ARTICLES

OVERCOMING GRIDLOCK: *CAMPBELL* AFTER A QUARTER-CENTURY AND BUREAUCRATICALLY RATIONAL GAP-FILLING IN MASS JUSTICE ADJUDICATION IN THE SOCIAL SECURITY ADMINISTRATION'S DISABILITY PROGRAMS

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INTRODUCTION

The Supreme Court's 1983 decision in *Heckler v. Campbell*[1] is one of the most influential administrative law decisions of the twentieth century.[2] However, a closer examination of the specific controversy addressed in *Campbell* reveals significant unresolved issues and adjudicative confusion that have grown with time. In *Campbell*, the Court sustained the Social Security Administration's (SSA's) use of the medical–vocational guidelines, commonly referred to as the "grid,"[3] to meet the agency's evidentiary burden of demonstrating the availability of other jobs that "exist in significant numbers in the national economy" and to which SSA disability claimants can make a work adjustment once they prove their inability to continue their past relevant work.[4] The grid operates at the final step in the agency's process for adjudicating claims under the disability standard.[5]

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1. 461 U.S. 458 (1983).

2. *See* Matthew C. Stephenson, *Mixed Signals: Reconsidering the Political Economy of Judicial Deference to Administrative Agencies*, 56 ADMIN. L. REV. 657, 686–87, 728 app. D (2004) (citing a study listing *Campbell* as the third most influential administrative law decision based on citation counts behind only Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984), and Motor Vehicle Mfg. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983)).

3. "Because parts are displayable as a simple chart or table, the medical vocational guidelines are commonly called 'the grid'—a usage which, though technically limited to the tables themselves, commonly includes the attendant explanatory matter." Hogan v. Schweiker, 532 F. Supp. 639, 643 n.4 (D. Colo. 1982). The grid can be viewed as one grid with multiple parts or tables or in plural form as "grids." For simplicity, I will use the singular term "grid" herein.

4. The Social Security Administration's (SSA's) disability benefit programs are the Disability Insurance (DI) component of the Old Age Survivors and Disability Insurance (OASDI) program and the Supplemental Security Income (SSI) disability program. Under the SSI program, the "other jobs" labor market work adjustment inquiry is triggered by a determination that claimants either cannot perform their past relevant work or do not possess past relevant work. *See generally* Frank S. Bloch, *Medical Proof, Social Policy, and Social Security's Medically Centered Definition of Disability*, 92 CORNELL L. REV. 189, 193–202 (2007) (describing these programs' histories and origins, their common disability standard, and the differences between social insurance and public assistance programs as reflected in the DI and SSI programs, respectively). As the Supreme Court described in *Campbell*, "[the grid] consist[s] of a matrix of the four factors identified by Congress—physical ability, age, education, and work experience—and set[s] forth rules that identify whether jobs requiring specific combinations of these factors exist in significant numbers in the national economy." 461 U.S. at 461–62.

5. The standard for determining disability in the SSA's programs is most often

The grid has been hailed as an important and innovative administrative device for SSA labor market work adjustment disability decisions, bringing mass justice consistency, efficiency, and uniformity to "the largest system of administrative adjudication in the western world."[6] It standardized decisional outcomes and obviated the need for costly, often inconsistent, and time-consuming vocational expert testimony in a large volume of cases. The SSA promulgated the grid in 1978 by taking administrative notice of occupational requirements, job incidence, and work adjustment assumptions utilizing the definitions and skill characteristics of jobs established by the United States Department of Labor (DOL) in the 1965 edition of the Dictionary of Occupational Titles (DOT)[7] and various DOL,

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perceived as a medical one based on objective medical facts demonstrated through scientific and clinical methodology. However, *disability* embraces a specific context and frame of reference: disability from work. As described by the national committee established to review the SSA's disability decision process research:

> Disability determination is a complex process, inescapably involving some interpretive judgment about capacity for work . . . . At a minimum, making such decisions requires clinical determination of the extent of a claimant's physical, mental, or sensory impairments; analysis of the degree to which such impairments limit the claimant's functional capacity relevant to work roles; and consideration of the interaction of the claimant's physical, mental, or sensory impairments with the person's age, education, and work experience to provide an overall picture of the claimant's future capacity for any sort of work. Finally the disability decision process requires a means for comparing those capacities with the capacities demanded by work roles in all jobs in the national economy that provide substantial gainful activity (SGA) earnings level.

COMM. TO REVIEW THE SSA'S DISABILITY DECISION PROCESS RESEARCH, INST. OF MED., THE DYNAMICS OF DISABILITY: MEASURING AND MONITORING DISABILITY FOR SOCIAL SECURITY PROGRAMS 113–14 (Gooloo S. Wunderlich et al. eds., 2002).

6. *Campbell*, 461 U.S. at 461 n.2 (quoting MASHAW, HEARINGS, *infra* note 12, at xi).

7. BUREAU OF EMP'T SEC., U.S. DEP'T OF LABOR, DICTIONARY OF OCCUPATIONAL TITLES (3d ed. 1965). The *Dictionary of Occupational Titles* (DOT) was intended to serve as "a catalogue of the occupational titles used in the U.S. economy as well as reliable descriptions of the type of work performed in each occupation." COMM. ON OCCUPATIONAL CLASSIFICATION & ANALYSIS, NAT'L RESEARCH COUNCIL, WORK, JOBS, AND OCCUPATIONS: A CRITICAL REVIEW OF THE *DICTIONARY OF OCCUPATIONAL TITLES* 1 (Ann R. Miller et al. eds., 1980). The DOT's first edition was published in 1939. *Id.* at 1. The Department of Labor (DOL) produced a fourth edition of the DOT in 1977 and a revised fourth edition in 1991. It has not produced an update since 1991. This Article is a companion piece to my Article, *The Labor Market Side of Disability Benefits Policy and Law*, 20 S. CAL. REV. L. & SOC. JUST. (forthcoming 2011), which provides a more comprehensive examination of labor market considerations in the social security disability programs. It includes analysis of empirical concerns due to continued reliance on the DOT. Both Articles utilize common or similar introductory and background material, but whereas *Labor Market Side* centers on the broader social welfare policy and empirical issues in the labor market side of disability benefit law, including those generated by the grid's and DOT's continued usage, this Article focuses on administrative adjudication, federal court judicial

Census Bureau, and state and local agency surveys.[8]

It is a legislative rule defining the adjudicative weight assigned to claimants' medical and vocational characteristics and resulting abilities to make work adjustments to the statutorily required "significant number" of jobs in the economy. As an administrative rule, the grid is unique in its character as a regulation that purports to authorize adjudicators to utilize several charts of administratively noticed presumptions to satisfy the agency's evidentiary burden of proof and resolve a large volume of individual cases with a multivariate calculus of factual combinations. It thus serves not only the legal and interpretive functions of most legal regulations but also less common evidentiary purposes.

The grid represents the agency's high-water mark with respect to Yale Law Professor Jerry Mashaw's bureaucratic rationality model of administrative justice, articulated in a comprehensive study and analysis of the SSA's disability adjudication process.[9] Bureaucratic rationality elevates considerations of efficiency, consistency, and the pursuit of accuracy through hierarchical and rigid adherence to centrally formulated policies over fairness through greater individualized evaluation. It thus privileges such centrally formulated bureaucratic decisionmaking over more individualized approaches, such as standard judicialized adjudication processes or professional expert evaluation.[10] Mashaw led an earlier comprehensive study of the SSA disability hearing process that conceded the necessity of judicialized adjudicative systems for determining disability claims,[11] but nonetheless advocated for the agency's greater systemic use of official notice and specifically suggested adoption of a grid-like regulation.[12]

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review, and administrative law theory regarding labor market work adjustment assessments that fall between the grid's gaps.

8. *See* Rules for Adjudication of Disability Claims in Which Vocational Factors Must Be Considered, 43 Fed. Reg. 55,349, 55,350–51 (Nov. 28, 1978).

9. *See* JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 117 (1983) [hereinafter MASHAW, BUREAUCRATIC JUSTICE] ("From the perspective of an administration concerned with systemic rationality, these [grid] regulations have much to commend them.").

10. *Id.* at 21–46.

11. *See* Lance Liebman & Richard B. Stewart, *Bureaucratic Vision*, 96 HARV L. REV. 1952, 1954 n.11, 1958 n.24, 1960 n.30 (1983) (reviewing MASHAW, BUREAUCRATIC JUSTICE, *supra* note 9) (noting Mashaw's eventual change in position from this earlier study and lack of reconciliation of the first study's conclusions in his second study).

12. *See* JERRY L. MASHAW ET AL., NAT'L CTR. FOR ADMIN. JUSTICE, SOCIAL SECURITY HEARINGS AND APPEALS: A STUDY OF THE SOCIAL SECURITY ADMINISTRATION HEARING SYSTEM 25, 82 (1978) [hereinafter MASHAW, HEARINGS] (explaining that the agency, "by regulation supported by appropriate administrative findings, could specifically authorize the taking of official notice in designated cases"; discussing the desirability of "better decisional standards" that "reduce individual [administrative law judge] discretion by providing per se

In sustaining the grid against challenge in *Campbell*, the Supreme Court held that properly empowered agencies, such as the SSA, may promulgate rules to resolve a class of general factual issues across the board in advance of individual adjudications.[13] Thus, because claimants could introduce evidence at their individual hearings to demonstrate that their circumstances did not fit into an unfavorable grid category, the grid rules conflicted with neither the Social Security Act's requirement in 42 U.S.C. § 423(d)(2)(A) for individualized consideration of each claimant's condition nor the requirement in 42 U.S.C. § 405(b) that hearing decisions be based on evidence adduced at the hearing.[14] The Court also rejected assertions that the grid denied claimants the right to notice and the opportunity to rebut administratively noticed facts protected in explicit terms in the Administrative Procedure Act (APA), 5 U.S.C. § 556(e),[15] and more generally, by the Fifth Amendment's Due Process Clause.[16] It reasoned

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rules, presumptions, or the like"; and referencing "proposed grid regulations"). Mashaw served as project director for this study. *Id.*

13. The Court reasoned:

> It is true that the statutory scheme contemplates that disability hearings will be individualized determinations based on evidence adduced at a hearing. But this does not bar the Secretary from relying on rulemaking to resolve certain classes of issues. The Court has recognized that even where an agency's enabling statute expressly requires it to hold a hearing, the agency may rely on its rulemaking authority to determine issues that do not require case-by-case consideration. A contrary holding would require the agency continually to relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding.

Campbell, 461 U.S. at 467 (citations omitted). For a more recent and oft-cited statement of this principle, see *American Hospital Ass'n v. NLRB*, 499 U.S. 606, 612 (1991) ("[E]ven if a statutory scheme requires individualized determinations, the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority.").

14. *Campbell*, 461 U.S. at 467–68 & n.11.

15. *Id.* at 469–70. In rejecting an earlier challenge to the grid's validity in the First Circuit, Judge (now Justice) Breyer explained:

> The Agency stated at the time the Grid was adopted that it was based upon "administrative notice" of conditions in the national labor market. That does not make the Grid an *instance* of "administrative notice." Rather, the Grid is a set of *rules*, promulgated pursuant to informal "notice and comment" rulemaking procedures, 5 U.S.C. § 553. The terms of 5 U.S.C. § 556(e) do not literally apply to informal rulemaking, *see* 5 U.S.C. § 556(c), and thus do not automatically require a disability claimant to be given the chance at his adjudicatory claims hearing to contest the "facts" underlying the Grid.

Sherwin v. Sec'y of HHS, 685 F.2d 1, 4 (1st Cir. 1982).

16. In *Campbell*, the Court largely sidestepped the applicability of the Due Process Clause to the alleged violation of the right to notice and the opportunity to rebut administratively noticed facts by construing the Second Circuit's opinion and the Plaintiff's lower court briefs as not properly raising the issue. *See* 461 U.S. at 468–69 & nn.12–13.

that the purpose of the rebuttal rights principle "is to provide a procedural safeguard: to ensure the accuracy of the facts of which an agency takes notice."[17] The rulemaking proceeding itself provided sufficient procedural protection to test the facts upon which the rule was based.[18]

A potentially large exception to the grid's application has produced much confusion and inconsistency in agency work adjustment evaluations. In upholding the grid, the Court in *Campbell* was careful to observe limits on its application; it specifically noted that "some claimants may possess limitations that are not factored into the guidelines."[19] "Thus, . . . the rules will be applied only when they describe a claimant's abilities and limitations accurately."[20]

The broadest and most litigated exception to the grid's direct application is in situations involving claimants with nonexertional or non-strength-related medical limitations. Section 200.00(e) acknowledges that nonexertional limitations are not factored into the calculus of claimant limitations that form the basis of the job incidence and work adjustment conclusions that are administratively noticed in the grid.[21] Where nonexertional limitations are present, the regulations explain that the grid rules do not provide dispositive conclusions, but should only be "giv[en] consideration" or used as a "framework" for determining how much the base of jobs administratively noticed in the grid is eroded by the additional

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Viewed as a procedural due process issue, a challenge to the denial of notice and the right to challenge presumptions contained in the grid rules before their application in an individual case would fall within the legislative action/legislative fact exception to the procedural due process right to be heard. *See* Minn. Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 283, 285 (1984) ("The Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy."); United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 245–46 (1973) (explaining that "there [is] no across-the-board constitutional right to oral argument in every administrative proceeding regardless of its nature"). *Compare* Bimetallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445–46 (1915) (stating that there is no due process right to be heard where a large number of persons is affected in a similar manner through generally applicable legislative enactment), *with* Londoner v. City & Cnty. of Denver, 210 U.S. 373, 385 (1908) (affirming a right to be heard where a small number of persons is affected in an exceptional and particularized manner by governmental enactment). *See generally* 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 10.6 (3d ed. 1994) (suggesting that the grid reflects a legislative promulgation of broad general rules applicable to the public at large based on general legislative facts about the labor market, not adjudicative or particularized facts about individual claimants to which procedural due process would apply).

17. *Campbell*, 461 U.S. at 470.

18. *See id.* (concluding that the accuracy of the administratively noticed facts had already been "tested fairly during rulemaking").

19. *Id.* at 462 n.5 (citation omitted).

20. *Id.*

21. 20 C.F.R. pt. 404, subpt. P, app. 2, § 200.00(e) (2010).

nonexertional restrictions.[22]

Claimants often have some form of nonexertional limitation. Even impairments that appear entirely physical or musculoskeletal in origin and which greatly impair strength, often produce some degree of nonexertional postural or manipulative restrictions or resulting pain that is mentally distracting or requires medication or treatment measures that limit vocational performance in some nonexertional manner. In addition, over 40% of all disability claimants suffer from some form of a mental or psychiatric condition—the prototypical nonexertional impairment.[23] Thus, the *Campbell* Court's recognition of the grid's restricted application portended a significant and elusive loophole. Indeed, Mashaw defended the grid's intrinsic "reasonableness" against claims of rigidity and over-generalization by pointing to exceptions to the grid's applicability that permit adjudicators to continue to individualize the work adjustment inquiry in appropriate cases.[24] However, he also expressly questioned whether the grid "exceptions will swallow the rules."[25]

The grid exceptions not only meet Mashaw's prediction in their breadth; the agency's ad hoc adjudicative methodology where grid exceptions are present has undermined the consistency and bureaucratic rationality the grid system was intended to ensure, sanctioned discriminatory and disadvantaged treatment of claimants with nonexertional impairments and limitations, and deeply divided the circuits. Courts and agency adjudicators differ on two fundamental questions. First, what is the proper general methodology for using the grid and the grid's administratively noticed occupational and job bases as a framework or guide on the work adjustment and significant numbers questions in grid exception cases, and is such methodology applicable when additional vocational or labor market evidence is procured? Second, under what circumstances may adjudicators deny a claim without additional vocational or labor market evidence by presuming or taking administrative notice of the lack of sufficient diminution or erosion of the grid's job bases due to the presence of limitations not factored into the grid's promulgation? While courts and agency adjudicators are divided on approaches to both issues, the circuits are particularly divided in their resolutions of the latter question and there

22. *Id.* § 200.00(e)(1)–(2).

23. Mental impairments afflicted 33.4% of disability insurance beneficiaries (1,961,090 beneficiaries) and 56.3% of adult SSI beneficiaries (2,224,714 beneficiaries) in 2002. *See* SOC. SEC. ADVISORY BD., DISABILITY DECISION MAKING AND DISABILITY INSURANCE ALLOWANCES: DATA AND MATERIALS 48 chart 29 (2006), http://www.ssab.gov/documents/chartbook.pdf [hereinafter DATA AND MATERIALS].

24. *See* MASHAW, BUREAUCRATIC JUSTICE, *supra* note 9, at 120–21.

25. *Id.* at 121.

is perhaps no substantive social security law issue that has generated greater division and confusion in the courts. Because of the large volume of affected cases and persons,[26] the circuit conflict, and the ambiguities in agency policy, both issues are overdue for Supreme Court resolution.[27]

On the first question, the SSA's promulgated regulations do not provide clear guidance on how to use the grid as a "framework" to determine whether the job bases administratively noticed in the grid are eroded by nonexertional restrictions to the point where the number of jobs no longer meets the statutorily required "significant number" to defeat a disability claim. While interpretive social security rulings provide important and significant direction which could be applied in a manner to produce greater consistency and similar treatment of grid-directed exertional and grid framework nonexertional cases alike,[28] courts and agency adjudicators often ignore or narrowly construe this agency guidance and issue thousands of inconsistent decisions each month.

These decisions reflect a form of adjudicative gestalt that produces arbitrary results for non-grid-directed claimants and denies them equal protection of the law. Thus, for example, 55- to 59-year-old claimants suffering conditions with significant nonexertional components such as psychoses, mental retardation, epilepsy, or severe asthma, might be found not-disabled based on identification of as few as 174 performable jobs. However, claimants with identical vocational profiles (age, education, work experience) but suffering only from exertional restrictions from arthritis, who are able to perform the requirements of millions of sedentary and light work jobs, would be deemed unable to make a successful vocational work adjustment to a significant number of jobs and found disabled based on the grid.

On the second question arising in grid exception cases, the courts are divided among three distinct approaches. The First and Ninth Circuits

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26. *See infra* notes 32–33 and accompanying text.

27. *See generally* EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 233–310 (9th ed. 2007) (collecting cases and discussing factors motivating exercise of the Court's certiorari jurisdiction including conflicts among the courts of appeals, the need for uniformity in the lower courts and agencies, the number of persons affected by the issue, and the issue's importance).

28. *See infra* notes 160–231 and accompanying text (discussing use of Social Security Rulings (SSRs)). SSRs are "indexes of precedential social security orders and opinions issued in the adjudication of claims, [and] statements of policy and interpretations which have been adopted but have not been published in the *Federal Register*." 20 C.F.R. § 402.35(a)(4) (2010). SSRs are not promulgated pursuant to Administrative Procedure Act (APA) notice-and-comment rulemaking processes in 5 U.S.C. § 553. *See, e.g.*, Bailey v. Sullivan, 885 F.2d 52, 62 (3d Cir. 1989); *see infra* notes 229–30 (describing legal significance and effect of SSRs).

authorize adjudicators to take unannounced and irrebuttable administrative or official notice that even medically severe nonexertional limitations do not meaningfully erode the grid's labor market work adjustment conclusions that were developed for claimants with only exertional limitations.[29] Thus, claims may be denied based solely on the exertional-based grid rules even where claimants possess indisputably severe nonexertional limitations. In contrast, the Fifth, Seventh, Eighth, Eleventh, and D.C. Circuits eschew sole reliance on the grid and mandate resort to other vocational evidence where a claimant's nonexertional limitations exceed a designated minimal medical "significance" threshold.[30] The Third Circuit is the only court of appeals that consistently approaches the issue as involving the proper scope and application of the official or administrative notice doctrine.[31] In all cases involving claimants with nonexertional limitations, it requires that the agency either produce direct vocational evidence on the occupational effect of the nonexertional limitations or provide advance notice that it intends to take administrative notice that the claimant's particular nonexertional limitation(s) do not significantly erode the grid's occupational base and then provide the claimant the opportunity to rebut such a conclusion.[32]

In summary, on both of these issues, the SSA's "grid exception" work adjustment determinations are patently inconsistent, and the circuits' approaches have produced even greater variation. In addition, some determinations and their broader decisional methodology are systematically arbitrary and inequitable. Others decisions are routinely issued in contravention of basic official notice principles. Accordingly, *Campbell*'s promise of helping to usher in an era of mass justice bureaucratic rationality through accuracy, consistency, and baseline fairness through the grid system has not yet been realized.[33]

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29. *See infra* notes 236–40 and accompanying text.

30. *See infra* notes 241–47 and accompanying text.

31. *See infra* notes 253–77 and accompanying text.

32. *See infra* notes 253–77 and accompanying text.

33. Mashaw's conception of bureaucratic rationality also called for the complete elimination of the SSA hearing and judicial review processes from which some of the inconsistencies discussed herein have arisen. *See* MASHAW, BUREAUCRATIC JUSTICE, *supra* note 9, at 198, 201–02. Extended examination and critique of Mashaw's provocative thesis is well-tread territory and is not the subject of this Article. For such examination, see Barry Boyer, *From Discretionary to Bureaucratic Justice*, 82 MICH. L. REV. 971, 971 (1984) (reviewing MASHAW, BUREAUCRATIC JUSTICE, *supra* note 9); Robert Kagan, *Inside Administrative Law*, 84 COLUM. L. REV. 816, 831–32 (1984) (reviewing MASHAW, BUREAUCRATIC JUSTICE, *supra* note 9); Liebman & Stewart, *supra* note 11, at 1954 (reviewing MASHAW, BUREAUCRATIC JUSTICE, *supra* note 9); Deborah Maranville, *Book Review*, 69 MINN. L. REV. 325, 345–47 (1984) (reviewing MASHAW, BUREAUCRATIC JUSTICE, *supra* note 9); Paul R. Verkuil, *The Self*

The importance of examining this problem is manifest. Administrative law scholars have described the SSA as the largest and most significant social welfare agency in the western world.[34] The SSA has described its cases involving full evaluation of vocational and labor market work adjustment issues as its "most difficult" to adjudicate.[35] The SSA processes close to four million claims on disability benefit matters alone each year,[36] and more than 40% of all disability insurance initial decisions are based on determinations about ability to make adjustments to other jobs in the labor market.[37]

While several scholars have analyzed the social construction of disability represented by the SSA disability benefit programs and have underscored the primacy of medical considerations in that construction,[38] the adjudicatory role of labor market factors and the grid system have received far less contemporary academic attention.[39] Thus, the sheer volume of

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Legitimating Bureaucracy, 93 YALE L.J. 780, 780 (1983) (reviewing MASHAW, BUREAUCRATIC JUSTICE, *supra* note 9). As more than a quarter century has elapsed since Mashaw's recommendations and the SSA's adjudicative process has persevered in virtually unchanged form, the SSA's work adjustment determinations and grid system continue to require nonarbitrary, equitably consistent, and otherwise legally supportable application.

34. *See* MASHAW, BUREAUCRATIC JUSTICE, *supra* note 9, at 18; Verkuil, *supra* note 33 at 781 ("It is the Mount Everest of bureaucratic structures: One studies it because it is there."); Richardson v. Perales, 402 U.S. 389, 399 (1971) ("The Social Security Act has been with us since 1935 . . . [and] [i]t affects nearly all of us."). The SSA's disability benefit programs, in turn, have been described as "the Western world's largest income support program for people unable to [work]." Charles H. Koch, Jr. & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 FLA. ST. U. L. REV. 199, 205 (1990).

35. *See* Rules for Adjudicating Disability Claims in Which Vocational Factors Must Be Considered, 43 Fed. Reg. 55,349, 55,349 (Nov. 28, 1978).

36. The agency processed over 2.1 million disability insurance applications and over 1.8 million SSI disability applications in 2006. *See* OFFICE OF RESEARCH, EVALUATION & STATISTICS, SOC. SEC. ADMIN., PUB. NO. 13-11826, ANNUAL STATISTICAL REPORT OF THE SOCIAL SECURITY DISABILITY INSURANCE PROGRAM, 2007, at 136 (2008); OFFICE OF RESEARCH, EVALUATION & STATISTICS, SOC. SEC. ADMIN., PUB. NO. 13-11827, SSI ANNUAL STATISTICAL REPORT, 2007, at 131 (2008).

37. DATA AND MATERIALS, *supra* note 23 at 60–62.

38. *See, e.g.*, JENNIFER L. ERKULWATER, DISABILITY RIGHTS AND THE AMERICAN SOCIAL SAFETY NET 3–4 (2006); DEBORAH A. STONE, THE DISABLED STATE 3 (1984); Bloch, *supra* note 4, at 191; Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. REV. 361, 363 (1996); Lance Liebman, *The Definition of Disability in Social Security and Supplemental Security Income: Drawing the Bounds of Social Welfare Estates*, 89 HARV. L. REV. 833, 842–47 (1976).

