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The Duty to Respond to Rulemaking Comments

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ABSTRACT. According to a familiar principle of administrative law, an agency must, when promulgating a rule, respond to significant comments that it received during the public comment period. This Essay examines the legal foundations for this duty, the policies that support it, and the circumstances in which it comes into play. It also suggests that the duty to respond to comments provides helpful context for evaluation of an agency's responsibilities following interim final rulemaking. In addition, the Essay considers the possibility of connections between the duty to respond and other familiar administrative-law doctrines, including procedural fairness and standing to sue. Overall, the Essay portrays the duty to respond to rulemaking comments as an exemplar of one manner in which the administrative process can evolve—through moderate, consensus-oriented refinement.

INTRODUCTION

The field of administrative law is constantly in flux, but some of its subfields are more dynamic than others. Currently, for example, the areas of greatest ferment include presidential removal of officers[1] and the scope of judicial review of agencies' legal interpretations.[2] Debates about those topics reflect deep ideological divisions within our polity. The area of federal rulemaking procedure is a much more stable domain. It is governed primarily by a provision of the Administrative Procedure Act (APA), § 553,[3] that has never been significantly

1. *See, e.g.*, Seila L. LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197 (2020); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010).
2. *See, e.g.*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024); Kisor v. Wilkie, 588 U.S. 558 (2019).
3. 5 U.S.C. § 553 (2018).

amended,[4] and the dominant precedents governing it were issued more than a generation ago.[5] Yet, in a less dramatic fashion, the rulemaking process continues to evolve (notably, in modern adaptations to the digital age).[6]

One point of continued development in rulemaking procedure relates to an administrative agency's obligation to respond to comments submitted during a notice-and-comment period. For decades, reviewing courts regarded this obligation as a component of substantive judicial review, relevant to a court's determination of whether an agency's rule was arbitrary and capricious.[7] About a decade ago, however, in *Perez v. Mortgage Bankers Ass'n*,[8] the Supreme Court reconceived this principle by characterizing it, for the first time, as a *procedural* duty imposed by the APA: "An agency must consider and respond to significant comments received during the period for public comment."[9] The newly formulated duty has thus become an expected step in the rulemaking process, including in cases that are not likely to be appealed.

To date, the duty to respond to comments has attracted little attention in professional commentary, whether as a principle of substantive or procedural review.[10] Yet the duty has a number of interesting features. This Essay attempts to identify and evaluate several of them. In addition, as the Essay will argue, the story of the evolution of this duty can serve as a case study illustrating a particular model of institutional reform.

Over the course of eight decades' worth of experience with the APA, courts and agencies have added a considerable interpretive gloss to the relatively skeletal text of the Act, especially in the case of its rulemaking requirements.[11] These

4. A minor amendment to the section, enacted in 2023, requires the agency to post a brief plain-language summary of a proposed rule on the internet. *Id.* § 553(b)(4).

5. *See, e.g.*, Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 523-24 (1978); United States v. Fla. E. Coast Ry., 410 U.S. 224, 226-29 (1973).

6. *See generally, e.g.*, Admin. Conf. of the U.S., Recommendation 2011-8: Agency Innovations in E-Rulemaking (adopted Dec. 9, 2011), *reprinted in* Adoption of Recommendations, 77 Fed. Reg. 2257, 2264 (Jan. 17, 2012).

7. *See infra* note 15 and accompanying text.

8. 575 U.S. 92 (2015).

9. *Id.* at 96.

10. *See* JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 342-44 (5th ed. 2012) (devoting three pages to the topic in a reference work of about 500 pages, exclusive of appendices); *see also* Admin. Conf. of the U.S., Recommendation 2011-2: Rulemaking Comments (adopted June 16, 2011), *reprinted in* Adoption of Recommendations, 76 Fed. Reg. 48789, 48791 (Aug. 9, 2011) (making no recommendation regarding agency responses to comments, although a congressional committee had apparently posed questions on that topic).

11. Ronald M. Levin, *The Evolving APA and the Originalist Challenge*, 97 CHI.-KENT L. REV. 7, 10-19 (2022).

interpretations have been, in practical effect, the creation of administrative common law.[12] The creation of common-law rules is hazardous because there is always the possibility that a court's creative elaboration will be carried to unhealthy extremes.

Nevertheless, with respect to the duty to respond to comments, courts have managed to avoid unmanageable extensions of the doctrine. The result has been a fairly stable equilibrium that seems to be supported by a consensus or near consensus among administrative-law practitioners and scholars.

In this Essay, I will discuss the doctrinal foundations of the duty, explaining some of the tradeoffs that its reception into administrative law has entailed. The doctrine serves to make agency decision-making better informed and more careful than it would otherwise be, and it also promotes public trust in the outcomes of the administrative process. A case can be made that, in some instances, the courts' pursuit of these benefits has come at too great a cost in terms of burdening the decision-making process. Such misfires probably do occur from time to time. On the whole, however, administrative-law practitioners appear to regard the duty to respond to rulemaking comments as a normal and valid component of the administrative-law system. I will also use the recent case of *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*[13] to illustrate how the duty to respond to rulemaking comments can illuminate related problems of APA implementation.

One additional prefatory comment seems appropriate. Most of the contributions to the Collection in which this Essay is being published explore relationships between procedure and fairness to individuals. This Essay presents a contrasting perspective. As a general proposition, administrative-rulemaking procedure is *not* designed to promote fairness to individual litigants. In Part V, I elaborate on that proposition and discuss some of its implications for agencies' duty to consider comments in rulemaking.

I. LEGAL FOUNDATIONS

An initial challenge is to understand how the APA can be interpreted as recognizing an administrative agency's duty to respond to rulemaking comments. During the years when this obligation was discussed solely in the context of ar-

12. *See, e.g.*, Emily S. Bremer, *The Undemocratic Roots of Agency Rulemaking*, 108 CORNELL L. REV. 69, 81-86 (2022); Jack M. Beermann, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1, 3 (2011); Gillian E. Metzger, *Foreword*, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1295, 1310-11(2012).

13. 591 U.S. 657 (2020).

bitrary-and-capricious review, the courts seemed to regard this as an easy question. Ever since the advent of widespread reliance on rulemaking to make substantive policy—which occurred in the 1960s and 1970s[14]—the courts have considered the obligation to respond to comments as a substantive requirement implicit in the concept of reasoned decision-making.[15]

But locating a *procedural* duty to respond would seem, at least at first glance, more of a challenge. Section 553(c) of the APA does require an agency to *consider* rulemaking comments,[16] but it contains no explicit mandate to write a *response* to them. As a matter of logic, the former does not necessarily entail the latter.[17] In *Mortgage Bankers*, the Court did not pause to explain its conclusion that the APA requires agencies to reply to substantial comments; it simply announced that conclusion in a rather casual fashion, in the course of summarizing the Act's rulemaking requirements.[18]

For several reasons, however, the Court's willingness to override the most natural reading of the statutory text should not be surprising. First, the courts' approach to APA interpretation has rarely reflected a strict textualist methodology. Instead, the courts appear to regard the APA as a "super-statute" (to use a

14. *See* Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1144-49 (2001).

15. "[T]he 'concise general statement' required by APA, 5 U.S.C. § 553 . . . was less than adequate. It is not in keeping with the rational process to leave vital questions, raised by comments which are of cogent materiality, completely unanswered." United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252 (2d Cir. 1977). The Second Circuit also quoted with approval, *id.*, from Auto. Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968): "We do expect that, if the judicial review which Congress has thought it important to provide is to be meaningful, the 'concise general statement of . . . basis and purpose' mandated by Section [553] will enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did." For more recent cases supporting the arbitrary-and-capricious rationale, see, for example, *Gresham v. Azar*, 950 F.3d 93, 103 (D.C. Cir. 2020), *vacated and remanded by Arkansas v. Gresham*, 142 S. Ct. 1665 (2022); and *Genuine Parts Co. v. EPA*, 890 F.3d 304, 313 (D.C. Cir. 2018).

