GUARDIANS OF THE BACKGROUND PRINCIPLES

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ABSTRACT

The debate over statutory interpretation often breaks down into a battle among textualists, intentionalists, and purposivists. But another consideration in statutory interpretation that is distinct from all three is the degree of importance given to substantive background principles of law. This Essay explores the potential for use of these "field-specific canons of construction" by administrative agencies. The Essay concludes that the institutional characteristics of agencies, particularly their specialized expertise, put them in a particularly good position to discern and utilize field-specific background principles as a tool of statutory construction.

INTRODUCTION

The literature on administrative statutory interpretation is sparse—as recently as 2005 Jerry Mashaw observed that "virtually no one has even asked, much less answered, some simple questions about agency statutory

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interpretation."[1] However, one point of agreement is that if there is to be a distinctive *methodology* for administrative statutory interpretation, it should take its content from the distinctive *institutional characteristics* of administrative agencies.[2] Scholarly writing on administrative statutory interpretation has catalogued some distinctive characteristics of agencies, such as their special "closeness to the legislative process,"[3] or their control over their interpretive agenda that results from their status as "active implementers" rather than "passive interpreters."[4] The scholarship has gone on to consider the implications of these characteristics for agency interpretive methodology.[5]

This Essay examines the methodological implications that follow from one of the distinctive characteristics of administrative agencies, namely, their deep engagement with and knowledge of their organic statutes. The Essay argues that this distinctive degree of knowledge puts agencies in a particularly good position to utilize an interpretive method which gives special weight to substantive background principles of law and which understands the meaning of statutory text in light of such background principles. This method, while recognizing the importance of statutory text and congressional intent, also recognizes that another vital consideration is that of maintaining a sound and coherent legal structure. In appropriate cases, an interpreter using this methodology will determine that the most important consideration in interpreting a statute is ensuring that the statute makes sense in light of the background principles of the field of law of which the statute forms a part.

These background principles, this Essay emphasizes, are distinct from many of the "canons of construction" used in statutory interpretation. The canons—particularly those favored by textualist interpreters—tend to be transsubstantive; that is, they are general principles of interpreting text that

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1. Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 501-02 (2005).

2. *E.g.*, *id.* at 503 (examining "the position that responsible administrators should take toward statutory interpretation given their position in the American constitutional order . . . and the practical necessities of administration"); Peter L. Strauss, *When the Judge is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 321 (1990) (noting numerous differences between the characteristics of administrative agencies and courts); *see also* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 61 (2006) ("[I]nterpretive rules must be chosen in light of *institutional capacities*.").

3. Strauss, *supra* note 2, at 346.

4. Mashaw, *supra* note 1, at 513.

5. *E.g.*, Strauss, *supra* note 2, at 347 (suggesting that the agencies' participation in the legislative process puts them in a better position than courts to make proper use of legislative history).

apply to statutes regardless of the subject matter.[6] The background principles referred to here are substantive in nature. They are specific to particular fields of law. They tilt the interpretive playing field in favor of particular results, namely, those that are in keeping with the usual practices in the area of law involved. If these principles are to be regarded as canons of construction, they would have to be distinguished as the "field-specific canons." Administrative agencies, being each expert in their particular field of law, are in the best position to discern and utilize these field-specific canons.

Part I of this Essay describes the interpretive method of using background principles of law as an influence on statutory interpretation and explores the use of this method in the context of administrative statutory interpretation. Part II provides some examples of this method in action. Part III draws lessons for agencies, courts, and Congress.

I. THE USE OF BACKGROUND PRINCIPLES IN STATUTORY INTERPRETATION

A. Background Principles, or "Field-Specific Canons of Construction"

The ongoing debate over statutory interpretation tends to break down into a debate between textualists on one side and intentionalists and purposivists on the other. Textualists believe that courts are bound by the text of statutes, regardless of what the enacting legislature might have intended, because "[t]he text is the law, and it is the text that must be observed."[7] Intentionalists, by contrast, seek to discover and implement the intent of the legislature.[8] Although they recognize statutory text as a critical indicator of legislative intent, they also recognize that "in rare cases the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, and those intentions must be controlling."[9] Purposivists attempt to "[d]ecide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved; and then . . . [i]nterpret the words of the statute immediately in question so as to carry out the purpose as best it can."[10]

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6. *See infra* Part I (noting that textualists use some substantive canons, such as the rule of lenity, but regard them with a certain degree of suspicion).

7. ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 22 (Amy Gutmann ed., 1997).

8. *See* Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 281, 301 (1990).

9. Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982).

10. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1374 (William N. Eskridge & Philip P.