39. *See* ANDREW F. POPPER, GWENDOLYN MCKEE, ANTHONY E. VARONA & PHILIP J. HARTER, ADMINISTRATIVE LAW: A CONTEMPORARY APPROACH 631–32 (2d ed. 2010) (comparing disability benefits scholarship in the early 1980s with current such scholarship and noting that "[m]ore recently, the [grid] process has not been front and center in the

determinations utilizing the grid system and labor market considerations, their complexity, and the inconsistency and potential inaccuracy of the SSA's methodology merit greater academic exploration of this phase of the disability adjudication process.

Part I of this Article analyzes the nature of labor market work adjustment determinations prior to the grid's regulations' promulgation through analysis of the scope and application of the official notice doctrine and the vocational expert program. Part II describes the SSA's present adjudication process and the five-step sequential evaluation system that culminates in the work adjustment assessment under the grid's legislative rules. Part III evaluates the agency's and courts' methodologies in situations where the grid is not directly applicable and analyzes the agency guidance supporting use of the grid's adjudicative framework to make work adjustment determinations. It compares and contrasts varying judicial approaches to work adjustment assessments in grid exception cases and also examines the conflicting judicial approaches for determining when nonexertional limitations are sufficiently significant to preclude sole reliance on the grid in work assessment evaluations.

This Article concludes by setting out approaches for resolving both of the major grid exception issues that have divided the circuits and agency adjudicators. On the first issue, it argues that the courts should compel the agency to utilize its interpretive guidance on the proper use of the grid's adjudicative framework in all work adjustment assessments. This would entail interpreting that guidance to mandate use of the grid occupational and job base numbers, and not ad hoc, adjudicative gestalt, as the proper measure of the "significant" quantum of performable jobs below which a claimant is deemed unable to make a sufficient work adjustment in grid exception cases. In turn, this would ensure greater fairness, consistency, and nondiscriminatory treatment of similarly situated claimants and give effect to statutory vocational factors. On the second issue, it advocates that the Court compel compliance with settled official notice doctrine to ensure procedural fairness and prevent standardless intuitive decisionmaking. At a minimum, this requires constraining agency adjudicators from taking irrebuttable administrative notice that the grid's job bases have not been significantly eroded by the presence of non-trivial, nonexertional limitations

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discourse regarding disability"). A few articles written over twenty-five years ago predicted some of the problems and trends with the grid that have emerged since *Campbell*, which are discussed and expanded upon with a contemporary focus herein. *See, e.g.*, John J. Capowski, *Accuracy and Consistency in Categorical Decision-Making: A Study of Social Security's Medical-Vocational Guidelines—Two Birds with One Stone or Pigeon-Holing Claimants?*, 42 MD. L. REV. 329, 349–53 (1983); Kathleen Pickering, Note, *Social Security Disability Determinations: The Use and Abuse of the Grid System*, 58 N.Y.U. L. REV. 575, 577 (1983).

in making work adjustment assessments.

I. LABOR MARKET WORK ADJUSTMENT DETERMINATIONS AND THE SSA'S PRE-GRID ADJUDICATIVE PROCESS

The Social Security Act Amendments of 1967 provided the first express congressional ratification of labor market considerations and vocational factors as unquestionable components of the statutory disability standard. The amendments provided in relevant part:

> An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence . . . , "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.[40]

Although the SSA had utilized limited vocational and labor market considerations by regulation and practice since the SSA disability insurance program's inception in 1956,[41] the 1967 Amendments established for the

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40. 42 U.S.C. § 423(d)(2)(A) (2006).

41. The agency's first non-medical disability regulations were promulgated in 1957. *See* 20 C.F.R. §§ 404.1501(b), 404.1502 (1967) (stating that in determining whether an individual's impairment makes him unable to engage in substantial gainful activity, "[c]onsideration is also given to such other factors as the individual's age, education, training and work experience"). In 1960, Congress prodded the agency to promulgate more detailed regulations to address non-medical factors in the disability determination process. *See* SUBCOMM. ON THE ADMIN. OF THE SOC. SEC. LAWS OF THE H. COMM. ON WAYS & MEANS, 86TH CONG., ADMINISTRATION OF SOCIAL SECURITY DISABILITY INSURANCE PROGRAM 18 (Comm. Print 1960). By 1961, the SSA promulgated regulations establishing that except when a claimant has only a "slight" medical impairment, a claimant's age, education, and work experience will be considered in determining ability to make labor market work adjustments. *See* 20 C.F.R. § 404.1502(a) (1961). These regulations also generally excused persons from making labor market work adjustments to less strenuous work if they had performed arduous physical labor for thirty-five or more years, had become medically precluded from performing such work, and had a marginal education. *See id.* § 404.1502(c). Thus, under agency criteria, claimants who might secure benefits could be divided into three categories: (1) those who met objective medical criteria in a schedule of presumptively disabling impairments; (2) those who fit into the thirty-five year arduous work with marginal education category; and (3) those not in the first two categories but who possessed more than a slight impairment and could not perform their past work. *See* ROBERT G. DIXON, JR., SOCIAL SECURITY DISABILITY AND MASS JUSTICE: A PROBLEM IN WELFARE ADJUDICATION 54–57 (1973). It is with respect to this third category that the agency was required to focus

first time a job incidence or numerosity requirement for the labor market work adjustment inquiry through the "work which exists in significant numbers" clause. Although Congress has amended the Social Security Act's disability benefit programs' provisions on several other occasions,[42] it has not altered the disability definition's labor market work adjustment standard since 1967.

The 1967 Amendments were enacted in response to court decisions that had both substantively expanded and procedurally altered the work adjustment assessment. The Second Circuit's 1961 decision in *Kerner v. Flemming* had initiated this trend by demanding non-theoretical evidence of alternative jobs to which claimants could adjust and by shifting the burden of proof to the agency on that point where the claimant "raise[d] a serious issue."[43] Other circuits then expanded *Kerner*'s substantive holding by vacating, as theoretical, agency work adjustment determinations that failed to evaluate the presence of such jobs in the community in which the claimant lived,[44] whether actual openings for such jobs existed,[45] or whether the employers' hiring practices undermined the claimant's chances at securing a position.[46] Courts had also extended *Kerner*'s procedural holding by expressly shifting the burden of proof to the agency, which must demonstrate the availability of jobs to which claimants can make a work adjustment in all cases where claimants demonstrated an inability to perform their former work.[47] Thus, by the mid-1960s, the agency was relying heavily upon the use of vocational experts in adjudicated hearings to supply the proof required to meet its new evidentiary burden in labor market work adjustment cases.[48]

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on the combination of medical and vocational factors and ascertain whether claimants had the ability to make adjustments to other work.

42. *See generally* FRANK S. BLOCH, BLOCH ON SOCIAL SECURITY 1.8, 1.9 (2010), *available at* Westlaw "BLOCHSS" database (describing amendments to the Act affecting the disability programs from 1984 to the present).

43. 283 F.2d 916, 921–22 (2d Cir. 1960).

44. *See, e.g.*, Massey v. Celebrezze, 345 F.2d 146, 157–58 (6th Cir. 1965).

45. *See, e.g.*, Cyrus v. Celebrezze, 341 F.2d 192, 196 (4th Cir. 1965); Hodgson v. Celebrezze, 312 F.2d 260, 263 (3d Cir. 1963).

46. *See, e.g.*, Sayers v. Gardner, 380 F.2d 940, 951–52 (6th Cir. 1967); Kirby v. Gardner, 369 F.2d 302, 305 (10th Cir. 1966).

47. *See* Robert M. Viles, *The Social Security Administration Versus the Lawyers . . . And Poor People Too*, 39 MISS. L.J. 371, 397–98 (1968) (collecting cases). Even before *Kerner*, some courts had pointed out the inequity of placing a burden on claimants to prove a broad negative proposition—the inability to adjust to every conceivable job in the American labor market. *See, e.g.*, Scales v. Flemming, 183 F. Supp. 710, 714 (D. Mass. 1959) ("Claimants were usually poor. Rarely did they have lawyers. Efforts to show the state of the labor market would be expensive.").

48. As described in the Mashaw-led comprehensive study of SSA hearings and appeals,

Although narrowing the substantive social and legal construction of disability, the 1967 Amendment did not purport to alter *Kerner*'s procedural holding—the judicially created shifting of the burden of proof to the SSA. Courts interpreting the 1967 Amendment therefore continued to place a burden on the agency to produce labor market evidence. That substantive burden was redefined as one of producing evidence of a "significant number" of jobs either in the "local economy" or in "several regions of the country" to which a claimant could make a work adjustment, taking into account the statutory vocational factors (the claimant's age, education, and work experience) in addition to medical limitations.[49] This agency burden is triggered by the claimant's demonstration of an inability to perform past relevant work, or lack of past relevant work for SSI claimants with no relevant work history.[50] Courts have described this initial past relevant work hurdle as the claimant's prima facie case.[51] Eventually, every court of appeals[52] and the Supreme Court[53] embraced this burden-shifting formulation. Over time, even the agency discontinued its opposition to the burden-shifting formulation and promulgated regulations acknowledging and explaining this process.[54]

> [t]he Secretary, after failing to persuade the Solicitor General to petition for certiorari in *Kerner*, moved promptly to comply. In 1962, a nationwide program of vocational experts was established to provide testimony at the hearing level; a year later *Kerner* was published as a Social Security Ruling, implying the Administration's acquiescence; and interpretative materials related to vocational factors in disability were distributed to the state agencies.

MASHAW, HEARINGS, *supra* note 12, at 142.

49. *See, e.g.*, Meneses v. Sec'y of Health, Educ. & Welfare, 442 F.2d 803, 807 (D.C. Cir. 1971) ("[T]he 1967 Amendments lighten the burden of what the Government must show, but claimant's showing of inability to return to former work does shift to the Government a burden of coming forward.").

50. *See id.*; *see also* Johnson v. Heckler, 769 F.2d 1202, 1210 (7th Cir. 1985) (collecting cases and adopting this burden shifting formulation from all twelve circuits), *vacated on other grounds sub nom.* Bowen v. Johnson, 482 U.S. 922 (1987).

51. *See Johnson*, 769 F.2d at 1210 (noting that all twelve circuits recognize this definition of the plaintiff's prima facie case).

52. *See id.*

53. *See* Bowen v. Yuckert, 482 U.S. 137, 146 n.5 (1987) (describing the specific mechanism for burden-shifting in disability proceedings).

54. *See* 20 C.F.R § 404.1512(g) (2010). Courts often use the terms burden of proof, production, or "coming forward" interchangeably in discussing the agency's work adjustment burden. The agency has explained that "[i]n the administrative process, the burden of proof generally encompasses both a burden of production of evidence and a burden of persuasion about what the evidence shows." 68 Fed. Reg. 51,153, 51,155 (Aug. 26, 2003). The claimants "shoulder the dual burdens of production and persuasion" through the various steps in the disability process leading up to evaluation of ability to perform past relevant work. *Id.* Then,

The agency attempted to meet its work adjustment burden of proof in two significant ways: (1) through the use of the official notice doctrine often coupled with notice of the DOT and other government job market publications; and (2) through the vocational expert program with a particular focus on the use of live vocational "expert" testimony at administrative hearings.

A. The Official Notice/Administrative Notice Doctrine

While there was some judicial support for the proposition that vocational experts are almost always necessary to supply evidence to satisfy the agency's labor market work adjustment burden in the post-*Kerner*, pre-grid time period,[55] several courts found that some form of properly implemented

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there is a limited shift in the burden of proof to us . . . . [to] determine[] that there is other work you can do. To make this finding, we must provide evidence that demonstrates that jobs exist in significant numbers in the national economy that you can do, given your [residual functional capacity (RFC)], age, education, and work experience. In legal terms, this is a burden of production of evidence.

This burden shifts to us because, once you establish that you are unable to do any past relevant work, it would be unreasonable to require you to produce vocational evidence showing that there are no jobs in the national economy that you can perform, given your RFC. However, as stated by the Supreme Court, "It is not unreasonable to require the claimant, who is in a better position to provide information about his own medical condition, to do so." [*Yuckert*, 482 U.S. at 146 n.5]. Thus, the only burden shift . . . is that we are required to prove that there is other work that you can do, given your RFC, age, education, and work experience . . . .

When the burden of production of evidence shifts to us . . . , our role is to obtain evidence to assist in impartially determining whether there is a significant number of jobs in the national economy you can do. Thus, we have a burden of proof even though our primary interest in the outcome of the claim is that it be decided correctly. As required by the Act, the ultimate burden of persuasion to prove disability, however, remains with you.

Id.

55. *See, e.g.*, *Meneses*, 442 F.2d at 809 (noting that the SSA had the burden on the other jobs issue, that "[n]o evidence whatever was adduced by the Secretary, neither testimony of a vocational expert such as he often provides, nor deposition or interrogatories," and that even "[a]ssuming that it is common knowledge that there are jobs available in the national economy for high school graduates with radio technology credits, *we do not think it is subject to judicial notice*, and the record is devoid of evidence on whether or to what extent there are *significant numbers* of jobs in the national economy which could be filled by a person with [claimant's] limited training and [medical condition]") (emphasis added); *see* Garrett v. Richardson, 471 F.2d 598, 603–04 (8th Cir. 1972) ("[I]t would be beyond the realm of reason to further require a claimant . . . to produce a vocational counselor to testify that there are no jobs in the national economy which he can perform. The burden of producing such a person must rest with the hearing examiner and in the absence of substantial evidence from other sources bearing directly on the issue of [SGA], the testimony of the

official or administrative notice could suffice as well under appropriate circumstances.[56] Official notice in agency adjudication is the administrative law "analogue" to judicial notice.[57] It is "a method for getting information into the record somewhere between proof and simple recognition of a fact so well accepted as to be beyond debate."[58]

In perhaps the most significant early (pre-APA) interpretation of the official notice doctrine, the Supreme Court in *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*[59] recognized procedural due process limits on the doctrine's application. In *Ohio Bell*, the Ohio Public Utilities Commission had adjusted the utility's property value downward for ratemaking purposes to reflect the Great Depression, which had commenced in the middle of the ratemaking. Although the Court approved the Commission's notice of the Depression and the general decline in market values as "one of its concomitants,"[60] it rejected the agency's use of the data because the general decline did not demonstrate "[h]ow great the decline has been for this industry or that, for one material or another, in this year or the next."[61]

In addition, "[f]rom the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice" committed by the agency was its failure to disclose the particular evidence on which it had relied.[62] Thus, the party against which the officially noticed facts were taken was denied the opportunity to "see the evidence or hear it and parry its effect."[63] The Court explained that "[official] notice, even when taken, has no effect than to relieve one of the parties of the burden of resorting to the usual forms of evidence. 'It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable.'"[64]

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vocational counselor is essential . . . ."); *see also* Taylor v. Weinberger, 512 F.2d 664, 669 & n.9 (4th Cir. 1975) (holding, in light of the shifting burden of proof to the agency, that internal agency guidelines put hearing officers on notice that to proceed with the hearing "without specific evidence of alternate employability, as might be given by a vocational expert, is to invite reversal").

56. *See* MASHAW, HEARINGS, *supra* note 12, at 76.

57. Walter Gellhorn, *Official Notice in Administrative Adjudication*, 20 TEX. L. REV. 131, 137 (1941). Courts and commentators use the terms "administrative notice" and "official notice" interchangeably in this context.

58. CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 5.55, at 212 (3d ed. 2010).

59. 301 U.S. 292, 299–307 (1937).

60. *Id.* at 301.

61. *Id.*

62. *Id.* at 302.

63. *Id.* at 302–03.

64. *Id.* at 301–02 (citations omitted).

Courts in both SSA cases and others have interpreted *Ohio Bell* as establishing two prerequisites for the use of official notice, one substantive and one procedural. First, the information must be substantively appropriate for official notice as a matter of common knowledge. Second, the agency must follow proper procedures in using the information, such as providing advance notice and a meaningful opportunity to rebut or contest its application by the agency in the adjudication.[65] With respect to *Ohio Bell*'s first requirement, the official notice doctrine has been expanded beyond matters of common knowledge or to facts "not subject to reasonable dispute," as is the limit of the judicial notice doctrine.[66] Rather, the academic debate over the official notice doctrine's substantive scope has centered upon varying attempts to categorize the type of facts that can be officially noticed.[67]

The Attorney General's Committee on Administrative Procedure has posited a distinction between "litigation" and "non-litigation" facts. Litigation facts arise from investigation of a pending case and should be adduced only from the usual adjudicative processes. Non-litigation facts are those that "develop[] in the usual course of business of the agency," "emerge from numerous cases," and "become part of the factual equipment of the administrators."[68] Such facts are appropriate for official notice because they fall within the acquired technical or scientific expert knowledge of the agency and are as "obvious and notorious" to such expert agency administrators as facts susceptible to judicial notice are to judges.[69]

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65. *See, e.g.*, Sykes v. Apfel, 228 F.3d 259, 272–73 (3d Cir. 2000) (interpreting and applying *Ohio Bell* in an SSA case on official notice of labor market work adjustment issues); Union Elec. Co. v. FERC, 890 F.2d 1193, 1202 (D.C. Cir. 1989) (interpreting and applying *Ohio Bell* to FERC case); *see also* Sayers v. Gardner, 380 F.2d 940, 954–55 (6th Cir. 1967) (applying *Ohio Bell* to place substantive and procedural limits on use of official notice doctrine in SSA case); Ross v. Gardner, 365 F.2d 554, 557–58 (6th Cir. 1966) (same).

66. Rule 201(b) of the Federal Rules of Evidence provides that, "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." FED. R. EVID. 201(b). The Advisory Committee notes to this rule emphasize that "caution" should be taken in the use of judicial notice based on a "tradition of circumspection" and judgment based on experience that the taking of evidence, subject to established safeguards, is the best way to resolve disputes of adjudicative facts. *See* Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 204–05 (1973).

67. *See* Ernest Gellhorn, *Rules of Evidence and Official Notice in Formal Administrative Hearings*, 1971 DUKE L.J. 1, 46 (1971) (noting the academic debate over different approaches to categorize noticeable facts).

68. *Id.* (quoting FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 77-8, at 72 (1941)).

69. *Union Elec. Co.*, 890 F.2d at 1202–03 (quoting ADMINISTRATIVE PROCEDURE IN

A more far-reaching distinction Kenneth Culp Davis first articulated in 1942 is that between adjudicative and legislative facts.[70] Adjudicative facts are those pertaining to the parties, their activities, and their properties.[71] Legislative facts "are those a tribunal seeks in order to assist itself in the legislative process of creating law or determining policy."[72] They are "ordinarily general and do not merely concern the immediate parties."[73] Davis pointed out that some facts do not fit into either category and are not clearly adjudicative or legislative.[74] Nevertheless, Davis argued that obvious legislative facts need not even be noticed or brought into the record; where critical and debatable, they can normally be subject to challenge through briefs and arguments.[75] On the other hand, adjudicative

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GOVERNMENT AGENCIES: REPORT OF THE COMMITTEE ON ADMINISTRATIVE PROCEDURE APPOINTED BY THE ATTORNEY GENERAL 71 (1941)); TOM C. CLARK, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE 79–80 (1947). The DOL has its own express administrative notice regulation which provides that noticeable facts must not be subject to "reasonable dispute" because they are either:

> (1) Generally known within the local area,
>
> (2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, or
>
> (3) Derived from a not reasonably questioned scientific, medical or other technical process, technique, principle, or explanatory theory within the administrative agency's specialized field of knowledge.

29 C.F.R. § 18.201(b) (2009).

70. *See* Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402–16 (1942) (distinguishing between adjudicative and legislative facts through analyzing the judicial treatment of the facts and their uses); Kenneth Culp Davis, *Official Notice*, 62 HARV. L. REV. 537, 549–66 (1949) (applying the legislative–adjudicative fact distinction with particular focus on the official notice doctrine).

71. Davis, *Official Notice*, *supra* note 70, at 549.

72. *Id.*

73. *Id.*

74. *See* KENNETH CULP DAVIS, ADMINISTRATIVE LAW TEXT § 15.03, at 300–01 (3d ed. 1972).

75. *See id.* § 15.09, at 314; Gellhorn, *supra* note 67, at 47. The Federal Rules of Evidence (Rule 201) adopts Davis's distinction between legislative and adjudicative facts for the application of the judicial notice doctrine in court proceedings. The advisory notes point out that the rules only pertain to judicial notice of adjudicative facts and that there is no rule restricting judicial notice of legislative facts. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 201–06 (1973). This omission has drawn scholarly criticism, including from Davis:

> [A] rule that parties should never have any rights with respect to judicial notice of legislative facts probably should not "govern." If a case turns on specific legislative facts which are doubtful, a party should have opportunity to show that the noticed facts are false. In an extreme case, denial of such an opportunity might even deny due process.
>
> A rule to govern judicial notice of legislative facts can be formulated. . . . [:] (a) a court may notice legislative facts if it believes them, whether or not they are subject to

facts must be brought into the record either through direct proof or by official notice. Whether adjudicative facts can be officially noticed or must be proven directly depends on three variables: "how close the facts are to the center of the controversy; the extent to which the facts are adjudicative or legislative; and the degree to which the facts are certain."[76] As the facts "move closer to the basic issues of the hearing, relate to the parties, and are disputed, the usual methods of proof must be observed; as they move in the opposite direction, official notice is permissible."[77]

The 1946 enactment of Section 7(d) of the APA codified the due process rebuttal rights second prong of *Ohio Bell* by providing that "[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary."[78] Despite Rule 201 of the Federal Rule

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> reasonable dispute, (b) unless the facts are too obvious to state, the court should state or summarize them, and it should indicate their source whenever a source is identifiable, [and] (c) the court should grant a party's reasonable request for opportunity to challenge the noticed facts, exercising discretion as to whether written presentations suffice in the circumstances or whether oral argument or submission of evidence subject to cross-examination should be allowed.

DAVIS, *supra* note 74, at § 15.07; *see also* Peggy C. Davis, *"There is a Book Out There . . .": An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539, 1542 (1987) (detailing "the deeply problematic nature of permissive legislative factfinding" and advocating "a more constrained method by which judges may take notice of legislative facts").

76. Gellhorn, *supra* note 67, at 47; *see also* DAVIS, *supra* note 74, § 15.09, at 314.

77. Gellhorn, *supra* note 67, at 47.

78. Administrative Procedure Act, 5 U.S.C. § 556(e) (2006) (formerly codified at 5 U.S.C. §1006(d)). Although the SSA had for some years taken the position that it need not hold hearings pursuant to the APA, in 2001, "the SSA Commissioner issued a written statement in which he confirmed the applicability of the APA to SSA adjudications." Robin J. Arzt, *Recommendations for a New Independent Adjudication Agency to Make the Final Administrative Adjudications of Social Security Benefits Claims*, 23 J. NAT'L ASS'N. ADMIN. L. JUDGES 267, 319 (2003) (citing a letter from Kenneth S. Apfel, SSA Commissioner, to Judge Ronald G. Bernoski, President, Association of Administrative Law Judges on January 9, 2001).

> Adjudications pursuant to the Social Security Act, . . . also are adjudications pursuant to the APA because (1) the SSA is an "agency" within the definition in Section 2(a) of the APA, and (2) a Social Security Act hearing is a proceeding that is an "adjudication" within the definition in Section 2(a) of the APA.

Id. at 320 (citations omitted); *see also* Robin J. Arzt, *Adjudications by Administrative Law Judges Pursuant to the Social Security Act are Adjudications Pursuant to the Administrative Procedure Act*, 22 J. NAT'L ASS'N. ADMIN. L. JUDGES 279, 298 (2002) ("[I]n 1976, Congress expressly ended what it described as the confusion regarding the applicability of the APA to the Social Security Act by enacting Public Law Number 94-202 . . . which 'clearly placed all social security cases . . . under the APA.'") (emphasis omitted). For further discussion of some of the "complex history" of the SSA and the APA, including the Supreme Court's avoidance of the issue in *Richardson v. Perales*, see Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 COLUM. L. REV. 1289,

of Evidence's reliance on the adjudicative-legislative fact distinction and its implication of relatively unrestricted judicial notice of legislative facts in federal court proceedings,[79] the APA does not include any such exemption from its provisions for federal administrative adjudications. More recently, the Supreme Court has recognized that official notice even of facts characterized as "legislative" must include the opportunity to respond to the facts noticed.[80]

Ernest Gellhorn has criticized both the Attorney General's and Davis's reliance on categories or labels to ascertain the proper application of the official notice doctrine.[81] He argued that the central focus should be on the question of fairness; is it fair with respect to costs and situational equities in the particular hearing to take official notice and transfer the burden of proof to a party?[82] He also suggested that if proof burdens are to be altered, "it should be accomplished openly through a shift in substantive policy rather than covertly by manipulation of procedural devices."[83]

Regardless of the interpretive approach to the doctrine employed, the SSA's use of the official notice doctrine to meet the work adjustment burden in the post-*Kerner* era has received, at best, a mixed reception from

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1306 & n.86 (1997). Apart from the APA, the Social Security Act also contains a requirement that its hearing decisions be "bas[ed] on evidence adduced at the hearing" which has relevance for the application of the official notice doctrine. *See* 42 U.S.C. § 405(b)(1) (2006). Indeed, the Court has explicated more generally an "evidence adduced at the hearing" requirement as a component of procedural due process in reliance on *Ohio Bell*. *See* Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (citing *Ohio Bell*). Thus, officially noticed facts may not be deemed to have been "adduced at the hearing" unless they are preceded by appropriate notice and the opportunity to confront such facts at the hearing. *Cf. id.* at 271–72 (finding that procedural due process at welfare hearings also requires adequate notice and opportunity to confront the evidence).

