Enterprise.*
JENS C. DAMMANN, J.D., LL.M., Dr. Jur., J.S.D.; *William Stamps Farish Professor in Law.*
JOHN DEIGH, B.A., M.A., Ph.D.; *Professor of Law and Philosophy.*
GEORGE E. DIX, B.A., J.D.; *George R. Killam, Jr. Chair of Criminal Law.*
JOHN S. DZIENKOWSKI, B.B.A., J.D.; *Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process.*
KAREN L. ENGLE, B.A., J.D.; *Cecil D. Redford Prof. in Law, Director of Bernard & Audre Rapoport Center for Human Rights & Justice.*
KENNETH FLAMM, Ph.D.; *Professor.*
WILLIAM E. FORBATH, A.B., B.A., Ph.D., J.D.; *Lloyd M. Bentsen Chair in Law.*
JULIUS G. GETMAN, B.A., LL.B., LL.M.; *Earl E. Sheffield Regents Chair.*
JOHN M. GOLDEN, A.B., J.D., Ph.D.; *Loomer Family Professor in Law.*
STEVEN GOODE, B.A., J.D.; *W. James Kronzer Chair in Trial and Appellate Advocacy, University Distinguished Teaching Professor.*
LINO A. GRAGLIA, B.A., LL.B.; *A. Dalton Cross Professor.*
CHARLES G. GROAT, B.A., M.S., Ph.D.; *Professor.*
PATRICIA I. HANSEN, A.B., M.P.A., J.D.; *J. Waddy Bullion Professor.*
HENRY T. HU, B.S., M.A., J.D.; *Allan Shivers Chair in the Law of Banking and Finance.*
BOBBY R. INMAN, B.A.; *Lyndon B. Johnson Centennial Chair in National Policy.*
DEREK P. JINKS, B.A., M.A., J.D.; *The Marrs McLean Professor in Law.*
STANLEY M. JOHANSON, B.S., LL.B., LL.M.; *James A. Elkins Centennial Chair in Law, University Distinguished Teaching Professor.*
CALVIN H. JOHNSON, B.A., J.D.; *Andrews & Kurth Centennial Professor.*
EMILY E. KADENS, B.A., M.A., Dipl., M.A., Ph.D., J.D.; *Baker and Botts Professor in Law.*
SUSAN R. KLEIN, B.A., J.D.; *Alice McKean Young Regents Chair in Law.*
SANFORD V. LEVINSON, A.B., Ph.D., J.D.; *W. St. John Garwood & W. St. John Garwood, Jr. Centennial Chair in Law, Professor of Gov't.*
STEFANIE A. LINDQUIST, B.A., J.D., Ph.D.; *A.W. Walker Centennial Chair in Law.*
VIJAY MAHAJAN, M.S.Ch.E., Ph.D.; *John P. Harbin Centennial Chair in Business.*

BASIL S. MARKESINIS, LL.B., LL.D., DCL, Ph.D.; *Jamail Regents Chair.*
INGA MARKOVITS, LL.M.; *"The Friends of Joe Jamail" Regents Chair.*
RICHARD S. MARKOVITS, B.A., LL.B., Ph.D.; *John B. Connally Chair.*
ALOYSIUS P. MARTINICH, B.A., M.A., Ph.D.; *Professor.*
THOMAS O. MCGARITY, B.A., J.D.; *Joe R. and Teresa Lozano Long Endowed Chair in Administrative Law.*
STEVEN A. MOORE, B.A., Ph.D.; *Bartlett Cocke Regents Professor in Architecture.*
LINDA S. MULLENIX, B.A., M. Phil., J.D., Ph.D.; *Morris & Rita Atlas Chair in Advocacy.*
STEVEN P. NICHOLS, B.S.M.E., M.S.M.E., J.D., Ph.D.; *Clint W. Murchison, Sr. Fellow of Free Enterprise.*
ROBERT J. PERONI, B.S.C., J.D., LL.M.; *The Fondren Foundation Centennial Chair for Faculty Excellence.*
H. W. PERRY, JR., B.A., M.A., Ph.D.; *Associate Professor of Law and Government.*
LUCAS A. POWE, JR., B.A., J.D.; *Anne Green Regents Chair in Law, Professor of Government.*
WILLIAM C. POWERS, JR., B.A., J.D.; *President, The University of Texas at Austin, Hines H. Baker and Thelma Kelley Baker Chair, University Distinguished Teaching Professor.*
DAVID M. RABBAN, B.A., J.D.; *Dahr Jamail, Randall Hage Jamail, & Robert Lee Jamail Reg. Chair, Univ. Distinguished Teaching Prof..*
ALAN S. RAU, B.A., LL.B.; *Mark G. and Judy G. Yudof Chair in Law.*
DAVID W. ROBERTSON, B.A., LL.B., LL.M., J.S.D.; *W. Page Keeton Chair in Tort Law, University Distinguished Teaching Professor.*
JOHN A. ROBERTSON, A.B., J.D.; *Vinson & Elkins Chair.*
DANIEL B. RODRIGUEZ, B.A., J.D.; *Minerva House Drysdale Regents Chair in Law.*
WILLIAM M. SAGE, A.B., M.D., J.D.; *Vice Provost for Health Affairs, James R. Dougherty Chair for Faculty Excellence.*
JOHN J. SAMPSON, B.B.A., LL.B.; *William Benjamin Wynne Professor.*
CHARLES M. SILVER, B.A., M.A., J.D.; *Roy W. and Eugenia C. MacDonald Endowed Chair in Civil Procedure, Professor in Government, Co-Director of Center on Lawyers, Civil Justice, and the Media.*
ERNEST E. SMITH, B.A., LL.B.; *Rex G. Baker Centennial Chair in Natural Resources Law.*
TARA A. SMITH, Ph.D.; *Professor.*
LEWIS J. SPELLMAN, B.B.A., M.B.A., M.A., Ph.D.; *Professor.*
JAMES C. SPINDLER, B.A., J.D.; *The Sylvan Lang Professor.*
MATTHEW L. SPITZER, B.A., Ph.D., J.D.; *Hayden W. Head Regents Chair for Faculty Excellence.*
JANE STAPLETON, B.S., Ph.D., LL.B., D. Phil.; *Ernest E. Smith Professor.*
JORDAN M. STEIKER, B.A., J.D.; *Judge Robert M. Parker Endowed Chair in Law.*
PAUL J. STEKLER, Ph.D.; *Professor.*
SHIRLEY E. THOMPSON, A.B., A.M., Ph.D.; *Professor.*
GERALD TORRES, A.B., J.D., LL.M.; *Bryant Smith Chair in Law.*
GREGORY J. VINCENT, B.A., J.D., Ed.D.; *Professor.*
WENDY E. WAGNER, B.A., M.E.S., J.D.; *Joe A. Worsham Centennial Professor.*
LOUISE WEINBERG, A.B., J.D., LL.M.; *William B. Bates Chair for the Administration of Justice.*
OLIN G. WELLBORN, A.B., J.D.; *William C. Liedtke, Sr. Professor.*
JAY L. WESTBROOK, B.A., J.D.; *Benno C. Schmidt Chair of Business Law.*
ABRAHAM L. WICKELGREN, A.B., Ph.D., J.D.; *Bernard J. Ward Professor in Law.*
ZIPPORAH B. WISEMAN, B.A., M.A., LL.B.; *Thos. H. Law Centennial Professor in Law.*
PATRICK WOOLLEY, A.B., J.D.; *Beck, Redden & Secrest Professor in Law.*

ASSISTANT PROFESSORS

MARILYN ARMOUR, B.A., M.S.W., Ph.D.
HUGH L. BRADY, B.A., J.D.
DANIEL M. BRINKS, A.B., J.D., Ph.D.
JUSTIN DRIVER, B.A., M.A., M.A., J.D.
ZACHARY S. ELKINS, B.A., M.A., Ph.D.
JOSEPH R. FISHKIN, B.A., M.Phil., D.Phil., J.D.
CARY C. FRANKLIN, B.A., M.S.T., D.Phil., J.D.
MIRA GANOR, B.A., M.B.A., LL.B., LL.M., J.S.D.
JENNIFER E. LAURIN, B.A., J.D.
ANGELA K. LITTWIN, B.A., J.D.
MARY ROSE, A.B., M.A., Ph.D.
SEAN H. WILLIAMS, B.A., J.D.

SENIOR LECTURERS, WRITING LECTURERS, AND CLINICAL PROFESSORS

WILLIAM P. ALLISON, B.A., J.D.; *Clinical Prof., Dir. of Criminal Defense Clinic, Co-Dir. of Actual Innocence Clinic.*
MARJORIE I. BACHMAN, B.S., J.D.; *Clinical Instruct., Staff Attorney.*
PHILIP C. BOBBITT, A.B., J.D., Ph.D.; *Distinguished Sr. Lecturer.*
KAMELA S. BRIDGES, B.A., B.J., J.D.; *Lecturer.*
CYNTHIA L. BRYANT, B.A., J.D.; *Clinical Professor, Director of Mediation Clinic.*
PAUL J. BURKA, B.A., LL.B.; *Senior Lecturer.*
MARY R. CROUTER, A.B., J.D.; *Lecturer, Assistant Director of William Wayne Justice Center for Public Interest Law.*
TIFFANY J. DOWLING, B.A., J.D.; *Clinical Instructor, Staff Attorney.*
LORI K. DUKE, B.A., J.D.; *Clinical Professor.*
ARIEL E. DULITZKY, J.D., LL.M.; *Clinical Professor.*
ELANA S. EINHORN, B.A., J.D.; *Lecturer.*
TINA V. FERNANDEZ, A.B., J.D.; *Lecturer.*
ELIZABETH FRUMKIN, B.A., M.A., J.D.; *Lecturer.*
DENISE L. GILMAN, B.A., J.D.; *Clinical Prof., Dir. Immigr. Clinic.*
BARBARA HINES, B.A., J.D.; *Clinical Prof., Dir. Immigr. Clinic.*
KRISTINE A. HUSKEY, B.A., J.D.; *Dir. Ntl. Sec. & Hum. Rts. Clinic.*
HARRISON KELLER, B.A., M.A., Ph.D.; *Vice Provost for Higher Education Policy, Senior Lecturer.*
JEANA A. LUNGWITZ, B.A., J.D.; *Clinical Professor, Director of Domestic Violence Clinic.*
TRACY W. MCCORMACK, B.A., J.D.; *Lect.; Dir. Trial Advoc. Prg..*
ROBIN B. MEYER, B.A., M.A., J.D.; *Lecturer.*
JANE A. O'CONNELL, B.A., M.S., J.D.; *Lecturer, Associate Director for Patron Services, Instruction, and Research.*
RANJANA NATARAJAN, B.A., J.D.; *Clinical Professor, Director of National Security Clinic.*
ROBERT C. OWEN, A.B., M.A., J.D.; *Clinical Professor.*
SEAN J. PETRIE, B.A., J.D.; *Lecturer.*
WAYNE SCHIESS, B.A., J.D.; *Sr. Lecturer, Dir. of Legal Writing.*
STACY ROGERS SHARP, B.S., J.D.; *Lecturer.*
PAMELA J. SIGMAN, B.A., J.D.; *Lect., Dir. Juvenile Justice Clinic.*
DAVID S. SOKOLOW, B.A., M.A., J.D., M.B.A.; *Distinguished Senior Lecturer, Director of Student Life.*
LESLIE L. STRAUCH, B.A., J.D.; *Clinical Prof. Child. Rights Clinic.*
GRETCHEN S. SWEEN, B.A., M.A., Ph.D., J.D.; *Lecturer.*
MELINDA E. TAYLOR, B.A., J.D.; *Sr. Lect., Dir. Envtl. Law Clinic.*
HEATHER K. WAY, B.A., B.J., J.D.; *Lecturer, Director of Community Development Clinic.*
ELIZABETH M. YOUNGDALE, B.A., M.L.I.S., J.D.; *Lecturer.*

ADJUNCT PROFESSORS AND OTHER LECTURERS

ROBERT J. ADAMS, JR., B.S., M.B.A., Ph.D.
WILLIAM R. ALLENSWORTH, B.A., J.D.
WILLIAM G. BARBER, B.S.Ch.E., J.D.
SHARON C. BAXTER, B.S., J.D.
WILLIAM H. BEARDALL, JR., B.A., J.D.
JERRY A. BELL, B.A., J.D.
ALLISON H. BENESCH, B.A., M.S.W., J.D.
CRAIG R. BENNETT, B.S., J.D.
JAMES B. BENNETT, B.B.A., J.D.
MELISSA J. BERNSTEIN, B.A., M.L.S., J.D.
ROBERT S. BICKERSTAFF, B.A., J.D.
MURFF F. BLEDSOE, B.A., J.D.
WILLIAM P. BOWERS, B.B.A., J.D., LL.M.
STACY L. BRAININ, B.A., J.D.
ANTHONY W. BROWN, B.A., J.D.
JAMES E. BROWN, LL.B.
TOMMY L. BROYLES, B.A., J.D.
W. A. BURTON, JR., B.A., M.A., LL.B.
JOHN C. BUTLER, B.B.A., Ph.D.
BENEDICTE CALLAN, B.A., Ph.D.
AGNES E. CASAS, B.A., J.D.
RUBEN V. CASTANEDA, B.A., J.D.
EDWARD A. CAVAZOS, B.A., J.D.
DAN J. CHRISTENSEN, B.B.A., J.D.
JEFF CIVINS, A.B., M.S., J.D.
JUDGE LEIF M. CLARK, B.A., M.Div., J.D.
GARY COBB, B.A., J.D.
ELIZABETH COHEN, B.A., M.S.W., J.D.
LYNN R. COLEMAN, B.A., LL.B.
JAMES W. COLLINS, B.S., J.D.
PATRICIA J. CUMMINGS, B.A., J.D.
DICK DEGUERIN, B.A., LL.B.
MICHELE Y. DEITCH, B.A., M.S., J.D.
ADAM R. DELL, B.A., J.D.
RICHARD D. DEUTSCH, B.A., J.D.
CASEY D. DUNCAN, B.A., M.L.I.S., J.D.
PHILIP DURST, B.A., M.A., J.D., Ph.D.
JAY D. ELLWANGER, B.A., J.D.
KAITLIN T. FARRELL, B.A., J.D.
ARLEY D. FINLEY, B.A., M.B.A., J.D.
JOHN C. FLEMING, B.A., J.D.
MARIA FRANKLIN, B.A., M.A., Ph.D.
DAVID C. FREDERICK, B.A., Ph.D., J.D.
GREGORY D. FREED, B.A., J.D.
FRED J. FUCHS, B.A., J.D.
MICHAEL GAGARIN, Ph.D.
GERALD J. GALOW, B.A., J.D.
JAMES B. GAMBRELL, B.S.M.E., M.A., LL.B.
FRANCIS J. GAVIN, B.A., M.S.T., M.A., Ph.D.
CHARLES E. GHOLZ, B.S., Ph.D.
MICHAEL J. GOLDEN, A.B., J.D.
JULIE E. GRANTHAM, B.A., J.D.
SHERRI R. GREENBERG, B.A., M.Sc.
ROBERT L. GROVE, B.S., J.D.
DAVID HALPERN, B.A., J.D.
ELIZABETH HALUSKA-RAUSCH, B.A., M.A., M.S., Ph.D.
JETT L. HANNA, B.B.A., J.D.
KELLY L. HARAGAN, B.A., J.D.
CLINT A. HARBOUR, B.A., J.D., LL.M.
ROBERT L. HARGETT, B.B.A., J.D.
JAMES C. HARRINGTON, B.A., M.A., J.D.
CHRISTOPHER S. HARRISON, Ph.D., J.D.
JOHN R. HAYS, JR., B.A., J.D.
P. MICHAEL HEBERT, A.B., J.D.
STEVEN L. HIGHLANDER, B.A., Ph.D., J.D.
SUSAN J. HIGHTOWER, B.A., M.A., J.D.
WILLIAM M. HINES, III, B.B.A., J.D.
JAMES C. HO, B.A., J.D.
KENNETH E. HOUP, JR., J.D.
RANDY R. HOWRY, B.J., J.D.
MONTY G. HUMBLE, B.A., J.D.
DIRK M. JORDAN, B.A., J.D.
SEAN D. JORDAN, B.A., J.D.
PATRICK O. KEEL, B.A., J.D.
DOUGLAS L. KEENE, Ph.D.
CHARI L. KELLY, B.A., J.D.
ROBERT N. KEPPLE, B.A., J.D.
MARK L. KINCAID, B.B.A., J.D.
AMI L. LARSON, B.A., J.D.
KEVIN R. LASHUS, B.A., J.D.
JODI R. LAZAR, B.A., J.D.
KEVIN L. LEAHY, B.A., J.D.
MAURIE A. LEVIN, B.A., J.D.
JAMES LLOYD-LOFTIS, B.B.A., J.D.
ANDREW F. MACRAE, B.J., J.D.
JIM MARCUS, B.A., J.D.
PETER D. MARKETOS, B.A., J.D.
HARRY S. MARTIN, A.B., M.L.S., J.D.
FRANCES L. MARTINEZ, B.A., J.D.
LAURA A. MARTINEZ, B.A., J.D.
RAY MARTINEZ, III, B.A., J.D.
LISA M. MCCLAIN, B.A., J.D., LL.M.
STEPHANIE G. MCFARLAND, B.A., J.D.
BARRY F. MCNEIL, B.A., J.D.
ANGELA T. MELINARAAB, B.F.A., J.D.
JO A. MERICA, B.A., J.D.
RANELLE M. MERONEY, B.A., J.D.
ELIZABETH N. MILLER, B.A., J.D.
DARYL L. MOORE, B.A., M.L.A., J.D.
EDWIN G. MORRIS, B.S., J.D.
MANUEL H. NEWBURGER, B.A., J.D.
DAVID G. NIX, B.S.E., LL.M., J.D.
PATRICK L. O'DANIEL, B.B.A., J.D.
M. A. PAYAN, B.A., J.D.
MARK L. PERLMUTTER, B.S., J.D.
LOUIS T. PIRKEY, B.S.Ch.E., J.D.
JUDGE ROBERT L. PITMAN, B.S., J.D.
ELIZA T. PLATTS-MILLS, B.A., J.D.
LAURA L. PRATHER, B.B.A., J.D.
JONATHAN PRATTER, B.A., M.L.S., J.D.
VELVA L. PRICE, B.A., J.D.
BRIAN C. RIDER, B.A., J.D.
GRETCHEN RITTER, B.S., Ph.D.
ROBERT M. ROACH, JR., B.A., J.D.
BRIAN J. ROARK, B.A., J.D.
BETTY E. RODRIGUEZ, B.S.W., J.D.
JAMES D. ROWE, B.A., J.D.
AMANDA M. RUNYON, B.B.A., J.D.
SARA J. RUSHING, B.A., LL.M., J.D.
MATTHEW C. RYAN, B.A., J.D.
KAREN R. SAGE, B.A., J.D.
MARK A. SANTOS, B.A., J.D.
CHRISTOPHE H. SAPSTEAD, B.A., J.D.
SUSAN SCHULTZ, B.S., J.D.
AMY J. SCHUMACHER, B.A., J.D.
MARCUS F. SCHWARTZ, B.B.A., J.D.
SUZANNE SCHWARTZ, B.J., J.D.
RICHARD J. SEGURA, JR., B.A., J.D.
DAVID A. SHEPPARD, B.A., J.D.
JUDGE ERIC M. SHEPPERD, B.A., J.D.
ALISSA R. SHERRY, B.A., M.A., Ph.D.
NADAV SHOKED, LL.B., S.J.D.
RONALD J. SIEVERT, B.A., J.D.
AMBROSIO A. SILVA, B.S., J.D.
BEA A. SMITH, B.A., M.A., J.D.
LYDIA N. SOLIZ, B.B.A., J.D.
KATHERINE J. SOLON, B.A., M.S., J.D.
JUSTICE ROSE B. SPECTOR, B.A., J.D.
DAVID B. SPENCE, B.A., J.D., M.A., Ph.D.
LAURA L. STEIN, B.A., M.A., Ph.D.
JAMES B. STEINBERG, B.A., J.D.
CHARLES H. STILL, B.B.A., J.D.

WILLIAM F. STUTTS, B.A., J.D.
MATTHEW J. SULLIVAN, B.S., J.D.
BRADLEY P. TEMPLE, B.A., J.D.
SHERINE E. THOMAS, B.A., J.D.
TERRY O. TOTTENHAM, B.S., LL.M., J.D.
JEFFREY K. TULIS, B.A., M.A., Ph.D.
ROBERT W. TURNER, B.A., LL.B.
TIMOTHY J. TYLER, B.A., J.D.
SUSAN S. VANCE, B.B.A., J.D.
ERIC M. VANHORN, B.A., J.D.
LANA K. VARNEY, B.J., J.D.
SRIRAM VISHWANATH, B.S., M.S., Ph.D.
DEBORAH M. WAGNER, B.A., M.A., J.D.
CLARK C. WATTS, B.A., M.D., M.A., M.S., J.D.
JANE M. WEBRE, B.A., J.D.
WARE V. WENDELL, A.B., J.D.
DARA J. WHITEHEAD, B.A., M.S.
RANDALL B. WILHITE, B.B.A., J.D.
DAVID G. WILLE, B.S.E.E., M.S.E.E., J.D.
MARK B. WILSON, B.A., M.A., J.D.
JUDGE PAUL L. WOMACK, B.S., J.D.
LUCILLE D. WOOD, B.A., J.D.
LARRY F. YORK, B.B.A., LL.B.
DANIEL J. YOUNG, B.A., J.D.

VISITING PROFESSORS

OWEN L. ANDERSON, B.A., J.D.
ANTONIO H. BENJAMIN, LL.B., LL.M.
AARON-ANDREW P. BRUHL, B.A., M.Phil., J.D.
PETER F. CANE, B.A., LL.B., D.C.L.
VICTOR FERRERES, J.D., LL.M., J.S.D.
FRANCESCO FRANCIONI, J.D., LL.M.
ROBERT M. O'NEIL, A.B., A.M., LL.B., LL.D., LL.D.
GUILLERMO A. PADILLA, J.D., Ph.D.
ADAM H. ROSENZWEIG, B.A.,LL.M., J.D.
KEVIN G. TOH, A.B., M.A., Ph.D., J.D.

* * *

Texas Law Review

Volume 89 Number 3 February 2011

* * *

Texas Law Review

Volume 89, Number 3, February 2011

* * *

Agency-Specific Precedents

Richard E. Levy* & Robert L. Glicksman**

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.[1] 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*,[2] *Overton Park*,[3] *Florida East Coast Railway*,[4] *Vermont Yankee*,[5] *State Farm*,[6] and *Chevron*,[7] which are

* J.B. Smith Distinguished Professor of Constitutional Law, University of Kansas.

** 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,[8] 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,[9] 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.[10] 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

---

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.[11]

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.[12]

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,[13] the development of administrative law is largely a twentieth-century phenomenon,[14] with the adoption of the APA as its defining feature.

---

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.[15] 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.[16]

A. The Emergence of Administrative Law

As Jerry Mashaw has pointed out in an important series of recent articles,[17] administrative agencies have existed ever since the founding.[18] Professor Mashaw's research reveals that during the first couple of decades of the new Republic, "Congresses 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."[19] Indeed, the Supreme Court issued some important decisions in what we today call administrative law in the nineteenth century.[20] As Mashaw also points out, however, until well

---

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.[21] 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."[22]

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.[23] 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.[24] 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.[25] 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.[26]

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

---

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.[27] 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.[28] Similarly, in *Londoner v. City of Denver*[29] and *Bi-Metallic Investment Co. v. State Board of Equalization*,[30] the Court developed the basic distinction between rulemaking and adjudication and held that due process does not require hearings when agencies adopt rules.[31]

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.[32] At the same time, opponents of the administrative state pushed for legislative reforms to control the burgeoning power of agencies.[33] 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.[34]

---

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[35] and the availability and scope of judicial review of agency decisions.[36] 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*,[37] 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.[38] Nonetheless, the language of the organic statute may trigger formal procedures if it specifies that a hearing on the record is required.[39] 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."[40] This exception allows an agency to promulgate "nonlegislative" (nonbinding) rules without following any prescribed procedures provided that it publishes them in accordance with § 552.[41]

The APA's procedures for adjudication require personal notice[42] and opportunity for a formal hearing at which a party may appear, present

---

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.[43] 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[44] and whose decision is normally subject to de novo review by the agency.[45] Although the rules of evidence do not generally apply to APA adjudications,[46] the ALJ's decision must be based on the evidence in the record, and ex parte communications are strictly forbidden.[47] 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."[48] 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.[49]

The APA's judicial-review provisions create a broadly available cause of action for review of agency decisions,[50] 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.[51] Related provisions address the timing of judicial review.[52] 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.[53] 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,[54] the "substantial evidence"

---

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,[55] and the requirement of consistency with applicable statutes.[56] 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.[57]

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.[58] 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."[59] 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.[60] Separation of powers and due process constrain the institutional structure and operation of agencies, but doubts about the constitutionality of the

---

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[61] even if particular administrative arrangements may raise constitutional questions.[62] 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.[63] In addition, the application of the APA reflects judicial doctrines derived from constitutional understandings such as the *Chenery* principle.[64]

Congress has supplemented the APA with several additional, overarching statutes concerning administrative procedures or judicial review. The Freedom of Information Act (FOIA)[65] and the Government in the Sunshine Act[66] added greater transparency and public access to agency records and proceedings. The Equal Access to Justice Act[67] 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."[68] 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.[69] Notwithstanding these changes, the APA has

---

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.[70]

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."[71] 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.[72] On the other hand, the organic statute may impose procedural or judicial-review requirements in addition to those of the APA.[73] 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.[74]

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

---

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."[75] 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.[76]

---

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,[77] 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.[78] Likewise,

---

"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.[79]

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.[80] 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.[81]

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)[82] in

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.[83]

The silo effect also reflects the problem of transaction costs.[84] 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.[85]

In addition to agency and transaction costs, the silo effect is also a problem of information costs.[86] Information is a valuable commodity that requires resources to produce and maintain and may be especially so within a large organization.[87] 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

---

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.[88]

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.[89] 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[90] or tax liability,[91] these

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.[92] 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.[93] 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

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.[94] 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.[95] 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.[96] These requirements do not apply, however, to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."[97] Rules adopted without notice and comment under this provision generally are not considered to be legally binding; i.e., they are "nonlegislative" rules.[98] Second, the degree of deference courts afford an agency's interpretation of a statute differs depending on whether the inter-

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.[99] 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,[100] 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,"[101] 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."[102] 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.[103]

---

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 Interpretative 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."[104] 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.[105]
- 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.[106]

---

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.[107] 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.[108] 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.[109] 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.[110]

Courts afford less deference to agencies' interpretations of their organic statutes embodied in nonlegislative rules than they do to interpretations reflected in legislative rules.[111] Legislative rules are reviewed under the famous two-step test from *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[112] 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."[113] 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 multifactored 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.,[114] 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."[115]

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.[116] 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.[117] 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.[118] 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

---

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.[119] 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.[120] 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."[121] Although the IRS also states that it "usually" publishes notice and solicits comments when promulgating interpretive regulations,[122] a recent empirical study of IRS rulemaking concluded that the IRS often does not fully comply with § 553.[123] 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

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.[124]

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.[125] 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).[126] 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.[127]

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*,[128] the court appeared to accept the IRS's position that IRS interpretive regulations are exempt from § 553,[129] but more recent cases draw that analysis into

---

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); Envtl. 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. Diffee 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.[130] To this point, the courts have not squarely addressed the issue,[131] 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.[132] 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.[133]

---

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.[134] Under *National Muffler Dealers Ass'n v. United States*,[135] "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."[136] In post-*Chevron* cases reviewing interpretive regulations, however, the Supreme Court been inconsistent as to whether *National Muffler* or *Chevron* applies.[137]

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.[138] 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.[139] Others have held that interpretive regulations that were adopted using notice-and-comment procedures are entitled to *Chevron* deference.[140]

---

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*:[141]

> 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.[142]

In *Bankers Life*, the court concluded that the "nonlegislative regulation" at issue was entitled to *Chevron* deference.[143] 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.[144] 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.[145]

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

---

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.[146] 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.[147] 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

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."[148] 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.[149] 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.[150] The Supreme Court has sent mixed signals on the issue with some cases indicating a more deferential approach than others[151] (and some providing relatively equal fodder for litigants seeking either deferential or rigorous judicial scrutiny of agency exercises of policy discretion).[152]

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

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.[153]

Second, in *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*,[154] 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."[155] 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.[156]

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.[157] And while *State Farm* might be considered to articulate a broadly applicable standard, it is not always cited or applied.[158] 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.[159]

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.[160] 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,[161] the courts (particularly the D.C. Circuit) routinely use this formulation to express the basic requirements of the arbitrary and capricious standard of review.[162] Although the requirement that agencies provide reasons for their decisions is a long-standing feature of judicial review of agency

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 Commc'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,[163] 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.[164]

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.[165] 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[166] and the reasoned decision making concept structures the relationship between the court and the agency in appropriate ways.[167] 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.[168] 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).[169] 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); *Achernar 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.[170] 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.[171] In sum, as stated by Judge Skelly Wright of the D.C. Circuit,

---

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."[172]

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).[173] It is interesting (but perhaps coincidental) that both FERC and the FCC are agencies that engage in

---

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.[174] 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.*[175] In *Allentown Mack Sales & Service, Inc. v. NLRB*,[176] 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.

---

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.[177]

References to the reasoned decision making requirement in NLRB cases appear to have increased since the *Allentown Mack* decision,[178] 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.

---

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.[179] 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.[180] Nonetheless, ex parte communications may undermine the rulemaking process, be unfair to interested parties, and compromise the record for judicial review.[181] 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.[182] In the 1960s and 1970s, the courts began to develop these procedures into a "paper hearing" process.[183] 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.[184] This view of the opportunity for comment implied that notice must be adequate to provide parties the opportunity for effective comment[185] and that the agency's statement of basis and purpose must reflect consideration of relevant comments.[186]

---

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.[187] 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).[188] 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.[189] The Supreme Court brought an abrupt halt to such judge-made procedures in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*[190] Thus, rulemaking procedures that do not trigger formal rulemaking under § 556 and § 557 of the APA today are governed by the paper hearing requirements

---

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*[191]) derived from the application of § 553, which may be supplemented or superseded by hybrid procedural requirements in the organic statute.[192]

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*,[193] 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."[194] While *Sangamon Valley* was a narrow decision based on the adjudicatory characteristics of the agency action,[195] in *Home Box Office, Inc. v. FCC*,[196] the court effectively announced a per se ban on ex parte communications in notice-and-comment rulemaking,[197] invalidating an FCC rule that allocated programming between broadcast and cable television networks because of extensive ex parte communications.[198] *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.[199]

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,[200] ex parte communications may be especially problematic in FCC cases.[201] In addition, the FCC uses a peculiar terminology that tends to reinforce these adjudicatory elements.[202] In any event, these FCC decisions are often cited in cases involving other agencies,[203] 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*.[204] 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.[205] 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.[206] 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.[207]

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.[208]

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.[209] 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.[210] 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."[211]

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

---

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.[212] Nonetheless, while courts have cited the case many times for various propositions,[213] especially for its treatment of ex parte communications within the Executive Branch[214] and its general attitude toward ex parte communications in informal rulemaking,[215] they have not applied the "central relevance" test for inclusion of documents in the rulemaking record except in cases involving the EPA.[216] 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.[217]

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.[218]

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."[219] 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."[220] But *Sierra*

---

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.[221]

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.[222] 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.[223]

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-

---

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.[224] 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*,[225] 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."[226] Although the case involved a provision of the National Labor Relations Act,[227] it is broadly cited in cases involving the APA and other statutes incorporating the substantial evidence standard.[228] *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.[229] The Court also addressed the weight to be given to ALJ findings that are reversed by the agency[230] (which has de novo decision-making authority), an issue we will discuss more fully below in connection with the fifth case study.[231]

---

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,[232] 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.[233] 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).[234] 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.[235] 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

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.[236] 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.[237] This treating physician rule took various forms in various circuits.[238] 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."[239]

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*,[240] 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).[241] 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.[242] 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."[243] Similarly, in *White v. Principi*,[244] the Federal Circuit refused to extend the treating physician rule to the context of veterans' benefits.[245] 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.[246]

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.[247] As *Universal Camera* framed the substantial evidence standard, the question is whether a "reasonable mind might accept"[248] 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"[249] 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.[250]

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.[251] 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.[252]

---

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.[253] 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.[254] 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.[255] 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.[256] 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.[257] In the initial decision, the court of

---

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.[258] The court of appeals emphasized that the NLRB had an insufficient basis for rejecting the hearing examiner's demeanor-based credibility determinations.[259] In an influential concurring opinion, Judge Frank drew a distinction between "testimonial" and "derivative" inferences.[260] 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.[261]

Shortly after the decision on remand in *Universal Camera*, the D.C. Circuit applied this approach in *Allentown Broadcasting Corp. v. FCC*,[262] only to be reversed by the Supreme Court.[263] 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."[264] 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*.[265] In *Penasquitos*, the Ninth Circuit declared that "evidence in the record which, when taken alone, may amount

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."[266] 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."[267] *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.[268]

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.[269] 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.[270] This sort of result is simply inconsistent with the vesting of deci-

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.[271] 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.[272]
- 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.[273]

---

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.[274] 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.[275] Our case studies suggest, however, that agency-specific precedents concerning agency procedures and judicial review arise in various areas with respect to various agencies.[276] 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.

---

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.[277] 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.[278] 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.[279]

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.[280] Distinctive programmatic features (such as the nonadversarial character of disability hearings[281]) 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

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.[282]

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.[283] 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.[284] 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.[285]

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.[286] Even when agency-

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.[287]

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.[288] 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.[289] 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.[290] 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.[291] 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.[292] 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

---

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.[293] 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.[294] 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.[295] 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.[296]

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.[297] 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).[298]

---

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[299]). And some of the agency-specific precedents we identify originated in the Judiciary[300] 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.[301] 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

---

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.[302] 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.[303] 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.[304] These conditions often make attorney specialization desirable and lead to the development of a specialized bar.[305] In the agencies that are the focus of our case studies—the IRS, FCC, EPA, SSA, and NLRB—specialization is the norm.[306] 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.[307] Attorney specialization

---

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/secfy10congbudgjust.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.[308] 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.[309] 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.[310]

---

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[311]—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.[312] As noted above, for a practitioner litigating against an agency, the value of a precedent depends on its ability to influence the outcome.[313] 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.[314] 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.[315]

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[316]) 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.[317] Thus,

---

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,[318] 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.[319] 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.[320] 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.[321] 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.[322] 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

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.[323] 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).[324] 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.[325] 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.[326] From a craft perspective, the norms of the profession determine the appropriateness of reliance on precedent.[327] 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.[328] Even as to general administrative law questions, a court is likely to view a case involving the same agency as more

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.[329]

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.[330] 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.[331]

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.[332] 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

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.[333]

As discussed previously, federal courts of appeals are, for the most part, generalist courts.[334] Depending on the specific agency and statutory framework, courts of appeals may conduct (1) direct review of an agency decision;[335] (2) review of the decision of a specialized court (which may be an Article III or Article I court);[336] or (3) review of a decision of a federal district court of general jurisdiction.[337] We might expect that in some cases, agency-specific precedents may be passed along from a specialized court to an appellate court,[338] especially if the appellate court has a relatively narrow jurisdiction.[339] 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.[340] If funneling of particular agency decisions to district courts produces agency-specific precedents at that level,[341] 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.[342]

---

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,[343] 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.[344] 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.[345] Third, precedents involving other agencies are likely to be more valuable because Supreme Court precedents on point are relatively rare.[346] 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.[347]

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.[348] 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

---

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.[349]

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.[350] 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.[351] The extent to which judicial decisions are likely to reinforce and create precedential silos, as opposed to

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.[352]

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.[353] 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.[354] Patent attorneys even have to pass a special bar examination to qualify for practice in the area.[355] 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.[356]

The Supreme Court's decision in *Dickinson v. Zurko*[357] 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.[358] The issue in *Zurko* was whether the

---

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. INTELL. 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.[359] 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."[360] 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.[361] 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."[362] 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.[363]

---

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."[364] 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,"[365] the Court concluded that § 559's clause saving pre-APA law applies only when the "[e]xistence of the additional requirement [is] clear."[366] 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.[367]

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.[368] 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.[369] Similarly, amici argued before the Supreme Court that it was better that the law remained settled than that it be settled correctly.[370] 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.[371] Further, adoption of the Federal Circuit's expansive interpretation of the § 559 exception for pre-APA law would establish a

---

> 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."[372]

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."[373] 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."[374] 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.[375] 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."[376] Instead, the Court concluded that "Congress has set forth the appropriate standard in the APA."[377]

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.[378] The policy discussion in *Zurko*, however, raises another important set of questions surrounding the phenomenon of agency-

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.[379] 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.[380] 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.[381]

---

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.[382] 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.[383] 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.[384]

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.[385] More fundamentally, provisions such as the hybrid rulemaking procedures of the Clean Air Act strike a different legislative balance between autonomy and accountability.[386] 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,

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'ns, 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.[387] 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.[388]

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."[389] 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,[390] 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

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.[391] 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.[392] 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.[393] 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,[394] 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.[395] 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.[396]

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

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.[397] 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.[398]

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.[399] 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.[400] 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.[401] To the extent that courts do not consider potentially applicable

---

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.[402] 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.[403] 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.[404]

But there may also be benefits from agency-specific precedents, which create a kind of agency federalism with similar advantages.[405] 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.[406] Likewise, agency-specific precedents may function as a kind of laboratory of administrative law experimentation[407] 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.[408] Conversely, agency-specific precedents may help to prevent the spread of bad doctrine by confining unfortunate precedents to a single agency.[409]

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

---

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,[410] 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.[411] First, as "gatekeeper" for agency litigation at the Supreme Court level, the Solicitor General can refrain from arguing in support of agency-specific precedents.[412] Second, because the Court often pays attention to the Solicitor General's views on whether to

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[413] (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.[414] 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[415] 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).[416]

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).[417] 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.[418] In some cases,

---

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.[419] 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.[420] 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.[421] 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.[422]

---

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.[423] Likewise, the Supreme Court has played the same role in civil procedure cases as it has in administrative law cases such as *Zurko*[424] 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.[425] The potential causes and normative implications of those context-specific precedents also seem to provide fertile topics for further investigation and analysis.[426]

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

---

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.

* * *

The Relative Irrelevance of the Establishment Clause

Richard C. Schragger*

Despite the heated legal, political, and scholarly battles that rage around the Court's Establishment Clause decisions, this Article contends that these decisions are actually quite tangential to the maintenance of the nonestablishment norm. The Article argues, first, that a pervasive feature of modern Establishment Clause jurisprudence is that the Court's stated doctrine is underenforced; second, that there are some legitimate reasons for that underenforcement; and, third, that the Court's decisions serve mostly as political markers that leave much pertinent activity wholly unregulated by law. By focusing not on what the Court is doing but on what it concertedly seeks not to do, the Article hopes to illuminate the relationship between law and politics in an era in which religious–political movements have become increasingly sophisticated. In light of these movements, the important question for scholars of the Establishment Clause is how the Court "manages establishment" in the political/legal culture outside constitutional law. The Article assesses four potential answers to this question and discusses a number of recent Establishment Clause decisions, paying special attention to disputes about the Ten Commandments, the Pledge of Allegiance, and faith-based initiatives. The Article concludes by suggesting how a self-conscious Supreme Court Justice might help maintain the constitutional settlement of nonestablishment despite the Court's limited doctrinal influence.

---

* Professor of Law, University of Virginia School of Law. Many thanks to Risa Goluboff for reading many previous drafts and to Richard Primus and the students in his constitutional law colloquium at Michigan for their comments. Chip Lupu, Micah Schwartzman, Fred Schauer, Jim Ryan, Richard Bonnie, Barb Armacost, and others at the Virginia Law School summer workshop also offered helpful suggestions. Mark Schottinger provided excellent research help.

Introduction

Debates about the contours of the Establishment Clause and the relationship between church and state in the United States often focus on the Supreme Court and its Religion Clause decisions. Religionists claim that the Court has built a wall of separation between church and state that devalues the beliefs of religious citizens and contributes to the secularization of the culture.[1] Secularists argue that the Court is the only bulwark against a creeping theocracy and that it should do more to keep religion distinct from the state.[2] Meanwhile, normative constitutional scholars describe judicial

1. *See* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 3 (1993) (lamenting that efforts to "banish religion for politics' sake . . . have created a political and legal culture that presses the religiously faithful to be other than themselves, to act publicly, and sometimes privately as well, as though their faith does not matter to them"); Carl H. Esbeck, *Equal Treatment: Its Constitutional Status*, *in* EQUAL TREATMENT OF RELIGION IN A PLURALIST SOCIETY 9, 13 (Stephen V. Monsma & J. Christopher Soper eds., 1998) (arguing that "with the arrival of the New Deal and the explosive growth in the regulatory/welfare state, enforcing strict separation confined religious education and charitable ministries to ever smaller and smaller enclaves" and that to "increasing numbers of Americans, strict separation present[ed] a cruel choice between suffering funding discrimination or forced secularization"); Michael W. McConnell, *Five Reasons to Reject the Claim that Religious Arguments Should Be Excluded from Democratic Deliberation*, 1999 UTAH L. REV. 639, 640–41 ("In these many areas of overlap, the idea of 'separation between church and state' is either meaningless, or (worse) is a prescription for secularization of areas of life that are properly pluralistic.").

2. *See* MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 257 (2007) (asserting that the Establishment Clause evidences the Founders' rational fear "of the mischief that can be fostered by religious institutions, particularly when they are sovereign" and that "[t]he history leading up to the founding of the United States and the Protestant cast of governance theories at the time undermine such attempts to treat religion as though it is not a dangerous and potent social force that must be limited, just as the state must be"); Steven G. Gey, *Life After the Establishment Clause*, 110 W. VA. L. REV. 1, 50 (2007) (stating that "every time particular religious factions have attempted to advance their own cause by circumventing our traditional national antipathy toward the joinder of church and state, the attempts have undermined religious liberty, increased the country's political divisions along religious lines, and even led to sectarian violence"); *cf.* BILL PRESS, HOW THE REPUBLICANS STOLE CHRISTMAS: THE REPUBLICAN PARTY'S DECLARED MONOPOLY ON RELIGION AND WHAT DEMOCRATS CAN DO TO TAKE IT BACK 71–72 (2005) (postulating that the United States is a secular nation but not a nation without values and arguing that the segregation of church and state actually allows America to be "the most religious nation on earth").

principles and doctrines intended to strike the appropriate balance between religion and the state.

This emphasis on the Supreme Court and its doctrinal formulations and decisions is understandable. The Constitution requires nonestablishment and protects free exercise.[3] And the Court has, since the advent of the modern religion clauses, been called on to mediate the relationship between church and state and has done so energetically at times.

Nevertheless, this Article contends that the Court's role in maintaining the norm of nonestablishment is significantly overstated. Despite the public attention that has greeted the Court's decisions on school prayer, religious school funding, and religious displays, the Court mostly avoids enforcing the core tenets of its stated Establishment Clause doctrine or simply does not apply it to a significant array of conduct that occurs at the intersection of religion and government. In the debates over the Court's Establishment Clause doctrine and its role in the religious culture wars, there is a lot of heat and light but—it turns out—relatively little fire. What the Court does is much less significant than what the Court does not do.

This Article argues (1) that a pervasive feature of the Court's Establishment Clause jurisprudence is that the Court's stated doctrine is underenforced[4] or is irrelevant to a whole range of arguably pertinent conduct; (2) there are some legitimate reasons for this judicial underenforcement or irrelevance; and (3) to the extent the Court is capable of enforcing its stated nonestablishment principles, it can only do so indirectly by managing establishment in the political/legal culture that exists beyond constitutional law. How the Court does or fails to do (3) is the main subject of this Article.

I begin by describing the significant areas of interaction between religion and the state that appear to be mostly unregulated by Establishment Clause doctrine.[5] For example, the Court's doctrine requires that laws be justified by a predominantly secular purpose. But in practice, the Court is not prepared to examine the actual intent of lawmakers. The Court, thus, does not prevent legislatures from adopting laws on the basis that those laws are required by God or a particular religious belief. Nor is the Court prepared to regulate nonlegislative government policies that are predominantly motivated in actuality by religious belief. The Court does not prevent religious organizations and activists from lobbying for such laws or policies on the basis that they are required by God and does not, except indirectly, pre-

3. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

4. *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1212–13 (1978) (describing the concept of underenforcement).

5. This exercise is partly inspired by Fred Schauer's argument that the Court's agenda is often tangential to the nation's. *See* Frederick Schauer, *The Supreme Court, 2005 Term—Foreword: The Court's Agenda—And the Nation's*, 120 HARV. L. REV. 4, 34 (2006).

vent legislators from voting for legislation because of their own individual commitments to codifying God's laws. Nor does the Court regulate the de facto exercise of power by particular religious groups, even if that exercise of power results in laws or policies that are coextensive with the tenets of a specific religion. In the political sphere, the doctrinal Establishment Clause is simply not relevant.

Moreover, except in limited formal settings, the Court does little to prevent religious endorsements despite a requirement that government officials not engage in expressions that indicate that one particular religion or religious worldview is a special favorite of the state. The Court does not prevent legislators or other government officials from making statements affirming the particular religious (often Judeo-Christian) nature of the country, from giving reasons grounded in a particular favored religion for their actions, from explicitly linking prayer and public policy, or from endorsing a particular set of explicitly religiously derived moral beliefs. Nor does the Court prevent politicians or government officials from making alliances with specific churches or religious groups or explicitly endorsing their message or asking them for financial or other assistance.

Along all these dimensions, the rules governing the relationship between church and state are a matter of constitutional culture and not a matter of constitutional doctrine. Nevertheless, normative constitutional scholarship sometimes reads as if the doctrinal category of nonestablishment was coextensive with the political category of nonestablishment. At the most, legal scholarship tends to focus on the former or the latter but not on the relationship between the two.[6] To the extent that the domain of government acts to which the doctrinal Establishment Clause is simply inapplicable is large, this is a mistake.

This Article argues that the existence of a significant domain in which the Establishment Clause is judicially inoperative should inform the Court's substantive approach to those areas in which the Establishment Clause is operative. The goal is to develop an account of the relationship between the

6. Debates about the legitimacy of religiously based arguments in the public square, for example, normally assume that constitutional restraints will not be judicially enforced except indirectly. *See, e.g.*, MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES 44–49 (1997) (assuming a previously argued conclusion that constitutional restraints lack direct judicial enforcement while arguing the moral justifiability of religiously based arguments in public debate); Richard Rorty, *Religion as Conversation-Stopper*, 3 COMMON KNOWLEDGE 1–6 (1994) (assuming that other participants in public discourse, rather than the courts, should determine the permissibility of religious argument in that discourse); Richard John Neuhaus, *A New Order of Religious Freedom*, 60 GEO. WASH. L. REV. 620, 621 (1992) ("There is no legal or constitutional question about the admission of religion to the public square . . . . Religion is merely the public opinion of those citizens who are religious."). Neuhaus's article was part of a *George Washington Law Review* symposium devoted to determining the contours of religious–political discourse. Symposium, *Religion in Public Life: Access, Accommodation, and Accountability*, 60 GEO. WASH. L. REV. 599 (1992).

constitutional doctrine of nonestablishment and the constitutional culture of nonestablishment. By focusing not on what the Court is doing but on what it concertedly seeks not to do, my hope is to illuminate the relationship between law and politics in the church–state context. That relationship is particularly fraught in an era in which religious–political movements have become increasingly ascendant and religion-inflected conflicts have attained national prominence.[7]

This Article has three parts. Part I describes the areas where religion and the state intersect but in which Establishment Clause doctrine appears to be inoperative or underenforced. Part II seeks to explain the absence of a serious judicial presence in these realms. Part III suggests a doctrinal approach to Establishment Clause disputes that is candid about these judicial limits. An important goal for such an approach is to provide criteria for determining when managing establishment in the wider public sphere may require *not* regulating establishment in the legal sphere. Throughout I discuss a number of recent Establishment Clause cases, paying special attention to disputes about the Ten Commandments, the Pledge of Allegiance, and faith-based initiatives.

The larger question (to which I offer only a tentative answer) is: how does and should the Supreme Court help maintain the constitutional settlement of nonestablishment? My view is that the Court's doctrinal role is quite limited, though its institutional role may be more robust. But this claim relies on accounts of how the Court's decisions affect the political and constitutional culture, and I do not pretend that these accounts are at all definitive. Focusing on the relationship between the constitutional doctrine of nonestablishment and the constitutional culture of nonestablishment, however, leads to a more accurate understanding of the Establishment Clause, for it reminds us of the Court's (and the Clause's) limitations.

I. Establishment Clause Underenforcement

My first claim is that, since the advent of its modern Establishment Clause jurisprudence, the Supreme Court has regularly underenforced[8] its

7. The recent controversy over the building of an Islamic community center two blocks from the 9/11 site is only the most recent example. *See* Sheryl Gay Stolberg, *Obama Strongly Backs Islam Center Near 9/11 Site*, N.Y. TIMES, Aug. 13, 2010 at A1 ("The community center proposal has led to a national uproar over Islam, 9/11 and freedom of religion during a hotly contested midterm election season."). Notably, even many of those who oppose the center have admitted that it would be unconstitutional to prevent it. *See, e.g.*, E-mail from Howard Dean to Glenn Greenwald (Aug. 17, 2010), *in* Glenn Greenwald, *Howard Dean: "Mosque" Should Move*, SALON (Aug. 18, 2010), http://www.salon.com/news/opinion/glenn_greenwald/2010/08/18/dean ("[N]o one who understands the American Constitution can reasonably doubt the right of the builders to build."). The fact that it would be unconstitutional to prevent the building has not translated into political tolerance.

8. This term is from Larry Sager's seminal article, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, though Sager's use of it is more formal than mine here. *See*

stated Establishment Clause principles. We see this across a number of principles and in a number of constitutional contexts. First, despite a doctrinal requirement that laws have a legitimate "secular legislative purpose,"[9] the Court avoids inquiring too deeply into the *actual* provenance of legislative acts. Even if a law or government act is *actually* motivated by a particular religious constituency or religious belief, the Court will uphold it if it can be justified with reference to a plausible secular criteria.[10] Thus, across a whole range of government policy making, religiously motivated decisions can be made, and the Court has little to say about it.

Second, despite a doctrinal requirement that government officials not engage in acts that "endorse"[11] a particular religion or religious perspective, the Court does relatively little to prevent public officials from specifically advocating a particular religious worldview, asserting that such a belief system is a prerequisite for membership in the political community, engaging in sectarian prayer as part of civic ritual, or specifically endorsing the religious claims of religious people.[12] Though the Court has regulated some formal categories of government speech in order to limit government endorsement, government officials' religiously based rhetoric appears to be mostly immune to the doctrinally enforced nonendorsement principle.[13]

Third, despite the Court's adoption of a principle of "no entanglement" between religion and government,[14] the Court does not regulate religious–political alliances.[15] While the Court has something to say about government acts that have explicit religious content, it has little to say about religiously infused and inspired policy agendas that can ultimately be justified without reference to religion. Thus, many of the central policy disputes that are currently most divisive along religious lines—abortion, contraception, stem-cell research, same-sex marriage, end-of-life care—cannot be understood through the constitutional lens of nonestablishment despite their deeply religious character. This domain of inapplicability is significant, especially so when seen from the perspective of laypersons, who regularly invoke the constitu-

---

Sager, *supra* note 4, at 1213. In some cases, I will be talking about formal underenforcement, i.e., situations in which the Court's decisions regarding the contours of the constitutional norm are not coextensive with the norm. In such cases, the norm is still legally binding on other constitutional actors. In other cases, I use the term to describe how the Establishment Clause norm is subservient to competing constitutional norms. In these instances, one might not describe the Establishment Clause norm as being legally binding on other constitutional actors because those actors are also bound by the competing constitutional norm.

9. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

10. *See infra* subpart I(A).

11. Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 592–94 (1989).

12. *See infra* subpart I(B).

13. PERRY, *supra* note 6, at 32.

14. *Lemon*, 403 U.S. at 613 (citing Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

15. *See infra* subpart I(C).

tional principle of nonestablishment to protest the influence of religiously motivated persons and parties in making government policy.[16]

My purpose here is not to argue for or against the Court's stated Establishment Clause doctrines but rather to describe how those doctrines are wholly unapplied to large swaths of conduct that occur at the intersection of government and religion. I think this domain of underenforcement is significant and cuts across a number of the Court's stated Establishment Clause doctrines. I have mentioned the secular purpose requirement, the nonendorsement principle, and the no entanglement requirement. In addition, much government conduct that goes unregulated appears to violate the principle of neutrality, which is said to require that the government not favor one religion over another or to favor religion over nonreligion. I will also argue that the Court does not attempt to regulate government acts that arguably violate the Court's stated principle of noncoercion, which requires that government not coerce citizens to engage in acts dictated by a particular religious code.

A. Religiously Based Lawmaking

At the core of Establishment Clause underenforcement is the Court's disinclination to police substantive laws or policies that are based in significant part on particular religious beliefs and motivated by a particular religious constituency. The doctrinal Establishment Clause appears to prevent the government from adopting laws or policies on the basis that those laws are required by God, as God's laws are understood by a particular religious group or groups.[17] But in practice, Establishment Clause doctrine has little to say about government actions that are *actually* motivated by religious constituencies and *actually* based in a particular religious code so long as the

16. *See* MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 3–8 (2008) (collecting religiously motivated political rhetoric and acts that have generated controversy in the political culture); *cf.* John C. Danforth, *In the Name of Politics*, N.Y. TIMES, Mar. 30, 2005, at A17 (lamenting the transformation of the Republican Party "into the political arm of conservative Christians"); Andrew Sullivan, *Terri Is the Dying Martyr the Republican Right Can Use*, SUNDAY TIMES, Mar. 27, 2005, § 1, at 15 (suggesting that President George W. Bush and the Republican Party were interested in the Terri Schiavo case as a means to energize religious zealots in preparation for midterm elections and in derogation of core Republican ideals).

17. *See* PERRY, *supra* note 6, at 14–16 ("[T]he nonestablishment norm forbids government to take any action based on the view that one or more religious tenets are closer to the truth or more authentically American or otherwise better than one or more competing religious or nonreligious tenets."). *But see* Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373, 381 (1992) ("Questions of morality, of right conduct, of proper treatment of our fellow humans, are questions to which both church and state have historically spoken. They are questions within the jurisdiction of both."); Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Does Not Violate the Establishment Clause*, 42 WM. & MARY L. REV. 663, 679–80 (2001) (recanting his earlier position and adopting the view that religiously based political choices do not violate the Establishment Clause).

government action can be justified with reference to some plausible secular criteria.[18]

That the nonestablishment norm prevents government from adopting laws predominantly on the basis that they are required by God or the religious tenets of some particular faith seems axiomatic, but it requires some defense. Some commentators have argued that laws that can be justified only on the grounds that they are compelled by God or some religious belief do not violate the nonestablishment norm unless those laws compel individuals to engage in acts of religious worship or exercise.[19] Nonestablishment, on this account, merely requires that the government not coerce individuals to practice a particular religion.[20] It does not prevent the government from adopting laws that originate in and are justified by a specific religious belief, including a belief that God demands their adoption.

This narrow interpretation of the nonestablishment norm is not current doctrine, however. Moreover, it requires distinguishing between those acts that compel worship or religious exercise and those that do not. Does a law requiring women to wear veils compel worship or does it simply regulate the day-to-day affairs of women?[21] Do dietary restrictions[22] or laws that limit work on the Sabbath compel a form of worship?[23] What about laws dictating how one can obtain a divorce, describing the appropriate standard for negligence, or the remedies for libel?

The majority of laws that are derived from religious sources are arguably laws that have little to do with acts of worship or religious ritual. For example, Jewish law regulates commercial and domestic relations, foreign affairs, and relations between the sexes; it provides a criminal code and dictates criminal penalties; sets forth a court system and procedural rules; and

18. PERRY, *supra* note 6, at 34.

19. *See, e.g.*, McConnell, *supra* note 1, at 656–57 (stating that "[o]ne false view of separation is the view that religious ideas must not serve as rationales for public policy" and arguing that the "principle of secular rationale" rests on "inaccurate stereotypes and questionable epistemological premises"); Michael Stokes Paulsen, Lemon *Is Dead*, 43 CASE W. RES. L. REV. 795, 803 (1993) ("[I]f a statute motivated by religion, or even intended to advance religion, is neutral in its effects on freedom of religious exercise and nonexercise, the Establishment Clause supplies no justification for outlawing it.").

20. *See* Paulsen, *supra* note 19, at 797 ("[T]he coercion principle, properly understood, is the best single test of when government action violates the Establishment Clause.").

21. For a discussion of French laws *outlawing* the wearing of veils, see generally Steven G. Gey, *Free Will, Religious Liberty, and a Partial Defense of the French Approach to Religious Expression in Public Schools*, 42 HOUS. L. REV. 1 (2005).

22. *See* Commack Self-Service Kosher Meats, Inc. v. Weiss, 294 F.3d 415, 432 (2d Cir. 2002) (striking down New York's kosher fraud laws).

23. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 453 (1961) (upholding Maryland's Sunday closing laws).

regulates weights and measures, money, and agricultural practices.[24] Under a narrow interpretation of the nonestablishment norm, the state could adopt one or all of these rules and regulations on the grounds that Jewish law demands them so long as the rules do not require individuals to engage in some form of religious ritual or worship.[25] A legislature could state explicitly that it is adopting wholesale the criminal code of the Hebrew scriptures or a judge could adopt a common law rule on the basis that it is required by the Gospels, and these acts would be immune from Establishment Clause challenge.[26]

Such a reading of the Establishment Clause would be anomalous, for while it would bar coerced religious ritual, it would permit coerced religious law. For this reason, courts have repeatedly asserted that laws that violate the nonestablishment principle are not just those that compel individuals to engage in a particular religious practice but also those that the state adopts because they are mandated by God or a religious belief system, that is, those laws that are not justified (at least in part) on nonreligious grounds. The category of impermissive lawmaking is thus in part attitudinal. A law that prohibits the charging of excessive rates of interest, that prohibits murder, or that mandates that the payment of taxes might very well have a religious

---

24. *See generally* GERSION APPEL, CONCISE CODE OF JEWISH LAW (1989); MENACHEM ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES (Bernard Auerbach & Melvin J. Sykes, trans.) (1994).