16. 5 U.S.C. § 553(c) (2018) ("After consideration of the relevant matter presented [during the comment period], the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.").

17. *Cf.* Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3440 (Jan. 25, 2007) (requiring agencies to solicit public comments on "economically significant guidance documents" and to post responses to comments, while describing a different "[p]ublic [a]ccess and [f]eedback" process for "significant guidance documents").

18. Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 96 (2015).

term introduced by Professors Eskridge and Ferejohn)[19] and, consequently, have adopted creative interpretations of its provisions in a wide variety of contexts.[20]

More particularly, in *Mortgage Bankers* the Court presumably contemplated that § 553(c) could be interpreted broadly enough to accommodate a duty to respond. The lower courts have long subscribed to a somewhat analogous conclusion in the context of the so-called *Portland Cement* doctrine, which requires an agency to disclose scientific data underlying a proposed rule.[21] That obligation is also not explicit in the APA, but it is widely accepted and has sometimes been explained as a means of making the "consideration" required by § 553(c) meaningful.[22] So, too, the duty to respond to comments can be understood as a tool that ensures that the required "consideration" will indeed occur.[23]

One might have expected that *Vermont Yankee Nuclear Power Corp. v. NRDC*[24] would stand in the way of this creative reading of the Act. In that case, the Court articulated the general principle that courts are not free to impose procedural obligations that are not rooted in positive law such as a statute or regulation. Nevertheless, when the Court set forth its dictum regarding responding to rulemaking comments in *Mortgage Bankers*, it ignored this supposed constraint. Instead of refraining from imposing procedural obligations, the Court endorsed the requirement to respond sua sponte in a case that did not really involve this question. This indifference to *Vermont Yankee* was all the more striking in that the *Mortgage Bankers* opinion relied on *Vermont Yankee* as a reason to reject a different procedural norm that had gained some support in lower-court opinions—namely, the idea that an agency must use notice-and-comment procedure when it wishes to replace one of its interpretations of its own regulations with a different interpretation.[25]

Despite the Court's unanimity, *Mortgage Bankers* might not be the Court's last word on the duty to respond. Justice Kavanaugh, who joined the Court after *Mortgage Bankers*, has expressed a unique perspective regarding expansive interpretation of the APA rulemaking provisions. As a circuit judge, he dissented on *Vermont Yankee* grounds from the D.C. Circuit's adherence to the *Portland Cement*

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19. *See* William N. Eskridge, Jr. & John Ferejohn, *The APA as a Super-Statute: Deep Compromise and Judicial Review of Notice-and-Comment Rulemaking*, 98 NOTRE DAME L. REV. 1893, 1895-96 (2023).

20. *See* Levin, *supra* note 11, at 10-19.

21. *See* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393-94 (D.C. Cir. 1973) (Scalia, J.).

22. Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors of the Fed. Rsrv. Sys., 745 F.2d 677, 683-85 (D.C. Cir. 1984).

23. *See* Bremer, *supra* note 12, at 83 (suggesting this interpretation).

24. 435 U.S. 519 (1978).

25. *See* Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 586 (D.C. Cir.1997) (adopting this now-defunct requirement).

doctrine, suggesting that it was a misinterpretation of the Act and would unduly complicate the regulatory process.[26]

If Kavanaugh were to question the *Mortgage Bankers* dictum regarding the duty to respond to comments in a future case, however, the evidence suggests that he would have trouble attracting support from his colleagues. In 2021, four of his frequent allies on the Court's right flank—Justices Alito, Gorsuch, Thomas, and Barrett—relied on that dictum unreservedly in their dissenting opinion in *Biden v. Missouri*,[27] notwithstanding the textualist methods to which each of them professes allegiance at least some of the time.[28]

In any event, the *Mortgage Bankers* dictum could not have come as much of a surprise to administrative lawyers. They were undoubtedly familiar with the substantive-judicial-review norm discussed above, and presumably most of them had long since incorporated it into their routine working procedures for rule development. Perhaps the clearest evidence that the administrative-law community had internalized this norm was the fact that a duty to respond to rulemaking comments had already been incorporated into a variety of statutes governing rulemaking in specialized situations, including the Unfunded Mandates Reform Act and Regulatory Flexibility Act.[29] Extrapolation of these obligations to the APA, whether by amendment or interpretation, was an obvious next step. Indeed, the American Bar Association (ABA) has been on record since 1981 favoring such an amendment to § 553.[30]

In short, the *Mortgage Bankers* dictum was not so much an innovation as the official culmination of a long-developing trend. It is unsurprising, therefore, that subsequent circuit-court decisions have relied squarely on that dictum with no signs of reluctance or hedging.[31]

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26. Am. Radio Relay League v. FCC, 524 F.3d 227, 245-47 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part and dissenting in part).

27. 595 U.S. 87, 105 (2022) (Alito, J., dissenting).

28. *See, e.g.*, Biden v. Nebraska, 143 S. Ct. 2355, 2376, 2378 (2023) (Barrett, J., concurring); Bostock v. Clayton Cnty., 590 U.S. 644, 685 (2020) (Alito, J., dissenting).

29. *See* LUBBERS, *supra* note 10, at 343-44.

30. *See* A.B.A. Section of Admin. L. & Regul. Prac., *Comments on H.R. 3010, The Regulatory Accountability Act of 2011*, 64 ADMIN. L. REV. 619, 629, 658 (2011) [hereinafter *Comments on H.R. 3010*]. The latest revision of the Model State Administrative Procedure Act expressly codifies the duty. MODEL STATE ADMIN. PROC. ACT § 313 (UNIF. L. COMM'N 2010). ("When an agency adopts a final rule, the agency shall issue a concise explanatory statement that contains: (1) the agency's reasons for adopting the rule, including the agency's reasons for not accepting substantial arguments made in testimony and comments.").

31. *See, e.g*, Heal Utah v. EPA, 77 F.4th 1275, 1291 (10th Cir. 2023); Hewitt v. Comm'r, 21 F.4th 1336, 1342 (11th Cir. 2021); Cigar Ass'n v. FDA, 964 F.3d 56, 63-64 (D.C. Cir. 2020); Altera Corp. v. Comm'r, 926 F.3d 1061, 1080 (9th Cir. 2019).

II. POLICY RATIONALES

As I suggested above, the courts' easy and decisive acceptance of these doctrinal developments has probably been bolstered by the substantial consensus among administrative lawyers that the duty to respond to rulemaking comments has a sound policy foundation. In this Part, I explore this policy foundation, discussing both the pros and cons of requiring agencies to respond to comments.

A. Benefits

As discussed above, courts have defended the duty as a tool for ensuring compliance with § 553(c)'s "consideration" requirement. While that argument is persuasive, the duty can also be seen as serving salutary ends in its own right. The law-review literature already contains some excellent analyses of these benefits. I will not attempt to duplicate those contributions but will briefly summarize them, with additional observations of my own.

Daniel T. Deacon has recently published a comprehensive analysis of an agency's obligation to consider alternative courses of action during a rulemaking proceeding.[32] As he explains, findings requirements in a rulemaking context facilitate the court's task of ascertaining whether and how the decision was based on relevant factors.[33] More broadly speaking, he adds, such requirements foster agencies' accountability to the public, by Inducing them to articulate justifications for their actions that affected interests can evaluate[34] Reason-giving requirements also serve a legitimating function, because they treat persons who are disadvantaged by a rule as entitled to an explanation for that choice.[35] In Jerry L. Mashaw's words, these requirements treat such persons as "entitled to evaluate and participate in a dialogue about official policies on the basis of reasoned discussion."[36] Finally, reason-giving requirements force agencies to give

32. Daniel T. Deacon, *Responding to Alternatives*, 122 MICH. L. REV. 671 (2024).

33. *Id.* at 689; *see also* Hameetman v. City of Chicago, 776 F.2d 636, 645 (7th Cir. 1985) (Posner, J.) (suggesting in an adjudication context that findings requirements make the due-process right to a hearing meaningful insofar as they tend to ensure that decision makers will base their decisions on the evidence elicited at the required hearings).