79. *See* FED. R. EVID. 201.

80. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 297–98 (2000) (accepting noticed City Council findings regarding the harmful effects of nude dancing on a part of the City and observing that "it is well established that, as long as a party has an opportunity to respond, an administrative agency may take official notice of such 'legislative facts' within its special knowledge").

81. Gellhorn, *supra* note 67, at 49. Louis Jaffe has offered a similar critique of Davis's position, noting that while Davis "has a healthy distrust of categories, [h]e has here succumbed . . . to their lure." Louis L. Jaffe, *Administrative Procedure Re-Examined: The Benjamin Report*, 56 HARV. L. REV. 704, 719 (1943). To Jaffe, "where facts bear closely and crucially on the issue, and are prima facie debatable, they should be developed in an evidentiary fashion" with the opportunity for rebuttal, and "[s]uch facts will not necessarily be 'adjudicative' in Mr. Davis' sense." *Id.*

82. Gellhorn, *supra* note 67, at 48; *see also* Ohio Bell Tel. Co. v. Pub. Util. Comm'n, 301 U.S. 292, 301–02 (1937) (noting that the critical effect of official notice is to relieve one of the parties of the burden of proving facts with the "usual forms of evidence.").

83. Gellhorn, *supra* note 67, at 48.

the courts. Some courts have found that either the explicit or implicit taking of official notice is not appropriate and have demanded more individualized proof of jobs or of the claimant's ability to perform or adapt to them, in light of medical and vocational limitations.[84] Others courts have pointed to the lack of specialized expertise by the lay agency adjudicators taking notice.[85] Furthermore, some courts have found notice appropriate under the first, substantive *Ohio Bell* step that requires an official notice analysis but rejected agency decisions under the second procedural step where the agency adjudicators failed to provide sufficient opportunity to confront and rebut noticed facts.[86]

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84. *See, e.g.*, Meneses v. Sec'y of Health, Educ. & Welfare, 442 F.2d 803, 809 (D.C. Cir. 1971); *see also* Hall v. Sec'y of Health, Educ. & Welfare, 602 F.2d 1372, 1376–77 (9th Cir. 1979) (holding that the Secretary may not meet his burden through administrative notice of unspecified light or sedentary occupations but must show that the "claimant has the physical and mental capacity to perform specified jobs, taking into consideration the requirements of the job as well as the claimant's age, education, and background"); Hephner v. Mathews, 574 F.2d 359, 362 (6th Cir. 1978) (finding that the administrative law judge's (ALJ's) administrative notice that light work exists in national economy and that claimant can perform unspecified light work is inadequate to meet the burden because the SSA must evaluate capacity to work "in light of his age, his education, [and] his work experience" and "in terms of specific types of jobs"). *See generally* Parker v. Harris, 626 F.2d 225, 233–34 (2d Cir. 1980) ("The Secretary argues that she was entitled to take administrative notice of the existence of custodial or security jobs. While we do not preclude the taking of such notice in an appropriate case . . . we reject it here because there was no 'job description clarifying the nature' and requirements of such jobs, . . . and no showing whatever that Parker would have been able to perform such jobs.").

85. As the Fourth Circuit has explained:

> [W]e expressly rejected the contention that the Secretary may establish specific vocational ability solely through medical evidence or by "administrative notice." . . . [T]he ALJ is not qualified to provide affirmative vocational evidence. Such evidence, rather, should be provided by persons who have, through training and experience in vocational counseling or placement, an up-to-date knowledge of job requirements, occupational characteristics and working conditions, and a familiarity with the personal attributes and skills necessary to function in various jobs.
>
> An ALJ who has heard a multitude of disability claims and vocational experts, and therefore feels knowledgeable in vocational matters, must resist the temptation to dispense with vocational expert testimony in favor of his own experience. Aside from the ALJ's lack of formal qualification and actual contact with the working community, it is manifestly unfair for the ALJ to rely on assumptions and "facts" which the claimant cannot, without reading the ALJ's mind, test or rebut.

Wilson v. Califano, 617 F.2d 1050, 1053–54 (4th Cir. 1980); *cf.* Ross v. Gardner, 365 F.2d 554, 557–58 (6th Cir. 1966) (determining that administrative notice is improper when it is based on a hearing officer's notice and interpretation of medical texts and treatises that are beyond his competence and are not matters of common knowledge).

86. *See, e.g.*, Fruge v. Harris, 631 F.2d 1244, 1247 (5th Cir. 1980) ("It is permissible for an ALJ to take administrative notice . . . that certain jobs are light and sedentary and exist in the national economy. . . . [But] the claimant must be aware of the 'administrative noticing'

Those courts which approved use of official notice in this context did so without meaningful analysis or application of either *Ohio Bell* requirement. These courts tended to approve notice in cases where claimants possessed the capacity to perform an unrestricted range of lighter work,[87] or where adjudicators identified specific jobs in the DOT or other government labor market publications that they deemed relatively less restricted claimants capable of performing.[88] On this latter point, the first Mashaw-led comprehensive study of SSA hearing and appeal processes drew a

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and given an opportunity to controvert the facts noticed. No mention of the ALJ's administrative noticing of any fact appears in the record. . . . [Thus, a]ctual evidence of these facts was required."). *See generally* Banks v. Schweiker, 654 F.2d 637, 640–42 (9th Cir. 1981) (holding that, although mass justice efficiency considerations should permit SSA ALJs to take administrative notice whenever convenient and useful, the ALJ's inadequate communication of intent to take administrative notice and lack of sufficient opportunity to rebut necessitates a new hearing). Based on related process concerns, the agency has recently issued an internal memorandum, clarifying that its ALJs may not take administrative notice of vocational expert (VE) interrogatories offered in prior hearings for use in subsequent ones. The agency reasoned that, since prior VE opinion does not fit within *Campbell*'s legislative rule promulgation and has not gone through rulemaking's "procedural safeguards to ensure the accuracy of the facts contained therein," subsequent administrative notice of prior VE testimony would violate the requirement that decisions be "based on evidence adduced at a hearing." *See* OFFICE OF THE CHIEF ADMIN. LAW JUDGE, CJB-09-03, PROHIBITION ON USE OF "GENERIC" VOCATIONAL EXPERT INTERROGATORIES BY ADMINISTRATIVE NOTICE (2009), https://secure.ssa.gov/apps10/public/reference.nsf/links/05262009025802PM (citing Heckler v. Campbell, 461 U.S. 458, 467, 470 (1983)). The agency also noted substantive problems with noticing prior VE opinions. The "data about the work that exists in significant numbers . . . can change over time" and would not, in any event, be "individually tailored" to the claimant's unique confluence of medical and vocational adversities. *Id.*

87. *See, e.g.*, Breaux v. Finch, 421 F.2d 687, 689–90 (5th Cir. 1970) (claiming that, since claimant "is perfectly capable of engaging in an infinite variety of jobs which can be classified as light work," "it was quite proper for the Secretary to take administrative notice" that such light work exists in the national economy that claimant could perform); *see also* McLamore v. Weinberger, 538 F.2d 572, 574–75 (4th Cir. 1976) (finding that administrative notice was proper as "within the common knowledge and experience of ordinary men" and that a twenty-six-year-old, semi-skilled, high school graduate who could perform light and sedentary work with only a "minor injury," "can engage in a number of light manual and semi-skilled jobs").

88. *See, e.g.*, Rinaldi v. Ribicoff, 305 F.2d 548, 550 (2d Cir. 1962) (finding that "even a cursory examination" of an officially noticed Department of Labor study of 214 jobs in which workers with back impairments, such as the claimant, were found employed, demonstrates that "an extremely wide range of employment opportunities was available to him"); *see also* McDaniel v. Celebrezze, 331 F.2d 426, 428–30 (4th Cir. 1964) (ruling that "official notice of recognized publications [(e.g., DOT, medical texts)] is not, in itself, grounds for reversing the decision of the Secretary" when the APA § 7(d) rebuttal rights provision has been met; the opportunity of counsel to "challenge and contradict" post-hearing official notice of these publications by SSA Appeals Council is sufficient).

distinction between official notice with "a documentary basis" on the work adjustment issue and official notice attempted without such a basis.[89] Mashaw suggested that the latter was the cause of restrictive court decisions on the doctrine's use.[90] Thus, he reasoned that greater permissible official notice could be accomplished in this context if the notice were based on the DOT and similar publications, and not merely the administrative law judges' (ALJs') intuitions.[91] Shortly thereafter, the SSA promulgated a regulation (apart from the grid) authorizing agency adjudicators to take administrative notice of "reliable job information" from the DOT and other government labor market publications in determining job availability and incidence.[92]

However, a flaw in the agency's approach, including the administrative notice regulation, is the failure to identify the precise purpose and limits on the noticeable use of the DOT and other government labor market materials.[93] The post-1967 Amendment's work adjustment inquiry devolves into at least three distinct questions that present obstacles for the use of government publications for official notice of work adjustment facts. I categorize these questions as job performability, job adaptability, and job incidence. Job performability involves the question of the ability functionally to perform alternative occupations and jobs in light of the claimant's medical limitations and statutory vocational limitations (education, training, and work experience to some degree). Is the claimant actually able to perform the specific job tasks demanded in the job(s) or occupation(s)?

Job adaptability is a somewhat less concrete inquiry that addresses the

89. MASHAW, HEARINGS, *supra* note 12, at 80–82 (explaining and distinguishing *Meneses*, 442 F.2d at 803, on that basis).

90. *Id.*

91. *Id.*

92. *See* 20 C.F.R. § 404.1509(c) (1979) (current version at 20 C.F.R. § 404.1566(d) (2009)).

93. For example, while an ALJ can take notice that light work or certain common occupations exist in the economy as a matter of common knowledge, using the DOT or otherwise, it does not follow that the ALJ can also notice a claimant's ability to perform or adapt to any given occupation in view of the claimant's unique medical and vocational restrictions. *See* O'Banner v. Sec'y of Health, Educ. & Welfare, 587 F.2d 321, 323 (6th Cir. 1978) (taking administrative notice that light work exists is permissible, but "there [must] be something more than mere intuition or conjecture" that the claimant has the capacity and qualifications to perform specific jobs). Indeed, an internal SSA memorandum supplied to Congress explained that while "administrative notice" of job incidence is permissible under the APA and agency rulings, the agency "must first respond to the issue of what type of work this claimant can do. This requires the use of live testimony by a vocational expert." STAFF OF H. COMM. ON WAYS & MEANS, 93D CONG., COMMITTEE STAFF REPORT ON DISABILITY INSURANCE PROGRAM 100 (Comm. Print 1974).

question of a claimant's ability to adjust to a new work environment and job functions and to sustain employment in that environment on a competitive basis regardless of the medical, educational, or acquired-skill abilities to perform the specific tasks involved in the work. For example, the inclusion of age as a mandatory factor in the statutory criteria is presumed to affect only adaptability and not performability in any manner that is independent from one's medical limitations.[94] Adaptability is evaluated through the age factor even though the precise manner in which age affects adaptability has been difficult to ascertain.[95] Thus, fifty-five-

94. When the SSA finally promulgated clarifying regulations on how to evaluate the statutory age factor, it noted that "'[a]ge' refers to how old you are (your chronological age) and the extent to which your age affects your ability to adapt to a new work situation and to do work in competition with others." 20 C.F.R. § 404.1563(a) (1981). In 2000, the SSA "incorporat[ed] the principle intended in this statement" into a new clause that provides that, in determining the extent to which age affects a person's ability "to adjust to other work, we consider advancing age to be an increasingly limiting factor in the [person's] ability to make such an adjustment." 65 Fed. Reg. 17,994, 17,995 (Apr. 6, 2000) (referencing 20 C.F.R. § 404.1563(a) (2000)). The 2000 revisions were not intended to alter the concept of adaptability or adjustment to other work. They were directed to supersede court decisions that conflated adaptability considerations of workers approaching retirement age and lacking "highly marketable" skills with "employability" considerations pertaining to such workers that had been written out of the Act through the 1967 Amendments. *See id.* at 17,995; *cf.* Preslar v. Sec'y of HHS, 14 F.3d 1107, 1112 (6th Cir. 1994) ("Implicit in the regulations and the judiciary's attempts to interpret 'highly marketable' is the notion that such skills, which are sufficiently coveted by employers and sufficiently specialized or unique so as to offset the disadvantage of advancing age, should normally enable the claimant to obtain employment."). The revisions also deleted reference to a "highly marketable skills" requirement for finding adaptability for such older workers. 65 Fed. Reg. at 17,995.

95. The concept of adaptability reflected in the age regulations may be seen as a limited component of what Robert Dixon referred to as "the key factor" in work adjustment determinations—the claimant's "set." Dixon uses the term "set" to reference such issues as a claimant's pain threshold, willingness to try to learn new skills, willingness to adjust lifestyle to accommodate the need for greater off-the-job rest, "residual zip in general," and pride. DIXON *supra* note 41, at 61. Indeed, in promulgating the age regulations for the grid, the agency found that age references physiological factors "which diminish a severely impaired person's *aptitude for new learning and adaptation to new jobs.*" 43 Fed. Reg. 55,349, 55,359 (Nov. 28, 1978) (emphasis added). *See generally* Miki Malul, *Older Workers' Employment in Dynamic Technology Changes*, 38 J. OF SOCIO-ECON. 809, 809 (2009) (finding that older workers "are typically limited in certain abilities such as flexibility, acceptance of new technology, and ability to learn new skills"); Jacob J. Sosnoff & Karl M. Newell, *Age-Related Loss of Adaptability to Fast Time Scales in Motor Variability*, 63B J. OF GERONTOLOGY 344, 344 (2008) ("The reduced capacity to adapt to stress has been hypothesized to result from the loss of complexity with aging."). John Capowski has argued that the grid regulations' failure to account more fully for claimants' "set" and a broader adjustment concept beyond the crude and narrow adaptability generalizations in the age regulations, although contributing to consistency because of the subjectivity of the "set" concept, "seriously undermines" the grid regulations' worth in accurately assessing disability. *See* Capowski, *supra* note 39, at 351–53.

year-old high-school-educated workers, who have performed unskilled medium work throughout their careers but can no longer physically perform such tasks, may not be deemed sufficiently adaptable to adjust to unskilled light or sedentary work, even if medically and educationally capable of handling all of the tasks involved in a wide range of light and sedentary occupations and jobs.[96] In addition, the SSA, from its very first vocational factor regulations in 1961, recognized the specific adaptability problems confronting claimants Robert Dixon has characterized as "worn-out, manual laborers"—marginally educated workers with a long history of arduous physical work.[97] SSA regulations authorize nonadaptability presumptions for such claimants even where proven medically capable of

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Matthew Diller has characterized the SSA's somewhat ambiguous use of the age factor as more of a socially constructed "moral judgment that claimants who are likely to have worked for a long time" and are close to retirement "should be rewarded" with an easier path to benefits than other claimants, rather than an empirically justified consideration relevant to either job performance or adaptability. Diller, *supra* note 38, at 424. He pointed out that any health effects of age on medical processes (i.e., healing, progressive degenerative changes) already "would be encompassed in any medical assessment of the claimant's physical and mental capacity to work." *Id.* at 423. Diller also observed that

> the SSA rationalized the treatment of age as a vocational factor in terms of the impact of age on adaptability to new work situations. . . . [But it also] acknowledged that none of the studies of the impact of age on employment differentiated between employer preferences and actual loss of vocational capacity.

Id. (citing 43 Fed. Reg. at 55,354). Despite the lack of clear empirical support or data, the agency, through the age regulations, still endeavored to "ascertain a point where it would be realistic to ascribe vocational limitations based on chronological age." 43 Fed. Reg. at 55,353. As Deborah Stone put it, "[e]ssentially, the agency conceded that it had no idea how age is related to specific vocational abilities, and then it proceeded to formulate such a relationship." STONE, *supra* note 38, at 166; *cf.* Capowski, *supra* note 39, at 353 (noting that, notwithstanding the SSA's admission of lack of supporting data and the resulting potential inaccuracies, there is a certain "rough justice" in the regulations' recognition of "the effects of the aging process" and the "proposition that aging affects adaptability"). Perhaps in recognition of this tenuous empirical foundation, the age regulations have always proscribed application of the age categories "mechanically in a borderline situation." *See* 20 C.F.R. § 404.1563(b) (2010). Consistent with Diller's "moral judgment" thesis and undoubtedly reflecting the agency's perception of changing mores, assumptions, and expectations about older workers' responsibilities in the labor market, the agency commenced a rulemaking in 2005 to increase the chronological age cutoffs at which nonadaptability presumptions are conclusive to tighten eligibility standards for older recipients. *See* 70 Fed. Reg. 67,101, 67,101 (Nov. 4, 2005). Perhaps recognizing that this sociopolitical judgment may have been premature, the agency recently withdrew the proposed rule. *See* 74 Fed. Reg. 21,563, 21,563 (May 8, 2009).

96. *See* 20 C.F.R. § 404.1563(d) (2010); 20 C.F.R. pt. 404, subpt. P, app. 2, §§ 201.02, 202.02 (2010). Before the grid's adoption in 1978, the agency lacked any promulgated guidance on how it evaluates age and adaptability.

97. *See* DIXON, *supra* note 41, at 55–56.

performing lighter employment.[98] Finally, the third discrete labor market inquiry, job incidence, derives from the 1967 Amendments. It is the inquiry about the existence of a significant number of jobs either in the "region" where the claimant lives or in "several regions of the country."

The DOT is merely a catalogue of jobs and occupations accompanied by basic descriptions and duties that take into account some of a claimant's medical and vocational restrictions (i.e., residual functional capacity and certain educational and skill levels). Assuming *arguendo* that the DOT could be deemed both methodologically and temporally "reliable," it would still present significant limitations for the use of the official notice doctrine to meet the labor market work adjustment burden of proof on all three of the work adjustment inquiries. First, the DOT does not particularize the job criteria to any given claimant's combination of restrictions. Accordingly, if that precise mix of medical and vocational restrictions is not apparent from the job description, then a performability conclusion cannot properly be derived from the DOT.[99] Second, the DOT provides no information whatsoever on adaptability and the relevance of work adjustment factors

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98. *See supra* note 41; 20 C.F.R. § 404.1565(a) (2010). Matthew Diller has also described this rule as more of a socially constructed reward for past effort as opposed to an empirically supported factual proposition on the inability of such claimants to adapt to medium or lighter work. *See* Diller, *supra* note 38, at 419 & n.197. He stated,

> It is difficult to see how an individual of similar age, with the same level of education but a shorter work history, or a history of work that is demanding but not deemed "arduous," would be more employable than an individual who meets the terms of the rule. Moreover, in its current form the rule departs from the general framework the SSA has developed for evaluating vocational factors in that it is based on length of work history rather than age. Thus, an individual who left school in order to work could satisfy the 35-year requirement in his or her early fifties—an age at which the SSA [in the grid] generally considers an individual to retain some ability to adapt to new work. Cf. . . . rule 202.10 (finding of nondisability for individual approaching advanced age, with limited education and history of unskilled work, who can perform light work).

Id. at 419–20 n.197.

99. As the Fifth Circuit explained in deciding "whether administrative notice of the [DOT] constitutes evidence similar to expert vocational testimony":

> The [DOT] differs from expert vocational testimony in many ways. The Dictionary does not define the occupations of hand-lacer and pencil inspector as repetitive, low-stress jobs. Nor does the dictionary describe the particular skills or qualifications needed for the positions. It also fails to identify the unique requirements of the positions, such as the pace at which one must work or the environment in which the work is performed. Instead, it simply gives a general description of the duties involved. The fact that Fields may be able to inspect a pencil or lace a football does not necessarily mean she can function as a pencil inspector or hand-lacer. The ALJ's determination that Fields can perform those jobs is mere speculation.

Fields v. Bowen, 805 F.2d 1168, 1171 (5th Cir. 1986) (citations omitted).

like age and the confluence of limited work history and education. Third, it also provides no information on job incidence, much less incidence that is particularized to the claimant's region or to "several" specific regions.[100]

Thus, whether official notice is government document-based, as advocated by Mashaw, or otherwise, it would be only the rarest of situations where notice of facts of all three work adjustment inquiries could be deemed a matter of common knowledge or "so obvious and notorious" to agency adjudicators—taking into account whatever expertise can be attributed to such lay decisionmakers—as to justify proof without any conventional evidence.[101] Even then, advance notice and the right to rebut such facts would be compelled under APA § 7(d) (5 U.S.C. § 556(e)) and *Ohio Bell*'s second prong.

Finally, Ernest Gellhorn's admonition on considering fairness and the situational equities of using official notice to re-shift a burden of proof, has particular resonance when applied to the work adjustment burden in SSA disability cases. Gellhorn observed that, while some courts had upheld

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100. *See infra* note 107 (citing DAVID F. TRAVER, SOCIAL SECURITY DISABILITY ADVOCATE'S HANDBOOK 20–8 (2009)). *But cf.* White v. Harris, 605 F.2d 867, 869 (5th Cir. 1979) (suggesting without explanation that the "much-used" DOT can be officially noticed both for job detail and job availability purposes). Some of the other government documents listed in the SSA's administrative notice regulations, such as miscellaneous local job surveys, might supply relevant job incidence data. However, these other sources are also not without significant shortcomings. For a detailed deconstruction of these other documentary sources and analysis of their methodological deficiencies for SSA work adjustment evaluation purposes, *see* TRAVER, *supra*, at ch. 15.

101. Even put in the context of Davis's formalistic adjudicative–legislative fact binary, while job incidence might be legislative in nature, performability and usually adaptability are adjudicative. *See* DAVIS & PIERCE, *supra* note 16, at 163–64. Moreover, incidence is meaningless without first answering the performability and adaptability inquiries to discern the types of jobs about which incidence evidence should be sought. All three inquiries are central in work adjustment disability cases. If disputed, they arguably command evidentiary proof even under Davis's official notice paradigm where the legislative grid rules are not dispositive. *See supra* notes 76–77 and accompanying text. The Eleventh Circuit, in express reliance on Davis's binary, has gone one step further and crafted a unique restriction on the use of the legislative grid rules notwithstanding *Campbell*. It has determined that the issue of adaptability based on age is an adjudicative fact not ever properly subject to legislative determination, even by regulation, and must therefore be considered on a case-by-case basis despite the grid. *See* Broz v. Schweiker, 677 F.2d 1351, 1357–61 (11th Cir. 1982), *vacated in light of* Heckler v. Campbell, 461 U.S. 952 (1983), *remanded*, 711 F.2d 957, 958–59 (11th Cir. 1983), *opinion modified on denial of reh'g*, Broz v. Heckler, 721 F.2d 1297, 1298–300 (11th Cir. 1983). It has since eased the SSA's burden on this factor by permitting the agency "to rely in the first instance on the age grids, but, if [claimants] introduce[] evidence that [their] ability to adapt is more limited than that presumed by the grids for [their age], the [agency] must prove [claimants'] ability to adapt by other evidence." Reeves v. Heckler, 734 F.2d 519, 525–26 (11th Cir. 1984).

official notice based on scientific data, technical facts, and academic articles, "many courts contend that this places too great a burden on the opponent to refute the 'noticed evidence.'"[102] Indeed, in support of this proposition, he cited a string of SSA disability cases.[103] The courts shifted the burden of proof in disability cases in express recognition of the manifest unfairness of requiring disabled, unemployed, mostly lower income claimants to prove a broad negative proposition about the absence of suitable alternative work in the labor market when this job market information is more readily available to the government.[104] That even the agency has openly acknowledged these fairness considerations in its burden of proof regulations[105] further counsels against reshifting this burden back to claimants through the device of official notice.[106] As Gellhorn argued, if such a reshifting of the burden is justified by countervailing policy concerns, such as agency efficiency or mass justice considerations, it should be accomplished openly though legislative processes designed to address substantive policy rather than covertly through procedural devices.

B. Vocational Expert Evidence

In response to significant resistance by the courts to the use of the official notice doctrine for individual labor market work adjustment decisions, and perhaps in recognition of some of the above problems and issues, the agency eventually recognized a virtually presumptive need for vocational expert (VE) testimony in work adjustment cases prior to the grid's

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102. Gellhorn, *supra* note 67, at 48.

103. *Id.* (citing cases).

104. As the Third Circuit explained:

> The . . . rule is consistent with the recognition that information as to the availability of jobs in the national economy is sophisticated information that most individuals do not have the resources to prove or disprove. The Secretary, on the other hand has vast resources and information at his disposal. Thus, considerations of fairness and policy require that the Secretary bear the risk of non-persuasion on the element of disability on which the Secretary is in a better position than the claimant to introduce evidence.