25. Commentators can be unclear about this distinction. For example, Douglas Laycock rejects the secular purpose requirement, arguing that exclusively religious claims can properly undergird laws governing "morality, . . . right conduct . . . , [and] proper treatment of our fellow humans." Laycock, *supra* note 17, at 381. But he also states that it is illegitimate for a religion to "use . . . the instruments of government . . . to directly impose their belief on others." *Id.* at 374–75. This may indicate a distinction between religious exercise and other kinds of laws, with the former receiving more protection than the latter. Commentators might also draw distinctions between citizens' reasons for voting and legislators' or judges' reasons for creating law—giving citizens more leeway than legislators and legislators more leeway than judges to act on solely religious reasons. *Cf.* KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 231, 236–39 (1988). Moreover, some might draw a distinction between authoritative religious justifications and more generic ones, that is, between justifications based in the primacy of a particular religious code and justifications based in general claims about what God or a religiously based morality might require. *Id.* at 35 (explaining that "the tightness of connection between the religious source of guidance and the conclusion about a particular issue can vary considerably").

26. For a somewhat oblique discussion of such a possibility, see Steven Smith, *Legal Discourse and the* De Facto *Disestablishment*, 81 MARQ. L. REV. 203, 217–18 (1998). It is not clear what is left of disestablishment if religious law can be an appropriate basis for secular law. But perhaps a distinction can be drawn between reasoning from religion (or religious principles) and treating them as authoritative. In *Legal Discourse*, Smith expresses wariness of the legal positivism that would support such a distinction. *Id.* at 218 ("This fact likely reflects the convergence of a questionable restriction on reliance of religious beliefs with a dubious legal positivism, which in combination may help account for the virtual absence of religious perspectives in legal discourse."). But Smith proceeds to reason from religious (or moral) principles in making an argument about the appropriate principle of damages in a tort case. *Id.* at 225. Contrast that with the answer given by a student in my property class when asked what the appropriate rule in a nuisance case should be. She replied that she would determine what Canon Law required and adopt that.

provenance as well as a nonreligious one. But justifying those laws solely on religious grounds without a plausible secular basis violates a norm of nonestablishment.

This secular purpose requirement has been stated in various ways, and its judicial application has been quite uneven. Nevertheless, the Supreme Court continues to reaffirm this view of nonestablishment: the predominant reason or motivation for a law's adoption has to be secular. Laws cannot be adopted in large part because they are compelled by a particular religion or religious belief system. As the Court held in *Lemon v. Kurtzman*,[27] laws must have a "secular legislative purpose" to be legitimate.[28] This is the first prong of the *Lemon* test, which continues to be battered but remains unvanquished.[29] *Lemon* requires a particular intent—that the government not act solely on the basis of religious doctrine or belief.[30] A law that cannot be justified by "considerations of state policy other than the religious views of some of its citizens"[31] is invalid under this test. Government actions that are animated solely by a religious purpose—for example, legislation that is adopted because God or some religious belief system requires it—are unconstitutional under the *Lemon* test.[32]

But it turns out that the Court normally avoids looking too deeply at the *actual* legislative motivation for a law to determine whether it has a legitimate secular purpose. Whether one votes to criminalize homosexual conduct because one believes that homosexuality is an abomination before God or whether one does so for some nonreligious reason is not easily susceptible (except in unusual circumstances) to judicial inquiry. And secular justifications for laws, i.e., justifications based on public welfare or individual dignity or some other justifications that do not invoke religious law, are relatively easy to conjure. The result is that across a whole range of government policy

27. 403 U.S. 602 (1971).

28. *Id.* at 612; *see also, e.g.*, Epperson v. Arkansas, 393 U.S. 97, 109 (1968) (striking down a state law that prevented the teaching of evolution because the state had offered no secular justification for its existence).

29. There are numerous critiques of the *Lemon* test and in particular of the "secular purpose" requirement. For a summary, see Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 467–72, and see also STEVEN G. GEY, RELIGION AND THE STATE 219–40 (2d ed. 2006) for a good discussion.

30. 403 U.S. at 612. Even in *Lemon*, it is worth noting, the Court held that the Pennsylvania and Rhode Island laws that dispensed financial aid to nonpublic schools, including "church-related" institutions, did not have an impermissible purpose. *Id.* at 613. The Court found "no basis for a conclusion that the legislative intent was to advance religion" and nothing to undermine the stated legislative purpose to "enhance the quality of the secular education in all schools covered by the compulsory attendance laws." *Id.* Instead, the aid programs were found to violate the Establishment Clause under the third, "excessive entanglement," prong of the *Lemon* test. *Id.* at 614–25.

31. *Epperson*, 393 U.S. at 107–08.

32. *See* Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 88 (2002) (asserting that the secular purpose test "bar[s] the government from enacting laws whose only justification is based on the tenets of some religion").

making, religiously infused or motivated policy decisions can be made, and as a practical matter, the Establishment Clause does not address them.[33]

The Court's reticence to examine the *actual* provenance of government legislation is reflected in the fact that the secular purpose prong of the *Lemon* test is so underused. As Justice Souter recently acknowledged, the Court has invalidated a government act because it violated the "secular purpose" requirement only five times since *Lemon*.[34] Most recently, it did so in *McCreary County v. ACLU of Kentucky*,[35] in which the Court struck down a posting of the Ten Commandments in a Kentucky county courthouse on the grounds that the county could provide no secular justification for it.[36]

At first glance, *McCreary County* seems to indicate the Court's willingness to look carefully at legislative motive when assessing government acts under the Establishment Clause. The Court reviewed the legislative and executive history of the Kentucky display, which included statements by county officials that the display was intended to reflect the civil laws' foundation in the Ten Commandments.[37] The Court cited the fact that a religious official accompanied the county executive when the display was hung, that the county had made references to Jesus Christ in its resolutions supporting the Ten Commandments, and that the county had declared that one of the purposes of the display was to "publicly acknowledge God as the source of America's strength and direction."[38] Moreover, the majority explicitly rejected the county's argument that the Court should avoid examining legislative motives or accept a secular one offered in the course of litigation.[39] Justice Souter's majority opinion repeatedly defended "secular purpose" as a test with teeth, one that is not met when legislatures offer post hoc rationalizations for acts that "objective observer[s]" would easily recognize as animated by religious purposes.[40]

---

33. *See* Michael J. Perry, *Religion in Politics*, 29 U.C. DAVIS L. REV. 729, 737 (1996) (noting the "'underenforcement' of the full ideal of nonestablishment").

34. McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 859 & n.9 (2005). In *McCreary County*, Justice Souter lists four cases: *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 308–09 (2000); *Edwards v. Aguillard*, 482 U.S. 578, 586–93 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 56–61 (1985); and *Stone v. Graham*, 449 U.S. 39, 41 (1980). *McCreary Cnty.*, 545 U.S. at 859 n.9. *McCreary County* makes the fifth. In *Epperson*, a state law was invalidated for lacking a secular purpose, but that decision took place before *Lemon*. *Epperson*, 393 U.S. at 107–08; *see also* Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51, 59 n.46 (2007) (listing all six Supreme Court cases invalidating government actions for lack of a secular purpose).

35. 545 U.S. at 844.

36. *Id.* at 881.

37. *Id.* at 850–58.

38. *Id.* at 851, 853 (internal quotation marks omitted).

39. *Id.* at 859–65.

40. *Id.* at 864 ("[A]lthough a legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective."); *id.* at 865 n.13 (rejecting the dissent's easier formulation of the test as having "no real bite"); *id.* at 866 n.14 (maintaining that a reasonable observer can generally identify actions taken

For all its bluster, however, *McCreary County* mostly signals the weakness of the secular purpose requirement. The cases in which the Court has enforced the secular purpose prong all involve some kind of religious practice or doctrine: the Court has struck down legislation on those grounds in two school-prayer cases,[41] two Ten Commandments cases,[42] and one creationism case.[43] These cases involve patently religious activities—prayer or specific religion-based doctrines—in which the religious purpose was obvious on the face of the government act. The Court has never struck down a substantive law that did not involve a specific religious practice or expression of religious dogma on the grounds that it was animated by an impermissible religious motive.[44]

Indeed, the Court has carefully avoided putting the state to the burden of providing secular justifications for nonreligion-specific laws even if those laws appear to have a religious provenance or coincide with the tenets of a particular religion. Abortion is the most obvious example.[45] In *Harris v. McRae*,[46] the Court rejected an Establishment Clause challenge to restrictions on abortion funding, holding that it would not assume that religion is being advanced because a law "happens to coincide or harmonize with the tenets of some or all religions."[47] And, as Justice Scalia pointed out in his dissent in

---

for sectarian reasons); *id.* at 874 ("[A]n implausible claim that governmental purpose has changed should not carry the day in a court of law . . . .").

41. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308–09 (2000); Wallace v. Jaffree, 472 U.S. 38, 56–61 (1985).

42. *McCreary Cnty.*, 545 U.S. at 881; Stone v. Graham, 449 U.S. 39, 41 (1980).

43. Edwards v. Aguillard, 482 U.S. 578, 586–93 (1987).

44. *But cf.* Lawrence v. Texas, 539 U.S. 558, 571(2003) (rejecting justifications for sodomy laws based in religious claims that homosexuality is immoral).

45. Ronald Dworkin has made a sustained argument that abortion is properly understood within the framework of the First Amendment. *E.g.*, RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE CONSTITUTION 104–10 (1996); RONALD DWORKIN, LIFE'S DOMINION 175 (1993). Laurence Tribe also initially made the argument that abortion restrictions violated the secular purpose requirement. Laurence H. Tribe, *The Supreme Court 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 18–25 (1973). He backed away from that view, however. LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 928 (1978). Mark Tushnet suggests that issues like abortion might be called "religion-sensitive" and argues that because of their nature courts should be involved in assessing the proper balance of interests. Mark V. Tushnet, *Reflections on the Role of Purpose in the Jurisprudence of the Religion Clause*, 27 WM. & MARY L. REV. 997, 1003–04 & n.18 (1986).

46. 488 U.S. 297 (1980).

47. *Id.* at 319 (quoting McGowan v. Maryland, 366 U.S. 420, 442 (1961)) (internal quotation marks omitted). However, Justice Stevens has at least twice provided a counter position:

> In short, there is no reasonable ground for believing that Nancy Beth Cruzan has any personal interest in the perpetuation of what the State has decided is her life. As I have already suggested, it would be possible to hypothesize such an interest on the basis of theological or philosophical conjecture. But even to posit such a basis for the State's action is to condemn it. It is not within the province of secular government to circumscribe the liberties of the people by regulations designed wholly for the purpose of establishing a sectarian definition of life.

Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 350 (1990) (Stevens, J., dissenting).

Edwards v. Aguillard,[48] a 1987 creationism case, the Court's claim that legislation is invalid if it is animated solely by religious belief is an anomaly: "We surely would not strike down a law providing money to feed the hungry or shelter the homeless if it could be demonstrated that, but for the religious beliefs of the legislators, the funds would not have been approved."[49]

Justice Scalia is certainly correct that the Court does not ordinarily plumb the psyches of legislators to determine if they were motivated by God or religious belief when they voted for a particular government policy or set of policies. The Court only enforces the secular purpose requirement in those circumstances when the law mandates a particular religious practice or dogma; that is, when the intent is clear on the face of the law. But this means that important elements of a religious or church-based policy agenda are mostly immune to Establishment Clause challenge. Even if laws that provide monies to feed the hungry, criminalize abortion, or prevent stem-cell research are demanded by religious constituencies and adopted by legislators who believe that they are doing God's work, the Court will avoid applying the secular purpose requirement. The Court will either accept the secular justification provided by legislators or provide a secular justification of its own.[50]

The Court signaled as much in *McCreary County*, observing that a law initially animated by a religious purpose could become clothed with a secular purpose over time and that Ten Commandments displays without a legislative history manifesting a religious purpose could be deemed constitutional in some circumstances.[51] Indeed, the Court's analysis in *McCreary County*, while employing the rhetoric of secular purpose, was mostly about whether the history of the adoption of the display constituted an endorsement of religion. That is, the analysis turned for the most part on whether a

---

> This conclusion [that life begins at conception] does not, and could not, rest on the fact that the statement happens to coincide with the tenets of certain religions, or on the fact that the legislators who voted to enact it may have been motivated by religious considerations. Rather, it rests on the fact that the preamble, an unequivocal endorsement of a religious tenet of some but by no means all Christian faiths, serves no identifiable secular purpose. That fact alone compels a conclusion that the statute violates the Establishment Clause.

Webster v. Reprod. Health Servs., 492 U.S. 490, 566–67 (1989) (Stevens, J., concurring in part and dissenting in part) (internal citations omitted); *see also* Bowers v. Hardwick, 478 U.S. 186, 211–12 (1986) (Blackmun, J., dissenting) ("The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine. . . . A state can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus."), *overruled by Lawrence*, 539 U.S. at 558.

48. 482 U.S. at 578.

49. *Id.* at 615 (Scalia, J., dissenting).

50. *But cf. Lawrence*, 539 U.S. at 571 ("The condemnation [of homosexual conduct] has been shaped by religious beliefs . . . . The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.").

51. McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 874 (2005).

reasonable person observing the county engaged in the adoption of the display could *believe* that the resulting law had a secular purpose. In other words, the Court, as Justice Scalia noted in dissent, was not concerned with "the *actual purpose* of government action, but the 'purpose apparent from government action.'"[52]

Justice Scalia's primary target—in his *McCreary County* dissent and elsewhere—has been the validity of the secular purpose requirement. He would abandon it altogether[53]—a view I will consider in Part III. For now, it is worth observing that Justice Scalia is correct that the Court would not invalidate a law that provided money for the homeless because it was predominantly motivated by the belief that God required it. Though the Court has held that the Establishment Clause prevents legislators from adopting laws on the basis that they are required by God or a particular religious belief system, the Court does not fully enforce that norm. And it is to this lack of enforcement that Justice Scalia's critique points.[54]

The Court will only invoke secular purpose when the law is religious on its face—prayer in school, creationism, and the Ten Commandments—and will avoid doing so if the law is not, even if it is *actually* animated by a religious purpose. At the end of the day then, secular purpose in the Court's parlance does not ultimately mean that laws cannot be adopted on the basis that they are required by God or a particular religious code. Secular purpose instead means that laws adopted on the basis that they are required by God cannot *look too much* like they were adopted because they are required by God.[55] The nonestablishment norm is thus applied indirectly: laws cannot *communicate* a message that they are somehow required by a religious belief system even if they are.[56]

---

52. *Id.* at 900–01 (Scalia, J., dissenting) (quoting *id.* at 860 (majority opinion)).

53. *Id.* at 902–03 (Scalia, J., dissenting).

54. *See* Gey, *supra* note 29, at 470. Gey notes:

> Contrary to the usual criticism of *Lemon*, the problem is not that the terms of *Lemon* mean too little; the problem is that the terms of *Lemon* mean too much. An honest application of the *Lemon* test would require a far more rigorous separation of church and state than a majority of the current Supreme Court is willing to enforce. This does not mean the test is flawed. Rather, the separation principle that gives the test meaning does not have the support necessary to provide courts applying *Lemon* with a consistent orientation.

Id.

55. *See* Edwards v. Aguillard, 482 U.S. 578, 615–16 (1987) (Scalia, J., dissenting) (noting that instances where legislators simply acted on their religious convictions or where a law merely coincided or harmonized with certain religious tenets did not violate the *Lemon* test); Koppelman, *supra* note 32, at 113–14 (arguing that the secular purpose prong of the *Lemon* test cannot always be satisfied by a mere rubber-stamp secular purpose because some legislation will be so clearly religious on its face that any purported secular purpose will be undermined).

56. *See McCreary Cnty.*, 545 U.S. at 863 ("A secret motive stirs up no strife and does nothing to make outsiders of nonadherents, and it suffices to wait and see whether such government action turns out to have (as it may even be likely to have) the illegitimate effect of advancing religion."); *see also* Clayton v. Place, 884 F.2d 376, 381 (8th Cir. 1989) (reversing district court's determination

B. *Religion-Endorsing Rhetoric and Observances*

Whether the norm of nonestablishment is or should be primarily concerned with the communicative aspects of government action is subject to some debate among Religion Clause scholars.[57] But even if one maintains that the primary concern of the Establishment Clause should be to limit government communication of messages of religious endorsement, one would be disappointed with the Court's jurisprudence. Expressive violations of the norm of nonestablishment also tend to be significantly underenforced by the Court. The Court's principles of nonendorsement and neutrality require that the government not take any position favoring or disfavoring religion or endorsing a particular religious view. Nevertheless, the Court, both through its substantive Establishment Clause doctrine and its doctrines of judicial avoidance, rarely attempts to regulate large swaths of government conduct and rhetoric that do just that.

The domain of expressive governmental acts that the Court does not attempt to regulate is quite significant. The doctrinal Establishment Clause does not appear to prevent a candidate for Congress from declaring that the United States is a Christian nation or, once she is elected, from declaring that Muslims are infidels. The judicially enforced Establishment Clause does not appear to prevent the President of the United States from asserting that the United States is a country based on a specific religion or particular religious principles. Government officials' rhetorical claims that they are inspired to public office by God and for the purposes of doing God's will or that they believe certain conduct should be illegal because the Bible requires it are essentially outside the reach of the Establishment Clause.[58]

That this sphere of official activity goes mostly unregulated is striking in light of the Court's preoccupation with government endorsements of religion: the Court has repeatedly asserted that government-sponsored expressive activities cannot communicate the government's endorsement of a particular religion or religion in general.[59] Of course, endorsement is a fuzzy

---

that school's "no-dancing" rule was adopted for religious reasons, despite the district court's finding that the rule did not have an articulated secular purpose).

57. *See* Koppelman, *supra* note 32, at 113–16 (explaining that a law's legitimacy under the secular purpose prong should be decided in light of how that law can be reasonably perceived by the general culture). For an explanation of the Court's endorsement doctrine, see *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 592–621 (1989).

58. *Cf.* Robert J. Lipkin, *Reconstructing the Public Square*, 24 CARDOZO L. REV. 2025, 2062 (2003) ("The Establishment Clause requires only the final stage of lawmaking to be free from religious reasons, not debates in the media, school board meetings, and other non-lawmaking contexts of political justification."). For discussion of the state action issue in Establishment Clause doctrine, see Richard J. Ansson, Jr., *Drawing Lines in the Shifting Sand: Where Should the Establishment Wall Stand? Recent Developments in Establishment Clause Theory: Accommodation, State Action, The Public Forum, and Private Religious Speech*, 8 TEMP. POL. & CIV. RTS. L. REV. 1, 6–8 (1998).

59. *See, e.g.*, *McCreary Cnty.*, 545 U.S. at 881 (finding that displaying the Ten Commandments in a Kentucky county courthouse served a predominantly religious purpose); *Cnty. of Allegheny*,

concept, and there is a great deal of disagreement over what the principle requires.[60] A great deal turns on what the "reasonable observer" (as interpreted by the Justices) would think about a particular religious display or government expression.

That being said, one can still recognize significant gaps in enforcement—at least of endorsement's core idea. For example, under current doctrine, the Court would likely find an Establishment Clause violation if an agency or an office of government were to assert that "America is a Christian Nation" in its official publications or on government documents, on the theory that such statements constitute an endorsement of religion and violate the principle of government neutrality toward religion. The Court has never sought, however, to adjudicate similar claims of Christian provenance by government officials, who appear to be free to make such assertions while speaking in their official capacities.[61]

---

492 U.S. at 602 (holding that the display of a crèche in a county courthouse expressly endorsed a Christian message).

60. I, along with much of the legal academy, have criticized the Court's endorsement test. *See* Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1875–80 (2004) (criticizing the Court's endorsement jurisprudence for its intrusiveness into "local political authority" and concluding that "the result . . . has been to drain the religious content from patently religious symbols and to reinforce a national standard that is both arbitrarily applied and detached from local social practice").

61. In her book *Liberty of Conscience*, Martha Nussbaum provides several examples of public officials endorsing Christianity or Christian teachings:

> John Ashcroft, former attorney general, regularly asked his staff to sing Christian songs before work began in the morning. . . . Ashcroft characterized America as a "culture that has no king but Jesus." . . . Lt. General William Boykin, a former head of U.S. Army Special Forces who is involved in the search for Osama bin Laden, said in a speech in June 2003 that radical Muslims hate the United States "because we're a Christian nation, because our foundation and roots are Judeo-Christian and the enemy is a guy named Satan." . . . Alan Keyes . . . claimed in a televised debate that voters should choose him because Jesus opposes his opponent, Barack Obama . . . . President Bush has recently endorsed the move to require the teaching of "Intelligent Design" . . . .

NUSSBAUM, *supra* note 16, at 5–6. Former President George W. Bush has also said that he was called by God to run for the presidency. Alan Cooperman, *Openly Religious, to a Point*, WASH. POST, Sept. 16, 2004, at A1. Similarly, politicians throughout the 1990s were outspoken about their religious beliefs and used religious gatherings to promote their political agendas. Steven G. Gey, *The No Religion Zone: Constitutional Limitations on Religious Association in the Public Sphere*, 85 MINN. L. REV. 1885, 1885–86 (2001). Political candidates have asserted "that their God and His teachings define the country's very nature." *Id.* at 1885. For example, then-Mississippi Governor Kirk Fordice proclaimed to the Republican Governor's Convention in 1992 that "the United States of America is a Christian nation." Cathy Young, *GOP's "Christian Nation"*, BOSTON.COM (July 12, 2004), http://www.boston.com/news/globe/editorial_opinion/oped/articles/2004/07/12/gops_christian_nation (internal quotation marks omitted). Similarly, the 2004 Texas Republican Platform includes the statement that "the United States is a Christian nation . . . founded on fundamental Judeo-Christian principles based on the Holy Bible." REPUBLICAN PARTY OF TEXAS, 2004 STATE REPUBLICAN PARTY PLATFORM, at P-8, *available at* http://www.yuricareport.com/GOPorganizations/TexasRPTPlatform2004.pdf. Additionally, several federal statutes in the United States Code and Executive Orders mention God. *See, e.g.*, 10 U.S.C. § 6031(b) (2006) ("[I]t is earnestly recommended to all officers, seamen, and others in the naval service diligently to attend at

Instead, the Court's religious expression decisions tend to regulate categories of speech—prayer in school, religious displays in certain settings, or "official" ongoing government pronouncements, such as displays of the Ten Commandments.[62] This appears to be a response to justiciability concerns. Individual government officials' pronouncements that endorse religion are fleeting and cannot be predictably repeated. And it would be difficult for a plaintiff to bring a case and to obtain a workable remedy for a violation.

But even in cases of official government pronouncements where justiciability concerns seem less dominant, courts often avoid applying the nonendorsement norm. Consider the Court's Establishment Clause standing doctrine. When frequent atheist litigant Michael Newdow challenged the prayer given at the 2001 Presidential Inauguration—during which the Rev. Franklin Graham offered his invocation "in the name of the Father, and of the Son the Lord Jesus Christ, and of the Holy Spirit"[63]—his claim was rebuffed by both the Eastern District of California[64] and the Ninth Circuit for lack of standing.[65] The Ninth Circuit reviewed the lower court's extensive findings *de novo* and, in a surprisingly curt opinion, held that Newdow failed to demonstrate the "sufficiently concrete and specific injury" necessary to sustain a challenge to the inaugural prayer.[66]

Consider also the Court's recent avoidance of the constitutional issue in *Elk Grove Unified School District v. Newdow*[67]—another case brought by Mr. Newdow. Though the Ninth Circuit vindicated Mr. Newdow's claim,[68] the Supreme Court dismissed it on procedural grounds.[69] The Court went out of its way to avoid ruling on the underlying substantive question—whether

---

every performance of the worship of Almighty God."); 31 U.S.C. § 5112(d)(1) (2006) (requiring that coins bear the inscription "In God We Trust"); 36 U.S.C. § 302 (2006) (declaring that the national motto is "In God We Trust"); Exec. Order No. 10,631, 20 Fed. Reg. 6057 (Aug. 17, 1955), *reprinted as amended in* 10 U.S.C. § 802 app. at 860 (2006) (requiring that a tenet of the Code of Conduct for Members of the Armed Forces shall be "I will trust in my God and in the United States of America"). There have also been legislative prayers, e.g., 151 CONG. REC. 14,525 (2005), invocations of God in legislative debates, e.g., 151 CONG. REC. 13,237 (statement of Rep. Turner) ("Mr. Chairman, Jesus Christ is my Lord and Savior."), and inaugural prayers, e.g., 143 CONG. REC. 471 (1997). For an example of a judge praying from the bench, see *Collmer v. Edmondson*, 16 F. App'x 876, 876–77 (10th Cir. 2001). For an example of a state motto that includes God, see *ACLU of Ohio v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289, 291 (6th Cir. 2001). *See generally* LESLIE C. GRIFFIN, LAW AND RELIGION—CASES AND MATERIALS 483–528 (2d ed. 2010) (providing several examples of politicians, including presidents, invoking religion in speeches).

62. *See supra* subpart I(A).

63. Newdow v. Bush, No. CIV S-01-0218 LKK GGH PS, 2001 U.S. Dist. LEXIS 25936, at *4 (E.D. Cal. Dec. 8, 2001).

64. *Id.* at *24–25.

65. Newdow v. Bush, 89 F. App'x 624, 625 (9th Cir. 2004).

66. *Id.*

67. 542 U.S. 1 (2004).

68. Newdow v. U.S. Cong., 292 F.3d 597, 612 (9th Cir. 2002).

69. *Newdow*, 542 U.S. at 5.

the words "under God" in the Pledge of Allegiance violate the Establishment Clause—by holding that Mr. Newdow did not have standing to challenge the recitation at his daughter's school.[70] While Newdow shared physical custody of his daughter, the girl's mother had full legal custody.[71] The Court did not foreclose the possibility that Newdow might have Article III standing but instead avoided the case on prudential standing grounds—holding that reasons of "judicial self-governance" kept the Court from conferring standing on Newdow in federal court when the proper resolution of California family law issues was unclear.[72] Chief Justice Rehnquist, joined by Justices Thomas and O'Connor,[73] wrote separately that Newdow had standing and that his case should be considered and dismissed on its merits.[74]

Newdow is puzzling unless one explains it as an exercise in judicial avoidance, an illustration of Alexander Bickel's "passive virtues."[75] Justice Stevens's standing doctrine is not just novel; it seems wholly out of character. Justice Stevens and the Justices who joined him are normally hostile to government-sponsored religious rhetoric in the public sphere[76] and generally reticent about using standing doctrine to restrict access to the courts.[77] The Ninth Circuit's decision striking down the Pledge, however, had been met by almost uniform public ridicule and political scorn,[78] despite some commentators' views that it represented a principled application of the Court's nonendorsement and neutrality doctrines.[79] For a Justice taking

---

70. *Id.* at 17–18.

71. *Id.* at 9.

72. *Id.* at 12, 17–18.

73. Justice Scalia took no part in the consideration of the *Elk Grove* case. *Id.* at 18.

74. *Id.* (Rehnquist, C.J., concurring in judgment).

75. *See* Alexander M. Bickel, *The Supreme Court 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

76. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 537 (1997) (Stevens, J., concurring) (concluding that a governmental preference for religion, in contrast to "irreligion," is prohibited by the First Amendment); Lee v. Weisman, 505 U.S. 577, 599 (1992) (holding that a school prayer at a graduation ceremony was forbidden by the Establishment Clause of the First Amendment).

77. *See, e.g.*, Hein v. Freedom from Religion Found., 551 U.S. 587, 637 (2007) (Souter, J., dissenting) (concluding that a religious organization had standing to challenge injuries caused by Executive Branch officials); *Lee*, 505 U.S. at 584 (finding it unnecessary to address a parent's standing in a graduation prayer case and deciding the case on the merits); Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 513–14 (1982) (Stevens, J., dissenting) (determining that taxpayer status granted a nonprofit organization standing to challenge the transfer of property from a federal agency to a religious institution).

78. Martin Kasindorf, *Court Rules Pledge of Allegiance Unconstitutional*, USA TODAY (June 26, 2002), http://www.usatoday.com/news/washington/2002/06/26/pledge-of-allegiance.htm#more.

79. *See* Sanford Levinson, *Assessing the Supreme Court's Current Caseload: A Question of Law or Politics?*, 119 YALE L.J. POCKET PART 99, 109 (2010) ("Perhaps the best recent example of a decision that can be explained only on political grounds was the Court's dismissal, on spurious 'standing' grounds, of a perfectly correct argument that would have forced them to sustain, just before the 2004 presidential election, the Ninth Circuit's *Newdow* holding . . . ."); Philip N. Yannella, *Stuck in the Web of Formalism: Why Reversing the Ninth Circuit's Ruling on the Pledge*

those principles seriously, it might be difficult to overturn the Ninth Circuit: the words "under God" in the Pledge contravene the letter, and arguably the spirit, of the neutrality and endorsement principles.[80] The dissenters' eagerness to reach the merits and the majority's eagerness to avoid them indicates a Court using procedural doctrines to avoid making constitutional decisions that might be premature or politically impracticable.

The failure of the Supreme Court to reach the substance of Newdow's claim is not an exception, however. Rather, it is a high-profile example of the Court's unwillingness to police official statements or government ceremonies that would otherwise be susceptible to the Court's stated Establishment Clause principles. Consider the recently decided *Hein v. Freedom from Religion Foundation, Inc.*,[81] in which the Court held that taxpayers did not have standing to contest Executive Branch expenditures that arguably violated the nonendorsement and neutrality principles.[82] *Hein* involved President Bush's use of monies to hold conferences and other events designed to promote his faith-based initiatives, at which it was alleged that government officials endorsed religion or specific religions.[83] The plaintiff, Freedom from Religion Foundation, claimed that the events were essentially religious revivals, sponsored and paid for by federal taxpayers.[84] The Foundation sought to establish standing under *Flast v. Cohen*,[85] a 1968 case that had permitted federal taxpayer standing in Establishment Clause cases.[86] *Flast* held that the normal rules of standing—which would not permit federal taxpayers to allege injuries based solely on their payment of taxes—are suspended in Establishment Clause cases.[87]

Hein looks like a significant restriction on the taxpayer standing doctrine adopted in *Flast*.[88] But despite it being an exception designed to encourage access to federal court, *Flast* never really opened the gates to plaintiffs asserting federal-taxpayer-induced injuries and certainly did not do so with regard to government officials' religion-endorsing speech. *Flast* it-

---

of Allegiance Won't Be So Easy, 12 TEMP. POL. & CIV. RTS. L. REV. 79, 90 (2002) (noting that the Pledge violates the coercion, endorsement, and neutrality tests).

80. *But see* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 37–45 (2004) (O'Connor, J., concurring) (listing four reasons why the inclusion of the words "under God" in the Pledge does not violate the Establishment Clause).

81. 551 U.S. 587 (2007).

82. *Id.* at 593.

83. *Id.* at 592, 595–96.

84. *Id.* at 595–96.

85. 392 U.S. 83 (1968).

86. *Id.* at 88.

87. *Id.* at 103–06.

88. *See* Ira C. Lupu & Robert W. Tuttle, *Ball on a Needle:* Hein v. Freedom from Religion Foundation, Inc. *and the Future of Establishment Clause Adjudication*, 2008 BYU L. REV. 115, 116–19 (detailing lower court decisions relying on *Hein* in restricting taxpayer standing in Establishment Clause-related litigation).

self had already been limited in *Valley Forge Christian College v. Americans United for Separation of Church and State*,[89] where the Court held that the *Flast* standing exception did not apply to decisions of an agency to transfer land under a statute adopted pursuant to Congress's powers under the Property Clause.[90] Moreover, even before *Flast*, municipal (and often state-taxpaying) plaintiffs could get into court based on the Court's relaxed taxpayer standing doctrine.[91] That doctrine is unrelated to the Establishment Clause but helpful to plaintiffs asserting spending violations by local and state governments.[92] Much Establishment Clause jurisprudence in the spending area has been made by state or municipal taxpayers, not by federal ones.[93] It is notable that only two Establishment Clause cases that have reached the Court since *Flast* relied on federal taxpayer standing.[94]

For my purposes, *Hein* is not significant because it imposes yet another limitation on federal taxpayers' access to the federal courts. The importance of *Flast* was always somewhat overstated,[95] and *Hein*'s limitations, if they do

89. 454 U.S. 464 (1982). In *Valley Forge*, the underlying constitutional issue was whether the federal government's transfer of public land worth $500,000 to a Christian educational institution, without requiring payment, under the Federal Property and Administrative Services Act of 1947, violated the Establishment Clause. *Id.* at 468–69. The Court avoided a decision on the merits of the case by holding that Americans United did not have standing to challenge the land transfer. *Id.* at 482.

90. *Id.* at 481–82.

91. *See* Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 629–32 (2004) (discussing examples of the Court applying less stringent standards in determining whether a state or municipal taxpayer has standing); Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 EMORY L.J. 771, 800–04 (2003) (arguing that confusing Supreme Court jurisprudence regarding state and municipal taxpayer standing has resulted in more lenient standing requirements for state and municipal taxpayers than for federal taxpayers). Both the future contours of *Flast* standing as well as the possible distinction between state and federal taxpayer standing are before the Court this Term. *See* Ariz. Christian Sch. Tuition Org. v. Winn, 562 F.3d 1002 (9th Cir. 2009), *cert. granted*, 130 S. Ct. 3350 (U.S. May 24, 2010) (No. 09-987).

92. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 643 (2003) (lifting the traditional limitation on public funding of religious education); Schragger, *supra* note 60, at 1816 (discussing the local nature of many Religion Clause disputes).

93. *See* Staudt, *Modeling Standing*, *supra* note 91, at 626 (reporting that "state and municipal taxpayers . . . file many more lawsuits against state and local government officials than federal taxpayers file against the US government"). That is because these disputes often involve public schools, which are predominantly funded by state and local taxpayers. *See, e.g.*, *id.* at 616 n.24, 629 (listing various state and municipal taxpayer lawsuits filed over public school funding).

94. Bowen v. Kendrick, 487 U.S. 589, 618 (1988) (citing *Flast* as the basis for standing); Tilton v. Richardson, 403 U.S. 672, 676 (1971) (failing to cite *Flast* but acknowledging that the plaintiffs were taxpayers).

95. *See* William P. Marshall & Maripat Flood, *Establishment Clause Standing: The Not Very Revolutionary Decision at* Valley Forge, 11 HOFSTRA L. REV. 63, 79 & n.95 (1982) ("Except for *Walz* [and the Establishment Clause cases], the Supreme Court has never recognized the right of a taxpayer to attack the favorable tax treatment of another taxpayer."); *see also* Gene R. Nichol, Jr., *Standing on the Constitution: The Supreme Court and* Valley Forge, 61 N.C. L. REV. 798, 802 (1983) ("[T]he Supreme Court has been reluctant to countenance such suits [(those in which the alleged injury is shared by the general public)], whether under the rubric of taxpayer or citizen standing."); *id.* at 817 ("The law of standing, therefore, prohibits the assertion of constitutional

not contaminate municipal or state taxpayer standing, do not change that.[96] Rather, *Hein* is important because it clearly articulates the Court's already implicit hesitance to regulate the public pronouncements of government officials—whether executive or legislative, whether state or national. The plurality in *Hein* was simply not prepared to regulate the speech of Executive Branch officials, no matter how significant a violation of nonendorsement or neutrality was alleged. Indeed, *Hein* mostly insulates from Establishment Clause scrutiny federal government officials' religious rhetoric. If taxpayers cannot assert standing to challenge Executive officials' religious rhetoric, then it is going to be difficult to find a plaintiff with a particularized injury who can. *Hein*, though, is not surprising. Rather, it reflects the reticence of the Court generally to regulate government officials' religious endorsements.

This is not to say that the Court has not made forays into limiting officials' religion-endorsing expressions. As already noted, the Court has regulated the content of municipal and state religious displays[97] and most recently struck down a display of the Ten Commandments in the *McCreary County* case.[98] It has also barred prayers in public schools and at particular school events.[99]

Moreover, one should not overstate the reach of the nonendorsement or neutrality principles. Those norms do not invalidate any and all religious pronouncements by government officials—only those an objective observer would view as exclusionary. That category may be somewhat narrower than a bare recital of the nonendorsement principle indicates.

Nevertheless, to the extent that the Court seeks to prevent government endorsements of religion or of particular religious beliefs, its interventions have been woefully incomplete from the perspective of its own doctrine. First, the Court has avoided enforcing its norms when it feels politically constrained. Indeed, it has never attempted to regulate government officials'

---

rights that are held in common, yet generalized statutory rights regularly constitute a basis to sue in the federal courts.").

96. This is a big "if," however. It is possible that the Court will reject both *Flast* and state taxpayer standing in the *Arizona Christian* case, 562 F.3d 1002 (9th Cir. 2009), *cert. granted*, 130 S. Ct. 3350 (U.S. May 24, 2010) (No. 09-987), or treat them as one and the same. *See* Lupu & Tuttle, *supra* note 88, at 115 (asserting that "[t]he Supreme Court has on a number of occasions treated the problems of state taxpayer standing as conceptually indistinguishable from federal taxpayer standing").

97. *See, e.g.*, Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 601–02 (1989) (holding that the display of a crèche in a county courthouse violated the Establishment Clause); Stone v. Graham, 449 U.S. 39, 42–43 (1980) (holding that a Kentucky statute that required the posting of the Ten Commandments in public schools violated the Establishment Clause).

98. McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 881 (2005).

99. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 317 (2000) (holding that student-led pre-football game prayer violated the Establishment Clause); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 226 (1963) (prohibiting mandatory in-school Bible reading); Engel v. Vitale, 370 U.S. 421, 424 (1962) (prohibiting daily recitation of a prayer in New York public schools).

nonformal, religious–political rhetoric, no matter how much those officials assert the favored status of a particular religion or religious group. The *Hein* decision simply makes this longstanding avoidance explicit.

Second, the Court's uneven jurisprudence has resulted in what Mark DeWolfe Howe famously called a "de facto establishment"—an unofficial privileging of religion in some aspects of our public culture that has persisted despite the formal disestablishment of religion.[100] Civic practices that endorse religion are sometimes "grandfathered in" or considered de minimis.[101] Often the de facto establishment is understood as a regrettable but necessary nod to deeply rooted cultural practices, i.e., ceremonial deism.[102] Whatever it is called, the public privileging of religion is (as Howe noted) an exception to a particular formulation of the disestablishment principle, one that has been articulated by the Court as nonendorsement or neutrality. But these principles are underapplied. While the Court has significantly restricted religious rhetoric in the schools (namely school prayer),[103] it has not limited a whole range of official religious-endorsing rhetoric outside them, nor has it ever truly been prepared to do so.

C. Religious–Political Alliances

The Court also does not regulate religious–political alliances. This regulatory gap is significant, for the Court has declared that political division along religious lines is a central concern of the Establishment Clause.[104] A politics that places the salvation of citizens at issue or that involves claims by partisans that "God is on our side" demonizes political opponents not just as wrong but as godless and thus raises the stakes for supporters on both sides. Religious factionalism coupled with political power can lead directly to

---

100. MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS 11–12 (1965).

101. *See* Lynch v. Donnelly, 465 U.S. 668, 674 (1984) (holding that a city's inclusion of a nativity scene in its Christmas display did not violate the Establishment Clause and noting that "[t]here is an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life"); McGowan v. Maryland, 366 U.S. 420, 431 (1961) (holding that Maryland law requiring businesses to close on Sunday does not violate the Establishment Clause because although "[t]here is no dispute that the original laws which dealt with Sunday labor were motivated by religious forces," the law is permissible because it also has secular motivations).

102. *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 795 (1983) (holding that the Nebraska legislature's practice of commencing each legislative session with a chaplain-led prayer did not violate the Establishment Clause). For a general treatment, see Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Observer*, 57 UCLA L. REV. 1545, 1549–56 (2010).

103. *See, e.g.*, *Engel*, 370 U.S. at 424 (holding that daily recitation of a prayer in public schools violates the Establishment Clause).

104. Lemon v. Kurtzman, 403 U.S. 602, 622 (1971) ("Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.").

religious persecution.[105] For those concerned about religiously inspired political divisiveness, limiting religious groups' ability and incentive to compete for political supremacy and control of the apparatus of civil government seems like a wise strategy.[106]

The entanglement prong of the *Lemon* test has sometimes been used to address this relationship between civil and religious power—to prevent too close a relationship between civil and religious authority or to bar political "takeovers" of civil government by religious groups. For example, in *Larkin v. Grendel's Den*,[107] the Court struck down a Massachusetts law that allowed churches to veto liquor license applications from businesses operating within 500 feet of the church.[108] Similarly, in *Board of Education v. Grumet*,[109] the Court struck down a New York law that created a school district that was coterminous with a religious sect's territorial boundaries.[110] Even without knowing how the churches or communities at issue in those cases would exercise their power, the Court held that the formal exercise of state powers by religious authorities violated the entanglement prong of the *Lemon* test.[111]

Aside from restricting these formal grants of authority to religious groups, however, the doctrinal Establishment Clause does not easily reach informal political interactions between religious groups and government officials. The doctrinal Establishment Clause does not prevent religious organizations and activists from lobbying for certain laws on the basis that they are required by God and does not, except indirectly, prevent legislators from voting for such legislation because of their own individual commitments to codifying God's laws. Additionally, under the Free Exercise Clause, the Court has affirmatively struck down laws that prevent religious officials from serving as legislators or in other capacities in the government.[112]

The Court also does not directly address the problem of political division along religious lines. The doctrinal Establishment Clause does not

---

105. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 237 (1689) (Ian Shapiro ed., Yale Univ. Press 2003) (arguing that no government official ought ever be allowed the power to act on the influence of religion, as any power that can be used "for the suppression of an idolatrous church" can just as easily be used "to the ruin of an orthodox one").

106. *See id.*

107. 459 U.S. 116 (1982).

108. *Id.* at 126–27.

109. 512 U.S. 687 (1994).

110. *Id.* at 702.

111. *Grumet*, 512 U.S. at 696–97; *Larkin*, 459 U.S. at 126–27. Only one other case has failed the entanglement prong since *Lemon* was decided. *See* Aguilar v. Felton, 473 U.S. 402, 412–14 (1985) (holding that New York's use of federal funds to pay public employees to provide remedial instruction at parochial schools violated the entanglement prong), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).

112. *See, e.g.*, McDaniel v. Paty, 435 U.S. 618, 629 (1978) (holding that a Tennessee statute prohibiting ministers from holding office violated the Free Exercise Clause).

prevent politicians from making political alliances with specific churches or religious groups, explicitly endorsing their message, or asking them for financial assistance.[113] Churches may, consistent with the Establishment Clause, create political parties or be closely affiliated with them.[114] And while we have not seen the rise of explicitly religious parties in the United States, we have seen the rise of sophisticated religious–political adjuncts to political parties, in the form of political action committees or lobbying organizations.[115]

This close affiliation is currently most evident on the political right, as the last forty years have witnessed the emergence of a politically active evangelical movement that has strong links to the Republican Party.[116] The Moral Majority, founded by Jerry Falwell in 1979, played a significant political role in Ronald Reagan's 1980 presidential victory.[117] And, though the Moral Majority is now defunct, a number of other organizations have taken its place, and they have continued to exercise significant influence in Republican Party politics. The Christian Right helped George W. Bush win the presidency and has remained an active presence in the Republican Party.[118]

---

113. For example, politicians and government officials, including Tom DeLay, Zell Miller, Bill Frist, Rick Santorum, and Robert Bork, participated in the Justice Sunday conferences organized by the Family Research Council (a conservative Christian organization) in 2005 and 2006. Thomas B. Edsall, *Conservatives Rally for Justices*, WASH. POST, Aug. 15, 2005, at A2; Laurie Goodstein, *Minister, a Bush Ally, Gives Church as Site for Alito Rally*, N.Y. TIMES, Jan. 5, 2006, at A14. At Justice Sunday II in August of 2005, then-Congressman Tom DeLay claimed "activist courts" are "ridding the public square of any mention of our nation's religious heritage." Edsall, *supra*. At the same event, former Senator Zell Miller (Democrat, Georgia) criticized the Supreme Court because it "removed prayer from our public schools . . . legalized the barbaric killing of unborn babies, and it is ready to discard like an outdated hula hoop the universal institution of marriage between a man and a woman." *Id.*

114. *See* Laycock, *supra* note 34, at 75 ("[T]he political arena is full of religious arguments and full of appeals to religious voters. As far as the law is concerned, churches can even create political affiliates and political action committees, although they choose not [to] do so, probably for good religious and political reasons."); *see also McDaniel*, 435 U.S. at 629 (invalidating a provision that excluded members of the clergy from the legislature); Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 670 (1970) (holding that "churches as much as secular bodies and private citizens have [the] right" to "take strong positions on public issues"); Branch Ministries v. Rossotti, 211 F.3d 137, 143 (D.C. Cir. 2000) (holding that the rights of churches to engage in political speech eliminate any burden on free exercise from the restrictions on political speech by charities organized as nonprofits).

115. ALLEN D. HERTZKE, REPRESENTING GOD IN WASHINGTON 5 (1988).

116. John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 350–52 (2001).

117. BARRY HANKINS, AMERICAN EVANGELICALS 147–48 (2008).

118. The history of fundamentalist Christians' affiliation with politics dates back to the 1920s, when they opposed the teaching of evolution in public schools, CLYDE WILCOX, ONWARD CHRISTIAN SOLDIERS? 30–31 (2d ed. 2000), and lobbied for the prohibition of alcohol, HERTZKE, *supra* note 115, at 32. From the 1930s through the 1960s, their political involvement was limited but took shape in the conservative fight against communism, which was seen as promoting atheism and threatening traditional Christian values. WILCOX, *supra*, at 34. Fundamentalist Christians' political involvement temporarily came to a head in 1964 when they supported Republican Barry

In the first decade of the twenty-first century, this close affiliation led one former Republican senator to complain that the Republican Party was becoming a "political arm of conservative Christians" and "the means for carrying out a religious program" that included opposition to homosexuality, same-sex marriage, stem-cell research, abortion, contraception, euthanasia, and the use of reproductive technologies.[119] This debate within and outside the Republican Party was sparked in part by the case of Terri Schiavo, the Florida woman whose husband sought an order in 2005 allowing her care-givers to terminate her life by removing her feeding tube after she had been in a persistent vegetative state for almost fifteen years.[120] For many observers, the attempt by government officials to intervene in the Schiavo case reflected those officials' or their constituents' religious views.[121]

Goldwater's presidential bid; the failure of that campaign led to a decade-long resignation from the political arena for fundamentalists. *Id.* at 34–35.

In 1976, Jimmy Carter, an evangelist and Democrat, garnered some support from evangelicals in his presidential victory. *Id.* at 36. Republican strategists saw this political reentry of evangelicals as an opportunity. *Id.* Consequently, they joined forces with the well-known evangelical leader Jerry Falwell to form the Moral Majority in 1979. *Id.* This strategy proved effective in Reagan's 1980 victory, which marked the beginning of a clear affiliation between fundamentalist Christians and the Republican Party. HANKINS, *supra* note 117, at 146–48. The "Christian Right" proved beneficial to the Republican Party throughout the 1980s, supporting Reagan's reelection and George Bush's successful 1988 campaign. KENNETH WALD & ALLISON CALHOUN-BROWN, RELIGION AND POLITICS IN THE UNITED STATES 228–30 (Cong. Quarterly Press 3d ed. 1997).

In the 1990s, the Christian Coalition, founded by Pat Robertson and managed by Ralph Reed, took the place of the Moral Majority as the predominant Christian Right group and shifted its focus toward affecting politics at the grassroots level. HANKINS, *supra* note 117, at 154–55. In the new millennium, the Christian Right has been represented by a wider variety of groups, including Focus on the Family and the Family Research Council, both of which were founded by James Dobson. *Id.* at 156. Their involvement is further evidenced in the 2008 Republican Platform, which referred to the "Judeo-Christian heritage of our country." REPUBLICAN NAT'L COMM., 2008 REPUBLICAN PLATFORM 53 (2008), *available at* http://www.gop.com/2008Platform/2008platform.pdf. The Republican Platforms of 1988 and 1992 contained similar references to a Judeo-Christian national heritage, whereas those of 1996, 2000, and 2004 did not. One can search these platforms through a database maintained by the The American Presidency Project. *Political Party Platforms*, THE AMERICAN PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/platforms.php. *See generally The 2004 Political Landscape*, THE PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, http://people-press.org/report/?pageid=757 (finding that "[o]ver the past 15 years, religion and religious faith also have become more strongly aligned with partisan and ideological identification," "[r]eligious commitment has increased substantially among self-identified conservatives," and "there is a nearly two-to-one Republican advantage among white evangelicals").

119. Danforth, *supra* note 16; *see also* John C. Danforth, *Onward (Moderate) Christian Soldiers*, N.Y. TIMES, June 17, 2005, at A27 (noting that moderate Christians often come to political conclusions that differ from those of conservative Christians).

120. *See* Michael P. Allen, *The Constitution at the Threshold of Life and Death: A Suggested Approach to Accommodate an Interest in Life and a Right to Die*, 53 AM. U. L. REV. 971, 976–78 (2004) (discussing the actions taken by Republican Governor Jeb Bush during the Terri Schiavo controversy and the efforts of "conservative political forces" to induce such political action); Thomas C. Marks, Jr., *Terri Schiavo and the Law*, 67 ALB. L. REV. 843, 844–45 (2004) (describing the series of events that surrounded the Terri Schiavo controversy).

121. Numerous government officials, including the Governor of Florida, the leader of the United States Senate, and the President of the United States, sought ways to block that removal on

This is not to say that the influence of religious-based political groups has been exclusive to the political right, however. The role of the black church in the civil rights struggle has often been noted;[122] the Southern Christian Leadership Conference was and is dominated by religious leaders.[123] Similarly, religiously based lobbying groups and churches have been prominent in left antiwar movements in the United States.[124]

Moreover, Democrats as well as Republicans have recognized the potential political benefits to religious outreach. The faith-based initiative, which seeks to channel federal monies to religious social service organizations,[125] began under President Bill Clinton,[126] a Democrat, but was

---

various grounds. *See, e.g.*, An Act for the Relief of the Parents of Terri Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 15, 15–16 (2005) (demonstrating Congress's will to block the removal of Shiavo's nutrition tubes on various grounds); Statement on Terri Schiavo, 41 WKLY. COMP. PRES. DOC. 458 (March 17, 2005) (demonstrating President George W. Bush's desire to block the removal of Shiavo's nutrition tubes).

For many commentators, this attempt to legislate an end-of-life decision reflected the influence of religious fundamentalists on the Republican Party. *See, e.g.*, *No Release from Death*, THE GUARDIAN (Apr. 2, 2005), http://www.guardian.co.uk/world/2005/apr/02/usa.guardianleaders1 (reporting John Danforth's concern that the Republican party "was being transformed into the political arm of conservative Christians"); Andrew Sullivan, *Comment: Terri is the Dying Martyr the Republican Right Can Use*, SUNDAY TIMES (Mar. 27, 2005), http://www.timesonline.co.uk/tol/comment/article438158.ece (citing the furor over the Schiavo case as "proof that the religious right runs the Republican party"). In fact, the Schiavo case was invoked as an example of the Republican Party's commitment to a "culture of life," a phrase borrowed by President Bush and other Republican leaders from the late Pope John Paul II's 1995 encyclical *Evangelium Vitae*, a Catholic theological document. JOHN PAUL II, EVANGELIUM VITAE 20 (1995), *available at* http://www.catholic-pages.com/documents/evangelium_vitae.pdf. President Bush introduced the phrase into our political lexicon during an October 3, 2000, debate with Vice President Al Gore, arguing against abortion-inducing drug RU-486 by stating, "We can work together to create a culture of life." Mary Leonard, *Bush Woos Catholics on Abortion: Nominee Echoes Pope's 'Culture of Life' Phrase*, BOSTON GLOBE, Oct. 9, 2000, at A1. The Republican Party later adopted the phrase in its 2004 Party Platform. REPUBLICAN NAT'L COMM., 2004 REPUBLICAN PARTY PLATFORM: A SAFER WORLD AND MORE HOPEFUL AMERICA 84 (2004). The Culture of Life Foundation was formed to promote the tenets of the Pope's teachings in American public life. *Cf. About Us*, CULTURE OF LIFE FOUNDATION, http://www.culture-of-life.org/ ("The Culture of Life Foundation . . . exists to reveal and present the truths about the human person at all stages of life and in all conditions.").

122. *See, e.g.*, ALDON D. MORRIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE 77 (1984) ("[T]he preexisting black church provided the early movement with the social resources that made it a dynamic force, in particular leadership, institutionalized charisma, finances, an organized following, and an ideological framework through which passive attitudes were transformed into a collective consciousness supportive of collective action.").

123. *SCLC Leadership*, S. CHRISTIAN LEADERSHIP CONF., http://www.sclcnational.org/core/item/page.aspx?s=3047.0.0.2607 (noting multiple reverends on the organization's board of directors).

124. Rebecca Phillips, *Religious Left Goes Anti-War on Iraq*, ABC NEWS (Feb. 16, 2003), http://abcnews.go.com/US/story?id=90854&page=1 (describing the religious group participation in advocating against the war in Iraq).

125. Linda C. McClain, *Unleashing or Harnessing "Armies of Compassion"?: Reflections on the Faith-Based Initiative*, 39 LOY. U. CHI. L.J. 361, 361 (2008).

expanded by George W. Bush,[127] a Republican, and has been continued by President Barack Obama, a Democrat.[128] An explicit strategy of the Obama campaign and Administration was and has been to make overtures to evangelical Christians.[129] Religion-favoring legislation often gains bipartisan support. The National Day of Prayer was passed by unanimous consent in 1952.[130] The Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act were adopted virtually without dissent.[131] Both statutes were heavily promoted by a range of religious groups.[132]

One tool that the government employs to limit religious politicking and lobbying is the Internal Revenue Service's requirements that restrict the political activities of nonprofit organizations.[133] The rules apply to any organization that seeks nonprofit status.[134] The IRS restriction is not religion specific, nor did it originate in a concern about enforcing the nonestablishment norm.[135] Nor is it the case that the Court's current Establishment Clause doctrine requires that churches that engage in politicking be denied a tax exemption; only that they may be.[136] Finally, it is worth noting that the

---

126. 151 CONG. REC. 21,065 (2005) ("Former President Bill Clinton signed four laws explicitly allowing faith-based groups to staff on a religious basis when they receive Federal funds.").

127. Steven Fitzgerald, Note, *The Expansion of Charitable Choice, the Faith Based Initiative, and the Supreme Court's Establishment Clause Jurisprudence*, 42 CATH. LAW. 211, 211 (2002).

128. The program has been renamed "White House Office of Faith-Based and Neighborhood Partnerships." Exec. Order No. 13,498, 74 Fed. Reg. 6533 (Feb. 5, 2009).

129. Russell Goldman, *Strange Bedfellows: Obama and Evangelicals*, ABC NEWS (June 12, 2008), http://abcnews.go.com/Politics/Vote2008/story?id=5053866&page=1.

130. 98 CONG. REC. 1546, 3807 (1952).

131. The Religious Freedom Restoration Act was passed by unanimous consent in the House, 139 CONG. REC. 27,241 (1993), and passed in the Senate by a vote of 97-to-3, *id.* at 26,416. The Religious Land Use and Institutionalized Persons Act was adopted by unanimous consent. 146 CONG. REC. 16,623, 16,703 (2000).

132. *See, e.g.*, B.A. Robinson, *Religious Freedom Restoration Acts: Federal Legislation*, RELIGIOUS TOLERANCE.ORG (2003), http://www.religioustolerance.org/rfra1.htm (stating that "[o]ver 60 religious organizations and civil liberties groups combined" to "promote the Religious Freedom Restoration Act"); B.A. Robinson, *Religious Freedom Restoration Acts: Additional Attempts at Federal Legislation: RLPA and RLUIPA*, RELIGIOUS TOLERANCE.ORG (2005), http://www.religioustolerance.org/rfra3.htm ("[The Religious Land Use and Institutionalized Persons Act] was supported by a most unusual coalition of religious and civil liberties groups, including the *American Civil Liberties Association*, *Christian Coalition*, *Family Research Council*, and *People for the American Way*.").

133. I.R.C. § 170(c)(2)(D) (2006); I.R.C. § 501(c)(3) (2006).

134. I.R.C. § 508(a).

135. *See* Lloyd Hitoshi Mayer, *Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise*, 89 B.U. L. REV. 1137, 1145 (2009) (indicating that there is no evidence that Congress intended to restrict the activities of houses of worship in enacting the IRS prohibition).

136. *See* Christian Echoes Nat'l Ministry v. United States, 470 F.2d 849, 855 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973) (finding that an organization's political activities must be balanced in the context of the organization's objectives to determine if a substantial part of its activities was aimed at influencing legislation); *see also* Regan v. Taxation with Representation of

IRS has rarely revoked the nonprofit status of a church because of inappropriate politicking.[137] The agency stepped up its enforcement in 2004, but it seems to use its power to suppress political activities in churches sparingly.[138] And churches or religious groups that segregate their political activities can do so with no limits.

The Judiciary has almost no role in regulating these political activities, and perhaps for obvious reasons.[139] The state action requirement has been interpreted in most cases to constrain government actors, not private ones. Religious constituents and lobby groups are not exercising state power—at least not directly or formally. The Court could seek to regulate those who do—the government officials who join in alliances with those groups or exercise power in close connection with them[140]—but it has never ventured into that territory.[141]

Wash., 461 U.S. 540, 551 (1983) (upholding the right of the IRS to limit the lobbying practices of nonprofits).