34. Deacon, *supra* note 32, at 689. For a similar analysis, see Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1279-82 (2009).

35. Deacon, *supra* note 32, at 690.

36. *Id*. at 690 n.118 (quoting Jerry L. Mashaw, *Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance*, 76 GEO. WASH. L. REV. 99, 118 (2007)).

careful consideration to potential alternative courses of action, thereby presumably improving the quality of the agency's ultimate decision.[37] Deacon emphasizes that the force of all these policy considerations is especially clear for agencies' responses to alternatives that commenters *actually proposed* during the notice-and-comment process.[38] But although he limits his claims to agencies' consideration of proposed alternatives, his arguments could also be applied more generally to the duty to respond to comments that raise other issues for the agency's consideration.

A dozen years ago, Jonathan Weinberg examined the rulemaking process in *The Right to Be Taken Seriously*, a full-length law-review study.[39] As the title suggests, he covers much of the same ground that Deacon does, but his perspective is more theoretical and holistic. The "right to be taken seriously," as he uses the phrase, corresponds to a government responsibility to attend to public comments, consider them on the merits, and respond to them.[40] This conception seems equivalent to, or at least it subsumes, the APA duty that is the subject of this Essay. Weinberg agrees with Deacon that the rulemaking process increases the likelihood of better agency decisions.[41] As he notes, "[d]ecision-makers routinely start the day with incomplete information, unexamined biases, and a limited sense of the possible," and exposure to a broad range of views can help rulemaking agencies overcome these problems.[42] He also argues that the process plays a legitimating function insofar as it contributes to citizens' sense that the government generates rules that work well.[43] Another legitimating function of the rulemaking process is to demonstrate that government can be democratically responsive by giving a fair hearing to citizens' arguments and taking their submissions seriously.[44]

Weinberg then discusses another benefit that some commentators[45] attribute to the rulemaking process — that it enhances democracy by enabling citizens to exercise equal participation rights. He devotes a lengthy, rich discussion to

37. *Id*. at 688.

38. *Id*. at 692-93.

39. Jonathan Weinberg, *The Right to Be Taken Seriously*, 67 U. MIA. L. REV. 149 (2012).

40. *Id*. at 150.

41. *Id.* at 158-62.

42. *Id.* at 159-60; *see also* Azar v. Allina Health Servs., 587 U.S. 566, 582 (2019) ("Notice and comment gives affected parties fair warning of potential changes in the law and an opportunity to be heard on those changes — and it affords the agency a chance to avoid errors and make a more informed decision.").

43. Weinberg, *supra* note 39, at 162.

44. *Id.* at 162-63.

45. *See id.* at 163-64 (collecting articles).

reviewing various theoretical conceptions of democracy that might support this conception.[46] Ultimately, however, Weinberg concludes that rulemaking does not and cannot accomplish this objective.[47] Formulation of a rule inherently requires numerous consultations in which the general public cannot participate.[48] Even during the comment phase, government officials tend to pay closest attention to industry sources and other sophisticated repeat players, not to less sophisticated ordinary citizens.[49] Moreover, bureaucrats often "have their own goals and their own agendas," so they will not necessarily care about what "ordinary citizens" want, except insofar as they need to write responses in order to avoid judicial reversal.[50] Weinberg recognizes that the use of internet technology has dramatically altered the manner in which agencies solicit and receive public comments, but he has doubts about the extent to which it can solve the problems just discussed.[51]

Thus, for these and other reasons, Weinberg submits that notice-and-comment rulemaking cannot effectively bring about a democratic dialogue that puts everyone on an equal plane. To this extent, the courts have shown commendable restraint by not defining the goals of the "duty to be taken seriously" too ambitiously. Yet, despite all of his skepticism about the "democracy" rationale for the duty, Weinberg clearly does endorse its more instrumental justifications, including its educative and legitimating consequences.[52]

B. Disadvantages

As both Deacon and Weinberg recognize, the duty to respond to rulemaking comments has costs as well as benefits. The most obvious disadvantage is its potential to lead to "ossification" — the slowing of the rulemaking process by way

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46. *Id.* at 163-78.

47. *See id.* at 172.

48. *See id.* at 178-81 (describing volume and the importance of ex parte contacts early in the rulemaking process).

49. *Id.* at 183-87.

50. *Id.* at 209-10.

51. *Id.* at 187-90.

52. *See id.* at 190 ("Agencies do read comments. The notice-and-comment process enables higher-quality decision-making by administrators."); *id.* at 211-12 ("In the end, law and politics are an instrumental realm; the dialogic function of notice-and-comment sits uneasily there. . . . The notice-and-comment process has important epistemic value, contributing to more engaged and informed agency decision-making."); *id.* at 214 ("The right to be taken seriously . . . contributes to government legitimacy.").

of increased agency workload.[53] More particularly, Wendy E. Wagner and others have argued that well-funded interest groups can bombard an agency with comments in order to achieve strategic advantages.[54] In addition to ossification, judicial enforcement of the duty to respond can implicate the same hazards that can occur in arbitrary-and-capricious review generally—judges' application of the requirement may be skewed because of the judges' lack of familiarity with the substantive area, and they may give undue weight to their own preconceptions and biases.[55]

The Supreme Court's very recent decision in *Ohio v. EPA*[56] illustrates this concern. Under the "good neighbor" provision of the Clean Air Act, "upwind" states are required to propose plans to curtail their emissions of pollution that would be harmful to "downwind" states.[57] If the U.S. Environmental Protection Agency (EPA) determines that a given state's plan is inadequate, it must institute a federal plan to bring the state into compliance.[58] In 2015, EPA proposed for comment a federal implementation plan that would have governed twenty-three states that had not met applicable standards for curtailing emissions of nitrous oxide.[59] Because of legal disputes about EPA's disapprovals of some of these states' plans, however, the ultimate federal plan would have applied to only twelve states.[60] Industry commenters had objected that the reduced coverage of the EPA plan would mean that it would no longer be cost-effective.[61] In an opinion by Justice Gorsuch, the Supreme Court granted an emergency stay to halt the EPA plan. It held that, in light of the agency's failure to offer a reasoned response to this critique, the applicants were likely to succeed on their claim that the agency decision was arbitrary and capricious.[62]

However, four dissenters, in an opinion by Justice Barrett, contended that the comments had not raised this alleged defect in the plan with "reasonable

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53. *See* Deacon, *supra* note 32, at 691-92 (describing "ossification" critiques); Weinberg, *supra* note 39, at 161. *See generally* Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345 (2019) (critiquing administrative procedures as impediments to agencies' fulfillment of their missions).

54. Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1329-34 (2010).

55. *See* Deacon, *supra* note 32, at 685-86.

56. 144 S. Ct. 2040 (2024).

57. *Id.* at 2048.

58. *Id.*

59. *Id.* at 2049.

60. *Id.* at 2052.

61. *See id.*

62. *Id.* at 2054.

specificity."[63] In fact, she argued, only one comment, out of a voluminous group of filings, had raised this objection, which was articulated ambiguously at best.[64] Moreover, she argued, the alleged error probably had not affected EPA's ultimate decision.[65]

The *Ohio* ruling has been criticized as a troubling example of how courts can use relatively minor objections to an agency explanation to derail a needed regulatory action.[66] I do not mean to suggest that the *Ohio* decision—which was framed as a substantive holding but can readily be extrapolated to apply to the APA procedural requirement as well—demonstrates that the duty to respond to rulemaking comments should be abolished. At the least, however, the costs of the doctrine are relevant to questions about how aggressively courts should enforce the duty, a topic I will address in Part III.