Torres v. Schweiker, 682 F.2d 109, 111–12 (3d Cir. 1982); *see also* Garrett v. Richardson, 471 F.2d 598, 604 (8th Cir. 1972); Thomas v. Celebrezze, 331 F.2d 541, 546 (4th Cir. 1964); Kerner v. Flemming, 283 F.2d 916, 922 (2d Cir. 1960); Scales v. Flemming, 183 F. Supp. 710, 714 (D. Mass. 1959).

105. *See infra* note 118.

106. *See generally* Lisa Brodoff, *Lifting Burdens: Proof, Social Justice, and Public Assistance Administrative Hearings*, 32 N.Y.U. REV. L. & SOC. CHANGE 131, 137 (2008) (arguing more broadly that the polices that inform evidentiary burden allocation—"efficiency, access to information, fairness and risk allocation"—all point toward placing a heightened burden on government in administrative hearings where critical social welfare needs are at stake).

adoption.[107] At hearings, ALJs typically elicit VE testimony by means of hypothetical questions, which include all of the claimant's various medical limitations supported by the record and the claimant's age, education, and previous work experience.[108] The VE then indicates whether jobs are available, to which such a hypothetical claimant can make a work adjustment, and the incidence of those jobs in the economy.[109] The agency has always relied heavily upon the VEs' use of DOT descriptions to identify job requirements.[110] However, since the DOT provides only limited

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107. As the Seventh Circuit described,

> Social Security officials introduced the vocational expert in 1962 after *Kerner v. Flemming* concluded that concrete evidence, rather than *a priori* reasoning by the hearing examiner, was essential. The agency initially responded by citing published studies and reports . . . ; when appellate courts concluded that these were too general to resolve specific claims, the agency turned to vocational experts who could apply their knowledge to each claimant's circumstances.

Banks v. Gonzales, 453 F.3d 449, 454 (7th Cir. 2006) (citation omitted); *see also* SOC. SEC. ADMIN., HISTORY OF SSA DURING THE JOHNSON ADMINISTRATION 1963–68, OPERATING METHODS, VOCATIONAL EXPERT PROGRAM (2010), http://www.ssa.gov/history/ssa/lbjoper5.html (noting that, in response to criticism that SSA reliance on evidence of jobs from government and industrial surveys was too "theoretical" or "speculative," the SSA "decided to employ vocational experts at administrative hearings, at which time these expert witnesses would address their testimony to the claimant's particular and highly individual situation in an effort to satisfy the *Kerner* criteria"); Taylor v. Weinberger, 512 F.2d 664, 669 n.9 (4th Cir. 1975) (stating that, in light of the shifting burden of proof to the agency, internal agency guidelines put hearing officers on notice that to proceed with the hearing "without specific evidence of alternate employability, as might be given by a vocational expert, is to invite reversal" (citing SOC. SEC. ADMIN., BUREAU OF HEARINGS AND APPEALS HANDBOOK, Part I, § 87, SECTION 1-87-10 (1967))).

108. *See* CAROLYN A. KUBITSCHEK, SOCIAL SECURITY DISABILITY LAW AND PROCEDURE IN FEDERAL COURT § 3:101 (2008), *available at* Westlaw "SSFEDCT" database.

109. There is no agency guidance on the statutory term "region where the claimant resides." At least one Circuit has found that VEs "almost always confine their testimony to . . . jobs that exist in the applicant's state, or an even smaller area." Barrett v. Barnhart, 368 F.3d 691, 692 (7th Cir. 2004). Sometimes VEs also include national job incidence figures, but rarely are those figures stated in terms of "several [specific and varied] regions of the country" as required under the alternative method of demonstrating a significant number of jobs under the 1967 Amendment to the Act codified at 42 U.S.C. § 423(d)(2)(A) (2006). The failure to so delineate the specific regions from which national job figures derive is thus arguably insufficient to satisfy the agency's burden. *See* Bragg v. Sullivan, No. 91-CV-1522, 1992 WL 278202, at *5 (N.D. Ohio Aug. 6, 1992) (VE testimony establishing 58,000 national jobs is insufficient to satisfy SSA's work adjustment burden, as specific regions were not identified).

110. Under more recent agency guidelines, ALJs have an affirmative obligation to inquire about the consistency between VE testimony and the DOT regarding the requirements of specified jobs and to reconcile any conflicts between these two sources of jobs characteristics information. *See* SSR 00-4p, 65 Fed. Reg. 75,759 (Dec. 4, 2000). *See generally* KUBITSCHEK, *supra* note 108, § 3:104 (describing case law variances in interpreting

descriptions and characteristics of jobs and no information about adaptability or job incidence,[111] VEs must base more claimant-particularized job descriptive, adaptability, and incidence testimony on other sources.

There are numerous problems with the use of VE testimony. First, there are no prescribed standards for job incidence or non-DOT job characteristics evidence and this evidence is often produced through questionable job data and unreliable methodologies. For example, VEs often rely on assertions of personal knowledge, experience, or unspecified industrial surveys to justify job incidence conclusions or to describe jobs otherwise not performable by claimants if DOT descriptions were used. When questioned, VEs often fail or decline to supply specific bases for the bottom line conclusions supportable by "knowledge or experience"[112] or to produce the purported supporting source materials upon request. Although the present approach to ensuring reliable expert testimony in federal judicial proceedings based on Rule 702 of the Federal Rules of Evidence[113] and the Supreme Court's opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[114] and its progeny is not categorically binding in

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the extent of ALJ duties to reconcile VE and DOT conflicts under SSR 00-4p).

111. *See* TRAVER, *supra* note 100, at 20–28 (stating that the VEs "cannot possibly cite the DOT as the basis for their *job numbers* when the DOT contains no information of any type indicating *how many* jobs exist for each job or occupational category").

112. *See generally* BARBARA SAMUELS, SOCIAL SECURITY DISABILITY CLAIMS: PRACTICE AND PROCEDURE, § 27:61 (2d ed. 2006), *available at* Westlaw "SSDCPP" database ("Many questions might be raised by a VE's testimony based on his or her own personal experience. . . . Is the VE's experience recent or remote? Is it based on actual placement of individuals with disabilities? How many placements does it involve? Does it involve placement of people with the kind of impairments from which the particular claimant suffers, or a different population? Has the VE actually placed impaired individuals in the same occupations the VE now testifies the claimant can perform? What personal knowledge does the VE have of those particular placements? What is that personal knowledge based on (site visits? reports from some other source? etc.).").

113. FED. R. EVID. 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.").

114. 509 U.S. 579, 592–93 (1993) (holding that a court's evaluation of proposed expert testimony must entail "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue"); *see also* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999) (extending *Daubert* to all expert testimony, not just testimony based on novel scientific methods).

administrative adjudications,[115] the principle that expert testimony should be based on reliable methodology also enjoys solid grounding in administrative law. The Seventh Circuit in *Donahue v. Barnhart* has explained that, in evaluating the substantiality of VE testimony under the substantial evidence standard of review applied to SSA and most other agency adjudications,[116] "[e]vidence is not substantial if . . . conjured out of whole cloth."[117] Thus, claimants represented by counsel who question the VE's basis are entitled to have the ALJ "make an inquiry (similar though not necessarily identical to that of Rule 702) to find out whether the purported expert's conclusions are reliable."[118] Put another way, while the

115. *See* 42 U.S.C. § 405(b)(1) (2006) (stating that the Federal Rules of Evidence's admissibility rules do not apply in SSA proceedings); Richardson v. Perales, 402 U.S. 389, 400 (1971) (same); *see also* 5 U.S.C. § 556(d) (2006) (providing more generally under the APA that in administrative hearings that "[a]ny oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence").

116. *See* 42 U.S.C. § 405(g); *cf.* 5 U.S.C. § 706(2)(E) (APA substantial evidence standard).

117. 279 F.3d 441, 446 (7th Cir. 2002); *see also* Nathaniel O. Hubley, Note, *The Untouchables: Why a Vocational Expert's Testimony in Social Security Disability Hearings Cannot Be Touched,* 43 VAL. U. L. REV. 353, 399–405 (2008) (proposing that the SSA's adopt a ruling that clarifies the application of *Daubert* and Rule 702 to VE testimony in SSA hearings). *See generally* D. Hiep Truong, Daubert *and Judicial Review: How Does an Administrative Agency Distinguish Valid Science from Junk Science,* 33 AKRON L. REV. 365, 389 (2000) (arguing for the application of *Daubert* and Rule 702 to administrative proceedings).

118. *Donahue,* 279 F.3d at 446. Presumably, the Seventh Circuit's "raise it or waive it" approach to VE testimonial reliability is limited to cases where the claimant is represented by counsel since it is predicated on the opportunity to cross-examine an expert on the methodological reliability of his or her testimony. This is a task a lay claimant cannot reasonably be expected to undertake. Thus, in *pro se* cases, the heightened duty to develop the record on behalf of unrepresented claimants should compel ALJs to specially inform the claimant of the VE reliability issues and perhaps even raise the Rule 702-like inquiries themselves. *Cf.* Fernandez v. Schweiker, 650 F.2d 5, 8–9 (2d Cir. 1981) (finding that *pro se* claimants should not be deemed to have waived the right to subpoena and cross-examine consultant doctors who provided hearsay medical reports (or, presumably, have waived the right to argue that the hearsay reports cannot alone amount to substantial evidence if the subpoenas were denied) per *Richardson v. Perales,* as the ALJ's heightened duty to develop the record on behalf of a *pro se* claimant should have "at the least" required informing claimant of the subpoena rights). *See generally* BLOCH, *supra* note 41, § 5.6 (discussing and collecting cases on the ALJs heightened duty to develop the record in *pro se* cases). The Supreme Court has found that "a large portion of Social Security claimants either have no representation at all or are represented by non-attorneys." Sims v. Apfel, 530 U.S. 103, 112 (2000). Moreover, in *Sims,* the Court held that the SSA's informal inquisitorial adjudicative model is inconsistent with the prudential requirement that claimants raise issues to the SSA appeals council in order to preserve those issues from waiver on judicial review, regardless of whether claimants are represented. *Id.* at 109–12. Thus, the Seventh Circuit's approach to VE reliability arguably did not go far enough and is inconsistent with *Sims,* even as applied to represented claimants. However, the Ninth Circuit, by conflating issues of evidentiary

VE "is free to give a bottom line . . . the data and reasoning underlying that bottom line must be available on demand."[119]

Second, there are no readily available published standards for VE certification, selection, or training. Although agency guidelines provide some, at least sparse, bases for identifying and qualifying medical experts based on the doctor's degree, license, and type of practice,[120] there is no corresponding guidance on what types of careers or degrees qualify one as a VE.[121] The SSA's internal Vocational Expert's Handbook, provided to VEs but not to the public at large, provides some guidance on qualifications by describing VE selection criteria:

> [U]p-to date knowledge of, and experience with, industrial and occupational trends and local labor market conditions; the ability to evaluate age, education and prior work experience in light of residual functional capacity; current and extensive experience in counseling and job placement of adult handicapped people; and knowledge of and experience using vocational reference sources, including the . . . DOT . . . .[122]

Nonetheless, the elusive, "emperor's new clothing" quality sometimes attendant to VE qualifications and evidence can be discerned from the Seventh Circuit's comments in *Donahue*:

> We asked the parties at oral argument what makes a vocational expert an 'expert' (and where the information in the [DOT] came from). They did not know. Maybe both the authors of the [DOT] and the vocational expert in

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sufficiency with admissibility, has impliedly suggested that *Donahue* went too far. *See* Bayliss v. Barnhart, 427 F.3d 1211, 1217–18 (9th Cir. 2005) (reasoning that because admissibility in administrative hearings is not governed by *Daubert*, *Kumho*, or Rule 702, "no additional foundation is required" for the VE's testimony other than the VE's "recognized expertise").

119. McKinnie v. Barnhart, 368 F.3d 907, 911 (7th Cir. 2003) (citation and quotation marks omitted) (finding that an ALJ may not condition order to VE to supply basis for opinion upon claimant's payment of VE's fees for additional work).

120. *See* OFFICE OF HEARINGS AND APPEALS, SOC. SEC. ADMIN., HALLEX I-2-1-30, PROFESSIONAL QUALIFICATIONS OF HEALTH CARE PROFESSIONALS (2005).

121. For some examples of titles of SSA VEs, see S. NORMAN FEINGOLD, THE VOCATIONAL EXPERT IN THE SOCIAL SECURITY DISABILITY PROGRAM: A GUIDE FOR THE PRACTITIONER 54 (1969) (listing titles of a cross-section of VEs that included "professors of psychology, education, and rehabilitation counseling; directors of private counseling and employment agencies; assistant dean of students; director of institutional research and counseling at a college; [and] consultant in counseling in a public school system"). *See also* MASHAW, BUREAUCRATIC JUSTICE, *supra* note 9, at 165 ("There is, indeed, no clear definition of what a vocational specialist, or expert, is . . . . [It] is in some sense a legal invention and includes persons whose training ranges from rehabilitation therapy through psychology to high school counseling.").

122. SSA VOCATIONAL EXPERT'S HANDBOOK 10 (2d ed. 2003) (*available in* TRAVER, *supra* note 100, at app. pt. 10, at A-85).

this case are talking out of a hat.[123]

Third, as a practical matter and particularly in the post-*Kerner*, pre-grid era, VE testimony varied widely and was usually decisive because it was seldom challenged, even in cases where claimants were represented.[124] Thus, decisions and benefits eligibility sometimes turned on the disposition and perspective of the VE, leading to perceptions of adjudicative inconsistency and arbitrariness.[125] The degree of inconsistency in the pre-grid period was further exacerbated by the absence of adjudicative guidance on the interaction of the statutory vocational factors (age, education, and work experience), the application of the adaptability concept as particularly reflected through the non-medically duplicative evaluation of the age factor, or the criteria for determining job incidence under the "significant numbers" statutory criteria.

On these first two issues, some VEs tended to fold the other jobs inquiry solely into the question of job performability. That is, regardless of the negative synergistic mix of adverse vocational factors, or in particular, the adversity of older age, these VEs found claimants not disabled if deemed functionally capable of performing the requirements of specific jobs.[126] They reasoned, for example, that "while older workers are generally less adaptable to change than younger workers, it is virtually impossible to apply that generalization to specific situations."[127] In addition, they relied on the nonempirical bromide that "if necessity requires, most individuals will adapt to new situations and new jobs."[128]

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123. 279 F.3d at 446; *see also* Liskowitz v. Astrue, 559 F.3d 736, 743 n.6 (7th Cir. 2009) ("In the past, we have expressed confusion over how a person becomes a 'vocational expert.'" (citation omitted)).

124. Mashaw has suggested that ALJs' approaches to VEs vary from treating them as "useless" and manipulating them through questioning to provide evidentiary cover to confirm the ALJ's predisposition, to timidly asking "an open-ended question that permits the [VE], in effect, to decide the case." MASHAW, BUREAUCRATIC JUSTICE, *supra* note 9, at 189. In either situation, the credited VE testimony is decisive. *See* Ken Matheny, *Social Security Disability and the Older Worker: A Proposal for Reform*, 10 GEO. J. ON POVERTY L. & POL'Y 37, 46 (2003) (written by an SSA appeals council appeals officer who observed that "vocational expert testimony will [often] violate our notions of common sense and seem divorced from how we perceive the real world, but, nonetheless, SSA adjudicators and the federal courts will defer to those opinions even when they border on the ludicrous").

125. *See* MASHAW, HEARINGS, *supra* note 12, at 78–79.

126. Alan Goldhammer, *The Effect of New Vocational Regulations on Social Security and Supplemental Security Income Disability Claims*, 32 ADMIN. L. REV. 501, 508 (1980).

127. *Id.*

128. *Id.* The "adaptation by necessity" principle is similar to another maxim, widely rejected by the courts, of "pain management by necessity"—that much pain can be disregarded because people find ways to cope with even extreme pain if necessary to survive. The courts have recognized that at a certain (albeit difficult to quantify) point, it is

On the job incidence question, there were very few reported decisions in the pre-grid era, as courts tended either to find other problems with VE testimony or sustain significant numbers findings without analysis, however large or small the numbers might be.[129] A few early pre-grid reported decisions found that the incidence of 200 to 1,000 appropriate jobs from the claimant's region was insufficient.[130] These court decisions did not attempt to determine how the mix of statutory vocational factors and adaptability issues might affect the bottom line "significant numbers" conclusion.

As in the pre-grid area, the approach that emerged in VE cases during the post-grid era (where the grid does not provide a rule of decision) has been simply to ascertain whether the number of jobs identified by the VE sounds significant from a "common sense" perspective.[131] Thus, courts

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reasonable for society to excuse workers from enduring further pain, suffering, or substantial discomfort in the job market. In a series of early cases shortly after the Act's passage, courts rejected Judge Learned Hand's "now famous aphorism" in a case under the War Risk Insurance Act, that "'[a] man may have to endure discomfort or pain and not be totally disabled; much of the best work of life goes on under such disabilities.'" Page v. Celebrezze, 311 F.2d 757, 762 (5th Cir. 1963) (quoting Theberge v. United States, 87 F.2d 697, 698 (2d Cir. 1937) ("[I]f the insurance had been against suffering, it would have read so.")). In *Page*, the Fifth Circuit observed,

> This notion that pain must be endured, that pain, no matter how severe or overpowering, is not disabling unless it will "substantially aggravate" a condition is "contrary to the standard announced in" cases from this and other Circuits since "the purpose of much social security legislation" including this Act, "is to ameliorate some of these rigors that life imposes."

Id.; *see also* COMM. ON PAIN, DISABILITY & CHRONIC ILLNESS BEHAVIOR, INST. OF MED., PAIN AND DISABILITY: CLINICAL, BEHAVIORAL, AND PUBLIC POLICY PERSPECTIVES 11 (Marian Osterweis et al. eds., 1987) ("Pain is inherently subjective; there are no thoroughly reliable ways to measure it; and the correlation between the severity of pain and the level of dysfunction is imperfect."); Jon C. Dubin, *Poverty, Pain, and Precedent: The Fifth Circuit's Social Security Jurisprudence*, 25 ST. MARY'S L.J. 81, 112–16 (1993).

129. *See* Ray v. Sec'y of Health, Educ. & Welfare, 465 F. Supp. 832, 837–38 (E.D. Mich. 1978) (noting the court's inability to "unearth[any] other case . . . giv[ing] substance to the phrase 'significant numbers'").

130. *See, e.g.*, Graves v. Sec'y of Health, Educ. & Welfare, 473 F.2d 807, 809 & n.5 (6th Cir. 1973) (ruling that 750 to 1,000 jobs is not a significant number); *Ray*, 465 F. Supp. at 838 (finding that "jobs which comprise only about .00013 of the work force in the plaintiff's region [200 jobs] do not exist in significant numbers," and "[w]hen jobs are this scarce, they exist 'only in a very limited number' as described in the Conference Report [to the 1967 Amendments]").

131. As the Sixth Circuit stated,

> We know that we cannot set forth one special number which is to be the boundary between a "significant number" and an insignificant number of jobs. . . . A judge should consider many criteria in determining whether work exists in significant numbers, some of which might include: the level of claimant's disability; the reliability

have found as few as 174 regional jobs and 32,000 national jobs sufficient while finding as many as 1,800 regional jobs and 58,000 national jobs insufficient.[132] Apart from supporting adjudicative gestalt, these decisions have sanctioned a "significant numbers" approach in VE hearing cases that still completely fails to consider the statutory age criteria and adaptability considerations based largely on age and the synergistic mix of statutory vocational adversities.

II. THE GRID REGULATIONS AND ADJUDICATIVE FRAMEWORK

The Mashaw-led study that criticized the varying use and widely inconsistent outcomes of VE-laden SSA hearings and advocated greater use of more judicially supportable document-based official notice on a case-by-case basis[133] also suggested broader, more sweeping solutions. The agency "by regulation supported by appropriate administrative findings could specifically authorize the taking of official notice in designated cases."[134] It

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> of the vocational expert's testimony; the reliability of the claimant's testimony; the distance claimant is capable of travelling to engage in the assigned work; the isolated nature of the jobs; the types and availability of such work, and so on. *The decision should ultimately be left to the trial judge's common sense in weighing the statutory language as applied to a particular claimant's factual situation.*

Hall v. Bowen, 837 F.2d 272, 275 (6th Cir. 1988) (emphasis added).

132. *Compare* West v. Chater, No. C-1-95-739, 1997 WL 764507, at *2–3 (S.D. Ohio Aug. 21, 1997) (45,000 national jobs is insufficient), Walker v. Shalala, No. H-93-2507, 1994 WL 171209, at *2 (S.D. Tex. Jan. 6, 1994) (1,800 jobs in the claimant's region is insufficient), *and* Bragg v. Sullivan, No. 91-CV-1522, 1992 WL 278202, at *5 (N.D. Ohio Aug. 6, 1992) (58,000 national jobs is insufficient (specific regions not specified)), *with* Weiler v. Apfel, 179 F.3d 1107,1110–11 (8th Cir. 1999) (32,000 national jobs is sufficient), *and* Allen v. Bowen, 816 F.2d 600, 602 (11th Cir. 1987) (174 jobs in the claimant's region is sufficient). *See generally* Petition for Writ of Certiorari, Pekrul v. Barnhart (No. 05-1020), 2006 WL 341276 (Feb. 8, 2006) (petitioning for certiorari to resolve asserted split in the circuits between competing ad hoc "substantial numbers" approaches and collecting cases); SAMUELS, *supra* note 112, at § 22:119 (collecting "significant numbers" cases); Andrew T. Palestini, *Jobs Which Exist in Significant Numbers—How Many, How Far from Home*, 4 OHA L.J. 7 (1994) (same).

133. *See supra* notes 89–91 and accompanying text.

134. MASHAW, HEARINGS, *supra* note 12, at 82. In commenting on this study's relationship to the agency's development of its grid regulations, the Third Circuit observed,

> In order to achieve greater uniformity in disability claim determinations, the Mashaw study considered three possible reforms. One was rejected out of hand as politically unacceptable and administratively cumbersome: namely, that each ALJ be instructed to make a finding of disability in only a certain percentage of the cases he reviews. The reform preferred by the authors was that a panel system be deployed—i.e., three ALJs would consider the merits of each disability claim. As a purely statistical matter, the variance in outcomes between these panel decisions and the decisions presently rendered by ALJs sitting alone would be significantly less. Recognizing that such a

could also supply "better decisional standards . . . that reduce individual ALJ discretion by providing per se rules, presumptions or the like."[135] Thus, emboldened by Congress's "exceptionally broad" delegation of rulemaking authority,[136] the agency promulgated the medical–vocational guidelines or "grid" regulations to accomplish this task. The grid avoids both the obstacles to the use of official notice in case-by-case work adjustment adjudicative determinations and the shortcomings and burdens of producing reliable and supportable VE evidence. It provides broad, across-the-board legislative rules based on irrebuttable official or administrative notice of all three work adjustment inquiries for claimants who fit into certain medical–vocational profiles. It thus satisfies the agency's burden of proof in such cases.[137]

A. The Sequential Evaluation Process

The grid is a component of the final step in the agency's promulgation of a five-step sequential evaluation process for disability benefits claims. The five-step process functions like a flow chart.[138] At each step, the process either resolves eligibility by finding that the claimant is disabled or not

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three-judge approach might entail "quite staggering" administrative costs, the authors also recommended "the development and enforcement of better decisional standards . . . that reduce individual ALJ discretion by providing per se rules, presumptions, or the like." HHS, in developing the medical–vocational [grid] regulations, appears to have followed this last recommendation.

Santise v. Schweiker, 676 F.2d 925, 930 n.14 (3d Cir. 1982) (quoting MASHAW, HEARINGS, *supra* note 12, at 24–27).

135. MASHAW, HEARINGS, *supra* note 12, at 25; *see also* Heckler v. Campbell, 461 U.S. 458, 466 n.10 (1983) (describing congressional calls for SSA rulemaking on nonmedical disability factors from 1954 to 1977).

136. *Campbell*, 461 U.S. at 466; *see also* 42 U.S.C. § 405(a) (2006).

137. While most courts, ALJs, and claimants' attorneys viewed the grid as a substantial departure from previous agency practice, the agency's comments on the grid when promulgated reflected its belief that the grid was based on "long-standing" internal practices. *Compare* 43 Fed. Reg. 55,349, 55,349 (Nov. 28, 1978), *with* Capowski, *supra* note 39, at 346–47 n.90 (discussing his Freedom of Information Act request for state agency guidance upon which the grid regulations were based and his conclusion that the suggested basis was not written "with the clarity that characterizes the [grid]" nor is it clear how widely and consistently such internal policies were applied).