137. Depending on the source, the IRS is said to have revoked the tax-exempt status of a church for political activities either once or twice. Several sources list the IRS as having done so only once—revoking the exempt status of the Church at Pierce Creek in Binghamton, New York, in 1992 after it took out a full-page ad urging Christians not to vote for Bill Clinton. The revocation was upheld by the D.C. Circuit in *Branch Ministries v. Rossotti*, 211 F.3d 137, 145 (D.C. Cir. 2000). *See* Benjamin M. Leff, *"Sit Down and Count the Cost": A Framework for Constitutionally Enforcing the 501(c)(3) Campaign Intervention Ban*, 28 VA. TAX. REV. 673, 696–97 (2009) ("In May of 2000, the U.S. Court of Appeals for the District of Columbia Circuit decided what is apparently the only case—*Branch Ministries v. Rossotti*—in which the Service revoked the tax-exempt status of a church for engaging in campaign intervention."). However, on a couple of different occasions, the IRS has stated that it has revoked the status of two churches for political activities. Although it is clear that one of these churches is the Church at Pierce Creek, the identity of the second church is unclear. *See* ERIKA LUNDER & L. PAIGE WHITAKER, CONG. RESEARCH SERV., RL 34447, CHURCHES AND CAMPAIGN ACTIVITY: ANALYSIS UNDER TAX AND CAMPAIGN FINANCE LAWS 1–2 (2008) ("In 2002, the IRS indicated that only two churches have lost their § 501(c)(3) status due to campaign intervention. One of these is the Church at Pierce Creek in Binghamton, New York . . . . The identity of the second church is not clear."); Suzanne Sataline, *Obama Pastors' Sermons May Violate Tax Laws*, WALL ST. J., Mar. 10, 2008, at A1 (recounting that only two churches have had their tax exemption status revoked since tax law amendments in 1954 restricted campaign activity by nonprofits, the most recent being Branch Ministries Inc. of Binghamton, N.Y. for placing "full-page ads in two newspapers in 1992 urging Christians not to vote for then-candidate Bill Clinton"). In addition to these two churches, there have been a number of religious nonprofit organizations that have had their tax-exempt status revoked. *See* Mayer, *supra* note 135, at 1148 & n.50 (claiming that five charities have lost tax-exempt status).

138. Mayer, *supra* note 135, at 1144.

139. *Cf.* Schauer, *supra* note 5, at 12–36 (discussing the contrast between the issues on the Court's agenda and those important to the American public).

140. The Court has diluted the state-action requirement in the past. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1, 23 (1948) (ruling that private discriminatory covenants become state-action if enforced by a court); Smith v. Allwright, 321 U.S. 649, 654, 664–66 (1944) (ruling that the Democratic Party of Texas's exclusion of black voters from participating in primary elections constituted state action).

141. Establishment Clause doctrine assumes a state-action requirement, so we may not consider these to be examples of judicial underenforcement. My point here is not that the state action doctrine should not exist (though one can certainly question it, see, e.g., Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 550 (1985), in which he suggests that the state-

Regardless of the reason, the doctrinal Establishment Clause is irrelevant to a whole range of activities that arguably implicate the Court's entanglement or neutrality principles. Again, I do not want to overstate the power of these principles—their meaning, reach, and application are subject to a great deal of dispute. My main point is that the Court leaves the resolution of religious–political entanglements almost exclusively to the political sphere. As Justice Brennan observed in his concurrence in *McDaniel v. Paty*,[142] the Establishment Clause prevents the "government from supporting or involving itself in religion," but it does not prevent political actors from "inject[ing] sectarianism into the political process."[143] The check against religious–political alliances is "refutation in the marketplace of ideas and . . . rejection at the polls."[144]

This is so despite the fact that one of the Court's stated Establishment Clause objectives is to avoid too close a connection between civil and religious power.[145] Churches and religiously based lobbying organizations play a significant role in American politics, seeking to influence policy and legislation at the local, state, and national levels.[146] The Court, however, has almost never attempted to limit that role.

---

action requirement should be eliminated), but that it significantly constrains the reach of judicial doctrine and especially Establishment Clause doctrine.

142. 435 U.S. 618 (1977).

143. *Id.* at 642 (Brennan, J., concurring).

144. *Id.*

145. *See supra* notes 107–15114 and accompanying text.

146. Religious lobbies have a long history of influence in the United States. Quakers helped start the movement for the abolition of slavery, DANIEL J.B. HOFRENNING, IN WASHINGTON BUT NOT OF IT 42 (1995), and in the 1920s, Methodist prohibition proponents were a significant religious force in Washington, D.C., HERTZKE, *supra* note 115, at 28–29. In 1943, the Quakers created the first official religious lobby to advocate for the protection of conscientious objectors during World War II, and the Civil Rights Act of 1964 was supported by a slew of liberal religious groups, including various Protestant denominations and black evangelical organizations. *Id.* at 29–31, 43. The 1980s marked the emergence of the fundamentalist Christian lobbies, which have not achieved their specific goals but have nonetheless influenced policy making. HOFRENNING, *supra*, at 44. For example, although fundamentalists have not succeeded at reinstituting school prayer or banning abortion, they helped in passing the Equal Access Act of 1984 (which provided certain rights for extracurricular religious groups in public schools) and have brought about various restrictions on abortion funding. WALD & CALHOUN-BROWN, *supra* note 118, at 263. Today, fundamentalist lobbies are more focused at the state and local levels, where many education and abortion issues are decided. WILCOX, *supra* note 118, 93–94. For examples of right-wing religious lobbyists, see John Chadwick, *Politics from the Pulpit: Evangelicals Pushing America Toward the Right*, THE RECORD, Mar. 13, 2005, at A1, *available at* 2005 WLNR 26670367 (describing the movement of some evangelical leaders to "mobiliz[e] churchgoers into a political force"); Holly Edwards, *Christian Right Leader Has Bush's Ear*, TENNESSEAN, Feb. 20, 2005, at B1, *available at* 2005 WLNR 26789535 (describing Richard Land as the embodiment of the "growing number of politically savvy evangelicals who are increasingly making masterful use of their broad religious support to influence government policy and promote a conservative agenda"); Farah Stockman, *Christian Lobbying Finds Success, Evangelicals Help to Steer Bush Efforts*, BOSTON GLOBE, Oct. 14, 2004, at A25, *available at* 2004 WLNR 3613233 ("Increased political savvy among conservative Christians and an increased focus on international affairs have played a role in the

D. Summary: The Domain of the Doctrinal Establishment Clause

Why these arenas of church–state interaction go unregulated is not my concern yet—the next Part will consider the reasons for underenforcement. It is sufficient here to describe the significant areas at the intersection of religion and government in which the Court's doctrine seems inoperative. Despite the claim that the Court is hostile to all things religious,[147] religion-endorsing rhetoric in the public sphere and religiously infused policy making can and does take place without significant Court oversight. De facto establishments are pervasive. Moreover, the Court's Establishment Clause decisions barely address religiously motivated political movements or the legislative outcomes of those movements—arguably a core concern of nonestablishment.

I am not arguing here that the Judiciary should address these areas but only that the stated domain of the doctrinal Establishment Clause is large and its operative domain is relatively small. Thus, the secular purpose requirement, which is supposed to police legislation to prevent it from being motivated solely for religious reasons, only seems to apply to legislation or policy making that *appears* to be motivated by religion, not to legislation or policy making that is *actually* motivated by religion. The nonendorsement principle, which is supposed to prevent government from signaling its approval and support of particular religions and sending a message of exclusion to others, has been applied half-heartedly and only to formal religious exercises but seems unable to reach many official endorsements of religion. The neutrality principle, which has been applied mainly in the context of government funding, has mostly been absent when it comes to government officials' religious rhetoric. And while the entanglement prong of the *Lemon* test applies to de jure grants of civil or political authority to religious organizations, it does not seem to have any applicability to de facto grants of civil or political authority to those same organizations.

At this point, one might raise the following three objections. First, one might dispute my descriptive claim, arguing that the Court has not been at all shy about extensively regulating numerous aspects of the church–state relationship. I think there are domains in which this is certainly the case. For example, the Court's doctrinal Establishment Clause has been deployed aggressively in the public schools context, where the Court has regulated the

---

success of evangelical lobbying."). The Catholic lobby has sided with fundamentalists on some issues (i.e., abortion) and with liberal Protestants on others (i.e., military policy). HERTZKE, *supra* note 115, at 36–37. Jewish lobbyists have typically sided with liberal Protestants and, perhaps because of their history of persecution, have been especially focused on advocating the strict separation of religion and government. *Id.* at 37–38.

147. *See* CARTER, *supra* note 1, 109 (explaining how some critics of the Establishment Clause doctrine blame the Supreme Court for what they see as religion's position of disfavor in America); RICHARD J. NEUHAUS, THE NAKED PUBLIC SQUARE 161 (1984) (decrying the Court's disapproval of state-sponsored prayer in schools).

funding, curriculum, and practices of school officials to ensure that the Judiciary's stated Establishment Clause norms are preserved.[148] Beyond the schools, however, the record is much spottier, especially when it comes to religiously infused policy agendas and religious rhetoric. The Court refuses to understand significant areas of government policy that have obvious religious overtones through the lens of nonestablishment. Moreover, it seems obvious that the Court is struggling—especially recently—with the balance between fealty to stated doctrinal principles and political expediency. Judicial avoidance seems to be alive and well in the Establishment Clause realm.

Second, one might argue that the Court has not had the opportunity to regulate certain kinds of behaviors because public officials tend to comply with the Court's general nonestablishment principles. But this seems plainly wrong. Public officials often seem to be purposefully rejecting the Court's doctrinal Establishment Clause by engaging in religion-endorsing rhetorical or policy-making behavior. And many religious groups reject the nonentanglement or nonneutrality principles altogether—arguing quite explicitly that civil power should be an instrument of godly power.[149] Indeed, to the extent religious constituents and groups have knowledge of the Court's doctrine, they are not particularly fond of it. In other words, there seems to be plenty of room for government officials to test the Court's resolve. Arguing that the disputes have not arisen is inaccurate.

Third, and finally, one might dispute the appropriate reach of Establishment Clause doctrine as I have framed it. One might argue that the nonendorsement principle is not being underenforced because it is a quite limited doctrine—when properly understood. Perhaps the same can be said for neutrality or secular purpose or the Court's other doctrinal formulations. Certainly, it may be possible to explain some of what the Court does not do

148. *See* Edwards v. Aguillard, 482 U.S. 578, 596–97 (1987) (invalidating a state statute that required the teaching of creationism in schools); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 779–80 (1973) (invalidating state laws granting financial aid to private schools); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 223–27 (1963) (holding unconstitutional a state law requiring prayer and daily reading of Bible verses in public schools, even though students could be excused upon written request of the parent); Engel v. Vitale, 370 U.S. 421, 424 (1962) (finding a state-agency directive requiring daily prayer in New York public schools to be "wholly inconsistent with the Establishment Clause").

149. *See, e.g.*, KEVIN PHILLIPS, AMERICAN THEOCRACY: THE PERIL AND POLITICS OF RADICAL RELIGION, OIL, AND BORROWED MONEY IN THE 21ST CENTURY 217 (2006) (observing that some fundamentalist religious constituencies want their government "to come from religious institutions, with the imprimatur of a president who openly favors at least some transfer of power"); Bruce Ledewitz, *Up Against the Wall of Separation: The Question of American Religious Democracy*, 14 WM. & MARY BILL RTS. J. 555, 560 (2005) (remarking on the emboldening of religious groups after the 2004 national election, and referring to one commentator who described the election as a possible "window of opportunity to impact a morally degenerating culture with the gospel").

as being consistent with its stated doctrine.[150] Nevertheless, I think that Justice Scalia is correct when he argues that the Court often fails to fully embrace its stated principles. Consider the recent standing decisions. In *Hein*, the plurality acknowledged that the President may have violated the Court's stated Establishment Clause doctrines and may do so again in the future.[151] But the Court held that these violations are unlikely to be addressed by the courts.[152]

A slightly different version of this last objection goes to the appropriate content of the Establishment Clause itself. One might argue that the Court does not apply its stated doctrine because the Establishment Clause does not require it. For example, an originalist of a certain bent might argue that the Establishment Clause is wholly jurisdictional and merely prevents Congress from intervening to disrupt state-level establishments.[153] But this objection does not address my descriptive claim, which is that the doctrine *as given* is significantly underenforced.

Of course, anyone who has examined the Court's Establishment Clause cases over the last twenty years recognizes that the doctrine is in considerable upheaval, or is, at the least, unevenly applied. Thus, there is some peril to my claiming a doctrinal "content" that can be "underenforced." That being said, the Court continues to assert and apply a set of basic principles that it has yet to disavow. That the Court's stated doctrine is admittedly much more expansive than what some Justices or scholars think is proper does not undermine my point. While I have made some claims about what the Establishment Clause requires, I have kept those claims to a minimum.

Nevertheless, I think that even an Establishment Clause doctrine that is being narrowed in important ways will generate some significant underenforcement. In other words, even if the reach of the doctrine was significantly limited, the descriptive claim still holds: the nonestablishment norm is inconsistently enforced by the Supreme Court through its constitutional doctrine. This is certainly so in the case of the Court's stated doctrine—the secular purpose and entanglement prongs of *Lemon* and the endorsement and neutrality principles—which are mostly honored in the breach.

It is also the case for the principle of government noncoercion—a principle that has been advocated by those who view the Establishment

150. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 33–45 (2004) (O'Connor, J., concurring in the judgment) (arguing that in-school recitation of the Pledge of Allegiance should not be disallowed because it does not violate the Establishment Clause).

151. *See* Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 589 (2007).

152. *Id.* at 612.

153. *See* Van Orden v. Perry, 545 U.S. 677, 693 (2005) (Thomas, J., concurring) (arguing that the Establishment Clause should never have been incorporated against the States).

Clause as a relatively minimal limitation on government action.[154] As I have already observed, laws that coerce conduct based on religious law might have little to do with actual religious practice. Compulsory church attendance is easily recognized as a violation of the nonestablishment norm. Religiously motivated legislation or policy that regulates nonritual conduct (a category that is difficult to define, as I have already argued) mostly avoids Establishment Clause scrutiny, however. The possibility and existence of coercive religiously based laws, however, means that the noncoercion principle is subject to the same underenforcement problems that bedevil nonendorsement and neutrality. Nonritual religiously based laws coerce just as much as laws that compel ritual.[155]

The principle of noncoercion is thus of limited use if the only coercion it reaches is coerced religious ritual. In fact, the Establishment Clause is arguably not even necessary to prevent such coercion—a robust Free Exercise Clause would likely prevent most kinds of government-required religious rituals.[156] Where the Establishment Clause might have some independent bite is through the invalidation of laws that do not directly impinge on free exercise rights but that coerce compliance with nonritual religious law or reflect a tendency toward theocratic governance. But, as I have already argued, the Court is not prepared to prevent the government from adopting laws on the basis that those laws are required by God or a particular religious belief.

II. Why Underenforcement?

What explains the Court's unwillingness to regulate large areas of activity that occur at the intersection of religion and the state? I have alluded to some of the reasons for Establishment Clause underenforcement, and they are consistent with the reasons for judicial underenforcement generally: political pragmatism, institutional competence, and privileging democratic-process values.

These rationales, however, take on a particular cast in the Establishment Clause context because of the special nature of religion and religious argument in a liberal democratic society. Two difficulties are faced by those who

---

154. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 587 (1992) ("It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise . . . ."); Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in part and dissenting in part) ("[G]overnment may not coerce anyone to support or participate in any religion or its exercise . . . .").

155. Indeed, nonritual-specific laws are in some ways more coercive than ritual-specific laws because they may have more substantive effects on people's lives and life prospects.

156. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 53 n.4 (2004) (Thomas, J., concurring) ("It may well be the case that anything that would violate the incorporated Establishment Clause would actually violate the Free Exercise Clause . . . ."); *id.* at 54 n.5 ("[C]oercive government preferences might also implicate the Free Exercise Clause and are perhaps better analyzed in that framework.").

want to draw a clear line between secular and religious governance. The first is that influential elements of the American legal tradition assert that law cannot avoid a moral justification[157] and that moral justifications can only be expressed in religious terms or originate in a belief in God or a belief in a religiously based moral framework.[158] The claim that the civil law must be grounded in a (religious) morality is certainly disputable. The fact that many hold that view is not.

The second difficulty is that—whether or not law requires a foundation in a religiously derived morality—American political culture is significantly influenced by religion. The moral arguments that undergird policy are often religiously based.[159] Because the political culture is also democratic, those influences are invariably brought to bear on public policy. A Judiciary that resists those influences would be deeply countermajoritarian. Not only would it sometimes act to overturn legislative majorities, but it would also be enshrining a particular notion of law shorn of morality derived from religious belief that much of the electorate shares. That kind of cultural countermajoritarianism is risky and explains in part why the Court seeks to avoid it.

These concerns are sometimes articulated using the terminology of separation of powers. What judges mean when they use that phrase, however, is that our constitutional tradition privileges speech, association, and democratic processes more than nonestablishment values. In the United States, our constitutional instincts are to give the widest berth possible for democratic deliberation and decision making, even if that deliberation or decision making is infused with religion and even if it invites the possibility of theocratic governance.

---

157. *See, e.g.*, Jerome E. Bickenbach, *Law and Morality*, 8 LAW & PHIL. 291, 292 (1989) ("We cannot but be aware of the evident analogies between morality and the criminal law, for example, or notice that legal discourse depends upon, indeed seems committed to, moral categories like responsibility, fault, compensation, justice, and rights."); Jurgen Habermas, *Law and Morality*, *in* 8 THE TANNER LECTURES ON HUMAN VALUES 219, 230 (Steven M. McMurrin ed., Kenneth Baynes trans., 1988) ("The moral principles of natural law have become positive law in modern constitutional states.").

158. *See, e.g.*, Harold Berman, *The Interaction of Law and Religion*, 31 MERCER L. REV. 405, 406 (1980) (emphasizing President Jefferson's statement that "the liberties of a nation [cannot] be thought secure when we have removed their only firm basis, a conviction in the minds of the people that their liberties are the gift of God").

159. *See, e.g.*, DAVID C. LEEGE & LYMAN A. KELLSTEDT, REDISCOVERING THE RELIGIOUS FACTOR IN AMERICAN POLITICS 12 (1993) (describing the moral logic of American political history as consisting of a belief that "[a] higher law gives purpose to the state" and that "[a] state gains legitimacy by invoking that higher law"); Berman, *supra* note 159, at 411 (discussing how our society values free speech and rights to privacy but that these values find their foundation in the freedom of religion and of religious exercise).

A. Political Pragmatism

Consider first the political pragmatism rationale. The most obvious explanation for Establishment Clause underenforcement is that the Court may be concerned about its inability to enforce its judgments in the civic arena against individual government speakers or a populace that is unwilling to accept the Court's pronouncements. Justice Scalia has made this argument, suggesting that the Court is unwilling to enforce its stated Establishment Clause doctrine because it is politically powerless to do so. In his dissent in *McCreary County*, a decision striking down a Ten Commandments display, Scalia argued that if the Court enforced the Establishment Clause as its principles required, it would lose "the willingness of the people to accept its interpretation of the Constitution as definitive."[160]

It is an uncontroversial assertion that the Court is a political actor.[161] The preservation of its political capital is an important and perhaps unavoidable enterprise for an institution with no real power to enforce its judgments but its stature as the authoritative interpreter of the law. The Court's political pragmatism can manifest in different ways, however.

The recent Pledge of Allegiance case and the Ten Commandments cases illustrate these differences. Recall that *Elk Grove Unified School District v. Newdow* involved a challenge to the recitation of the Pledge of Allegiance, which includes the phrase "under God."[162] The Court dismissed the case for lack of prudential standing,[163] a move that may have been designed to protect the Court's institutional prestige. As I have already noted, *Newdow* seems like a classic case of judicial avoidance, both because of the novelty of Justice Stevens's prudential standing argument and because of the obvious political import of a decision declaring portions of the Pledge unconstitutional.[164]

Similarly, many commentators have explained Justice Breyer's decision to switch votes in the Ten Commandments cases—the first striking down the display of the Commandments in a county courthouse,[165] the second upholding the display of the Commandments on a monument outside a state

160. McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 893 (2005) (Scalia, J., dissenting).

161. *See, e.g.*, RICHARD A. POSNER, HOW JUDGES THINK 269 (2008). Judge Posner entitles his book's tenth chapter as "The Supreme Court Is a Political Court." *Id.*

162. 542 U.S. 1, 5 (2004).

163. *Id.* at 17–18.

164. Consider the reaction to the Ninth Circuit's decision that the phrase "under God" was, in fact, a violation of the Establishment Clause. President Bush called the decision "ridiculous," the Senate's Democratic Leader Tom Daschle called it "just nuts," and the U.S. Senate unanimously passed a resolution condemning the Ninth Circuit's decision. Debra Carrolton Harrell & Margo Horner, *Court Rejects Pledge of Allegiance in Schools*, SEATTLE POST-INTELLIGENCER (June 27, 2002), http://www.seattlepi.com/national/76318_pledge27.shtml (internal quotation marks omitted).

165. *McCreary Cnty.*, 545 U.S. at 881.

capitol[166]—as a pragmatic political decision.[167] It appears that Justice Breyer may have been concerned that a decision striking down both Ten Commandments displays would have risked the Court's political legitimacy. By changing his vote from *McCreary County*, which invalidated the Kentucky courthouse display, to *Van Orden v. Perry*, which permitted the Texas display, Justice Breyer may have been attempting to avoid popular political fallout from a combined decision to strike them both. In light of the seemingly inconsequential differences between the displays in Kentucky and Texas,[168] it is difficult to understand Justice Breyer's votes in any other way.

Nevertheless, there are important differences between Stevens's opinion in *Newdow* and Breyer's opinion in *Van Orden*. In *Newdow*, Justice Stevens uses the doctrine of prudential standing to avoid ruling on the constitutionality of the Pledge.[169] The Court's stated and only reason for dismissing Newdow's claim on standing grounds is to avoid interfering with the domestic relations law of California.[170] But the Court's avoidance of the constitutional issue is opaque. Justice Stevens's opinion makes no attempt to connect the Court's ruling to any substantive Establishment Clause concerns. He never attempts to counter the dissenters' arguments that the majority is dodging a difficult constitutional decision. There is no acknowledgement that the prudential standing doctrine is being employed to avoid hard constitutional questions or to effectuate a substantive purpose.

In contrast, Justice Breyer's concurring opinion in *Van Orden* is remarkably—though still not entirely—candid about the political basis for his decision to "switch" his vote and create a 5–4 majority to uphold the Texas monument containing the Ten Commandments. Justice Breyer does

166. Van Orden v. Perry, 545 U.S. 677, 703 (2005) (Breyer, J., concurring).

167. *See* Richard A. Posner, *The Supreme Court 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 32, 101–02 (2005) (noting the merits of Justice Breyer's concurrence given the "political character of constitutional adjudication"); Tom Curry, *Breyer Casts Decisive Vote on Religious Displays*, MSNBC.COM (June 27, 2005), http://www.msnbc.msn.com/id/8378199/ ("Hinting at practical political consequences, Breyer also worried that if the court banned long-standing displays of the Ten Commandments, it might spark public outrage . . . .").

168. The display struck down in *McCreary County* was entitled "The Foundations of American Law and Government Display" and included nine framed documents of equal size. 545 U.S. at 856 (internal quotation marks omitted). One document included a text of the Ten Commandments and explicitly cited the "King James version" of the Bible at "Exodus 20:3–17." *Id.* at 851–52. Other documents included in the display were "copies of the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the National Motto ["In God We Trust"], the Preamble to the Kentucky Constitution, and a picture of Lady Justice." *Id.* at 856. Similarly, the display upheld in *Van Orden* was one of seventeen monuments on the Texas State Capitol grounds and included a text of the Ten Commandments as well as symbols including "two Stars of David and the superimposed Greek letters Chi and Rho, which represent Christ." 545 U.S. at 681.

169. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 17–18 (2004).

170. *See id.* at 17 (stating that where standing is based on family law rights that are in dispute, the Court should "stay its hand rather than reach out to resolve a weighty question of federal constitutional law").

not state explicitly that he is doing so because he believes that a contrary decision by the Court would be unenforceable. He does acknowledge, however, in a way the Court often does not, that the Court's decisions themselves have political effects that need to be taken into account as a matter of substantive constitutional law.[171] A contrary decision, writes Justice Breyer toward the end of his concurrence in *Van Orden*, "might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid."[172] This statement comes fairly close to an acknowledgement that a fear of political backlash animates Justice Breyer's decision.

Justice Breyer's concurrence in *Van Orden* and Justice Stevens's majority opinion in *Newdow* can both be described as politically pragmatic. Yet Justice Stevens's prudential standing argument for avoidance is plausible but mostly invented—it is a sleight of hand. Justice Breyer's argument for avoidance, by contrast, is substantive. He mostly tells us what he is doing, which is avoiding the political repercussions of a contrary decision. This avoidance, however, is not justified explicitly because it preserves the Court's political capital. Rather, it is justified because it is consistent with one of the chief purposes of the Establishment Clause: to avoid religious divisiveness.

Justice Breyer, in other words, adopts a purpose-driven account of the Establishment Clause that not only constrains legislative and executive action but also limits the Court's review of legislative and executive action. The Court is bound by the primary norm of avoiding religious divisiveness, which prevents it from sometimes enforcing a secondary norm of government nonendorsement or neutrality. To the extent that a judicial decision would create a religious backlash in the political arena, it should be avoided. Both Justice Stevens and Justice Breyer understand that the Court is implicated by politics. Justice Breyer is willing to integrate that fact into the Court's substantive constitutional doctrine.

Thus, the underenforcement of the norm of nonestablishment could be a product of the Court's timidity, as Justice Scalia argues,[173] or it could be a product of the norm of nonestablishment itself. These two reasons for the Court's underenforcement are importantly different. In the first, the Court uses procedural doctrines to avoid the application of principles that would otherwise apply. In the second, the Court is required to apply its principles hierarchically, conscious of its own role in their possible contravention.

171. *Van Orden*, 545 U.S. at 698–705 (Breyer, J., concurring).

172. *Id.* at 704.

173. McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 890 (2005) (Scalia, J., dissenting) ("[T]he Court has not had the courage (or the foolhardiness) to apply the neutrality principle consistently.").

Justice Breyer's switched vote in the Ten Commandments cases is not convincing if one attempts to understand it as a straightforward application of the Court's principles of nonendorsement or neutrality. His votes are more defensible, however, if one understands them as an application of the hierarchically superior principle of political nondivisiveness. One could agree that the principles of nonendorsement and neutrality require the Court to strike down the Ten Commandments display in *McCreary County* while simultaneously arguing that the principle of nondivisiveness requires the Court to permit the display in *Van Orden*. This result would be justified by a norm of nonestablishment that privileges the value of political nondivisiveness and understands the Court to be a central contributor to that state of affairs.[174]

B. Institutional Competence

That the underenforcement of the doctrinal Establishment Clause might serve to advance Establishment Clause values is somewhat surprising. When the Judiciary underenforces a particular constitutional command, it often does so in order to advance a competing constitutional value.[175] The familiar notion of "institutional competence" as a limit on judicial enforcement partakes of this idea more generally, for it concerns the appropriate role of the Court in a constitutional system of separate and coequal branches. The competence argument explains the Court's reticence to police laws for an improper religious motive. First, as with many cases in which legislative motive is at stake, courts find it difficult to determine what motivates particular legislators. Second, and more specific to the Establishment Clause, courts cannot wholly exclude religious rationales as an appropriate basis for lawmaking.

The first is a generic concern. As I have already discussed, courts are loath to examine too closely the motives of lawmakers in Establishment Clause cases. Even in instances when there are objective indicia of motive, legislators will often be able to provide plausible secular reasons for reli-

174. As a formal matter of underenforcement, it might follow that a different court that does not have the same political salience as the Supreme Court should follow *McCreary County* instead of *Van Orden* on the reasoning that a subconstitutional court does not implicate the same divisiveness concerns as does the Supreme Court. That is, the Ninth Circuit does not experience the same kinds of substantive Establishment Clause limits on its ability to strike down legislation which violates the nonendorsement or neutrality principle. Thanks to John Harrison for this point. *See also* Sager, *supra* note 4, at 1251–52 (arguing that nonuniform answers to federal constitutional questions among state courts "should be welcomed as an exercise which can richly inform future federal judicial enforcement decisions").

175. *See, e.g.*, Idaho Dep't of Emp't v. Smith, 434 U.S. 100, 104–05 (1977) (Stevens, J., dissenting in part) (arguing that the Court should abstain from deciding certain cases because "this Court's random and spasmodic efforts to correct errors summarily may create the unfortunate impression that the Court is more interested in upholding the power of the State than in vindicating individual rights"); Sager, *supra* note 4, at 1214 (arguing that the Court often refrains from deciding cases because of "concerns of the Court about its institutional role").

giously inspired laws if required to do so. Thus, determining actual motive would entail a forensic capability that courts do not have. The *McCreary County* Court acknowledged this, rejecting "judicial psychoanalysis of a drafter's heart of hearts" in favor of an objective test of legislative purpose, by which an objective observer would consider the "traditional external signs" of purpose: "'text, legislative history, and legislative implementation.'"[176]

Of course, these traditional signs only help in narrow categories of government action, those with obvious religious content for which legislatures did not provide a secular justification. Indeed, *McCreary County* all but invites savvy legislatures to mask their true religious purposes. Responding to arguments that secular purpose is easily feigned, the majority asserted that this was not a constitutional problem. There is "no reason for great constitutional concern" when a lawmaker has a "secret [religious] motive," wrote Justice Souter, because a secret motive does not constitute a "divisive announcement that in itself amounts to taking religious sides."[177] A true but unarticulated religious motive for legislation does not render the legislation unconstitutional. In this way, the *McCreary County* majority saved the secular purpose prong of *Lemon* by turning it into a formality.

The second reason for judicial underenforcement is more specific to the Establishment Clause. The Court's unconcern about sham motives is in part a function of its inability to engage in "judicial psychoanalysis." But lurking beneath the debate about legislative motive is a more profound set of concerns that explain the Court's disinclination to fully enforce the secular purpose rule. As I have argued, the secular purpose requirement prevents legislatures from adopting laws because those laws are mandated by God or a particular religious belief system—a core concern of nonestablishment. But the Court underenforces the secular purpose requirement because it is not prepared to eliminate entirely religious motives for lawmaking except in the most obvious circumstances.

This reticence makes some sense. The appropriate basis for legal regulation and the corresponding obligation to obey the law is heavily contested.[178] Laws can have utilitarian or dignitary justifications or can be based on rights, conceptions of human relationships, charity, or good works. Laws are always based in some culturally contingent moral code, one that is often derived from a particular religious tradition or traditions. Isolating one

176. 545 U.S. at 862 (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000)).

177. *Id.* at 863.

178. Perry makes a number of these kinds of arguments, as do others. *See, e.g.*, Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Does Not Violate the Establishment Clause*, 42 WM. & MARY L. REV. 663, 672 (2001) ("For virtually every moral belief on which a legislature might be tempted to rely in disfavoring conduct . . . it is the case that although for many persons the belief is religiously grounded . . . , for many others the belief . . . is grounded wholly on secular (nonreligious) premises.").

or another justification for lawmaking is both difficult and highly tendentious.

The search for a nonreligious basis for law has produced a number of philosophies of law. (Indeed, the concept of popular sovereignty itself constitutes an attempt to divorce law from the divine, replacing God with the people as the legitimate source of law.) Unlike religiously based theories of law, foundational theories of political morality are not based in a supernatural morality. John Rawls's political liberalism is an example.[179] The goal of nonreligiously based foundationalism is to generate the minimum agreement necessary to govern in a pluralist society, in large part by agreeing to disagree over ultimate questions of salvation and cabining debate on those terms. Rawls, among other theorists, thus argues that religious reasons for government action are inappropriate and that the discourse of judges, legislators, and politicians should comport with what he calls "public reason"—justifications that can be understood by all members of a polity in which there is deep disagreement about foundational beliefs.[180]

Those who object to this limit on religious reason-giving argue that the Enlightenment culture of nonreligious foundationalism is itself reflective of a particular religious worldview—that of Enlightenment deism or "reason" as understood through a tradition of vaguely tolerant Protestantism.[181] According to these critics, those who claim that laws should not be based on religious grounds do not truly mean it; they mean only that laws should not be based on enthusiastic or hierarchical religions—that the "reason" on which laws should be based cannot be evangelical, fundamentalist, or Catholic, for instance.[182]

This argument is not entirely unfair; certainly the founding generation shared a set of religious convictions that grounded their constitution making, including their arguments in favor of religious tolerance.[183] Behind the

---

179. JOHN RAWLS, POLITICAL LIBERALISM (1993).

180. *Id.* at 212–54. For a seminal discussion of this question, see KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988). *See also* Joshua Cohen, Establishment, Exclusion and Democracy's Public Reason 27 (Nov. 2009) (unpublished manuscript), *available at* http://128.122.51.12/ecm_dlv2/groups/public/@nyu_law_website__academics__colloquia__constitutional_theory/documents/documents/ecm_pro_063731.pdf ("Endorsement excludes because it conflicts with the ideal of public reason, which requires that political justification proceed on a shared terrain of argument . . . .").

181. *See, e.g.*, McConnell, *supra* note 1, at 651–52 (explaining that some theorists argue that seemingly objective beliefs rely on the same faith claims that support religious beliefs); *cf.* Michael W. McConnell, *Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 152 (1992) ("[A]ttorneys for traditionalist parents have tried to portray secular ideology as the religion of 'secular humanism' . . . .").

182. *See* McConnell, *supra* note 1, at 652–53 (indicating that Catholicism and fundamentalism are the two religious views secular liberals are most concerned about).

183. Recall that Jefferson's Act for Establishing Religious Freedom begins: "Whereas, Almighty God hath created the mind free . . ." VA. CODE ANN. § 57-1 (2007) (recodifying the Act drafted by Thomas Jefferson in 1777); John Locke, *A Letter Concerning Toleration*, *in* TWO

"reason" of Enlightenment political philosophy there was often a foundational deism of a particularly Protestant kind.[184]

This challenge to the core idea of what constitutes a "religious" or a "secular" reason is often accompanied by the wholesale rejection of nonreligiously based foundationalism. For some, belief in God—that is, belief in a monotheistic entity—is a prerequisite for law, secular or religious. Certainly, variants of the three main Western religions—Judaism, Christianity, and Islam—share the view that a moral code is incoherent unless grounded in a belief in God. There is also a sociological tradition that asserts that religion is, at the very least, a salutary basis for civil law in that it promotes respect for the rule of law, liberty, and civic responsibility. Alexis de Tocqueville famously made this latter claim.[185]

Moreover, the existence of robust alternatives to religious foundationalism has not prevented natural lawyers throughout American history from urging obedience to the law only so long as it is consistent with God's law. The antislavery movement of the nineteenth century and the civil rights struggle of the twentieth are often given as examples of religiously based legal–political movements.[186] To what extent these movements were ultimately grounded in and derived their strength from religious dogma is the subject of some historical dispute.[187] What is not disputed is that many advocates in these causes based their arguments in claims about God's

---

TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION, *supra* note 105, at 22, 25 ("The toleration of those that differ from others in matters of religion, is so to agreeable the Gospel of Jesus Christ . . . .").

184. McConnell makes this argument. *See* McConnell, *supra* note 1, at 644–45 (listing various theorists known for grounding their enlightened political philosophy in theology). Locke, the contract theorist most central to the American experience, had the divine at the heart of his natural rights theory. *See* Alex Tuckness, *Locke's Political Philosophy*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Nov. 9, 2005), http://plato.stanford.edu/entries/locke-political/ (detailing Locke's philosophical positions, many of which invoked Christian theology and teachings).

185. ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 392 (Francis Bowen ed., Henry Reeve trans., Univ. Press 4th ed. 1863) (observing that Americans "combine the notions of Christianity and of liberty" such that they view their religiosity as integral to their freedom).

186. *See, e.g.*, McConnell, *supra* note 1, at 647–48 ("Unless we regret the religiously-motivated activism of . . . Harriet Beecher Stowe, Sojourner Truth, William Jennings Bryan, Dorothea Dix, and Martin Luther King, Jr., how can we say that presenting religious arguments in political debate is an act of bad citizenship?"); Claire McCusker, *When Church and State Collide: Averting Democratic Disaffection in a Post-*Smith *World*, 25 YALE L. & POL'Y REV. 391, 396 (2007) ("The role of religion in abolitionism and the passing of the Thirteenth, Fourteenth, and Fifteenth Amendments, the temperance movement and the Eighteenth Amendment, female Suffrage and the Nineteenth Amendment, and the civil rights movement and the repeal of Jim Crow laws is well documented by scholars.").

187. *Compare* McCusker, *supra* note 186, at 396, *with* Bret Boyce, *Equality and the Free Exercise of Religion*, 57 CLEV. ST. L. REV. 493, 525 (2009) ("Abolitionism in the nineteenth century and the civil rights movement of the twentieth century were strongly rooted in religious values; but slaveholders and opponents of civil rights also claimed to find justification in religion.").

requirements.[188] As is often observed, rights claims are often grounded in a foundational God, the most famous example being the Declaration of Independence.[189] Whether those claims must be so grounded as a philosophical matter does not make much difference. Religiously based justifications for obedience to the law are popular in the United States.[190] As a cultural matter, Americans' moral (and therefore legal) codes tend to be justified with reference to some religious tradition.[191]

Establishment Clause underenforcement is thus both a nod to this cultural reality and a recognition that the Court is not capable of resolving a difficult philosophical question about legal foundations. For all the language of secular purpose, the Court is hesitant to define too rigorously or explicitly the legitimate grounds for lawmaking. While religious motivations are out-of-bounds, they are not *too* out-of-bounds. Perhaps that is what *McCreary County*'s invitation to legislative dissembling tells us: the *appearance* of a secular purpose may be the best we can do in a world of disputed first principles about the appropriate foundations of the law. There are good reasons why the Court is not prepared to abandon its position that religious reasons for government action violate the nonestablishment principle as a formal matter. There are also good reasons why the Court is not ready to fully enforce that position.

---

188. *See* John L. Hammond, *Revival Religion and Antislavery Politics*, 39 AM. SOC. REV. 157, 183–84 (1974) (summarizing the role that Christian revival played in the antebellum abolitionist movement); Letter from Martin Luther King, Jr. from Birmingham Jail to Fellow Clergymen (April 16, 1963), *available at* http://mlk-kpp01.stanford.edu/index.php/encyclopedia/documentsentry/annotated_letter_from_birmingham/ (invoking Christian teachings to demonstrate that segregation "is not only politically, economically and sociologically unsound, it is morally wrong and awful").

189. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights . . . .").

190. *See, e.g.*, Kent Greenawalt, *The Natural Duty to Obey the Law*, 84 MICH. L. REV. 1, 48 (1985) ("Although Christians through the ages have had very different interpretations of the relevant biblical passages and of the citizen's obligations to the state, the basic premise that political authority is ordained by God has been one basis for assigning the claims of the state a high priority."); Richard Land, *The Christian and the Government: A Delicate Balance*, THE ETHICS & RELIGIOUS LIBERTY COMM'N OF THE S. BAPTIST CONVENTION (July 10, 2007), http://erlc.com/article/the-christian-and-the-government-a-delicate-balance ("It is our godly duty to obey the law even when no one's looking . . . .").

191. *See* GEORGE GALLUP, JR. & D. MICHAEL LINDSAY, SURVEYING THE RELIGIOUS LANDSCAPE: TRENDS IN U.S. BELIEFS 97 (1999) ("Within this country, individuals have employed religious dogma to conclusively settle matters such as slavery and segregation, prohibition and pacifism, and on many topics, people have later renounced these conclusions again on spiritual grounds."); ROBERT D. PUTNAM & DAVID E. CAMPBELL, AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US 496 (2010) (observing that "most Americans, even those that are not particularly religious, endorse a moral code based on the laws of God"); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1265 (1994) ("The second nonsectarian argument for the constitutional privileging of religion appeals to our desire as a society to remain alive to the moral, non-self-regarding aspects of life, and sees organized religion as a taproot of this vital aspect of human flourishing.").

C. *Privileging Democratic Process Values*

This cultural reality may also explain the Court's hesitance to apply its principles of nonestablishment fully to religious rhetoric in the public sphere. This underenforcement can be explained in part by institutional pragmatism: it would be quite difficult for the Court to enforce a proscription against legislators' or politicians' statements endorsing God or a particular religion. Separation of powers might also counsel against enforcing speech codes on Congress or the President. These latter concerns animated Justice Kennedy's concurrence in *Hein*, the faith-based initiatives case.[192]

These concerns might be more than pragmatic, however. It may be offensive to democratic theory for the Court to attempt to control public religious discourse beyond cabining certain ideal, "formal" types of government speech. This reason for the underenforcement of government-endorsing religious rhetoric is thus similar to the reason for underenforcing a strict secular purpose requirement—it may be inconsistent with democratic norms for the Judiciary to prevent citizens or their representatives from advocating the adoption of laws for whatever reason, including religious reasons. Here we see Justice Kennedy's stronger claim in *Hein* that underenforcement is a function of the fact that open discussion (including religious discussion) is "essential to democratic self-government."[193] On this argument, the expansive debate and deliberation necessary for a functioning democracy requires that the Court not close off any justification for political decision making, including the justification that particular laws are required by God or a specific religious worldview.

That democratic political process norms are more important than the nonestablishment norm is reflected in the privileged constitutional position of speech and associational rights in the United States.[194] The doctrinal Establishment Clause has never been understood to prevent religious organizations or persons from lobbying for laws on the basis of their religious beliefs or advocating that representatives adopt laws because they are required by God.[195] By extension, the Establishment Clause rarely limits

---

192. *See* Hein v. Freedom from Religion Found., 551 U.S. 587, 615–18 (2007) (Kennedy, J., concurring).

193. *Id.* at 616.

194. *Cf.* McDaniel v. Paty, 435 U.S. 618, 641 (1978) (Brennan, J., concurring) ("The State's goal of preventing sectarian bickering and strife may not be accomplished by regulating religious speech and political association.").

195. *See id.* at 642. In *McDaniel*, Justice Brennan stated,

> Our decisions under the Establishment Clause prevent government from supporting or involving itself in religion or from becoming drawn into ecclesiastical disputes. These prohibitions naturally tend, as they were designed to, to avoid channeling political activity along religious lines and to reduce any tendency toward religious divisiveness in society. Beyond enforcing these prohibitions, however, government may not go. The antidote which the Constitution provides against zealots who would inject sectarianism into the political process is to subject their ideas to refutation in the

pronouncements by government officials that they will or should follow the dictates of God or God's law in pursuing public, governmental ends.[196] Other countries with more rigorous concerns about religious divisiveness are not so speech-favoring.[197] For example, the French norm of "secularism"—derived from a long history of Catholic domination of the political system—is privileged in a way that the American norm of nonestablishment is not.[198]

Indeed, to the extent that speech rights come into conflict with a nonestablishment norm, speech generally wins. The Court has continually held that speech rights trump nonestablishment concerns. In a number of cases, the Court has held that the government cannot bar religious speakers from public forums even if the purpose of the bar is to avoid church–state entanglement.[199]

The Court's privileging of speech does have some limits: it applies to wholly private speech not publicly sponsored speech, which can be regulated.[200] In addition, the Court has not held that government limits on advocacy by nonprofit organizations, many of which are religious, violate any norm of free exercise or association.[201] As I have already observed, the IRS may, according to the Court, condition nonprofit status on a willingness to forgo certain practices, including engaging in political speech.

> marketplace of ideas and their platforms to rejection at the polls. With these safeguards, it is unlikely that they will succeed in inducing government to act along religiously divisive lines, and, with judicial enforcement of the Establishment Clause, any measure of success they achieve must be short-lived, at best.

Id.

196. *But see* McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 857–58 (2005) (striking down a posting of the Ten Commandments in a Kentucky courthouse).

197. *See, e.g.*, James A. Huff, Note, *Religious Freedom in India and Analysis of the Constitutionality of Anti-Conversion Laws*, 10 RUTGERS J.L. & RELIGION (2009) (article at 25) ("[The High Court of India] also held that you could limit free speech to encourage public order. The court upheld the conviction of an editor of a magazine . . . because the editor 'deliberately and maliciously' outraged the religious feelings of a particular religious class . . . .").

198. *See* NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT 236 (2005) ("They have it much easier in France, for example, where the principle of *laïcité*—in effect, constitutionalized strong secularism—simply rejects the notion that religion is an inherently meaningful source of values, and so can easily conclude that religion can be excluded from the public sphere altogether.").

199. *See, e.g.*, Rosenberger v. Rector of the Univ. of Va., 515 U.S. 819, 845–46 (1995) (holding that the University of Virginia could not deny funding to a student newspaper on the basis of its religious message).

200. Note, however, that the public/private distinction can also permit religious speech by deeming it private. *See* Salazar v. Buono, 130 S. Ct. 1803, 1811 (2010) (concluding that a district court erred in enjoining the government from implementing a statute transferring federal land containing a privately placed cross to a private party). *But cf.* Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1129 (2009) (determining that privately donated religious monuments in a park reflect government speech rather than private speech).

201. *Cf., e.g.*, Christian Echoes Nat'l Ministry v. United States, 470 F.2d 849, 857 (10th Cir. 1972) (denying tax-exempt status to a religious nonprofit with significant involvement in lobbying and elections), *cert. denied*, 414 U.S. 864 (1973).

But these restrictions, far from being at the center of the nonestablishment norm, are actually at the fringes. The Court's doctrine privileges speech, religious or otherwise, over nonestablishment, and it privileges association and political participation with little regard for Establishment Clause concerns. Religious organizations or religiously motivated individuals cannot be prevented from engaging in the same associational, political, and lobbying activities as any other organization or group. The constitutional norms of association and speech would not tolerate differential treatment of these organizations, and the state action requirement limits enforcement of nonestablishment norms against nongovernmental groups. Moreover, even when government officials are implicated, their relative receptiveness to political efforts is almost entirely a matter of constitutional culture and not a matter of constitutional doctrine.

The notion that the doctrinal Establishment Clause should not (as a normative matter) or cannot (as a practical one) impose too stringent limits on public deliberation and debate—whether claims about the sources of law or the source of law itself—helps explain the underenforcement of nonestablishment in the political arena more generally. Underenforcement is a pervasive feature of the nonestablishment norm in large part because that norm is submerged to norms of self-governance. And it turns out that the norm of self-governance could, in theory and practice, permit governance by religious law. Religiously motivated laws and religiously motivated advocacy are mostly unregulated, which means that concerted religiously infused political agendas are not readily susceptible to Establishment Clause scrutiny.

The result is a sense of dislocation. For example, one reading the Republican Party Platform of 2008 finds a document that asserts America's "Judeo-Christian heritage"[202] and proclaims the Party's opposition to abortion,[203] same-sex marriage,[204] and homosexuals in the military.[205] The Platform also asserts the Party's support of school prayer and religious school vouchers.[206] Those who support these policies and those who oppose them recognize quite clearly that they are of a piece: the Party's statement that America is a Judeo-Christian country is intimately related to the Party's opposition to abortion and support of school prayer. More importantly, the Party's rhetoric and its specific policies arguably arise out of similar religiously grounded values and norms that, for supporters, constitute a unified political agenda.

---

202. REPUBLICAN NAT'L COMM., *supra* note 118, at 53.
203. *Id.* at 52.
204. *Id.* at 53.
205. *Id.* at 5.
206. *Id.* at 44–45.

The Court's Establishment Clause jurisprudence, however, disaggregates these religiously infused statements and policies. The jurisprudence therefore appears partial and incoherent both to religionists and nonreligionists. The former wonder why the Court is hostile to cultural indices of religion: school prayer or public statements of religious endorsement. The latter wonder why the Court has nothing to say about explicit religiously inspired political agendas. Neither side can make sense of a jurisprudence that limits prayer at high school graduations[207] but that permits the President to issue a Thanksgiving Day Proclamation,[208] Congress to declare a "Day of Prayer,"[209] or a religious official to invoke Jesus Christ during presidential inaugurations.[210]

This dissonance seems at first to represent a failure of doctrine, but it may instead represent a lack of execution.[211] Whether one adopts a principle of nonendorsement, neutrality, or noncoercion as the chief tool of Establishment Clause analysis will not prevent these principles from being embarrassed by a significant category of government acts that have never been susceptible to judicial regulation. Attempts to distinguish these government activities using a particular doctrinal principle will always be unconvincing.

III. Managing Establishment

One effect of focusing on the Establishment Clause's pervasive underenforcement is that it changes our perspective on the frailties of legal doctrine. The recognition that the Court's nonestablishment doctrine is significantly underenforced takes some pressure off the principles the Court employs in resolving Establishment Clause disputes. And it shifts the debate away from the coherence of those principles to a debate about the limits of judicial action in enforcing them. There is an implicit balancing in the Court's decision making between nonestablishment and norms of democratic

207. Lee v. Weisman, 505 U.S. 577, 598–99 (1992).

208. *See* Lynch v. Donnelly, 465 U.S. 668, 675 (1984) (mentioning that the presidential Thanksgiving Proclamation is one of several examples of "official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders").

209. *See id.* at 677 (mentioning that the National Day of Prayer is another example of the government acknowledging America's "religious heritage"). *But see* Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 603 n.52 (1989) ("It is worth noting that just because [the Court has] sustained the validity of legislative prayer, it does not necessarily follow that practices like proclaiming a National Day of Prayer are constitutional.").

210. Newdow v. Bush, No. CIV S-01-0218 LKK GGH PS, 2001 U.S. Dist. LEXIS 25936, at *4 (E.D. Cal. Dec. 8, 2001).

211. *See* Gey, *supra* note 29, at 470 (arguing that the *Lemon* test is a useful analytic tool but that applying the test by its terms "would require a far more rigorous separation of church and state" than the Supreme Court would willingly endorse).

governance. We may question the results of that balancing, but it is no doubt taking place.

An additional reason to think about underenforcement as a pervasive characteristic of the Establishment Clause is that it focuses our attention on the relationship between doctrinal nonestablishment and political nonestablishment. The pragmatic and philosophical limits on judicial enforcement serve as a reminder that constitutional adjudication is dynamic. The Court does not act in a static manner to prevent establishment but rather interacts with the other institutions of government and the constitutional culture in order to manage it.[212] The shift to a dynamic perspective helps us to understand both the possibilities and limits of judicial doctrine. How should the Court best use its admittedly limited judicial capital to influence the overall amount of establishment in the constitutional culture? What should a self-conscious Justice who understands the Court's institutional limits but desires to enforce the Court's stated doctrine do?

Of course, these questions assume that the Court plays some role in enforcing constitutional limits—that its decisions have some effect on what government officials and political actors do. This assumption is itself controversial.[213] By some lights, the Court could have little to no effect on the political and governmental space in which those actors operate. It is instructive to remember that disestablishment was initially politically, not judicially, compelled.[214]

Or, alternatively, causation could be reversed. The Court's doctrine and decisions could be a product of politics and the wider constitutional culture, rather than an influence on it. A persuasive story can be told that the Court's initial modern forays into regulating the church–state relationship were a reflection or outcome of Catholic–Protestant religious politics, not a shaper or cause of that politics.[215] And so there may be a historical response to the question of judicial influence, and one that can only be answered by determining the causal relationship between the Court's decisions and the nonestablishment norm. That history may indicate that the Court normally follows political majorities or acts mostly to reinforce an already existing

---

212. *Cf.* William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 30–31 (1994) (describing the interactions between the Executive, Legislative, and Judicial Branches in the lawmaking process).

213. *See* Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369, 394 (1992) (concluding that judicial independence is "seldom found" when Congress is opposed to Court opinion); Daryl Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657 (2011) (seeking to explain why political actors would obey constitutional commands that they oppose).

214. *See* Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEXAS L. REV. 955, 960 (1989) (characterizing the disestablishment of religion as a "public decision" in the 18th century).

215. Jeffries & Ryan, *supra* note 116, at 312–15; Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 46 (1996).

political settlement.[216] The judicial enforcement of the Establishment Clause may be best understood as political history—the Court's shifting doctrines may simply reflect that history and not substantially alter it.[217]

I will return to this possibility, but for now I want to cabin it in its most aggressive form. Many historians would accept a more nuanced relationship between what the Court does and politics writ large.[218] So for this third Part, I assume a world in which the Supreme Court plays a preeminent role in articulating constitutional law and that by articulating constitutional law, the Court has an effect on political and governmental actors and shapes what they, lower courts, the public, and other institutions of government do going forward.

With that assumption in hand, this Part canvasses four approaches to Establishment Clause (non)enforcement. I discuss these approaches with a few goals in mind. First, I want to say something about the relationship between judicial doctrine and political/cultural behavior and how the Justices might reconcile the gap between the two. Relatedly, I want to say something to the Justice who is at least somewhat committed to the Court's existing doctrine and worries about how to put it into effect. And finally, I want to say something about the role that the Court might play in maintaining the core political principle of nonestablishment under the current conditions of underenforcement—recognizing that the core is contentious, but that it is not unbounded.

A. Abandon the Establishment Clause

A first possible response to the gap between stated Establishment Clause doctrine and its application is to abandon the doctrine, either because

---

216. For the most recent articulation of this view, see BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009). For other accounts of how the Supreme Court does not readily depart from existing political settlements, see GERALD N. ROSENBERG, THE HOLLOW HOPE (1993), and MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004). *See also* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 40–50 (1999).

217. *See* Klarman, *supra* note 215, at 47 (attributing the shift in the Court's Establishment Clause doctrine to dramatic political, social, and ideological changes). It is notable that a recent prominent treatment of religion and religious attitudes in the United States barely mentions the Supreme Court and has no index entry for "Establishment Clause" or "Free Exercise Clause." Aside from *Roe v. Wade*, the book appears to mention only two other Supreme Court cases, both in passing. *See generally* PUTNAM & CAMPBELL, *supra* note 191.

218. *See, e.g.*, SARAH BARRINGER GORDON, THE SPIRIT OF THE LAW: RELIGIOUS VOICES AND THE CONSTITUTION IN MODERN AMERICA 4 (2010) (emphasizing the mutual influence between religious views and legal doctrines); Jeffries & Ryan, *supra* note 116, at 369–70 (recognizing that both internal and external factors have contributed to the Court's dynamic Establishment Clause jurisprudence); Klarman, *supra* note 215, at 47 (acknowledging that evolving political views shaped Establishment Clause transformation).

it is wrong or because it cannot be honestly applied in light of the structural limitations described in Part II. Another reason to abandon the doctrine is because it is discriminatory—it singles out religion in a way that is inconsistent with modern constitutional sensibilities. In both instances, it can be argued that other constitutional doctrines that better fit the current constitutional culture—like equality—more effectively serve to advance the values of nonestablishment. In both cases, the Establishment Clause as interpreted by the Supreme Court does comparatively little work in maintaining the nonestablishment norm. If nonestablishment flourishes constitutionally, it will not be because the Court enforces it judicially.

Justices Scalia and Thomas have made the first kind of abandonment argument.[219] Justice Scalia in particular has argued both that the Court's doctrine is wrong and that we know that it is wrong because it has never been honestly and consistently followed.[220] Justice Scalia specifically rejects the secular purpose prong of *Lemon*, the nonendorsement rule, and even aspects of the noncoercion principle (as I have described it), in large part on the grounds that the principles cannot be and have never been applied to a significant array of government conduct.[221] In the place of these doctrines is a very narrow notion of what constitutes establishment. In his almost twenty-five years on the Court, Justice Scalia has never joined a majority to strike down a government action on Establishment Clause grounds.[222]

Both Justices Scalia and Thomas take a quasi-originalist view that seeks to reconcile current Establishment Clause doctrine with the original practices and traditions of the founding generation. This approach mostly defines nonestablishment in terms of majoritarian preferences and practices at the

---

219. Justice Scalia has urged the court to adopt

> an Establishment Clause jurisprudence that is in accord with out Nation's past and present practices, and that can be consistenly applied—the central feature of which is that there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments.

Van Orden v. Perry, 545 U.S. 677, 692 (2005) (Scalia, J., concurring). *See also id.* at 692–94 (Thomas, J., concurring) (arguing that the Court should reconsider Establishment Clause incorporation against the states or, in the alternative, only prohibit government acts that coerce).

220. *See, e.g.*, McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 890 (2005) (Scalia, J., dissenting) ("[T]he Court has not had the courage (or the foolhardiness) to apply the neutrality principle consistently."); *Van Orden*, 545 U.S. at 692 (Scalia, J., concurring) (arguing that the Court should adopt an Establishment Clause jurisprudence "that can be consistently applied").

221. *See, e.g.*, *McCreary Cnty.*, 545 U.S. at 908–09 (Scalia, J., dissenting) (casting doubt on the noncoercion principle by arguing that there is no agreed upon standard or definition for what constitutes coercion); *Van Orden*, 545 U.S. at 692 (Scalia, J., concurring) (rejecting the nonendorsement rule by explaining that there should be "nothing unconstitutional in a State's favoring religion generally" since this is in accordance with "our Nation's past and present practices").

222. *But see* Hernandez v. Comm'r, 490 U.S. 680, 713 (1989) (O'Connor, J., dissenting) (arguing, joined by Justice Scalia, that the contested government action violated the Establishment Clause).

point in time when the country was overwhelmingly Protestant and overwhelmingly theistic. The long history of religious proclamations, religious references, religious favoritism, and religious behavior by American public officials is thus proof of the Establishment Clause's meaning, not of its underenforcement through time.[223] The nonestablishment principle thus operates within a civic culture that is in the main monotheistic and Christian.

Justice Thomas has been most explicit in his willingness to abandon the Establishment Clause.[224] He has argued that all the work that the Clause does could be done through the Free Exercise Clause.[225] The nonestablishment norm merely prevents coercive religious ritual and some (but not all) forms of religious preferentialism, and very little else.[226] Justice Thomas also rejects Establishment Clause incorporation, on the ground that some states in the eighteenth and early nineteenth centuries maintained established churches.[227] And both Justices Scalia and Thomas appear to embrace the idea that civil law could be a pure reflection of religious law, at least where the law does not compel religious worship.[228]

A different form of abandonment is proposed by scholars who would replace much of Establishment Clause doctrine with neutrality or nondiscrimination principles borrowed from free speech[229] and equal protection

---

223. *See, e.g.*, *McCreary Cnty.*, 545 U.S. at 885–89 (Scalia, J., dissenting) (relying on the government's past and present religious acts and support to illuminate the Establishment Clause's meaning).

224. *Van Orden*, 545 U.S. at 693 (Thomas, J., concurring).

225. *See* Cutter v. Wilkinson, 544 U.S. 709, 728 n.3 (2005) (Thomas, J., concurring) ("I note, however, that a state law that would violate the incorporated Establishment Clause might also violate the Free Exercise Clause.").

226. Justice Thomas stated as much:

> It is difficult to see how government practices that have nothing to do with creating or maintaining the sort of coercive state establishment described above implicate the possible liberty interest of being free from coercive state establishments. . . . To be sure, I find much to commend the view that the Establishment Clause "bar[s] governmental preferences for *particular* religious faiths."

Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 53 (2004) (Thomas, J., concurring) (quoting Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 856 (1995) (Thomas, J., concurring)). *See also id.* at 53 n.4 ("It may well be the case that anything that would violate the incorporated Establishment Clause would actually violate the Free Exercise Clause . . . .").