Even if the duty to respond contributes to ossification and imposes other burdens on agencies, it is instructive to evaluate this duty in light of proposed alternatives. Consider the controversy over the Regulatory Accountability Act, a set of proposed amendments to the APA.[67] The House of Representatives passed the bill in 2011, although it was never enacted.[68] One provision of the bill would have required an agency to address a checklist of specified considerations in every APA rulemaking proceeding.[69] The requirement would have been backed by the threat of reversal on judicial review if the agency did not discuss any of these considerations in enough depth to satisfy a reviewing court.

One flaw in the proposal was that some of the items on the checklist would have been issues that, in the context of a particular rulemaking, no one cared very much about. The duty to respond is far more efficient; the comment process itself operates to identify issues that the agency needs to address, in addition to the ones that it would have been required or inclined to discuss on its own initiative. A letter submitted to the House Judiciary Committee by the Section of

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63. *Id.* at 2061 (Barrett, J., dissenting).

64. *Id.* at 2061-63.

65. *Id.* at 2063-68.

66. *See* Daniel A. Farber, *An Elephant Giving Birth to a Mouse*, REGUL. REV. (July 22, 2024), https://www.theregreview.org/2024/07/22/farber-an-elephant-giving-birth-to-a-mouse [https://perma.cc/BJB9-MCGN]; Nicholas Bagley, *The Big Winners of This Supreme Court Term*, ATLANTIC (June 29, 2024), https://www.theatlantic.com/ideas/archive/2024/06/big-winners-supreme-court-term/678845 [https://perma.cc/6Q6M-286N].

67. H.R. 3010, 112th Cong. (2011).

68. *See Roll Call 888*, U.S. HOUSE OF REPRESENTATIVES (Dec. 2, 2011), https://clerk.house.gov/Votes/2011888 [https://perma.cc/NRC5-9V3A].

69. H.R. 3010, 112th Cong. § 3(b) (2011) (proposed § 553(b)); *see also Comments on H.R. 3010, supra* note 3030, at 631-32 (describing and expressing concern about "enormously burdensome" proposed requirements).

Administrative Law and Regulatory Process of the ABA made this point in the course of explaining why the proposed APA amendment was unnecessary:

> [W]here particular considerations are important and relevant, they will almost always emerge simply as a result of the dynamics of the rulemaking process. . . . Stakeholders have every incentive to raise the issues that most need attention, and rulemaking agencies have a recognized duty to respond to material and significant comments. . . . This is a fundamental point. The rulemaking process is to a large extent self-regulating. Commenters can be relied on to raise important issues. Knowing this, agencies anticipate the comments. And comments not anticipated must be grappled with.[70]

Thus, while the duty to respond to rulemaking comments may result in burdens for agencies, it is more efficient than at least one proposed alternative.

III. SCOPE

The preceding discussion leads naturally to the question of how to define the scope of an agency's duty to respond to rulemaking comments. Although courts may have once tolerated preambles that stated, without elaboration, that the agency had given consideration to all comments, such a perfunctory recital will not suffice today.[71] On the other hand, the duty does not extend to all rulemaking comments—a limitation that makes sense in light of the potential costs that could result from overenforcement of this principle, as discussed in Section II.B above. Authoritative pronouncements begin with the remark in *Mortgage Bankers* that "significant comments" require a response, as well as with the language of *Portland Cement*: "Manufacturers' comments must be significant enough to

70. *Comments on H.R. 3010*, *supra* note 30, at 633-34. I played a leadership role in compiling and synthesizing the Section's views on the bill, but the insightful passage quoted in the text was contributed by Professor Michael Herz.

71. *See* La. Fed. Land Bank Ass'n, v. Farm Credit Admin., 336 F.3d 1075, 1080 (D.C. Cir. 2003) (invalidating the final agency rule for "noting merely" that a comment letter "mentioned" statutory authorities without analyzing its arguments); LUBBERS, *supra* note 10, at 342 (describing pre-1971 EPA comment responses that "would not suffice today"); KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 5.4 (7th ed. 2018) ("No court today would uphold a major agency rule that incorporates only a 'concise general statement of basis and purpose.'").

step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern."[72] But these vague criteria are only a starting point.

Courts have had relatively little difficulty identifying certain recurring types of comments that do *not* meet these standards. Under the case law, agencies do not need to respond to comments that are obscurely stated,[73] purely speculative,[74] or buried inconspicuously in a lengthy advocacy document.[75] The difficulty comes about when courts have to apply those exceptions to concrete situations. Furthermore, the task of describing the qualities of a meritorious comment has proved to be a challenge, even at the conceptual level.

A common formulation in the case law is that significant comments are limited to those that are (1) relevant and (2) would require a change in the rule if adopted.[76] The relevancy point is straightforward.[77] The latter point makes intuitive sense when the thrust of the overlooked comment was to point out a supposed mistake in the agency's stated reasoning. That was the situation in *Portland Cement* itself, the case from which this language derives.[78] The court can agree or disagree that the criticism was cogent enough to deserve a response. In other contexts, this language may not fit the situation so easily, but the general idea seems to turn on the court's view as to the cogency or persuasiveness of the neglected or inadequately considered comment.[79]

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72. Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973); *see also Vermont Yankee*, 435 U.S. 519, 553 (1978) (relying on *Portland Cement*'s language in a licensing context).

73. Northside Sanitary Landfill, Inc. v. Thomas, 849 F.2d 1516, 1519 (D.C. Cir. 1988) ("We agree with the EPA that, by neglecting timely to put the EPA on proper notice of its objections, Northside has forfeited its right to have this court examine those objections on the merits.").

74. Pub. Citizen v. FAA, 988 F.2d 186, 197 (D.C. Cir. 1993) (quoting Home Box Off., Inc. v. FCC, 567 F.2d 9, 36 n.58 (D.C. Cir. 1977)).

75. CTS Corp. v. EPA, 759 F.3d 52, 65 (D.C. Cir. 2014).

76. Sherley v. Sebelius, 689 F.3d 776, 784 (D.C. Cir. 2012); City of Portland v. EPA, 507 F.3d 706, 715 (D.C. Cir. 2007); Safari Aviation Inc. v. Garvey, 300 F.3d 1144, 1151 (9th Cir. 2002).

77. *See* Am. Mining Cong. v. EPA, 965 F.2d 759, 771 (9th Cir. 1992) ("The [low] number of inactive mines [as highlighted in public comments] was irrelevant to EPA's rule; the relevant point was whether or not discharges from those mines were likely to be contaminated. None of the comments AMC complains were not answered suggested that inactive mines were not a significant source of pollution.").

78. Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973).