In some of my prior interpretation scholarship,[11] I have tried to call attention to another important force in statutory interpretation—one that cuts across all these different schools of thought. Courts, my work has suggested, may interpret, bend, or even depart from statutory text, not necessarily in light of anything that could realistically be called the legislative intent or purpose behind the statute interpreted, but rather in light of the *background principles* of the relevant field of law.[12] Courts discern these background principles from the entire body of legal sources that make up the relevant field of law, and, in appropriate cases, these principles may be the most important consideration in statutory interpretation.[13] In rare cases, courts may give so much weight to the background principles that they will override even apparently clear statutory text.[14] In doing so, courts act as a repository of the principles developed over the years in a field of law and help to maintain coherence in the law.[15]

I have previously referred to this interpretive methodology as "contextualism."[16] This has not turned out to be a good name, since the name is easily confused with the simpler notion that text should be understood in context, which everyone accepts.[17] The distinctive point of the method described is that of paying particular attention to one specific element of context, namely, the context provided by the background principles of the relevant field of law.

The use of these background principles is distinct from the interpretive methodologies used by textualists, intentionalists, or purposivists. Textualists, naturally, focus on tools of textual analysis. While they recognize the importance of understanding text in context,[18] they tend to prefer contextual tools that emphasize what John Manning calls the "semantic context" over the "policy context"; that is, textualists look to context to understand the ordinary usages of statutory words rather than to understand the policies

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Frickey eds., 1994). Hart and Sacks immediately add the qualification that the court should make sure "that it does not give the words . . . a meaning they will not bear." *Id.*

11. Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023 (1998) [hereinafter Siegel, *Textualism and Contextualism*]; Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 GEO. WASH. L. REV. 309 (2001) [hereinafter Siegel, *Statutory Drafting Errors*].

12. Siegel, *Textualism and Contextualism*, *supra* note 11, at 1031; Siegel, *Statutory Drafting Errors*, *supra* note 11, at 348.

13. Siegel, *Textualism and Contextualism*, *supra* note 11, at 1060.

14. *Id.* at 1041-49.

15. *Id.* at 1107; Siegel, *Statutory Drafting Errors*, *supra* note 11, at 333.

16. Siegel, *Textualism and Contextualism*, *supra* note 11, at 1032.

17. *E.g.*, SCALIA, *supra* note 7, at 37; John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 (2005).

18. *E.g.*, SCALIA, *supra* note 7, at 37.

underlying statutes.[19] Thus, for example, when textualists apply "canons of construction," they tend to prefer the transsubstantive canons—those canons, such as *expressio unius* or *ejusdem generis*, that are general interpretive principles that apply to statutes regardless of subject matter and that do not favor any particular result.[20] Textualists will use some substantive canons—canons, such as the rule of lenity, that "load the dice for or against a particular result"[21]—but they view such rules with some suspicion, inasmuch as their fundamental goal is to give statutes the best textual interpretation and not to favor or disfavor any substantive outcome.[22]

By contrast, background principles are the opposite of transsubstantive. The background principles referred to here are the substantive principles of the particular field of law of which the statute to be interpreted forms a part. They do not apply to statutes generally. To the extent that they could be called canons of construction, they are *field-specific* canons. Their use favors particular results—namely, results that are in keeping with the normal practices in the field of law involved.

The use of background principles is therefore distinct from textualism. Yet reliance on background principles is not necessarily the same as intentionalist or purposivist analysis, although often it will coincide with them. The interpretive result that follows from the use of background principles often coincides with the result that would follow from intentionalist or purposivist methodology because legislatures often, even typically, intend to follow the usual principles of the relevant field of law.[23] But in a given case, the background principles might not coincide with the apparent intent or purpose behind the particular statute under consideration. Courts will sometimes give more weight to background principles than to legislative intent or purpose. The dominant focus may be on maintaining a coherent structure within the relevant field of law.[24]

A quick example, drawn from my previous study of the use of background principles in administrative law decisions,[25] will illustrate the above points. Consider the numerous administrative statutes that appear to instruct agencies to resolve specified controversies on a case-by-case basis and to

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19. John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 92-96 (2006); *see also* Siegel, *Textualism and Contextualism*, *supra* note 11, at 1043 (noting that textualists prefer to search context to "illuminate the meaning of particular words that require interpretation").

20. SCALIA, *supra* note 7, at 25-26.

21. *Id.* at 27.

22. *Id.* at 27-29.

23. Siegel, *Textualism and Contextualism*, *supra* note 11, at 1103.

24. *See, e.g.*, *id.* at 1049-54 (providing examples).

25. *See id.*

hold an administrative hearing in each case.[26] Courts have resisted the straightforward, textual reading of these statutes. In interpreting these statutes, courts have consistently given great weight to a background principle of administrative law. The principle is that administrative hearings are appropriate when an administrative decision turns on disputed *facts*.[27] In light of this background principle, courts have consistently permitted administrative agencies to adopt general rules that cut off the need for hearings in individual cases when the facts are agreed and only points of law are at issue. Courts have done this even in the very teeth of statutes that, textually, instruct agencies to hold an administrative hearing in each case.[28]

In so doing, the courts have given more weight to the background principles of administrative law than to statutory text. Other cases show courts giving more weight to background principles than to legislative intent or purpose.[29] Thus, the use of background principles is a separate force in statutory interpretation that is distinct from textualist, intentionalist, or purposivist methods.