227. *Id.* at 49–50.

228. *See, e.g.*, *McCreary Cnty.*, 545 U.S. at 885–94 (Scalia, J., dissenting) (relying on the government's past and present religious acts and support to illuminate the Establishment Clause's meaning); *Cutter*, 544 U.S. at 729 (Thomas, J., concurring) (characterizing mandatory religious observance as a constitutionally prohibited establishment of religion).

229. *Cf.* Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 130 S. Ct. 2971, 2978 (2010) (applying First Amendment free speech analysis to the claims of a religious organization against a "public law school['s] condition[ing of the group's] official recognition . . . on the organization's agreement to open eligibility for membership and leadership to all students"). As Stanley Fish recently pointed out, *Christian Legal Society* was "squarely about religion" but could not be analyzed under the Establishment or Free Exercise Clauses. Stanley Fish, *Is Religion Special?*, N.Y. TIMES (July 26, 2010), http://opinionator.blogs.nytimes.com/2010/07/26/is-religion-special/; *cf.* Mark Tushnet, *The Redundant Free Exercise Clause*, 33 LOY. U. CHI. L.J. 71, 83 (2001)

doctrine.[230] This approach is animated in part by a concern that religion, religious individuals, and religious claims are being treated differentially—either worse or better than their secular equivalents.[231] One can suppress this differential treatment by reading the Establishment Clause as a nondiscrimination provision rather than as a special limit on specifically religious conduct, religious speech, or religious political activity.

The shift away from the Establishment Clause to other constitutional principles is attractive because it replaces a set of doctrines that are only weakly applied and often misunderstood with principles that may be more familiar. The emphasis on nondiscrimination as opposed to nonestablishment in particular may be salutary because it assimilates religion into the mainstream of constitutional law, with its emphasis on equal and nonarbitrary government treatment. And to the extent that nonestablishment is concerned with sectarian favoritism or preferentialism, equal protection can do most of that work.

Nondiscrimination also provides a different language for talking about particular hot-button issues that have deeply religious content, such as abortion or homosexuality. It is notable that challenges to opposite-sex marriage laws have primarily been brought under the Equal Protection and Due Process Clauses, not under the Establishment Clause.[232] Nevertheless, when

---

(arguing that the Free Speech Clause provides protection for almost all of what the Free Exercise Clause does).

230. *See, e.g.*, CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 51–77 (2007) (describing a model of religious freedom based on equality); Thomas C. Berg, *Can Religious Liberty Be Protected as Equality?*, 85 TEXAS L. REV. 1185, 1186 (2007) (asserting that Supreme Court decisions and commentators can be found to support a nondiscrimination approach to the Religion Clauses). For a discussion about the shift to neutrality in Religion Clause adjudication, see Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1, 11–12 (2000), and compare NUSSBAUM, *supra* note 16, at 21–22, 229–31 (discussing equality and neutrality in the context of establishment issues and recent challenges by members of the Court to the consensus behind the neutrality approach). *See generally* Douglas Laycock, *supra* note 34 (discussing his concept of "substantive neutrality").

231. The abandonment of the Establishment Clause is also animated by the apparent conceptual difficulties in defining religion and describing its proper bounds vis-à-vis other comprehensive belief systems. According to scholars of this ilk, the irreconcilable gap between judicial doctrine and constitutional practice is simply a product of these intractable conceptual difficulties. *See, e.g.*, STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM *passim* (1995) (arguing that there is no way to distinguish religious from nonreligious claims and no possibility of a neutral principle that would not privilege certain worldviews over others); Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, *in* LAW & RELIGION: A CRITICAL ANTHOLOGY 383 *passim* (Stephen M. Feldman ed., 2000) (discussing liberalism's inability to generate a theory of religious freedom without contradicting core liberal commitments)); Larry Alexander, *Kent Greenawalt and the Difficulty (Impossibility?) of Religion Clause Theory*, 24 CONST. COMMENT. 243, 243–44 (2009) (arguing that the difficulty of distinguishing between what is religion and what is not religion hampers any effort to generate a coherent theory of religious liberty).

232. *See, e.g.*, Gill v. Office of Pers. Mgmt., 699 F.2d 374, 377 (D. Mass. 2010) (holding that the Defense of Marriage Act violates the Equal Protection Clause); *In re* Marriage Cases, 183 P.3d

testing such laws for a rational basis, courts have indicated that they will not consider religious rationales for the opposite-sex limitation, effectively importing a secular purpose requirement into equal protection doctrine.[233] Indeed, the courts take it as a given that a rational basis cannot be in the form of a religious objection. In the recently decided same-sex marriage case out of California, the district court cited *Everson v. Board of Education of Ewing Township*[234]—one of the first of the Court's modern Establishment Clause decisions—in requiring that the defenders of opposite-sex marriage offer non-religious reasons for the restriction.[235] The defenders of the marriage ban did not contest that requirement in any way.

Why not test these laws more straightforwardly under the Establishment Clause and its secular purpose principle? Perhaps the invocation of equal treatment is more attractive in the wider political and constitutional culture and more consistently applicable through doctrine.

The move towards neutrality or nondiscrimination is less responsive to other nonestablishment norms, however. It does not readily address the concern about religious factionalism or of government-sponsored religion-endorsing speech—at least not directly. Nor does it address the problem of religiously motivated lawmaking. It is fully possible that other constitutional doctrines should dominate even when religion or religiously inspired politics

---

384, 453 (Cal. 2008) (declaring that state laws prohibiting same-sex marriage violate equal protection, due process, and privacy principles), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, *amendment ruled unconstitutional*, Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1003–04 (N.D. Cal. 2010); Lewis v. Harris, 908 A.2d 196, 211, 215–17 (N.J. 2006) (holding that there is not a fundamental right to same-sex marriage under the New Jersey Constitution but that same-sex couples must be afforded the same rights as opposite-sex couples based on equal protection principles); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961, 969 (Mass. 2003) (declaring that the marriage licensing statute denying marriage licenses to same-sex couples does not have a rational basis and, thus, violates the Massachusetts Constitution); Baehr v. Lewin, 852 P.2d 44, 57, 67 (Haw. 1993) (holding that there is not a fundamental right to same-sex marriage under the Hawaii Constitution but that Hawaii laws prohibiting same-sex marriage will be subjected to strict scrutiny in equal protection challenges).

233. *See* Varnum v. Brien, 763 N.W.2d 862, 904–06 (Iowa 2009) (addressing the unspoken religious element of the challenged opposite-sex marriage law, even though the proponents of the law offered only secular justifications, and striking down the law on equal protection grounds). In defense of the holding in *Goodridge*, Justice Greaney wrote:

> I do not doubt the sincerity of deeply held moral or religious beliefs that make inconceivable to some the notion that any change in the common-law definition of what constitutes a legal civil marriage is now, or ever would be, warranted. But, as a matter of constitutional law, neither the mantra of tradition, nor individual conviction, can justify the perpetuation of a hierarchy in which couples of the same sex and their families are deemed less worthy of social and legal recognition than couples of the opposite sex and their families.

798 N.E.2d at 973 (Greaney, J., concurring); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992) ("Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy . . . . Our obligation is to define the liberty of all, not to mandate our own moral code.").

234. 330 U.S. 1 (1947).

235. *Perry*, 704 F. Supp. 2d at 930–31.

are at stake: privacy (for abortion or end-of-life decisions), speech and association (for political participation), or equal protection (for discriminatory laws). But though these doctrines can vindicate some nonestablishment values, they cannot vindicate them all. And these other doctrines—one thinks of privacy in the abortion context or equal protection in the same-sex marriage context—are not necessarily any more tractable than nonestablishment.

B. Avoid Backlash

A second approach would retain an independent Establishment Clause doctrine but with heightened sensitivity to the political costs of its enforcement. The dominant trope here is avoiding political backlash. The relationship between the Court's Establishment Clause doctrine and the political culture of nonestablishment has often been discussed in these terms. Commentators sometimes argue that a politically active Religious Right developed in response to the liberalizing "anti-religion" decisions of the Warren Court.[236] The agenda of the Republican Party has long included overturning the Court's bar to school prayer and aid to sectarian schools, as well as *Roe v. Wade*.[237] To the extent that nonestablishment is undercut by a heightened religiously based politics, the Court could be seen as inhibiting nonestablishment through its rulings instead of advancing it.

A judge concerned about the overall amount of establishment in the constitutional culture might rightly be attentive to how a specific Establishment Clause decision is likely to be received by the public and by particular political actors. This attentiveness could be generic or doctrine specific. In either case, we hear echoes of Bickel's notion of political capital.[238]

Consider Bill Eskridge's "pluralism-facilitating judicial review."[239] According to Eskridge, the Court should be attentive to the polarizing effects of its decisions and should actively use judicial review to lower the stakes of

---

236. *Cf.* Steven D. Smith, *Constitutional Divide: The Transformative Significance of the School Prayer Decisions* 101–02 (Univ. of San Diego Sch. of Law Legal Studies Research Paper Series, Research Paper No. 10-038, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1691661 (claiming that the school prayer decisions contributed to the "culture wars"). *But cf.* PUTNAM & CAMPBELL, *supra* note 191, at 115–16 (offering evidence that the 1960s Supreme Court decisions concerning prayer in school were "at most, a modest contributor" to the rise of evangelicalism).

237. 410 U.S. 113 (1973). To view the Republican Party platforms, which advocate these policy positions, see *Political Party Platforms*, *supra* note 118.

238. *See generally* Bickel, *supra* note 75 (discussing the political influences on the Supreme Court's decision regarding whether, when, and how to adjudicate).

239. William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1294 (2005) (internal quotation marks omitted).

politics.[240] Eskridge argues that the Court should seek to "ameliorate politically destructive culture wars by denying groups state assistance in their efforts to exclude, demonize, or harm groups they dislike."[241] In doing so, however, the Court should avoid "raising the stakes of politics" by sidestepping national resolutions to controversial issues when local ones will do, adopting narrow and incremental interpretations of constitutional and statutory provisions, and by using "procedural dodges" to avoid deciding tough constitutional issues.[242] Judicial review can facilitate democratic decision making by enforcing neutral rules of political engagement while avoiding political backlashes like those that Eskridge argues followed *Roe v. Wade*.[243]

Richard Primus offers a more doctrine-specific approach, arguing that sometimes judges should take public opinion into account as part of their first-order interpretation of particular constitutional commands.[244] Here, the doctrinal answer to the question "what does the Constitution require?" includes consideration of potential public reaction. As Primus puts it:

> [T]he consequentialist, backlash-fearing argument, which persuades many theorists that judges should sometimes stop short of what the law truly demands, presumes that there are cases in which the public has a view different from that of the judges, that judges are aware of the divergence, and that judges should alter their behavior accordingly. If there are in fact cases where these conditions obtain, it may be better to think of the public's strongly held view as one of the elements constituting the right answer rather than as something with which the right answer must compromise.[245]

Primus recognizes that there is a certain formalism in thinking about constitutional adjudication as producing something that "the law truly demands" against which political considerations must be balanced and taken into account.[246] But it does seem plausible to assume that a self-conscious judge might think in these terms. Under such conditions, the backlash-limiting approach might be a way of reconciling doctrinal nonestablishment, cultural nonestablishment, and the gap between the two.

Certainly, Justice Breyer's opinion in *Van Orden* seems to be an example of Primus's approach. As I have already described, in *Van Orden*, Justice Breyer treated as a first-order condition the possible adverse reaction

---

240. *See id.* at 1301–10 (discussing methods by which judges can and should actively employ judicial review to lower the stakes of politics).

241. *Id.* at 1283.

242. *Id.*

243. *Id.* at 1313.

244. Richard Primus, *Double-Consciousness in Constitutional Adjudication*, 13 REV. CONST. STUD. 1, 1–3 (2007).

245. *Id.* at 3.

246. *Id.*

to a decision to apply the Establishment Clause to order the removal of permanent Ten Commandments displays. In determining that the Establishment Clause would be undermined instead of advanced by a ruling that ordered their removal, Justice Breyer was exercising more than judicial self-restraint in the face of the Court's limited political capital. He was also doing something more than generically lowering the stakes of politics. In *Van Orden*, Breyer interpreted the Establishment Clause as a mandate to avoid sectarian strife and argued that vindicating that important nonestablishment norm was paramount despite the religious provenance, nonneutrality, and endorsing nature of the display.

There are reasons to be skeptical of judges shaping their jurisprudence or political behavior to avoid backlash or to seek to ameliorate conflict in this way. Theories of political backlash are often based on small, historical samples over relatively short timeframes—*Brown v. Board*,[247] *Roe v. Wade*,[248] *Lawrence v. Texas*[249]—and they tend to overestimate the impact of Court decisions. It also seems unlikely that the Justices will be able to accurately predict when a decision will generate a backlash. Indeed, not long ago, theorists believed that the Court could ameliorate politically divisive culture wars by deciding cases and taking issues *out* of the political process.[250] Backlash theories also cannot predict the long-term consequences of a Court's decision. Consider Michael Klarman's argument that the *Brown* decision did not advance the civil rights struggle but that the violence engendered by the decision did.[251] Southern political backlash led to a counterpolitics of racial justice that became ascendant with the civil rights acts of the 1960s.[252] One can imagine backlashes and counter backlashes, *ad infinitum*.

In the same way, the rise and fall of religiously motivated politics is far from predictable. As I have already noted, it is commonly theorized that the

---

247. 347 U.S. 483 (1954).

248. 410 U.S. 113 (1973).

249. 539 U.S. 558 (2003).

250. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court stated,

> Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.

505 U.S. 833, 866–67 (1992).

251. KLARMAN, *supra* note 216, at 441–42 ("The post-*Brown* racial fanaticism of southern politics produced a situation that was ripe for violence, while *Brown* itself created concrete occasions on which violent opposition to school desegregation was likely. . . . By helping lay bare the violence at the core of white supremacy, *Brown* accelerated its demise.").

252. *See generally id.* at 442 (stating that the backlash resulting from *Brown* was necessary to "enable[] transformative racial change to occur as rapidly as it did" under the Civil Rights Act of 1964).

Christian Right developed in response to the Supreme Court's decisions on school prayer and abortion or to the cultural upheavals of the 1960s. However, there is another theory that says the Christian Right was created by Republican strategists who took advantage of widespread Christian contempt for the IRS's removal of tax-exempt status from racially segregated private Christian schools in the 1970s.[253]

According to this account, *Bob Jones University v. United States*[254]—which upheld the IRS's penalization of a fundamentalist Christian university for its racially discriminatory policies[255]—is a more direct cause for the political response that followed than was *Roe* or the school prayer decisions. Indeed, according to Paul Weyrich, a conservative strategist during the 1970s, past attempts had failed at mobilizing fundamentalist voters based on abortion and prayer in school.[256] The tax issue was different, however, in that it inhibited the fundamentalists' ability to take refuge in their own subculture.[257] Weyrich contends that the abortion issue was tacked onto the Republican agenda after the Christian Right was formed in response to the IRS taxing issue.[258]

The possibility that *Roe* played less of a role than *Bob Jones* in generating a political response[259]—at least initially—counsels against drawing easy political conclusions from particular Supreme Court

253. RANDALL BALMER, GOD IN THE WHITE HOUSE: A HISTORY 94–97 (2008).

254. 461 U.S. 574 (1983).

255. *Id.* at 605.

256. WILLIAM MARTIN, WITH GOD ON OUR SIDE 173 (1996).

257. HANKINS, *supra* note 117, at 144. When the teaching of evolution became widely accepted following the Scopes Monkey Trial in 1925, many fundamentalists were content to withdraw from national politics because they could take refuge in their own isolated communities. BALMER, *supra* note 253, at 97. Private Christian schools were seen as a sanctuary, where students were free to pray and were not subject to the teaching of evolution. MARTIN, *supra* note 256, at 168 ("Although many of these schools were 'segregation academies,' formed in the aftermath of *Brown*, 'most scholarly investigations have concluded . . . that by the mid-1970s integration was no longer a significant factor in their continued proliferation.'" (internal quotation marks omitted)). Thus, when the IRS reached into the private realm of these Christian schools (on the basis of segregation), fundamentalist Christians were outraged. *Id.* at 168–69. Republicans saw this outrage as an opportunity to revive fundamentalist Christians' political involvement in favor of the Republican Party, which claimed to be opposed to intrusive governmental actions; thus, fundamentalists were motivated to reenter the political realm, and the Republicans won their renewed voting bloc by convincing fundamentalist leaders that the Democratic Carter Administration was responsible for the IRS removal of Bob Jones University's tax-exempt status (even though the IRS decision regarding Bob Jones University was made before Carter came into office). BALMER, *supra* note 253, at 98, 100–01.

258. BALMER, *supra* note 253, at 100.

259. *Cf.* Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 417–18 (2007) (noting the influence that *Bob Jones* had on the opposition to *Roe*); PUTNAM & CAMPBELL, *supra* note 191, at 392 (noting that it "took a few years for evangelical leaders to embrace the pro-life cause").

decisions.[260] It seems somewhat naïve to believe that a split decision in the Court's Ten Commandments cases or the Court's avoidance of a decision in the Pledge of Allegiance case will effectively reduce religious–political activity. In fact, political and cultural operatives who oppose the Court's pronouncements on religion have used the decisions in the Ten Commandments cases to press for the erection of additional Ten Commandments monuments,[261] while simultaneously arguing that the Court is hostile to religion in the public square.[262] The very ambiguity of the Court's decisions may inflame the ongoing political and cultural debate.

The notion that "the public" has identifiable interests and opinions on particular judicial subjects might be similarly naïve. In avoiding "unpopular" decisions, the Court may only be avoiding the ire of particular interests. It is very difficult for the Justices to know when they should consider the demands of "the people" and when the people are indistinguishable from powerful interest groups. We might be less inclined to countenance departures from the Court's stated jurisprudence when that departure looks like it is a response to a particular political constituency.

Nevertheless, a general theory of judicial review that emphasizes the Court's role in lowering the stakes of politics is attractive in the Establishment Clause context. One can argue whether Justice Breyer's concurrence in *Van Orden* was a strategic, stakes-lowering political move—like Justice Stevens's standing decision in *Newdow*—or an example of how constitutional "law" can be sensitive to public reaction. And one can dispute the actual political effects of these decisions. Nevertheless, both *Newdow*

---

260. *Cf.* Post & Siegel, *supra* note 259, at 375–77 (arguing that, although most commentators view backlash as problematic, there are positive benefits that can result from backlash). A recent example of a backlash that was unanticipated was the public's response to the Court's decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), a takings case. *See* Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100, 2163–64 (2009) (describing the backlash to *Kelo* as anomalous given the decision's consistency with relevant precedent).

261. *See, e.g.*, Andy Kanengiser, *Ten Commandments Display Receives OK from Senators*, CLARION LEDGER, Mar. 30, 2005, at A1, *available at* 2005 WLNR 27035709 (detailing the Mississippi Senate's overwhelming approval of legislation allowing the Ten Commandments to be displayed at public buildings); Ken Kusmer, *State Lawmakers Want Monument in Place*, FORT WAYNE NEWS SENTINEL, June 28, 2005, at L1, *available at* 2005 WLNR 10175356 (describing Indiana legislators' calls for the installation of a Ten Commandments monument on the statehouse grounds); *cf.* Melanie Hunter, *Amendment Would Reverse Ruling on Ten Commandments*, CNSNEWS.COM (June 30, 2005), http://www.gopusa.com/news/2005/july/0701_ten_commandments.shtml (describing a constitutional amendment introduced by more than one hundred congressmen that would create the right to post the Ten Commandments on public property).

262. *See, e.g.*, Hans Hacker, *Moses v. Jesus: Why do Conservative Christians Prefer Moses' Commandments to Jesus' Beatitudes*, EZINE ARTICLES (July 6, 2005), http://ezinearticles.com/?Moses-v.-Jesus:-Why-do-Conservative-Christians-Prefer-Moses-Commandments-to-Jesus-Beatitudes?&id=48961 ("Rejection of the Ten Commandments by courts has contributed to disaffection with the society, belief that Christian values are under attack, and sustained political and legal action on the part of the conservative Christian social movement.").

and *Van Orden* emphasize the need for an account of the Establishment Clause that recognizes the role of the Court in shaping the political culture. A pragmatic institutionalist worries both about the contours of Establishment Clause doctrine and the political costs and benefits of applying it fully.

C. Permit Symbols but Regulate Money

A third potential approach to managing establishment has much in common with "avoid backlash" but emphasizes an adjustment of the Court's Establishment Clause priorities. Specifically, some commentators have argued that the Court's sporadic regulation of symbolic or expressive establishment harms is misplaced and that the Court should be more concerned with harms that arise from government funding or subsidization of religious activity.[263]

Noah Feldman has addressed this argument directly to the political culture. He argues for a kind of political truce: Religionists would be permitted most of their expressive and symbolic acknowledgements of religion while secularists would get limitations on most kinds of government funding.[264] In contrast, I have argued for a shift from symbols to money in the course of developing a decentralized account of the Establishment Clause[265]—something I will say more about in the next section.

Both accounts share a common view that regulating symbols unnecessarily heightens religious tensions. First, the regulation of symbols and expressive government acts generates a politicized environment by forcing public officials and groups to take sides in highly emotional and fraught cultural battles. The disputes over crèches, Christmas displays, and Ten Commandments displays are extremely divisive and have little middle ground. Often these battles are local, but litigation heightens their profile. The costs in terms of religious polarization and politicization are high; the Court's decisions striking down governments' religiously infused speech tend to contribute to religious–political factionalism rather than reduce it. Court decisions foster grievances that can be exploited by political operatives and leveraged in the service of larger political and social goals.

Second, while government expression is important, it does not have the political effect of money, which aligns the interests of religious groups and the government in a more thoroughgoing way. Money raises the political stakes for religious groups, who may compete for access to government

---

263. *See* FELDMAN, *supra* note 198, at 236–37 ("I believe that the history of church and state in America . . . point[s] toward an answer. . . . [O]ffer greater latitude for public religious discourse and religious symbolism, and at the same time insist on a stricter ban on state funding of religious institutions and activities.").

264. *Id.* at 237.

265. Schragger, *supra* note 60, at 1880. *But see* Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972, 977–79 (2010) (arguing that there are high costs to allowing noncoercive religious endorsements).

funds. It also raises the stakes for government officials, whose electoral prospects might hinge on how much largesse they deliver to substantial religious constituencies. Money thus creates political leverage on both the government and religion side.

Consider again the President's faith-based initiative. This program may be a way of bringing religious organizations into the mainstream of the federal-funding and grant-making systems. But it is also a way for the political parties to distribute resources to particular religious constituencies. And those constituencies will certainly be aware of a particular political party's role in providing that support. Government financial support of religious institutions, thus, may have significant political repercussions as religious groups become reliant or dependent on government largesse. Religious "pork" is particularly dangerous at the national level where the sums are significant and the stakes for religious organizations are high.

That being said, whether divisiveness increases or decreases in response to particular judicial decisions is an empirical question, and we may want to hesitate before assuming that certain judicial settlements will produce equivalent political settlements.[266] In terms of Feldman's cultural détente, it is not clear which religionists and which secularists are going to lay down their political arms. There is no reason to think that either side will be satisfied with his proposed institutional compromise. One cannot stop Mr. Newdow from bringing lawsuits to enforce the nonendorsement principle or religionists from seeking public funding for sectarian activities.

It also might be the case that a permissive approach toward religious symbols will prefigure a permissive approach toward money. If the Court permits a form of government-sponsored Christian civic religion, this may undermine efforts in other areas to assert nonestablishment values. The expressive force of the Court's decision to strike down a Ten Commandments display may be at its height precisely because it constitutes an important and underappreciated message to the political culture.[267]

The symbols–money distinction also might mistake the national mood. In a religiously diverse society, the government's deployment of specific

266. Consider Justice Breyer's assessment of divisiveness in two recent cases. In *Zelman*, Justice Breyer made a strong case in dissent for why vouchers and other kinds of financial transfers to religious entities would produce religious factionalism. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 724–25 (2002) (Breyer, J., dissenting) (voicing concern that efforts to enforce the criteria that will invariably accompany government funds expended on voucher schools "not only will seriously entangle church and state, but also will promote division among religious groups, as one group or another fears (often legitimately) that it will receive unfair treatment at the hands of the government" (citation omitted)). In *Van Orden*, he found that the ongoing existence of the Ten Commandments display at issue had not generated similar divisiveness. Van Orden v. Perry, 545 U.S. 677, 700–04 (2005) (Breyer, J., concurring).

267. *Cf.* Frederick Schauer, *May Officials Think Religiously?*, 27 WM. & MARY L. REV. 1075, 1084 (1986) (arguing that the Court might choose to resist the political culture's embrace of unconstitutional but otherwise widely accepted acts).

sectarian symbols may be more offensive than the government's funding of sectarian programs—at least if that funding is available to all religious groups on an equal basis. It may be that money no longer raises substantial concerns because the Protestant–Catholic battles that marked the mid-twentieth century have been replaced by a more diverse set of religious concerns and public support of sectarian education is no longer viewed as a cultural or political threat.[268] As a number of commentators have noted, the Court's decisions have moved in this direction—less regulation of money and more regulation of symbols[269]—and thus may reflect an emerging political consensus.

D. Decentralize Establishment

A final approach to managing establishment does not divide up the world primarily in terms of subject matter (money vs. expression) but instead according to the level of government that is engaged in the religion-burdening or -favoring activity.[270] This approach seeks to take advantage of the dispersal of power to reinforce nonestablishment principles. By limiting the exercise of centralized power, one can limit both religion's influence on the state and the state's influence on religion. As operationalized, the doctrine would treat federal funding of sectarian schools and federal religious expression differently from local funding and local religious expression. Courts would scrutinize the former more closely than the latter; local religion-favoring or -burdening activities would be treated with more deference than equivalent state or national religion-favoring or -burdening activities.

I have made this argument at length elsewhere,[271] so I will just sketch its outlines here. At its conceptual heart, Establishment Clause decentralization

---

268. *Cf.* Jeffries & Ryan, *supra* note 116, at 366 (observing that religious schools are no longer all Catholic and school aid no longer favors any one religion).

269. *See* Ira C. Lupu, *Government Messages and Government Money:* Santa Fe, Mitchell v. Helms, *and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771, 772–73 (2001) (describing how cases in Establishment Clause jurisprudence have been tending in the direction of regulating symbols).

270. *See* Schragger, *supra* note 60, at 1818–19 (arguing that courts should be cognizant of the level of government against which rights are being asserted).

271. *Id.* at 1831–91. Others have made versions of it as well. *See* Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 EMORY L.J. 19, 89–104 (2006) (articulating a theory of partially incorporating the First Amendment to maintain core nonestablishment norms while explicitly expanding state leeway to promote and support religious enterprise); Mark D. Rosen, *Establishment, Expressivism, and Federalism*, 78 CHI.-KENT L. REV. 669, 669 (2003) (suggesting that it is desirable to tailor constitutional limitations based on whether the government actor is a federal, state, or local entity); Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1516–17 (2005) (arguing that tailoring of application of constitutional principles to different levels of government has merit and should not be categorically rejected); *see also* Steven D. Smith, *Our Agnostic Constitution*, 83 NYU L. REV. 120, 153 & n.126 (2008) (discussing federalism as a potential solution to church–state conflicts).

reduces political tension by denationalizing a significant array of religion-benefiting or religion-burdening government conduct. It thus has affinities to the "avoid backlash" and "permit symbols but regulate money" approaches already discussed. It also calls for somewhat less regulation of local religion-benefiting or -burdening activities, so it "abandons" the Establishment Clause to some degree at these lower levels of government.

But decentralization is less strategic than these alternatives for it is motivated by a robust account of the structural requirements of nonestablishment. Decentralization has two purposes. First, borrowing from Christopher Eisgruber, I argue that America's tradition of decentralized local government helps promote American-style religious pluralism.[272] Government fragmentation provides numerous jurisdictional opportunities to engage in both community and church formation. The existence of thousands of somewhat autonomous local governments encourages the formation of new communities, new churches, and the religious competition that results.[273] This competition among sects is the chief structural barrier to national dominance by any one sect.

Second, decentralization has a basic Madisonian foundation: while religious factions in a part of the nation may be divisive, it is unlikely that localized factions will generate a stable oppressive faction in the whole.[274] The extended sphere creates a structural difficulty for larger-scale organization. Combine the extended sphere with the decentralization of political authority and you have a structural barrier to large-scale religious–political alliances and the political divisiveness that those alliances arguably generate.[275] The Court best preserves nonestablishment by ensuring the political preconditions for nonestablishment.[276] And it does this by taking into account the scale of government activity when determining an Establishment Clause violation.[277]

This judicial attentiveness to scale can promote pluralism in three ways. First, the decentralized Establishment Clause subjects national-level religion–state relationships to increased scrutiny in order to prevent the undermining of religious pluralism through the favoring of highly motivated, issue-specific religious groups. Second, it limits judicial involvement in local matters, thus providing room for localities to serve as sites for resolving religious–political disputes in diverse and locally responsive ways. And third, it reduces religious tension by avoiding the national politicization of local religion–state controversies. In this way, stakes lowering can be a pri-

272. Schragger, *supra* note 60, at 1828.
273. *Id.* at 1829.
274. *Id.* at 1823.
275. *Id.* at 1853.
276. *Id.* at 1815.
277. *Id.* at 1818–19.

mary tenet of Establishment Clause doctrine, not just an exception to its enforcement.

This attention to scale can be accommodated within existing doctrine. Both the advancement and entanglement prongs of the *Lemon* test can treat as doctrinally salient the institutional location and political import of particular government regulations or acts. And while the Court would continue to have to draw contentious lines, those lines would be related to the actual, substantive effects of a government program or act rather than to the vindication of abstract principles of government conduct. According to this argument, funding of religious institutions and organizations—and, in particular, centralized funding of such institutions—is generally more dangerous than local religious endorsements. Decentralization thus overlaps with "permit symbols but regulate money" but only insofar as many religious endorsements are local.

There are some obvious objections to a decentralized Establishment Clause regime. One might object that local governments are more likely than Congress to oppress minority religious groups. Borrowing from Madison's *Federalist 10*, one could argue that smaller-scale governments can be more easily captured by majoritarian factions.[278] On this theory, the religious-benefiting or -burdening behavior of Congress is likely to be relatively more benign than the religious-benefiting or -burdening behavior of local governments. Congressional legislation has to appeal to a wider audience and cannot readily favor one sect in the nation over another.

I have countered this argument elsewhere so will not spend significant time on it here.[279] Suffice it to say that even if Congress is less susceptible to majoritarian faction (and I am not sure that is right), it is oftentimes more susceptible to minoritarian faction.[280] One has to pick one's preferred political pathology, as public choice theory has taught.

Moreover, some recent history points away from the assumption that centralized religious-favoring activities will be mostly neutral or nondenominational. Consider again the White House's faith-based initiative, which, while ostensibly denominationally neutral, has been alleged to favor Christian and more evangelical churches.[281] Consider also the line of

278. THE FEDERALIST NO. 10, at 83–84 (James Madison) (Clinton Rossiter ed. 1961).

279. *See* Schragger, *supra* note 60, at 1823–31 (asserting that decentralization under "constitutional conditions in which religious activity will more likely be pursued" serves as a "structural check on religious aggrandizement" that encourages "healthy religious pluralism," the "chief structural check on religious factionalism").

280. *See generally* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 12–37 (1991) (examining the role of interest groups in the political process).

281. *See* DAVID KUO, TEMPTING FAITH: AN INSIDE STORY OF POLITICAL SEDUCTION 159–60 (2006) (recalling conservative Republicans' efforts "to allow groups that aimed to convert people to a particular faith to be able to receive direct federal grants").

congressional-enacted statutes that have been promoted by particular religious groups. These include the placing of "In God We Trust" on U.S. money,[282] the adoption of an official national "Day of Prayer,"[283] and, most recently, the designation of a large white cross on formerly public land as a national war memorial.[284] It seems that religious favoritism is not restricted to local governments. Church influence might in fact be at its height in Congress, where extraordinary national pressure can be brought to bear on noncompliant members.[285]

That is not to say that localism answers the problem of religious oppression—only that the Court's doctrine should reflect the reality of institutional power and its implications for the overall relationship between religion and the state. The local funding of religious schools should not be treated the same as the national funding of religious schools. The political stakes at the national level are significantly higher than the political stakes at the local level, and the imposition of national religious-favoring or religious-disfavoring norms by the Court, Congress, or the President contributes more to the creation of religious–political factions than do local ones. Moreover, giving room to localities to operate as sites for the resolution of religiously infused disputes and encouraging some regulatory experimentation and diversity encourages a healthy religious pluralism.

By accounting for scale, a politically aware Establishment Clause doctrine might be able to reduce the political stakes of symbolic religious fights.[286] A decentralized doctrine thus achieves both a substantive and a strategic goal: it advances religious peace by dampening the pressure for national-level religious–political alliances.

E. Summary: Doctrinal and Institutional Relevance

Decentralization is a process-oriented approach—it turns on the Madisonian claim that religious pluralism is the best strategy for maintaining the nonestablishment norm. It further claims that political decentralization

---

282. Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2122–23 (1996).

283. *Id.* at 2151.

284. *See* Salazar v. Buono, 130 S. Ct. 1803 (2010).

285. *See* FARBER & FRICKEY, *supra* note 280, at 146 (concluding that "relatively compact groups," such as religious organizations, "are likely to exercise undue influence"); HERTZKE, *supra* note 115, at 49–69 (discussing the intense grassroots lobbying power of various religious organizations).

286. This admittedly may be naïve. Consider how a local zoning issue involving a mosque project in lower Manhattan has produced a national firestorm. *See* Stolberg, *supra* note 7 (describing the debate—which has elicited statements from President Barack Obama and other public figures—as both a "high-profile battle" and "thorny"). It may be that the Court's main task should be to rein in outliers, which is a form of centralization. *See* Eskridge, *supra* note at 239, 1283; Levinson, *supra* note 213, at 736 ("[M]ost of the Court's major interventions have been to impose an emerging or consolidated national consensus on local outliers.").

promotes religious pluralism and that judges can foster decentralization when regulating church–state relations.

Two important questions require some attention in this concluding section, however. The abandonment of the Establishment Clause in favor of constitutional doctrines like equality, the generic avoidance of political backlash, the regulation of money instead of symbols, and the decentralized Establishment Clause are all potential mechanisms for managing the relationship between legal nonestablishment and political nonestablishment. These approaches are addressed to the courts and to the Supreme Court in particular. But (1) what if the judicially enforced Establishment Clause has little causal relationship to the constitutional settlement of nonestablishment, or at least a highly unreliable relationship to it? And (2) even assuming such a relationship, is it possible to say anything about how specific judicial decisions contribute to that constitutional settlement?

As to the first question, there are reasons to believe that a judicially enforced Establishment Clause is not necessary for the maintenance of a core nonestablishment political norm. The experience of other countries with weak judicially enforced disestablishment traditions but a strong culture of nonestablishment might be a guide.[287] Looking at our own history of religious freedom, it may be that the particular circumstances of colonial religious pluralism—at least among Protestant sects—was the primary driver of religious tolerance and nonestablishment. This is a common story and one Madison seems to have embraced.[288] It holds that nonestablishment got off the ground in early America because it was politically sensible for competing sects to lay down their (political) arms; under circumstances of relative equality, all could agree not to attempt to take over the state.[289]

Religious pluralism and the initial act of formal disestablishment—which helped to increase religious pluralism by setting the conditions for tolerance—may be the chief reasons that the core nonestablishment norm in the United States has remained relatively robust over time.[290] As noted above, government fragmentation and the extended sphere may have also

287. GRIFFIN, *supra* note 61, at 88 (providing examples of countries where religious freedom has been achieved in the absence of a constitutionally mandated nonestablishment norm).

288. *See* Schragger, *supra* note 60, at 1823–25 (discussing Madison's "positive pluralism").

289. John Ragosta offers a more nuanced version of this story in the case of Virginia. JOHN A. RAGOSTA, WELLSPRING OF LIBERTY: HOW VIRGINIA'S RELIGIOUS DISSENTERS HELPED WIN THE AMERICAN REVOLUTION AND SECURED RELIGIOUS LIBERTY (2010). He argues that the Anglican political establishment traded religious freedom to gain the support of Presbyterians and Baptists in the run up to the Revolution. *See id.* at 52–62. When the war was over, those dissenting sects sought to consolidate their gains in the face of establishment leaders' efforts to retrench. *See id.* at 115–32. That political effort and the support of Enlightenment intellectuals among the gentry culminated in the adoption of Thomas Jefferson's Statute for Establishing Religious Freedom. *See id.* at 133–34, 169.

290. *Cf.* PUTNAM & CAMPBELL, *supra* note 191, at 4, 494–95, 523 (describing America's fluid religious environment as the central contributor to religious pluralism and civil peace).

contributed by fostering the creation of sects and the competition between them. These are structural characteristics of the American constitutional order over which the Court may have limited direct influence.

"Limited" does not mean no influence, however. The Court can attempt to reinforce these structural defenses of nonestablishment, particularly when it is aware that its doctrines have limited reach. On balance, a judicial strategy that aims to foster religious pluralism is better than one that does not. And under conditions of uncertainty, it may be the best that the Court can do.

This brings us to the second question. Assuming that the Court's jurisprudence matters to some degree, how do specific judicial decisions contribute to maintaining nonestablishment as a political norm? To the extent an institutional innovation like nonestablishment is preserved, the political actors in the system have to be incentivized to respect or at least not to challenge it.[291] It may be that the constitutional settlement is in the actors' immediate self-interest (understood in bargaining terms), but there are also reasons for political actors to defer to judicially enforced constitutional norms even if particular court decisions are not in the actors' short-term self-interest. An ample literature seeks to explain why judicial supremacy would be supported by Congress or the President.[292] This literature highlights the potential strategic political benefits these actors gain from an institutional arrangement in which the Judiciary is tasked with certain kinds of constitutional enforcement.[293]

The possibility of judicial maintenance of the core political norm of nonestablishment may thus be a function of the political class's need—and the political culture's respect—for courts more generally. One can certainly question whether the Court's Establishment Clause decisions receive such respect—the long and sometimes continuing resistance to the school prayer

---

291. *See* Levinson, *supra* note 213, at 662–63 (identifying one focus of Madisonian constitutional design as providing political incentives to comply with constitutional rules).

292. *See, e.g.*, LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 230–32 (2004) (noting broad changes in the general public attitude towards the inherent legitimacy of the Supreme Court as the locus of constitutional authority as a reason why astute politicians may hesitate to publicly oppose judicial rulings); James L. Gibson et al., *Measuring Attitudes Toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354, 364 (2003) (observing that the American public currently bestows a great deal of institutional legitimacy on the Supreme Court); Levinson, *supra* note 213, at 733–45 (explaining several benefits to both the Legislative and Executive Branches in having an independent Judiciary with the power of judicial review).

293. *See* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY 293–95 (2007) (discussing various political incentives to giving deference to courts and allowing judges to become more assertive); Levinson, *supra* note 213, at 742 ("An independent judiciary can also serve the interests of political leaders by taking responsibility for contentious or divisive issues those leaders would prefer to avoid.").

decisions comes to mind.[294] Nevertheless, a judicially articulated Establishment Clause may have some expressive value, especially to the extent that the Judiciary has become institutionally entrenched. The Founders believed that nonestablishment was part and parcel of a republican project that would reinforce Enlightenment and republican habits of thought. The program of nonestablishment was in part a cultural one—intended both to ameliorate religious enthusiasm and to direct it toward the preservation of political liberty. The nonestablishment norm thus has a specific role to play in creating the civic conditions for liberal democratic government. To the extent that the Court can articulate those norms and propagate them, it will have achieved some of those purposes.

All of which is to say that the Court's Establishment Clause decisions are mainly rhetorical—they advance the political value of nonestablishment by articulating themes, framing debates, or by restating political values. As Justice Souter observed in *McCreary County*, the principle of religious neutrality is not "an elegant interpretive rule" that can "draw the line in all . . . multifarious situations" but rather "has provided a good sense of direction."[295] Neutrality cannot "possibly lay every issue to rest" but "invoking neutrality is a prudent way of keeping sight of something the Framers of the First Amendment thought important."[296] Justice Souter may have continued that the principle of religious neutrality tells something to the political branches and the constitutional culture at large—that departures from neutrality should not be the norm.[297] Such a principle serves as a rhetorical touchstone, to be referenced for use by Congress and the Executive Branch, lower courts, and state courts and legislators.

Of course, to the extent that the Court is engaged in the rhetorical practice of nonestablishment, it has to be aware of how that rhetoric will be received in the wider political culture. The costs of enforcement in certain cases might be an increase in religious polarization or the hardening of religious–political alliances that are not susceptible to judicial scrutiny.[298] But how to assess the Court's long-term effect on constitutional culture is quite difficult.

---

294. *See* Ellis Katz, *Patterns of Compliance with the* Schempp *Decision*, 14 J. PUB. L. 396, 401 (1965) (analyzing the political and social backlash following the Supreme Court's ruling that daily Bible reading in public schools was in violation of the Establishment Clause).

295. McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 875 (2005).

296. *Id.* at 876.

297. Whether the political culture listens is altogether another question. Recall again the recent dispute over the lower Manhattan Islamic center. *See* Stolberg, *supra* note 7.

298. Fred Schauer's discussion about how courts should approach official behavior that is all-but-inevitable but nevertheless unconstitutional is useful here. Schauer distinguishes between "strategies of accommodation" and "strategies of resistance"—which can be mapped onto the approaches I have described above. Schauer, *supra* note 267, at 1084.

Conclusion

We thus end where we began—with the relative irrelevance of the Establishment Clause. I have argued that the doctrinal integration of scale and institutional location would advance a politically sensitive Establishment Clause. But that is a somewhat modest proposal in light of the many church–state issues that the Court has never addressed and never will. On many of the core issues that animate religionists and serve as fuel for the religious and political culture wars, the Establishment Clause as doctrinally enforced by the Judiciary is irrelevant.

The constitutional protection against religiously motivated and infused laws that do not touch on religious practice or church aid has to come from elsewhere, outside of the Establishment Clause. As I have already observed, the Court's equal protection jurisprudence can prevent religious majorities from putting into place religious moralities that are at odds with the liberal democratic commitment to equality and can ensure the enforcement of political process norms that prevent political entrenchment. The Court's privacy jurisprudence (to a much lesser extent) can prevent religious majorities from demanding adherence to laws that are based predominantly on a religiously grounded morality that interferes with basic human goods. And speech and voting rights can ensure that majoritarian processes are open and fair.

All of this assumes that the Court can act at least somewhat independently of majoritarian preferences or at least can act to shape those preferences. To the extent that this is true, the Court has no choice but to enforce the Establishment Clause under circumstances in which potentially dangerous church–state relationships are never fully foreclosed. The Court can be candid about this possibility and can embed such candor into existing doctrine. Or the Court can keep this possibility at arm's length by acting as if its Establishment Clause doctrine reaches to its fullest stated extent.

One might object that the Court should not make it a practice of articulating principles that it cannot ultimately enforce. But this objection should be made with due regard for the Court's institutional role. Certainly the Court should do its best to provide rules of decision that can be applied by lower courts and that provide guidance to legislators, citizens, and potential litigants. But the Court can provide those rules while describing the limits of judicial action.

The Court can do this informally through mechanisms of avoidance, as Justice Stevens did in *Newdow*. But it also can do so explicitly by devolving responsibility for full enforcement of certain nonestablishment principles to other political actors. As the political question doctrine illustrates, there is a world of difference between a judicial decision holding that a court cannot enforce an existing constitutional norm and a judicial decision holding that a particular constitutional norm does not apply. The former represents a statement about the limitations of judicial competence, not a statement about

the norms themselves. Lack of judicial enforcement does not relieve the political branches of their duty to obey the Constitution—an acknowledgment of underenforcement constitutes an implicit expectation that those branches will fulfill their own duties. Of course, this expectation constitutes the purest of rhetorical jurisprudence.

In arguing that the Court is a relatively bit player in the maintenance of the nonestablishment norm, I have now treaded on the long-running debate about the efficacy of parchment barriers. How constitutional norms are maintained even in the face of popular pressure to dispense with them is a large and important question, but not one that can easily be answered here.[299] The Court certainly plays some role, but how and in what direction is quite open to debate.

I do not want to leave the impression that the Court can never act in a heroically countermajoritarian manner, but only that when it does (as historians have now thoroughly documented)[300] the consequences can undermine the Court's explicit purposes. In the Establishment Clause arena, the Court does not regulate large swaths of conduct at the intersection of church and state that have the capacity to undermine the Court's stated principles of nonestablishment. I have argued that there are sometimes legitimate reasons for this underenforcement—or at least reasons that are deeply embedded in a set of constitutional values that often trump the value of nonestablishment.

This does not mean that judicial decisions do not have real effects. The Establishment Clause as interpreted by the Supreme Court does prevent certain kinds of government action. The state cannot officially declare one church to be the true church; it cannot cede the exercise of civil power to religious entities; it cannot currently fund religious education directly or discriminate between religions when distributing funds; it cannot currently introduce certain religious practices into schools—like prayer; and it currently cannot engage in some kinds of religion-infused government expression or ceremonies. These are real limits on government action, though my contention has been that they are relatively narrow limits when examined from the perspective of the Court's stated doctrine.

If that is the case, then what maintains the core political value of nonestablishment and what can the Court do to contribute to that maintenance? It may be that nonestablishment is self-enforcing, a result of a lucky confluence of eighteenth-century religious pluralism and a new invention called disestablishment. Or maybe nonestablishment is an inevitable

299. *See* Levinson, *supra* note 213, at 659 (asking why popular majorities in power have infrequently broken constitutional rules when constitutional limitations proved inconvenient to their interests).

300. *Cf.* Klarman, *supra* note 215, at 59 (discussing the school prayer decisions of the early 1960s).

result of modernity and the decoupling of religion and state that is a part of the larger assertion of freedom of conscience that has arisen out of the same Enlightenment tradition.

We are interested in doctrine, however, and so we have to ask: how much of this is attributable to the Judiciary? In this Article, I have argued that much less is attributable to the courts than is sometimes assumed by both proponents and critics of the Court's Establishment Clause doctrine. That doctrine is mostly subordinated to norms of self-governance that tend to overwhelm the nonestablishment principle. If that is so, then we have to rely on other mechanisms to ensure that religion and the state are not too closely allied.

* * *

Book Reviews

Justice Takes a Stand

JUSTICE: WHAT'S THE RIGHT THING TO DO? By Michael J. Sandel. New York: Farrar, Straus, and Giroux, 2009. 308 pages. $15.00.

Reviewed by Jeffrey Abramson*

It is often thought, and taught, that fidelity to the Constitution requires judges to put aside or to bracket moral and religious values when deciding legal questions.[1] In this view, the Constitution does not rest on any one particular moral philosophy any more than it rests on any one particular economic theory, as the Supreme Court once mistakenly held during the so-called *Lochner* era.[2] We are, after all, a diverse people who reasonably disagree on intractable matters of ultimate spiritual concern. For this very reason, government treats persons as worthy of equal respect only when its laws do not take sides on whose values are right or good. Constitutional justice aspires to achieve *neutrality*, erecting and protecting procedures that leave persons free to choose among competing values for themselves. The merit of legal reasoning that remains neutral as to underlying moral or religious questions is that such legal reasoning is restrained in ways that all reasonable citizens are likely to accept.

---

* Professor of Law and Government and Fellow of the Frank C. Erwin, Jr., Centennial Chair in Government, University of Texas. I wish to thank the editors of the Texas Law Review for suggesting that Professor Michael Sandel and I review one another's recent books. It should be noted that Professor Sandel and I are longtime friends, but because our books have many overlapping themes, the editors proposed this arrangement to bring recent work in political theory to the attention of a legal audience. In this endeavor, we have been joined by our friend and former colleague, Professor Russell Muirhead, who has reviewed Professor Sandel's and my book together.

1. *See, e.g.*, JOHN RAWLS, POLITICAL LIBERALISM 236 (1993) ("The justices cannot, of course, invoke their own personal morality, nor the ideals and virtues of morality generally. Those they must view as irrelevant. Equally, they cannot invoke their or other people's religious or philosophical views.").

2. In *Lochner v. New York*, 198 U.S. 45 (1905), the Supreme Court struck down a maximum-hour law that would have restricted bakers to working no more than ten hours a day. *Id.* at 64. The Court read the Due Process Clause of the Fourteenth Amendment as protecting an employee and employer's liberty of contract in ways that regulation of hours infringed. *Id.* at 53–54. The *Lochner* decision became a precedent relied on by the Court to strike down a series of New Deal economic regulations during the Depression. By 1937, however, the Court repudiated *Lochner* and has held fairly consistently ever since that the Constitution does not deprive the political branches of the power to adopt reasonable economic regulations. *See, e.g.*, W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 393 (1937) (declaring that the legislature has a "wide field of discretion" when dealing with employer–employee relations).

But is such neutrality possible? Is it always feasible to decide legal questions without taking a stance, implicitly or explicitly, on the underlying moral dispute that gives rise to controversy, say, about abortion, same-sex marriage, or stem-cell research? And even were it possible, is it desirable to interpret the Constitution according to a strict separation of legal questions from moral inquiry about the right result? In *Justice: What's the Right Thing to Do?*,[3] the eminent political philosopher Michael J. Sandel answers both questions emphatically in the negative.

I. Morally Neutral Versus Morally Engaged Jurisprudence

Sandel is our leading internal critic of the liberal paradigm for constitutional law that prevailed approximately from *Brown v. Board of Education*[4] in 1954 to *Roe v. Wade*[5] in 1973. Conservatives, Sandel maintains, do not need encouragement to ground constitutional interpretation on moral answers about virtuous behavior.[6] But historically, liberals feared the divisiveness of morality and religion in public life; they sensed a threat to freedom and privacy whenever the state endorsed a particular conception about the morally desirable way to act—sexually or religiously or artistically.

The liberal constitutional project, at its best, is about extending basic liberties and the equal protection of the law to all. Understandably, this project seems threatened by discrimination in favor of or against the first-order moral values held by any person or group. Some views end up either being preferred or disparaged in ways that undermine the ideal of equal respect to all. But it is Sandel's view, in some of the most compelling and persuasive chapters of his new book, that even the most rigorous application of discrimination law cannot resolve certain questions about "who deserves what."

To answer that question, courts must reach and judge the underlying moral question about how our society justly distributes desert and honor, public recognition and approval. Is the state discriminating against a physically handicapped high school student who wishes to join the cheerleading squad?[7] This depends on what the "essence" or purpose of cheerleading is.

---

3. *See* MICHAEL J. SANDEL, JUSTICE: WHAT'S THE RIGHT THING TO DO? 251 (2009) ("The attempt to detach arguments about justice and rights from arguments about the good life is mistaken for two reasons: First, it is not always possible to decide questions of justice and rights without resolving substantive moral questions; and second, even where it's possible, it may not be desirable.").

4. 347 U.S. 483 (1954).

5. 410 U.S. 113 (1973).

6. SANDEL, *supra* note 3, at 249–50; *see also* MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 217 (2d ed. 1998) ("Where political discourse lacks moral resonance, the yearning for a public life of larger meanings finds undesirable expressions. Groups like the 'moral majority' and the Christian right seek to clothe the naked public square with narrow, intolerant moralisms. Fundamentalists rush in where liberals fear to tread.").

7. *See* SANDEL, *supra* note 3, at 184–86.

If cheerleaders are athletes and we admire them for their flips and gymnastic talent, then good reasons abound to exclude persons in wheelchairs from joining the squad. But if we admire cheerleaders mostly for their school spirit and their capacity to feel and to spread enthusiasm, then a wheelchair is irrelevant to the talents we admire. Hence, what seems on the surface to be a merely legal issue about discrimination depends upon making an underlying moral judgment: What talents are most worthy of respect in a cheerleader? For Sandel, many legal cases take a form similar to the cheerleading example. There simply is no way to decide the legal issue without deciding an underlying moral question. This is why, for Sandel, constitutional interpretation is a form of moral philosophy. *Justice* is an elegant and powerful book that captures in print much of the excitement students must feel when taking the course upon which the book is based.

II. Two Case Studies: Abortion and Same-Sex Marriage

Consider two cases where Sandel argues for shifting the jurisprudential paradigm from moral neutrality to moral engagement. The first is the controversy over abortion.[8] As a people, we disagree on the moral status of the fetus—on whether the fetus is already a person. In *Roe v. Wade*, Justice Blackmun's majority opinion purported to resolve the constitutional issue about abortion without resolving the moral dispute about its morality.[9] The basic argument was that, whatever one's private moral views on abortion, law should set those views aside and defend a woman's right to abortion solely by arguing that the collective powers of the state should not be used to dictate a choice that is so intimate and fundamental to a woman's liberty.

Justice Blackmun defends his opinion as scrupulously neutral between pro- and anti-abortion arguments. The only thing he argues for is a *public* morality that leaves the ultimate choice to the *private* moralities of women. Some women will regard abortion as morally impermissible and the rule of law announced in *Roe* leaves them as free as ever to act on their moral views. Other women will understand abortion as morally defensible and *Roe* permits them, on equal terms, to act on the basis of their values. In this way, to put it in Sandel's terms, the underlying issue as to whether abortion is a choice *deserving* of social respect is never broached at all. For Blackmun, the equal liberty with which *Roe* treated both the pro- and anti-abortion choices was precisely its justification. For Sandel, it makes the legal reasoning in *Roe*

8. *Id.* at 251–52.

9. *See Roe*, 410 U.S. at 116 (acknowledging that "moral standards . . . are all likely to influence and color one's thinking and conclusions about abortion" but stating that the Court's task was "to resolve the issue by constitutional measurement, free of emotion and of predilection").

problematic despite the fact that Sandel himself agrees with the liberal position "against banning abortion."[10]

Sandel first faults *Roe* for failing to achieve the neutrality at which it aims. To allow the abortion choice is implicitly to devalue the religious position that regards the fetus as a person and hence abortion as murder. One has to be fairly certain that such a moral view about the fetus is wrong to place a higher value on a woman's choice than on fetal rights.[11]

But even assuming for argument that *Roe* did craft a morally neutral rule of law, Sandel's larger point is that such neutrality comes with a political price. By not engaging the moral argument that abortion is equivalent to murder and not persuading people that this view is wrong, *Roe* left the defense of abortion shorn of the kind of mobilizing and transforming public argument that could have won strong and lasting support for a woman's right to control her own body. Here we come to an important aspect of Sandel's approach to constitutional issues. He wants people not merely to *tolerate* abortion, even in circumstances where they personally find it morally odious; he wants them to *respect* the abortion choice. But the question of whether the abortion choice is worthy of the stronger stance of respect is necessarily *judgmental*.[12] Sandel welcomes this moment of moral judgment. Of course, it may be that, once engaged with the arguments, people will find no reason to respect the abortion choice in this or that circumstance. This is a risk that Sandel is prepared to take. For him, it is a preferable risk to run than the contrary dangers created when we suppress public debate about moral issues such as abortion, driving the debate underground where it is more likely to "provoke backlash and resentment."[13]

The difference between the nonjudgmental attitude promoted by an ethic of tolerance and the judgmentalism frankly avowed by an ethic of respect becomes clearer when Sandel turns to the current controversy over

---

10. *See, e.g.*, Michael J. Sandel, Letter to the Editor, *The Case for Liberalism: An Exchange*, N.Y. REV. BOOKS, Oct. 5, 2006, http://www.nybooks.com/articles/archives/2006/oct/05/the-case-for-liberalism-an-exchange/ (arguing that liberal support of the right to choose abortion rests on the correct, implicit assumption that a fetus is not a person).

11. *See* SANDEL, *supra* note 3, at 251. Sandel argues that

> if it's true that the developing fetus is morally equivalent to a child, then abortion is morally equivalent to infanticide. And few would maintain that government should let parents decide for themselves whether to kill their children. So the "pro-choice" position in the abortion debate is not really neutral on the underlying moral and theological question; it implicitly rests on the assumption that the Catholic Church's teaching on the moral status of the fetus . . . is false.

Id. For a contrary argument in defense of the neutrality of the liberal view on abortion, see Thomas Nagel, *Progressive but Not Liberal*, N.Y. REV. BOOKS, May 25, 2006, http://www.nybooks.com/articles/19012 (explaining that liberals could remain neutral about the moral status of a fetus and still defend the right to choose based on the separate moral value of freeing individuals from collective control).

12. SANDEL, *supra* note 3, at 261.

13. *Id.* at 268.

same-sex marriage. One legal strategy favored by advocates for the gay community is precisely to leave aside the question of what people think, morally speaking, about homosexuality.[14] Whatever one's attitude toward gay sexuality, one can be persuaded that the state has no business regulating anyone's sexual mores and, hence, that prohibition of same-sex marriage is a classic case of discrimination.

Sandel argues persuasively that we cannot sensibly answer the doctrinal legal questions about discrimination against same-sex couples in marriage (Is the sex of a couple relevant to marriage classifications? Are same-sex and opposite-sex couples similarly situated when it comes to the state's interest in marriage?) without confronting the underlying substantive question about the purposes of marriage. Marriage is an institution that distributes not just material benefits; it crucially distributes the status that comes from public recognition of one's relationship *as* a marriage, rather than as, say, a civil union or domestic partnership. But this is to say that "[t]he debate over same-sex marriage is fundamentally a debate about whether gay and lesbian unions are worthy of the honor and recognition that, in our society, state-sanctioned marriage confers. So the underlying moral question is unavoidable."[15]

To flesh out his case for reaching the moral question of whether gay relationships are deserving of the same honor and recognition as straight relationships, Sandel has recourse at this point in the book to the philosophy of Aristotle. Even to mention Aristotle in a book review runs the risk of creating the misimpression that *Justice* is a book aimed only at political philosophers. Nothing could be further from the case. *Justice* grew out of a popular course by the same name that Sandel has taught to a generation of undergraduates; the book captures the teaching brilliance with which Sandel shows students how a detour into something as removed from practical politics as the study of Aristotle is not so distant from contemporary debates at all.

For Sandel, the lasting contribution of Aristotle is to show two allied aspects of justice. First, justice is "teleological," meaning that the definition of "rights requires us to figure out the *telos* (the purpose, end, or essential nature) of the social practice in question."[16] Secondly, justice is "honorific" because to "reason about the telos of a practice—or to argue about it—is, at least in part, to reason or argue about what virtues it should honor and reward."[17]

---

14. *See, e.g.*, Brenda Feigen, *Same-Sex Marriage: An Issue of Constitutional Rights Not Moral Opinions*, 27 HARV. WOMEN'S L.J. 345, 346 (2004) (arguing that the right to same-sex marriage should be based not on morality but on the constitutional rights of privacy and equal protection).