138. Bloch, *supra* note 4, at 211; *see also* 20 C.F.R. § 404.1520 (2010) (describing each of the steps in the process). In 1980, as a part of a project titled "Operation Common Sense," the agency rewrote and reorganized the sequential evaluation and grid regulations in an effort to make them simpler and briefer. *See* 45 Fed. Reg. 55,566, 55,566 (Aug. 20, 1980). *See generally* Elizabeth S. Ferguson, Note, *Untangling "Operation Common Sense": Reopening and Review of Social Security Administration Disability Claims*, 87 MICH. L. REV. 1946 (1989) (describing a perceived shortcoming in the agency's clarification effort).

disabled, or it continues to the next step. The first step evaluates whether the claimant is currently performing substantial gainful activity (SGA).[139] If claimants are engaging in SGA, then they are deemed not disabled and their claims are denied. If not, the process moves to the second step for an evaluation of whether the claimant has a "severe" medically determinable physical or mental impairment, defined as an impairment that does not "significantly limit [the claimant's] physical or mental ability to do basic work activities."[140]

Step two is designed to distinguish disability applications from routine unemployment claims by denying benefits to persons who lack a true medical basis contributing to their unemployment. It allows denial of claims based on medical grounds alone to claimants found to be lacking a "severe" impairment. The courts have interpreted step two narrowly as a *de minimis* screening device or "slightness" standard to weed out frivolous or trivial claims since the Act generally requires consideration of more than merely medical factors—i.e., age, education, and prior work experience—in determining disability.[141] The agency must also consider the combined effects of a claimant's impairments and limitations to determine if their cumulative effect is more than *de minimis*, or slight, under this step.[142]

If the claimant does have a severe impairment, the process continues to the third step to determine whether the claimant's impairments are so

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139. *See* 20 C.F.R. § 404.1571 (2010); *supra* note 76 (describing current (2010) earning levels at which SGA is presumed).

140. 20 C.F.R. § 404.1521(a) (2010). The SSA defines "basic work activities" as "the abilities and aptitudes necessary to do most jobs." *Id.* § 404.1521(b). Examples of these include:

> (1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling; (2) Capacities for seeing, hearing, and speaking; (3) Understanding, carrying out, and remembering simple instructions; (4) Use of judgment; (5) Responding appropriately to supervision, co-workers and usual work situations; and (6) Dealing with changes in a routine work setting.

Id.

141. *See, e.g.*, Dixon v. Shalala, 54 F.3d 1019, 1024–25 (2d Cir. 1995) (describing *de minimis* "slightness" step-two standard, noting that five members of the Supreme Court in Bowen v. Yuckert, 482 U.S. 137 (1987), found that application of a greater than slightness standard would be unlawful, and sustaining class-wide invalidation of the SSA's systematic application of a greater than slightness step-two threshold in New York state); KUBITSCHEK, *supra* note 108, §§ 3:14–:15 (collecting cases); *see also* SSR 85-28, 1983–91 Soc. Sec. Rep. Serv. 390, 392 (West 1985).

142. *See* Bailey v. Sullivan, 885 F.2d 52, 60 (3d Cir. 1989); SSR 85-28, *supra* note 141. *See generally* Dixon v. Heckler, 589 F. Supp. 1494, 1508 (S.D.N.Y. 1984) (explaining how step two should not be interpreted to prevent the SSA from finding a severe impairment from the combined effects of impairments "[i]n much the same way, a mathematician might prove that because two does not equal four, two plus two never equals four").

severe that they meet or equal the criteria of the listings of impairments.[143] The listings are the successor to the administrative schedule or catalogue of automatically disabling impairments developed at the outset of the SSA disability program.[144] Because impairment severity for the listing is set at a very high level,[145] it is employed by the agency as a presumptive screening device to lock in claims the agency deems likely indicative of an inability to perform SGA, and it preserves administrative resources required for a fuller evaluation of such cases.[146] Thus, if the impairment meets or is equivalent in severity to the requirements of the listings, SSA grants the claim. If not, the process continues to the fourth step.

The last two steps involve claims that cannot be resolved through medical evidence alone "and address the more complex medical–vocational aspects of the disability standard."[147] Steps four and five both rely on the agency's assessment of the claimant's "residual functional capacity" (RFC). RFC is a measure of how claimants' medical limitations affect their ability to perform work functions.[148] The RFC assessment first requires an assessment of the claimant's exertional, or strength-related, limitations. The agency's exertional RFC assessment corresponds to the DOT's classification of jobs by exertional requirements (sedentary, light, medium, heavy, and very heavy) and is based on limitations that restrict an individual's ability to do strength-related work activities: walking, standing,

143. The listings are contained in Listing of Impairments, 20 C.F.R. pt. 404, subpt. P, app. 1 (2010).

144. *See supra* note 41.

145. *See* MASHAW, BUREAUCRATIC JUSTICE, *supra* note 9, at 165 (recounting conversations with SSA consulting physicians who made rhetorical observations that the listings "are so strict *live* patients don't have those symptoms").

146. *See* COMM. ON IMPROVING THE DISABILITY PROCESS, INST. OF MED., IMPROVING THE SOCIAL SECURITY DISABILITY DECISION PROCESS 71 (John D. Stobo et al. eds., 2007) ("From the beginning, the guides were conceived as a way to quickly identify allowance cases without performing a comprehensive analysis of an individual's capacity to work . . . ."); Revised Medical Criteria for Determination of Disability, Musculoskeletal System and Related Criteria, 66 Fed. Reg. 58,010, 58,027 (Nov. 19, 2001) ("The Act does not, in fact, make any provision for the listings at all. The listings are an administrative convenience established by regulation to identify obviously disabled individuals."). While listing level severity is set at a high level because it is a "screen in" device that seeks to minimize "false positives," there may be claimants who are found disabled at step three who would be determined ineligible at steps four or five. INST. OF MED., *supra*, at 93; *see, e.g.*, Ambers v. Heckler, 736 F.2d 1467, 1470 (11th Cir. 1984) ("Consideration of the fact that [the claimant] could return to her past work is not a relevant inquiry once she met the Listing . . . .").

147. Bloch, *supra* note 4, at 213.

148. *See* 20 C.F.R. § 404.1545(a) (addressing residual functional capacity).

sitting, lifting, carrying, pushing, and pulling.[149]

Nonexertional limitations are all restrictions that are not strength-related as described above.[150] They include limitations that are sensory (visual, auditory, tactile); postural (stooping, climbing, kneeling, crouching, balancing, crawling); manipulative (fine/gross dexterity, reaching); environmental (restrictions from dust, gas, heat, cold, moisture, allergens, mold, chemicals, heights, or dangerous machinery in the work environment); and mental (cognitive or psychiatric restrictions).[151] While regulations and case law often use "impairment" terminology, agency guidance clarifies that "[m]edical impairments and symptoms, including pain, are not intrinsically exertional or nonexertional. It is the functional limitations or restrictions caused by medical impairments and their related symptoms that are categorized as exertional or nonexertional."[152] Nonexertional limitations must also be factored into RFC, as for example, even a claimant with an exertional RFC for very heavy work may lack the mental RFC for meaningful employment. Step four then examines whether the claimants, given their RFC, are able to perform jobs or occupations that they had done in the past.[153] If so, the SSA will deny the claim.

If not, the process continues to step five, the final step. Only at step five

149. *See id.* §§ 404.1567, 404.1569a(b). For example, sedentary work involves sitting for up to six hours, standing and walking for up to two hours, and lifting up to ten pounds occasionally, in an eight-hour work day. Light work involves standing and walking for up to six hours and lifting up to twenty pounds with pushing and pulling of arm and leg controls while seated; medium work is light work with lifting up to fifty pounds; heavy and very heavy work involves lifting up to or over one hundred pounds, respectively. *See id.* § 404.1567; SSR 96-8p, 61 Fed. Reg. 34,474, 34,475–77 (July 2, 1996); SSR 83-10, 1983–91 Soc. Sec. Rep. Serv. 24, 29–30 (West 1983). Claimants deemed capable of performing one category are also considered capable of performing all less strenuous categories of work. Thus, a claimant capable of light work is deemed capable of also performing sedentary work. *See* Medical Vocational Guidelines, 20 C.F.R. pt. 404, subpt. P, app. 2, § 204.00. There are no grid tables based on exertional capacity for heavy or very heavy work because the agency presumes claimants whose only limitations are exertional and are capable of such a wide range of employment can make work adjustments regardless of vocational adversities. *See id.* The agency evaluates medical evidence of limitations caused by medically determinable impairments in making RFC assessments. *Id.* § 404.1545(a). The claimant's RFC is also based on the consideration of the claimant's "symptoms (such as pain), signs, and laboratory findings together with other evidence . . . obtain[ed]." *Id.* at pt. 404, subpt. P, app. 2, § 200.00(c).

150. Exertional and Nonexertional Limitations, 20 C.F.R. § 404.1569a(a).

151. *See id.* § 404.1569a(c)(i)–(iv).

152. SSR 96-8p, 61 Fed. Reg. 34,474, 34,475 (July 2, 1996).

153. To be "relevant" past work must (1) have been performed within the last fifteen years, (2) have lasted long enough to be learned, and (3) have constituted SGA. 20 C.F.R. § 404.1565(a).

does the process fully address the medical–vocational disability standard. Step five is where the SSA determines whether there is a significant amount of work available in the national economy to which claimants can make a work adjustment, taking into account their RFC, age, education, and work experience. If so, the claimants are not disabled; if not, then they are disabled. The sequence utilizes the grid to facilitate the step-five determination.

B. The Grid Tables and Methodology

The grid is a series of matrices that provides decisional rules based on administrative notice of the availability or non-availability of a significant number of jobs to which the claimant can make a work adjustment. The grid's rules apply only to claimants with solely exertional medical limitations and only in situations where a claimant's medical–vocational profile coincides precisely with the criteria of a rule.[154] Where the grid applies, its work adjustment rules are conclusive and may not be rebutted through contrary VE testimony or otherwise.[155]

The grid includes three tables based, respectively, on RFCs for sedentary, light, and medium work with decisional rules based on the combination of those RFCs with various permutations of age, education, and work experience. Age is divided into four categories: closely approaching retirement age (sixty to sixty-four); advanced age (fifty-five to fifty-nine); closely approaching advanced age (fifty to fifty-four); and younger individuals (below fifty).[156] Education is also apportioned into four categories: high school or above, limited (seventh to eleventh grade), marginal (sixth grade or below), and illiterate or unable to communicate in English.[157] Work experience is categorized as none, unskilled, semi-skilled,

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154. *See id.* pt. 404, subpt. P, app. 2, § 200.00(b), (e).

155. *See* SSR 83-5a, 1983–91 Soc. Sec. Rep. Serv. 390 (West 1983).

156. *See* 20 C.F.R. § 404.1563(c)–(e) (discussing age as a vocational factor); *supra* notes 95, 101 (discussing potential rebuttal of the age presumptions generally and in "borderline" situations). Younger individuals are further subdivided into two categories (forty-five to forty-nine and eighteen to forty-four) in Table I used for claimants with an RFC for sedentary work. Claimants in the forty-five to forty-nine younger individual subcategory limited to sedentary work who are either illiterate or unable to communicate in English, and are either unskilled or have no work experience are deemed unable to make a work adjustment to a significant number of jobs. *See id.* pt. 404, subpt. P, app. 2, tbl.1, § 201.17. There are no other categories for younger individuals on any of the three tables where inability to make a work adjustment is presumed. *See id.* at tbls.1–3.

157. *Id.* § 404.1564. Because the regulations reference illiteracy *or* inability to communicate in English as a disjunctive requirement in this last education category, some courts have held that there is no grid category for younger claimants further limited vocationally by a conjunction of these deficits (both illiterate *and* unable to communicate in

or skilled. Claimants in the latter two categories will be placed into a different grouping, presuming greater work adjustment potential, if deemed to possess transferable skills.[158] Where a claimant's characteristics (i.e.,

English). Therefore, they may not be presumed capable of making a work adjustment through direct grid rule application. *See, e.g.*, Martinez v. Heckler, 735 F.2d 795, 796 (5th Cir. 1984). The agency has attempted to limit *Martinez* by acquiescing to it in the Fifth Circuit but repudiating it for the rest of the country. Its acquiescence ruling suggests that it was always the agency's intent to apply the disjunctive rule to persons in the conjunctive category in the sedentary and light grid rules applicable to younger individuals. *See* SSAR 86-3(5), 1983–91 Soc. Sec. Rep. Serv. 855, 856 (West 1986). The agency has commenced but apparently abandoned a rulemaking to supersede *Martinez*. *See* Clarification of the Education and Previous Work Experience Categories in the Medical–Vocational Rules, 68 Fed. Reg. 40,213, 40,216 (July 7, 2003); Social Security Administration Semiannual Regulatory Agenda, 70 Fed. Reg. 65,479, 65,489 (Oct. 31, 2005) (listing the final action date of October 2005 but not finalizing regulation). It is unclear what previous administratively noticed publications support the grid's illiteracy work adjustment rules, much less the proposed new regulation for claimants both illiterate and unable to communicate in English. Indeed, at least one court in a non-grid case has refused to apply the DOT's reading level requirements for jobs, deeming the DOT too generous to claimants because it would preclude a work adjustment finding for illiterate claimants; the lowest DOT reading level requires reading proficiency of at least ninety-five words per minute. *See* Warf v. Shalala, 844 F. Supp. 285, 288–90 (W.D. Va. 1994) (ruling that the mathematical and reading requirements are merely advisory).

158. 20 C.F.R. § 404.1565(a). Unskilled work needs little or no judgment to do simple duties which can be learned on the job in a short period of time (thirty days or less); semi-skilled work may require alertness and close attention to watching machine processes, inspecting, testing or looking for irregularities, or tending equipment or property; skilled work requires use of judgment to determine the operations to be performed in order to obtain the proper form, quality, or quantity of material to be produced and may require dealing with people, facts, or figures or abstract ideas at a high level of complexity; transferability of skills is only a consideration when prior work was either skilled or semi-skilled and is most probably found among jobs in which the same or a lesser degree of skill is required, the same or similar tools and machines are used, and the same or similar raw materials, products, processes, or services are involved. *See id.* § 404.1568(d)(1)–(4); SSR 83-10, *supra* note 149, at 27–28; SSR 83-11, 1983–91 Soc. Sec. Rep. Serv. 33, 35–36 (West 1983); SSR 82-41, 1975–82 Soc. Sec. Rep. Serv. 847, 849–52 (West 1982); *see also* Draegert v. Barnhart, 311 F.3d 468, 474–75 (2d Cir. 2002). The grid only takes notice of unskilled jobs and transferable skills may not be transferred to unskilled work. *See* SSR 82-41, *supra*, at 849. Thus, if a claimant would be deemed unable to make a work adjustment under the grid without considering transferable skills, such a claimant can only be found not disabled if demonstrated that such claimant's transferable skills permit a work adjustment to a meaningfully enhanced occupational base as a result of those skills. *See* TRAVER, *supra* note 100, § 1712, ch. 18. While agency guidance does not mandate the presence of a VE to evaluate the presence and potential vocational impact of transferable skills at hearings, the ALJ's application of administrative notice of these issues, consistent with proper official notice principles, would present substantial challenges. *See* SAMUELS, *supra* note 112, § 27:53 (listing situations when VE testimony is "necessary" including "to evaluate the existence and nature of skills and their transferability"); *supra* notes 55–106 and accompanying text; *infra*

RFC, age, education, and work experience) "exactly" meet the combination of those in a grid rule, the rule directs a decision in the case.[159]

The grid also concretely resolves both the somewhat elusive adaptability and job incidence, or statutory "substantial numbers," inquiries that have vexed the courts and commentators based on the calculus of factors and categories for exertional RFC, age, education, and work experience described above. Social Security Ruling 83-10 explains how the grid resolves these issues:

> When the medical–vocational rules were promulgated, administrative notice was taken of the fact that it was possible to identify, at the unskilled level, approximately 200 sedentary occupations; approximately 1,600 sedentary and light occupations; and approximately 2,500 sedentary, light and medium occupations, each representing numerous jobs in the national economy. (By "administrative notice" we mean our recognition that various authoritative publications identify occupations which exist in the national economy; these sources are listed in sections 404.1566 and 416.966 of the regulations.) Thus, as related to RFC, the occupational base considered in each rule consists of those unskilled occupations identified at the exertional level in question. . . .
>
> The Issue of Work Adjustment
>
> In the situations considered in the numbered table rules (those indicating decisions of "Disabled" as well as "Not disabled"), an individual has the RFC to perform a full range of the unskilled occupations relevant to the table. Each of these occupations represents numerous jobs in the national economy. *However, the individual may not be able to adjust to those jobs because of adverse vocational factors.*
>
> The issue of whether a work adjustment is possible involves a determination as to whether the jobs whose requirements can be met provide an opportunity for adjusting to substantial and gainful work other than that previously performed. Accordingly, *the issue of work adjustment is determined based on the interaction of the work capability represented by RFC (the remaining occupational base) with the other factors affecting capability for adjustment—age, education, and work experience.*
>
> Each numbered rule in Appendix 2 includes an administrative evaluation which determines whether a work adjustment should be possible. In each instance, the issue is decided based on the interaction between the person's occupational base as determined by RFC with his or her age, education, and

notes 235–78 and accompanying text (analyzing requirements of official notice doctrine and application in SSA cases); *cf.* Pickering, *supra* note 39, at 597–98, 617 (suggesting the grid should be invalidated as arbitrary and capricious if interpreted, in cases with transferable skills findings, to permit direct application of grid rules to deny benefits to claimants deemed otherwise unable to make work adjustments under the grid if lacking such transferable skills, since the grid rules only take notice of unskilled work).

159. SSR 83-11; *see* 20 C.F.R., pt. 404, app. 2, § 200.00(a).

work experience.[160]

Close examination of the grid's methodology coupled with the addition of occupational base job data more fully elucidates how the adaptability and job incidence questions are resolved within the contours of the grid's adjudicative framework. The grid tables are predicated on the existence of 200 unskilled sedentary occupations, 1,400 unskilled light occupations, and 900 unskilled medium occupations for a total of 2,500 unskilled occupations in the national economy at these RFC levels.[161] There is a quantum of jobs within the national economy for each particular occupation.[162] SSA regulations and guidance contain no estimates of the number of jobs within the occupations that are administratively noticed in the grid but state that the job figures were derived from a variety of publications.[163] The precise number of jobs within the various respective unskilled occupational bases is difficult to ascertain partly because job numbers change each day with the elimination or addition of individual job positions. However, a common source of job data utilized by vocational experts, the Occupational Employment Quarterly II (OEQ), prepared by the U.S. Publishing Company, estimates that there were 702,341 unskilled sedentary, 8,548,337 unskilled light, and 6,066,235 unskilled medium jobs in the national economy in the second quarter of 2010.[164] Thus, as a rough estimate, in light of the OEQ methodological data uncertainties described herein,[165] the "not disabled" conclusions based on the grid rules for claimants who can perform a full range of sedentary, light, or medium work reflects determinations that the presence of approximately 700,000, 9,250,000, or 15,300,000 jobs, respectively, is insufficient. Those job numbers do not comprise "work which exists in significant numbers in the national economy" to which such claimants can make a work adjustment in light of their particular combinations of RFC, age, education, and work experience.

Take, for example, the situation under the grid of a fifty-five-year-old, high-school-educated claimant, with an unskilled heavy work history, who

160. SSR 83-10, *supra* note 149 (emphases added).

161. *See* 20 C.F.R. pt. 404, subpt. P, app. 2, §§ 201.00–203.00.

162. *See id.*

163. *See id.* § 200.00(b).

164. U.S. PUBL'G CO., OCCUPATIONAL EMPLOYMENT QUARTERLY II 2.0 (OEQII2.0) 3 (July 2010). This is probably something of an overcount since the OEQII2.0's data does not disaggregate part-time jobs from these figures and, while based on government data, contains estimates. *See* TRAVER, *supra* note 100, § 15.10.3. Nevertheless, vocational experts often rely on the OEQII2.0 to support their labor market work adjustment assessments. *See id.* § 1510.3.1; Liskowitz v. Astrue, 559 F.3d 736, 744 (7th Cir. 2009).

165. *See supra* note 164.

can no longer perform the exertional demands of that work but can perform a full range of both sedentary and light work, and the actual job tasks of the millions of jobs in the combined unskilled sedentary and light work job bases. If the only question is job performability, the claimant would lose; this claimant can perform the job tasks involved in the full range of light and sedentary occupational bases comprising millions of jobs in the economy. However, grid rule 202.04 reflects administrative notice that the claimant cannot adapt or make work adjustments to a large enough number of those jobs to meet the "significant numbers" statutory standard in light of the confluence of adverse medical and vocational limitations. Such a claimant is therefore disabled.[166]

The grid, therefore, reflects administrative notice that the approximately 9.25 million jobs, derived from the 1,600 combined light and sedentary occupations, is not a sufficiently significant number of jobs in the economy to which this claimant can make a work adjustment. However, a claimant with the identical vocational profile, if exertionally limited to an RFC for a full range of medium work, would be found not disabled under grid rule 203.14.[167] In that scenario, the grid takes administrative notice that the addition of the medium work occupational base to the light and sedentary job base, for a total of 2,500 occupations reflecting approximately 15.3 million jobs, would comprise a significant number of jobs to which this claimant could make a work adjustment. Accordingly, for this claimant's profile, 1,600 occupations and 9.25 million jobs are not sufficiently significant to permit a work adjustment under the grid; however, 2,500 occupations and 15.3 million jobs are sufficient.

III. GAPS IN THE GRID: USING THE GRID'S ADJUDICATIVE FRAMEWORK FOR GRID EXCEPTIONS

A. The Grid Framework Erosion Approach to Work Adjustment Determinations

While the grid provides a direct and immediate rule of decision only in claims involving exertional restrictions, the agency's regulations and rulings provide that the grid's adjudicative framework should still be employed in cases where the grid's per se rules are not directly applicable. This includes cases where the administratively noticed grid occupational and job bases are eroded by the presence of nonexertional limitations, or due to falling between two exertional RFC categories, or lacking the exertional RFC for even a full range of sedentary work. It also includes the situation where the

166. *See* Medical–Vocational Guidelines, 20 C.F.R., pt. 404, subpt. P, app. 2, § 202.04 (listing RFC decisions for light work).

167. *Id.* § 203.14.

grid's unskilled occupational bases are not eroded, but enhanced, by a claimant's possession of transferable skills. In that situation, a claimant otherwise deemed disabled under the grid's administratively noticed unskilled occupational base might be presumed capable of making a work adjustment to the larger occupational base reflected by the addition of semi-skilled or skilled occupations to the unskilled bases.[168] In any of these situations, additional vocational evidence or administrative notice would be required to determine the extent of the erosion or enhancement of the job base in order to decide the ultimate question of whether a claimant could make a work adjustment to a significant number of jobs.[169]

In these grid exception cases, agency guidance mandates use of the grid as a "framework" to determine the extent of erosion or enhancement of the applicable grid jobs bases in making the "off the grid" work adjustment/significant numbers assessment. For example, in the situation of a common grid exception—claimants with both exertional and nonexertional limitations—the grid regulation's explanatory section provides:

> (e) Since the rules are predicated on an individual's having an impairment which manifests itself by limitations in meeting the strength requirements of jobs, they may not be fully applicable where the nature of an individual's impairment does not result in such limitations, e.g., certain mental, sensory, or skin impairments. In addition, some impairments may result solely in postural and manipulative limitations or environmental restrictions. . . .
>
> . . . .
>
> (2) . . . [W]here an individual has an impairment or combination of impairments resulting in both strength limitations and nonexertional limitations, the rules in this subpart are considered in determining first whether a finding of disabled may be possible based on the strength limitations alone and, if not, the rule(s) reflecting the individual's maximum residual strength capabilities, age, education, and work experience provide a *framework for consideration of how much the individual's work capability is further diminished in terms of any types of jobs that would be contraindicated by the nonexertional limitations*. . . .[170]

Further guidance is supplied in Social Security Ruling 83-14, which provides:

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168. *See supra* note 158.

169. In the Fifth Circuit, under the *Martinez* rule and AR 86-3(5), additional vocational evidence would be required to determine the extent of erosion of the grid's sedentary and light occupational bases due to the confluence of illiteracy and an inability to communicate in English. *See supra* note 157.

170. 20 C.F.R. pt. 404, subpt. P, app. 2, § 200.00(e) (emphasis added); *see id.* § 200.00(d).

The Exertionally Based Rules as a Framework for Evaluating Additional Impairments of a Nonexertional Nature

Where a person cannot be found disabled based on strength limitations alone, the rule(s) which corresponds to the person's vocational profile and maximum sustained exertional work capability (Table No. 1, 2, or 3) will be the starting point to evaluate what the person can still do functionally. The rules will also be used to determine how the totality of limitations or restrictions reduces the occupational base of administratively noticed unskilled sedentary, light, or medium jobs.

A particular additional exertional or nonexertional limitation may have very little effect on the range of work remaining that an individual can perform. The person, therefore, comes very close to meeting a table rule which directs a conclusion of "Not disabled." On the other hand, an additional exertional or nonexertional limitation may substantially reduce a range of work to the extent that an individual is very close to meeting a table rule which directs a conclusion of "Disabled."