B. Background Principles and Administrative Agencies

In the context of this symposium, the key question is what role background principles play, or should play, in *administrative* statutory interpretation. The answer is that the use of substantive background principles as a tool of statutory construction is even more appropriate for agencies than for courts. This answer follows from the distinctive institutional characteristics of courts and agencies.

The reasons why it is appropriate for *courts* to use background principles as a tool of statutory construction—and particularly why courts might in some cases give these background principles so much weight that they

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26. *See id.* at 1045-49. Perhaps the most striking example was considered in *United States v. Storer Broadcasting*, 351 U.S. 192 (1956), in which the statutory text stated that whenever the Federal Communications Commission denied an application for a broadcast license, it was to "formally designate the application for hearing." *Id.* at 195-96 n.5 (quoting 47 U.S.C. § 309(b) (1952)).

27. Siegel, *Textualism and Contextualism*, *supra* note 11, at 1045-48.

28. *Id.* Even in *Storer Broadcasting*, in which the statutory text required a hearing whenever the Federal Communications Commission denied an application for a broadcast license, the Supreme Court permitted the agency to deny hearings in cases in which the applicant already owned the maximum number of broadcast stations permitted by the agency's rules. 351 U.S. at 202.

29. For examples of cases in which courts have privileged background principles of law above apparent legislative intent or purpose, see Siegel, *Textualism and Contextualism*, *supra* note 11, at 1049-54.

would outweigh statutory text—depend on institutional features of courts.[30] Several such features are relevant. First, courts engage statutes after their enactment, typically at the moment of their application to particular cases, as opposed to legislatures, which necessarily act prospectively and generally. Courts also consider discrete issues regarding the interpretation of a statute. These features of the judicial process put courts in a good position to detect unusual statutory deviations from background principles. As I have previously demonstrated, one important source of statutory deviation from background principles is legislative inattention or error.[31] The hurly-burly of the legislative process, and the need for an up-or-down vote on a whole statute at a particular time, permits such errors to slip through.[32] In the judicial setting, the focus can be placed on a single issue, and the court can take such time as is needed to consider the issue. This promotes the discovery of deviations from background principles that can provide the crucial clue that statutory text resulted from drafting error.

Courts are also skilled at "discerning principles of law and at working out the demands of the ever changing legal topography."[33] This is the very essence of the method of employing background principles. The demand for reasoned explanation of judicial decisions, as opposed to the unexplained logrolling permitted in the legislative process, gives courts an institutional advantage in the function of maintaining coherence in the law.[34]

Finally, courts have institutional advantages with regard to their knowledge of certain areas of law. I have most thoroughly explored the use of background principles in statutory construction with regard to administrative law and civil procedure statutes.[35] These are areas in which courts have played an important role in the development of the law and in which courts could be expected to have deep knowledge of the applicable field-specific canons.[36] Unlike Congress, which considers general administrative law or civil procedure principles only sporadically, courts deal with them all the time and can therefore play a useful role in maintaining coherence in these areas of law.

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30. *See id.* at 1107-08; Jonathan R. Siegel, *Judicial Interpretation in the Cost-Benefit Crucible*, 92 MINN. L. REV. 387, 420-22 (2007) [hereinafter Siegel, *Judicial Interpretation*].

31. *See generally* Siegel, *Statutory Drafting Errors*, *supra* note 11.

32. *See id.* at 341-43.

33. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 96 (1982).

34. *Id.*

35. *See* Siegel, *Textualism and Contextualism*, *supra* note 11 (exploring background principles of administrative law); Siegel, *Statutory Drafting Errors*, *supra* note 11 (exploring background principles of civil procedure).

36. *See* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 115 (1998) (noting the prevalence of judge-made law in administrative law); Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 814-15 (2008) (noting the "large body" of procedural common law).

Applying this same kind of analysis to administrative agencies shows that agencies will typically be in an even better position than courts to make good use of a field's background principles in statutory construction. Agencies will generally have the same institutional advantages as courts, plus more.

First, like courts, agencies engage statutes after enactment. Although agencies do not necessarily interpret statutes at the moment of their application—agencies also interpret statutes prospectively, as in the rulemaking process—agencies, like courts, are in a position to take the time to consider discrete interpretive questions, separated from the need for an up-or-down vote on an entire statute. As noted above, this characteristic promotes the discovery of ways in which statutory text may fail to conform with background principles.

Agencies also, like courts, typically give reasons for their interpretive decisions. Usually, agencies *must* give reasons, because an agency's interpretive decisions are typically subject to judicial review, which will demand reasons.[37] Again, the use of reason in the interpretive process promotes the development of a coherent body of law.