15. SANDEL, *supra* note 3, at 254.

16. *Id.* at 186.

17. *Id.*

In Aristotelian terms, the debate over same-sex marriage is fundamentally a debate about the telos or purposes of marriage and whether same-sex couples are worthy of equal recognition and honor when it comes to meeting those purposes.[18] *If* the purpose of marriage were to honor only couples capable of procreating children, then perhaps there would be a rational basis for treating same-sex couples differently than opposite-sex couples. But we know this is not an apt description of marriage in our society because even infertile opposite-sex couples, couples on their deathbeds, or opposite-sex couples who have no intention of having children are deemed worthy of marriage. So the argument that the ability to biologically procreate is essential to the moral meaning of marriage as we currently practice it is mistaken.

If biological procreation is not the "virtue" (so to speak) marriage honors, then what is the relevant virtue we honor with the title of marriage? Sandel turns to the landmark Massachusetts Supreme Judicial Court decision recognizing same-sex marriage to answer that question.[19] What is crucial for him is that the court's decision is decidedly *not* neutral about the honorific features of marriage. The court rejects the procreation argument as an inade-

---

18. Sandel's reliance on Aristotle may lead him to overstate the honorific features of marriage in our society. If the state distributes honor in distributing marriage licenses, it is a low-level honor because even prisoners and ex-felons can marry. In a private conversation with Sandel, he once sketched out for me, partly in jest, a system that would resolve the same-sex marriage debate in more Aristotelian terms. Every couple, straight or gay, would start out with a civil union as a kind of probationary period; they would be awarded the higher honor of "marriage" only after proving the worth of their relationship over time. Of course, even in such a system, Sandel acknowledged the criteria for meriting the marriage title would have to be fairly easy to meet, such as staying together for a few years. If marriage is a badge of honor for opposite-sex couples, it is a fairly minimal one. Only when same-sex couples ask to marry does the issue of moral approval come to the fore. This may not be quite right because the state does reject polygamous marriages as unworthy of state recognition. But no state seriously inquires into the moral character of a man and a woman seeking a marriage license. The honorific dimensions of marriage seem less than Sandel's Aristotelianism assumes. Of course, Sandel could respond with a telling question: then *why* is it that gays and lesbians consider the difference between marriage and civil union so important, even if the material benefits are equal in both arrangements? One possible response to Sandel, suggested to me by Professor Mitchell Berman of The University of Texas School of Law, is that "a discriminatory provision all by itself can and often does send a demeaning message even when the benefit being provided . . . is trivial." E-mail from Mitchell N. Berman, Richard Dale Endowed Chair in Law, The University of Texas School of Law (Sept. 3, 2010) (on file with author). Berman's point is not that marriage lacks significant expressive or honorific value; it is just that we have prima facie grounds to challenge the inherent stigma in discrimination *without* making a full-blown inquiry into the underlying issue of marriage's moral meaning. E-mail from Mitchell N. Berman, Richard Dale Endowed Chair in Law, The University of Texas School of Law (Nov. 1, 2010) (on file with author). Berman does go on to note that the prima facie case of discrimination could be rebutted if opponents of same-sex marriage managed to specify some meaning, purpose, or honor of marriage that justified the state's refusal to sanction same-sex marriages. *Id.* But he doubts that any serious inquiry into the honorific dimensions of marriage would yield such a justification. *Id.*

19. SANDEL, *supra* note 3, at 256–60 (explaining the opinion of Chief Justice Margaret Marshall in Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003)).

quate description of marriage as it currently exists. And it puts forward, both as a better description of existing marital practices and as a better moral ideal when it comes to expressing what virtues are worth honoring, the claim that we distribute the honorific title of marriage in recognition of the virtue of a couple entering into an exclusive, loving commitment.[20] To see the commitment to enter into such a love relationship as what we honor in marriage is already to see why the sexual orientation of the partners is irrelevant from any rational point of view.

Of course, *if* there were some basis in fact for thinking that same-sex couples were deficient when it comes to the virtues of love, exclusivity, or stability of relationships, then perhaps there would be a rational basis for disparaging same-sex relationships—for withholding the public recognition and honor that marriage as a title delivers. But this is an inquiry that Sandel believes progressives should welcome, not shun. Public engagement with the underlying moral issue—whether gay relationships are worthy of respect—is more likely (than the feint toward neutrality) to promote the moral transformations and mobilizations that protection of gay rights will ultimately need.

Is Sandel right that resolving the legal question about bans on same-sex marriage (are they discriminatory) waits on answering a moral question about marriage (whose relationships deserve state sanction and why)? Consider the 2010 federal court decision on the issue decided over a year after the publication of *Justice*. In *Perry v. Schwarzenegger*,[21] Judge Vaughn Walker of the U.S. District Court held, after lengthy evidentiary hearings, that Proposition 8, the California ballot initiative amending the state constitution to prohibit same-sex marriages, was an unconstitutional violation of the Fourteenth Amendment's due process and equal protection guarantees.[22] On the face of it, the judge presented his decision as grounded on facts rather than morality. Indeed, Judge Walker openly adopted the posture of neutrality Sandel eschews. The judge stressed that the state's interest in excluding same-sex couples must be "secular" and "[t]he state does not have an interest in enforcing private moral or religious beliefs without an accompanying secular purpose."[23] He specifically excluded as no argument at all any bald

20. *See id.* at 259 ("The essence of marriage, she maintains, is not procreation but an exclusive, loving commitment between two partners—be they straight or gay.").

21. 704 F. Supp. 2d 921 (N.D. Cal. 2010).

22. *Id.* at 997. In November 2008, California voters approved an amendment to the California Constitution that provided that "[o]nly marriage between a man and a woman is valid or recognized in California." CAL. CONST. art. I, § 7.5. That amendment, popularly known as Proposition 8, superseded the California Supreme Court's decision earlier that year recognizing same-sex marriages under the existing state constitution. Strauss v. Horton, 207 P.3d 48, 66–68 (Cal. 2009) (discussing the passage of Proposition 8 in the wake of *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008)), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5).

23. *Perry*, 704 F. Supp. 2d at 930–31.

religious assertion that homosexuality is a sin.[24] Instead, the judge based his decision on testimony taken during the weeks-long trial on three crucial factual issues: (1) whether there is any difference between same-sex couples and opposite-sex couples "in the characteristics relevant to the ability to form successful marital unions," such as love, deep emotional bonds, and strong commitments to their partners;[25] (2) whether same-sex parenting is "of equal quality" to opposite-sex parenting;[26] and (3) whether there was any basis in fact for thinking that allowing same-sex couples to marry would harm opposite-sex couples.[27] On these crucial issues, the judge found that there was no evidence at all for treating same-sex couples differently from opposite-sex couples or as a threat to opposite-sex marriage.[28] The judge then ruled, as a matter of law, that even the most minimal level of judicial scrutiny required him to strike down a classification that had no "rational basis" in fact.[29]

In line with the liberal paradigm, Judge Walker certainly understood himself as making no substantive judgment about the moral purpose of marriage but simply concluding that *whatever* one takes the purpose of marriage to be, the supporters of Proposition 8 failed to provide any factual evidence as to why the ban on same-sex marriage served the State's asserted interests.[30]

Readers of *Justice* will find that Sandel gives them reasons to question whether the fact/value distinction holds up in *Perry*. During trial, proponents of Proposition 8 repeatedly returned to the claim that "responsible procreation is really at the heart of society's interest in regulating marriage," and hence same-sex couples cannot achieve the state's purposes in distributing marriage licenses.[31] But the judge noted, in terms of history and current practice, that "California, like every other state, has never required that individuals entering a marriage be willing or able to procreate."[32]

Crucially, Judge Walker rejected the procreation argument not just as a bad description of current practice but also as morally insulting. Quoting the Supreme Court, Judge Walker noted that "[i]t would *demean* a married

---

24. *Id.*; *see also id.* at 938 (noting that "moral disapprobation" of same-sex couples does not justify Proposition 8, "no matter how large the majority that shares that view"); *id.* at 985–86 (listing a finding of fact by the court that "[r]eligious beliefs that gay and lesbian relationships are sinful or inferior to heterosexual relationships harm gays and lesbians").

25. *Id.* at 967.

26. *Id.* at 999.

27. *Id.* at 972.

28. *Id.* at 998–1002.

29. *Id.* at 991–97.

30. I owe this way of framing the liberal argument driving Judge Walker's approach in *Perry* to my colleague, Gary Jacobsohn, Malcolm Macdonald Professor in Constitutional and Comparative Law, Department of Government, University of Texas.

31. *Perry*, 704 F. Supp. 2d at 931.

32. *Id.* at 956.

couple were it to be said marriage is simply about the right to have sexual intercourse."[33] Instead, the judge deeply inquired into the history of marriage and found that the evolving essence of marriage is "the state recognition and *approval* of a couple's choice to live with each other, to remain committed to one another and to form a household based on their own feelings about one another and to join in an economic partnership and support one another and any dependents."[34] Married couples are "honored and respected" for "making a public commitment to the world and to your spouse, to your family, parents, society and community."[35] Here, in the very attention the judge gave to the importance our society attaches to having one's relationship publicly recognized and approved, the moral and honorific aspects of marriage break through as Sandel would have predicted.

The liberal approach insists that giving gays legal permission to marry need not be construed as the state's moral approval or endorsement of such marriages. But Judge Walker's decision continually returns to the root question, as identified by a witness at the trial, of what "society most values, most esteems" in a marriage[36] and whether there is any reason to regard same-sex relationships as less worthy than opposite-sex relationships. Judge Walker is not neutral on the question of whether same-sex couples are entitled to the same public respect as opposite-sex couples. His entire factual inquiry is devoted to showing why, when it comes to what we honor in a marriage, same-sex couples are identical in virtue to opposite-sex couples.[37] To withhold the marriage title from same-sex couples and label their relationships as domestic partnerships is to deny same-sex couples "due respect,"[38] to "reduce the value of same-sex relationships,"[39] to relegate them to "second-class citizenship,"[40] to withhold the "symbolic"[41] and "social meaning"[42] of marriage as the "definitive expression of love and commitment,"[43] and to deliver a message that "gays and lesbians are not as good as heterosexuals."[44]

---

33. *Id.* at 992 (emphasis added) (quoting Lawrence v. Texas, 539 U.S. 558, 567 (2003)).

34. *Id.* at 961 (emphasis added).

35. *Id.* at 971–72.

36. *Id.* at 970.

37. *See Perry*, 704 F. Supp. 2d at 967 ("Like opposite-sex couples, same-sex couples have happy, satisfying relationships and form deep emotional bonds and strong commitments to their partners. Standardized measures of relationship satisfaction, relationship adjustment and love do not differ depending on whether a couple is same-sex or opposite-sex.").

38. *Id.* at 972.

39. *Id.* at 971.

40. *Id.* at 974.

41. *Id.* at 971.

42. *Id.* at 970.

43. *Id.*

44. *Id.* at 973.

The *Perry* findings of fact may turn out to be a decisive moment of civic education in the debate over same-sex marriage. If the decision proves capable of changing persons' minds, it will be because the trial judge did not set aside as irrelevant the moral question of whether gay and lesbian relationships are worthy of equal respect but made that inquiry central to the decision. The fact-finding takes on significance and persuasion only when framed against *what* it is we are trying to find out, which is what the value of state-sanctioned marriage is in the first place.

III. Sandel's Civic Republicanism

Throughout *Justice* and his previous writings, Sandel emphasizes that the Constitution is best interpreted in light of the civic-republican tradition that animated the founding generation and that continues to instill moral value in democracy.[45] Collective self-government is morally preferable to other forms of government only when it collects more than self-interests—only when it transforms us from isolated seekers of our own good into engaged citizens pursuing a common good. But the creation of a common good among diverse people is no easy task; it requires inspiring in persons the solidarities of citizenship and "the qualities of character that self-government requires."[46] It is Sandel's basic point that the pursuit of liberal neutrality cannot awaken in citizens the civic virtues, sacrifices, and service that are indispensable to a common good. By avoiding and shunning public discourse about the moral meaning of our communal lives, liberalism leaves the public square denuded, empty of engagement with the crucial questions about the good life that citizens must debate if they are to become a community with a common good of any sort.[47]

Sandel repeatedly turns to the necessary connection between democracy and civic virtue as justification for shifting our jurisprudential paradigm from the ideal of moral neutrality to the ideal of moral engagement and public discourse about the common good. Democracy is decidedly *not* neutral about the good life; it is founded precisely on the ethical elevation of character that comes when individuals share a good in common with others. To put it in

---

45. *See* SANDEL, *supra* note 3, at 265–69 ("A politics of moral engagement is not only a more inspiring ideal than a politics of avoidance. It is also a more promising basis for a just society."); *see also* MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 128–33 (1998) (discussing how the framers of the Constitution "adhered to republican ideals" because "they continued to believe that the virtuous should govern and that government should aim at a public good beyond the sum of private interest").

46. SANDEL, *supra* note 3, at 266; *see also* Sandel, *America's Search for a New Public Philosophy*, ATLANTIC MONTHLY, Mar. 1996, at 57, 58 ("The republican conception of freedom, unlike the liberal conception, requires a formative politics, a politics that cultivates in citizens the qualities of character that self-government requires.").

47. *See* SANDEL, *supra* note 3, at 260–69 (advocating a politics of the common good); SANDEL, *supra* note 6, at 217 ("[P]ublic reason is too spare to contain the moral energies of a vital democratic life.").

Aristotelian terms, sharing a good in common with others—being responsible for creating and maintaining a community that gives moral meaning to our lives—*is* our human telos, the highest good we can achieve on this earth. *Justice* is at its inspirational best in contrasting the allegiances of a self anchored to a particular community with a rootless self whose identity is detached from community and portable from place to place.

But an important question arises about Sandel's project as it relates to constitutional law. After all, it is one thing to argue that the people at large are best educated into the virtues of self-government when they engage one another in open political debate about the moral meaning of their lives. It is another matter to argue that judges should likewise ground constitutional interpretation on substantive moral judgments about the good life. It is one thing to praise President Obama, as Sandel does, for openly appealing to his Christian faith as a source of values and inspiration for his political arguments.[48] It would be another matter entirely to propose that a judge's religion is a relevant source for his or her constitutional interpretations. Every time a court "constitutionalizes" a particular result, as *Roe* did with abortion, the fear is that this ends deliberation rather than starts it and excludes the people from debating the moral choice in the way Sandel's praise of civic republicanism requires. Consider, for instance, this crucial passage in *Justice* and how the reasoning depends on inviting popular, and not judicial, discourse on moral questions:

> [T]he life of the citizen enables us to exercise capacities for deliberation and practical wisdom that would otherwise lie dormant. This is not the kind of thing we can do at home. We can sit on the sidelines and wonder what policies we would favor if we had to decide. But this is not the same as sharing in significant action and bearing responsibility for the fate of the community as a whole.[49]

It is not readily apparent how *judicial* resolution of fundamental moral controversies would answer to a model of citizens "sharing in significant action" or "bearing responsibility for the fate of the community as a whole."[50] Nonetheless, in previous writings Sandel has urged judges, not just the president and the people, to engage underlying moral issues when resolving matters of constitutional law. Take, for instance, the famous dispute

---

48. SANDEL, *supra* note 3, at 245.

49. *Id.* at 199.

50. In this regard, it is of interest that even as some groups adopted a litigation strategy for overturning Proposition 8, other groups were politically organizing to overturn the same-sex marriage ban through a new initiative campaign. That campaign was apparently having success. *See* Lou Cannon, *For Politicians, a Marriage of Inconvenience*, N.Y. TIMES, Aug. 8, 2010, at WK8 (quoting a Democratic consultant's statement that the *Perry* ruling was "a short-term plus for [California gubernatorial candidate] Jerry Brown and another long-term nail in the demographic coffin of the Republican party"); Andrew Gelman et al., *Over Time, a Gay Marriage Groundswell*, N.Y. TIMES, Aug. 22, 2010, at WK3 (observing that 45% or more of Americans now support same-sex marriage, up significantly from 25% when the Defense of Marriage Act was passed in 1996).

in the late 1970s about whether the First Amendment Free Speech Clause gave Nazis a right to march in Skokie, Illinois, a community with a significant number of concentration camp survivors.[51] Sandel thought that the case would have been relatively easy to decide had judges put aside the spurious search for neutrality when it comes to speech and simply judged the moral worth of hate speech to democracy.[52]

Had judges been willing to confront this underlying question of whether a Nazi march is worthy of respect in a democracy, they would have seen the difference between protecting Martin Luther King Jr.'s march across the Edmund Pettus bridge in Selma, Alabama, despite traffic problems, and protecting a Nazi, despite trauma to concentration camp survivors. The difference is not rooted in any idiosyncratic or subjective moral judgment peculiar to one judge; it is inherent in the core democratic values of equal respect. King's march was in pursuit of equality; the Nazi march was under banners about racial and religious hatred.

Is there risk—democratic risk—when government is empowered through its courts to disparage some speech as morally unworthy of legal protection?[53] Even if we assume Nazis are an easy case, what about government attempts to censor Communist speech during the fascistic Stalin era and afterwards?[54] What about the preaching of jihadi doctrines today? I take it that Sandel is well aware of the risks. Throughout *Justice*, he readily acknowledges that moral judgment is—well, judgmental. There is no a priori guarantee that public discourse about a particular work of art—say, a graphic sexual movie—or a particular religious doctrine—say, Christian Science belief that children should not be taken to medical doctors—is worthy of public respect.[55] When it comes to *political* deliberation about such topics, Sandel

---

51. Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978).

52. *See* SANDEL, *supra* note 45, at 81–90 (discussing the court's refusal to bracket some speech as inherently injurious).

53. *See* CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 112–13 (2003) (voicing concern that isolating groups from societal interaction tends to make them more extreme). One danger, explored by Cass Sunstein and others, is that groups will be polarized and insulated into their own enclaves if members hear only their own views echoed in private. Thus, for example, persons with racist tendencies are likely to become more extreme in those views if they are locked out of public debate with opponents and have their own views continually reinforced by like-minded others. *Id.* For an excellent summary of the phenomenon of group polarization, see Robert B. Talisse, *Dilemmas of Public Reason: Pluralism, Polarization, and Instability*, *in* THE LEGACY OF JOHN RAWLS 107, 113–16 (Thom Brooks & Fabian Freyenhagen eds., 2005).

54. *Cf.* EDWARD ALWOOD, DARK DAYS IN THE NEWSROOM: MCCARTHYISM AIMED AT THE PRESS 61–62 (2007) (chronicling the blacklisting and firing of newspaper and broadcast employees during the early 1950s for their alleged Communist ties and including statements from a newspaper employee's dismissal letter that "'Communism is the antithesis of democracy'" and from the president of Warner Studios that he would not tolerate any employee "'who belongs to any Communist, Fascist or other un-American organization'").

55. SANDEL, *supra* note 3, at 268 ("There is no guarantee that public deliberation about hard moral questions will lead in any given situation to agreement—or even to appreciation for the moral and religious views of others.").

is clear that the risks are worth running. For unless we are willing to risk our politics and our views about other people's religions and moral views, we will never engage other people in the first place in the ways that democracy requires. We will never "connect with the moral and spiritual yearning abroad in the land, or answer the aspiration for a public life of larger meaning."[56]

But can—does—Sandel make the same argument about why we should bear the risks involved when judges, not the people at large or their representatives, resolve hard questions of constitutional law in favor of a particular substantive vision of the good life? It is, to repeat, not entirely clear how Sandel answers this question. One way to answer is to follow John Ely in limiting constitutional judges to removing procedural obstacles to the proper working of democracy—obstacles that occur when prejudice restricts a group's right to vote or orthodoxies deny equal freedom of expression to certain points of view.[57] But Ely was clear that, once a court has purified democratic procedures of prejudice and roadblocks, courts should live with the substantive moral result arrived at through fair democratic procedures.[58] This is precisely where Sandel differs from Ely; Sandel is emphatic that "procedural justice" is not enough, that progressive causes are best served by substantive decision making about the common good.

But Sandel may be overconfident here or insufficiently risk averse to the dangers of inviting judges to make substantive moral decisions. As of this writing, an eventual appeal of Judge Walker's decision in *Perry v. Schwarzenegger* to the Supreme Court remains possible, even likely.[59] Suppose the Court were to reverse the trial court and hold that Proposition 8 permissibly expressed, in part, the voters' deeply held religious equation of homosexuality with sin. Or suppose the Court were to find that domestic partnership laws already answer to the moral meaning of the Equal Protection Clause, and the whole furor over the "M" word is much ado about nothing. Such a decision would be as grounded on substantive moral judgment as was Judge Walker's defense of the integrity of gay relationships. Little in Sandel's model of substantive moral engagement tells us why Aristotelianism, rather than Catholicism, gives us a better reading of the Equal Protection Clause.[60] Liberals can say that we should not leave a

56. *Id.* at 250.

57. *See* JOHN ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 181 (1980) (concluding that judicial review "can appropriately concern itself only with questions of participation, and not with the substantive merits of the political choice under attack").

58. *Id.*

59. *See* Jesse McKinley, *Both Sides in California's Gay Marriage Fight See a Long Court Battle Ahead*, N.Y. TIMES, June 27, 2010, at A12 (noting that "both sides expect" the case to eventually be taken "all the way to the Supreme Court").

60. In *Perry*, Judge Walker refused to give any weight at all to testimony from persons who claimed God dictated their equation of homosexuality with sin. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 931 (N.D. Cal. 2010) (noting with approval that even Proposition 8's proponents

group's rights at the mercy of a majority's moral views, but this is precisely the argument Sandel's model forecloses.

Here is another issue. As Sandel is well aware, the civic-republican tradition he invokes always viewed democratic politics as necessarily local and hostile to distance and bigness. The kind of attachment to community that breeds civic virtue was always thought to be "rooted in a particular place, carried out by citizens loyal to that place and the way of life it embodies."[61] But if the civic virtues can be intensely practiced only in relation to a particular place, then one of the most settled aspects of modern constitutional law—the nationalization of most of the provisions in the Bill of Rights—is problematic for Sandel. The nationalization of rights removed from local communities the right to shape a *particular* way of life when it came to religion,[62] speech,[63] or, most recently, guns.[64] There became instead only one unitary and uncontestable answer to the meaning of "ordered

---

abandoned in court "previous arguments from the campaign that had asserted the moral superiority of opposite-sex couples"). In line with liberal demands for neutrality and public reason, the judge deemed bald religious assertions to be no rational argument at all because they sprung from faith, not fact. But Sandel presumably would oppose this exiling of substantive moral views anchored in religion. Throughout *Justice* and previous writings, he dissents from the Rawlsian argument that values rooted in ultimate religious worldviews (what Rawls calls "comprehensive doctrines") are held so intractably that they cannot be debated at all and hence have no place in public deliberations. RAWLS, *supra* note 1, at 10. For Sandel, allegiance to religious faith is admirably "constitutive" of many persons' identities; they would not be the persons they were without loyalty to their religion. Respect for such attachments should carry *some* weight in our moral debates. Thus, unlike Judge Walker, Sandel would at least have to count the traditional religious condemnations of homosexuality as a permissible moral argument in favor of Proposition 8. It does seem possible that the Supreme Court would take precisely this approach and find a "rational basis" for the distinction between same-sex and opposite-sex couples from the very existence of a centuries-old religious tradition limiting marriage to a man and a woman. Sandel might find such a conclusion morally odious, but his jurisprudential model seems to invite such substantive moral stances into the law. Can Sandel argue, consistently with his call for explicitly engaging the issue of what respect is due to gay couples, that the religious rejection of homosexuality is one of those views to which we should give a hearing but which we should then reject as wrong or at least as inconsistent with the way the Court understands the moral ideal of equality when applied to other groups, or even to gays and lesbians, apart from the marriage issue? I think this might very well be his approach, but *Justice* does not fully flesh out this argument.

61. Sandel, *supra* note 46, at 74.

62. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 535 (1993) (characterizing the City's ordinances that had targeted Santeria as "impermissible attempt[s] to target petitioners and their religious practices," while noting as significant a related city resolution that had stated that "residents and citizens . . . have expressed their concern that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety").

63. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 418 (1989) (holding that burning of the American flag constituted speech protected under the First Amendment, thereby invalidating dozens of state statutes that prohibited burning the American flag).

64. *See, e.g.*, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (holding that the Second Amendment right to keep and bear arms is fully applicable to the states); District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (upholding the lower court's rejection of a District of Columbia law banning handguns).

liberty" in ways that Sandel might consider to be undermining of the civic republicanism he sets out to defend.[65]

IV. The Moral Inspiration Within Liberalism

In the end, much of Sandel's case depends on accepting his description of liberal societies as morally arid. Sandel certainly gives the liberal paradigm its due: it oversaw a remarkable expansion of liberty and equality in the United States. But there is no mistaking Sandel's mapping of the limits of liberal justice: it leaves us with a thin and precarious respect for one another—Sandel at one point calls it "spurious respect"—and without the sense of belonging that makes for a common good.[66]

But is the liberal ideal of neutrality as vapid and uninspiring as Sandel would have it? Sandel signals out candidate John F. Kennedy's famous speech in 1960 meant to quiet voters' fear of electing a Catholic as President of the United States.[67] To defuse any sense that as President he would be bound to obey papal dictates, Kennedy argued that his religion was a matter of interest only to himself and his family and that as President, he would make decisions concerning the national interest without regard to religious dictates.[68] Sandel concedes that the speech was "a political success," but he views it as an example of the exile of religion and morality from public life that he criticizes.[69]

What Sandel may undervalue is that Kennedy's separation of a president's religion from a president's duty was not just politically successful; it was morally successful as well, inspiring in us an understanding that we are one as citizens even if we are different by religion, that the Presidency is open to all without regard to religion, and that the neutral secular state provides safe haven for religions to flourish equally. As a result of Kennedy's speech, American Catholics won a public respect that had

---

65. From the civic-republican point of view, turning to federal courts to resolve the same-sex marriage debate would seem especially problematic. Historically, marriage has been a locally situated and defined institution. *But cf.* Loving v. Virginia, 388 U.S. 1, 2 (1967) (declaring unconstitutional a state law that prohibited interracial marriages). I owe to Professor Daniel Rodriguez the observation that much of the current debate over same-sex marriage taking place at the state level would seem to meet "Sandellian criteria for dialogic deliberation, engagement with moral disagreement, and the choice of (comparatively) representative institutions—even sometimes direct democracy—to make ultimate judgments." E-mail from Daniel Rodriguez, Minerva House Drysdale Regents Chair in Law, The University of Texas School of Law (Oct. 29, 2010) (on file with author). Sandel might decry results reached in some states while applauding contrary results in others. But, consistently with his civic-republican defense of self-government, he should not wish to remove the debate into federal court.

66. SANDEL, *supra* note 3, at 268.

67. *Id.* at 244–45 (citing Senator John F. Kennedy, Address to the Greater Houston Ministerial Association (Sept. 12, 1960)).

68. *Id.* at 245.

69. *Id.* at 245, 249.

often been denied them previously.[70] Liberalism did not avoid the issue of what respect we owe Catholics; it confronted it head on and exposed the prejudices behind the fear of a first Catholic president.[71]

Liberal neutrality is its own moral compass, guiding us to cherish a common good forged precisely by the capacious capacity of a people to share their lives with other persons *without* resolving their moral differences and certainly without sitting in judgment of other persons' basic aims, ends, or values in life.[72] Sharing a *public* morality that does not judge the private moralities of straights or gays, or Jehovah's Witnesses or Catholics, is inspiring in its own right. If this is so, then liberalism already is a "morally engaged" politics of the sort Sandel seeks.

V. Conclusion

For anyone interested in the intersection of constitutional law and political philosophy, Michael Sandel's latest book on justice is indispensable. Sandel's considerable achievement is to take political philosophy from its sometimes lofty and distant perches and bring it to bear on enduring political and legal disputes. Sandel shows persuasively that it is impossible to read the Constitution without having *some* political theory in mind, whether it is the liberal ideal of the neutral state he disputes or the republican ideal of

---

70. *See* Brian T. Kaylor, Editorial, *Kennedy Speech Eloquently Balanced Religion, Politics*, HOUS. CHRON., Sept. 10, 2010, http://www.chron.com/disp/story.mpl/editorial/outlook/7195602.html ("Kennedy's speech and subsequent victory on Election Day opened the door for Catholics to take full advantage as citizens in the American political process. Today, our nation has its first Catholic vice president, a Catholic majority on the U.S. Supreme Court for the first time in history, and numerous Catholic governors and members of Congress.").

71. Professor Sanford Levinson has noted, in an e-mail exchange, that Kennedy's speech is best understood as that of a "non-serious" Catholic that can have little appeal to a believer in a "'divine sovereign' whose commands are knowable." E-mail from Sanford Levinson, W. St. John Garwood and W. St. John Garwood, Jr. Centennial Chair in Law, The University of Texas School of Law (Aug. 17, 2010) (on file with author). But consider the career of Father Robert Drinan in the House of Representatives. An ordained priest, Drinan held a House seat in the Massachusetts delegation from 1970 to 1980. His views were decidedly liberal on issues such as abortion and birth control. He resigned in 1980 when a papal edict prohibited priests from holding political office, making a choice that showed just how seriously he took his Catholicism. Nevertheless, during his decade in the House, Father Drinan could hardly have been seen as legislating according to papal dictates. *See* Colman McCarthy, *Father Drinan, Model of Moral Tenacity*, WASH. POST, Jan. 30, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/01/29/AR2007012902015.html (chronicling Drinan's resignation from Congress in 1980 at the behest of the Pope, who felt his views, particularly with respect to abortion, were too liberal).

72. As one commentator has noted,

> Rightly conceived, [liberalism] does not thwart the uninhibited political discussions which are the mark of a vigorous democracy. We can argue with one another about political issues in the name of our different visions of the human good while also recognizing that, when the moment comes for a legally binding decision, we must take our bearings from a common point of view.

Charles Larmore, *Public Reason*, *in* THE CAMBRIDGE COMPANION TO RAWLS 368, 383 (Samuel Freeman ed., 2003).

civic virtue he promotes. Sandel is at his most elegant in showing us that political debates can and often do achieve coherence and consistency: there is not an endless variety of political positions to try on but a considered choice between two basic positions that have been debated at least since Plato's time. In one position, we cannot possibly answer questions about what rights are due a person without first inquiring into what is good for people—what fulfills or perfects our human nature. In the competing position, we can never resolve, through reason alone, questions about the good life, and for that very reason, we start from the fundamental premise that individuals have the right and freedom to choose their own good in their own way. *Justice* is a sustained rumination on the difference between these two views and how the tension between them plays out in contemporary legal cases.

Every once in a while, a book comes along of such grace, power, and wit that it enthralls us with a yearning to know what justice is. This is such a book. Michael Sandel does not make it easier to know "what the right thing to do" is. But he makes the inquiry unavoidable.

* * *

The Ancients Among Us

MINERVA'S OWL: THE TRADITION OF WESTERN POLITICAL THOUGHT. By Jeffrey Abramson. Cambridge: Harvard University Press, 2009. 388 pages. $18.95.

JUSTICE: WHAT'S THE RIGHT THING TO DO? By Michael J. Sandel. New York: Farrar, Straus, and Giroux, 2009. 308 pages. $15.00.

Reviewed by Russell Muirhead*

Science would be no worse off if we neglected its history. The history of science is a curiosity, but it is of little use in understanding the natural world. Painstaking attention to Aristotle's biology or Franklin's theory of electricity would only cause one to misunderstand the world. Their theories have been superseded by superior ones. The history of science is progressive—as a friend of mine in neurobiology says, everything he teaches will be obsolete in twenty years.

It is tempting (probably irresistible) to claim a similar progress for politics. The great achievements of the modern polity—the rejection of religious intolerance, monarchic or aristocratic rule, and natural inequality and the corresponding affirmation of toleration, democracy, and freedom—all make it difficult (crazy even) to view the politics of the past as superior to the present. In this light, John Rawls would be a better guide to understanding justice than the utilitarians who dominated moral philosophy for 200 years before him, and modern philosophers in general would be better guides than the ancients.[1] So we might read Aristotle's *Politics* just as we would read his *Physics*: out of curiosity but not out of desire to form a good understanding of things.

Jeffrey Abramson and Michael Sandel reject this position. Together, their books—Abramson's *Minerva's Owl*[2] and Sandel's *Justice*[3]—hold that the history of political philosophy is not entirely historical. Although they regard modern politics as distinctive, neither believes that Aristotle's

* Robert Clements Associate Professor of Democracy and Politics, Dartmouth College.

1. This is the characterization of political philosophy recently suggested by Samuel Freeman. *See* Samuel Freeman, *A New Theory of Justice*, N.Y. REV. BOOKS, Oct. 14, 2010, at 58 ("During the previous two hundred years [before the 1971 publication of John Rawls, *A Theory of Justice*], utilitarianism had been the predominant view in Anglo-American political philosophy.").

2. JEFFREY ABRAMSON, MINERVA'S OWL: THE TRADITION OF WESTERN POLITICAL THOUGHT (2009).

3. MICHAEL J. SANDEL, JUSTICE: WHAT'S THE RIGHT THING TO DO? (2009).

Politics, for instance, has been "refuted" or surpassed. Even if we do not know ancient political thought intimately, we know it intuitively because the arguments of the ancients remain in important respects *our* arguments. As Abramson says, the "controversy between ancient and modern political ideals is a live one."[4] Or, as Sandel observes, we "can't quite shake off" the ancient way of thinking about justice.[5]

This posture toward the history of political thought could implicate Abramson and Sandel in untimely and problematic possibilities. That Athenian democracy was predicated on slavery means anyone who looks to ancient democracy as a model has something to explain. The problem is only more acute with Aristotle, who (on the surface, at least) defends the naturalness of certain kinds of slavery[6] and, more generally, a natural hierarchy where men deserve to rule over women and some men over other men.[7] To see the contest of the ancients and the moderns as a live contest, or to suppose that we *ought* not "shake off" ancient ways of thinking about justice, reopens the foundational questions that we moderns pride ourselves on having foreclosed, such as the justice of slavery or the natural inequality of persons. It is a mark of progress that we do not have to argue these points.

To contest this progress is not, of course, what either Abramson or Sandel intends. Both of these writers are moderns and affirm, without feeling the need to argue for it, the natural moral equality of human beings. They implicitly embrace the achievements of political modernity. But why, if they adopt the fundamentals of modern political morality, do both thinkers regard ancient political thought as relevant or "alive"? Why should we moderns regard ancient theories as containing arguments that should inform our own evaluations of political things? The answers to these questions take us to the heart of what each of these books offers.

I. Abramson and the Promise of Political Maturity

Minerva's Owl is a tour, as the subtitle says, of the "tradition of western political thought" that starts with Plato and works its way through the philosophies of Aristotle, Augustine, Machiavelli, Hobbes, Locke, Rousseau, Kant, John Stuart Mill, Hegel, and Marx. Such a book might claim an authority, both for the philosophers whose work constitutes the western tradition and for the author who supervenes over the philosophers—picking and choosing, accepting and rejecting. Although his mastery is everywhere

4. ABRAMSON, *supra* note 2, at 4.

5. SANDEL, *supra* note 3, at 10.

6. *See* 2 ARISTOTLE, *Politics*, *in* THE COMPLETE WORKS OF ARISTOTLE I.5.1255a1, at 1991 (Bollingen Series No. 71, Jonathan Barnes ed., 1984) (Revised Oxford Translation) (arguing "that some men are by nature free, and others slaves, and that for these latter slavery is both expedient and right").

7. *Id.* I.2.1252a25–.1252b5, at 1986–87.

evident, Abramson relinquishes his own authority: he is an author without all the answers who refuses to compress himself to a single line of interpretation or narrative of the history of political thought. Answers foreclose on possibilities, and Abramson's intention is the reverse—he wants to open our minds to the questions and arguments, possibilities and problems that our ordinary political experience closes off. Instead of telling his readers *what* to think, he invites them simply *to think*. And what he hopes this leads to is not that they come to possess a certain political understanding or agree with a particular set of propositions but that they acquire what might be called "political maturity."[8]

"[T]he language of political theory," Abramson says in his introduction, "*is* the ordinary language in which real politics is conducted."[9] The facts so often singled out as the "real causes" of political things—self-interest and material advantage—never set the terms political people use to defend causes and campaigns. No one runs for office saying, "I need your vote because winning will be good for me," or, "I voted for the bill because it will make me and my friends richer." In politics, even the most cynical have to appeal to the common good in order to make their causes respectable and persuasive.

But what constitutes the common good? This is *the* question of politics and political theory, and to this question the ancients and moderns give broadly different answers. In the simplest contrast, ancient political thought conceives of the common good in terms of virtue or excellence: a good polity is one that successfully cultivates virtue among those most able to attain it. By contrast, modern political thought displaces the question of virtue and makes freedom the central value. A good polity in modern terms is not one that cultivates (moderns would say, "imposes") virtue but one that leaves citizens free to live out their own conception of the good life, limited only by the need to respect a similar freedom for others.

This is partly what makes Plato's politics, for instance, sound so strange to modern ears. Abramson devotes four chapters to the *Republic*,[10] where Socrates guides his interlocutors through the innovations and reforms that perfect justice would seem to require. These include a regime of censorship, not only of literature but also music, a eugenics program that intensely regulates sexual mating, the abolition of private property and private love for the ruling class, and a meritocracy that treats men and women with perfect equality. Abramson is unsympathetic to (even dismissive of) all these suggestions. And he regards Plato too as unsympathetic to Socrates'

8. *See* DANA VILLA, PUBLIC FREEDOM 208 (2008) ("Political maturity is something that can be gained, and it is something that can be lost. This is a truth that the civic republican tradition framed as the problem of 'corruption' . . . .").

9. ABRAMSON, *supra* note 2, at 7.

10. *Id.* at 17–86.

proposals, at least if they are taken as genuinely practical suggestions. The *Republic* is, Abramson argues, not meant to be practical. It is a "tragic republic," in that it does not supply a "call to action" but instead reveals injustices no political order can remediate.[11] An anti-utopian utopia, "[t]he *Republic*," Abramson says, "is a vast meditation on the unbridgeable chasm . . . that separates the task of the teacher from the task of the political actor."[12] There is much we might learn about politics that we cannot put into action.

For instance, consider the famous "noble lie" of Plato's *Republic*, which says first, that at birth people's souls are mixed with metals—whether gold, silver, or bronze—and second, that the citizens of the Republic were literally born of the spot of earth that their city occupied. The first part of the lie functions to reconcile citizens to their place in the social hierarchy: some do stimulating, important jobs that develop their capacities (like ruling) while others toil in darkness and boredom. Even a just society cannot easily avoid some kind of division of labor with the division's attendant hierarchies. Today, a market ideology claims that the laws of supply and demand set CEO compensation at 275 times that of an ordinary worker;[13] whether this is true—highly doubtful—is less important in some ways than whether the compensation structure works. At least Plato calls his noble lie a lie—something today's ideologists of the market cannot admit for their own mode of justification. To read the *Republic* as a "tragic republic" is to entertain the idea that all societies need some kind of lie, or myth, in order to justify inequalities that in some respects are socially useful.

Perhaps no inequality is more severe than membership: some people, through no doing of their own, are born into full membership in the polity, while others are forever denied. To say that we are born of this earth, as Plato's noble lie asserts, gives a reason why *we* are here on this land and may exclude others from its advantages. Nothing is more important in international politics than boundaries, and yet nothing is less justifiable. A notable argument in contemporary political thought holds that immigration restrictions are unjust. Yet a prominent advocate of this view also acknowledges that, in the real world, open borders are unimaginable.[14] How are we to make sense of injustices that we cannot imagine erasing? Do we bother—or do we look elsewhere, to problems more easily solved?

---

11. *Id.* at 83.

12. *Id.*

13. *See* LAWRENCE MISHEL, JARED BERNSTEIN & HEIDI SHIERHOLZ, THE STATE OF WORKING AMERICA 2008/2009, at 220 (2009). For an account of how market forces drive up CEO pay, see Robert B. Reich, *CEOs Deserve Their Pay*, WALL ST. J., Sept. 14, 2007, at A13.

14. *See* Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251, 259–60 (1987). For a summary of Carens's revised view, which gives more emphasis to the necessary gap between a perfectly just world and the "real world," see Joseph H. Carens, *A Reply to Meilaender: Reconsidering Open Borders*, 33 INT'L MIGRATION REV. 1082, 1094 (1999).

Plato's *Republic*, as Abramson shows, puts these questions at the center of our political vision. The limits of politics are imposed by a world recalcitrant to our deepest longings for justice, a world that can never be remade according to the ideals we most want to see made real. And the limits of philosophy are such that its wisdom cannot claim political authority: philosophy cannot tell political people what is to be done because philosophy cannot entirely know. This leaves us, some argue, with a conservative suspicion of not only utopian ideals but all plans for reform. The modern aspiration to use science and social science to "enlighten" the world or to bring reason to bear on ameliorating the human condition courts grave dangers, and a confrontation with the *Republic* should render us, at most, reluctant reformers. On this view, Plato illuminates the injustices that beset the social and political world, and he reveals the sustained violence against human nature that fighting these injustices would require. Ultimately, the *Republic* points to pessimistic passivism—an ability to identify injustice and a corresponding inability to do anything about it.

Abramson almost—but not quite—embraces this view. "[T]he interpretation of the *Republic* I offer is not wholly pessimistic about change," he insists.[15] Yet the change it invites is more psychological than political: the *Republic* does not change politics so much as it changes *us*. On Abramson's argument, Plato transforms us by nourishing an observational self—an ability to stand outside the customs and standards of our political place. Plato cultivates this stand and reveals how it is essential for thinking about justice. What matters most to Abramson is less whether complete justice is a coherent aspiration or a practical possibility than the psychological transformation Plato provokes. We can do and we can see ourselves doing simultaneously. We can live in the political world we were born into, and simultaneously we can see that world from afar, as if we were not of it; this is *the kind of person* Plato creates. "No one who learns to observe his or her own behavior in some detached and analytic way goes back to being the same person observed," Abramson says.[16]

The kind of person the *Republic* calls into being is both of their world and not of it, and this is the kind of person Abramson, too, wants to educate. He resists saying this too directly, and to its credit *Minerva's Owl* lacks even a touch of didactic tendentiousness. Abramson does not have a narrow "line" to impose on the authors and books he discusses; he resists the temptation to package the history of political thought in a manner that privileges particular political commitments and causes of the moment. Although he is a former prosecutor, he is not trying to win a case; his voice is that of the master teacher who sees each side of a question and whose classroom techniques are as effective as they are unobtrusive. As he surveys various thinkers in turn,

15. *Id.* at 84.
16. *Id.*

he considers each with patience and sympathy and subjects the thinkers more to common sense than to the refined arguments of experts.

Abramson acknowledges at the outset a single fundamental commitment: "There is one political value that I do endorse, and that is democracy," he says.[17] Yet he does not relax his critical, inquiring, and skeptical spirit when it comes to Rousseau, the most democratic of the thinkers Abramson discusses. Of Rousseau's ideal of citizenship, which is closest to what participatory democrats recommend for contemporary democracy,[18] Abramson is restrained:

> Most of us are too busy living our lives to be the model citizen Rousseau adored. Truth be told, there are times when I would like to be a better citizen of the university and of the national community. I would like to feel that sense of belonging that Rousseau's Romans got from devotion to the common good. But not always and every day; I would still want time for moneymaking, career moves, hiking holidays, Boston Red Sox games, family get-togethers, and the like. Rousseau does not permit me to opt in and out of citizenship or to set my own civic schedule.[19]

This gentle confession is devastating to Rousseau's ideal of citizenship. Like Abramson, most readers will also want time for their own lives, whatever they think of Rousseau's inspiring image of what Ben Barber later called "strong democracy."[20] Abramson admires Rousseau's "passion for equality and his unmasking of the hypocrisies and pretenses of all manners of elites," and hopes that it will "kindle in others the same fire for change that it once kindled in me."[21] And yet, he admits, "[t]hose fires in me have died down over time as I have come to worry more about the dark purposes to which nationalism and devotion to the state can be . . . put."[22] Rousseau, Abramson insists, did not entertain such dark purposes himself, but he was "insufficiently careful" in his description of civic devotion.[23] For Rousseau, this is excusable: "perhaps he could not be careful and angry at the same time."[24] Yet Abramson lets the suggestion linger that readers ought to be what Rousseau was not—both careful and angry. If they feel the passionate

---

17. *Id.* at 9.

18. *See id.* at 247 (recounting Rousseau's wish that "we morph from narrowly self-interested actors into moral persons whose new senses of self are wrapped up with the virtues of belonging, allegiance, patriotism, solidarity, and fraternity").

19. *Id.* at 250.

20. *See* BENJAMIN R. BARBER, STRONG DEMOCRACY 150–55 (1984) (defining "strong democracy" as "politics in the participatory mode: literally, it is self-government by citizens").

21. ABRAMSON, *supra* note 2, at 257.

22. *Id.*

23. *Id.*

24. *Id.*

detestation of corruption, hypocrisy, and injustice, they should yet have some patience with a world that can never be entirely cleansed of such vices.

To see Abramson at once reject some of the central teachings of Rousseau and yet learn from him—indeed, call Rousseau his "favorite" thinker[25]—is to encounter an uncommonly capacious mind and generous temperament at work. Throughout the book, Abramson sympathetically engages what he rejects and tilts against what he is inclined to embrace. Amid the contemporary partisan climate, where politics is almost exclusively a matter of friends and enemies, readers might want to know, "Whose side are you on?"[26] Yet cultivating a resistance to the partisan temper is Abramson's point: engaging the history of political thought in the west takes us beyond the "sides" that dominate everyday politics by developing a capacity of reflection that overcomes the politics of small-minded points and equally small-minded counterpoints that distort both our politics and ourselves. In a book about political philosophy, it is not easy (as the writing teachers say) to "show, rather than tell." Yet this is what Abramson does. He resists directing his readers to this or that conclusion or interpretation. Instead he shows them how an engagement with the history of political thought might support a certain kind of civic virtue—a stance that is critical yet open to reform, skeptical yet optimistic, tough-minded yet not disdainful of dreams. His way of sifting through various arguments by a great range of thinkers in the canon of western political thought—without categorizing them as "good" or "bad" or placing them on teams ("good for us" and "critical of us") and instead endeavoring to discover each thinker's own terms—demonstrates a stance that constitutes an alternative to the ideological and partisan political postures that so often today define what it is to be political.

The value of this stance might seem to be that it renders us more philosophical and less political. As Abramson suggests at several points, political philosophy does not tell us "what is to be done."[27] Instead, by confronting us with fundamental alternatives, it prods us to examine our own views more carefully and to articulate them more consistently. "What happens to my students' politics, in the partisan sense of the term," Abramson says, "is none of my concern. . . . But I do hold all of us responsible for defending our views, whatever they are, in a consistent and

25. *Id.* at 222.

26. Useful accounts of the increasing partisanship in American politics can be found in Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. (forthcoming Apr. 2011), and ALAN I. ABRAMOWITZ, THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY (2010).

27. ESSENTIAL WORKS OF LENIN: "WHAT IS TO BE DONE?" AND OTHER WRITINGS (Henry M. Christman ed., 1987). This title was inspired by the novel NIKOLAI CHERNYSHEVSKY, WHAT IS TO BE DONE? (Michael R. Katz trans., Cornell Univ. Press 1989) (1863).

coherent fashion."[28] And yet, as a whole, Abramson's grand tour of the history of political thought suggests that citizens of liberal democracy should not be entirely consistent: they should rather feel the competing pull toward activity and passivity, the rival claims of privacy and public spirit, and the allure of both idealism and despair. Liberal citizens should be conflicted about the claims of progress and the importance of making one's peace with the degree of injustice that no political order can be entirely without. Abramson's interpretations of various thinkers combine to remind readers that the most humane politics cannot take its shape according to reason narrowly construed. To bring an ethic of philosophic consistency to the political world is to ignore the most important lessons of the western tradition of political thought, which on Abramson's reading support a way of being in the political world that holds contrary tendencies in a tense but stable balance. This is the way, as Abramson demonstrates rather than argues, of liberal citizens.

Liberal citizens have their loyalties: "We are committed to democracy," Abramson says, "and asking for a defense of democracy's superiority seems a bit like asking for a defense that the earth is round—an idle and silly academic exercise."[29] And yet they can recognize that democracy, like all politics, is imperfect. Its imperfections arise not simply because it fails to live up to its own values of freedom and equality but because these very values invite competing interpretations and applications. More, they are partial and shield from view other values that are also compelling, also partly true. Liberal democracy is not politics on the model of a flawless argument; it cannot depend on one consistent public philosophy and still be liberal democracy. It is an untidy package, and holding that package together requires persons of a certain sort.

Abramson's reading of the western tradition calls forth this sort of person. It is not just an education of the mind, and his point is not merely to equip readers to think about politics with more rigorous consistency or philosophic clarity; it is an education of the soul. Put differently, this is as much a book of psychology as of political theory. That Abramson's invitation to become such a person is at once so compelling and yet so indirect and understated is the power of the book. Like the best teachers, Abramson lets us think we have come to our own conclusions.

II. Sandel and the Politics of Moral Engagement

Sandel too prefers to show his argument in action rather than lay it down obtrusively. The action consists of dozens and dozens of cases, and the proof of his argument consists in whether his interpretation of justice makes

28. *Id.* at 4.
29. *Id.* at 350.

better sense of the cases and examples than rival accounts of politics and justice do. Sandel's masterful interpretations set familiar political arguments and moral controversies in new ways that reveal why we think the way we do—and why those who disagree might think the way they do. Thinking one's way through the examples Sandel offers is its own education, independent of Sandel's distinctive argument.

Sandel's claim is that the dominant public philosophy of our day—a version of liberalism that asks us to prune politics of considerations of the good—blinds us to important elements of our own politics and distances us from our own intuitions about justice. In particular, liberalism asks that we prescind from political argument considerations about what philosophers call "the good"—a shorthand for understandings of what makes life excellent or worthwhile or what qualities constitute an admirable character. Liberalism refuses to invoke considerations about the good when justifying the coercive power of the state because it views individual citizens as free to disagree about the good and free to form, act from, and revise their own conceptions of the good. Compelling though the liberal image of freedom is, ultimately, Sandel argues, it miscasts what politics is necessarily about, distorts our political deliberations, and makes justice harder to achieve. Contemporary liberalism is defective, Sandel holds, both as a guide to understanding the nature of political disagreement in contemporary politics and as a model for the terms in which disagreement should be framed.

Notwithstanding his critical posture, Sandel renders the liberal view with such clarity and force that many readers will be persuaded of it. Like Abramson, winning the argument is not Sandel's ultimate point, and like Abramson's book, this book was born in the classroom, where for the past several decades Sandel has taught Harvard's most famous course, entitled simply *Justice*. Sandel cares more about equipping his readers to make their own case than he cares about persuading them of his. This is why Sandel's argument makes its first full appearance only after the reader is 200 pages into the book, only after he has given the reader the resources to argue with him.

Here is the argument, in brief:

> The notion that justice should be neutral toward conceptions of the good life reflects a conception of persons as freely choosing selves, unbound by prior moral ties. These ideas, taken together, are characteristic of modern liberal political thought.
>
> . . . .
>
> Whether egalitarian or libertarian, theories of justice that aspire to neutrality have a powerful appeal. They offer hope that politics and law can avoid becoming entangled in the moral and religious controversies that abound in pluralist societies. . . .

> Despite its appeal, however, this vision of freedom is flawed. So is the aspiration to find principles of justice that are neutral among competing conceptions of the good life.[30]

To make his case, Sandel guides his readers through the two great streams of modern moral philosophy that give specificity to the great and general values of freedom and equality. The first is utilitarianism, especially that of Jeremy Bentham and John Stuart Mill. The second great modern tradition of morality insists that each human being is invested with certain claims that even the general welfare cannot override; here, Sandel focuses on the philosophy of Immanuel Kant. Sandel next gives careful and sympathetic attention to contemporary liberal philosophy, including libertarians, who prioritize property rights, and egalitarian liberals, who emphasize that citizens need certain resources if freedom is to be effective rather than merely formal. This discussion culminates in the liberalism of John Rawls, whose *Theory of Justice* represents, Sandel says, "the most compelling case for a more equal society that American political philosophy has yet produced."[31]

To highlight the flaws in contemporary liberalism, Sandel turns away from modern political thought to Aristotle. Where modern thinkers define justice as a rule of the game that everyone who plays the game would freely accept, Aristotle thought of justice in a more common sense way of giving people what they deserve. The drama and high stakes of actual political life, in Aristotle's view, consist of disagreements about what people deserve.

Modern politics attempts to circumvent this disagreement. The modern strategy of circumvention is based, for some, on an epistemological conviction that we cannot know what people deserve. For others, the strategy is based in a recognition that disagreements about moral desert will never end and ultimately invite violence (especially when these disagreements are informed by religion). To avoid such a fate, the modern formula for politics bases justice on what everyone can agree on: physical security, personal freedom, and comfortable living. Modern justice turns away from the ancient concern with the good life and human virtue toward concerns with economics and fair distribution. Freedom, prosperity, and fairness take the place in modern politics that the human good and the sacred took in the politics of ages past.

To be sure, Sandel does not suggest that modern understandings of justice should be pulled up, root and branch; he betrays no secret sympathy for either the aspiration to theocracy that destabilized the politics of early modernity or a politics (akin to the ancient model) that would substitute the pursuit of virtue for the pursuit of happiness and prosperity. His point is one

30. *Id.* at 218–20.

31. SANDEL, *supra* note 3, at 166.

more subtle—namely, that the achievements of modern politics are incomplete and that we should embrace that incompleteness. We cannot "shake off" understandings rooted in ancient political philosophy, nor would justice be better served if we could.

Sandel's examples—such as the draft, affirmative action, the permissibility of torture, employment discrimination, the distribution of wealth and income, and new reproductive technologies, among many others—reveal how debates that beset contemporary politics invoke ancient understandings of justice. Together the examples show that the problem with liberalism is not an analytical or logical flaw that afflicts it as a theory. It is that liberalism distorts our own political experience. It misdescribes who we are and much of what we want from political life. This distortion, in turn, compresses and misdirects much political debate and argument—impoverishing our politics and committing us to misunderstanding ourselves.

Sandel is at his most forceful when he shows how economic and individualistic understandings of human freedom miscast citizenship and civic obligation. Consider, for instance, the military draft. In the U.S. Civil War, draftees could discharge their obligations by hiring substitutes to serve in the Army for them. This policy, which spurred lethal protest riots in New York City at the time, was thought to be "a form of class discrimination."[32] It is unfair for the rich to buy their way out of a civic obligation the rest cannot evade.

But, as Sandel asks, "If the Civil War system was unfair because it let the affluent hire other people to fight their wars, doesn't the same objection apply to the volunteer army? . . . [W]hat's the difference, morally speaking?"[33] Today's all-volunteer army extends the logic of the Civil War system: as Sandel asks,"If you're going to let people hire substitutes, why draft anyone in the first place?"[34] The main difference between the two is that in the Civil War system, a poor draftee who could not afford to hire a substitute was forced to fight, whereas the all-volunteer army does not literally force anyone, however poor, to enlist. The difference between the two, however, depends on whether the choice to enlist is convincingly free. For some, enlistment only looks attractive because they have so few options, which is why so few graduates of the most prestigious universities join the military.[35] To the extent that the choice to enlist is a reflection of profoundly unattractive (or nonexistent) alternatives, "volunteer" is a misnomer,

32. *Id.* at 77.

33. *Id.*

34. *Id.* at 80.

35. *See* David M. Halbfinger & Steven A. Holmes, *Military Mirrors a Working-Class America*, N.Y. TIMES, Mar. 30, 2003, at A1 (noting that of the twenty-eight servicemen killed in the war to that point, only one was from an elite college or university).

rendering the difference between the all-volunteer army and the Civil War system a slight one at best.

But a more fundamental similarity between the two systems would remain even if we were convinced that individual decisions to join the all-volunteer military were free: both systems regard military service as something that can be bought and sold on the market. The objection to this, as Sandel argues, "says that military service is not just another job; it's a civic obligation."[36] And "if military service (or national service) is a civic duty, it's wrong to put it up for sale on the market."[37] If we view military service as simply a job like any job, there is no reason to restrict the job to American citizens (and as Sandel notes, military recruiting today is not restricted to citizens).[38] Further, there is no reason to restrict hiring to the U.S. government—why not outsource the military entirely? "Or is there," Sandel asks, "a moral difference between paying Federal Express to deliver the mail and hiring Blackwater to deliver lethal force on the battlefield?"[39]

This question, in turn, depends on how we understand civic obligation. On the liberal formula, obligations arise from two sources: either from our natural duties to all human beings (the prohibition on killing innocents, for instance) or from our own consent (like the obligation to pay back a loan). But *obligations of citizenship* often cannot be traced to either source. They are duties to fellow citizens rather than to all human beings, and they are rooted in membership rather than in individual acts of consent. A "striking implication" of the liberal understanding of obligation, Sandel observes, "is that 'there is no political obligation, strictly speaking, for citizens generally.'"[40] On the liberal account of obligation, we would have no civic obligation to vote, to stay informed, or to atone for injustices committed by our country in the past. Nor would we be justified in taking any pride in the historical achievements of our people or place.

The thin citizenship that follows from separate selves connected only by the universal duties they owe all human beings on one hand and individual choices on the other in fact cannot make sense of the pride and shame citizens often feel for their country's past. Nor can it account for the duties citizens feel they owe each other (as opposed to all inhabitants of the world). Some might freely deny that there is any such thing as *civic* obligation or that we owe fellow citizens *as citizens* anything special; they might reject the idea that contemporary Americans have a special duty to confront the legacy of racism or even a special reason to take pride in the success of the American experiment. Citizenship, on this view, does not make the past *our* past. With

36. SANDEL, *supra* note 3, at 84.
37. *Id.* at 84–85.
38. *Id.* at 89.
39. *Id.* at 90.
40. *Id.* at 224 (quoting JOHN RAWLS, A THEORY OF JUSTICE 114 (1971)).

this denial must come not only a transformation of who we take ourselves to be as citizens but also an evisceration of public life—and probably too, an eclipse of any possibility for the kind of justice that pays special heed to the plight of the least advantaged because without civic solidarity, deep mutual obligations are hard to sustain.