79. Deacon has suggested that "[o]ne way to think about [the materiality inquiry] is: is it possible that the comment might have changed the agency's mind or affected it in any way?" Deacon, *supra* note 32, at 693. A difficulty with that framing is that the word "might" sets a very low bar: a court would have trouble concluding that a particular comment *could not possibly* have had an impact on the agency. *Cf.* TSC Indus., Inc. v. Northway, 426 U.S. 438, 445, 449 (1976) (holding that the omission of a fact from a proxy statement is material "if there is a substantial likelihood that a reasonable shareholder *would* consider it important," as opposed to being an

Kristin Hickman and Richard Pierce have cited in their treatise a pair of contrasting tax cases to illustrate the elusiveness of the "significant comment" standard.[80] Both dealt with the validity of a Treasury regulation that governed the circumstances under which a donor could claim a charitable deduction for donating an easement in land to a charitable organization for conservation purposes.[81] Congress had specified that the conservation purposes of the easement must last "in perpetuity" and that the document conveying the easement must contain specific provisions to address the contingency in which external events might make the perpetual continuation of that purpose unworkable.[82] Under those circumstances, the easement would have to be sold and the proceeds turned over to the donee organization.[83] Two courts of appeals reached conflicting decisions as to the validity of the regulation. The Eleventh Circuit concluded that Treasury had responded too cursorily to the New York Land Conservancy's warning that the proceeds provision, with its potential for unforeseeable consequences, might discourage prospective donors from making conservation donations.[84] The Sixth Circuit concluded that the conservancy's comment had not required a response because it had expressed general concerns about the proceeds provision but did not "engage with it" and "left Treasury to guess" at the nature of the asserted connection between those concerns and the proceeds provision.[85] Both courts devoted several pages to debating this issue, and it is not immediately clear which court had the better of that argument (nor do Hickman and Pierce take a stand on that point).

On the whole, however, the ambiguity in the "significant" or "material" qualifiers attending the duty to respond to comments does not seem overly problematic. Judicial-review standards in other sectors of administrative law often share this degree of ambiguity, and that state of affairs is not widely regarded as intolerable. Justice Frankfurter wrote for the Court in a classic opinion explicating the meaning of the APA term "substantial evidence":

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omission that "a reasonable shareholder *might* consider important" (emphasis added)). More fundamentally, surely agency officials are in the best position to know what was in their own minds, and thereby to determine whether *they* could have been influenced by a comment. A better way to frame the question for the reviewing court would be to ask whether the agency could *reasonably* have failed to take account of the comment.

80. HICKMAN & PIERCE, *supra* note 71, at § 5.4.

81. *See* Treas. Reg. § 1.170A-14(g)(6).

82. *See* I.R.C. § 170(h)(5)(A) (2018).

83. *See* Treas. Reg. § 1.170A-14(g)(6)(i)-(ii).

84. Hewitt v. Comm'r, 21 F.4th 1336, 1351-53 (11th Cir. 2021).

85. Oakbrook Land Holdings, LLC v. Comm'r, 28 F.4th 700, 714-15 (6th Cir. 2022). One judge in the Sixth Circuit agreed with *Hewitt* on this issue but would have ruled against Oakbrook on other grounds. *Id.* at 723-28 (Guy, J., concurring in the judgment).

> A formula for judicial review of administrative action may afford grounds for certitude but cannot assure certainty of application . . . . There are no talismanic words that can avoid the process of judgment. The difficulty is that we cannot escape, in relation to this problem, the use of undefined defining terms.[86]

Arguably, the courts do need a degree of flexibility as they respond to the variety of situations that can arise.

IV. A COLLATERAL APPLICATION

The administrative-law principles underlying the APA's duty to respond to comments can be illuminating even outside the context of standard § 553 notice-and-comment rulemaking. In *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*,[87] for example, the Supreme Court considered an agency's adoption of a "final" or replacement rule following interim final rulemaking.[88] The Court's opinion, however, was not convincing. Attention to the duty to respond to comments could have led to a more persuasive opinion.

Under the APA, agencies are permitted to forgo notice-and-comment procedure when such procedure would be "impracticable," "unnecessary," or "contrary to the public interest," provided that the agency makes an explicit "good cause" finding explaining why it invoked the exemption.[89] The "impracticable" and "contrary to the public interest" branches of the exemption are used when an agency considers issuance of a rule to be urgent. In this situation, the agency will typically make use of interim final rulemaking. That is, it will invite post-promulgation comments, with an assurance that they will consider these comments and then issue a replacement rule.[90] The Administrative Conference of the United States (ACUS) gave impetus to the use of interim final rulemaking in 1995 with a recommendation that, among other things, said that the invitation to submit post-promulgation comments should include a statement that the agency will respond to significant adverse comments.[91]

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86. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488-89 (1951).

87. 591 U.S. 657 (2020).

88. *See id.* at 683-86.

89. 5 U.S.C. § 553(b)(B) (2018).

90. Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 712-15 (1999).

91. Admin. Conf. of the U.S., Recommendation 95-4: Procedures for Noncontroversial and Expedited Rulemaking (adopted June 16, 1995), *reprinted in* Adoption of Recommendations, 60 Fed. Reg. 43108, 43110-13 (Aug. 18, 1995).

As agencies have utilized this process, the courts have often needed to fashion a remedy in cases where they have found that the agency's good-cause finding was mistaken. In such cases, they have had to consider whether or not these deficiencies taint the final rule. The ACUS recommendation stated:

> Where an agency has used post-promulgation comment procedures (i.e., appropriate agency ratification or modification of the rule following review of and response to post-promulgation comments), courts are encouraged not to set aside such ratified or modified rule solely on the basis that inadequate good cause existed originally to dispense with pre-promulgation notice and comment procedures.[92]

Not all courts have followed this advice. Some have concluded that the post-promulgation procedure does not cure the agency's error because after an interim rule is on the books, inertia may make agencies less receptive to taking those comments seriously.[93] An intermediate position has been that, in order to validate the replacement rule, an agency must at least demonstrate that it considered the post-promulgation comments with "a mind that is open to persuasion"—a judgment that would depend in part on whether the replacement rule made changes in the interim rule.[94]

The *Little Sisters* case grew out of an interim rule that implemented the contraception mandate in the Affordable Care Act but provided an exemption for religious organizations.[95] Pennsylvania brought suit to challenge the exemption, and Little Sisters and other religious organizations intervened to defend the exemption.[96] The Third Circuit held that the interim rule and the replacement rule were both unlawful.[97] One ground for this decision was that the agencies that had issued the interim rule (the Departments of Treasury and Health and Human Services) had not considered the post-promulgation comments with an open mind; they made no changes in the rule as initially adopted and relied on essentially the same arguments that they had invoked initially.[98]

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92. *Id*.

93. *See, e.g.*, N.J. Dep't of Env't Prot. v. EPA, 626 F.2d 1038, 1049-50 (D.C. Cir. 1980) ("We are convinced that the Fifth Circuit accurately assessed the psychological and bureaucratic realities of *post hoc* comments in rule-making.").

94. Advocs. for Highway & Auto. Safety v. Fed. Highway Admin., 28 F.3d 1288, 1291-93 (D.C. Cir. 1994); Air Transp. Ass'n of Am. v. Dep't of Transp., 900 F.2d 369, 379-80 (D.C. Cir. 1990), *remanded on other grounds*, 498 U.S. 1077 (1991).

95. Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 591 U.S. 657, 664 (2020).

96. *Id.* at 668.

97. Pennsylvania v. President U.S., 930 F.3d 543 (3d Cir. 2019).

98. *Id.* at 568-69.

The Supreme Court reversed the Third Circuit in a majority opinion written by Justice Thomas.[99] He argued that the government had followed all of the steps required by the APA, including notice, invitation to comment, and consideration of the ensuing comments; its procedures were permissible even though the agencies had not taken these steps in the usual sequence.[100] Moreover, the openmindedness test found no support in the text of the APA, so the Third Circuit's decision had violated the principles of *Vermont Yankee*.[101]

Some scholars have taken issue with the *Little Sisters* opinion. Kristin E. Hickman and Mark R. Thomson have sharply criticized the case as "a strikingly narrow and limited analysis of the APA's text [in which] the Court arguably upended decades of jurisprudence and foundational principles of administrative law."[102] More specifically, they take issue with the Court's apparent belief that "the order in which the steps outlined in § 553(b) and (c) is unimportant."[103] As they argue earlier in their article, "postpromulgation procedures are often a poor substitute for the prepromulgation notice-and-comment process specified in the APA."[104] "As a practical matter," they continue, "it is well understood that, the further that agencies go down the road of the rulemaking process, the more committed they are to the regulations they have drafted, and the less likely they are to make changes in response to comments received."[105]

Hickman and Thomson's second objection to the *Little Sisters* opinion is that "[t]he Court seems at least implicitly to have embraced a vision of agency rulemaking procedures that focuses principally on notice *to* the public rather than collaboration and engagement *with* the public."[106] Indeed, they add, "the Court made no reference whatsoever to the role of public *participation* in notice-and-comment rulemaking."[107]

I agree with Hickman and Thomson that the Court's reliance on textualist interpretation was excessive.[108] These authors' policy arguments also have force. For several reasons, however, I basically agree with the ACUS position that a

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99. *Little Sisters*, 591 U.S. at 661.