. . . .

The Disability Determination or Decision Based on a Combination of Exertional and Nonexertional Impairments

. . . .

Whenever a vocational resource is used and an individual is found to be not disabled, the determination or decision will include (1) citations of examples of occupations/jobs the person can do functionally and vocationally and (2) a statement of the incidence of such work in the region in which the individual resides or in several regions of the country.

In reaching judgments *as to the sufficiency of the remaining exertional job base (approximately 2,500 unskilled medium, light, and sedentary occupations, approximately 1,600 unskilled light and sedentary occupations, and approximately 200 unskilled sedentary occupations),* there are three possible situations to consider:

1. Where it is clear that the additional limitation or restriction has very little effect on the exertional occupational base, the conclusion directed by the appropriate rule in Tables No. 1, 2, or 3 would not be affected.
2. Where it is clear that additional limitations or restrictions have significantly *eroded* the exertional job base set by the exertional limitations alone, the remaining portion of the job base will guide the decision.
3. Where the adjudicator does not have a clear understanding of the effects of additional limitations on the job base, the services of a V[E] will be necessary.[171]

Taking the previous example of a fifty-five-year-old, high-school-educated, unskilled claimant with an exertional RFC for medium work,

171. SSR 83-14, 1983–91 Soc. Sec. Rep. Serv. 41 (West 1983) (emphases added).

suppose that the claimant is further limited due to nonexertional limitations and is moderately limited in following even simple instructions, using judgment, and working at an efficient pace due to borderline intellectual functioning (IQ of 72); has environmental restrictions precluding work around heat, cold, moisture, dust, or certain allergens due to severe asthma; and has a postural restriction on any reaching over the shoulder with the dominant arm due to the residuals of multiple rotator cuff injuries. Suppose further that a VE testifies that this claimant can perform twenty occupations, reflecting 400,000 jobs in the economy notwithstanding these limitations. Under the ad hoc "common sense" gestalt approach of ascertaining significant numbers without reference to the grid's occupational and job base numbers (and without considering issues of adaptability based on age and the combination of adverse statutory vocational factors), the claimant would likely be found not disabled.[172] However, if the grid framework approach described in the agency guidance above is interpreted as requiring analysis of the extent to which the grid's occupational and job bases are eroded by the nonexertional limitations and the comparative size of the remaining bases, this claimant would be found disabled.

If limited to an RFC for the full range of light work, this claimant would be determined unable to make a work adjustment to a significant number of jobs under the grid. The ability to perform 1,600 occupations, reflecting approximately 9.25 million jobs, would not be enough. Since the claimant would be found not disabled if capable of adjusting to 2,500 occupations, reflecting 15.3 million jobs under the medium work grid table and applicable rule, there has been quite substantial erosion of the applicable occupational and job bases due to the nonexertional limitations. Thus, using the grid as a framework and the grid's administratively noticed work adjustment conclusions and job bases as the parameters for this inquiry, the claimant, capable of performing only twenty occupations and 400,000 jobs, must be found disabled.

Indeed, agency guidance suggests that if the remaining occupational and job bases identified by the VE after erosion due to nonexertional limitations are significantly closer to the light work bases under which the claimant would be found disabled than to the medium work occupational or job bases under which the claimant would be denied, then the claimant should be found disabled. Although drafted to address the grid exception for claimants who fall between two exertional categories, SSR 83-12 further clarifies the framework approach to using the various occupational bases as principled and consistent comparison points for the significant numbers

172. *See supra* notes 131–32 and accompanying text.

work adjustment inquiry. It provides:

> 2. If the exertional level falls between two rules which direct opposite conclusions, i.e., "Not disabled" at the higher exertional level and "Disabled" at the lower exertional level, consider as follows:
>
> a. An exertional capacity that is only slightly reduced in terms of the regulatory criteria could indicate *a sufficient remaining occupational base* to satisfy the minimal requirements for a finding of "Not disabled."
>
> b. On the other hand, if the exertional capacity *is* significantly reduced in terms of the regulatory definition, it could indicate *little more than the occupational base for the lower rule* and could justify a finding of "Disabled."
>
> c. In situations where the rules would direct different conclusions, and the individual's exertional limitations are somewhere "in the middle" in terms of the regulatory criteria for exertional ranges of work, more difficult judgments are involved as to *the sufficiency of the remaining occupational base* to support a conclusion as to disability.[173]

Similar regulatory language and Social Security Rulings set out this approach for using the grid's adjudicative framework to assess erosion of the applicable occupational and job bases and the comparative size of the remaining job base for other grid exceptions. This includes the exceptions for claimants with solely nonexertional impairments/limitations,[174] those with exertional RFCs in between applicable exertional categories as discussed,[175] or those younger individuals lacking the RFC to perform even a full range of sedentary work.[176]

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173. SSR 83-12, 1983–91 Soc. Sec. Rep. Serv. 36 (West 1983) (emphasis added). Admittedly, for the likely relatively small number of cases where job or occupational base erosion analyses supply evidence that places claimants not significantly closer to one or the other, but firmly "in the middle" of two ranges of grid exertional category bases with differing work adjustment conclusions, a degree of ad hoc judgment with the potential for inconsistency cannot be fully avoided. I have assumed this is a relatively infrequent phenomena because I am unaware of a single reported case since the relevant SSRs' adoptions over twenty-five years ago involving such a firmly mid-grid-range erosion finding.

174. 20 C.F.R. pt. 404, subpt. P, app. 2, § 200.00(e); SSR 85-15, 1983–91 Soc. Sec. Rep. Serv. 343 (West 1985).

175. 20 C.F.R. pt. 404, subpt. P, app. 2, § 200.00(d); SSR 83-12, *supra* note 173.

176. 20 C.F.R. pt. 404, subpt. P, app. 2, § 200.00(h)(1); SSR 96-9p, 60 Fed. Reg. 34,478, 34,479–80 (July 2, 1996). Because there is no "sub-sedentary" grid table and occupational base, the grid framework job base erosion analysis is somewhat different for this grid exception. This approach evaluates the extent of erosion of the unskilled sedentary job base using as guidance, a variety of adjudicative examples that permit erosion presumptions. *See* 20 C.F.R. pt. 404, app. 2 § 200.00(h)(3). *See generally* TRAVER, *supra* note 100, at ch. 12, § 1719 (describing the grid framework approach for younger claimants with subsedentary RFCs). The grid regulations acknowledge that "sedentary work represents a significantly restricted range of work." 20 C.F.R. pt. 404, subpt. P, app. 2, § 201.00(b). For examples of grid framework erosion analyses for all of these grid exceptions, see TRAVER at chs. 12 & 17.

Despite the apparent clarity of the agency guidance, and principled consistency generated from using essentially the same occupational and job bases and identical adaptability considerations to determine the significant numbers/work adjustment issue in grid and grid exception cases alike, courts and agency ALJs have only occasionally invoked it.[177] Whether applying a form of the grid framework occupational base erosion approach in the SSRs or categorically rejecting it, the courts have rarely evinced full understanding of this methodology. A series of Ninth Circuit cases reveals the adjudicative confusion surrounding the collision of the SSRs' grid framework erosion approach to work adjustment in grid exception cases, and the perseverant ad hoc "common sense" gestalt approach that predated the grid.

In *Swenson v. Sullivan*,[178] a grid exception case involving a claimant with exertional and nonexertional limitations, the Ninth Circuit appeared to embrace the above grid framework job base erosion approach. In *Swenson*,

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For the grid framework erosion approach in the situation where claimants have transferable skills, see *id.* at ch. 18.

177. The first published explication of the grid framework job base erosion approach to determining the ability to adjust to "work which exists in significant numbers" in grid exception cases appeared in an earlier version of the Social Security Disability Advocate's Handbook written by former Administrative Law Judge Ralph Wilborn. *See generally* RALPH WILBORN, WILBORN'S SOCIAL SECURITY DISABILITY ADVOCATE'S HANDBOOK: THE SEQUENTIAL EVALUATION OF DISABILITY (2002). Because of adjudicators' difficulties in reaching consensus on a phrase as open-ended and ambiguous as "work which exists in significant numbers," Wilborn labeled the quest to discern the meaning of this phrase as analogous to the search for the "Holy Grail." *See generally* RALPH WILBORN, *In Search of the Holy Grail: A Definition of 'Work Which Exists In Significant Numbers,'* in WILBORN'S SOCIAL SECURITY DISABILITY HANDBOOK: THE SEQUENTIAL EVALUATION OF DISABILITY (2002). He stated:

> Studying federal court Social Security disability case law teaches that for claimants' representatives, agency adjudicators and federal court judges alike, comprehending the intricacies of the step-five "disability" determination process is much like piercing together a complex jigsaw whose patterns are so ill-defined that it often is only through a series of epiphanies that one piece is fitted to another.
>
> However like the complex jigsaw puzzle, once all the pieces of the process are fitted together, its solution may seem surprisingly obvious.

Id. at 1. After pointing out that there is no black letter definition of this critical statutory phrase, Wilborn concluded as follows: "There is, however, a 'conceptual' definition. The statutory term of art, '*work which exists in significant numbers*,' is defined, conceptually, in . . ." the grids, and the "SSA's Social Security Rulings . . . provide the key for determining *when, in terms of the* [grid], work exists in '*significant numbers.*'" *Id.* Experienced social security practitioners have reported to the Author that ALJ Wilborn was one of the few ALJs who regularly granted benefits in grid exception cases based on a determination that the claimant could not adjust to a "significant number" of jobs in reliance on the grid framework job base erosion approach derived from the SSRs and grid job base numbers.

178. 876 F.2d 683 (9th Cir. 1989).

a claimant with an exertional RFC for light work would have been found disabled based on the sedentary work grid but not on the light work grid based on exertional capacity along with his age, education, and work experience. Because the claimant possessed nonexertional limitations, a VE testified. The VE found, however, that the combination of the claimant's nonexertional and exertional limitations eroded the remaining job base to less than the number of jobs in the grid's light work job base under which the claimant would be found not disabled based on exertional capacity alone.[179] However, after also finding that there were several thousand jobs that the claimant could perform, the VE "expressly concluded that such jobs existed in significant numbers."[180]

The court remanded the case, finding the VE's testimony contradictory.[181] The court first noted that when the grids are "not fully applicable" because of the existence of nonexertional limitations, they nonetheless provide "a framework for consideration of how much the individual's work capability is . . . diminished . . . by the nonexertional limitations."[182] It then held, in what it determined to be an issue of first impression, that the grid framework continued to apply, even in cases involving grid exceptions where a VE has testified about job numbers.[183] It

179. *Id.* at 688–89.

180. *Id.* at 689.

181. *Id.* Actually, the court, while properly recognizing that the work adjustment inquiry must be determined with reference to the grid job base figures, misinterpreted the facts and the VE's testimony and ultimately used the wrong figures. The VE had testified that the nonexertional limitations would erode the job base to a point below the job base in the grid category under which the claimant would be disabled when he reached age fifty-five. *Id.* That is the light work grid rule and job base. *See* 20 C.F.R. pt. 404, subpt. P, app. 2, § 202.06. However, the claimant was only fifty-two at the time and therefore would be disabled under the sedentary grid rule and job base. *Swenson*, 876 F.2d at 689; *see* 20 C.F.R. pt. 404, app. 2, tbl.1, § 201.14. Thus, the claimant's remaining job base at age fifty-two fell between the grid job base under which he would be found disabled (sedentary) and the grid job base under which he would be found not disabled (light). Pursuant to SSRs 83-14 and 83-12, and using the grid job bases as a framework, the court should have remanded for a determination of whether the remaining job base was significantly closer to one or the other job bases, thus dictating a result.

182. *Swenson*, 876 F.2d at 688 (citing 20 C.F.R. pt. 404, subpt. P, app. 2, § 200.00(e)(2) (2010)).

183. *Id.* A year earlier, the court remanded a grid exception case where the agency had denied a claimant based on direct application of the grid without procuring VE testimony to ascertain the erosive effects of nonexertional limitations. *See* Desrosiers v. Sec'y of HHS, 846 F.2d 573 (9th Cir. 1988). In a concurring opinion, Judge Pregerson observed,

> When the Secretary is required to call a vocational expert, the [grid] Guidelines "provide an overall structure" and a "frame of reference" within which the vocational expert must evaluate and the ALJ must decide individual cases. 20 C.F.R. pt. 404, subpt. P, app. 2, § 200.00(d) (1987). If either a vocational expert's testimony or an

stated:

> Regulatory language supports the position that an ALJ *may not find* from vocational testimony that a claimant, deemed disabled under the grids, nonetheless could perform a substantial number of jobs and not be disabled . . . . *We interpret the regulations to require the Secretary to reject vocational testimony that is inconsistent with the grids' overall framework* . . . . If an expert testifies that a claimant would be disabled under the grid best approximating the totality of his exertional and nonexertional limitations, the Secretary must reject, or specify reasons for accepting, any significantly inconsistent testimony, such as that the claimant nonetheless could perform a substantial number of jobs.[184]

A few months after *Swenson*, the Ninth Circuit clarified the binding nature of the grid's adjudicative framework and the importance of the adaptability assumptions that are quantified through the grid's work adjustment/significant numbers methodology. In *Cooper v. Sullivan*,[185] the ALJ's primary error was the failure to acknowledge that a claimant's nonexertional "manipulative impairment" based on osteoarthritic changes in one hand, the lower back, and both wrists also limited the claimant exertionally to light work.[186] By the time the claimant's case proceeded to the hearing stage, she had exceeded age fifty-five. Thus, for part of the adjudicative period in question, she was under fifty-five years old, and for

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ALJ's decision appears to be inconsistent with the overall structure provided by the Guidelines, a claimant may challenge the testimony or the decision on that basis.

Id. at 578–79 (Pregerson, J., concurring).

184. *Swenson*, 876 F.2d at 688 (emphases added). By suggesting that the VE's testimony was "inconsistent" by both identifying thousands of performable jobs, and at the same time, finding that the job incidence totals were below those in the applicable grid rule's job base, the court reflected some confusion about the full nature of the grid's adjudicative premises. The court's reasoning fails to acknowledge that a claimant can be deemed unable to make a work adjustment to a sufficient number of jobs in the grid, even when the number of jobs such a claimant can perform may number into the millions. In other words, performability alone is not the end point of the grid rules; adaptability based on age and the combination of other adverse vocational factors are also noticed in the grid's work adjustment presumptions. In addition, the court's last sentence erroneously suggests that the agency could conceivably accept VE testimony that was "significantly inconsistent" with the grid's overall framework if proper reasons were supplied. Under the grid framework erosion approach, the agency may not accept a VE's adaptability and work adjustment findings that are contrary to those derived from the grid. The grid's assumptions are the product of binding administrative notice embodied in legislative rules and made expressly applicable to grid exception cases by binding SSRs. *Swenson*'s more basic holding has been followed. *See* Distasio v. Shalala, 47 F.3d 348, 349–50 (9th Cir. 1995) (ruling that where the VE only identified sedentary jobs in a grid exception case, and the claimant would be found unable to make work adjustment under the sedentary grid rule, *Swenson* mandates an award of benefits).

185. 880 F.2d 1152 (9th Cir. 1989).

186. *See id.* at 1154.

part, she was older.[187] Because the ALJ had characterized the claimant's condition as entirely nonexertional, he had procured VE testimony in lieu of the grid.[188] Based on VE testimony that the claimant could perform "several jobs" whether she was fifty-five or under, the ALJ utilized the ad hoc, "common sense" significant numbers approach and concluded that the claimant was not disabled.[189]

The Ninth Circuit reversed this decision, finding that the grid's light work rule mandated a finding of disability for the period after her fifty-fifth birthday.[190] It then remanded the remainder of the case for a determination of the extent of the light work job base's erosion due to claimant's nonexertional manipulative limitations for the period in which she was under age fifty-five.[191] It observed that different grid-based job adaptability assumptions applied to the pre- and post-fifty-five period.[192] The court observed that the claimant would be found disabled based on the sedentary grid rule and not disabled under the light work grid rule for the adjudicative period in which she was between fifty and fifty-five years old.[193] The court then offered a rare judicial explanation of the grid's methodology and adaptability assumptions. It stated the following:

> Moreover, we note that the ALJ erred when he disregarded the assumptions which underlie the grids. Based on the vocational expert's testimony, the ALJ concluded that Mrs. Cooper was not disabled because "[c]onsidering the types of work which the claimant is still functionally capable of performing in combination with her age, education and work experience, *she can be expected to make a vocational adjustment to work which exists in significant numbers in the national economy.*" However, *the regulations stress that the most difficult problem that a claimant such as Mrs. Cooper faces is that of adapting to a new job.* Indeed, that is the reason that the grids direct the conclusion that claimants like Mrs. Cooper are disabled. "[F]or individuals of advanced age [*i.e.*, age 55 or older] who can no longer perform vocationally relevant past work and who have a history of unskilled work experience . . . the limitations in vocational adaptability represented by functional restriction to light work warrant a finding of disabled." Just as the ALJ may not disregard the grids' conclusion of disability, he also may not disregard the assumptions which underlie the

187. *Id.* at 1158.

188. *Id.* at 1154–55.

189. *See id.* at 1155; *see also supra* notes 131–33 and accompanying text.

190. *See Cooper*, 880 F.2d at 1157–58.

191. *Id.* at 1158.

192. *See id.* (suggesting that an individual "closely approaching advanced age" who possesses the same physical limitations as the claimant would receive "slightly different" treatment under the job adaptability regulations).

193. *Id.*

grids.[194]

Several years later, a different panel of the Ninth Circuit in *Moore v. Apfel*[195] rejected the grid framework erosion approach entirely and returned to the ad hoc "common sense" methodology in a case similar to *Swenson* involving a claimant whose nonexertional limitations reduced his remaining job base. In *Moore*, the record established that the job base erosion from nonexertional restrictions would place the remaining job base closer to the sedentary work grid job base under which the claimant would be deemed unable to make a work adjustment as opposed to the light work grid job base under which he would lose.[196] Nevertheless, the court rejected the erosion argument and did so without even mentioning *Swenson*. It reasoned that SSR 83-12 merely required that the ALJ obtain VE testimony when a claimant's nonexertional limitations "put him between two [grid] rules."[197] Once the VE testifies that "a person with [the claimant's] profile [can] perform substantial gainful work in the economy," that is all that is required.[198] Since the number of jobs the VE identified (125,000 nationally; 7,700 "regionally") was consistent with prior numbers the court had accepted as "significant" under the ad hoc approach to this issue, no comparison to the job bases in the grid and use of the grid's adaptability presumptions was required.[199]

A few years later, in *Lounsburry v. Barnhart*,[200] the Ninth Circuit appeared to return to the grid framework approach and rejected the ad hoc "common sense" approach in a case where it cited *Cooper* and *Swenson* but not *Moore*. *Lounsburry* concerned a claimant with transferable skills, so the issue involved the potential expansion of the grid's unskilled job bases due to these skills rather than erosion. Without sufficient transferable skills, the grid would deem the claimant unable to make a work adjustment.[201] A VE testified that the claimant's skills transferred to only one occupation representing 65,855 jobs in the national economy.[202] The ALJ found that

194. *Id.* at 1157–58 (second emphasis added) (quoting 20 C.F.R. pt. 404, subpt. P, app. 2, § 202.00(c) (1988)).

195. 216 F.3d 864 (9th Cir. 2000).

196. *Id.* at 870–71 ("Moore argues . . . that the upper category, 'light' work, was so reduced that it was essentially equivalent to the lower category, 'sedentary' work, which would have meant he was classified as 'disabled.'").

197. *Id.* at 870.

198. *Id.*

199. *Id.* at 869–70. *Moore* has been followed. *See* Thomas v. Barnhart, 278 F.3d 947, 960 (9th Cir. 2002) (applying *Moore* without citing *Swenson*).

200. 468 F.3d 1111 (9th Cir. 2006).

201. *Id.* at 1116–17 (quoting 20 C.F.R. pt. 404, subpt. P, app. 2, § 200.00(c) (2006) (referencing Rule 202.07 n.2)).

202. *Id.* at 1113.

these numbers reflected a sufficiently "significant number[]" of jobs to justify a nondisability decision.[203]

In analyzing the ALJ's reasoning, the Ninth Circuit was forced to confront a potential conflict in the language of different sections of the agency's regulations and the question of whether the term "significant range of work" under the applicable regulations and SSRs referenced the range of occupations administratively noticed in the grid or an ad hoc "range" of jobs tethered neither to the grid's occupational nor job bases. Section 202.00(c) provides that

> for individuals of advanced age . . . who have only skills that are not readily *transferable to a significant range of semi-skilled or skilled work* that is within the individual's [RFC], . . . the limitations in vocational adaptability represented by [an RFC for] light work warrant a finding of disabled.

However, the agency's general regulation implementing the 1967 Amendment's "significant numbers" requirement provides that "[w]ork exists in the national economy when there is a significant number of jobs (*in one or more occupations*) having requirements which you are able to meet."[204] In reconciling these provisions, the court also applied SSR 83-10 and its reference to a "full range of work" reflecting "substantially all *occupations* within that exertional range." In reversing the agency, the court stated the following:

> Under Rule 202.00(c), although Lounsburry has some transferable skills, she will be disabled if those skills "are not readily transferable to a significant range of semi-skilled or skilled work." Thus, the specific issue we confront is the meaning of the phrase "significant range of work." The Commissioner takes the position that the term "work" refers to individual *jobs*, and the phrase "significant range" only requires Lounsburry to adjust to other work existing in significant numbers in the national economy in one or more occupations. However, the term "work" under Rule 202.00(c) means distinct *occupations*, and "significant numbers" is no substitute for and cannot satisfy the plain language of Rule 202.00(c) requiring a "significant *range* of . . . work" (emphasis added).
>
> Social Security Ruling 83-10 (1983) ('SSR 83-10') "address[es] the issue of capability to do other work" by providing "definitions of terms and concepts frequently used in evaluating disability under the medical–vocational rules." . . . SSR 83-10 defines the phrase, "Range of Work," as "*Occupations* existing at an exertional level." It defines the related phrase, "Full Range of Work," as: "All or substantially all *occupations* existing at an exertional level." *Id.* at *16 (emphasis added). We thus construe the phrase "significant range of . . . work" in Rule 202.00(c) to require a significant number of

203. *Id.* at 1113 n.1.

204. 20 C.F.R. § 404.1566(b) (2010) (emphasis added).

> occupations. The record in this case establishes that Lounsburry's skills would transfer to precisely one occupation at her residual functional capacity. One occupation does not constitute a significant range of work. Rule 202.00(c) directs a finding of disability for Lounsburry.
>
> The Commissioner's reliance on 20 C.F.R. § 404.1566(b) (2004), which provides that "[w]ork exists in the national economy when there is a significant number of jobs (in one or more occupations)," is misplaced. In whatever manner "work" is defined, Rule 202.00(c) demands a "significant range of" it. To interpret "significant range of . . . work" to mean simply "work" nullifies the concept of "range" contained in the text. . . .
>
> Furthermore, 20 C.F.R. § 404.1566(b) is inapplicable to Lounsburry's case. It defines "work" at a high level of generality and only to operationalize the broad definition of disability articulated by the Commissioner in interpreting a different statute[:] 42 U.S.C. § 423(d)(2)(A). However, the purpose of the grids is to individualize the disability determination process; the grids supply the test for satisfying § 423(d)(2)(A) in particular cases. The Commissioner may not substitute a definition of disability applicable generally for one narrowly tailored by the grids to Lounsburry's circumstances.[205]

While the Court in *Lounsburry* found strong support for looking to the grid's "occupational" bases to determine whether the VE's testimony supported the claimant's ability to make a work adjustment, a grid framework analysis based on the SSRs, as described above, and the grid's "job" bases would have led to the same conclusion. The VE's identification of only 65,000 additional skilled jobs to the unskilled job base (9.315 million jobs) would not be deemed to sufficiently expand the light work job base away from the approximately 9.25 million jobs under which the claimant would prevail to a close enough point on the continuum to the 15.3 million jobs in the medium work job base under which the claimant would lose.[206]

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205. *Lounsburry*, 468 F.3d at 1117 (quoting SSR 83-10, *supra* note 149). Section 404.1566(b) could also be reconciled with the occupational base range directives of SSR 83-10 and the applicable grid transferable skills explanatory sections by interpreting the general clause referencing "at least one occupation" as an acknowledgment of the possibility that a single occupation or two might comprise the bulk of a range of work such as the sedentary range. It is conceivable that a common occupation or occupations like sedentary clerk or receptionist could eventually comprise a substantial majority of the actual jobs in the fragile and diminishing unskilled sedentary work occupational base. *See supra* note 176. So for example, in a case involving a younger individual and a determination under SSR 96-9p of sedentary job base erosion that is below the full range, it is conceivable that eventually one or more occupations might include enough of the occupational base range to establish a significant majority of the total unskilled sedentary job base and justify a work adjustment finding.