In addition to these features that agencies share with courts, agencies have relevant features that courts lack. Most notably, agencies are specialized. Courts may be experts in the general subject of administrative law, but, with only rare exceptions, courts lack expertise in any particular field of law presided over by an administrative agency—judges are generalists who deal with environmental law one day and banking law the next.[38] Each agency, by contrast, specializes in administering a particular statute or statutes. The agency and its staff engage that statute on a continuing basis. They are constantly implementing it and interpreting its provisions in the course of rulemaking, adjudication, and numerous other, less formal agency activities, such as providing guidance to regulated parties.[39]

This deep engagement with the statute puts the agency in a particularly good position to discern and apply the background principles of the field of law involved. Like courts, agencies will have generalized expertise in administrative law; unlike courts, agencies will also have a deep appreciation of the particularized principles of the fields of law they administer. The

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37. *See, e.g.*, Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971); SEC v. Chenery Corp., 318 U.S. 80, 94 (1943).

38. The exceptions would be courts such as the Federal Circuit, which, because of its specialized jurisdiction, might be expected to know nearly as much about patent law as the Patent Office. *See, e.g.*, Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 7 (1989) (discussing the creation of a "single forum to hear appeals from most patent disputes").

39. *See, e.g.*, Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 453 (1989) (noting that the agency "lives with the statute constantly").

Environmental Protection Agency (EPA) will know the field-specific principles of environmental law; the FCC will know the principles of telecommunications law, and so on.

Knowledge and understanding of the field-specific principles is, of course, the first necessity in applying them. Because of their continuing, pervasive engagement with their organic statutes, agencies are in the best position to know the background principles of their respective areas of law and to understand how any given provision of the organic statute fits with those principles. By applying these field-specific canons in the construction of their organic statutes, agencies can usefully produce sensible and coherent results.

Agencies also are not plagued by the "coordination" problem.[40] Judicial engagement with a particular administrative statute may occur in dozens of different courts. If one goal of using field-specific canons is to maintain coherence in the law, that goal could be thwarted if different courts take different views on the weight to be given to a particular canon in the interpretation of a particular statute. The Supreme Court, and to some extent the D.C. Circuit, provide some coordinating influence, but the process of reconciling conflicting judicial interpretations is slow and cumbersome.

An agency, by contrast, typically has nationwide responsibility for the statute or statutes it administers. If the agency, in determining the meaning of a provision of its organic statute, decides that the most important consideration is a field-specific canon in the relevant field of law—so important that it overrides statutory text and/or legislative intent or purpose—that decision is made once and is then nationally effective.[41] The agency is therefore in a better position than courts to use field-specific canons to maintain coherence in the law.

Thus the institutional characteristics of agencies, most particularly their specialized expertise, suggest that even more than courts, agencies both can and should look to field-specific background principles of law in interpreting their organic statutes. The agencies are in the best position to discern and utilize these principles. By doing so, the agencies can play a useful role in promoting sensible and coherent results in their fields of law.

II. THE FIELD-SPECIFIC CANONS IN ACTION

Describing the importance of substantive background principles in the abstract—that is, attempting a transsubstantive discussion of how agencies might use substantive principles—seems somewhat arid. A concrete example may provide a better sense of what field-specific canons are, how agen-

40. *See* VERMEULE, *supra* note 2, at 118.
41. *Id.* at 208.

cies employ them in statutory construction, and how agencies may, in some cases, give these canons more weight than statutory text, legislative intent, or purpose. The 1990 case of *Natural Resources Defense Council (NRDC) v. United States Environmental Protection Agency* provides an excellent illustration of the influence of background principles in administrative statutory interpretation.[42]

The case concerned a statutory restriction on hazardous waste disposal. In interpreting this restriction, the EPA understood the statute in light of background principles of environmental law. The case shows how the use of background principles may produce an interpretation that is distinct from what would likely follow from either textualism, intentionalism, or purposivism.

As usual, understanding the point at issue requires learning some details of a possibly unfamiliar statutory scheme.[43] Fortunately, it's not hard, and the case is even rather interesting. The careful reader will be rewarded with an improved appreciation of administrative interpretive methods.

The *NRDC* case concerned the disposal of hazardous waste by "deep injection," that is, disposing of hazardous waste by injecting it into "wells" located thousands of feet beneath the surface of the earth.[44] The Resource Conservation and Recovery Act of 1976,[45] as amended by the Hazardous and Solid Waste Amendments of 1984,[46] permitted such disposal of hazardous waste only if the Administrator of the EPA determined that the disposal would be "protective of human health and the environment for as long as the waste remains hazardous."[47] Moreover, in light of the possibility that some of the injected waste might, over time, migrate from the "injection zone," the statute imposed the following specific requirement for implementing this general safety standard:

> [A] method of land disposal may not be determined to be protective of human health and the environment . . . unless, upon application by an interested person, it has been demonstrated to the Administrator, to a reasonable degree of certainty,

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42. 907 F.2d 1146 (D.C. Cir. 1990). I became familiar with this case as a law clerk to the dissenting judge, so my views of the outcome are presumably biased. I use the case in my Administrative Law class as an illustration of what it is like to litigate a *Chevron* case in practice. I provide the students with relevant portions of the statute, the legislative history, and the administrative and judicial decisions.

43. *See* Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 354 (2005) (noting this difficulty with providing examples in statutory interpretation scholarship).

44. *NRDC*, 907 F.2d at 1149.