100. *Id.* at 683-86.

101. *Id.* at 684-85.

102. Kristin E. Hickman & Mark R. Thomson, *Textualism and the Administrative Procedure Act*, 98 NOTRE DAME L. REV. 2071, 2096 (2023).

103. *Id.* at 2100.

104. *Id.* at 2097.

105. *Id.* at 2097-98.

106. *Id.* at 2101.

107. *Id.*

108. *See* Levin, *supra* note 11, at 10-19 (endorsing the courts' creative interpretations of the APA in a variety of circumstances).

court should not reject a final rule simply because it has supplanted an interim final rule.

First, I have reservations about the Third Circuit's "openmindedness" criterion. Administrative-law doctrine generally contemplates that in rulemaking—unlike adjudication—agency officials may and often will enter into the process with strong opinions about what they want to accomplish as part of their policy agenda.[109] In a post-promulgation rulemaking context, I doubt that a reviewing court should put pressure on an agency to make changes in its initial rule simply in order to avoid a holding that it has violated the APA's procedural requirements.

More fundamentally, once the post-promulgation rulemaking process is complete, the question of whether the agency's good-cause finding was erroneous is moot—not in the jurisdictional sense, but in a practical sense. Going forward, it is not easy to see what more the court can do for the challengers. The agency has already solicited comments on the interim rule; whether a further round of comments could accomplish anything would seem speculative at best.

This is not to say that the agency cannot be held accountable for its good-cause violation if there was one. In the first place, the "mootness" point applies only to the period *after* the agency has finalized its replacement rule. The best time to prevent members from suffering adverse consequences as a result of the APA violation would be in the immediate wake of the adoption of the interim rule, through a motion to stay implementation of the rule pending completion of the post-promulgation process or through a preliminary injunction that would have the same effect. This form of relief actually did work in the *Little Sisters* controversy; a lower court had enjoined the interim rule's implementation during the entire period leading up to the Supreme Court's review.[110] Of course, the lower courts will not always grant such preliminary relief, but the question whether to grant it is essentially the same as in other cases in which a challenger contends that a newly issued rule should not go into effect while allegations of reversible error are being sorted out.

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109. *See* Ass'n of Nat'l Advertisers v. FTC, 627 F.2d 1151, 1175-76 (D.C. Cir. 1979) (Leventhal, J., concurring) ("In the case of agency rulemaking, . . . the decisionmaking officials are appointed precisely to implement statutory programs, and with the expectation that they have a personal disposition to enforce them vigilantly and effectively. . . . It would be the height of absurdity, even a kind of abuse of administrative process, for an agency to embroil interested parties in a rulemaking proceeding, without some initial concern that there was an abuse that needed remedying, a concern that would be set forth in the accompanying statement of the purpose of the proposed rule.").

110. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 591 U.S. 657, 672-73 (2020).

Moreover, if the interim rule does go into effect and a court later finds that the good-cause finding was erroneous, the agency remains accountable for harms that the rule brought about *before* the APA violation was cured through the post-promulgation procedure.[111] Conversely, a person who violated the interim rule before the agency cured it should not be penalized if a court later determines that the rule was issued without good cause.

The *Little Sisters* opinion would have been more persuasive if it had incorporated a discussion of the duty to respond to the comments that it received in response to the invitation that accompanied the issuance of the interim rule. Such enforcement can ameliorate Hickman and Thomson's policy concerns. Just as in standard notice-and-comment proceedings, enforcement of this duty ensures that the agency will give those comments enough attention to reply to any significant arguments in them. The court can then review the responses according to normal standards of reasoned decisionmaking. Of course, the extent of public engagement that this dynamic can accomplish is limited, but that limitation exists even in ordinary rulemaking.[112] And, although the discipline imposed by this requirement cannot completely overcome the inertia factor to which Hickman and Thomson refer, the benefits of enforcement of the duty are substantial for the reasons I discussed in Section II.A of this Essay.

In the *Little Sisters* case itself, Justice Thomas mentioned in his statement of facts that the agency did respond to the post-promulgation comments,[113] and the challengers apparently did not deny that it had performed this task conscientiously. But he did not highlight that detail.[114] If he had incorporated into his analysis the agency's fulfillment of its duty to respond to significant comments (a duty that a unanimous Court had recognized five years earlier in *Mortgage Bankers*), he could have written a more persuasive opinion. One can hope that the lower courts that have occasion to apply *Little Sisters* in the future will take account of that requirement anyway.

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111. *See* Paulsen v. Daniels, 413 F.3d 999, 1008 (9th Cir. 2005). If the agency never does get around to replacing the interim rule, as often happens, its vulnerability to an APA challenge based on the deficiencies of the good-cause finding would also persist indefinitely.

112. *See supra* notes 47-51 and accompanying text (discussing Weinberg).

113. *Little Sisters*, 591 U.S. at 672-73.

114. Justice Thomas's usual preference for textualist methodology may help to explain this omission. Another explanation may be that, as Hickman and Thomson suggest, the Court may have been primarily interested in the substantive issues in the case, namely the scope of the religious organizations' exemption from the contraception coverage mandate in the Affordable Care Act; the procedural issues in the case may have gotten much less attention. Hickman & Thomson, *supra* note 102, at 2101-02. *Cf.* Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 253-55 (noting the Court's propensity to rely on plain-meaning interpretations of statutes as an easy way to dispose of cases that it may not find very interesting).

V. FAIRNESS

One of the purposes of this Collection is to explore relationships between procedure and fairness. In the context of administrative law *adjudication*, fairness considerations obviously loom large. Much case law interpreting the Due Process Clauses of the Fifth and Fourteenth Amendments and the hearing provisions of the APA is designed to promote fair treatment for individual litigants.[115] In the context of agency *rulemaking*, however, the connection between procedure and fairness is less straightforward.[116] To be sure, courts have often declared in general terms that notice-and-comment procedure serves to promote fairness,[117] but they do not ordinarily pause to examine this linkage carefully. This Part probes the complexities of the procedure-fairness relationship to lay groundwork for an analysis of the fairness aspects, if there are any, of the agency's duty to respond to rulemaking comments.

Administrative-law rulemaking is depersonalized in multiple ways. A notice-and-comment proceeding has no parties. Proceedings for judicial review of rules are initiated by individual litigants, but the court's analysis of the substantive issues is impersonal. It typically focuses on whether a rule is lawful and well-reasoned as a general matter, not in relation to the particular plaintiff's situation.[118] Judicial review of the rule is based on the administrative record, without regard to whether the plaintiff contributed in any way to the contents of that record.

Similar observations also apply to rulemaking procedure. That process is perhaps best understood in terms of an agency's *duties* to the public at large, rather than in terms of the *rights* of persons who will be regulated by the rule or

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115. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (holding that "identification of the specific dictates of due process" depends in part on "the private interest that will be affected by the official action").

116. Although some of the hearing provisions of the APA do apply to so-called formal rulemaking, namely 5 U.S.C. §§ 553(c), 556-57, that set of procedures has largely fallen into desuetude, as a result of the Supreme Court's decision in United States v. Fla. E. Coast Ry., 410 U.S. 224 (1973).