206. *See supra* notes 171–73 and accompanying text (describing grid framework analysis under SSR 83-12 and SSR 83-14 with reference to comparisons to the occupational base

Thus, under either a grid "occupational" or "job" base approach, the claimant should prevail. This claimant would lose only under an ad hoc "common sense" approach in which an adjudicator is free to find any number of jobs or occupations sufficient to meet the significant numbers or "significant range of work" requirements, and no adaptability work adjustment assessment based on grid-noticed presumptions need be undertaken.

Finally, two years later, the Ninth Circuit limited *Lounsburry* to its facts and applied the ad hoc approach in another case involving expansion of the grid's occupational base due to the presence of transferable skills. In *Tommassetti v. Astrue*,[207] a VE testified that the claimant's transferable skills expanded the applicable grid sedentary occupational base by only one occupation (semiconductor assembler) reflecting 100,000 jobs nationally.[208] The ALJ concluded that this testimony established a significant number of jobs sufficiently to augment the unskilled sedentary base and found the claimant not disabled.[209] The claimant argued that one single additional occupation could not establish a "significant range of skilled work" to infer sufficient grid occupational base expansion under *Lounsburry*.[210] The court, however, explicitly rejected *Lounsburry*'s applicability and implicitly rejected the entire grid adjudicative framework by reasoning simply that the light work rule uses different language than the sedentary rule.[211] Although the claimant pointed out that the analogous grid sedentary work explanatory provision, § 201.00(e),[212] also requires that a claimant's skills be transferable to "a significant range of skilled work" within the claimant's RFC,[213] the court inexplicably dismissed the argument in one sentence as "not persuasive."[214] The court concluded its opinion with the observation that the grid was adopted "to increase consistency and promote . . . uniformity"

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numbers where a claimant falls between two grid rules that direct opposite results); *supra* notes 158, 168, and accompanying text (describing the grid framework approach with reference to the grid's unskilled occupational and job bases when enhanced with skilled or semi-skilled jobs for a claimant with transferable skills).

207. 533 F.3d 1035 (9th Cir. 2008).

208. *Id.* at 1043.

209. *See id.* (relying on Rule 201.07, which states that claimants of advanced age who can perform sedentary skilled or semi-skilled work and possess a high school degree are not disabled).

210. *Id.*

211. *See id.* at 1044 (stating that a contrary conclusion would lead to confusion and inconsistency in applying grid rules).

212. *See* 20 C.F.R. pt. 404, subpt. P, app. 2, § 201.00(e) (2010).

213. 533 F.3d at 1044 n.5.

214. *Id.*

in step-five disability determinations.[215] Thus, the claimant's efforts to "graft" the light work rules onto the sedentary work rules "would lead to the confused and arbitrary application of grid rules from one exertional category to other exertional categories and might in effect, defeat the goal of consistency and uniformity in decision-making that the particularized grids serve."[216]

The *Tommassetti* decision reflects manifest error in two respects. First, the court misread the common "significant range" language in both the sedentary and light work grid transferable skills explanatory sections (202.00(c) and 201.00(e)). More fundamentally, the court, in the name of consistency and uniformity, rejected the grid adjudicative framework's significant numbers/work adjustment approach that is based on consistent and uniform, grid-derived occupational and job bases. Ironically, instead it applied an ad hoc, arbitrary approach that varies dramatically from case to case, bears no relationship to the occupational and job bases used for all claimants who fit within the grid's criteria, and fails to incorporate any considerations of adaptability based on age.

The Seventh Circuit has been somewhat less equivocal in its continued adherence to the ad hoc approach. In *DeFrancesco v. Bowen*, the court first expressed solicitude for the grid framework and described the occupational base erosion process under SSR 83-12.[217] Later in this opinion, however, the court appeared to embrace the ad hoc approach based on VE testimony of jobs that is untethered to the grid's framework, "spirit," or "formula" for ascertaining whether the jobs identified are sufficiently significant in number under the Act where a case falls within the grid's "gaps."[218]

Then, in *Fast v. Barnhart*, the Seventh Circuit more definitively rejected the grid framework erosion approach in a case involving a claimant with solely nonexertional limitations.[219] In so doing, the court construed provisions of the applicable SSR narrowly and in isolation, misinterpreted the facts in the Ninth Circuit's decision in *Swenson*, and thereby misconstrued its holding and expressly reaffirmed the validity of an ad hoc work adjustment approach. It stated,

215. *Id.* at 1044.
216. *Id.*
217. 867 F.2d 1040, 1045 (7th Cir. 1989).
218. *See id.*
219. 397 F.3d 468, 469 (7th Cir. 2005).

Where a nonexertional limitation might substantially reduce the range of work an individual can perform, use of the grids is inappropriate and the ALJ must consult a VE.

Fast acknowledges that the grids do not apply directly, but she urges that they should nonetheless have been used as a framework for decision. She contends that 20 C.F.R. Pt. 404, Subpt. P, App. 2 § 200.00(e) and its corresponding policy statement, SSR 85-15, support her theory because both discuss the use of the grids as a "framework."

. . . .

But Fast is not reading either . . . § 200.00(e)(2) or SSR 85-15 carefully enough. Both of them address the situation in which someone suffers from two kinds of impairments—exertional and nonexertional—and they describe how the two are to be handled together. Fast, in contrast, suffers solely from nonexertional limitations. In that situation, both [rules] state that the grids *should* be given "consideration" only. . . .

Next, Fast contends that *Swenson v. Sullivan*, 876 F.2d 683 (9th Cir. 1989), supports her "framework" approach. In *Swenson* the Ninth Circuit reversed a finding by an ALJ that a claimant with a combination of exertional and nonexertional disabilities was not disabled, even though he was deemed disabled under the grids based on his exertional impairments alone. *Id.* at 689. The court "require[d] the Secretary to reject vocational testimony that is inconsistent with the grids' overall framework." *Id.* at 688. Fast argues that her case is analogous because the ALJ disregarded the grids and relied on VE testimony alone.

Once again, however, Fast is overlooking a critical distinction. In *Swenson*, the claimant's exertional limitations alone *supported* a finding of disability under the grids, but the ALJ nonetheless relied on the VE's testimony to reach a result inconsistent with the grids. Fast's limitations, by contrast, could not support a finding of disability under the grids, because she has no exertional limitations.

. . . .

Finally, Fast urges us to overrule *Lee* [*v. Sullivan*, 988 F.2d 789, 793 (7th Cir. 1993)]. Her problem with *Lee* is that this court did *not* insist there that the ALJ use the grids as a framework. What the *Lee* opinion focused on was whether "a claimant's non-exertional limitations restrict the full range of employment opportunities at the level of work that he or she is capable of performing." In such a case, we said, the use of the guidelines is precluded. But, just as in this case, we went on to hold that the claimant was not disabled based on VE testimony that 1,400 jobs existed in the regional economy that the claimant could perform despite his exertional limitations. *Id.* at 793–94.

We see no reason to overrule *Lee*. Fast's rather odd argument that the grids must somehow be used as a framework has no support, and it conflicts

> with the common-sense rule that where the grids do not address a particular problem, the ALJ is entitled to rely on [VE testimony].[220]

Although clarifying *DeFrancesco*'s ambiguities, at least in cases involving solely nonexertional limitations, the court's reasoning in *Fast* fails to supply a credible interpretation of SSR 85-15 and the SSR grid framework scheme. The panel first incorrectly assumed that 85-15 only "addresses the situation" in which a claimant suffers both exertional and nonexertional limitations. It then provides only that the grid "should" be considered in cases involving solely nonexertional limitations. However, SSR 85-15's title expressly references the agency's methodology for using "[t]he [grid] rules as a framework for evaluating *solely nonexertional* impairments."[221] It provides that a decisionmaker *must* consider the grid "[ta]ble rules for specific case situations" in assessing whether "the person can be expected to make a vocational adjustment considering the interaction of his or her age, education or work experience."[222] The panel's decision expressly eschews reference to the grid rules in any fashion and also provides no mechanism for consideration of adaptability or "vocational adjustment" based upon age and the interaction of other vocational factors as interpreted through the grid rules. Furthermore, the court failed to examine the framework methodology set out in the other SSRs discussed or cross-referenced in 85-15 (such as 83-10, 82-41, and 83-12), which further clarifies the applicability of the grid framework in grid exception cases.[223]

The Seventh Circuit also misinterpreted the Ninth Circuit's decision in *Swenson* in its effort to distinguish it. *Swenson* did not involve a claimant who was deemed disabled based on exertional limitations alone. Rather, the Ninth Circuit had set aside the agency's decision because a VE testified that the additionally limiting effects of the claimant's nonexertional restrictions eroded the claimant's remaining job base to a point where she might be found unable to make a work adjustment with reference to the grid's job bases.[224]

More fundamentally, the Seventh Circuit in *Fast* reaffirmed its earlier ad hoc approach in *Lee*, which had held that 1,400 jobs was a significant number of jobs in a decision that did not even mention the grid's

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220. *Id.* at 470–72 (select citations omitted).

221. SSR 85-15, *supra* note 174, at *1 (emphasis added).

222. *Id.* at *3 (emphasis added).

223. SSR 85-15 also provides some examples of using its terms for entirely nonexertional mental impairment profiles. Some of the examples expressly include references to grid rules to provide reasoning regarding the occupational base available to claimants in the listed examples. *Id.* at *5 (Example 3 referencing grid Rule 203.10, Example 4 referencing grid Rules 201.07, 202.07, 203.07, Example 5 referencing grid Rules 203.11–203.17).

224. *See supra* notes 178–84 and accompanying text.

framework, adaptability issues, or any relevant SSRs. Thus, under the court's approach, a fifty-five-year-old claimant without transferable skills, who would be deemed unable to make a work adjustment on the grid if limited to the grid's 9.25 million light job base, and found unable to perform even 0.002% of that job base in an ad hoc grid exception analysis, could still be found capable of making such a work adjustment. In other words, a claimant could be deemed capable of making a work adjustment with a severe mental impairment and a limitation to less than 0.002% of the job base under which a claimant with an identical vocational profile, but suffering only the exertional consequences of arthritis, would be found disabled.[225] In summary, the Seventh Circuit's approach—using the grid's job bases only for cases involving strength-related impairments and limitations and the ad hoc approach for mental and other nonexertional impairments and limitations—sanctions significantly discriminatory, disadvantageous, and arbitrary treatment of claimants in the latter category based solely on disability type.

A few other circuits have discussed the general grid framework approach in grid exception cases with somewhat less relevant analysis than the Ninth and Seventh Circuits. The Third Circuit has offered further variation on this issue. It has interpreted the grid framework erosion approach and the ad hoc "common sense" approach as alternative approaches that may be applied in the same case.[226] The Sixth Circuit, like the Seventh Circuit but with less reasoning, has interpreted the SSRs narrowly to support continuation of an ad hoc approach.[227] The Tenth, Eighth, and Eleventh Circuits have adopted the ad hoc approach without giving extended relevant consideration to either the SSRs' grid framework erosion approach or the relationship of the VEs' ad hoc job numbers to the grid's job bases.[228]

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225. *See* Lee v. Sullivan, 988 F.2d 789, 794 (7th Cir. 1993) (citing cases finding a significant number of jobs based on VE testimony ranging from only 174 jobs to 1,266 jobs).

226. *See* Boone v. Barnhart, 353 F.3d 203, 204–10 (3d Cir. 2004); *see also* Liskowitz v. Astrue, 559 F.3d 736, 743 (7th Cir. 2009) ("As few as 174 jobs has been held to be significant . . . ." (citation omitted)). The 0.002% figure is derived by dividing 9,250,000 (the approximation of the grid's combined light and sedentary work job bases applicable for the light work grid table) by 174 (the lowest judicially accepted "significant number" of jobs under the ad hoc approach. This figure equals 53,160, or approximately 50,000. Thus, under the ad hoc approach, a claimant can be found not disabled and capable of making a work adjustment where she is able to adapt to only 1/50,000—or 0.002%—of the job base represented in the applicable grid under which a similarly vocationally situated claimant would be found disabled and unable to make a work adjustment and adapt to a significant number of jobs.

227. *See* Wright v. Massanari, 321 F.3d 611, 615–16 (6th Cir. 2003); *see also* Wilson v. Comm'r of Soc. Sec., 378 F.3d 541, 549–50 (6th Cir. 2004).

228. *See, e.g.*, Trimiar v. Sullivan, 966 F.2d 1326, 1330–32 (10th Cir. 1992) (850–1,000

The grid framework emerging case law reflects significant inter- and intra-circuit variation. Because the somewhat predominant ad hoc, "common sense" significant numbers approach to the work adjustment determination in grid exception cases conflicts with agency guidance, fails to accord full effect to statutory vocational factors, and in particular, issues of adaptability based on age, and in any event, produces profound adjudicative inconsistency and markedly unequal treatment between grid and grid exception claimants, its usage necessitates rejection by the agency and the courts. Part of the courts' confusion on this issue may reflect some degree of uncertainty over the legal significance of the grid framework SSRs. Although SSRs are not promulgated through APA notice-and-comment rulemaking,[229] by promulgating a separate regulation pursuant to

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jobs is a significant number); Jenkins v. Bowen, 861 F.2d 1083, 1087 (8th Cir. 1988) (500 jobs is a significant number); Allen v. Bowen, 816 F.2d 600, 602 (11th Cir. 1987) (174 jobs is a significant number). Underscoring the ad hoc, standardless nature of this work adjustment approach, a supervisory staff attorney at the SSA's hearings and appeals unit published an article in the agency's office of hearings and appeals reporter, provided to hearing and appeals adjudicators across the country, offering his "impression . . . that some courts will accept a clearly credible expert's testimony that jobs exist in significant numbers *without even discussing any actual numbers*." Palestini, *supra* note 132, at 24 (emphasis added).

229. The Court has not ruled on the proper approach for evaluating the relevant SSRs' legal significance. However, SSRs are a superior form of interpretive agency authority over the agency's internal rules for the lower levels of agency adjudication known as Program Operations Manual System (POMS) or the claims manual. The agency has not bound its adjudicators by regulation to the claims manual and the Court has held that it lacks the force of law. *See* Schweiker v. Hansen, 450 U.S. 785, 789 (1981). Nevertheless, the Court has also held that a court evaluating SSA interpretive guidance, even in a POMS, should at least accord the POMS "respect" based on *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944), and sometimes deference pursuant to *Auer v. Robbins*, 519 U.S. 452, 461 (1997). *See* Wash. State Dep't of Health & Soc. Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 385–87 (2003). The Court has explained the "respect" required by *Skidmore* as a function of "the thoroughness evident in [the agency guidance's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140.

Auer mandates deference to agency rules as reflected in the Court's decision in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, an agency rule that interprets a statute, and does not conflict with it, should be followed by the courts if the rule reflects a reasonable interpretation of the statute. *See* 467 U.S. at 842–43. *Auer* mandates *Chevron* deference to certain sufficiently authoritative forms of agency interpretive guidance that interpret ambiguous agency regulations. For a delineation of the evolution and limits of application of the *Auer* doctrine and the *Chevron/Skidmore* binary for interpretive agency authority, see the Court's trilogy of *Gonzales v. Oregon*, 546 U.S. 243, 255–75 (2006), *United States v. Mead Corp.*, 533 U.S. 218, 226–39 (2001), and *Christensen v. Harris*, 529 U.S. 576, 586–88 (2000). *See also* Stephen M. Johnson, *Bringing Deference Back (But for How Long?): Justice Alito,* Chevron, Auer *and* Chenery *in the 2006 Term*, 57 CATH. U. L. REV. 1, 31–33 (2007). Thus, at a minimum, SSRs must be accorded *Skidmore* respect and sometimes usually more decisive *Auer/Chevron* deference. *See, e.g.*, Bray v. Comm'r of SSA,

APA notice-and-comment rulemaking, the agency has made SSRs binding on the agency.[230] The agency is thus bound to follow SSRs in individual cases and cannot disregard them on an ad hoc basis.[231]

Furthermore, to disregard its SSRs in this context, or to interpret them narrowly so as to permit an ad hoc approach in grid exception cases that is completely untethered from grid occupational and job base numbers, would produce other administrative law and constitutional infirmities. Since the ad hoc approach sanctions the use of widely varying job numbers for each case—even for cases with highly similar facts—it is systemically arbitrary. The Third Circuit, commenting on the entirely ad hoc, pre-grid work adjustment assessment process, explained as follows:

> An agency that makes thousands upon thousands of individualized determinations as to disability each year will inevitably at times treat similarly situated persons differently. It is not surprising, therefore, that [the Department of Health and Human Services] was subjected to considerable criticism with respect to what some perceived to be the agency's failure to "produce predictable and consistent results." One academic study concluded, for example, that "[t]he inconsistency of the disability process is patent. Indeed, it is widely believed that the outcome of cases depends more on who decides the case than on what the facts are." Such a state of affairs, of course, is difficult to accept:
>
> > Perhaps no characteristic of a procedural system is so uniformly denounced as a tendency to produce inconsistent results. When disposition depends more on which judge is assigned to the case than on the facts or the legal rules, the tendency is to describe the system as

554 F.3d 1219, 1225 (9th Cir. 2009) (applying *Auer* deference to SSR 82-41). However, the Court has also clarified that agency counsel's mere litigation positions on how an act, regulation, or ruling should be interpreted are entitled to no special consideration. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212–13 (1988).

230. Social Security Rulings "are binding on all components of the [SSA]." 20 C.F.R. § 402.35(b)(1), (2) (2010); Heckler v. Edwards, 465 U.S. 870, 873 n.3 (1984).

231. The Sixth Circuit has stated:

> It is an elemental principle of administrative law that agencies are bound to follow their own regulations. . . . The Supreme Court has long recognized that a federal agency is obliged to abide by the regulations it promulgates. *See* Vitarelli v. Seaton, 359 U.S. 535, 545 (1959); Service v. Dulles, 354 U.S. 363, 372 (1957); Accardi v. Shaughnessy, 347 U.S. 260, 267 (1954). An agency's failure to follow its own regulations "tends to cause unjust discrimination and deny adequate notice" and consequently may result in a violation of an individual's constitutional right to due process. Where a prescribed procedure is intended to protect the interests of a party before the agency, "even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed." *Vitarelli*, 359 U.S. at 547 (Frankfurter, J., concurring).

Wilson, 378 F.3d at 545 (quotation and select citations omitted).

> lawless, arbitrary, or the like, even though the case assignment is random."[232]

Perhaps more significantly, the use of dramatically lower and disadvantaging job numbers for work adjustment assessments for persons with nonexertional limitations or other non-grid factors under the ad hoc approach raises serious equal protection concerns.[233] At a minimum, government classifications must bear a rational relationship to a legitimate governmental interest.[234] Neither the agency adjudicators that have employed the ad hoc approach nor courts that have sustained it have proffered rational means or legitimate ends for the widely disparate and disadvantaged adjudicative treatment of claimants in grid exception cases.

B. The Nonexertional Grid Exception and Adjudicative Use of the Official Notice Doctrine[235]

Even before determining job base erosion due to nonexertional limitations or other grid exceptions, the agency is required to determine in the first instance whether a claimant possesses limitations which can potentially erode the relevant exertional job bases and thereby preclude

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232. Santise v. Schweiker, 676 F.2d 925, 930 (3d Cir. 1982) (quoting MASHAW, HEARINGS, *supra* note 12, at 19); *see also* TRAVER, *supra* note 100, § 1708 ("[S]trange as it may seem, in an Agency that is interested in consistency in adjudication, the simple fact of how many jobs equals a 'significant number' at a specific age, education, and work experience . . . is a factual issue to be decided on a case-by-case basis by adjudicators.").

233. The Fifth Amendment incorporates equal protection concepts to the federal government through its due process clause. *See* Bolling v. Sharpe, 347 U.S. 497, 498–99 (1954).

234. *See, e.g.*, Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439–47 (1982) (holding that the selective special use permit requirement for mentally disabled group homes lacked a rational relationship to a legitimate government purpose); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (holding that a federal amendment removing food stamps from households containing a person unrelated to other household members lacked a rational relationship to a legitimate government interest).

235. While this Part's focus is on the de facto or announced use of the official notice doctrine to determine that nonexertional limitations do not remove a claimant from direct application of an unfavorable exertional grid rule, the analysis would apply equally to other less common grid exceptions. This would include use of official notice to determine that: (1) exertional limitations that place a claimant between two exertional ranges with differing work adjustment conclusions do not remove a claimant from direct application of the unfavorable higher range grid rule (*see* SSR 83-12, *supra* note 173); or (2) exertional limitations that prevent performance of a full range of sedentary work do not preclude direct unfavorable application of a sedentary grid rule (*see* SSR 96-9p, *supra* note 176); or (3) transferable skills that expand the grid's unskilled job base permit denial based on the grid rules that reference the potentially expanded job bases (*see* SSR 82-41, *supra* note 158).

direct application of the grid's per se rules when used to "lock-out"[236] and deny claims. The grid regulations make clear that the vocationally limiting effects of nonexertional limitations have not been administratively noticed through the grid's legislative rules and thus their presence precludes a conclusive determination of nondisability based on the grid tables' direct application. However, promulgated regulations provide scant guidance on determining how adjudicators should evaluate whether such nonexertional restrictions may affect the job base.

Accordingly, the grid has proven to be a tempting device for a busy agency confronting pressing mass justice realities. The agency often attempts to squeeze claimants with nonexertional limitations into a fully exertional category in a grid table to deny the claim by asserting, without vocational or labor market evidentiary basis, that the nonexertional limitations have no meaningful erosive impact on the grid's exertional occupational and job bases. Direct grid application averts the time and resources required to provide individualized VE work adjustment determinations based on the varied and less definable effects on jobs and the occupational base from nonexertional limitations. Where the grid applies directly, VE testimony followed by either the grid job base erosion approach under the SSRs or an ad hoc approach to work adjustment is thus unnecessary.

The courts of appeals are even more clearly divided on their approaches to the question of determining when nonexertional limitations preclude application of a grid exertional rule than they are on a general framework approach. The courts are in conflict on such basic questions as (1) under what circumstances *may* adjudicators presume or take administrative notice of the extent of diminution or erosion of the grid's job bases due to the presence of nonexertional limitations without additional vocational or labor market evidence to support non-erosion conclusions; (2) under what circumstances *must* adjudicators utilize vocational testimony or other vocational or labor market evidence to support non-erosion conclusions; and (3) when, if the adjudicators take administrative notice of the lack of sufficient grid job base erosion due to nonexertional or other grid exception limitations, they must provide claimants notice and the opportunity to rebut the non-erosion work adjustment conclusions.

The Ninth Circuit has held that agency adjudicators may determine, without vocational or labor market evidence, that even otherwise medically

236. Agency regulations and rulings mandate that claimants with both exertional and nonexertional limitations must be accorded the "lock-in" favorable evaluation to assess whether they meet the grid's per se rules for demonstrating inability to make a work adjustment on exertional grounds alone. *See supra* notes 170–71 and accompanying text.

severe nonexertional limitations (i.e., limitations that have a significant or non-trivial impact on work-related functions)[237] do not significantly erode the job base administratively noticed in the grid.[238] The First Circuit has adopted a similar approach.[239] While not announcing it as such, the Ninth and First Circuits have, in essence, authorized adjudicators to take unannounced and irrebuttable administrative or official notice that even medically severe nonexertional limitations do not meaningfully erode the grid's labor market work adjustment conclusions that were developed for claimants with only exertional limitations. It reflects a form of official notice because the agency adjudicator is assuming a vocational or labor market fact—that a claimant's severe nonexertional limitations have a trivial erosive impact on grid's job base—without any direct proof of that fact through record evidence. Under this approach, the agency may simply rely on the grid's per se nondisability work adjustment rules as if the severe nonexertional limitations did not exist. This is the case, whether or not the adjudicator purports to have relied on direct application of the grid rule or to only have used the grid as a "framework" in this manner.[240]

In contrast, the Eighth Circuit has held that where a claimant has a

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237. *See supra* notes 141–42 and accompanying text.

238. *See* Hoopai v. Astrue, 499 F.3d 1071, 1075–76 (9th Cir. 2007). *Hoopai* is one of the clearest cases sanctioning de facto, unannounced, irrebuttable administrative notice that severe nonexertional limitations do not significantly erode the grid's occupational or job bases. However, it is predicated on a few faulty assumptions. First, the Ninth Circuit conflated a step-two severity finding with a step-four finding of inability to perform past relevant work that satisfies the claimant's prima facie case. *See id.* at 1076. Then, the court determined that if a finding of a step-two severe nonexertional impairment would require use of a VE at step five,

> the two steps would collapse and a vocational expert would be required in every case in which a step-two determination of severity is made. This would defeat the purpose of the grids because a claimant could not reach the step-five determination without making out a prima facie case of a severe disability at step two.

Id. This reasoning fails to recognize that claimants with only severe exertional impairments or limitations at step two would still proceed to a step-five determination based solely on the grid and without a VE. In the situation where a claimant has nonexertional limitations, the grid by its express terms does not provide a direct rule of decision because the grid was not based on administrative notice of the effects of such limitations. Thus, direct application of the grid to claimants with severe limitations separate and apart from those upon which the grid was based cannot be properly deemed "the purpose of the grids."