45. 42 U.S.C. §§ 6901-6992 (2000).

46. Pub. L. No. 98-616, 98 Stat. 3221 (codified at scattered sections of 42 U.S.C.).

47. 42 U.S.C. § 6924(f) (2000).

> that there will be *no migration of hazardous constituents from the disposal unit or injection zone for as long as the wastes remain hazardous.*[48]

The key issue in the case was the meaning of this statutory requirement. In particular, the parties (and the judges) fought over the question of whether the statutory requirement that there be "no migration of hazardous constituents from the . . . injection zone" applied without regard to the *concentration* of hazardous constituents that migrated.[49]

Understanding this question requires understanding the distinction between two key environmental law terms: "hazardous constituent" and "hazardous waste." A "hazardous constituent" is any substance on a specific list found in the Code of Federal Regulations.[50] This list is "defined by molecular formulae without reference to concentrations,"[51] so a *single molecule* of any substance on the list is a "hazardous constituent." In order for a substance to be a "hazardous waste," however, it must either display a specified hazardous characteristic[52] or it must be "capable of posing a substantial present or potential hazard to human health or the environment" in light of factors that include the concentration of hazardous constituents in the substance.[53] In other words, a substance containing even a single molecule of a listed compound contains a *hazardous constituent*, but usually the substance will be a *hazardous waste* only if the *concentration* of hazardous constituents in the substance is sufficiently high that the substance is genuinely hazardous.

This difference was critical to the controversy surrounding the "no migration" standard. In adopting rules to implement the statutory standard, the EPA in effect determined that it would permit deep injection of hazardous wastes so long as the injector could demonstrate that no *hazardous waste* would later migrate from the injection zone.[54] This interpretation

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48. 42 U.S.C. § 6924(g) (2000) (emphasis added).
49. *Id.*
50. 40 C.F.R. § 261, app. VIII (2008).
51. Natural Res. Def. Council v. EPA, 907 F.2d 1146, 1159 (D.C. Cir. 1990).
52. 40 C.F.R. § 261.11(a)(1) (2008) (referring to characteristics listed in subpart C of § 261, namely, ignitability, corrosivity, reactivity, or toxicity).
53. 40 C.F.R. § 261.11(a)(3)(ii) (2008).
54. The agency's final rule provided:

> Any person seeking an exemption from a prohibition under subpart B of this part for the injection of a restricted hazardous waste into an injection well or wells shall submit a petition to the Director demonstrating that, to a reasonable degree of certainty, there will be no migration of hazardous constituents from the injection zone for as long as the waste remains hazardous. This demonstration requires a showing that:
>
> . . . .
>
> Before the injected fluids migrate out of the injection zone or to a point of discharge or interface with USDW, the fluid will no longer be hazardous because

allowed deep injection of hazardous wastes even if some hazardous *constituents* might be expected to migrate from the injection zone, so long as the hazardous constituents did not migrate at such concentrations as to make the migrating matter a hazardous *waste*.

The NRDC sought judicial review. It claimed that the agency's regulation violated the governing statute. By a 2-1 vote, the D.C. Circuit upheld the regulation.[55]

The main point of interest is how the agency arrived at its interpretation. The interpretation was not textualist. The statutory text required that there be "no migration of hazardous *constituents* from the disposal unit or injection zone for as long as the wastes remain hazardous."[56] Even the judges who voted to uphold the agency's interpretation acknowledged that, "read literally, the 'no migration' standard would seem to prohibit the migration of even a single molecule (or perhaps an appropriate de minimis amount) for the statutory time period, even though the migrating waste is itself not hazardous at all."[57] The majority and the dissent both noted that the agency's interpretation effectively read the statute as though it permitted deep injection provided there would be no migration of hazardous *waste* from the injection zone.[58] As the dissent pointed out, if Congress had meant to forbid migration of "hazardous waste," it could have said so, but instead it forbade migration of hazardous constituents.[59] Thus, the text of the statute cut strongly against the agency's reading.

There is also considerable doubt as to whether the agency's reading implemented congressional intent or purpose. First of all, as just noted, Congress wrote a precise term of art, "hazardous constituents," into the statute. If Congress had intended to impose the rule that the agency ultimately adopted, a different term of art that would have expressed precisely that rule was readily available. Moreover, while a full analysis of other intentionalist clues (such as the legislative history and other provisions in the same statute) would be too long for this short Essay, suffice it to say that there were several indications that suggested Congress intended its "no migration of hazardous constituents" standard to mean what it said.[60]

> of attenuation, transformation, or immobilization of hazardous constituents within the injection zone by hydrolysis, chemical interactions or other means.

40 C.F.R. § 148.20(a) (2008).

55. *Natural Res. Def. Council*, 907 F.2d at 1162; *id.* at 1166 (Wald, C.J., dissenting).

56. 42 U.S.C. § 6924(g) (emphasis added).

57. *Natural Res. Def. Council*, 907 F.2d at 1159.

58. *Id.* at 1160; *id.* at 1166 (Wald, C.J., dissenting).