In addition to making room for the civic obligations, Sandel argues that politics should make room for a larger family of arguments and reasons than the modern liberal formula for politics permits, including those that arise from religious attachments. Beyond religion, Sandel more generally holds that politics often cannot, and in any case should not, insulate itself from arguments about the virtues that constitute an excellent person or reasons that are based in a conception of what makes for an excellent or good life.[41]

These are exactly the sort of reasons and arguments that modern politics views with suspicion. The most common argument against a "politics of the good" takes the form of a question: Who's to say? To put it more declaratively, no one seems to have the wisdom or insight into the nature of the good and the true that would justify their possessing authority over others. As Hobbes said, "For these words of Good, Evil, and Contemptible, are ever used with relation to the person that useth them: There being nothing simply and absolutely so; nor any common Rule of Good and Evil, to be taken from the nature of the objects themselves . . . ."[42] Even if in principle there were some common rule based in nature, that rule would be sufficiently obscure that people of good faith would disagree about what it says. On this view, to base politics on a conception of the good—or, more modestly, to invite arguments based on a conception of the good into the political sphere—introduces disagreements that cannot easily be brokered or compromised, fuels contests that necessarily insult those who lose (as some inevitably must), and invites conflicts that tempt parties to hatred and violence. In welcoming religious arguments and arguments about the good life and virtue into public life, Sandel takes on the core of modern politics.

Yet with respect to a number of issues, Sandel argues, we have no choice; we already have a politics of the good, and the question is how fully we are willing to understand ourselves and our politics. There is no way, for instance, to decide certain questions without "taking a stand on an underlying moral and religious controversy."[43] For instance, there is no way to decide whether embryonic stem cell research should be permitted without also deciding whether an early embryo should be counted as a person. Data collected by the unprejudiced activity of the senses (science) is insufficient to

41. *See id.* at 251 ("The attempt to detach arguments about justice and rights from arguments about the good life is mistaken . . . it is not always possible to decide questions . . . without resolving substantive moral questions . . . even where it's possible, it may not be desirable.").

42. THOMAS HOBBES, LEVIATHAN 39 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651).

43. SANDEL, *supra* note 3, at 251.

answer that question: the matter of when personhood begins necessarily involves moral and religious arguments.

Beyond cases like this, Sandel argues that it is often self-defeating to insulate politics from religious arguments even when it seems possible to do so. For instance, Sandel argues, while it is possible to decide the question of same-sex marriage without making any moral judgments about the worthiness of homosexual relationships, it is not possible to make the case *for* same-sex marriage unless one enters the terrain of such judgments. The nonjudgmental position, as Michael Kinsley and Tamara Metz argue, points not to extending marriage to same-sex couples but to the disestablishment of marriage.[44] Only when the state removes itself from the business of recognizing various kinds of relationships and leaves this role to churches and other private associations will the law be truly neutral about the worthiness of various forms of relationships.[45] Neither of the two most common positions on the issue—barring same-sex marriage on one hand and recognizing it on the other—succeed at neutrality; both implicitly or explicitly involve moral judgments about the good as it relates to the meaning and purpose of marriage.

Sandel thinks our politics should welcome what is implicit in these cases and admit into political discussion moral and religious considerations about the worthiness of social practices and the virtues they are meant to convey. This is not just a matter of being honest about the reasons that motivate us to take particular political stands. More importantly, Sandel claims that getting over the liberal allergy to morality (even religious morality) will invest politics with more substance and make it more engaging. "A politics of moral engagement," Sandel says in his closing lines, "is not only a more inspiring ideal than a politics of avoidance. It is also a more promising basis for a just society."[46]

The political ideal Sandel describes is indeed more inspiring than a politics that avoids all considerations of the good. Whether it is in fact more promising at a practical level depends on whether we have overcome the dangers that liberalism was originally designed to displace. The prospect of a majority imposing its moral conceptions on the rest (something that American constitutionalism makes difficult yet that never seems entirely remote) will be sufficiently alarming to chase many of Sandel's readers to

---

44. *See* Tamara Metz, *Why We Should Disestablish Marriage*, *in* JUST MARRIAGE 99, 101–02 (Mary Lyndon Shanley ed., 2004) (arguing that the state does not possess the moral authority to define marriage and should remove itself from the business of defining marriage in order to maintain a legitimate morally neutral position); Michael Kinsley, *Abolish Marriage: Let's Really Get the Government Out of Our Bedrooms*, WASH. POST, July 3, 2003, at A23 (arguing that the only resolution of the gay-marriage debate that will satisfy both liberals and conservatives is the abolition of civil marriage).

45. SANDEL, *supra* note 3, at 253–56.

46. *Id.* at 269.

the liberal position that he at once so convincingly presents and criticizes. Sandel's recommendations would be attractive if a politics of moral engagement led to persuasion and agreement or even if it led only to reflection, deliberation, and respectful disagreement. But if (and this is liberalism's originating worry) we will inevitably disagree about the good, then a politics of the good must inevitably be partisan, where each group seeks to impose its own ideas on the whole. Politics would not be guided by a common conception of the good but by one party's partial understanding of the good.

This points to the profound optimism that informs Sandel's ideal of a deliberative democracy of moral engagement. At bottom, Sandel departs from the moderns in his confidence about our individual and collective capacity to reason about the good. It is one thing (and an important thing) to understand that we cannot entirely avoid such reasoning, even in public matters—Sandel is right to point out this fact, uncomfortable though it might be. But it is another to argue that we should engage in such reasoning rather than search for pragmatic strategies of avoidance. To suggest this is to believe in the ancient conception of human reason as a faculty that is capable of deliberating about the good, while rejecting the ancient view that some are much better reasoners than others (and so, deserve to rule). In this, Sandel possesses more confidence in human reason and in democracy than either the ancients or the moderns. What he calls on us to do politically has never quite been done; a vast and heterogeneous population of political equals deliberating respectfully about the good life and forming a sufficiently broad agreement about the ideals that inform our laws to give the laws legitimacy. Perhaps it is not possible—but it has not been tried, as Sandel says.[47] But Sandel seems right to say that it is more vital and inspiring than the constricted image of democracy that prefers moral avoidance for moral engagement.

III. Conclusion: Abramson's Citizen in Sandel's Republic

At first sight, it does not appear as though the kind of citizen Abramson's education in political philosophy is meant to nourish will easily inhabit the Sandelian deliberative democracy. What follows from a thorough engagement with the history of political thought, for Abramson, is a keen sensitivity to the tragic dimension of politics, a sympathetic distance from great political ideals, and a sense that no political ideal can be so worthy as to command our perfect loyalty. At the same time, the greatest political ideals, carried by the greatest thinkers in the canon of political thought, are too forceful to fully dismiss and too magnetic to wholly resist. Abramson's citizen inhabits the space between faith and disenchantment, neither

47. *See id.* at 268–69 ("There is no guarantee that public deliberation about hard moral questions will lead in any given situation to agreement . . . . It's always possible that learning more about a moral or religious doctrine will lead us to like it less. But we cannot know until we try.").

expecting full satisfaction of the longing for justice nor resigned to inevitable disappointment. This form of political maturity, it might seem, cannot be at one with the optimism that informs the Sandelian republic. It might seem more at home with the skepticism of the liberal republic, which, in its insistence on equal rights but corresponding resistance to a politics of the good, stands between utopian idealism and nihilistic despair.

And yet, the Sandelian ideal of democracy demands a great deal of political maturity—of a sort very akin to that which Abramson's book is meant to instill. Sandel can depart from the early modern wariness of religion and the twentieth century's suspicion of political ideals only because he assumes that the citizens of today have internalized enough of a tragic sensibility that they will not want to try to remake society and politics according to any image of the whole truth. Sandel assumes that citizens today are not inclined to refight the Wars of Religion, which is why it is possible to readmit the kinds of reasons and arguments to the political realm that foundational liberals sought to exclude without inviting uncompromising disagreement, personal offense, and violence. The capacity that Sandel invests in the democratic citizenry grounds the optimism that ultimately informs his democratic ideal, and this capacity in turn is what Abramson's education is meant to produce.

Whether the citizens of today, as they are, are up to the task of truly governing themselves in the manner Abramson and Sandel hope for is a further question. For all our defects, today's citizens harbor great reserves of civic energy and civic hope—though most of this energy lands outside of formal politics, especially for young people. Abramson and Sandel show us how we might direct this energy back into the political sphere. They do not require that we neglect or forget the skepticism that is an ineliminable part of modern democratic citizenship—on the contrary, each in his own way requires it. They only ask that we appreciate our politics as a mixture of elements, ancient and modern, and that we dare to act on the hopes for democratic life that we cannot quite shake off.

Socratic Temptations

MINERVA'S OWL: THE TRADITION OF WESTERN POLITICAL THOUGHT. By Jeffrey Abramson. Cambridge: Harvard University Press, 2009. 388 pages. $18.95.

Reviewed by Michael J. Sandel*

Jeffrey Abramson's *Minerva's Owl: The Tradition of Western Political Thought*,[1] is a wonderfully engaging history of political theory. It is an appealing and accessible introduction to the subject, not only for students but for anyone who wants to reflect on the competing conceptions of democracy, equality, and freedom that inform contemporary politics and law.

The book reflects Abramson's experience as a teacher. For years, he taught the history of political theory (and also American constitutional law) at Brandeis University. But *Minerva's Owl* is not a collection of lectures. It is a sustained account of the tradition of Western political thought told in the personal style of a teacher who wants to entice his students to join a continuing conversation about politics in the company of the philosophers who shaped it.

Abramson's choice of thinkers is unabashedly canonical. He begins with Plato, Aristotle, and Augustine; moves into the early modern world with Machiavelli; and surveys the social contract tradition of Thomas Hobbes, John Locke, and Jean-Jacques Rousseau. He then takes up the great liberal thinkers, Immanuel Kant and John Stuart Mill, followed by nineteenth-century critics of liberalism, Friederich Hegel and Karl Marx. The story ends in the twentieth century with John Rawls and his critics.

Other authors and teachers have told this story before. But Abramson's telling has a distinctive appeal. Like the best teachers, he treats the philosophers not as objects of reverence but as interlocutors. Abramson's personal voice and interpretive take on the subject draw the reader in. At the heart of the book's appeal is the fact that Abramson's stance toward the tradition he describes is marvelously conflicted. By conflicted, I do not mean confused. I mean genuinely torn between two rival ways of thinking about politics.

The first way of thinking holds that politics should seek to cultivate virtue and promote the good life. According to this view, which Abramson associates with ancient political thought, we should "judge political

---

* Michael J. Sandel is the Anne T. and Robert M. Bass Professor of Government at Harvard University and the author, most recently, of *Justice: What's the Right Thing to Do?*

1. JEFFREY ABRAMSON, MINERVA'S OWL: THE TRADITION OF WESTERN POLITICAL THOUGHT (2009).

arrangements by their contribution to bringing us closer to the ultimate moral ends of the good life."[2]

> In this way of thinking, there can be no "rights" belonging to individuals that trump the power of politics to make people virtuous. For what is right in politics is explicable only when we directly ask and answer the question of what is good for human beings, what fulfills or realizes or perfects our nature. Unless we first know what fulfills our nature as fully functioning human beings, we cannot possibly have a standard or ideal against which to judge political choices.[3]

The second way of thinking, which Abramson associates with modern political theory, rejects the notion that the state should affirm any particular conception of the good life. In the name of justice, fairness, and respect for individual choice, it holds that "the state must refrain from enforcing morality on the people."[4]

> Instead, justice requires politics to bracket or put aside substantive moral issues, such as how people should conduct themselves religiously, sexually, or artistically. . . . It is not the mission of politics to resolve these strong moral disagreements by siding with the answer of some over others. This would be to treat persons unequally and deprive individuals of their equal capacity to "choose their own good in their own way." Thus a just state is a neutral state, devising procedures whose moral value derives precisely from the framework they provide for permitting persons to agree to disagree about their ultimate moral ideals.[5]

Of course, proponents of each approach often disagree among themselves. Those who believe that politics should promote virtue and the good life may not agree about what the good life consists of. And those who believe that the state should be neutral on substantive moral questions may not agree about what laws, and what rights, neutrality requires. The contrast is further complicated by the fact that, as Abramson points out, some modern political theorists questioned the neutrality principle and sought to reconnect political argument with considerations of the good life. Among the canonical modern thinkers, for example, both Rousseau and Hegel emphasize the educative, character-forming role of civic life.[6] But the contrast between the

---

2. *Id.* at 7.

3. *Id.* at 7–8.

4. *Id.* at 8.

5. *Id.*

6. *See id.* at 252–54 (noting Rousseau's belief that "[t]he citizen's moral commitment to the common good restores selflessness to the self"); *id.* at 305–06 ("Hegel did agree with Rousseau . . . that there is a freedom we attain only by calling out the universal in us, only by using reason to free us from merely slavishly following whatever desires or opinions we happen to have.").

two camps is nonetheless a familiar and useful way of distinguishing ancient from modern political thought.

Given its emphasis on toleration and freedom of choice, the modern view of politics is often described as the liberal tradition. But it is important to distinguish this sense of "liberal" from its meaning in contemporary politics. The familiar distinction between conservatives and liberals, as we use those terms in American politics today, does not map neatly onto the contrast between ancients and moderns. It is true that some contemporary conservatives favor legislating morality, as when opponents of abortion or same-sex marriage argue that the law should enforce their moral views about such questions, while contemporary liberals argue that individuals should be free to make their own choices about whether to have an abortion or whom to marry.

But the conservative–liberal distinction sometimes cuts across the ancient–modern divide. While cultural conservatives harken back to the virtue tradition of ancient political theory,[7] many economic conservatives defend laissez-faire, free-market capitalism on libertarian grounds.[8] In doing so, they draw upon the individualistic premises of modern political thought. And while many contemporary liberals advocate civil liberties and individual rights on grounds of neutrality and freedom of choice,[9] it is also possible to defend such rights in the name of virtue and the good life. (Consider, for example, the evangelical Christian abolitionists of the 1830s and 1840s who argued that slavery should be abolished because it was a sin.)[10]

In the introduction to the book, Abramson slides into identifying the ancient–modern divide with the contrast between contemporary conservatives and liberals. He suggests that conservatives (following the ancients) want to legislate morality, while liberals (following the moderns) argue "for tolerating the moral choices of others even when one disagrees with them."[11] Later in the book, however, he acknowledges that these are

---

7. *See, e.g.*, ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY 21, 28 (1993) (proposing arguments in support of moral legislation in the tradition of Aristotle and Thomas Aquinas); David F. Forte, *The Framers' Idea of Marriage and Family* (reviewing Aristotelian ideology regarding the necessary connection between virtue and a healthy polity), *in* THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET, AND MORALS 103–07 (Robert P. George & Jean Bethke Elshtain eds., 2006).

8. *See, e.g.*, 1 FRIEDRICH A. HAYEK, LAW, LEGISLATION AND LIBERTY: RULES AND ORDER 55 (1973) (arguing that a system valuing liberty will only be maintained if the coercive power of all authority is limited); LUDWIG VON MISES, ECONOMIC POLICY: THOUGHTS FOR TODAY AND TOMORROW 52 (3d ed. 1979) ("The idea of government interference as a 'solution' to economic problems . . . [is] very unsatisfactory and often quite chaotic.").

9. *See, e.g.*, Mark P. Strasser, *"Defending" Marriage in Light of the* Moreno-Cleburne-Romer-Lawrence *Jurisprudence: Why DOMA Cannot Pass Muster After* Lawrence, 38 CREIGHTON L. REV. 421, 446–47 (2005) (asserting freedom of choice as an argument in favor of same-sex marriages).

10. *See, e.g.*, William Lloyd Garrison, Address to the Colonization Society (July 4, 1829), *available at* http://teachingamericanhistory.org/library/index.asp?document=562 (proclaiming that slavery is a national sin and that the slaves should be emancipated).

11. ABRAMSON, *supra* note 1, at 9.

two different sets of distinctions. He observes, for example, that some advocates of gay rights (the liberal view) argue for bracketing "our substantive moral differences over whether gay sexuality is good or bad," while others defend gay rights "by engaging directly with the underlying moral argument about sexual orientation."[12]

In the debate between the ancient and modern ways of thinking about politics, Abramson ultimately leans toward the moderns. He worries that a politics of virtue is a judgmental politics at odds with democracy and respect for individual choice. "No political democracy can be built on such a tendency to judge and to rate whose happiness is better. For Socrates, that was the point. For us, I hope it is a point of resistance."[13]

But despite his liberal, nonjudgmental instincts, Abramson is deeply drawn to the idea that politics should aim at higher ideals than toleration and choice. *Minerva's Owl* pulsates with the tension between these two conflicting convictions.

At first glance, it might seem that this tension reflects Abramson's two intellectual vocations; in addition to being a political theorist, Abramson is a lawyer who has written and taught on the subjects of civil liberties, constitutional law, and juries.[14] So it is tempting to think that the political theorist in him may be drawn to Platonic ideals of the good life while the lawyerly side brings out his commitment to liberal, procedural values. But it is difficult to read *Minerva's Owl* without being struck by another, more intriguing, contrast. Running through the book is a series of reflections on the relation of teachers to students and on the orientations to politics characteristic of the old and the young.

Part of what makes a great teacher is a vivid memory of what it was like to be a student. One of the most moving passages of *Minerva's Owl* begins with such a memory. In introducing Plato's *Republic*, Abramson recalls his own first encounter with it as a college student. "I understood little of it, but I fully felt—I still feel—the force of Socrates' promise that learning can change who we are."[15] And so, from the start, Abramson was drawn to political theory for its transformative promise. "I loved the prospect that studying would set me free, that the coming life of the mind would be radical and revolutionary, dramatic and dangerous, transforming and transcending."[16] He remembers the old professor (at Amherst College) who introduced him to the subject:

> I can still smell the pleasant aroma of cherry pipe tobacco that my professor was free in those days to exhale over us; for years afterwards

12. *Id.* at 343.

13. *Id.* at 81.

14. *See, e.g.*, JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY (Harvard Univ. Press 2000).

15. ABRAMSON, *supra* note 1, at 10.

16. *Id.*

> that scent clung to the pages, and just smelling them wafted me back to him and his love of Socrates. The longer my professor dwelled on a passage, the more deeply the smell attached to the words, so for the longest time I could tell what he thought were the most important parts of the *Republic* just by putting nose to book. And so through a combination of the senses I became addicted to the *Republic*.[17]

Notwithstanding this addiction, Abramson now qualifies his once unbridled admiration for a thinker who rejects modern notions of liberty and equality. "Looking back on my own youthful enthusiasm for Socrates, I confess I should have offered more resistance. I had not expected to find that the philosopher who first awakened me to reflect on political values would be a thinker who saw little value in democracy."[18] This is the first statement of a theme that recurs throughout the book: Modern liberalism is a product of sobriety and middle age, whereas the ancient aspiration to a politics of character, virtue, and higher ideals is a philosophy of youthful passion and abandon.

Having partly outgrown his youthful embrace of Socrates, Abramson now faults him for thinking that knowledge of the good and the just is available only to the philosophically minded few who manage to emerge from the shadows of the cave and glimpse the sun. And he worries about Socrates' illiberal claim that "it is impossible to know *how* to treat persons fairly . . . without first knowing *what* is good for them."[19] For Socrates,

> Justice is a virtue precisely because it delivers to people the goods they would wish to have if they correctly understood what it was that fulfilled their natures and made them happy in the best way that human beings can achieve happiness. This explains why Socrates will argue that knowledge of justice waits upon knowledge of the good. Knowledge of the good is "prior" to justice, in the sense that we must first know what is good for persons before we can fashion just procedures and institutions that deliver the good life.[20]

But despite mustering this belated "resistance" to Socrates' elitism and illiberalism, Abramson remains drawn to Socrates' notion that politics and philosophy are erotically charged activities that engage the passions and transform the soul. The *Republic* consists of a dialogue between Socrates and a group of young men who are waiting to watch a torchlight parade at a festival in Piraeus, the port area of Athens.[21] But the conversation about justice proves so absorbing and seductive that they never make it to the festival.[22] "It is certainly Socrates' mission in the *Republic* to change,

17. *Id.* at 10–11.
18. *Id.* at 14.
19. *Id.* at 40.
20. *Id.* at 40–41.
21. PLATO, THE REPUBLIC 327a–328b (R.E. Allen trans., Yale Univ. Press 2006).
22. *Id.* at 331d.

elevate, and sublimate youth's natural eroticism. But the enthusiasms of eros are never repressed, never denied."[23]

Abramson appreciates Socrates' insight that good teaching and good politics tap into the erotic passions of the young, if ultimately to redirect them. Some see learning as a form of discipline in which students are taught to surmount their passions, prejudices, and desires through the use of reason. But Abramson suggests that Socrates was a "better teacher for seeking to arouse his students' eroticism, enthusiasm, passions, and energy. Unless they were so engaged, they would never find their happiness in the strange journey into philosophy Socrates wishes them to take."[24]

According to Socrates, politics must also attend to eros and soulcraft. The ideal city he describes in the *Republic* has a famous division of labor, according to which the guardian class provides soldiers to guard the city and philosophers to rule it.[25] Certain people are suited by their natures to perform these roles.[26] But Socrates devotes much attention to the kind of education that will equip them to realize their natures and perform their roles well. In both cases, the right kind of education involves deploying and redirecting eros—toward love of honor, in the case of warriors, and toward love of wisdom and truth, in the case of philosopher kings.[27]

This emphasis on forming guardians with the right character leads Socrates to propose various illiberal measures, such as censorship of poets and music,[28] the regulation of sexual practices among soldiers,[29] and even the abolition of the family.[30] Although Abramson does not endorse these measures, he shows that they cannot simply be dismissed out of hand. He takes seriously Socrates' observation that musical rhythms can "'insinuate themselves into the inmost part of the soul'"[31] and points to the many ways that political regimes have celebrated certain musical styles or worried about their subversive effects.[32] (Consider, for example, the disputes in various eras over the influence of jazz, or rock, or rap music.)

Abramson also thinks Socrates has a point when Socrates worries about the risk that sexual passions may crowd out or confound the bond among soldiers. Although Socrates favored recruiting women as well as men into the military,[33] he knew that sexual passions could disrupt and displace the

23. ABRAMSON, *supra* note 1, at 18–19.

24. *Id.* at 63.

25. PLATO, *supra* note 21, at 373d–376e, 501d–502c.

26. *See id.* at 374e–376e (discussing the traits that would naturally result in the best guardians).

27. *See id.* at 378e–383c, 504d–509c (discussing the educational goals for the philosopher kings and guardians in the Republic).

28. *Id.* at 423d–425c.

29. *Id.* at 458c–459e.

30. *Id.* at 457b–458c.

31. ABRAMSON, *supra* note 1, at 52 (quoting PLATO, *supra* note 21, at 401d).

32. *Id.* at 53.

33. PLATO, *supra* note 21, at 451b–457b.

nonsexual erotic bonds of solidarity and patriotism that military service requires. Socrates offers the example of Achilles, who withdrew from combat when Agamemnon took away his enslaved woman and flew into a frenzied rage of revenge when his lover Patroclus was killed by Hector.[34] Abramson offers the intriguing suggestion that a similar consideration may explain the reluctance of the U.S. military to accept openly gay and lesbian soldiers. He does not agree with the policy but suggests that a Socratic worry about how sexual attractions compete with and complicate bonds of comradeship may underlie the military's resistance to allowing openly gay and lesbian soldiers to serve.[35]

Abramson offers a rich and sympathetic account of Socrates' moral and political vision, including Socrates' claim that, for those who can attain it, the life of the mind is a truer source of happiness than material or physical pleasures. But he rebels against Socrates' hierarchy of happiness and the notion that some are less suited than others to realize the pleasures of philosophy. Here again, Abramson confesses a youthful enthusiasm for the ancients' aspiration to a politic of higher ideals. For Abramson, this enthusiasm has given way, with time and maturity, to a more inclusive, less judgmental liberalism:

> [W]hen I was young I found it difficult to resist the invitation to journey upward and onward, from the cave into the light, from the lower to the higher. But it is one thing to judge oneself and to aspire to change for the better. It is another to sit in judgment of other persons and to limit their aspirations. Socrates asks us to do both. He wants some individuals, but only some, to journey with him, while leaving others behind with the "lower" or "lesser" happiness that fits them. Such a use of the "higher/lower" comparison pushes Socratic politics in an antidemocratic direction. He could have—I think he should have—praised the diversity of ways in which human beings experience pleasure . . . . But his views on human equality preclude such an open invitation to the life of the mind.[36]

One might think that Abramson's liberal and democratic commitments would lead him to celebrate the modern political thinkers who occupy the second half of the book. So it is striking to discover that he finds the leading liberal political theorists disappointing, each in a different way. Thomas Hobbes rejects the ancient idea that politics should aim at a *summum bonum*, or highest good.[37] In that sense, Hobbes launches the liberal tradition. He argues that men and women should agree to obey a sovereign in order to es-

34. *Id.* at 390e–391e.

35. ABRAMSON, *supra* note 1, at 54–55.

36. *Id.* at 80–81.

37. THOMAS HOBBES, LEVIATHAN 70 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651).

cape the insecurities of the state of nature.[38] The purpose of politics is not to develop our human faculties or to achieve the highest ends of which we are capable but simply to keep the peace. Abramson rightly criticizes Hobbes's "cramped view of human freedom,"[39] which maintains that the choice to leave the state of nature and agree to the social contract is free, despite the fact that it is an offer we cannot refuse, governed by the desire to avoid the risk of a violent death.

Abramson finds little inspiration in John Locke's version of liberalism, especially in contrast to the ancients' more exalted conception of politics:

> I remember the considerable deflation I felt upon seeing his opening description of what politics is all about. The state, he writes in his *Letter Concerning Toleration*, exists merely to protect our "possession of outward things, such as money, lands, houses, furniture, and the like." My eyes became glued to this word "furniture." Where had all that glorious Platonic talk gone about politics elevating the self to a higher moral plateau, taking responsibility with others for sustaining a common life?[40]

Abramson is also disappointed by Locke's "watered-down notion of tacit consent."[41] Because few of us (other than naturalized citizens) ever actually consent to our government, it seems we are obligated to obey simply as a virtue of living in a particular place without any moment of deliberate choice. "Consent, which promised to declare our freedom, ends up suggesting our subjugation."[42]

When he turns to Immanuel Kant, the greatest and most rigorous liberal philosopher, Abramson finds a more powerful conception of freedom than other liberals offer. But Abramson concludes, following Hegel, that Kantian autonomy comes at a price. Kantian conscience "found its freedom only in disembodied ways, only by detaching oneself from culture—its history, custom, and traditions—and floating above all this, reasoning purely and universally."[43] Gone were "the ethical attachments to community that the polis once had provided Greek citizens."[44]

Of the liberal thinkers he discusses, Abramson seems most tempted by John Stuart Mill, whose book *On Liberty* offers a powerful critique of paternalism that is often cited in American legal debates. The argument depends on a distinction between self-regarding and other-regarding acts. The state may regulate actions that affect others but not actions that affect only

---

38. *See id.* at 117–21 (arguing that the aim of entering into a commonwealth is self-preservation and getting out of the warlike conditions of the state of nature).

39. ABRAMSON, *supra* note 1, at 194.

40. *Id.* at 199.

41. *Id.* at 213.

42. *Id.*

43. *Id.* at 278.

44. *Id.*

oneself.[45] Motorcycle helmet laws are a classic example. If I want to risk serious injury by riding a motorcycle without a helmet, then I should be free to do so provided I am prepared to bear the costs of any injury.

After exploring the difficulty of finding much behavior that is entirely self-regarding, Abramson offers an ethical critique of Mill's overriding emphasis on individual choice. "[I]t may be that mobility and detachment can be carried too far," Abramson writes, "that a thoroughly rootless person, with no firm commitments, situated nowhere, is too easily preyed upon by those who offer a home, a community, a sense of belonging."[46] He doubts that Mill's regard for freedom of choice could "make room for the solidarities of life."[47] A liberalism that accords sole importance to the choosing life, Abramson writes, accords too little value "to virtues such as loyalty and solidarity" and may therefore be "destructive of the virtues of sharing a common good with other human beings."[48]

The modern political thinker Abramson likes best is arguably the least liberal: Jean-Jacques Rousseau. Here, finally, is a thinker beloved by both the young Abramson and the old: "When I was an undergraduate, Rousseau was my favorite. He still is."[49] That Rousseau is his favorite reflects Abramson's conflicted stance toward ancient and modern ways of thinking about politics. Rousseau accepted the modern idea that freedom involves the exercise of a sovereign will.[50] But he did not believe we could realize such freedom as individual selves acting on our idiosyncratic desires. He believed that freedom is only possible insofar as we renounce or transcend our particular interests and participate in the general will.[51]

Like the ancients, Rousseau believed that we can only be free by living in a community of a certain kind, which requires in turn an ambitious formative, or educative, project. Good citizens are made not born, so a central question for politics is how to cultivate in citizens a commitment to the common good. The idea of molding citizens connects Rousseau with Plato and leads him to worry (as Plato did) about the corrupting influences of popular entertainment.

Rousseau opposed the idea of bringing a theater to his native Geneva, fearing it would corrupt citizens by turning them into spectators and distract

---

45. JOHN STUART MILL, ON LIBERTY 82–83 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

46. ABRAMSON, *supra* note 1, at 299.

47. *Id.*

48. *Id.*

49. *Id.* at 222.

50. *See* JEAN-JACQUES ROUSSEAU, DISCOURSE ON POLITICAL ECONOMY AND THE SOCIAL CONTRACT 137–38 (Christopher Betts trans., Oxford Univ. Press 1994) (1762) ("The constant will of all the citizens of the state is the general will: it is through the general will that they are citizens and have freedom.").

51. *See id.* (explaining how the general will allows people to be free yet subject to laws they oppose).

them from attending to their public duties.[52] He wanted to avoid the moral and civic corruption the theater had brought to Paris, where people, as Abramson puts in his own words, "sit in the dark and cry copious tears for the fictional miseries of imaginary persons" all the while neglecting the actual miseries of their fellow citizens.[53] Rousseau argues that, rather than gather as spectators watching actors on a stage, the citizens of Geneva should find their entertainment in public festivals that invite popular participation.[54]

Abramson's ambivalence is on full display in his final verdict on Rousseau, whose portrait of the citizen he finds "both appealing and frightening."[55] He finds it appealing insofar as it locates us in communities worth belonging to, making possible the loyalties, solidarities, and traditions that liberal individualism fails to provide. He finds it frightening in that it leaves little room for pluralism or disagreement. "There is room for only one community, one unity, and that is the state itself . . . ."[56] Any disagreement is seen as "the triumph of factionalism and the mere pursuit of private interests."[57]

Abramson concludes by seeing each way of thinking about politics as a necessary and persisting corrective to the other. While Rousseau does not properly appreciate the "eloquence of [the] liberal vision of individuals left free to be the authors of their own distinctive life plans," he, or someone like him, "will always be necessary to check the excesses of individualism" to which the liberal ethic may lead.[58] Returning to the theme of age and youth, Abramson hopes that Rousseau's passion for equality and unmasking of the hypocrisies of elites "will kindle in others the same fire for change it once kindled in me."[59] Standing back, as he repeatedly does, from the passions of his youth, he writes, "Those fires in me have died down over time as I have come to worry more about the dark purposes to which nationalism and devotion to the state can be . . . put."[60] But when it comes to protesting injustices such as the inequality between rich and poor and the sacrifice of the common good to greed and self-interest, "I still hope to be marching alongside Rousseau."[61]

---

52. Allan Bloom, *Introduction* to JEAN-JACQUES ROUSSEAU, POLITICS AND THE ARTS: LETTER TO M. D'ALEMBERT ON THE THEATRE, at xxxi (Allan Bloom trans., Cornell Univ. Press 1960) (1758).

53. ABRAMSON, *supra* note 14, at 252.

54. ROUSSEAU, *supra* note 52, at 125.

55. ABRAMSON, *supra* note 1, at 254.

56. *Id.* at 255.

57. *Id.*

58. *Id.* at 254–55.

59. *Id.* at 257.

60. *Id.*

61. *Id.*

More than a history of political thought, *Minerva's Owl* is a humane meditation on the vocation of teaching, the passage of time, and the passion that politics can inspire.

* * *

Notes

Indian Arbitration and "Public Policy"*

Introduction

Parties choose arbitration for its finality, efficiency, and relative economy. The significance of these considerations is amplified where, as in India, the judiciary is notoriously backlogged and dispute resolution through traditional forums is infamously slow. The state's vital interest in equitable dispute resolution often comes into conflict with party autonomy and the freedom to contract for arbitration as a dispute resolution mechanism. The balance between these competing interests is reflected in the United States Commission on International Trade Law (UNCITRAL) Model Laws and many nations' arbitration statutes; while parties are free to contractually supersede many of the gap-filling provisions of these statutes, they include certain mandatory checks on the arbitration process that parties cannot avoid with a carefully drafted contract.

Among these compulsory provisions is the requirement that arbitrating parties submit to certain national courts' power to set aside or refuse to enforce an arbitral award if it is in conflict with the public policy of the nation.[1] Nowhere is the juxtaposition between the legitimacy of autonomous parties' contracts, on one hand, and the state's interest in applying its mandatory public law, on the other, more clear. Debate concerning the proper role and scope of public policy vis-à-vis arbitration is fierce on the national and international stage. Especially with respect to international commercial arbitration, this debate revolves around competing conceptions of the proper starting point for statutory and jurisprudential interpretations of public policy as applied to arbitral awards with a strong nexus to a nation's laws and people.

As the nation with the second largest population[2] and the twelfth largest nominal gross domestic product (GDP),[3] India's global importance as an

---

* I am particularly grateful for helpful comments from and conversations with Professor S. K. Verma, Sumeet Kachwaha, Dharmendra Rautray, and the many others with whom I met in Delhi and Mumbai. Further thanks are owed to the helpful and kind librarians at the Indian Law Institute Library and the University of Delhi Faculty of Law Library for their invaluable guidance and assistance with my research. I would also like to thank the members and editors of the Texas Law Review for their thoughtful suggestions and editing, particularly John Summers, Eric Leventhal, Zac Padgett, and George Padis. Finally, I am eternally grateful to my research assistant and travel companion, Kalani Man, for his unflagging friendship and support and to my biggest fan and most exacting editor, my mom.

1. UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION ch. VII, art. 34, ¶ (2)(b)(ii) (amended 2006); The Arbitration and Conciliation Act, No. 26 of 1996, INDIA CODE (1996), *available at* http://indiacode.nic.in.

2. CIA, *India*, THE WORLD FACTBOOK (2010), https://cia.gov/library/publications/the-world-factbook/geos/in.html.

emerging market and growing economy is undeniable. India's size as a potential market for investors and its wealth of natural and human resources have catapulted it onto the international stage, especially since the liberalizing economic reforms of the early 1990s. In recent years, India has unequivocally expressed its intention to be a pro-arbitration nation, a desire that is amplified by concerns regarding its backlogged courts. The laws and jurisprudence surrounding both international and domestic arbitration have significant potential to affect India's ability to attract foreign investment. Arguably, a functional domestic arbitration system is as important to this goal as international arbitration; myriad multinational corporations have subsidiaries incorporated in India that are subject to India's domestic arbitration laws, including Coca-Cola, British Petroleum, Ford Motors, Samsung, Hyundai, Accenture, and Reebok.[4]

In this Note, I will analyze India's oft-criticized law surrounding public policy as applied to arbitral awards. I will introduce the statutory scheme and surrounding case law in light of international criticism and a limited nationalist defense of what are perceived to be protectionist measures. I will defend India's interpretation of public policy on legal and practical grounds and submit legal and institutional recommendations that, if implemented, would address the concerns of both international investors and vulnerable Indian parties.

In Part I, I will provide a brief history of post-colonial India's economic policies and statutory schemes vis-à-vis arbitration, in order to provide a frame of reference for an assessment of the implications of the current legal system governing arbitration in India. In Part II, I will introduce two competing viewpoints in analytical legal scholarship on arbitration law in India. In Part III, I will introduce a recent judgment of the Indian Supreme Court imposing a broad interpretation of public policy grounds for setting aside domestic arbitral awards that has garnered considerable international criticism. I will evaluate the judgment as a potentially legitimate judicial interpretation and defend the holding. Departing from public policy as it relates to domestic arbitral awards, in Part IV, I will analyze a 2008 Indian Supreme Court judgment and the resulting possibility that Indian courts may set aside international awards on public policy grounds. Finally, in Part V, I will submit recommendations that, if implemented, would align India with

3. CIA, *GDP (Official Exchange Rate)*, THE WORLD FACTBOOK (2010), https://www.cia.gov/library/publications/the-world-factbook/fields/2195.html.

4. ACCENTURE IN INDIA, http://www.accenture.com/Countries/India/default.htm (2010); BP IN INDIA, http://www.bp.com/sectiongenericarticle.do? categoryId=171&contentId=2000620 (2010); COCA-COLA INDIA, http://www.coca-colaindia.com (2010); FORD INDIA, http://www.india.ford.com (2010); HYUNDAI MOTOR COMPANY, http://www.hyundai.com/in/en/main/ (2009); Meenakshi Radhakrishnan-Swami, *How Reebok Tackled India Challenge*, REDIFF.COM INDIA (Feb. 15, 2005), http://www.rediff.com/money/2005/feb/15spec1.htm; SAMSUNG INDIA, http://www.samsung.com/in/ (2010).

the prevailing international view of the meaning of public policy as applied to arbitral awards.

I. Background

A. Economic History of Post-Colonial India (1947 to Present)

Prior to the 1990s, India "strove to be economically self-sufficient" and actively discouraged foreign investment with restrictive regulations.[5] India's system of insular and protective economic regulations subjected industry to high levels of government control[6] and gave the country a "well deserved reputation for red tape, bureaucratic delays, and bribery."[7] Under this framework, designed to foster socialistic democracy, India's economic policy revolved around large state-owned businesses and a highly regulated private sector.[8]

Though India achieved limited success in attaining the socialistic goals of its pre-1990s policies, the country became increasingly isolated from the global economy.[9] By 1991, India "was on the verge of economic collapse" as a result of skyrocketing foreign debt, rampant new-money financing, soaring inflation, and threats of trade sanctions from the United States.[10] In 1991, the impending economic crisis spurred the enactment of the New Industrial Policy (NIP), marking a fundamental shift in Indian foreign relations and developmental policy.[11] Specifically, the NIP relaxed regulation of foreign investment in India, increased the permitted levels of foreign ownership of Indian companies, instituted a capitalistic trade policy, provided tax incentives for foreign investors, liberalized foreign trademark requirements, and privatized many sectors of the economy.[12]

In the second half of the 1990s, "the IT boom brought India to the forefront as a result of a large educated workforce and the low cost of human capital."[13] Since 2000, India has enjoyed "robust GDP and [i]ndustrial growth" and concurrent demographic shifts, due to changing consumer attitudes, urbanization, and rising incomes.[14] Today, India is a "more

---

5. Tracy S. Work, *India Satisfies Its Jones for Arbitration: New Arbitration Law in India*, 10 TRANSNAT'L LAW. 217, 218 (1997).

6. David A. Carpenter & Ajay K. Mago, *Developments in the Indian Economy and the Impact on Foreign Investment*, *in* DOING BUSINESS IN INDIA: CRITICAL LEGAL ISSUES FOR U.S. COMPANIES 2009, at 377, 381 n.3 (PLI, Course Handbook Ser. No. B-1720, 2009).

7. Work, *supra* note 5, at 218.

8. *Id.* at 220.

9. *Id.* at 221.

10. *Id.*

11. *Id.* at 220.

12. *Id.* at 223.

13. Carpenter & Mago, *supra* note 6, at 19.

14. *Id.*

modern business economy,"[15] though lack of political consensus still impedes statutory and institutional changes.[16]

Tellingly, India's GDP grew at an average annual rate of 8.8% between fiscal years 2003 and 2008.[17] Foreign investment has increased concurrently. In 1991, foreign investment in India totaled approximately $100 million.[18] By 2006, foreign investment totaled over $15.6 billion and continues to increase steadily.[19] To put this in perspective, these statistics show an increase by more than 15,000% of foreign investment in India in the fifteen years between 1991 and 2006, though such a calculation does not account for inflation. Undeniably, "India has emerged as one of the most attractive investment destinations in the world . . . ."[20]

B. Former Arbitration Law

Prior to 1996, the statutory framework with respect to arbitration in India was governed by two statutes: the 1940 Indian Arbitration Act regulated domestic arbitration[21] and the 1961 Foreign Awards (Recognition and Enforcement) Act regulated the enforcement of foreign awards under the New York Convention.[22] The 1961 Act replaced the 1937 Arbitration (Protocol and Convention) Act, which had previously governed the enforcement of foreign awards.[23]

Under the 1940 Act, judicial intervention was required throughout the process of domestic arbitration. Judicial action was required, for example, to set arbitral proceedings in motion, to determine the existence of a valid arbitration agreement and arbitrable dispute, to extend the period of time permitted for making an award, and to enforce an arbitral tribunal's award.[24] Judicial participation in the arbitral process, whereby the court often reviewed the substantive merits of arbitral decisions, led to "widespread

---

15. Work, *supra* note 5, at 218.

16. Carpenter & Mago, *supra* note 6, at 19.

17. Timothy G. Massad, *Current Developments in India's Capital Markets: Implications for U.S. Investors and Corporations*, *in* DOING BUSINESS IN INDIA 2009: CRITICAL LEGAL ISSUES FOR U.S. COMPANIES 33, 37 (Sonia Baldia chair, 2009).

18. Carpenter & Mago, *supra* note 6, at 20.

19. *Id.*

20. *Id.*

21. The Arbitration Act, No. 10 of 1940, INDIA CODE (1993), *available at* http://indiacode.nic.in.

22. The Foreign Awards (Recognition and Enforcement) Act, No. 45 of 1961, INDIA CODE (1993), *available at* http://indiacode.nic.in.

23. The Arbitration (Protocol and Convention) Act, No. 6 of 1937, INDIA CODE (1993), *available at* http://indiacode.nic.in.

24. *See* Krishna Sarma et al., *Development and Practice of Arbitration in India—Has it Evolved as an Effective Legal Institution* 3 (Stanford Ctr. on Democracy, Dev., and the Rule of Law, Working Paper No. 103, 2009), *available at* http://iis-db.stanford.edu/pubs/22693/no_103_sarma_india_arbitration_india_509.pdf (describing the stages of the arbitration process in which the Arbitration Act of 1940 required judicial intervention).

discontent over excessive judicial intervention in arbitral proceedings with attendant delays and uncertainty."[25]

C. *Governing Law—The Arbitration and Conciliation Act, 1996*

In 1996, India enacted a new arbitration statute, the Arbitration and Conciliation Act, and repealed the prior statutory framework.[26] The Statement of Objects and Reasons appended to the Act explained that the 1940 Act had become outdated in light of the economic reforms of the early 1990s and that these reforms could not "become fully effective if the law dealing with settlement of both domestic and international commercial disputes remain[ed] out of tune with such reforms."[27] By substantially adopting the UNCITRAL Model Law and Rules, the 1996 Act sought to harmonize India's arbitration laws with those of other nations, consolidate the previous Acts, provide for a fair and efficient arbitral process, minimize the supervisory role of courts, and provide for enforcement of awards as decrees of the court.[28] The sum of these reforms was an attempt to "inspire confidence in the Indian dispute resolution system, attract foreign investments and reassure international investors in the reliability of the Indian legal system to provide an expeditious dispute resolution mechanism."[29]

Though the 1996 Act was modeled on the UNCITRAL Model Law, it represented a significant departure from the UNCITRAL Model Law in that it applied, in Part I, to domestic arbitrations,[30] and, in Part II, to enforcement of international commercial arbitral awards,[31] whereas the UNCITRAL Model Law applied only to international commercial arbitration.[32] To some, this dual application of the 1996 Act is one of the Act's primary infirmities, because the UNCITRAL Model Law was not designed for the ad hoc domestic arbitrations that are prevalent in India and because the dual regimes invite conflation of jurisprudence between Parts I and II of the Act.[33]

---

25. Aloke Ray & Dipen Sabharwal, *Indian Arbitration at a Crossroads*, WHITE & CASE 1 (Jan. 2007), http://www.whitecase.com/files/Publication/95158305-3e74-48b9-a15d-6c303ff241d7/Presentation/PublicationAttachment/729186fa-70f4-43b8-9185-734535d46f48/article_Indian_Arbitration.pdf.

26. The Arbitration and Conciliation Act, No. 26 of 1996, INDIA CODE (1996), *available at* http://indiacode.nic.in.

27. The Arbitration and Conciliation Act, No. 26 of 1996, Statement of Objects and Reasons § 1 [hereinafter Statement of Objects and Reasons], *reprinted in* V. A. MOHTA & ANOOP V. MOHTA, ARBITRATION, CONCILIATION AND MEDIATION 53, 54 (2d ed. 2008).

28. *Id.*

29. Sarma et al., *supra* note 24, at 4.

30. The Arbitration and Conciliation Act § 2.

31. *Id.* § 44.

32. Sarma et al., *supra* note 24, at 4.

33. *See* LAW COMM'N OF INDIA, ONE HUNDRED AND SEVENTY-SIXTH REPORT ON THE ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2001, at 2 (2001), *available at* http://www.

D. The 2003 Proposed Amendments to the 1996 Act

In 2003, the Law Commission of India prepared a report on the infirmities of the 1996 Act and suggested a number of amendments.[34] Based on the Law Commission's report, the Arbitration and Conciliation (Amendment) Bill was submitted to Parliament in December 2003.[35] The 2003 Amendments would have clarified the public policy grounds for setting aside an award by adding a section allowing an award to be set aside "on the additional ground that there is an error which is apparent on the face of the arbitral award giving rise to a substantial question of law."[36] However, the Bill has not been taken up for consideration by the legislature, and efforts at legislative amendment of the 1996 Act are stalled at this time.[37]

II. Competing Paradigms

A. Majority View: Arbitration Law Should Strive to Attract Foreign Investors

The vast majority of relevant legal scholarship is written under the implicit assumption that India's arbitration law should be promulgated, first and foremost, to attract foreign investors. Emphasizing the necessity of providing efficient and predictable remedies, many suggest that because foreign investors typically prefer arbitration, the legal system should provide a pro-arbitration and therefore pro-investment environment, thereby minimizing the risk premium factored into potential legal costs by foreign parties doing business in India.[38] While some critics do acknowledge the remarkable growth rate of the Indian economy and foreign investment, they nevertheless insist that the potential for quicker growth merits primary consideration in formulating legal principles.[39]

This overwhelmingly pro-investment stance is echoed by many Indian scholars and attorneys. In a recent working paper exploring links between the quality of legal performance and economic growth in India, attorneys Krishna Sarma, Momota Oinam, and Angshuman Kaushik wrote that

---

lawcommissionofindia.nic.in/arb.pdf (noting that the UNCITRAL Model Law, which served as the basis for the 1996 Arbitration and Conciliation Act, was intended as a common model for international arbitration, but that the Act of 1996 also made such provisions applicable to purely domestic arbitration, which caused "some difficulties in the implementation of the Act").

34. Sarma et al., *supra* note 24, at 5.

35. *Id.* at 5 n.16.

36. The Arbitration and Conciliation (Amendment) Bill § 27, 2003 (India), *available at* http://lawmin.nic.in/legislative/arbc1.pdf.

37. Sarma et al., *supra* note 24, at 5.

38. Ray & Sabharwal, *supra* note 25, at 3.

39. *See id.* (opining that although the Indian economy received $5.5 billion in direct foreign investment in 2005–2006, the prospects of further increasing such investment were imperiled by legal uncertainty about the enforceability of arbitration decisions).

> although the huge influx of overseas commercial transactions spurred by the growth of the Indian economy has resulted in a significant increase of commercial disputes, arbitration practice has lagged behind. The present arbitration system in India is still plagued with many loopholes and shortcomings, and the quality of arbitration has not adequately developed as a quick and cost-effective mechanism for resolution of commercial disputes.[40]

Retired Justice P.A. Mohammed wrote in an Indian Council of Arbitration paper that

> [t]he onward march in the field of foreign investment encouraging [the] private sector cannot be easily brushed aside. But the hurdles for such continuous development are always from within. The delay in bureaucratic actions, arbitration proceeding[s] and court procedure are some of the hurdles which forbid development.[41]

In a 2002 journal article, Indian scholars stressed the importance of "meet[ing] the needs of foreign investors and businessmen" in developing jurisprudence under the 1996 Act.[42]

From this perspective, the interpretation of Part I of the 1996 Act, which deals with domestic arbitration, is equally important to the encouragement of foreign investment and development. Because Part I applies where both parties are either Indian nationals or corporations,[43] its provisions would mandatorily apply to arbitration agreements where one party is a subsidiary of a multinational corporation that has incorporated in India.

B. Minority View: Some Protectionist Measures Are Warranted

A small minority of relevant legal scholarship expresses the competing view that the residual power of Indian courts to intervene in the arbitral process "is desirable—perhaps even necessary—to protect the interests of vulnerable Indian parties."[44] Globally, select commentators defend the use of limited protectionist measures by developing nations in response to the frequently inferior bargaining power of parties from developing nations in

---

40. Sarma et al., *supra* note 24, at 1.

41. P.A. Mohammed, *ADR and Law Ministry's Proposals for Amendment in the Arbitration and Conciliation Act, 1996*, ICA ARB. Q., Oct.–Dec. 2003, at 4, 5, *available at* http://www.ficci.com/icanet/icanet/quterli/quaterly.htm.

42. Vinay Reddy & V. Nagaraj, *Arbitrability: The Indian Perspective*, 19 J. INT'L ARB. 117, 117 (2002).

43. The Arbitration and Conciliation Act § 2, No. 26 of 1996, INDIA CODE (1996), *available at* http://indiacode.nic.in.

44. Dipen Sabharwal, *Another Setback for Indian Arbitration (and Foreign Investors)*, INT'L DISP. Q. (White & Case, New York, N.Y.), Spring 2008, at 6, 7, *available at* http://www.whitecase.com/idq/spring_2008_4/.

international commercial contracts with wealthier parties from developed countries.[45]

As a corollary to this line of reasoning, some suggest that it is difficult to apply the UNCITRAL statutory framework to India's largely ad hoc domestic arbitrations.[46]

C. Reconciling the Two

At first glance, these two paradigms seem diametrically opposed—the majority view advocates for a path of least resistance for investors at all costs, while the minority view encourages protectionism and advocates for a legal system that is attuned to the inferior bargaining position of Indian parties in international commercial arbitration. Perhaps the two viewpoints are not irreconcilable, despite advocating different considerations for lawmaking with respect to arbitration. I intend to show that a middle ground between the two viewpoints does exist, at least with respect to India's interpretation of public policy vis-à-vis arbitral awards. It is possible for India's arbitration legal scheme to attract foreign investors and encourage development and, simultaneously, keep limited protectionist measures in place to ensure that arbitral awards affecting Indian parties are fair, both procedurally and substantively.

The viewpoint that Indian policy should be calculated so as to attract foreign investment is not without merit, and indeed, Indian policy since the 1990s reforms has been openly formulated to achieve this goal. However, it is equally clear that it is not in India's interest to pursue foreign investment at all costs; there is a point at which policies become so favorable to foreign investors as to sacrifice fairness to the party with inferior bargaining power in contract negotiations. In international commercial arbitration, the Indian party will frequently be in a position of inferior bargaining power; in domestic arbitration involving a corporate subsidiary of a multinational corporation, the local Indian party will frequently be in a position of inferior bargaining power; and even in purely domestic arbitration, perfectly equal bargaining power is a rarity.[47]

---

45. *See, e.g.*, Robert Cooter & Hands Bernd Schaefer, *Academic Scribblers and Defunct Economists*, 60 U. TORONTO L.J. 467, 476 (2010) (showing that some have argued that "developing countries should reject free trade and protect their 'infant industries' while their firms grow big and strong"); Brent T. White, *Putting Aside the Rule of Law Myth*, 43 CORNELL INT'L L.J. 307, 314 (2010) (showing that some have "argued that developing countries should enact tariffs and provide subsidies in order to protect nascent domestic industries and develop a diversified economy").

46. *See, e.g.*, A.K. Ganguli, *The Proposed Amendments to the Arbitration and Conciliation Act, 1996–A Critical Analysis*, ICA ARB. Q., Oct.–Dec. 2003, at 27, 29–30, *available at* http://www.ficci.com/icanet/icanet/quterli/quaterly.htm (proposing that as far as domestic arbitration is concerned, because ad hoc arbitrations are more common than institutional arbitrations, the applicable law should be a simplified version of the UNCITRAL Model Law).

47. *See* Edna Sussman, *The Arbitration Fairness Act: Unintended Consequences Threaten U.S. Businesses*, 18 AM. REV. INT'L ARB. 455, 469 (2007) (noting that in almost every transaction one

With unequal bargaining power comes the risk that, both procedurally and substantively, the arbitration process will be unfair to one party. Because, in the case of Indian arbitration, that party will almost universally be the Indian party, it is in India's interest to maintain some protectionist checks on the arbitration system. Such checks, as long as they are based on sound legal principles and used with restraint, should not significantly affect India's position as an attractive location for foreign investors, and it does not appear that the checks already in place have done so.

In the 2010 Foreign Direct Investment Confidence Index, India ranks third in the world in attractiveness to foreign investors, behind only China and the United States, based on a survey assessing the sentiments of senior executives at the world's largest companies.[48] Though this represents a fall from its 2009 position at number two, India remains a highly attractive market for foreign investors, and its GDP is among the fastest growing in the world.[49] If India's primary goal in promulgating arbitration policy is to attract foreign investors, it appears that India has been largely successful on this front. Indeed, almost 70% of American multinational corporations surveyed are highly satisfied with their experiences doing business in India.[50] The satisfaction rate is even higher in the computer/software industry, where 83% of multinational corporations surveyed report a high level of satisfaction.[51]

The economist's answer to this argument is simple: though India has been successful in attracting foreign investment, if India were to rid its arbitration policy of protectionist measures in favor of finality and efficiency at all costs, foreign investors would invest even more and growth would be even more accelerated. Without addressing the contentious debate on this issue, suffice it to say that persuasive evidence exists that too much growth too soon may be a bad thing for developing nations.[52] As it stands, however, it appears that India's ability to attract foreign investors has not been significantly hampered by its arbitration policy. At most, the increased legal

---

party arguably has greater bargaining power); *see also* Walid John Kassir, *Current Development: The Potential of Lebanon as a Neutral Place for International Arbitration*, 14 AM. REV. INT'L ARB. 545, 546 (2003) (discussing how hostility to international arbitration developed as a reaction against powerful foreign companies taking advantage of weaker entities in the Global South).

48. A.T. KEARNEY, INVESTING IN A REBOUND: THE 2010 A.T. KEARNEY FDI CONFIDENCE INDEX 10 (2010), *available at* http://www.atkearney.com/images/global/pdf/Investing_in_a_Rebound-FDICI_2010.pdf.

49. *Id.* at 12; CIA, *GDP—Real Growth Rate*, THE WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2003rank.html (Oct. 19, 2010).

50. Navneet S. Chugh, *Doing Business in India 2009: Critical Legal Issues for U.S. Companies*, *in* DOING BUSINESS IN INDIA: CRITICAL LEGAL ISSUES FOR U.S. COMPANIES 2009, at 377, 381 n.3 (PLI, Course Handbook Ser. No. B-1720, 2009).

51. *Id.*

52. *See India Overheats*, ECONOMIST, Feb. 3, 2007, at 11 (voicing concern that India's economy has grown too fast and warning this will lead to high inflation and increased imports).

costs and loss of finality associated with India's arbitration system are factored into investors' negotiated contracts with Indian parties as a risk premium,[53] which may be a price that India is willing to pay in exchange for assurance that fairness and justice cannot be completely contracted around through an arbitration agreement.

In Parts III and IV, I will introduce and analyze India's public policy statutory scheme and the surrounding jurisprudence, bearing in mind these competing paradigms. In Part V, I will offer recommendations to reconcile these competing considerations in the Indian context. Considering India's position as an important and quickly growing global market that is highly attractive to foreign investors, I believe that limited procedural and institutional reforms can simultaneously make India more attractive to foreign investors and ensure that Indian parties, and indeed all parties, involved in arbitration in India or arbitration enforcement in India are satisfied with the fairness *and* efficiency of the process.

III. Public Policy Grounds for Setting Aside Domestic Awards—The *SAW Pipes* Judgment

Pursuant to the 1996 Act, a domestic arbitral award may be set aside by the court if a party furnishes proof of some procedural unfairness.[54] In a separate subsection, the statute provides that an arbitral award may be set aside if the court finds that the award is in conflict with the public policy of India.[55] Interestingly, this separate subsection makes no mention of the applying party or the proof required therefrom, stating only that the award may be set aside by the court if the court finds such a conflict.[56] The enumerated grounds for challenging an arbitral award are intended to be exhaustive, and, unlike the English Arbitration Act of 1996, "no appeal on a question of law is provided."[57]

The inclusion of the public policy exception is an "acknowledgement of the right of the state and its courts to exercise ultimate control over the arbitral process."[58] This power of the courts was much broader under the statutory framework of the 1940 Act, which allowed courts to set aside an arbitral award where "an award [had] been improperly procured or [was]

53. *See* RICHARD A. BREALEY & STEWART C. MYERS, PRINCIPLES OF CORPORATE FINANCE 195 (5th ed. 1996) ("Investors require extra expected return for taking on risk . . . .").

54. *See* The Arbitration and Conciliation Act § 34, No. 26 of 1996, INDIA CODE (1996), *available at* http://indiacode.nic.in (enumerating procedural irregularities, such as lack of notice, that permit a court to set aside an arbitral award).

55. *Id.* § 34(2)(b)(ii).