117. *See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 316 (1979) ("In enacting the APA, Congress made a judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment."); White v. Shalala, 7 F.3d 296, 303 (2d Cir. 1993) (citations omitted) (stating that notice-and-comment procedures "reintroduce public participation and fairness to affected parties").

118. I am not speaking here about enforcement proceedings in which a court considers whether an agency properly applied a regulation to the respondent. Such a proceeding is adjudicative in nature and does not intrinsically implicate the validity of the rule itself. If the enforcement defendant does contest the rule's validity, the court's resolution of that question will entail the same impersonal inquiries as arise in pre-enforcement proceedings.

will benefit from it. These duties serve to advance *collective* public goals such as accuracy and political accountability. In this sense, the notice-and-comment process can be described as promoting "fairness" to the public,[119] but it would seem that this phrasing is simply a loose characterization of procedures that have been instituted primarily for other reasons. Fairness does not drive the analysis on its own.

Because APA rulemaking procedure serves the collective interests of *the public*, it is not designed to guarantee fairness to members of the public *on an individual level*. In this sense, the traditions of rulemaking can be traced back to the century-old case of *Bi-Metallic Investment Co. v. State Board of Equalization*,[120] which established that due process generally does not apply to rulemaking proceedings. In modern administrative law, this perspective on individual fairness in rulemaking often goes unarticulated, but its ramifications can be discerned in a number of specific contexts.

For example, the wording of APA § 553(c) requiring "consideration of the relevant matter presented" seems to contemplate that an agency must give individualized consideration to every public comment it receives, but this implication has proved unworkable in an era in which an agency may receive hundreds of thousands, or even millions, of electronically submitted comments in a single proceeding. ACUS has acknowledged this reality by recommending that this APA requirement "does not require agencies to ensure that a person reads each one of multiple identical or nearly identical comments."[121] Agencies rely on sorting software, among other technical and managerial devices, to cope with those occasional proceedings that elicit a flood of comments.[122]

A very recent decision by the Supreme Court seems, at least at first blush, in tension with the foregoing authorities. In *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*,[123] the Court held that 28 U.S.C. § 2401(a), the six-year default statute of limitations for suits against the United States, operates at a "plaintiff specific" level.[124] That is, the six-year limitations period for any given

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119. *See* J. Skelly Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 379-81 (1974) (describing the § 553 procedures in these terms).

120. 239 U.S. 441, 444-45 (1915); *see also* Minn. State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 283-85 (1984) (reaffirming *Bi-Metallic*); *Fla. E. Coast Ry.*, 410 U.S. at 244-45 (same).

121. Admin. Conf. of the U.S., Recommendation 2011-1: Legal Considerations in e-Rulemaking ¶ 1(a)(1) (adopted June 16, 2011), *reprinted in* Adoption of Recommendations, 76 Fed. Reg. 48789, 48789-90 (Aug. 9, 2011).

122. *See generally* Admin. Conf. of the U.S., Recommendation 2021-1: Managing Mass, Computer-Generated, and Falsely Attributed Comments (adopted June 17, 2021), *reprinted in* Adoption of Recommendations, 86 Fed. Reg. 36075, 36075-77 (July 8, 2021).

123. 144 S. Ct. 2440 (2024).

124. *Id.* at 2455.

plaintiff begins running when that plaintiff was injured by an agency rule, even if other regulated persons were injured years earlier when the rule was issued and would now be time-barred from challenging the rule.[125] In so holding, the Court parted company with nearly all of the circuits, which had ruled in earlier cases that § 2401(a) required the six-year clock to start after the rule's issuance, regardless of when any individual plaintiff was injured.[126]

Upon further analysis, however, *Corner Post* is consistent with the impersonal nature of agency rulemaking because it is a holding about the availability of judicial review, not the rights of litigants within a rulemaking proceeding. The right to seek judicial review obviously varies from person to person — one litigant may have standing to sue when another does not. Moreover, § 2401(a) is only a default provision and is inapplicable to countless regulatory contexts in which Congress has indeed prescribed a limitations period. Those provisions are typically construed to be statutes of repose.[127] Thus, such statutes treat all would-be plaintiffs equally by barring each of them from suit after the expiration of the time period specified in the particular statute.

Sometimes the impersonal nature of rulemaking procedure operates to the advantage of the individual litigant. For example, a plaintiff does not need to have commented on a rule in order to be able to seek judicial review of it. As one court has pointed out, a contrary principle would mean that the vast majority of potential litigants could not sue, and if no one commented on a particular rule, no one could seek judicial review of it.[128] A related example stems from the doctrine of issue exhaustion. That doctrine rests on the basic principle that a judicial-review litigant may not rely on an issue that was not initially raised at the agency level (unless the issue is so obviously crucial that the agency should be expected to have raised it without any prompting).[129] But application of the doctrine does not depend on whether the particular litigant who has filed for judicial review raised the issue at the agency level. If the issue was raised by any commenter (or by the agency on its own initiative), a litigant whose submission to

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125. *See id*. at 2450, 2452-53.

126. *See id*. at 2449.

127. *See id*. at 2453; *id*. at 2476-77 (Jackson, J., dissenting). *See generally* Ronald M. Levin, *Statutory Time Limits on Judicial Review of Rules: Verkuil Revisited*, 32 CARDOZO L. REV. 2203 (2011) (discussing how such statutes are construed).

128. Dobbs v. Train, 409 F. Supp. 432, 435 (N.D. Ga. 1975), *aff'd sub nom.* Dobbs v. Costle, 559 F.2d 946, 950 (5th Cir. 1977).

129. *Compare* Util. Solid Waste Activities Grp. v. EPA, 901 F.3d 414, 435 (D.C. Cir. 2018) (enforcing issue exhaustion), with Nat. Res. Def. Council v. EPA, 755 F.3d 1010, 1023 (D.C. Cir. 2014) (declining to apply issue exhaustion to "key assumptions"); *see also* Ronald M. Levin, *Making Sense of Issue Exhaustion in Rulemaking*, 70 ADMIN. L. REV. 177, 196-98 (2018) (explaining justifications for the exception).

the agency dealt with entirely different issues is not barred by issue exhaustion from raising that point in court.[130] And, although relevant authority is sparse, I have argued that the same should be true of a judicial-review plaintiff who did not participate in the rulemaking proceeding at all.[131]

One might at first think that an agency's duty to respond to rulemaking comments does, to a greater extent than other procedural obligations, implicate the rights of the persons who submitted the comment. In some sense, the agency needs to reply to *them*. On closer analysis, however, that argument is dubious. The preamble that accompanies a newly promulgated rule does need to come to grips with the issues raised in the comment, but the court's main concern will be whether the substance of the agency's response is cogent enough to withstand substantive review for reasonableness. Frequently the preamble does not even identify who raised a particular issue. If an issue was raised in multiple comments, the preamble might offer a collective response, instead of going over the commenters' submissions one by one.[132]

VI. STANDING

The conceptual distinction discussed in the preceding Part between an agency's duty to respond to comments and a commenter's right to receive a (cogent) response may make a practical difference in the context of the doctrine of standing. According to the leading case *Lujan v. Defenders of Wildlife*,[133] to have standing to bring suit, a plaintiff must show that he is under threat of suffering an "injury in fact" that is "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'"[134] A plaintiff who establishes a threat of concrete and particularized injury from a rule would then have standing to sue and could rely on a breach of the duty to respond to comments in building a case that

130. *See* Admin. Conf. of the U.S., Statement #19: Issue Exhaustion in Preenforcement Judicial Review of Administrative Rulemaking (adopted Sept. 25, 2015), *reprinted in* Adoption of Statement, 80 Fed. Reg. 60611, 60611-13 (Oct. 15, 2015); Jeffrey S. Lubbers, *Fail to Comment at Your Own Risk: Does Issue Exhaustion Have a Place in Judicial Review of Rules?*, 70 ADMIN. L. REV. 109, 132-33, 138-39 (2018); Levin, *supra* note 129, at 195.