59. *Id.* at 1166-67 (Wald, C.J., dissenting).

60. *See id.* at 1168-73. For example, everyone agreed that a different section of the same statute did require the Administrator to determine (in certain circumstances) whether there would be any migration of hazardous constituents, regardless of concentration. See 42 U.S.C. § 6925(j)(4), which showed that Congress contemplated that such migration would be

Against the pull of both textualism and intentionalism, what did the agency have on its side? Primarily just one thing, but a powerful thing: the background principles of the relevant area of law. The relevant field-specific canon was that *concentrations matter*. The principle that concentrations matter is deeply embedded in environmental law. Environmental law defines the concept of "hazardous constituents" without regard to concentration, but it typically assigns no legal relevance to hazardous constituents per se. Hazardous constituents actually matter only if they are present at a sufficient concentration. As the agency observed when adopting its interpretation of the statute, "[t]he emphasis on concentration levels, as opposed to single molecules, is deeply established in EPA's regulations. Ordinarily the term 'hazardous constituents' has no regulatory effect unless concentrations are also considered."[61]

Moreover, this background legal principle has its roots in scientific reality. The agency noted that "wastes can be rendered nonhazardous in the sense of concentration . . . but there is no chemical reaction that will completely eliminate all molecules of some [hazardous] constituents. Thus a standard based on single molecules would not reflect the reality of chemical transformations."[62]

In short, whatever Congress may have intended by the statutory "no migration" standard, and whatever the text of the standard actually said, the idea of having the permissibility of deep injection turn on the potential for migration of single molecules of hazardous constituents did not fit into the structure of environmental regulation. Consideration of concentrations was a deeply established background principle within that structure. The agency allowed the importance of this background principle to outweigh both the text of the statute and indications of Congress's likely intent and purpose in enacting the 1984 amendments.

The reviewing court approved the agency's interpretation. Like the agency, the court noted the "exceptional character" of the statutory text, by which the court evidently meant the text's clash with the relevant field-specific canon.[63] The court said that the unusual departure from background

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legally relevant in at least some cases. Moreover, the legislative history showed that Congress knew it had imposed this strict rule. The House bill had proposed to redefine the term "hazardous constituents" so as to exclude constituents that migrated only in nonhazardous concentrations. The Conference Report stated that the conferees "explicitly reject[ed]" this redefinition. *See Natural Res. Def. Council*, 907 F.2d at 1169-70 (Wald, C.J., dissenting) (quoting H.R. REP. NO. 98-1133 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5649, 5669) (emphasis omitted).

61. Amendments to Technical Requirements for Class I Hazardous Waste Injection Wells, 53 F.R. 28118, 28122 (July 26, 1988).

62. *Id.*

63. *Natural Res. Def. Council*, 907 F.2d at 1160.

principles indicated "a need to be on guard against facile literalism."[64] The court therefore determined that the text, whatever it might seem to mean upon a literal reading, was sufficiently ambiguous that the agency's reading deserved *Chevron* deference.[65]

The generalizable lesson of the *NRDC* case is that the *most* important consideration in an agency's interpretation of a statute may be neither the text of the statute, nor the apparent intent or purpose behind it, but the background principles of the area of law that the agency administers. As is the case with judicial interpretation, scholars have argued about whether agencies should interpret statutes textually or whether they should be free to consult legislative history.[66] But, as this Essay suggests, in some cases the real question in agency interpretation may have little to do with whether the agency consults legislative history and much more to do with the weight the agency gives to background principles.[67] As the agency attempts to promote coherence in its regulatory program, it must make sense of innumerable provisions in the statute or statutes it administers. It can promote a sensible and coherent regulatory structure by interpreting particular statutory provisions in light of the background principles of its area of law.

The *NRDC* case shows that these principles are necessarily peculiar to the agency involved. They are principles of substantive law, not general, transsubstantive interpretive tools. No transsubstantive canon of construction such as *ejusdem generis* could have yielded the EPA's interpretation. The critical factor was a field-specific canon—a substantive principle unique to environmental law.

Obviously the EPA was in the best position to appreciate the principles of environmental law. It spends all its time interpreting and administering environmental law and has the most expertise in how the various provisions of environmental statutes fit together. A court will interact only episodically with environmental law,[68] and Congress too is a generalist body with many responsibilities and demands on its time. The agency's distinctive institutional characteristics put it in the best position to understand how particular statutory provisions should be interpreted in light of the field-specific canons of the area of law it administers.

It seems likely that each administrative agency discerns and deploys similar, field-specific canons appropriate to its particular field. For several

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64. *Id.*

65. *Id.*

66. *E.g.*, Strauss, *supra* note 2, at 335-51.

67. *Cf.* Siegel, *Textualism and Contextualism*, *supra* note 11, at 1030-31 (making a similar point with regard to judicial interpretation).