56. *Id.*

57. Promod Nair, *Surveying a Decade of the 'New' Law of Arbitration in India*, 23 ARB. INT'L 699, 728 (2007).

58. *Id.* at 730.

other-wise invalid."[59] Indeed, in reviewing arbitral awards under the 1940 Act, Indian courts interpreted the phrase "otherwise invalid" as a catchall provision, allowing them to consider the substantive merits of an award and, frequently, to set aside awards founded on errors of law.[60] Arguably in response to this broad standard of review and the perception that the provision was being used by losing parties as a mechanism to challenge and effectively retry adverse awards,[61] the Statement of Objects and Reasons appended to the 1996 Act by the Indian legislature listed the minimization of the supervisory role of the courts among its main objectives.[62]

The Indian courts were given little guidance as to how to interpret the changes wrought by the 1996 Act. Because the 1996 Act repealed the previous statutes and drastically altered India's arbitration statutory framework, the courts' interpretive case law under the 1940 Act was "rendered superfluous."[63] Additionally, there was "no widespread debate and understanding of the changes" before the statute was enacted.[64] As a result, some argue that, when presented with issues of law under the 1996 Act, Indian judges have interpreted the provisions of the new Act in much the same way as the 1940 Act.[65]

Before the passage of the 1996 Act, in *Renusagar Power Co. v. General Electric Co.*,[66] the Indian Supreme Court, interpreting the scope of public policy as a ground to refuse enforcement of a foreign award, held that an arbitral award is contrary to the public policy of India if it is contrary to: (1) a fundamental policy of Indian law, (2) the interest of India, or (3) justice or morality.[67] Though *Renusagar* was not interpreted or decided under the 1996 Act, it is frequently cited as an example of an appropriately narrow interpretation of public policy for the review of arbitral awards.[68]

With this interpretation of public policy in mind, in 2003 the Supreme Court addressed a public policy challenge to a domestic arbitral award in *Oil*

---

59. The Arbitration Act § 30, No. 10 of 1940, INDIA CODE (1993), *available at* http://indiacode.nic.in.

60. Ray & Sabharwal, *supra* note 25, at 1.

61. *See id.* at 1 (cautioning foreign investors that arbitration awards are often subject to challenge in Indian courts by the losing party).

62. Statement of Objects and Reasons § 4(iv), *supra* note 27, at 55.

63. Sarma et al., *supra* note 24, at 4.

64. *Id.*

65. *See id.* at 5 ("In the absence of case laws and general understanding of the Act in the context of international commercial arbitration, several provisions of the 1996 Act were brought before the courts, which interpreted the provisions in the usual manner.").

66. (1994) 1 S.C.R. 22 (India).

67. *Id.* at 60.

68. *See* Sidharth Sharma, *Public Policy Under the Indian Arbitration Act: In Defence of the Indian Supreme Court's Judgment in* ONGC v. Saw Pipes, 26 J. INT'L ARB. 133, 140 (2009) (addressing the argument that *SAW Pipes* erroneously expands the narrow interpretation of public policy in *Renusagar*).

& Natural Gas Corp. v. SAW Pipes Ltd.[69] The aggrieved party challenged an adverse arbitral award because the arbitral tribunal had incorrectly applied the law of liquidated damages to the case.[70] In holding that the challenged award was legally flawed, the Court held that, in addition to the interpretation of public policy in *Renusagar*, a domestic arbitral award may be set aside if it contravenes the "provisions of the [1996 Arbitration and Conciliation] Act or any other substantive law governing the parties or is against the terms of the contract."[71] The holding of the Supreme Court in *SAW Pipes* added "patent illegality" as a fourth public policy consideration to the three considerations previously enumerated in *Renusagar*.[72]

The *SAW Pipes* decision has been sharply criticized. Fali Sam Nariman, a well-known Indian constitutional jurist and internationally recognized authority on international arbitration, has argued that the decision has "'virtually set at naught the entire Arbitration and Conciliation Act of 1996 . . . and put the clock back to where we started under the old 1940 Act.'"[73] In a publication by international lawyers, the decision is said to have "interpreted public policy in the broadest terms possible" and "paved the way for losing parties in the arbitral process to have their day in Indian courts on the basis of, in effect, any alleged contravention of Indian law, so resurrecting the near-limitless judicial review that the 1996 Act was designed to eliminate."[74] Likewise, an Indian arbitration lawyer has written that the judgment "quite rightly [has] been criticised"[75] and has made "a significant dent in the jurisprudence of arbitration in India."[76] Despite such criticism, the Court has not reconsidered its position.

A. Legal Arguments in Support of the SAW Pipes *Judgment*

Despite the fervor and ubiquity of criticism of the *SAW Pipes* judgment, there are compelling legal arguments suggesting that, without regard to the correctness of the Court's holding on the specific facts of the case, the principle laid down by the Court is legally sound.

---

69. (2003) 5 S.C.C. 705 (India).

70. *Id.* at 707.

71. *Id.* at 727–28.

72. *Id.*; *see also* Sharma, *supra* note 68, at 142 (discussing whether *SAW Pipes* was justified in adding a fourth consideration).

73. Sumeet Kachwaha, *The Indian Arbitration Law: Towards a New Jurisprudence*, 10 INT'L ARB. L. REV. 13, 15 (2007) (quoting F. S. Nariman, Speech at the Inaugural Session of "Legal Reforms in Infrastructure" (May 2, 2003)).

74. Ray & Sabharwal, *supra* note 25, at 2.

75. Sumeet Kachwaha, *Enforcement of Arbitration Awards in India*, 4 ASIAN INT'L ARB. J. 64, 70 (2008).

76. Kachwaha, *supra* note 73, at 15.

1. Philosophy Behind the Public Policy Exception.—The public policy defense to the validity of an arbitral award is a statutory recognition of the tension between, on one hand, the autonomy of private contracting parties and, on the other hand, the state's dual interests in dispute resolution and justice. The interaction between arbitration and public policy seeks to strike a balance between these competing considerations of finality and justice.[77] Though there is considerable disagreement regarding the proper scope of the public policy defense, it is nearly universally acknowledged to be "an appropriate 'tool for external constraint' on the freedom of members of the international business community to determine their commercial relationships and to structure dispute resolution as they see fit."[78]

Countries that have adopted the UNCITRAL statutory framework recognize that arbitral awards are generally legitimate and therefore final and binding upon the contracting parties, but that it is equally imperative for the state to have some control over the way in which arbitral awards are reached.[79] This is exemplified by the statutory framework itself—the contracting parties have unbridled autonomy with respect to certain aspects of the arbitration process, such as many procedural matters, while some provisions of the statute are mandatory and cannot be contracted around.[80] Because dispute resolution is primarily a state function, the role of the courts and the legislature in regulating the arbitral process cannot be completely undermined.[81] The state's concern with the process and outcome of arbitration proceedings is further legitimized by the lack of a precedential system in arbitration law[82] and the undeniable existence of circumstances where "'the intervention of the court may be not only permissible but highly beneficial.'"[83]

The public policy defense is recognized in the UNCITRAL model statutory framework[84] and by the New York Convention[85] as a legitimate

77. *See* Christopher S. Gibson, *Arbitration, Civilization and Public Policy: Seeking Counterpoise between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law*, 113 PENN ST. L. REV. 1227, 1228 (2009) (claiming that a "reformed concept of substantive public policy" is required in order to uphold the balance between finality and justice).

78. *Id.* at 1231.

79. Sharma, *supra* note 68, at 133.

80. *See id.* at 136 (noting that procedural matters such as "appointment of arbitrators, place, language and procedure for arbitration" are open to party autonomy while some matters such as the number of arbitrators and the court's authority to grant interim measures are mandatory provisions).

81. *Id.* at 137.

82. *Id.* at 136.

83. *Id.* at 137 (quoting Coppee-Lavalin S.A./N.V. v. Ken Ren Chemicals & Fertilisers Ltd., 2 All E.R. 449, 466 (1994)).

84. *See* UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION ch. VII, art. 34, ¶ (2)(b)(ii) (amended 2006) (providing that an arbitral award may be set aside if "the award is in conflict with the public policy of this State").

area of state control over arbitral awards. The validity of the existence of a public policy defense in the 1996 Act is not contested; rather, the scope of the defense is at issue. Accepting the legitimacy of the state's power, exercised through its judicial system, to set aside or refuse to enforce arbitral awards on public policy grounds, the salient issues for an analysis of the Indian Court's interpretation of the public policy defense are the correct statutory interpretation of the 1996 Act and the precedential effect of prior Supreme Court decisions.

2. The Power of the Court to Interpret the Meaning of "Public Policy."—The most common criticism of the Indian Supreme Court's judgment in *SAW Pipes* is that it is plainly contrary to the language in section 5 of the 1996 Act, arguing that section 5 "calls for minimal court interference in arbitral proceedings."[86] A plain reading of the relevant section, however, shows that it does not call for minimal judicial interference. Rather, section 5 reads, "Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."[87] This criticism, therefore, "seems to be unfounded and based on an erroneous interpretation of section 5"; the section merely states that judicial intervention is permissible only where expressly allowed by the Act.[88]

Accepting, therefore, that judicial intervention is permissible where provided by the Act, the relevant determination becomes the extent to which section 34 of the Act allows recourse against an arbitral award. Section 34 provides that an arbitral award may be set aside by the court if the court "finds that . . . the arbitral award is in conflict with the public policy of India."[89] By its very nature, the phrase "public policy" is not susceptible to a "plain meaning" reading by the courts; it requires interpretation, as a "dynamic concept that evolves continually to meet the changing needs of society, including political, social, cultural, moral, and economic dimensions."[90] This sentiment was echoed by the Supreme Court of India in *Murlidhar Aggarwal v. State of Uttar Pradesh*,[91] where the Court explained that "public policy does not remain static in any given community. It may vary from generation to generation and even in the same generation. Public

85. *See* Foreign Awards (Recognition and Enforcement) Act § 7, No. 45 of 1961, INDIA CODE (1993), *available at* http://indiacode.nic.in (providing that "[a] foreign award may not be enforced under this Act . . . if the court dealing with the case is satisfied that . . . the enforcement of the award will be contrary to public policy").

86. Sharma, *supra* note 68, at 137–38.

87. The Arbitration and Conciliation Act § 5, No. 26 of 1996, INDIA CODE (1996), *available at* http://indiacode.nic.in.

88. Sharma, *supra* note 68, at 138.

89. The Arbitration and Conciliation Act § 34.

90. Gibson, *supra* note 77, at 1230.

91. (1975) 1 S.C.R. 575 (India).

policy would be almost useless if it were to remain in fixed moulds for all times."[92]

It is perhaps also significant that the public policy defense is contained in a separate subsection from other grounds for setting aside an arbitral award; while section 34(a) requires that the "party making the application furnish[] proof" of the grounds, section 34(b) requires only that the Court find that the award is contrary to public policy.[93] Arguably, the words "if the court . . . is satisfied that" in the subsection containing the public policy defense "afford ample scope for judicial interpretation."[94]

Accepting that there is nothing on the face of the statute restricting Indian courts' ability to interpret and give meaning to what constitutes "the public policy of India," some critics look to the legislature's intent, as expressed in the Statement of Objects and Reasons appended to the 1996 Act, for the proposition that "minimiz[ing] the supervisory role of courts" was among the main objectives of the bill.[95] However, this argument fails on the same grounds as arguments based on section 5 of the Act: an intent to minimize the interventionist policies of the courts does not foreclose the court from intervening where expressly permitted by the Act.

On the contrary, the legislature's explanation of the public policy defense, which suggests specific examples of situations where an arbitral award would be in conflict with the public policy of India, begins with the phrase "without prejudice to the generality of subclause (ii)."[96] Arguably, this choice of words suggests the legislature's intent to "keep the scope for future interpretation open."[97]

Considering the plain text of the 1996 Act regarding the public policy defense, arguments that the Court's interpretation of public policy under *SAW Pipes* is a departure from "the letter of the law"[98] and "contrary to the plain language of the 1996 Act"[99] are erroneous. Likewise, though the Statement of Objects and Reasons expresses a desire to minimize judicial supervision of the arbitral process,[100] nothing suggests that the legislature intended to foreclose court intervention where expressly provided in the Act. As such, arguments that the judgment in *SAW Pipes* is a departure from "the

92. *Id.*

93. The Arbitration and Conciliation Act § 34.

94. Sharma, *supra* note 68, at 139.

95. Ranbir Krishan, *An Overview of the Arbitration and Conciliation Act 1996*, 21 J. INT'L ARB. 263, 265 (2004).

96. Sharma, *supra* note 68, at 140.

97. *Id.*

98. Kachwaha, *supra* note 73, at 17.

99. Kachwaha, *supra* note 75, at 70.

100. Statement of Objects and Reasons § 4, *supra* note 27, at 55 (listing a reduced supervisory role for the courts as one of the "main objectives" of the bill).

spirit of the law"[101] are unfounded. Given the innate ambiguity of "public policy," it is clear that the legislature intended for the Indian courts to play some role in the development of a jurisprudential interpretation of the phrase. Whether or not the scope of interpretation is correct, it is undeniable that the Supreme Court was not overreaching the bounds of its power in interpreting public policy as applied.

Another common critical angle of attack on the *SAW Pipes* judgment is that it "erroneously expanded the meaning of 'public policy of India,' which was given a narrow interpretation in the *Renusagar* case."[102] The validity of such an argument depends upon the precedential effect of *Renusagar* on the judgment in *SAW Pipes*. It is essential to reiterate that *Renusagar* dealt with an interpretation of public policy as applied to the enforcement of a foreign award under the repealed Foreign Awards (Recognition and Enforcement) Act of 1961.[103] Though the relevant provision is substantially replicated in Part II of the 1996 Act, the precedential effect of *Renusagar* is doubtful, both because the 1961 Act has been repealed and because the decision was based on the enforcement of a foreign award and not, as in *SAW Pipes*, the setting aside of a domestic award.[104]

Even assuming, for the purpose of argument, that *Renusagar* had binding precedential effect on the Supreme Court's decision in *SAW Pipes*, the Court in *Renusagar* did not "lay down any bar on expansion of the term 'public policy of India' in the future."[105] Likewise, the *SAW Pipes* judgment did not lay down any principles contrary to those enumerated in *Renusagar*—though the *Renusagar* judgment did hold that a "mere error" of law is not enough to merit the setting aside of an award, the *SAW Pipes* Court, in accepting "patent illegality" as a ground for setting aside an award, did not hold otherwise.[106] The distinction between a "mere error" and "patent illegality" is clear, especially considering the *SAW Pipes* Court's insistence that the "[i]llegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy."[107]

The importance of the *Renusagar* judgment lends itself to another argument regarding the legislative intent in passing the 1996 Act. At the time of the enactment of the 1996 Act, the narrower interpretation of public policy in *Renusagar* had been the accepted interpretation for about twelve

101. Kachwaha, *supra* note 75, at 70.
102. Sharma, *supra* note 68, at 140.
103. Renusagar Power Co. v. Gen. Elec. Co., (1994) 1 S.C.R. 22, 60 (India).
104. *See infra* subsection IV(A)(3)(b).
105. Sharma, *supra* note 68, at 142.
106. *Id.*
107. Oil & Natural Gas Corp. v. SAW Pipes Ltd., (2003) 5 S.C.C. 705, 728 (India).

years.[108] Arguably, had the legislature intended to faithfully adhere to the three-pronged definition enumerated in *Renusagar*, "what was held in the case . . . would have been specified in the statute."[109] The strength of this argument is, however, diminished by the fact that the legislature did not include a ground of challenge based on "[a]n error of law apparent on the face of the award," which was "judicially read and recognized as a ground under the [1940 Act] to set aside an award."[110]

It is clear that even if *Renusagar* did have binding precedential effect on the *SAW Pipes* Court, the judgment does not run afoul of the principles of law enumerated by the *Renusagar* Court. Having justifiably interpreted the 1996 Act, in the absence of any binding precedent to the contrary, the Supreme Court in *SAW Pipes* laid down a legal principle well within the bounds of its constitutional authority.

Public policy is frequently described as "a principle of judicial legislation or interpretation founded on the current needs of the community."[111] The nature of the public policy defense is such that it requires interpretation—and, in limited form, judicial legislation—in order to "bridge the gap between what is and what is intended to be."[112] Indeed, courts arguably "fail in their duty if they . . . approve helplessly of an interpretation of a statute or document . . . which is certain to subvert the societal goals and endanger the public good."[113] On a plain reading of the 1996 Act, a review of available evidence regarding the legislative intent regarding the Act, and an analysis of the legal arguments in favor of and against the judgment, it is clear that the Supreme Court's decision in *SAW Pipes* is neither contrary to the letter of the law nor plainly the spirit of the Act or the Indian legal system. Without regard to the "correctness" of the Court's interpretation of public policy, the holding in *SAW Pipes* is undeniably a permissible interpretation of public policy as applied to arbitration.

3. The "Correct" Interpretation of Public Policy in Arbitration Law.— Accepting that the Indian Supreme Court did not act beyond the scope of its authority, many critics have argued that the *SAW Pipes* judgment expressed an understanding and definition of the public policy defense that is simply

108. V.A. MOHTA & ANOOP V. MOHTA, ARBITRATION, CONCILIATION AND MEDIATION 355 (2d ed. 2008).

109. *Id.*

110. *Id.* at 340.

111. Sharma, *supra* note 68, at 147.

112. *Id.*

113. *Id.*

incorrect.[114] A look at the legal and practical arguments affecting a proper interpretation of the public policy defense proves illuminating.

a. Substantive Law as Public Policy.—The Supreme Court held in *SAW Pipes* that a "patent" violation of the substantive law of India represents an irreparable conflict with the public policy of India, warranting the setting aside of a domestic arbitral award.[115] The correctness of such an interpretation depends on the fundamental proposition that certain provisions of law also reflect the public policy of a country. Significantly, the Supreme Court narrowed its holding by requiring that the illegality in question "go to the root of the matter."[116] By requiring that the challenged illegality of the arbitral award be "patent" and not "of trivial nature,"[117] the Court essentially restricted its holding to circumstances where the contractual agreement runs contrary to an explicit and well-defined public policy, as demonstrated by the positive statutory law of India, rather than on general considerations of the public interest.

Some critics argue that the indefinability of "public policy" and "patently illegal" make such terms vulnerable to judicial misuse.[118] Because of this vulnerability, the argument goes, "the narrower the meaning given to public policy, the better it is for arbitration."[119] This argument is both cynical and erroneous; the difficulty of line drawing does not render a legal principle unsound. Even so, in relying on statutory law rather than subjective considerations of the public interest, the Court has enumerated a fairly simple test for the determination of patent illegality.

Another criticism of the *SAW Pipes* judgment results from a mistrust of the Indian judiciary. Some critics of the *SAW Pipes* judgment argue that "if an award is allowed to be challenged on the ground of illegality, there is no guarantee that the court, before which such award is under challenge, will take the correct view."[120] Closely related to the argument that the indefinability of public policy renders it subject to misuse, this argument is "based on a flawed premise that a supervisory jurisdiction can be exercised only if there is certainty that the authority exercising such jurisdiction will always, without exception, deliver the correct decision and will never make a mistake."[121] The difficulty of interpretation of a legal rule, no matter how

114. *See* Sarma et al., *supra* note 24, at 19 (opining that *SAW Pipes* contravenes the legislative intent of the 1996 Act by increasing the scope of judicial intervention in challenging arbitral awards).

115. Oil & Natural Gas Corp. v. SAW Pipes Ltd., (2003) 5 S.C.C. 705, 727 (India).

116. *Id.* at 728.

117. *Id.*

118. Sharma, *supra* note 68, at 143.

119. *Id.*

120. *Id.* at 146.

121. *Id.*

severe, has no bearing on its correctness. Even so, the legal rule laid down in *SAW Pipes* is neither terribly complex nor especially hard to apply. As with any legal rule, the judgment in *SAW Pipes* requires both caution and judicial restraint in its application. However, the distinction between a "mere error" of law and a "patently illegal" award is not particularly nuanced, despite the inevitable existence of some gray areas.

Others argue that by allowing the Court to second-guess arbitral decisions, no matter how egregious, the *SAW Pipes* judgment "goes against this Act's object to ensure finality of arbitral awards."[122] Finality, though an important goal of the arbitral process, must be balanced with other interests of the dispute-resolution system, such as justice and fidelity to the law. If finality were the ultimate goal of the arbitral system, parties would be able to contract out of judicial review of awards, providing for absolute finality without possibility of review, yet parties are not permitted to contract around the provisions of the Act allowing judicial review.[123] Finality, however important, "cannot be guaranteed at the cost of illegality."[124]

b. Distinction Between Setting Aside and Refusing to Enforce.—It can fairly be argued that, because the *SAW Pipes* Court considered a request for the setting aside of a domestic award rather than a request for the refusal to enforce a foreign award,[125] the Supreme Court was warranted in granting Indian courts fairly wide discretionary review. Arguably, because setting aside is granted where the award is not yet final and nonenforcement is granted after an award is already given finality, wider discretionary review is warranted with respect to the setting aside of domestic awards.[126]

This distinction—between setting aside and refusing to enforce—was noted in Paragraph 44 of the Explanatory Note to the 1985 Model Law prepared by UNCITRAL.[127] The note explains that "the grounds relating to public policy, including non-arbitrability, may be different in substance, depending on the State in question (i.e. State of setting aside or State of enforcement)."[128] Likewise, the Court in *SAW Pipes* acknowledged the distinction, explaining that "[t]he concept of enforcement of the award after

122. *Id.* at 145.

123. *Id.*

124. *Id.* at 145–46.

125. Oil & Natural Gas Corp. v. SAW Pipes Ltd., (2003) 5 S.C.C. 705, 713 (India).

126. *See* Sharma, *supra* note 68, at 141 (explaining that a narrow interpretation of grounds on which an arbitral award may be set aside is unnecessary before the award has become final, leading to the argument that grounds for refusing enforcement of an arbitral award should be restrictively interpreted only after the validity of the award has been decided).

127. *Id.*

128. UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION explanatory note ¶ 44 (1985).

it becomes final is different and the jurisdiction of the Court at that stage could be limited."[129] Continuing, the Court suggested that

> [I]n a case where the validity of award is challenged there is no necessity of giving a narrower meaning to the term "public policy of India." On the contrary, wider meaning is required to be given so that the "patently illegal award" passed by the arbitral tribunal could be set aside.[130]

This distinction, additionally helpful in disclaiming the precedential effect of the holding in *Renusagar*,[131] is especially persuasive given the strong interest India has in the resolution of conflicts and enforcement of awards via domestic arbitration. Domestic arbitral awards have a stronger nexus to Indian law and parties. Additionally, endemic procedural and substantive errors associated with India's prevalent ad hoc domestic arbitration system may warrant closer review by Indian courts.

B. Negative Externalities of the SAW Pipes *Judgment: Speed and Cost*

In addition to the legally based arguments regarding the soundness of the holding in *SAW Pipes*, some critics have made the practical argument that the interpretation given to public policy in *SAW Pipes* "will cause unnecessary delay in the resolution of disputes."[132] Critics of the judgment suggest that losing parties will challenge awards as contrary to the public policy of India, perhaps on spurious grounds, and that such challenges, "even if unsuccessful, can delay enforcement for several years."[133] Ancillary to this argument, critics argue that delays caused by public policy challenges will add to the costs incurred by both parties because parties will be required to continue paying lawyers and court fees beyond the completion of the arbitral proceedings.[134]

The possibility that a legal ruling is susceptible to abuse and will cause delays has no bearing on the validity of the ruling. Even so, there is little evidence that in the seven years since the *SAW Pipes* decision public policy

---

129. Oil & Natural Gas Corp. v. SAW Pipes Ltd., (2003) 5 S.C.C. 705, 723 (India).

130. *Id.* at 724.

131. *See supra* text accompanying notes 102–07.

132. Sharma, *supra* note 68, at 145.

133. Aloke Ray & Dipen Sabharwal, *India and Arbitration—Arbitration Clauses for Contracts With Indian Parties*, WHITE & CASE 1 (Feb. 2008), http://www.whitecase.com/files/Publication/1d6f180d-548d-4a83-9ab0-38e6e3b3b707/Presentation/PublicationAttachment/dff84918-b15f-41c3-a496-3b12ce6571e9/Article_India_and_Arbitration_Arbitration_Clauses_for_Contracts_With_Indian_Parties.pdf.

134. *See* M. Jagannadha Rao, *Arbitration in India: Section 34,* ONGC vs. SAW Pipes, *Manifest Illegality and Similar Approaches in UK and US*, HALSBURY'S LAW MONTHLY (May 2009), http://www.halsburys.in/arbitration-in-india.html (lamenting the transformation of Indian arbitral proceedings into a "luxury clinic" only available to the wealthiest of clients in the wake of *SAW Pipes*).

challenges have been used as a dilatory tactic by a significant number of losing parties. Between the enactment of the 1996 Act and September 2007, only 151 domestic arbitral awards were challenged on public policy grounds in front of Indian high courts (lower courts).[135] Those challenges accounted for 26.72% of total challenges to domestic arbitral awards.[136] Of those 151 challenges, 112 (74.17%) were rejected outright and only fourteen were actually modified by the court, representing 9.27% of the awards challenged on public policy bases and 2.47% of the total domestic awards challenged.[137] During the same time period, only two domestic awards were appealed to the Indian Supreme Court on public policy grounds.[138] One appeal was outright rejected, and the appeal that was heard was not modified by the court.[139] These statistics are particularly underwhelming given the eleven-year time span and the fact that the *SAW Pipes* judgment was not handed down until 2003.

Some critics, acknowledging that "Indian courts so far have resisted applying *SAW Pipes* to set aside a large number of domestic awards," still insist that applications for review based on public policy are used as a dilatory tactic.[140] Given the statistics, it appears that challenges are relatively rare and, when made, are frequently rejected by the high courts.[141] That is not to say, however, that there is not a clear incentive for aggrieved parties to challenge adverse awards on public policy grounds in Indian courts. With nearly 35 million cases pending in the Indian judiciary and a 28% increase in filed cases over the last few years,[142] the backlog of cases is tremendous, and a challenge has the potential to cause years of delay and significantly increase the expenses incurred by the parties.

C. India's Interpretation as Correct

India's domestic arbitration jurisprudence, and specifically its interpretation of public policy as applied to domestic arbitration, can provide a meaningful check on the largely unregulated ad hoc arbitration conducted in India if used with restraint and with an understanding of the finality desired by those who elect to arbitrate. The use of substantive law as evidence of the public policy of a country is both logical and legally

---

135. Kachwaha, *supra* note 75, at 73.

136. *Id.*

137. *Id.*

138. *Id.* at 74.

139. *Id.*

140. Ray & Sabharwal, *supra* note 133, at 1.

141. *See* Kachwaha, *supra* note 75, at 73 (illustrating that public policy reviews comprised only 26.72% of total arbitral award appeals between 1996 and 2007, of which 74.17% were rejected outright).

142. Dharmendra Rautray, *Delhi High Court Launches Arbitration Centre*, DISP. RESOL. J., Nov. 2009, at 13, 13.

warranted, especially given the court's insistence that "patent illegality" goes to the root of the arbitral award if it is to be used as grounds for setting aside.[143]

The most salient arguments against India's domestic arbitration public policy jurisprudence and the holding in *SAW Pipes* are those based on the potential consequences of the holding: threats to finality and enforcement, threats of delays because of the possibility that spurious claims will be used to prolong proceedings, and the likelihood of increased costs for both parties if arbitral awards are reviewed by the backlogged Indian courts. Though it is possible to argue that the potential consequences of a jurisprudential decision have no logical bearing on its legal correctness, these arguments go to the root of many parties' motivations for electing to arbitrate agreements—finality, efficiency, and economy. As such, they are important and certainly are not without merit, especially in a country that has expressed an unequivocal desire to be perceived as a "pro-arbitration" regime.[144]

In Part V, I will make recommendations that seek to address the concerns of those who criticize the *SAW Pipes* judgment and a broad interpretation of public policy generally. I argue that certain practical and economical—given the limited financial resources of the Indian judiciary—reforms will directly assuage the threats to finality, efficiency, and economy posed by the judgment in *SAW Pipes*. First, however, in Part IV, I will address the Supreme Court's dramatic extension of the *SAW Pipes* judgment to the arena of international commercial arbitration.

IV. Extension of the *SAW Pipes* Judgment to International Commercial Arbitration

The *SAW Pipes* judgment becomes much more significant when considered in light of the Supreme Court's 2002 decision in *Bhatia International v. Bulk Trading S.A.*[145] and the subsequent dramatic extension of its holding. In *Bhatia*, faced with the question of whether an Indian court can provide interim relief under section 9 of Part I of the 1996 Act to arbitrations held outside of India, the Court held that the entirety of Part I of the 1996 Act, the part of the Act previously applying only to domestic Indian arbitrations, applies to international commercial arbitrations held outside of India, regardless of the applicable law under the contract.[146]

143. Oil & Natural Gas Corp. v. SAW Pipes Ltd., (2003) 5 S.C.C. 705, 728 (India).

144. *See* Aloke Ray & Dipen Sabharwal, *What Next for Indian Arbitration?*, ECONOMIC TIMES (India), Aug. 29, 2006, http://economictimes.indiatimes.com/articleshow/1933720.cms (opining that one purpose of the 1996 Act was to "create a pro-arbitration legal regime in India").

145. Bhatia Int'l v. Bulk Trading S.A., (2002) 2 S.C.R. 411 (India).

146. *Id.* at 429–30.

In 2008, the ruling in *Bhatia* was extended by the Supreme Court in *Venture Global Engineering v. Satyam Computer Services*.[147] In *Venture Global*, an award handed down in London,[148] governed by the laws of Michigan,[149] and requiring performance in India was challenged in India under section 34 of the 1996 Act,[150] which provides the grounds on which a *domestic* award may be *set aside*.[151] The Court held that the *Bhatia* decision extended to the application of section 34 to international commercial arbitrations.[152]

Arguably, the ruling in *Venture Global* "has fundamentally altered the jurisdiction of Indian courts in respect of foreign awards."[153] Though section 34 of the 1996 Act stipulates the reasons why a domestic award may be set aside by the court, Part II of the Act, governing the enforcement of international arbitral awards under the New York Convention, only provides the bases on which an Indian court may *refuse to enforce* such an award.[154] Though the 1996 Act provides that an Indian court may refuse to enforce an international arbitral award on public policy grounds, the Court in *SAW Pipes* specifically limited the application of the expansion of the meaning of public policy to domestic awards.[155]

In effect, *Venture Global* "creates a new procedure and a new ground for challenge to a foreign award."[156] The *Venture Global* holding allows parties to ask an Indian court to set aside a foreign arbitral award, in addition to the option to request that the Indian court refuse to enforce the award. Significantly, "the setting aside of a foreign award has an international effect of rendering the award unenforceable in all [New York] Convention countries, while the refusal to enforce has an effect limited to only that country."[157] Substantively, the *Venture Global* holding subjects international arbitral awards to the expanded interpretation of "public policy" expressed

147. Venture Global Eng'g v. Satyam Computer Servs. Ltd., (2008) 1 S.C.R. 501, 521 (India).

148. *Id.* at 507.

149. *Id.* at 525.

150. *See id.* at 518 (defending the application of section 34 to this case).

151. The Arbitration and Conciliation Act § 34, No. 26 of 1996, INDIA CODE (1996), *available at* http://indiacode.nic.in.

152. *Venture Global*, 1 S.C.R. at 521.

153. Raghav Sharma, Bhatia International v. Bulk Trading S.A.: *Ambushing International Commercial Arbitration Outside India?*, 26 J. INT'L ARB. 357, 364 (2009).

154. The Arbitration and Conciliation Act § 48.

155. *See* Oil & Natural Gas Corp. v. SAW Pipes Ltd., (2003) 5 S.C.C. 705, 727 (India) (noting that domestic arbitration awards are governed by section 34 of the 1996 Act and accepting the view that "the phrase 'Public Policy of India' used in Section 34 in context is required to be given a wider meaning").

156. Kachwaha, *supra* note 75, at 78.

157. Sharma, *supra* note 153, at 364.

by the Supreme Court in *SAW Pipes*, despite the *SAW Pipes* Court's specific limitation of its holding.[158]

A. Why Bhatia *and* Venture Global *Are Bad*

Subsequent to the Court's holding in *Venture Global*, criticism of the *SAW Pipes* judgment and its expanded definition of public policy increased in severity. A publication by a lawyer at an international law firm stated that "even if transactions are structured to ensure that disputes are arbitrated outside India, the post-*Venture Global* risk is that parties will find spurious grounds to unwind arbitral awards in Indian courts, thereby undermining the parties' original bargain."[159] An Indian arbitration lawyer argued that "till [*Venture Global*] is clarified or modified . . . the enforcement mechanism for foreign awards has become clumsy, uncertain and inefficient."[160]

Criticisms of the *Venture Global* decisions echo those of *SAW Pipes*, though on an international scale: if parties to international commercial arbitrations are allowed to petition Indian courts to set aside an award, the nonpetitioning party is helpless to avoid the resulting delays, costs, and threats to the finality bargained for under the arbitral agreement.[161] Threats to finality in the international context are exacerbated by the unprecedented idea that an Indian court could set aside a foreign award instead of merely refusing to enforce it, because the setting aside of an award renders it unenforceable in all New York Convention countries;[162] the party could not simply go elsewhere to attempt to enforce the award.

B. Why Bhatia *and* Venture Global *Are Good*

The arguments in favor of the holding in *Bhatia* are not strictly protectionist, and the holding has not been completely repudiated by those who argue that arbitration policy should be formulated strictly to encourage foreign investors. Although Part II of the 1996 Act does not allow Indian courts to grant interim measures, foreign parties may now apply to Indian courts for interim measures under the *Bhatia* holding.[163]

---

158. *See* Venture Global Eng'g v. Satyam Computer Servs. Ltd., (2008) 1 S.C.R. 501, 521, 523 (India) (holding that section 34 of the Act is applicable to foreign arbitration agreements and as such the extended definition of the public policy of India can be invoked to set aside the foreign award). *But see SAW Pipes*, 5 S.C.C. at 723 (accepting the view "that the scheme of Section 34 which deals with setting aside the domestic arbitral award and Section 48 which deals with enforcement of foreign award are not identical" and only section 34 allows the setting aside of awards contrary to the public policy of India).

159. Sabharwal, *supra* note 44, at 6.

160. Kachwaha, *supra* note 75, at 79.

161. *See supra* Part IV.

162. Sharma, *supra* note 153, at 364 ("[T]he setting aside of a foreign award has an international effect of rendering the award unenforceable in all Convention countries . . . .").

163. *See id.* at 357 (stating that the *Bhatia* holding is significant because it gives Indian courts the ability to "intervene in international commercial arbitrations held outside India irrespective of

The message of the *Venture Global* hearing echoes the protectionist and justice-focused considerations espoused by the minority of legal scholarship regarding Indian arbitration law; the Court argues that it cannot overlook the obvious illegality of performance of an arbitral award in India.[164] Those who defend the *Venture Global* decision argue that "most national courts would consider it a serious lacuna in an award if the award required performance in a manner which would be illegal under the law of the country where the award had to be enforced."[165] Even the defenders of the judgment, however, insist that "only in the rarest cases [should] a challenge under section 34 be allowed in respect of international arbitration awards."[166]

On the peculiar facts of the case, the victorious party sought enforcement of an award, requiring performance in India, in the United States;[167] arguably,

> when an award concerns performance by parties in India, the Indian courts will at least be receptive to the argument that they should be reluctant to allow parties to circumvent Indian public policy by not standing in the way of enforcement of an award taking place outside India when such enforcement requires some act to be carried out in India.[168]

Given these unique facts, the *Venture Global* holding will and should only be used rarely—when an application for enforcement requiring some act to be performed in India is made outside of India.

The protectionist argument for the *Venture Global* result is clear: in the absence of such a rule, Indian parties could be left with no recourse based on Indian public policy, despite the obvious nexus of a judgment with India and its laws. Those who oppose strictly protectionist policies will be relieved to know that the party seeking protection by the Indian courts in *Venture Global* was the foreign party![169] As such, the policy is not strictly protectionist, but is rather intended to give the Indian courts some jurisdiction to stop enforcement of awards requiring performance in India in other jurisdictions—the only way to stop such enforcement is to set aside the award entirely.

---

the property law governing the arbitration agreement," including the power to grant interim measures).

164. Sarosh Zaiwalla, *Commentary on the Indian Supreme Court Judgment in* Venture Global Engineering v. Satyam Computer Services Ltd., 25 J. INT'L ARB. 507, 511 (2008).

165. *Id.*

166. *Id.*

167. *See* Venture Global Eng'g v. Satyam Computer Servs. Ltd., (2008) 1 S.C.R. 501, 507 (India).

168. Zaiwalla, *supra* note 164, at 511.

169. *See Venture Global*, 1 S.C.R. at 506 (noting that the appealing party, Venture Global Engineering, was incorporated in Michigan).

C. *Avoiding Application of Part I to an International Arbitration Contract*

However, this judgment may not have a significant effect on international commercial arbitrations with Indian parties or on requiring enforcement in India because of parties' ability to contract out of its application. The Court in *Bhatia* specifically provided that the parties to an international arbitration may, by express or implied agreement, exclude the provisions of Part I of the 1996 Act from application to their contract.[170] The ability of contracting parties to opt out of the applicability of Part I was reaffirmed in *Venture Global*.[171]

Considering this option, foreign parties may find it helpful to contract out of applying Part I of the 1996 Act to their contract and arbitration agreement.[172] However, given the possible benefits of some provisions of Part I, if applied to international contracts, foreign parties may seek to benefit from the *Venture Global* holding by disclaiming the applicability of Part I of the 1996 Act, except for the provisions relating to interim measures and other measures deemed desirable.[173]

V. Recommendations

In this section, without regard to the "correctness" of the holdings in *SAW Pipes* and *Venture Global*, I will make several recommendations addressing the competing concerns of the two viewpoints introduced in Part II. Because so many of the admittedly valid criticisms of the two judgments and Indian arbitration jurisprudence generally revolve around the interrelated concerns of finality, efficiency, and cost, any recommendations seeking to reconcile the two viewpoints should address these concerns, while bearing in mind the risk of injustice posed by the inevitably inferior bargaining power of one party to an arbitration agreement.

A. *Creation of a Special Arbitration Bench*

Attacks on the *SAW Pipes* and *Venture Global* holdings are made under the implicit assumption that the notorious backlog and inefficiency of Indian courts will greatly exacerbate the negative externalities of the decisions. As such, my first and most important recommendation is that India create a special judicial bench, or perhaps several special regional benches, specifically designed to hear and adjudicate arbitration-related petitions.

---

170. Bhatia Int'l v. Bulk Trading S.A., (2002) 2 S.C.R. 411, 429 (India).

171. *Venture Global*, 1 S.C.R. at 521.

172. *See* Ray & Sabharwal, *supra* note 133, at 2 (encouraging foreign parties to specifically exclude the applicability of Part I to their arbitration agreements).

173. Joseph Tirado, *Enforcement of Awards in India: Lessons from the Indian Arbitration Act*, *in* 1 INTERNATIONAL ARBITRATION 2009, at 225, 229, 233 (PLI, Course Handbook Ser. No. B-1821, 2009).

This suggestion has been broached occasionally by Indian commentators,[174] but it has garnered little national or international attention.

Such a bench or benches would consist of a panel of judges who would review only petitions relating to arbitration. The bench would summarily reject petitions based on spurious claims and petitions that, on their face, appear designed only to induce delay. In hearing accepted petitions for relief, the bench would concentrate on the efficient resolution of such petitions, perhaps through a strict time schedule, and would have the power to dismiss petitions at any point during the hearings process if it became clear that the claim was meritless or that one party was purposefully delaying or prolonging the hearings to further delay enforcement of the award. Depending on constitutional and other considerations, the decision of the bench could be non-appealable or, alternatively, could be appealable only to the Indian Supreme Court, which would then exercise restraint and caution in hearing appeals.

Such a bench has myriad advantages. First, a special arbitration bench would greatly increase the speed and efficiency with which Indian courts hear arbitration cases. This, in turn, would reduce the additional expenditures required of the parties, shorten the period of time between the dispensation of the arbitral award and the point at which it is deemed final and enforceable, and lessen the incentive for losing parties to challenge awards only to delay enforcement.

Second, if arbitration cases were expedited in front of a special bench, the bench would be able to more quickly develop a clear jurisprudence regarding the interpretation of public policy and other provisions of the 1996 Act. With the development of precedent, the meaning of public policy would become increasingly clear, and the bench would be able to establish the sorts of awards that *would* be set aside or refused enforcement based on public policy grounds and the sorts of challenges that *would not* fall under the defense. Over time, the bench would be able to reject the petitions of more and more complainants, as it becomes clear which claims have merit under the bench's interpretation. This would in turn reduce the incentive for losing parties to make meritless claims in order to prolong proceedings; meritless claims would be summarily rejected by the bench. Over time, arguably, this would lead to fewer challenges of arbitration awards generally, as parties would be better able to predict the result of a given challenge based on the bench's jurisprudence.

Third, the creation of a special bench would ensure that the judges hearing arbitration cases are well-versed in arbitration law. The judges selected for appointment to the bench would necessarily be those who have demonstrated marked judicial restraint in setting aside and refusing to

174. *See, e.g.*, Zaiwalla, *supra* note 164, at 511 (presenting the "special bench" idea as a possible solution).

enforce arbitral awards and a clear understanding of India's arbitration laws as they relate to international arbitration laws and international and national economies.

Overall, the creation of a special bench to hear arbitration claims would allow the Indian judiciary to adhere to its interpretation of public policy, while ameliorating the negative effect of such an interpretation on the finality, economy, and efficiency of the arbitration process. This would directly address the complaints of foreign investors and reduce the risk premium factored into contracts with Indian parties. At the same time, a special bench would provide timely access to the courts for aggrieved parties and allow the judiciary to address problems of illegality and public policy, especially as exacerbated by unregulated ad hoc arbitration and the unequal bargaining power so often present in Indian contracts.[175] Bearing in mind the relatively limited resources of the Indian government, the cost of the creation of a special bench for arbitration claims would be negligible; given the relatively small number of arbitration claims,[176] the creation of only a few judicial positions would be needed.

B. Investment in the Development of Institutional Arbitration within India

Many of the problems with domestic arbitration in India stem from the ad hoc arbitration so commonly used by domestic parties.[177] Many have argued that the unregulated nature of ad hoc arbitration leads to more errors of justice and failures of procedure than are present in international commercial arbitration, which is almost universally overseen by established arbitration institutions.[178] The endemic existence of errors in ad hoc arbitration, some have argued, is the cause of Indian courts' relatively frequent intervention in domestic arbitral proceedings.[179]

As such, I recommend that the Indian government invest in the development of institutional arbitration within India. The fruition of this recommendation has already begun with the recent launch of the Delhi High

---

175. *See* Ilan Benshalom, *The New Poor at Our Gates: Global Justice Implications for International Trade and Tax Law*, 85 N.Y.U. L. REV. 1, 51 ("The vulnerability and low bargaining power of developing countries dictate that certain types of economic activities with high long-term negative externalities are shifted to them.").

176. See *supra* notes 135–42 and accompanying text.

177. Rautray, *supra* note 142, at 13.

178. *See, e.g.*, Amina Dammann, *Vacating Arbitration Awards for Mistakes of Fact*, 27 REV. LITIG. 441, 507–08 (arguing that procedural rules present in institutional arbitration effectively foster a more correct determination of facts underlying the dispute).

179. *See id.* (postulating that the need for review might be greater where the arbitration is ad hoc); Harpreet Kaur, Note, *The 1996 Arbitration and Conciliation Act: A Step Toward Improving Arbitration in India*, 152 HASTINGS BUS. L.J. 261, 277–78 (2010) ("Most of the criticism that is currently aimed at India's arbitration process will end with institutionalizing arbitration."); Ray & Sabharwal, *supra* note 25, at 1 (noting that there was widespread discontent about excessive judicial intervention prior to the 1996 reforms).

Court Arbitration Centre (DAC) in November 2009.[180] The DAC rules are modeled on the International Chamber of Commerce Rules of Arbitration, and the DAC will adhere to strict time schedules and procedures to secure efficient resolution of disputes.[181] The London Court of International Arbitration (LCIA) launched an office in Delhi in 2009, but tellingly, it has not arbitrated a single dispute since its launch, while the DAC has arbitrated several.[182]

Continued investment by the Indian government in arbitration centers under the direction of the various high courts would, especially in concert with corresponding special arbitration benches, greatly standardize the procedural justice of arbitrations held within India and encourage parties agreeing to arbitrate to avoid the ad hoc arbitration that is so riddled with error. Simultaneously, through adherence to strict time limits and imposition of fees that are reasonable for Indian parties (as opposed to the relatively high fees charged by the LCIA), increased use by Indian parties of such institutional arbitration would increase the efficiency and finality of the arbitration process and decrease the associated costs for the parties, without compromising the parties' access to the courts for review of meritorious challenges to awards.

C. *Review of the* Venture Global *Judgment by a Larger Bench of the Supreme Court*

Given the ambiguities and criticism accompanying the *Venture Global* decision, I recommend that a larger bench of the Supreme Court review and clarify the judgment. Though it contradicts prevailing trends in international arbitration law, the decision is not without merit in that it grants recourse to parties who would otherwise be without remedy to challenge enforcement of an award that has a clear nexus to Indian law and Indian public policy. At the very least, however, the holding requires restriction to the exceptional situation where a party has clearly attempted to avoid Indian review, despite the fact that enforcement requires performance in India. Such restriction would assuage investors' fears that the decision invites abuse without leaving parties remediless in the situation the decision is designed to prevent.

VI. Conclusion: Reconciling the Competing Paradigms

India has clearly expressed a desire to create an investor-friendly arbitration regime in order to encourage international parties to invest in and contract with Indian parties and, on a larger scale, foster India's continued

180. Rautray, *supra* note 142, at 13.

181. *Id.*

182. Interview with Dharmendra Rautray, Partner, Kachwaha and Assocs., in Delhi, India (Mar. 18, 2010) (audio on file with the Texas Law Review).

growth as an emerging global market and world power. Simultaneously, however, India has an equally valid stake in protecting the interests of its citizens and businesses and securing dispute resolution that is both procedurally and substantively fair. Equitable dispute resolution and economic development are among the primary interests of the national government, and India has a legitimate stake in fostering the growth and development of both. As demonstrated, these two governmental goals may sometimes be at odds, and legal development may nurture one while negatively affecting the other.

I submit that the desire to use arbitration to attract foreign investment and the desire to provide Indian parties with an equitable dispute resolution mechanism are reconcilable, at least vis-à-vis the limited area of Indian public policy as grounds for challenging an arbitral award. The most important of my recommendations is the creation of a special bench for arbitration cases; such a bench would directly address foreign parties' concerns regarding cost, efficiency, and finality, while increasing parties' access to the courts to challenge arbitral awards. Ancillary to the creation of such a bench, through investment in institutional arbitration within India and restriction of the holding in *Venture Global*, the Indian government could fortify its pro-arbitration stance and increase India's attractiveness as a destination for foreign investment without compromising the interests of its people and businesses.

Amelia C. Rendeiro

How Much Is an Illegal Immigrant's Life Worth?*

I. Introduction

In 2000, the Immigration and Naturalization Service (INS) estimated that 1.04 million illegal immigrants resided in Texas.[1] A study four years later estimated that that number had grown to between 1.5 and 1.8 million.[2] Many of these immigrants work in dangerous jobs, particularly construction-related jobs.[3] Combining the large number of illegal immigrants with hazardous employment creates a high likelihood that beneficiaries of illegal immigrants will bring wrongful-death lawsuits. The Texas Workers' Compensation Act provides the sole avenue for redress[4] but only if the employer subscribes to the Act.[5] Texas is the only state that does not require employers to carry workers' compensation insurance,[6] and in 2006 it was estimated that 37% of employers—who employed roughly 18% of the workforce—opted out of the system.[7]

The Texas legislature created wrongful-death suits when it enacted the Texas Wrongful Death Act (WDA).[8] The cause of action contains five

---

* I would like to thank Professor Patrick Woolley for teaching me how to write a scholarly article as his research assistant and for his continuous support, comments, and critiques on this Note. I would also like to thank the Texas Law Review staff and editors for their diligent efforts preparing this Note for publication, particularly Brice Wilkinson and Tracey Bamberger, who both went beyond their duties and provided invaluable assistance. I would like to thank my family for their unequivocal support. Finally, I am thankful for the constant love and support of my wife, Kate, who has always believed in me.

1. FED'N FOR AM. IMMIGRATION REFORM, THE COSTS OF ILLEGAL IMMIGRATION TO TEXANS 2 (2005).

2. *Id.* at 7.

3. The Department of Labor recently calculated that around 10% of workplace deaths occur from falls in jobs such as construction, roofing, and painting. *See* U.S. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, CENSUS OF FATAL OCCUPATIONAL INJURIES: 2009, at 4, 7 (2010), *available at* http://www.bls.gov/iif/oshwc/cfoi/cfch0008.pdf (noting that, in 2009, workplace falls accounted for 14% of all occupational fatalities and that most of those falls were from ladders, scaffolds, or roofs).

4. TEX. LAB. CODE ANN. §§ 406.031, 408.001–.002 (West 2006).

5. *Id.* § 406.002.

6. Kate Galbraith, *Workers' Comp Concerns Raised at House Hearing*, TEXAS TRIB., July 29, 2010, http://www.texastribune.org/texas-energy/energy/workers-comp-concerns-raised-at-house-hearing/.

7. *Texas Nonsubscription FAQ's*, COMBINED GROUP, http://www.nonsubscription.net/FAQ.htm.

8. TEX. CIV. PRAC. & REM. CODE ANN. §§ 71.001–.031 (West 2008); *In re* Labatt Food Serv., 279 S.W.3d 640, 644 (Tex. 2009). The Texas WDA is used only by way of example. The arguments presented in this Note apply with equal force to any state-based claim that provides for back or future wages as a remedy. Allowing for recovery of future wages is commonplace in wrongful-death statutes of all states. *See, e.g.*, Fisher v. Walters, 428 So. 2d 431 (La. 1983) (allowing future loss-of-support damages under Louisiana wrongful-death laws); Mitchell v. Buchheit, 559 S.W.2d 528 (Mo. 1977) (allowing parents to recover any pecuniary benefit reasonably expected from a decedent child beyond the age of minority); Gonzalez v. N.Y. Hous.

elements: (1) the plaintiff is a statutory beneficiary of the decedent;[9] (2) the defendant is an individual or corporation;[10] (3) the defendant's wrongful act caused the death of the decedent;[11] (4) the decedent would have been entitled to bring a lawsuit if he had lived;[12] and (5) the plaintiff suffered actual injury.[13] If the plaintiff can establish these five elements, then he is entitled to damages. The damages consist of four main categories: (1) pecuniary losses, (2) mental anguish, (3) loss of companionship and society, and (4) loss of inheritance.[14] By far the largest percentage of damages comes from pecuniary losses, which mainly consist of the decedent's lost earning capacity.[15]

Because most of the damages resulting from a wrongful-death suit are based on the decedent's lost earning capacity, the beneficiaries of an illegal immigrant face a significant additional hurdle to recovery: Does the decedent's illegal immigrant status bar an award of lost earning capacity?[16]

Auth., 572 N.E.2d 598 (N.Y. 1991) (providing that pecuniary injuries under New York's wrongful-death statute may be calculated on the basis of the decedent's future earning potential). The preemption issue will also arise in any state-based claim that provides recovery for lost past or future wages, such as breach of an employment contract and general personal injury claims. *See, e.g.*, Hyde-Way, Inc. v. Davis, No. 2-08-313-CV, 2009 WL 2462438, at *9 (Tex. App.—Fort Worth Aug. 13, 2009, no pet.) (discussing the judgment awarding past lost wages in a personal injury case); Mantas v. Bradley, No. 05-97-01910-CV, 2001 WL 959389, at *8 (Tex. App.—Dallas Aug. 24, 2001, no pet.) (stating that the damages available for breach of an employment contract include the value of the contract).

9. *See* CIV. PRAC. & REM. § 71.004 ("An action to recover damages as provided by this subchapter is for the exclusive benefit of the surviving spouse, children, and parents of the deceased.").

10. *See id.* § 71.001 ("'Person' means an individual, association of individuals, joint-stock company, or corporation or a trustee or receiver of an individual, association of individuals, joint-stock company, or corporation.").

11. *See id.* § 71.002(b) ("A person is liable for damages arising from an injury that causes an individual's death if the injury was caused by the person's or his agent's or servant's wrongful act, neglect, carelessness, unskillfulness, or default.").

12. *See id.* § 71.003(a) ("This subchapter applies only if the individual injured would have been entitled to bring an action for the injury if the individual had lived or had been born alive.").

13. *See id.* § 71.002(a) ("An action for actual damages arising from an injury that causes an individual's death may be brought if liability exists under this section.").

14. *See* Moore v. Lillebo, 722 S.W.2d 683, 687 (Tex. 1986) (defining the elements of damages allowed in wrongful-death cases).

15. *See* Simpson v. United States, 322 F.2d 688, 691 (5th Cir. 1963) ("[A]lthough the jury is not *limited* in wrongful death actions to a computation of pecuniary loss based upon the projection into the future of deceased's past earnings, this is the basic or primary element of such awards."); John Deere Co. v. May, 773 S.W.2d 369, 379 (Tex. App.—Waco 1989, writ denied) (noting that in a wrongful-death suit, damages are measured by the pecuniary loss to the beneficiary except in a suit where the decedent is a child); John G. Culhane, *Even More Wrongful Death: Statutes Divorced from Reality*, 32 FORDHAM URB. L.J. 171, 175 n.14 (2005) ("In many cases, if not most, the pecuniary losses will far outstrip the emotional losses (at least from the point of view of dollars recoverable in a lawsuit)."); Meredith A. Wegener, *Purposeful Uniformity: Wrongful Death Damages for Unmarried, Childless Adults*, 51 S. TEX. L. REV. 339, 343 (2009) (questioning "the predominant, compensation-focused wrongful death damage system").

16. A decedent's illegal status may also affect whether the decedent's spouse can recover as a statutory beneficiary. This is beyond the scope of this Note. As common law spouses may recover,

This defense could be raised either by an employer who did not subscribe to workers' compensation insurance or by a defendant unrelated to the decedent's employment. The employer defendants create a more complex problem, and both scenarios remain unresolved by either the Texas or U.S. Supreme Court. But analysis of existing federal immigration statutes, case law, and general preemption principles offers a solution, which this Note will attempt to exposit.

Congress created a high hurdle when it passed the Immigration Reform and Control Act (IRCA) of 1986,[17] which makes it illegal for an employer to knowingly hire an illegal immigrant or retain an employee once the employer determines that the employee is an illegal immigrant.[18] It also proscribes illegal immigrants from tendering false or fraudulent documents to gain employment.[19]

The landmark decision interpreting the IRCA and explaining its federal purpose is *Hoffman Plastic Compounds, Inc. v. NLRB*.[20] In *Hoffman*, the U.S. Supreme Court held that providing backpay to illegal immigrants frustrates the federal policy of decreasing the magnetic force between the U.S. economy and foreigners who want to illegally enter the United States for work.[21] But this decision split the Court 5–4 with the four dissenting Justices arguing that awarding backpay did not frustrate federal policy.[22] The existence of such a substantial disagreement among the Justices as to the nature of the federal policy underlying the IRCA raises important questions about the scope of Congress's preemptive intent.

---

however, this probably does not pose an obstacle. *See* Shepherd v. Ledford, 962 S.W.2d 28, 32 (Tex. 1998) (discussing how the decedent's common law spouse could have recovered under the WDA).

17. Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

18. 8 U.S.C. § 1324a(a)(1)–(2) (2006). Section 1324a states,

> It is unlawful for a person or other entity . . . to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien . . . . It is unlawful for a person or other entity, after hiring an alien for employment . . . to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

Id.

19. *Id.* § 1324c(a)(2) ("It is unlawful for any person or entity knowingly . . . to use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement of this chapter or to obtain a benefit under this chapter."). Because the IRCA governs the employer–employee relationship, it is more likely that a court would find preemption arising out of that relationship. A nonemployer defendant could also try to raise the defense that because the decedent could not work in the United States without either the employer or employee breaking federal law, the court cannot award the decedent's beneficiaries wage-based damages. This is, however, a much more strained argument. Accordingly, this Note will focus on beneficiaries suing a decedent's employer who did not subscribe to workers' compensation insurance.

20. 535 U.S. 137 (2002). *Hoffman* is discussed in-depth in Part III.

21. *See id.* at 151–52 (stating that allowing the Board to award backpay would "encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations").

22. *Id.* at 155 (Breyer, J., dissenting).

In the aftermath of *Hoffman*, several commentators discussed its potential effect on state tort suits.[23] Many focused on the practical effects on litigation—how to pursue or defend a lawsuit using *Hoffman*.[24] Others focused on how to calculate damages—bar all damages, allow full damages using U.S. wages, use the decedent's country of origin's wages, or use the decedent's illegal status and risk of deportation to reduce a damages award based on U.S. wages.[25] Similarly, the courts were unable to come to a consensus and expressed differing views.[26]

Part II of this Note explains the traditional background of federal preemption jurisprudence, and Part III considers the role *Hoffman* has in this analysis. *Hoffman* might appear to be the seminal case addressing whether a decedent's immigration status should bar wrongful-death damages given that it involved illegal immigration. But its facts differ significantly from those in state wrongful-death suits, and thus it ultimately proves to be of limited value. To gain a more complete picture, three recent Supreme Court cases—discussed in Part IV—must be included in the analysis. In particular, the Court's shift away from implied preemption suggests that it would not find a state tort claim preempted. Congress can enact statutes with expansive express preemption clauses, but when it fails to do so, state law, particularly generally applicable laws promulgated under the state's police power, should remain intact.

To determine whether the WDA has been preempted, Part V argues for a two-pronged preemption test: (1) Does the WDA conflict with the IRCA and federal policy? (2) If a conflict exists, does the IRCA preempt the WDA? In this Part, I focus on how the two swing Justices on this issue—Justice Thomas and Justice Kennedy—would answer these questions. This is

---

23. *See, e.g.*, Benny Agosto, Jr. & Robert Rodriguez, *The Immigration Debate: Can Undocumented Workers Recover Lost Wages in Personal Injury Suits?*, HOUS. LAW., Sept.–Oct. 2006, at 15, 19 (discussing a Texas appellate court's treatment of *Hoffman* in Tyson Foods, Inc. v. Guzman, 116 S.W.3d 233 (Tex. App.—Tyler 2003, no pet.), where the court rejected the argument that because the plaintiff was not a U.S. citizen, he was not entitled to receive any compensatory award for lost earning capacity); Hugh Alexander Fuller, *Immigration, Compensation and Preemption: The Proper Measure of Lost Future Earning Capacity Damages After* Hoffman Plastic Compounds, Inc. v. NLRB, 58 BAYLOR L. REV. 985, 995–98 (2006) (analyzing *Hoffman*'s effects on damage measures in later state and federal decisions); J.J. Knauff, *A Defense Primer for Suits by Illegal Aliens*, 61 BAYLOR L. REV. 542, 551–58 (2009) (reviewing the treatment of lost-earnings claims in Texas and other states both before and after *Hoffman*).