131. Levin, *supra* note 129, at 199-207.

132. LUBBERS, *supra* note 10, at 343.

133. 504 U.S. 555 (1992).

134. *Id.* at 560 (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)). The Court went on to say that the injury must also "be 'fairly . . . trace[able] to the challenged action of the defendant'" and it "must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 560-61 (quoting Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 41-42 (1976); then quoting *id.* at 38; then quoting *id.* at 43; and then quoting *id.* at 38). For purposes of the present discussion, I will put aside the traceability and redressability components of the *Lujan* test, which are not directly relevant to the analysis.

the rule is invalid on the merits. But *Lujan* went on to explain that an alleged violation of procedural law (in that case, the failure of the Agency for International Development to consult with the Secretary of the Interior before taking action that could harm an endangered species) would generally not constitute the kind of injury that Article III of the Constitution requires for standing unless it is accompanied by a concrete injury.[135]

The Court expanded on that discussion in *Summers v. Earth Island Institute*.[136] The plaintiffs claimed that the Forest Service was making certain land-use decisions without complying with applicable notice-and-comment provisions in its enabling statute.[137] As one basis for standing, the plaintiffs relied on their alleged statutory right to file comments in such proceedings.[138] The Court rejected that theory, remarking that "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing."[139] The Court's "in vacuo" language has found acceptance in subsequent courts-of-appeals decisions.[140] Taken together, *Lujan* and *Earth Island* cast considerable doubt on the possibility that an agency's breach of its duty to respond to rulemaking comments, unaccompanied by a tangible injury, would be sufficient grounds to support standing for a litigant who seeks to enforce that duty in court.

On the other hand, *Lujan* also acknowledged that "[t]he . . . injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'"[141] Relying on this reasoning, courts have found sufficient "informational standing" to enable a citizen to sue to obtain campaign-finance disclosures that were guaranteed by the Federal Election Campaign

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135. *Id.* at 571-73, 572 n.7.

136. 555 U.S. 488 (2008).

137. *See id.* at 491.

138. *Id.* at 496-97.

139. *Id.* at 496; *id.* at 501 (Kennedy, J., concurring in part and concurring in the judgment) (quoting *id.* at 496 (majority opinion)). The dissenters in *Earth Island* were readier than the majority to assume that the agency's procedural errors gave rise to a realistic risk of causing tangible harm to the plaintiffs in the future, but they did not take issue with the majority's "in vacuo" point. *See id.* at 504, 510 (Breyer, J., dissenting).

140. *E.g.*, Wild Va. v. Council on Env't Quality, 56 F.4th 281, 297 n.8, 299 (4th Cir. 2022); Sch. of the Ozarks, Inc. v. Biden, 41 F.4th 992, 1000 (8th Cir. 2022); Strubel v. Comenity Bank, 842 F.3d 181, 189 (2d Cir. 2016); WildEarth Guardians v. Jewell, 738 F.3d 298, 305 (D.C. Cir. 2013); Nat'l Ass'n of Home Builders v. EPA, 667 F.3d 6, 15 (D.C. Cir. 2011).

141. Lujan v. Defs. of Wildlife, 504 U.S. 555, 578 (1992) (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975) (alteration in original)); *see also id.* at 580 (Kennedy, J., concurring in part and concurring in the judgment) (observing that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before").

Act.[142] Similarly, the Court has recognized the right to sue for information disclosure pursuant to the Freedom of Information Act and for the right to attend public meetings pursuant to the Federal Advisory Committee Act.[143]

Conceivably, standing to vindicate the APA duty to respond to rulemaking comments could be defended on a similar basis. Indeed, the ABA Section of Administrative Law and Regulatory Practice once suggested a (hypothetical) possibility of this sort.[144] That suggestion predated *Earth Island*, but that case could potentially be narrowly distinguished on the basis that the right to file comments is wholly intangible,[145] whereas a suit to enforce an agency's duty to respond would aim to require the government to provide something tangible—a response—that might be more comparable to the disclosures sought in the campaign finance and Freedom of Information cases discussed in the preceding paragraph.

Nevertheless, this line of reasoning presupposes that the APA duty to respond to rulemaking comments could be reinterpreted as an individual right to receive comments. As Part V of this Essay argued, much of today's administrative law has been built on a contrary assumption. In any event, even if such a reconceptualization of the duty to respond to comments were to occur, it might not be desirable. To be sure, it would advance some of the values embedded in the APA, but its potential to contribute to ossification of the administrative process would also be substantial (especially if an allegedly *inadequate* response could infringe this right). At the least, the burden of justifying such a departure from current norms should rest with those who would favor it, and I am not aware of anyone who has made a case for that outcome.

CONCLUSION

As this Essay has argued, the history and present status of the duty to respond to rulemaking comments can serve as a revealing case study of a quiet but important administrative-law reform. The reform happened without fanfare. No memorable event served as its kickoff, and no one in the administrative-law world has been identified as its champion. Even *Mortgage Bankers*, the first case

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142. *See* Fed. Election Comm'n v. Akins, 524 U.S. 11, 13-14, 19-20 (1998).

143. *See* Pub. Citizen v. U.S. Dep't of Just., 491 U.S. 440, 449-50 (1989).

144. *See* A.B.A. Section of Admin. L. & Regul. Prac., *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1, 54-55 (2002) (discussing this possibility).

145. *Cf. Wild Va.*, 56 F.4th at 299 (holding that "the 'mere inability to comment effectively or fully, in and of itself, does not establish an actual injury.'" (quoting Int'l Bhd. of Teamsters v. Transp. Sec. Admin., 429 F.3d 1130, 1135 (D.C. Cir. 2005)); United States v. AVX Corp., 962 F.2d 108, 119 (1st Cir. 1992) (same).

in which the Supreme Court expressly recognized the duty, took this step by means of what appeared to be a passing remark, essentially acknowledging a legal development that had long since become a fait accompli. Nevertheless, administrative lawyers have evidently had no difficulty intuiting, or at least appreciating, the insight that rules will tend to be more seriously considered—and more palatable to members of the public—in a regime in which agencies are expected to respond to rulemaking comments. At the same time, agencies do not seem to consider this incremental increase in their workload overly onerous. Despite occasional lapses, they have understood it, internalized it, and implemented it without significant resistance.

How could this reform have occurred without an explicit footing in the language of the APA, without a significant history predating the modern rulemaking era, and without legislative ratification along the way? Part of the explanation, I have argued, is that the courts have displayed restraint in their elaboration of the duty. Commentators have floated ambitious idealistic goals for the doctrine, suggesting that observance of the duty might democratize the rulemaking process, increase fairness to individuals, or establish the kind of legalistically defined "right" that could support standing to enforce the duty in court. These suggestions have had some influence as aspirational goals, but courts have been skeptical, to say the least, about giving any of them a clear-cut endorsement.

The result has been the formation and persistence of a consensus or near consensus in support of the agencies' duty to respond to rulemaking comments. Neither the courts, nor ACUS, nor Congress has ever become the site for a conspicuous battle over the validity or scope of the duty. In an era of intense polarization and ideological conflict over the future of administrative law, including failed efforts at APA reform through legislation,[146] this success story of moderate, incremental reform through common-law development looks downright refreshing.

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146. *See generally* Ronald M. Levin, *The Regulatory Accountability Act and the Future of APA Revision*, 94 CHI.-KENT L. REV. 487 *passim* (2019) (discussing an unenacted 2017 Senate bill); *Comments on H.R. 3010*, *supra* note 30, *passim* (discussing an unenacted 2011 House bill).