68. *E.g.*, Mashaw, *supra* note 1, at 511. There are a few specialty courts, such as the Tax Court, the Court of Veterans Affairs, and the Federal Circuit, but the above statement is directed at most reviewing courts.

reasons, however, it is not so easy to provide a catalogue of examples of matters in which the use of field-specific canons has influenced administrative statutory interpretation. First, it is difficult to search for such examples—it is not as though there is a West key number for cases in which an agency relies on background principles. Second, precisely because the field-specific canons are field specific, recognizing examples of their use across a variety of agencies would require a degree of expertise in the law of multiple agencies that no one author would be likely to have. Third, because statutory text as well as legislative intent and purpose will normally be congruent with a field's background principles (that is why the background principles are the background principles, after all), cases in which an agency's statutory interpretation can confidently be said to have turned on background principles, as opposed to other modes of statutory interpretation, will be the exception rather than the rule. Finally, as noted earlier, each example presented will require the reader to learn details of a different statutory scheme, and even an interested reader would probably lack the patience for numerous examples presented in the level of detail given in the *NRDC* example above.

Still, at least one additional example may be briefly noted, so as to verify that *NRDC* is not unique. My colleague Dick Pierce observed field-specific canons in action in agency interpretation in *Maislin Industries, Inc. v. Primary Steel, Inc.*[69] In that case, the Interstate Commerce Commission (ICC), in the 1980s, had to interpret Congress's command that a motor carrier "may not charge or receive a different compensation . . . than the rate specified in . . . [its] tariff."[70] Despite this apparently clear text, and despite a century of implementing a stringent "filed rate doctrine"[71] that required carriers to charge their filed rates even if they agreed on different rates with shippers, the agency determined that a carrier that negotiated a different rate with a shipper, but did not file the negotiated rate, could not later recover the (higher) filed rate from the shipper.[72] The reason, as Pierce explains at length, lay in a background principle specific to the ICC's area of specialty, rate regulation. The filed rate doctrine is appropriate in monopolistic industries to prevent monopolists from giving price breaks to their favored customers. Congress had, however, deregulated the trucking industry by 1980 so that it became competitive. The operative background principle was then

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69. 497 U.S. 116 (1990); *see* Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 766-76 (1995).

70. 49 U.S.C. § 10761(a) (1982); *see Maislin Indus.*, 497 U.S. at 120.

71. *Maislin Indus.*, 497 U.S. at 127-30.

72. *NITL—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986).

that filed rate rules apply to regulated markets but not to competitive ones.[73] In light of this principle, the ICC prohibited carriers from recovering their filed rates from shippers after negotiating different rates. The Supreme Court, however, in an opinion relying far more heavily on textual analysis than on respect for background principles, reversed the agency's interpretation.[74] As Pierce explains, the Court's failure to give effect to the relevant field-specific canon created a situation in which carriers could get away with practices that were "patently outrageous" in a deregulated market.[75]

As in *NRDC*, the agency's interpretation rested on its expert understanding of the background principles of its field of law. Both cases show that agencies are uniquely well positioned to discern and deploy the "field-specific canons" of the areas of law they administer.

III. LESSONS FOR AGENCIES, COURTS, AND CONGRESS

Having examined the use of background principles both abstractly and by example, we may ask what lessons should be drawn. The influence of field-specific canons in administrative statutory interpretation has lessons for all of the different actors in the system: agencies, Congress, and courts.

For administrative agencies, the main lesson, as one might expect, is to be alert to the usefulness of background principles as guides to statutory interpretation. By giving appropriate weight to background principles, agencies can help maintain good sense and coherence in the fields of law that they administer. The special responsibility that each agency bears for the field of law that it administers makes it particularly appropriate that the agency should play this role.

At the same time, the other lesson for agencies is to beware of the potential *dangers* of reliance on background principles. Like any interpretive methodology, reliance on background principles can be abused. In particular, agencies should not rely so strongly on background principles that they prevent Congress from departing from, or even altering, background principles when it wishes to do so. The *NRDC* case discussed in Part II, in addition to providing a striking example of the use of background principles in administrative statutory interpretation, may also provide an example of the principles' potential misuse (which is why the example of their use is so striking). At least one reading of the case is that the agency disregarded

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73. *Maislin Indus.*, 497 U.S. at 144 (Stevens, J., dissenting) ("Rules requiring adherence to predetermined prices are characteristic of regulated markets, but are incompatible with independent pricing in a competitive market.").

74. *Id.* at 135-36 (majority opinion).

75. Pierce, *supra* note 69, at 773.

Congress's likely intent and purpose, expressed in clear statutory text, because of its own desire to keep doing things in its usual way.[76]

Congress does not always act in accordance with background principles, and everyone agrees that Congress's instructions to agencies (where constitutional) must be respected.[77] An agency's specialized expertise puts it in the best position to understand Congress's instructions in light of the field-specific background principles under which the agency operates, but it also creates the much-noted danger of "tunnel vision."[78] In this context, "tunnel vision" takes the form of assuming that Congress is acting in accordance with normal background principles when it perhaps is not. Or it may mean the agency gives more weight to the importance of perpetuating background principles and maintaining coherence in the agency's field of law than to obeying Congress's instructions.