24. *See, e.g.*, Agosto & Rodriguez, *supra* note 23, at 19 (noting that the *Tyson* court held that *Hoffman* "does not apply to common-law personal injury damages"); Knauff, *supra* note 23, at 557–58, 569, 577 (analyzing a hypothetical case in light of *Hoffman*).

25. *See, e.g.*, Fuller, *supra* note 23, at 1006–09 (analyzing several damage-calculation methods and concluding that the best approach is "to allow the award of lost future earnings based on United States wage rates" unless the defendant produces "evidence showing another measure is more appropriate").

26. *Compare* Sanango v. 200 E. 16th St. Hous. Corp., 788 N.Y.S.2d 314, 316–19 (N.Y. App. Div. 2004) (holding that *Hoffman* requires courts to find state claims preempted by the IRCA), *with* Rosa v. Partners in Progress, Inc., 868 A.2d 994, 1000 (N.H. 2005) (finding *Hoffman* persuasive but not controlling authority).

significant because if either Justice were to join the liberal Justices on this issue, the Court would not find preemption. This Note concludes by arguing that the U.S. Supreme Court would not hold that the IRCA preempts the WDA; however, the Court is unlikely to arrive at a consensus answering the two questions.

II. Types of Federal Preemption

Before examining the cases and policies that shape the particular analysis of whether the WDA would be preempted by federal law, a brief overview of federal preemption is necessary. Federal preemption falls into three main categories: (1) express statutory preemption; (2) implied preemption from federal law occupying the field the state law is regulating; and (3) implied preemption from a direct conflict between the state and federal law.[27] Federal preemption originates in the Supremacy Clause, which provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[28] Federal preemption encompasses enacted federal law, but it also applies in certain situations in which the federal government has not taken action.[29]

The IRCA, as currently codified, contains a narrow express preemption clause: "The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."[30] This provision specifically limits itself to "sanctions"—wrongful-death damages are liability assessments, not civil fines.[31] Further, it only preempts laws governing employment. Because the IRCA does not expressly abrogate the WDA, any preemption must be implied.

---

27. Weaver's Cove Energy, L.L.C. v. R.I. Coastal Res. Mgmt. Council, 589 F.3d 458, 472 (1st Cir. 2009); *see also* Riegel v. Medtronic, Inc., 128 S. Ct. 999, 1006–07 (2008) (upholding an express preemption clause); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (explaining field preemption); Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (holding that state law created an unacceptable obstacle to federal policies).

28. U.S. CONST. art. VI, cl. 2.

29. *See, e.g.*, West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 192, 206–07 (1994) (invoking the "'negative' aspect of the Commerce Clause" to hold that a state price regulation violated the Commerce Clause).

30. 8 U.S.C. § 1324a(h)(2) (2006).

31. *Id.* The preemption provision of the IRCA may, however, preclude awarding exemplary damages against defendants who acted willfully or with gross negligence in cases involving an illegal immigrant. *Cf.* R & R Contractors v. Torres, 88 S.W.3d 685, 696–97, 711 (Tex. App.—Corpus Christi 2002, no pet.) (holding that a plaintiff may recover punitive damages for wrongful death from an employer in a gross negligence action under the Texas Workers' Compensation Act and remanding to determine whether plaintiff had discharged its burden of proving gross negligence by clear and convincing evidence). Exemplary damages, unlike liability damages, are designed to penalize a defendant for outrageous or malicious conduct and to deter such conduct in the future. Owens-Corning Fiberglas Corp. v. Malone, 972 S.W.2d 35, 40 (Tex. 1998).

The second form of preemption—occupying the field—can be dismissed. While the federal government does occupy the field of immigration,[32] the WDA does not regulate immigration. If Texas were to promulgate an immigration statute that set out immigration policy, that statute would be preempted under the occupying-the-field rationale.[33] But such is not the case here. The WDA is a generally applicable statute that governs tort liability principles; if it affects immigration, it does so only indirectly. The IRCA is a federal immigration statute; Congress did not pass it to regulate state tort claims.

The Court recently declined to determine whether incidental regulations—state laws that affect the subject of a federal statute but were not intended by the state government to regulate that subject—should be preempted by field preemption.[34] While the Court held that the incidental regulations were preempted, the Court refused to "accept[] [or] reject[] the FDA's distinction between general requirements that directly regulate and those that regulate only incidentally."[35] It is a long-standing principle that the Court should apply field preemption, as with all preemption, only when it is the "clear and manifest purpose of Congress."[36] This can be shown when "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."[37] Field preemption is also appropriate if the "federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject . . . . Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose."[38] While the Supreme Court has held that the "[p]ower to regulate immigration is unquestionably exclusively a federal power," not every state law that "in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted by this constitutional

32. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 4 (providing Congress with the power to "establish an uniform Rule of Naturalization").

33. Arizona recently passed a statute that arguably did just that. Support Our Law Enforcement and Safe Neighborhoods Act, S. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (to be codified at ARIZ. REV. STAT. ANN. § 11-1051). In *United States v. Arizona*, the district court partially granted the United States' motion for a preliminary injunction on several of the statute's provisions, holding that the United States was likely to succeed on its claim that certain provisions conflict with a comprehensive federal scheme and are preempted. 703 F. Supp. 2d 980, 986–87, 1004, 1006 (D. Ariz. 2010). The Ninth Circuit ordered the parties to submit briefs, and the case was heard on November 1, 2010. Scheduling Order, United States v. Arizona, No. 10-16645 (9th Cir. July 30, 2010), *available at* http://www.ca9.uscourts.gov/datastore/general/2010/07/30/10-16645_order.pdf.

34. *See* Riegel v. Medtronic, Inc., 128 S. Ct. 999, 1010–11 (2008) (holding that New York's common law tort liability, when applied to medical devices, was preempted by the federal Medical Device Amendments of 1976).

35. *Id.* at 1011.

36. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

37. *Id.*

38. *Id.* (citation omitted).

power, whether latent or exercised."[39] In this case, Congress did not clearly and manifestly express a purpose to regulate state wrongful death; therefore, the WDA cannot be preempted under a field preemption analysis.

Because the IRCA's narrow preemption clause does not apply to wrongful-death suits and the WDA does not directly regulate where federal law occupies the field, the WDA will be preempted only if the federal and state laws conflict. This is where courts and academics have focused their inquiries into the possible preemption of illegal immigrants' ability to receive earnings-based damages under state statutes like the WDA.[40]

III. The *Hoffman* Decision and Subsequent Interpretations

While the U.S. Supreme Court has not considered whether state wrongful-death suits have been preempted by the IRCA, it did address whether an illegal immigrant could receive wage-based remedies in *Hoffman*, a landmark 2002 case. As explained above, the bulk of a wrongful-death recovery typically comes from lost earning capacity.[41] Therefore, whether an illegal immigrant may recover wage-based remedies is the most crucial question in the case. If these damages were unavailable, few (if any) wrongful-death suits for illegal immigrants would be viable. In *Hoffman*, the Supreme Court addressed whether an illegal immigrant could receive backpay after his employer fired him for organizing a union.[42] The Court held that the IRCA and federal policy prohibited awarding backpay to illegal immigrants.[43]

The Court provided two main reasons for denying backpay: (1) the employment of illegal immigrants is necessarily unlawful under the IRCA in that it requires the employee to provide false documents or that it requires the employer to knowingly employ illegal immigrants;[44] and (2) if the Court allowed an illegal immigrant to receive wages that could not be earned legally, it would "condone[] and encourage[] future violations" of the law.[45] This decision created a 5–4 split among the Justices. Four Justices argued that the NLRB needs the ability to enforce its rules and that awarding backpay would not affect the magnetic force between the U.S. economy and noncitizens who want to enter the country illegally to work.[46]

---

39. De Canas v. Bica, 424 U.S. 351, 354–55 (1976).

40. *See, e.g.*, *Developments in the Law—Jobs and Borders*, 118 HARV. L. REV. 2171, 2230–32 (2005) (surveying cases in which lower courts applied *Hoffman* to hold that state law worker protections providing for the recovery of lost wages by illegal workers are preempted by the IRCA).

41. *See supra* note 15 and accompanying text.

42. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 140–43 (2002).

43. *Id.* at 151.

44. *Id.* at 148–49.

45. *Id.* at 150.

46. *Id.* at 155 (Breyer, J., dissenting). The dissent agreed with the majority that the "purpose of the immigration statute's employment prohibition is to diminish the attractive force of employment, which like a 'magnet' pulls illegal immigrants toward the United States." *Id.* (citing H.R. REP. NO.

The first disagreement between the majority and the dissent was whether the NLRB had the power to award backpay to a plaintiff who had violated the law.[47] But that issue is particular to criminal cases, not civil, and thus does not affect the analysis of whether a state's wrongful-death statute is preempted.[48] But the second disagreement, whether the federal interest in curtailing the magnetic force is hampered by awarding backpay, does bear on whether a state's tort suit should be preempted. If the dissent correctly characterized the effect on federal policy as nonexistent, then the WDA should not affect federal policy either.

In fact, there is arguably no direct conflict because the remedy is pay for "work not performed."[49] One potential test for preemption is whether it is possible to abide by both the federal and state laws.[50] In this case, the plaintiffs are not seeking an injunction that forces an employer to allow the employee to work; they only seek monetary damages. The IRCA does not proscribe *paying* illegal immigrants for work. It prevents *hiring* illegal immigrants and using fraudulent documents to gain employment.[51] In *Hoffman*, the Court did not focus on this distinction but rather concentrated on how awarding backpay frustrates the federal policy of reducing the magnetic force.[52]

Although five Justices determined that awarding backpay frustrates federal policy, four Justices argued that "award[ing] backpay could not significantly increase the strength of this magnetic force, for so speculative a future possibility could not realistically influence an individual's decision to migrate illegally."[53] Justice Breyer argued that the Court's holding would have the opposite effect—it would increase the magnetic force by creating incentives for employers to hire illegal immigrants.[54] Similar logic applies to

---

99-682, pt. 1, at 45 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5649–50). But it argued that permitting backpay "could not significantly increase the strength of this magnetic force, for so speculative a future possibility could not realistically influence an individual's decision to migrate illegally." *Id.*

47. *See id.* at 156–57 (challenging the majority's view and arguing that denying the NLRB the power to award backpay would frustrate the underlying purpose of the statute).

48. *Hoffman* had two competing federal interests: (1) the NLRB's interest in enforcing the NLRA and (2) the federal interest delineated in the IRCA in curbing the flow of illegal immigrants into the U.S. workforce. *Id.* at 148–49 (majority opinion). Whether the plaintiff's illegal conduct barred him from receiving damages resembles an analysis under the "unclean hands" doctrine and is beyond the scope of this Note.

49. *Id.* at 149.

50. *See, e.g.*, Wyeth v. Levine, 129 S. Ct. 1187, 1194–97 (2009) (concluding that the state law claims were not preempted because "Wyeth could have revised [the] label even in accordance with the amended regulation").

51. *See* 8 U.S.C. § 1324(a)(3)(A) (2006) ("Any person who, during any 12-month period, knowingly hires for employment at least 10 individuals with actual knowledge that the individuals are aliens described in subparagraph (B) shall be fined under title 18 or imprisoned for not more than 5 years, or both.").

52. *Hoffman*, 535 U.S. at 150–52.

53. *Id.* at 155 (Breyer, J., dissenting).

54. *Id.*

wrongful-death suits. Because they would essentially be shielded from significant tort liability, employers would have a strong incentive to employ illegal immigrants in dangerous situations.[55]

The important distinction between *Hoffman* and whether the IRCA preempts the WDA is that *Hoffman* dealt with conflicting federal policies, not a state law conflicting with federal policy. If a true direct conflict exists, then the state law is preempted under the Supremacy Clause. But as discussed above, four Justices rejected the view that there was a conflict between the NLRA and the IRCA. And by replacing the NLRA with a generally applicable state tort law like the WDA, the vote among the other five Justices would likely change. In the preemption context, federalism concerns create additional considerations. Due to these concerns, there is a general presumption against preemption, with the Court becoming increasingly hesitant to find preemption without clear congressional intent. If the Court holds the state law preempted, then the Court prevents states from determining how they want to allocate risks and damages among their constituents. After Justice Thomas's concurring opinion in *Wyeth*,[56] the Court may hesitate before preempting state laws without express congressional approval.[57]

Hoffman is the most recent decision to consider whether an illegal immigrant may receive earnings-based remedies. But it does not mandate preempting state law. Four Justices argued that the IRCA should not have prevented the NLRB from awarding backpay to an illegal immigrant. That same argument—that awarding damages does not frustrate federal policy—supports upholding state tort suits that award similar damages because those suits do not create an obstacle for federal policy.

IV. Three Recent Supreme Court Decisions

If Texas's interest in enforcing its WDA is less than the NLRB's interest in enforcing the NLRA, then plaintiffs should not recover lost-earning-capacity-based damages. But if, as I argue, Texas's interest is greater, then the dynamic changes, and so may the Court's decision. For a complete preemption analysis, three recent Supreme Court decisions must

---

55. The purpose of tort law in this context is to hold employers to their duty to reasonably safeguard their employees' safety. *See* Leitch v. Hornsby, 935 S.W.2d 114, 117 (Tex. 1996) ("[A]n employer does have a duty to use ordinary care in providing a safe work place."). Wrongful-death actions force employers to evaluate their practices, and if employers are not providing sufficient precautions, claims can demonstrate the public's disapproval and compel conformity to acceptable safety conditions. *Cf.* Hofer v. Lavender, 679 S.W.2d 470, 474 (Tex. 1984) (providing that punitive damages, which are available in wrongful-death actions, serve a dual purpose of punishing the wrongdoer and also having the wrongdoer serve "as an example for the good of the public").

56. *See infra* section IV(B)(2).

57. *See infra* notes 95–118 and accompanying text. Justice Thomas joined the majority opinion in *Hoffman*, but he may vote that the IRCA does not preempt the WDA because the IRCA's express preemption clause does not address wage-based tort suits. Justice Kennedy—another Justice in the majority in *Hoffman*—has taken narrow views of the scope of federal policy to avoid finding a conflict between state and federal law. *See infra* subpart V(A).

also be considered: (1) *Riegel v. Medtronic, Inc.*;[58] (2) *Wyeth v. Levine*;[59] and (3) *Altria Group, Inc. v. Good*.[60] These cases demonstrate the Court's different approach to preemption when the law in question is a state law enacted under the state's traditional police power. While the facts of these cases do not explicitly address illegal immigrants, wage-based damages, or wrongful-death suits, they are arguably more important to the preemption analysis than *Hoffman* in determining whether a plaintiff can receive damages based on an illegal immigrant's future earning capacity and therefore the viability of wrongful-death suits.

A. Riegel v. Medtronic, Inc.

Riegel demonstrates how an express preemption clause affects the Supreme Court's analysis. Because the *Riegel* Court held that the state law was preempted, *Riegel* provides a contrast to *Altria Group, Inc. v. Good*,[61] in which the Court held that a state law was *not* preempted despite the federal law containing an express preemption clause.

Donna Riegel filed a suit against Medtronic after a Medtronic catheter ruptured in Charles Riegel's coronary artery.[62] The Food and Drug Administration (FDA) had given its premarket approval to the catheter.[63] The central issue was whether the preemption clause of the Medical Device Amendments (MDA) of 1976 barred Riegel from suing under New York tort law.[64] Riegel alleged that Medtronic violated several New York common law duties when its catheter caused Charles Riegel's injuries.[65] The federal district court held that her claims were preempted by the MDA,[66] and the Second Circuit affirmed, holding that if Riegel's claim were permitted, it would "impose state requirements that differed from, or added to" the federal requirements.[67] The Supreme Court agreed.

To determine that the state requirements were preempted by the MDA, the Supreme Court carefully examined the differences in the duties imposed

58. 128 S. Ct. 999 (2008).
59. 129 S. Ct. 1187 (2009).
60. 129 S. Ct. 538 (2008).
61. *See infra* subpart IV(C).
62. *Riegel*, 128 S. Ct. at 1005.
63. *Id.*
64. *Id.* at 1006 (citing 21 U.S.C. § 360k(a) (2006)).
65. *Id.* at 1005.
66. *Id.* at 1005–06. The text of the preemption clause in the MDA states,
> [N]o State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement—(1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and (2) which relates to the safety or effectiveness of the device . . . .

21 U.S.C. § 360k(a).
67. Riegel v. Medtronic, Inc., 451 F.3d 104, 121 (2d Cir. 2006), *aff'd*, 128 S. Ct. 999 (2008).

by federal and state law.[68] The Court focused on the individualized and particularized requirements, which differentiated this case from the general requirements set out in *Medtronic, Inc. v. Lohr*.[69] The Court then held that the common law claims constituted "requirements" as proscribed in the MDA preemption clause.[70] Using a plain-reading method, the Court held that Congress wanted to preempt these types of common law claims to prevent juries from creating variable requirements and favoring plaintiffs.[71]

Finally, the Court rejected Riegel's argument that the language in the MDA's preemption clause explicitly retains "'[s]tate or local requirements of general applicability where the purpose of the requirement relates either to other products in addition to devices . . . or to unfair trade practices in which the requirements are not limited to devices.'"[72] The Court interpreted the regulation as excluding "requirements that relate only incidentally to medical devices, but not other requirements."[73] It declined to decide whether a distinction between direct and incidental regulations has merit.[74]

At first glance, this case does not appear to support the argument that the IRCA does not preempt the WDA for myriad reasons: the case concerned the MDA not the IRCA, no party was an illegal immigrant, the MDA contains a broad express preemption provision that more closely relates to the state law while the relation of the preemption provision of the IRCA to the state law is far more tangential, and in an 8–1 decision,[75] the Court held that the state law claims were preempted. But this case provides a stark contrast

---

68. *See Riegel*, 128 S. Ct. at 1006–08 (discussing how the common law duty "that requires a manufacturer's catheters to be safer, but hence less effective" is at odds with the federal scheme).

69. *Id.* at 1006–07. This is the opposite result from *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), which allowed the state law claims because they were not specific to the device but instead reflected "entirely generic concerns about device regulation generally." *Id.* at 501.

70. *Riegel*, 128 S. Ct. at 1006–07.

71. The Court was concerned that juries would focus on the damage inflicted upon the plaintiffs rather than the benefits from those not in the litigation. *Id.* at 1008.

72. *Id.* at 1010 (alteration in original) (quoting 21 C.F.R. § 808.1(d)(1)).

73. *Id.*

74. *Id.* at 1011.

75. Justice Ginsburg, alone in dissent, argued against preemption under the Court's precedent. She began her dissent with a string of quotes from previous decisions:

> Courts have "long presumed that Congress does not cavalierly pre-empt state-law causes of action." [Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)]. Preemption analysis starts with the assumption that "the historic police powers of the States [a]re not to be superseded . . . unless that was the clear and manifest purpose of Congress." [Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)]. "This assumption provides assurance that the 'federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the courts." [Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)]. The presumption against preemption is heightened "where federal law is said to bar state action in fields of traditional state regulation." [N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995)].

Id. at 1013 (Ginsburg, J., dissenting). While Justice Ginsburg's position as lone dissenter does not carry much weight, the opinions she cited were majority decisions. Additionally, similar quotes appear in the majority opinions in the next few cases examined.

to *Wyeth v. Levine*, which upheld state claims against the FDA.[76] And the distinction between direct and indirect regulation, while left unresolved by the Court, may play an important role in whether the Texas WDA is preempted.

B. Wyeth v. Levine

One year after *Riegel*, the Court decided *Wyeth v. Levine*. *Wyeth*'s facts resemble *Riegel*'s, but in *Riegel*, the FDA promulgated regulations under the MDA—which contains an express preemption clause—while in *Wyeth* the FDA promulgated regulations under the Food, Drug, and Cosmetic Act (FDCA), which does not have an express preemption clause.[77] The amount of tension between the federal and state laws in the two cases appears similar, but the Justices' votes changed dramatically, demonstrating the effect of the preemption clause. Justice Ginsburg, the sole dissenter in *Riegel*, joined the majority in an opinion that mirrors her dissent in both logic and the use of precedent.[78]

Doctors in Vermont injected Diana Levine with Phenergan using an IV-push, which caused Levine to develop gangrene and ultimately resulted in the amputation of her arm.[79] At trial, Levine argued that the label should have instructed physicians to administer the drug via IV-drip method instead of the riskier IV-push method.[80] Wyeth argued that because the FDA had approved the label's warning, Levine's tort suit was preempted.[81] The Vermont jury found that Wyeth had violated the state tort laws.[82]

On appeal, Wyeth maintained its two preemption arguments: (1) it could not comply with the state law duty to modify Phenergan's label without violating federal law; and (2) if the state law created new labeling requirements, then it would provide an "unacceptable 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[83]

1. The Majority Held that the FDCA Did Not Preempt the Vermont State Law.—To answer the preemption question, the U.S. Supreme Court

76. *See generally* Wyeth v. Levine, 129 S. Ct. 1187 (2009) (upholding the claims in a 6–3 decision).

77. *Id.* at 1195, 1200.

78. *Id.* at 1190. The Justices appeared to follow their political lines, with the four main liberal justices (Justices Stevens, Souter, Ginsburg, and Breyer), joined by Justice Kennedy, disagreeing with Chief Justice Roberts and Justices Scalia and Alito. But Justice Thomas strayed from his fellow conservatives and wrote an opinion concurring with the liberals. This switch, and Justice Thomas's concurring opinion, provide an important swing in federal preemption jurisprudence.

79. *Id.* at 1191.

80. *Id.* at 1191–92.

81. *Id.* at 1192.

82. *Id.* at 1190–91.

83. *Id.* at 1193 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

emphasized two pillars of preemption law: (1) "'the purpose of Congress is the ultimate touchstone in every pre-emption case'";[84] and (2) "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,'" the Court should "'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"[85]

The Court first determined Congress's purpose in the FDCA, particularly emphasizing Congress's attempt to preserve state law.[86] When Congress amended the FDCA, it added a savings clause that limited preemption to only "direct and positive conflict[s]" with the FDCA.[87] In contrast, the MDA—the statute of interest in *Riegel*—contains an express preemption clause with respect to medical devices.[88] By comparing the two statutes, both enforced under the power of the FDA, the Court held that the congressional purposes diverged.[89] The lack of an express preemption clause, coupled with a savings clause, meant that Congress was concerned about preserving state law in the FDCA context but not in the MDA context.[90]

The Court then addressed Wyeth's first contention: Wyeth could not simultaneously comply with the state law duties and the federal labeling duties.[91] But, according to the Court, Wyeth failed to present evidence that the FDA would not have approved a change to Phenergan's label.[92] Wyeth argued that the FDA would have found a label change inappropriate—a contention rejected by the trial court and the Vermont Supreme Court.[93] In concluding that the state law was not preempted under an impossibility doctrine, the Court stated that "[i]mpossibility pre-emption is a demanding defense. . . . Wyeth has failed to demonstrate that it was impossible for it to comply with both federal and state requirements."[94] This strict standard severely limits impossibility preemption to cases in which following the state law unequivocally violates federal law.

---

84. *Id.* at 1194 (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)).

85. *Id.* at 1194–95 (alterations in original) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)).

86. *Id.* at 1194–96.

87. *Id.* at 1196 (internal quotation marks omitted).

88. *Id.* at 1200.

89. *See id.* (indicating that despite Congress's enactment of an express preemption provision for medical devices, it has not enacted such a provision for prescription drugs).

90. *See id.* ("[Congress's] silence on the issue, coupled with its certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness.").

91. *Id.* at 1196.

92. *Id.* at 1198.

93. *Id.* at 1198–99.

94. *Id.* at 1199.

Wyeth also argued that the state law duty interfered with the "purposes and objectives of federal drug labeling regulation."[95] It argued that the FDCA created a "floor and a ceiling for drug regulation"[96]—because the FDA approved Phenergan's label for both IV-drip and direct IV-push methods, a state law verdict could not mandate one method over the other.[97] Wyeth analogized its case to *Geier v. American Honda Motor Co.*,[98] which involved a Department of Transportation rule that allowed car manufacturers to choose from a variety of passive restraint systems.[99] The plaintiff in *Geier* argued that Honda had a duty to install an airbag, but the Court held that to force the manufacturer to use an airbag prevented the "variety and mix of devices that the federal regulation sought."[100] While the rule in *Geier* went through a formal rulemaking process, the FDA did not specifically contemplate a proffered change to Phenergan's label.[101] Thus, the Court rejected Wyeth's argument that the state law crashed through a ceiling created by the FDCA.[102]

The Court also denied Wyeth's general contention that the state law posed an obstacle to the federal objectives because Congress could have enacted an express preemption provision if it felt that state laws hindered its goals.[103] The Court found the congressional silence significant: "'The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them.'"[104]

Beyond demonstrating the unwillingness of the Court to take a broad view of impossibility preemption, *Wyeth* emphasizes the importance of an express preemption clause. This logic may be extended to other cases with congressional silence on preemption. For example, awarding wrongful-death damages is not inconsistent with federal immigration laws; rather, Congress

95. *Id.*
96. *Id.*
97. *Id.*
98. 529 U.S. 861 (2000).
99. *Wyeth*, 129 S. Ct. at 1203 (citing *Geier*, 529 U.S. at 875).
100. *Geier*, 529 U.S. at 881.
101. *Wyeth*, 129 S. Ct. at 1198–99.
102. *Id.* at 1204.
103. *Id.* at 1200.
104. *Id.* (alteration in original) (quoting Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 166–67 (1989)). In *Bonito Boats*, the Court held that a Florida statute that provided patent-like protections for an unpatented process was preempted by the federal patent laws. *Bonito Boats*, 489 U.S. at 144. The Florida statute broke "the tradition of peaceful co-existence between state market regulation and federal patent policy," thereby "enter[ing] a field of regulation which the patent laws have reserved to Congress." *Id.* at 167. By mentioning unfair-competition law and trade-secret law, the Court suggests that even if the state law creates a tension with a federally occupied field, state laws may retain viability. Moreover, field occupation is a stronger justification for preemption than creating an obstacle to federal policy. Thus, the threshold for preempting a state law on obstacle grounds should be higher.

is tolerating any tension. The IRCA express preemption clause only preempts sanctions, which may implicitly support allowing tort damages. The importance of an express preemption clause is heightened in areas of traditional state regulation. *Riegel* involved the MDA, which has an express preemption clause, and the Court upheld preemption 8–1. But *Wyeth*, on arguably similar facts, produced a 6–3 decision in favor of allowing the state claim. Finally, the Court did not extend its floor and ceiling preemption from a rule made in a formal rulemaking process to a regulation promulgated by the FDA.

2. Justice Thomas Advocates a Drastic Shift in Preemption Jurisprudence.—The most consequential opinion, however, might not be the majority opinion. Justice Thomas, concurring in the judgment and writing separately, wanted to distance himself from "the majority's implicit endorsement of far-reaching implied pre-emption doctrines."[105] He expressed his disapproval of the Court's "'purposes and objectives' pre-emption jurisprudence" that "routinely invalidates state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law."[106]

Justice Thomas's objections to implied preemption stem from his philosophy that emphasizes federalism and the designed dual sovereignty in the Constitution.[107] While the Supremacy Clause grants the federal government the ability to limit the power of the states, the Tenth Amendment allows states to retain substantial authority.[108] Justice Thomas's strong view of federalism is manifested by how he interprets the text of the Supremacy Clause. The Supremacy Clause "gives 'supreme' status only to those [federal laws] that are 'made in Pursuance' of '[t]his Constitution.'"[109] To be pursuant to the Constitution, however, laws must comply with its requirements. First, the federal law must be passed in accordance with one of Congress's enumerated powers.[110] If it is, the law must still follow the procedures required for passing a bill into law—chiefly bicameral passage and presentment to the President.[111] Justice Thomas argued that "pre-

105. *Wyeth*, 129 S. Ct. at 1205 (Thomas, J., concurring).

106. *Id.*

107. *Id.* at 1205–07.

108. *See id.* at 1205–06 ("'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'" (quoting U.S. CONST. amend. X)).

109. *Id.* at 1206 (quoting U.S. CONST. art. VI, cl. 2).

110. *Id.* This point is arguably more important to Justice Thomas than to the other Justices. When the Court has decided cases questioning whether a federal law exceeds federal power under the Commerce Clause, Justice Thomas has expressed a desire to return to pre-New Deal treatment of the Clause. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) (arguing for the Court to return to its original narrow interpretation of the Commerce Clause).

111. *Wyeth*, 129 S. Ct. at 1207 (Thomas, J., concurring).

emptive effect be given only [to those] federal standards and policies that are set forth in, or necessarily follow from, the statutory text that was produced through the constitutionally required bicameral and presentment procedures."[112]

Because Justice Thomas believes that the Supremacy Clause only applies to laws that pass constitutional muster, he has previously questioned "expand[ing] federal statutes beyond their terms through doctrines of implied pre-emption."[113] If the Court expands the purposes-and-objectives preemption, then it may unconstitutionally invalidate state laws.[114] This may allow the Court to arbitrarily expand federal statutes.[115] Notably, the Court can pick and choose from multiple possible interpretations, even when the text of the statute is unambiguous.[116] Relying on congressional intent and legislative history, which are not part of the bicameral and presentment procedures, gives the Supremacy Clause greater force than it warrants. Instead, the Court should focus on "whether state law conflicts with the text of the relevant federal statute or with the federal regulations authorized by that text."[117]

Justice Thomas does not advocate that the Court disregard the force of the Supremacy Clause. Congress can still preempt state law, but it should use the constitutionally mandated process. It has the vehicle to do it—an express preemption clause. Because many federal statutes contain express preemption clauses, the lack of one is telling.[118]

If Congress does include an express preemption clause, the same logic should require Justices to give express preemption clauses their plain meaning. Justice Thomas cautions against allowing Justices the ability to pick and choose possible interpretations to reach their desired result with implied preemption. The same concerns exist if express preemption clauses are accorded too expansive or constrictive interpretations.

Because Justice Thomas believed in *Wyeth* that it was "evident from the text of the relevant federal statutes and regulations themselves that the state-law judgment below is not pre-empted," he did not find it necessary to decide

---

112. *Id.*

113. Bates v. Dow Agrosciences L.L.C., 544 U.S. 431, 459 (2005) (Thomas, J., concurring in part and dissenting in part).

114. *Wyeth*, 129 S. Ct. at 1217 (Thomas, J., concurring).

115. *Id.* at 1207 (citing Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 678 (2003) (Thomas, J., concurring)).

116. *Id.* (citing Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 388–91 (2000) (Scalia, J., concurring)).

117. *Id.* at 1208.

118. *See* O'Melveny & Myers v. FDIC, 512 U.S. 79, 85 (1994) ("[M]atters left unaddressed in [a comprehensive and detailed federal] scheme are presumably left subject to the disposition provided by state law."); Gregory M. Dickinson, Chevron*'s Sliding Scale in* Wyeth v. Levine*, 129 S. Ct. 1187 (2009)*, 33 HARV. J.L. & PUB. POL'Y 1177, 1187 (2010) ("[T]he applicability of the presumption against preemption . . . is partly determined by the presence or absence of an express preemption clause.").

whether the Court should adopt a presumption against preemption when a statute does not have an express preemption clause.[119] Unlike the majority, Justice Thomas did not take the position that "the presumption should apply in a case such as this one, where Congress has not enacted an express-pre-emption clause."[120] However, he agreed with the majority's narrow reading of impossibility preemption, citing cases that required "state law [to] penaliz[e] what federal law requires" or "where compliance with both federal and state regulations is a physical impossibility."[121]

But Justice Thomas especially criticizes the majority's position that a state law that presents an obstacle to federal purposes and objectives must be preempted.[122] He revisits the case that first promulgated this doctrine, *Hines v. Davidowitz*,[123] and reiterates Justice Stone's concern that "state power would be improperly diminished through a pre-emption doctrine driven by the Court's 'own conceptions of a policy which Congress ha[d] not expressed and which is not plainly to be inferred from the legislation which it ha[d] enacted.'"[124]

Under Justice Thomas's approach, the Court's decision in *Geier* should be overturned for the same reasons. He argued that "[t]he Court's decision in *Geier* to apply 'purposes and objectives' pre-emption based on agency comments, regulatory history, and agency litigating positions was especially flawed," particularly in light of the statute's savings clause.[125] This form of preemption "allowed th[e] Court to vacate a judgment issued by another sovereign based on nothing more than assumptions and goals that were untethered from the constitutionally enacted federal law."[126]

While Justice Thomas agrees with the result in *Wyeth*, he strongly criticizes the Court's reasoning, asserting that there is "no factual basis for the assumption underlying the Court's 'purposes and objectives' pre-emption jurisprudence that *every* policy seemingly consistent with federal statutory text has necessarily been authorized by Congress and warrants pre-emptive effect."[127] Instead, the Supremacy Clause should "accor[d] pre-emptive effect to only those policies that are actually authorized by and effectuated through the statutory text."[128] Otherwise, "the Court's pre-emption jurisprudence [will] facilitat[e] freewheeling, extratextual, and broad

119. *Wyeth*, 129 S. Ct. at 1208 n.2 (Thomas, J., concurring).

120. *Id.*

121. *Id.* at 1209 (internal quotation marks and citations omitted).

122. *Id.* at 1211.

123. 312 U.S. 52 (1941).

124. *Wyeth*, 129 S. Ct. at 1212 (Thomas, J., concurring) (alterations in original) (quoting *Hines*, 312 U.S. at 75 (Stone, J., dissenting)).

125. *Id.* at 1214.

126. *Id.* at 1215.

127. *Id.* at 1216 (emphasis added).

128. *Id.*

evaluations" of federal policy.[129] Congress has the tools necessary to preempt state law—the Court should require it to go through the constitutionally mandated process.

Justice Thomas's argument for preemption resembles the debate over strict textualism, which remains far from settled. Textualists typically advocate looking at outside sources only to resolve ambiguities.[130] When assessing federal preemption, however, the conservative Justices, other than Justice Thomas, switch their positions on textualism and strike down laws that do not facially conflict with the plain meaning of the text of a federal statute.[131] This is arguably because the laws that the conservatives are preempting are plaintiff friendly.[132] Justice Thomas's clear-line approach could curtail the appearance that the Justices are deciding preemption cases based on their preferred outcomes.

3. The Dissent Argued that the FDA, Not State Tort Juries, Should Determine the Policy.—The dissent, authored by Justice Alito, cautioned that "tragic facts make bad law."[133] The dissent argued that Congress intended for the FDA to create uniform drug regulations to determine whether a drug is safe.[134] If the federal policy of uniformity did not preempt state tort laws, then the balance between safety and efficacy would erode.[135] The dissent argued that the FDA has a better vantage point to see the entirety of data while individual juries only see the negative results without seeing the drug's benefits.[136] This was crucial in *Geier*, and the dissent argued that this case should have the same result.[137]

Apparently the other Justices did not find Justice Thomas's philosophy palatable—neither the majority nor the dissent adopted his narrow view of

---

129. *Id.* at 1217.

130. *See, e.g.*, John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 84–85 (2006) ("In fact, in cases of ambiguity, textualists are sometimes willing to make rough estimates of purpose from [certain outside] sources."). Consulting legislative history and other outside sources may be a double-edged sword. *See* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 368–70 (1994) (noting that legislative history sometimes broadens the field of argument by impeaching clear statutory text and sometimes narrows the field of argument by resolving textual ambiguity).

131. Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEXAS L. REV. 1, 37, 42 (2004).

132. For an interesting article that examines the relationship between the politics of law being struck down and the likelihood that a Justice will strike it down, see Rorie Spill Solberg & Stefanie A. Lindquist, *Activism, Ideology, and Federalism: Judicial Behavior in Constitutional Challenges Before the Rehnquist Court, 1986–2000*, 3 J. EMPIRICAL LEGAL STUD. 237 (2006). This article provides empirical evidence suggesting that conservative justices are more likely to strike down liberal laws and liberal justices are more likely to strike down conservative laws. *Id.* at 257 & fig.3.

133. *Wyeth*, 129 S. Ct. at 1217 (Alito, J., dissenting).

134. *Id.* at 1218–19.

135. *Id.*

136. *Id.* at 1229–30.

137. *Id.* at 1220–21.

the Supremacy Clause. But his position is consequential because his unique methodology may position him as the swing vote in preemption cases. He appears much more likely to concur with the liberal Justices and permit state tort suits, which changes the Court's voting dynamic. Although the liberal Justices and Justice Thomas use different methods, they will often arrive at the same result. The liberal Justices' tendency to find no preemption coupled with Justice Thomas's reticence on implied preemption may mean that state tort laws are less likely to be found preempted in the future.[138]

C. *Altria Group, Inc. v. Good*

While the two previous cases suggest that preemption depends on whether federal law contains an express preemption clause, the final case demonstrates that even with an express preemption clause, the Court may hold that the state law is not preempted. In *Altria Group, Inc. v. Good*, the Supreme Court affirmed the First Circuit's holding that the Federal Cigarette Labeling and Advertising Act (Labeling Act) did not preempt the Maine Unfair Trade Practices Act (MUTPA) even though the Labeling Act contained an express preemption clause.[139] The plaintiffs alleged that Altria

---

138. *See* Young, *supra* note 131, at 39–50 (describing the "weak autonomy model" to which the liberal justices subscribe in preemption cases). Notably, Professor Young highlights how "[o]rdinarily pro-states Justices forget about federalism in preemption cases, and generally nationalist Justices suddenly remember it." *Id.* at 42. While Justice Thomas may not have convinced his colleagues to join his position, commentators have argued that his position may be influential for examining agencies' rules and interpretations that may preempt state law. *See The Supreme Court, 2008 Term—Leading Cases*, 123 HARV. L. REV. 153, 268 (2009) (asking if *Wyeth* affects "whether courts should defer to agency preemption determinations and . . . what level of deference should be accorded in light of the preemption doctrine's countervailing federalism concerns"); Eric Policastro, Comment, *Saying Goodbye to Implied-Federal Preemption: The Contemporary Scope of Federal Preemption in Light of* Geier, Riegel, *and* Wyeth, 61 BAYLOR L. REV. 1028, 1052 (2009) (arguing that federal agencies will now have a harder time preempting state laws and that implied conflict preemption may no longer be viable). Policastro uses President Obama's directive, issued on May 20, 2009, as evidence that agencies will have a harder time preempting state law. *Id.* at 1050–52. President Obama's directive declared that "executive departments and agencies have sometimes announced that their regulations preempt State law" and that "preemption of State law by [them] should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption." Memorandum on Preemption, 2009 DAILY COMP. PRES. DOC. 384 (May 20, 2009). *Wyeth* dealt with the preemptive effect of an agency regulation that, unlike *Geier*, did not go through formal rulemaking. And while the Court will probably not adopt the drastic opinion that using legislative history and other extratextual findings to preempt state laws is unconstitutional, the reasoning, applied to agency decisions, is more appealing. Professor Mota, after examining the Court's recent decisions, stressed that Congress must now "explicitly spell out what is preempted, and even what is not preempted, to avoid further time consuming and expensive litigation." Sue Ann Mota, *Federal Preemption After* Medtronic, Altria Group, *and* Wyeth, 35 OKLA. CITY U. L. REV. 147, 166 (2010).

139. Altria Grp., Inc. v. Good, 129 S. Ct. 538, 541 (2008). Justice Stevens wrote the majority opinion, which was joined by Justices Kennedy, Souter, Ginsburg, and Breyer. *Id.* at 540–41. This same group of justices formed the majority in *Wyeth*. 129 S. Ct. at 1190. Justice Thomas, who concurred with the same group as the majority in *Wyeth*, wrote the dissenting opinion in *Altria*. *Id.* at 1204–17 (Thomas, J., concurring); *Altria*, 129 S. Ct. at 551–63 (Thomas, J., dissenting). Justice

ran fraudulent advertisements for its cigarettes, manufactured by Philip Morris, by claiming that its "light" cigarettes delivered lower levels of tar and nicotine than regular brands despite knowing that this was untrue.[140] The plaintiffs argued that the defendants knew that light cigarette smokers unconsciously engaged in compensatory behavior, which negates the lower levels.[141] The district court held that *Cipollone v. Liggett Group, Inc.*,[142] which held that state failure-to-warn and warning-neutralization claims were preempted by the Labeling Act, required it to find preemption.[143]

Although the Labeling Act contains an express preemption clause, an express preemption clause "does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains."[144] While the Labeling Act's preemption clause suggests that Congress determined that the federal warnings are "both necessary and sufficient to achieve its purpose of informing the public of the health consequences of smoking," it did not preempt the MUTPA claims.[145] The Court determined that "[n]othing in the clause suggests that Congress meant to proscribe the States' historic regulation of deceptive advertising practices."[146] As the Labeling Act's purposes did not present a direct conflict, the Court turned to whether the text of the Act required preemption.[147]

The Court distinguished this case from *Cipollone* because the state law here "has nothing to do with smoking and health."[148] This distinction accentuates the difficulty in drawing clear lines. The Court acknowledged its potential shortcomings, noting that its "analysis of these claims may lack 'theoretical elegance,' [but] we remain persuaded that it represents 'a fair understanding of congressional purpose.'"[149] This ambiguity stems from the Court according different levels of breadth on perceived congressional purposes.[150] The Court found that the MUTPA focused on a duty not to

---

Thomas was joined in *Altria* by Justices Scalia and Alito, and by Chief Justice Roberts. *Altria*, 129 S. Ct. at 551 (Thomas, J., dissenting).

140. *Id.* at 541 (majority opinion).

141. *Id.*

142. 505 U.S. 504 (1992).

143. *Altria*, 129 S. Ct. at 542.

144. *Id.* at 543.

145. *Id.* at 544.

146. *Id.* at 545 n.6.

147. *Id.* at 545.

148. *Id.* The Court in *Cipollone* suggested that positive state law requiring additional labeling requirements would be preempted by the 1965 Act, in holding that a private state tort claim was not preempted by the Act. *See* Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 518–19 (1992) (arguing that the 1965 Labeling Act "is best read as having superseded only positive enactments by legislatures or administrative agencies that mandate particular warning labels").

149. *Altria*, 129 S. Ct. at 547–48.

150. *Compare Cipollone*, 505 U.S. at 524 (taking a narrow reading for the Labeling Act's preemption clause), *with* Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 222, 232 (1995) (holding that

deceive rather than on imposing new safety requirements and held that the Labeling Act's narrow preemption clause did not abrogate the plaintiffs' claims.[151]

The dissent attacked the Court's inarticulate test for preemption, reiterating complaints in the dissent in *Cipollone*.[152] In cases after *Cipollone*, Justice Thomas argued that lower courts have had difficulty applying its holding and that the Court's "recent pre-emption decisions have undermined, and in some cases overruled, central aspects of the plurality's atextual approach to express pre-emption."[153] This claim-by-claim approach focuses on whether it is predicated on a duty "based on smoking and health" or on a "more general obligation."[154] Instead of following the plurality in *Cipollone*, Justice Thomas agreed with Justice Scalia that because "Congress had expressed its intent to pre-empt state law by enacting [the preemption clause], the Court's 'responsibility [was] to apply to the text ordinary principles of statutory construction.'"[155]

This conforms to Justice Thomas's approach in the other preemption cases—he grants full effect to preemption clauses, which may require an expansive reading of the preemption clause, but he refuses to provide similar effect when Congress does not include one. Full effect may require the Court to consider implied preemption to supplement the clause, or it would "place[] a heavy burden of exactitude on Congress when it wishes to say anything about pre-emption."[156]

According to Justice Thomas, the key question is whether Congress expressed its intent to preempt state law by using an express preemption clause. If it did use a preemption clause, then the Court should not try to find a loophole for sympathetic plaintiffs that allows recovery contrary to federal policy. If Congress did not enact a preemption clause, then the federal policies did not go through the constitutionally mandated process and are thus prevented from receiving preclusive effect from the Supremacy Clause. While this approach would provide greater direction to the lower courts, no Justice joined Justice Thomas's opinion, and the lower courts must still attempt to apply the more nebulous tests from earlier preemption cases.

---

the state law contract claim was not preempted in spite of the unusually broad scope of the Airline Deregulation Act preemption provision).

151. *Altria*, 129 S. Ct. at 551.

152. *Id.* at 552 (Thomas, J., dissenting) (rephrasing Justice Scalia's complaints stated in his dissent in *Cipollone*).

153. *Id.*

154. *Id.* at 553 (internal quotation marks omitted).

155. *Id.* at 553–54.

156. *Id.* at 554 n.1.

V. Applying the Court's Emerging Preemption Jurisprudence to the Texas Wrongful Death Act

Since the Court decided *Hoffman* in 2002, the Court's preemption jurisprudence has undergone a significant transformation. Factually, *Hoffman* appears the most relevant to addressing whether beneficiaries of an illegal immigrant may receive wrongful-death damages based on lost earning capacity. But *Hoffman* dealt with two competing federal interests, not a federal and a state interest. In *Hoffman*, four Justices determined that awarding an illegal immigrant backpay based on "work not performed" that "could not lawfully have been earned" would not create an obstacle to federal immigration policy.[157] A state law allowing earnings-based damages should also not create an obstacle and therefore should not be preempted.

Additionally, in recent decisions the Court has expressed concern about usurping traditional state police powers. Because the states' interest in enforcing their tort laws exceeds the federal interest in enforcing the IRCA, courts should not extend *Hoffman* to preempt state law without performing an in-depth preemption analysis, starting with the IRCA's text. If the Labeling Act in *Altria* did not expressly preempt plaintiffs from suing about a label under state law, the IRCA's express preemption clause cannot reasonably preempt suing for wrongful-death damages. Even Justice Thomas, the outspoken proponent of express preemption clauses, should agree with this result. If the Court were to expand the IRCA's preemption clause restricting state sanctions to cover civil liabilities like wrongful-death suits, the Court would be taking impermissible interpretive licenses, arguably to reach its desired result. Because the WDA differs so greatly from the subject matter of the IRCA, courts must only consider implied preemption. Courts should only preempt state law if the two laws directly conflict—either in making compliance with both impossible or creating an obstacle for federal policy—or if the state law invades a field that the federal government occupies.

The three recent Supreme Court cases—especially Justice Thomas's concurrence in *Wyeth*—may signal that courts need to alter their approach to preemption. In *Riegel*, eight Justices found that the MDA preempted the state law, but in *Wyeth* and with similar facts, six Justices determined that the FDCA did not preempt state laws. The different outcomes stemmed from two strong presumptions: (1) the lack of an express preemption clause in the FDCA favors retaining state laws[158] and (2) "'the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"[159] While in *Wyeth* the Court held

157. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 160 (2002) (Breyer, J., dissenting).

158. Wyeth v. Levine, 129 S. Ct. 1187, 1200 (2009).

159. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). The Court in *Wyeth* also quoted this passage. *Wyeth*, 129 S. Ct. at 1194–95.

that the general presumption against preemption applies in all preemption cases, it said in *Altria* that the presumption applies with particular force in areas of traditional state authority. These two presumptions, working in concert, would support a holding that the IRCA does not preempt the WDA.

In *Altria*, the Court held that the Labeling Act did not preempt the MUTPA despite the Labeling Act's express preemption clause.[160] Even with an express preemption clause, the Court still undertakes preemption analysis. This philosophy did not originate in *Altria*; in *Cipollone*, the Court held that express preemption clauses should be narrowly construed.[161] The state law in question prohibited deceptive advertising—the plaintiffs alleged that light cigarettes were fraudulently depicted as safer—which is much more related to the Labeling Act than the WDA is to the IRCA. Thus even with a more express preemption clause, claims under the WDA would arguably not be preempted. An expansive express preemption clause that covered civil liabilities would create absurd results. An undocumented employee could work for an employer, the employer could refuse to pay the worker at all, and the employee would be left without recourse. However, because the IRCA's express preemption clause is much narrower and only applies to sanctions, not liabilities, the analysis is much simpler. It requires a two-step process: (1) Does the WDA conflict with the IRCA's policy? and (2) If the WDA conflicts with the IRCA's policy, must the federal law abrogate the state law?

A. What Is the Correct Scope of the IRCA's Policy?

In *Hoffman*, five Justices interpreted the IRCA's scope broadly and held that awarding backpay frustrated the IRCA's purpose[162] while the other four Justices argued that it did not.[163] But will this same split be repeated with the added federalism concerns and the presumptions against preempting a generally applicable state law? Two factors must be considered: (1) whether any of the four dissenting Justices would change their position to follow the *Hoffman* precedent[164] and (2) whether any of the Justices in the majority in *Hoffman* would switch their position now that a broad policy reading would abrogate a generally applicable state tort law promulgated under the state's traditional police power.[165]

---

160. *Altria*, 129 S. Ct. at 541.

161. *See* Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 518 (1992) ("[T]he presumption against the pre-emption of state police power regulations . . . reinforces the appropriateness of a narrow reading . . . .").

162. *Hoffman*, 535 U.S. at 151–52.

163. *Id.* at 155 (Breyer, J., dissenting).

164. This question is not precise because two of the dissenting Justices, Justice Souter and Justice Stevens, have left the Court. They were replaced by Justice Sotomayor and Justice Kagan, respectively. For this Note I, perhaps erroneously, assume that the new Justices will view the policy in the same way as their predecessors.

165. This question presents the same problem: Chief Justice Rehnquist and Justice O'Connor have left the Court, with Chief Justice Roberts and Justice Alito replacing them. As with the liberal

It is unlikely that the four dissenting Justices would change their minds and follow the *Hoffman* precedent elucidating the IRCA's policy. Professors Spaeth and Segal have gathered empirical evidence that Justices do not switch their views based on precedent, so if a Justice dissents in one case, that Justice almost always votes the same way in a similar case.[166] Thus, four Justices would most likely not find a conflict, and without a conflict, there is no preemption. But they would still need one more vote for a majority.

Two Justices might flip sides: Justices Kennedy and Thomas. They might do so, however, for different reasons. Justice Kennedy joined the majority opinion in *Hoffman* and may feel constrained by his earlier position concerning the scope of the IRCA's policy. But *Hoffman* addressed two federal laws and Justice Kennedy did not have the incentive to take a narrow view. In some cases addressing preemption, Justice Kennedy has taken narrow views of federal policy, which would allow plaintiffs to sue under state tort law. And here, because the Court would be considering whether the IRCA conflicts with a state law, the Court could distinguish *Hoffman* without overruling it. Justice Kennedy may thus argue that the Court should take a more narrow view of federal policy for preemption considerations than it does for conflicting federal law.

B. If the WDA Creates an Obstacle for the IRCA's Policy, Should It Be Abrogated?

If Justice Kennedy does not adopt a more restrained reading of the IRCA's federal policy, the four liberal Justices could still convince Justice Thomas to join their result. Because the IRCA contains an express preemption clause, albeit narrow, Justice Thomas may find preemption. But Justice Thomas argues only for express preemption "actually authorized by and effectuated through the statutory text."[167] The IRCA preemption clause does not actually authorize preempting state wrongful-death suits, only "civil or criminal sanctions."[168] Under the clause's plain meaning, wrongful-death suits are not preempted, and with Justice Thomas's reticence toward implied preemption, he could also uphold the state law even if he believes it conflicts with federal policy.

So there are two ways for the Court to take the opposite view of *Hoffman* and allow recovery based on an illegal immigrant's lost earning capacity: (1) narrow the scope of the IRCA's policy or (2) strictly construe the language of an express preemption clause and then find an absence of

---

Justices, I assume that the new conservative Justices will vote in the same manner as their predecessors.

166. *See generally* HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL 287–315 (1999) (presenting empirical evidence that U.S. Supreme Court Justices rarely shift their voting behavior toward established precedent after previously dissenting from it).

167. Wyeth v. Levine, 129 S. Ct. 1187, 1216 (2009) (Thomas, J., concurring).

168. 8 U.S.C. § 1324a(h)(2) (2006).

implied preemption based on a state law conflicting with federal policy. While either way is possible (if not likely), only one is necessary.

VI. Conclusion

If Congress intends to preempt state law, then it has the device to do so—an express preemption clause. And when Congress does include an express preemption clause, the courts should read it for its plain meaning. This does not require an impossible level of exactness from Congress, but when Congress wants to preempt traditional, generally applicable state laws, it must explicitly say so. If courts can cherry-pick from legislative history, they can actively pursue the result they prefer whether or not an express preemption clause exists. Allowing courts to use material that did not go through the constitutionally mandated process for enacting legislation creates bad policy and infringes upon the Legislative Branch.

Because the IRCA contains a narrow express preemption clause, courts should look to the text of the statute. It does not expressly preempt civil liabilities, likely because Congress did not believe that allowing state tort laws to stand would threaten its immigration policy. Further, even if these laws' tangential effects frustrated the immigration policy, preempting all state liabilities would create absurd results. In the twenty-five years since enacting the IRCA, Congress has not attempted to amend the Act to preempt state claims. In *Hoffman*, Justice Breyer argued that denying recovery to illegal immigrants would increase the magnetic force of the U.S. economy by increasing the pull from employers. The majority's counter—the NLRB has other punishments at its disposal—is inapplicable in a wrongful-death case. If an employer can escape civil tort liability, then nothing will deter it from repeating its conduct. So even if allowing an illegal immigrant or his decedents to recover would increase a foreigner's desire to illegally enter the United States, the reduction in employers' incentives to hire illegal immigrants outweighs it.

No doctrine of preemption should deny recovery under the WDA. The IRCA does not expressly preempt civil tort suits, and the texts of the WDA and the IRCA do not directly conflict. Even if creating an obstacle to a federal policy remains a viable form of preemption, denying beneficiaries the right to sue under the WDA would obstruct the federal policy of decreasing the magnetic pull between illegal immigrants and the United States. Courts should give full effect to the language of preemption clauses, but in areas of traditional, generally applicable state tort law—like the WDA—they should require a strong relationship between the federal and state laws.

Mark J. Tindall

* * *

JAMAIL CENTER FOR LEGAL RESEARCH
TARLTON LAW LIBRARY
THE UNIVERSITY OF TEXAS SCHOOL OF LAW

The Tarlton Law Library Oral History Series features interviews with outstanding alumni and faculty of The University of Texas School of Law.

Oral History Series

No. 1 - *Joseph D. Jamail, Jr.* 2005. $20
No. 2 - *Harry M. Reasoner* 2005. $20
No. 3 - *Robert O. Dawson* 2006. $20
No. 4 - *J. Leon Lebowitz* 2006. $20
No. 5 - *Hans W. Baade* 2006. $20
No. 6 - *James DeAnda* 2006. $20
No. 7 - *Russell J. Weintraub* 2007. $20
No. 8 - *Oscar H. Mauzy* 2007. $20
No. 9 - *Roy M. Mersky* 2008. $25

Forthcoming:

Gloria Bradford, Patrick Hazel, James W. McCartney, Michael Sharlot, Ernest E. Smith, John F. Sutton, Jr.

Other Oral Histories Published by the Jamail Center for Legal Research

Robert W. Calvert (Texas Supreme Court Trilogy, Vol. 1). 1998. $20

Joe R. Greenhill, Sr. (Texas Supreme Court Trilogy, Vol. 2). 1998. $20

Gus M. Hodges (Tarlton Law Library Legal History Series, No. 3). 2002. $20

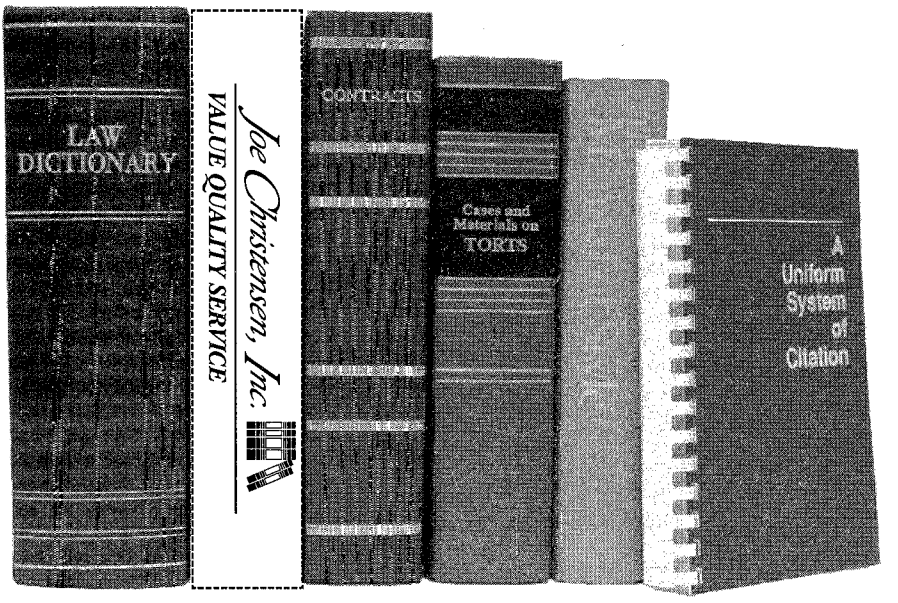
Corwin Johnson (Tarlton Law Library Legal History Series, No. 4). 2003. $20

W. Page Keeton (Tarlton Legal Bibliography Series, No. 36). 1992. $25

Jack Pope (Texas Supreme Court Trilogy, Vol. 3). 1998. $20

Order online at http://tarlton.law.utexas.edu/ click on Publications
or contact Publications Coordinator,
Tarlton Law Library, UT School of Law,
727 E. Dean Keeton St., Austin, TX 78705

phone (512) 471-6228; *fax* (512) 471-0243;
email tarltonbooks@law.utexas.edu



We Complete the Picture.

In 1932, Joe Christensen founded a company based on Value, Quality and Service. With 77 years of printing experience, Joe Christensen, Inc. remains the most experienced Law Review printer in the country.

Our printing services bridge the gap between your editorial skills and the production of a high-quality publication. We ease the demands of your assignment by offering you the basis of our business—customer service.

Joe Christensen, Inc.

1540 Adams Street
Lincoln, Nebraska 68521-1819
Phone: 1-800-228-5030
FAX: 402-476-3094
email: sales@christensen.com

Value

Quality

Service

Your Service Specialists

* * *

* * *

* * *

Texas Law Review

The Greenbook: Texas Rules of Form

Twelfth Edition

A comprehensive guide for Texas citation, newly revised in 2010.

Texas Law Review

Manual on Usage & Style

Eleventh Edition

A pocket reference guide on style for all legal writing.

School of Law Publications
University of Texas at Austin
727 East Dean Keeton Street
Austin, Texas USA 78705
Fax: (512) 471-6988 Tel: (512) 232-1149
Order online: http://www.texaslawpublications.com


TEXAS
TLR
LAW REVIEW