Often, giving weight to background principles has the effect of promoting fulfillment of legislative intent. The legislature usually intends to act in accordance with background principles, and startling departure from background principles in statutory text can be the clue that the text represents a drafting error.[79] But as the *NRDC* case and other examples show, reliance on background principles is not always an intentionalist mode of interpretation. The maintenance of sensible and coherent principles of law is valuable, and interpreters are right to give this value decisive weight in some cases, but agencies should also bear in mind the danger of giving so much weight to field-specific canons that they frustrate Congress's ability to exercise its powers.

The corresponding lesson for Congress is that when it wishes to depart from a background principle, it needs to make its desires especially clear. Everyone acknowledges legislative supremacy in theory, but in practice, the agency that interprets Congress's commands may give more weight to maintaining the usual structure of the relevant area of law than to statutory text or legislative intent, and a reviewing court may permit such privileging of background principles. In order to exercise its supremacy effectively, Congress must be aware of this possibility and must take appropriate measures to guard against it. Congress must maintain the best awareness of background principles that it can, and it should charge its most knowledge-

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76. This is a good place to remind the reader that my judgment of the case is probably biased. *See supra* note 42.

77. *See, e.g.*, Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 283-94 (1989).

78. *E.g.*, Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2077-78 (2008); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1174 (2008); Caleb Nelson, *Statutory Interpretation and Decision Theory*, 74 U. CHI. L. REV. 329, 359 (2007).

79. Siegel, *Statutory Drafting Errors*, *supra* note 11, at 358.

able committee staff with determining whether any statutory provisions that it desires to enact depart from or change background principles. The same staff should ensure that, when Congress desires to change a background principle or to act in a way contrary to a background principle, it will do so in a way that will not permit its desires to be misconstrued.

The best way to do this would, of course, be in statutory text. For example, when Congress passed the Hazardous and Solid Waste Amendments of 1984, it might, in forbidding migration of hazardous constituents from the injection zone, have added a phrase such as "regardless of concentration" to the statutory text to make clear that it was really forbidding migration of even individual molecules of hazardous constituents.[80] At the very least, however, the legislative history should have clearly reflected that Congress knew its new standard was contrary to background principles and that it was deliberately departing from those principles.

Of course, it is easy to say after the fact how Congress might have made any statutory text unambiguous if only it could have anticipated the interpretive question involved. So it is somewhat artificial to point out how Congress might have made the 1984 amendments or their legislative history clearer. Indeed, possibly the drafter of the amendments thought that the amendments *were* unambiguous—they used a precise technical term, "hazardous constituents," to express the standard of forbidden migration, and it should not have been necessary to add "and we really mean it."

The point, however, is that there was, even at the time of the amendments' adoption, an important clue that they would be open to misinterpretation—namely, their departure from the usual background principles of environmental law. If Congress wants its desires to be implemented, it must attempt to recognize departures from background principles at the time of their adoption and give special care to the statutory text involved. While it may seem strange to add "and we really mean it" to statutory text, or even to legislative history, express acknowledgement of the unusual character of the intended rule is the key to overcoming the natural resistance of agency implementers to departing from their usual practices.

Finally, the lesson for courts is to appreciate the superior position that agencies are in to discern and apply field-specific canons. It is no secret that courts should respect administrative statutory interpretation because of the agencies' superior expertise in their respective fields. As others have noted, the superior expertise of agencies, rather than an implicit delegation of power from Congress, may well be the true basis for *Chevron* deference.[81] This Essay suggests one mechanism by which that expertise mani-

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80. *See* 42 U.S.C. § 6924(g)(5) (2006). The words "regardless of concentration" could have been inserted after the words "injection zone."

81. *E.g.*, Cass Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 926-27 (2003).

fests itself: Agencies can best discern the field-specific background principles of the areas of law that they administer, and best deploy them in the interpretation of statutory text. In considering whether an agency interpretation passes the *Chevron* test, courts should bear in mind the value of the agency's knowledge of these background principles.

At the same time, however, courts must be alert to the danger noted above, that an agency will adhere to background principles so strongly as to frustrate legislative supremacy, or, even worse, that an agency might use background principles as an excuse to depart from statutory text to further its political agenda.[82] Under the rule of *Chevron*, a tie goes to the agency, and background principles may, as in *NRDC*, play an important role in convincing a court that what seems to be a textual win for a private petitioner is actually a tie. But courts should remain alert to their role in requiring agencies to follow Congress's clear instructions.

CONCLUSION

Although the main battles in the interpretation wars tend to be fought between those who believe that text is the determinant of statutory meaning and those who would permit interpreters to consult intent or purpose, another, often dispositive force in interpretation is the influence of field-specific background principles of law. In some cases, interpreters give more weight to these "field-specific canons of construction" than to statutory text, legislative intent, or purpose. Administrative agencies are uniquely well positioned to implement the background principles of the fields of law that they administer. We should therefore expect, and support, reliance on the field-specific canons in administrative statutory interpretation.

82. *See* Siegel, *Judicial Interpretation*, *supra* note 30, at 425-26.