239. *See, e.g.*, Ortiz v. Sec'y of HHS, 890 F. 2d 520, 524 (1st Cir. 1989) (even "significant non-strength" limitations do not preclude exclusive reliance on the grid unless they are found to preclude a wide range of the grid's job bases).

240. In this context, as the First Circuit has recognized that "[d]espite what may be suggested by use of the word 'framework,' whenever an ALJ fails to take vocational testimony, he must be deemed '[i]n reality' to have 'relied exclusively on the grid to show the existence of jobs claimant could perform.'" *Id.* at 524 n.4 (citation omitted).

severe nonexertional impairment, "the Commissioner's use of the grids at step five, as opposed to VE testimony," reflects error.[241] The Fifth Circuit announced a similar rule, requiring that where a claimant's nonexertional impairments or limitations have more than a "slight" or "minimal effect" on work activities, the agency may not satisfy its step-five work adjustment burden of proof through reliance on direct application of the grid's rules.[242] Along the same lines, the Tenth Circuit determined that the agency may not rely upon direct application of the grid to deny benefits unless three conditions are met; the claimant: (1) "has no significant non-exertional impairment;" (2) "can do the full range of work at a particular residual functional capacity on a daily basis;" and (3) "can perform most of the jobs in that residual functional capacity category.[243] The Eleventh,[244] Seventh,[245] and D.C.[246] and Fourth[247] Circuits appear to incorporate elements of the Eighth Circuit's approach of mandating resort to other vocational or job base evidence where a claimant's nonexertional limitations exceed a designated minimal medical "significance" threshold.

The Second,[248] Fourth,[249] Sixth,[250] and Tenth[251] Circuits have relied on standards which look closer to the Ninth and First Circuits' but are difficult definitively to categorize. They each purport to permit sole reliance on the

241. King v. Astrue, 564 F.3d 978, 979 (8th Cir. 2009).

242. *See* Loza v. Apfel, 219 F.3d 378, 398–99 (5th Cir. 2000).

243. Thompson v. Sullivan, 987 F.2d 1482, 1488 (10th Cir. 1993).

244. *See, e.g.*, Phillips v. Barnhart, 357 F.3d 1232, 1242 (11th Cir. 2004) ("[E]xclusive reliance on the grids is not appropriate *either* when [the] claimant is unable to perform a full range of work at a given level *or* when a claimant has nonexertional impairments that significantly limit basic work skills." (quoting Francis v. Heckler, 749 F.2d 1562, 1566 (11th Cir. 1985)) (internal quotation marks removed)).

245. *See, e.g.*, Villano v. Astrue, 556 F.3d 558, 564 (7th Cir. 2009) ("When a claimant has nonexertional limitations that *might* significantly reduce the range of work she can perform, the ALJ may not rely on the Grid to find a claimant not disabled but must instead consult a VE to determine whether the claimant can perform a significant number of jobs.") (emphasis added and citations omitted).

246. *See, e.g.*, Smalls v. Shalala, 966 F.2d 413, 417 (D.C. Cir. 1993) ("If a claimant suffers from nonexertional limitations that *could* limit the claimant's ability to perform jobs of which she would be otherwise capable, mechanical application of the grids is inappropriate.") (emphasis added).

247. *See, e.g.*, Walker v. Bowen, 889 F. 2d 47, 49 (4th Cir. 1989) ("We recognize that not every nonexertional limitation or malady rises to the level of a nonexertional impairment, so as to preclude reliance on the grids. . . . The proper inquiry . . . is whether the nonexertional condition affects an individual's residual functional capacity to perform work of which he is exertionally capable.") (citation omitted).

248. *See, e.g.*, Bapp v. Bowen, 802 F.2d 601, 605–06 (2d Cir. 1986).

249. *See, e.g.*, Walker v. Bowen, 889 F.2d 47, 49 (4th Cir. 1989).

250. *See, e.g.*, Abbot v. Sullivan, 905 F.2d 918, 926–27 (6th Cir. 1990).

251. *See, e.g.*, Channel v. Heckler, 747 F.2d 577, 579–81 (10th Cir. 1984).

grid's conclusive work adjustment rules unless adjudicators make the essentially vocational determination that nonexertional limitations significantly erode the applicable grid jobs bases (or the availability of the full range of work at the most applicable exertional level). However, these circuits frequently reject agency decisions for making grid framework non-erosion conclusions without any supporting vocational evidence from which non-erosion could be inferred.[252] These circuits have also not explicitly rejected the Eighth Circuit's explicit—or the Fifth, Seventh, Eleventh, and D.C. Circuits' implicit—requirement that vocational work adjustment evidence be produced in all cases where nonexertional limitations are deemed medically significant or non-trivial.

The Third Circuit is the only court of appeals that has consistently identified that this inquiry involves an analysis of the proper scope of the official notice doctrine.[253] In *Sykes v. Apfel*, the court analyzed the agency's sole reliance on a per se grid rule to determine that a claimant with a nonexertional impairment deemed "severe,"[254] one-eyed blindness

252. *See, e.g.*, Jordan v. Comm'r of Soc. Sec., 548 F.3d 417, 424 (6th Cir. 2008); Rosa v. Callaghan, 168 F.3d 72, 82 (2d Cir. 1999); *Channel*, 747 F.2d at 580–81.

253. *See, e.g.*, Sykes v. Apfel, 228 F.3d 259, 271–72 (3d Cir. 2000); *see also* Poulos v. Comm'r of Soc. Sec., 474 F.3d 88, 95 (3d Cir. 2007) ("This lack of supporting evidence highlights why we require an ALJ either to take vocational evidence or to follow the proper steps to take official notice, providing the claimant with an opportunity to see the evidence on which the ALJ relies and with an opportunity to challenge the ALJ's conclusion."); Allen v. Barnhart, 417 F.3d 396, 401–08 (3d Cir. 2005). Several other courts have identified on occasion that this issue implicates official notice principles. *See, e.g.*, Warmoth v. Bowen, 798 F.2d 1109, 1110–13 (7th Cir. 1986) ("[W]e only require that there be reliable evidence of some kind that would persuade a reasonable person that the limitations in question do not significantly diminish the employment opportunities otherwise available. . . . We therefore conclude that the Secretary erred *when he in effect summarily took administrative notice* that there is a significant number of unskilled, sedentary jobs in the national economy that Warmoth can perform.") (emphasis added and citations omitted); Delgado v. Barnhart, 305 F. Supp. 2d 704, 710 (S.D. Tex. 2004) ("In instances in which the Guidelines merely serve as a decisional framework (*e.g.*, when significant nonexertional limitations are involved), the ALJ *may not simply take administrative notice of jobs existing in the economy* and must, therefore, satisfy his burden of proof in some other fashion, most typically via the testimony of a vocational expert.") (emphasis added); *cf.* Wilson v. Califano, 617 F.2d 1050, 1053 (4th Cir. 1980) ("In *Taylor v. Weinberger*, [512 F.2d 664 (4th Cir. 1975),] *we expressly rejected the contention that the Secretary may establish specific vocational ability solely through medical evidence or by 'administrative notice.'* Implicit in *Taylor* is the recognition that the ALJ is not qualified to provide affirmative vocational evidence.") (emphasis added); Kuwahara v. Bowen, 677 F. Supp. 553, 562 (N.D. Ill. 1988) ("Appellate courts properly frown on efforts to take judicial notice of the availability of jobs with specific vocational requirements. This Court has no desire to play armchair vocational expert.") (citations omitted).

254. The ALJ found, and the Commissioner did not contest, that the claimant's nonexertional visual impairment reflected a "severe" impairment under the agency's step-two nonseverity regulations. *See Sykes*, 228 F.3d at 261. In the 1980s, the agency

(monocular vision), could make a work adjustment to a significant number of jobs. The court first observed that "[th]e Social Security Administration has not conducted a rulemaking establishing either that the lack of binocular vision does not significantly diminish the occupational base for light work or more generally establishing common facts applicable to individuals with Sykes's set of impairments."[255] Accordingly, "[t]he grids do not purport to answer this question, and thus under *Campbell* the practice of the ALJ determining without taking additional evidence the effect of the nonexertional impairment on residual functional capacity cannot stand."[256]

The court then analyzed the propriety of the ALJ's de facto application of official notice of that non-erosion fact as a substitute for record evidence. In its administrative notice analysis, the court reiterated the two basic substantive and procedural "prerequisites" for application of the official notice doctrine under *Ohio Bell*: "First, the information noticed must be appropriate for official notice. Second, the agency must follow proper procedures in using the information, disclosing it to the parties and affording them a suitable opportunity to contradict it or 'parry its

implemented, but then withdrew, a Social Security Ruling which had established that monocular vision and nineteen other impairments or conditions could not be deemed severe impairments and were thus per se nonsevere under the agency's regulations. *See* SSR 82-55 (rescinded and replaced by SSR 85-28, which deleted the twenty per se not-severe conditions). *See generally* Dixon v. Shalala, 54 F.3d 1019, 1023–33 (2d Cir. 1995) (describing SSR 82-55's rescission and legal problems with its application). A determination that a nonexertional limitation or impairment is severe at step two has vocational implications; it means that the claimant has a limitation that has more than a slight or trivial impact on ability to perform at least one of the several "basic work activities" in the agency's regulations. *See supra* notes 140–42 and accompanying text.

255. *Sykes*, 228 F.3d at 270.

256. *Id.* The court relied on a similar case in the Eleventh Circuit involving application of the grid to a claimant with monocular vision to underscore the absence of an evidentiary basis for the non-erosion finding. *See id.* (citing Francis v. Heckler, 749 F.2d 1562, 1567 (11th Cir. 1985)). Several other courts have found that neither ALJ intuition nor medical evidence can supply an appropriate evidentiary basis for the labor market facts of job base erosion or job incidence. *See, e.g.*, Foreman v. Callahan, 122 F.3d 24, 26 (8th Cir. 1997) ("[T]he ALJ's unsupported assertion that Foreman's mental impairment would not limit his ability to perform the full range of jobs contemplated in the grids 'invaded the province of the vocational expert.'") (citation omitted); DeFrancesco v. Bowen, 867 F.2d 1040, 1045 (7th Cir. 1989) (finding that the ALJ failed to procure a VE "either because of his belief—untenable given the record—that DeFrancesco's medical condition impaired his ability to perform light work but slightly, or because the [ALJ] confused a medical advisor with a vocational specialist"); *cf. Wilson*, 617 F.2d at 1053 (reiterating that the agency may not "establish specific vocational ability solely through medical evidence" and the "ALJ is not qualified to provide affirmative vocational evidence").

effect.'"[257] On the first substantive requirement, the court found that the doctrine "allow[s] adjudicators to take notice of commonly acknowledged facts, but official notice is broader than judicial notice insofar as it also allows an administrative agency to take notice of technical or scientific facts that are within the agency's area of expertise."[258] Nevertheless, the court declined to decide whether official notice of the lack of meaningful grid light work occupational base erosion from monocular vision met this substantive requirement.[259] It concluded that even if official notice were substantively appropriate, it would be procedurally inappropriate. "[T]he ALJ would have had to provide Sykes with notice of his intent to notice that fact and, if Sykes raised a substantial objection, an opportunity to respond."[260] The court concluded that,

> On remand, if the ALJ intends to rely on official notice rather than additional vocational evidence to establish that Sykes's nonexertional impairment does not diminish his occupational base for light work, the ALJ must provide notice to Sykes that he intends to notice that the lack of binocular vision causes no diminution in the occupation base and give Sykes an opportunity to respond.[261]

The Third Circuit's approach further highlights the non-uniformity and conflict among the circuits on this issue. Indeed, the court in *Sykes* expressly interpreted several of the other circuits' approaches to the nonexertional exception as more narrow than its own.[262] It has recently admonished the agency to apply the *Sykes* standard in cases in the Third Circuit and to refrain from continuing to cite the Second Circuit's approach in *Bapp*.[263]

The agency has issued an acquiescence ruling in *Sykes* which also reveals ambiguity and confusion in the agency's approach to this issue.[264] The agency issues acquiescence rulings only where it determines that a "Court of Appeals holding conflicts with [its] interpretation of a provision of the Social Security Act or regulations and the Government does not seek

257. *Sykes*, 228 F.3d at 272 (citing Union Elec. Co. v. FERC, 890 F.2d 1193, 1202 (1989) (quoting Ohio Bell Tel. v. Pub. Util. Comm'n, 301 U.S. 292, 301–302 (1937))).

258. *Id.*

259. *See id.* at 273.

260. *Id.*

261. *Id.* at 273. Because the court left open the question of the substantive propriety of the administrative notice doctrine's application in this context, presumably that issue could still be challenged on remand and on future appeals.

262. *See id.* at 268–69 n.12 (citing cases in the First, Second, Fifth, Seventh, and Tenth Circuits and explaining the rejection of their holdings—that ALJs may determine that nonexertional limitations do not significantly erode the grid's occupational bases without taking vocational evidence or proper official notice—due to inconsistency with *Campbell*).

263. *See* Poulos v. Comm'r of Soc. Sec., 474 F.3d 88, 94 n.4 (3d Cir. 2007).

264. *See* SSAR 01-1(3), 1992–2008 Soc. Sec. Rep. Serv. 514 (West 2001).

further judicial review or is unsuccessful on further review."[265] The agency notes that *Sykes* differs from national policy in that agency adjudicators can presume non-erosion without either vocational evidence or the procedural protections of the official notice doctrine—notice and rebuttal rights—in a wider variety of situations than *Sykes* permits.[266] Other than pointing to the "instance" where interpretive adjudicative guidance in an SSR supports a conclusion that a particular nonexertional limitation does not significantly erode the job base—an issue the agency also noted was expressly reserved in *Sykes* and thus not decided contrary to agency policy[267]—the agency offered no further clarity on adjudicators' authority to make non-erosion determinations. The Ruling suggested only one way that agency policy differs from the *Sykes* holding: the agency does not "always consult" a VE or other vocational evidence in nonexertional cases.[268] However, neither does *Sykes* command such a result; it requires vocational evidence or the proper invocation of the official notice doctrine. Thus, with the possible exception of reserving the right to invoke de facto official notice of job base non-erosion without complying with the doctrine's due process and APA-based prerequisites, the agency has not identified any specific way in which *Sykes* is contrary to the SSA's national policy and adjudicative approach to the issue. In short, there is perhaps no substantive Social Security disability law issue for which there is greater adjudicative confusion and non-uniformity at present among courts and agency alike.

Finally, in *Allen v. Barnhart*,[269] the Third Circuit addressed the issue reserved in *Sykes* concerning the use of the agency's examples of the

265. 20 C.F.R. § 404.985(b) (2010).

266. *See* SSAR 01-1(3), *supra* note 264, at 517–18.

267. *See id.* at 517 ("The court stated that it was not deciding the issue of 'whether Social Security Rulings can serve the same function as the rulemaking upheld in Campbell.' The court further stated that it need not resolve the issue of whether 'the Commissioner can properly refer to a ruling for guidance as to when nonexertional limitations may significantly compromise the range of work that an individual can perform.'") (citation omitted); *Sykes*, 228 F.3d at 271 & n.15. In *Sykes*, the agency argued on appeal that SSR 85-15 supported the non-erosion conclusion. *Id.* This ruling is written in a flexible, nonconclusive fashion, providing generally that visual impairments that only prevent performance of jobs requiring good vision do not preclude a substantial number of jobs at all exertional levels. At the same time, the ruling provides that some persons with adverse vocational characteristics who have worked in jobs requiring good vision will be so precluded. *See* SSR 85-15, *supra* note 174. The court found that this ruling did not purport to supply a definitive or conclusive decisional rule applicable to Sykes's situation but merely a "factor for consideration." *Sykes*, 228 F.2d at 271. Moreover, since the ALJ had not applied this SSR in the decision, its use for the first time on appeal violated the settled administrative law principle precluding post hoc justifications for agency decisions. *Id.* (citing SEC v. Chenery, 318 U.S. 80 (1943)).

268. *See* SSAR 01-1(3), *supra* note 264, at 518.

269. 417 F.3d 396 (3d Cir. 2005).

potential erosive impact of various nonexertional limitations in its SSRs. The claimant in *Allen* had been found previously disabled based solely on severe psychiatric impairments, including bipolar disorder and manic–depressive disorder with "schizoid" features.[270] The ALJ had found that the claimant's condition had improved to the point that he had the capacity to perform "simple, routine repetitive work." Then, in reliance on the grid and SSR 85-15, and without any vocational testimony, the ALJ determined that a restriction to "simple, routine repetitive work" would not erode the job base in any of the applicable exertional grid rules and thus justified terminating the claimant's benefits.

On appeal, the agency asserted explicitly that it could rely on SSR 85-15 in lieu of record vocational evidence (and implicitly, without proper invocation of the official notice doctrine) to determine that the claimant's nonexertional psychiatric restrictions do not erode the grid's job bases.[271]

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270. *Id.* at 397.

271. The ALJ's only apparent reference to SSR 85-15 to support his non-erosion conclusion was a citation in his penultimate finding that

> Given the claimant's age, level of education, work skills and residual functional capacity for a full range of work at all exertional levels. 20 C.F.R. § 404.1569 and Medical–Vocational Rule 204.00, Appendix 2, Subpart P, Regulations No. 4, used as a framework for decisionmaking, warrants a conclusion of not disabled. The claimant's mental limitations do not significantly erode the base of unskilled jobs available (SSR 85-15).

Brief of Appellee at *6, Allen v. Barnhart, No. 04-2163, 2004 WL 4990654 (Aug. 23, 2004). On appeal, the agency expanded the ALJ's reasoning to suggest that language paraphrased from example four in SSR 85-15 "provides substantial evidence to determine the impact of Allen's nonexertional limitations." *Id.* at *17. Example four of SSR 85-15 provides the following:

> Example 4: Someone who is of advanced age, has a high school education, and did skilled work as manager of a housing project can no longer, because of a severe mental impairment, develop and implement plans and procedures, prepare budget requests, schedule repairs or otherwise deal with complexities of this level and nature. Assuming that, in this case, all types of related skilled jobs are precluded but the individual can do work which is not detailed and does not require lengthy planning, the remaining related semiskilled jobs to which skills can be transferred and varied unskilled jobs, at all levels of exertion, constitute a significant vocational opportunity. A conclusion of "not disabled" would be appropriate. (Compare rules 201.07, 202.07, and 203.13 of Appendix 2.).

SSR 85-15, *supra* note 174. Apart from *Allen*, the agency apparently takes the nationwide position that its SSRs' non-erosion examples are "evidence" as opposed to simply legal interpretive rules. *See, e.g.*, Jordan v. Comm'r of Soc. Sec., 548 F.3d 417, 424 (6th Cir. 2008) ("SSA argues on appeal that SSR 85-15 constituted the necessary 'reliable evidence' that Jordan's nonexertional limitations did not significantly limit her ability to perform light work."). Indeed, in *Sykes*, the Third Circuit noted that the *Skidmore* "respect" doctrine (see *supra* note 229) might not be "entirely apposite" with reference to the non-erosion examples in SSR 85-15 because "we deal here with a prior agency determination of fact" as opposed

In rejecting the agency's argument, the court set two prerequisites for the use of SSRs in this context: one substantive and one procedural. First, "if the [agency] wishes to rely on an SSR as a replacement for a vocational expert, it must be crystal-clear that the SSR is probative as to the way in which the nonexertional limitations impact the ability to work, and thus, the occupational base."[272] Second, where use of a ruling is substantively proper, the claimant should be provided "advance notice" and the opportunity to contest the ruling's suggested non-erosion conclusion.[273] The claimant may choose to do so, for example, by "calling claimant's own expert."[274] Because the ALJ's mere conclusory reference to SSR 85-15 failed to supply the requisite "crystal-clear fit" between the non-erosion conclusions and the totality of the claimant's psychiatric limitations, the court set aside the agency's decision.[275] Although *Allen* appears more

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to an interpretation of law. 228 F.3d at 271 n.14.

272. *Allen*, 417 F.3d at 407.

273. *Id.* at 407–08.

274. *Id.*

275. Some SSRs contain examples of various nonexertional limitations that "generally" or "usually" substantially limit or do not substantially restrict various occupational bases. *See generally* TRAVER, *supra* note 100, at ch. 12 (describing these examples). The SSRs thus include both "lock-in" and "lock-out" examples. The examples do not appear to reflect definitive erosion/non-erosion conclusions. *Compare* TRAVER, *supra* note 100, § 1200.1 (suggesting that use of the modifiers "generally" or "usually" coupled with the agency's burden of proof on this issue should require a persuasive demonstration by the agency that a disability finding is not mandated for a claimant with an SSR profile where substantial erosion "usually" or "generally" occurs), *with* Lauer v. Apfel, 169 F.3d 489, 493 (7th Cir. 1999) (suggesting that a "lock-in" job base erosion example in SSR 96-9p based on presumed job base erosion from inability to stoop is only advisory and does not mandate a favorable decision by agency adjudicators). The agency may choose to bind itself to the SSRs' "lock-in" examples of presumed job base erosion as a matter of administrative convenience as it has done with the medical listings at step three of the sequential evaluation process. *Cf. supra* notes 144–46 and accompanying text (describing listings). This would save the agency time and resources from a further individualized assessment. As with the listings, the ruling's application might be over-inclusive and benefit some people who might be rejected under such a further assessment. *See id.* That possibility would be part of the agency's cost–benefit calculation. However, use of the "lock-out" examples to deny claims based on presumed non-erosion of the job bases implicates issues of substantive and procedural fairness to claimants.

In *Campbell*, the court rejected the argument that the claimant should be able to rebut the grid rules' legislatively promulgated conclusions, reasoning that the opportunity to test the grid's conclusions occurred in the APA rulemaking itself. *See supra* notes 15–18 and accompanying text. It also pointed out the various sources relied upon substantively to support the grid's rules. *See supra* notes 7–8 and accompanying text. In contrast, the SSRs' assumptions have not been tested in rulemaking or otherwise and list no empirical sources of information supporting the examples' non-erosion conclusions. *Cf.* CJB-09-03, *supra* note 86 (applying similar reasoning to ban administrative notice of prior VE interrogatories). There

clearly divergent from agency policy than *Sykes*, the agency has failed to issue an acquiescence ruling in *Allen*.[276]

None of the Third Circuit cases has set a minimal medical threshold for use of its two-prong official notice approach to job base non-erosion.[277] The agency's authority to insist on such a threshold to winnow out frivolous or trivial nonexertional limitations is likely inherent in the authority supporting its non-severity regulations. However, just as the proper application of those regulations requires that even slight or minimal impairments and limitations must be considered in combination to evaluate whether they have a more than slight cumulative impact on basic work activities and permit a claim to proceed beyond step two,[278] so too, such a cumulative approach must be employed to determine whether even slight nonexertional limitations can produce significant exertional job base erosion in the aggregate at step five.

CONCLUSION

As Judge Posner has observed, "The grid has simplified the determination of social security disability claims and brought about a modicum of uniformity in the adjudications of almost a thousand administrative law judges. But it has the characteristic flaws of mechanical rules, and one of them is that it abounds in gaps."[279] The gaps in the grid

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is not even the most minimal safeguard against potentially unsupported bureaucratic assumptions that might find resonance in such a "lock-out" ruling. Nor is there a legislative rule justification, as in *Campbell*, for disregarding the official notice doctrine's substantive and procedural safeguards when those SSRs are relied upon to relieve the agency of satisfying its work adjustment burden of proof.

276. *See* Stieberger v. Sullivan, 738 F. Supp. 716, 757–60 (S.D.N.Y. 1990) (noting that the agency's current announced policy of acquiescence in circuit court precedent still results in de facto or informal nonacquiescence when the agency declines to issue an acquiescence ruling (AR) on a circuit precedent since agency adjudicators are forbidden from applying circuit precedents that are not embodied in ARs).

277. In *Sykes v. Apfel*, the Third Circuit suggested in a footnote that even nonsevere, nonexertional limitations might still have a significant impact on the grid's occupational bases and it did not exempt cases involving such nonsevere restrictions from its holding's requirement of either producing vocational evidence or taking proper official notice. 228 F.3d 259, 268 n.12 (3d Cir. 2000). However, the agency's acquiescence ruling appeared to limit *Sykes*'s application to its narrow factual context—a case where a nonexertional limitation was deemed "severe" or nontrivial at step two. *See* SSAR 01-1(3), *supra* note 264, 516 ("In view of the ALJ's finding that the claimant had a severe nonexertional impairment, the court stated that we cannot establish the existence of other jobs in the national economy that Sykes can perform by relying on the grids alone, even if [we use] the grids only as a framework instead of to direct a finding of no disability.").

278. *See supra* notes 141–42.

279. DeFrancesco v. Bowen, 867 F.2d 1040, 1045 (7th Cir. 1989).

have produced the two most important and conflicting substantive issues in the western world's largest administrative adjudicative system. Fortunately, they can and should be properly resolved through resort to settled administrative law principles. First, the agency should adhere, and the courts should compel agency adherence, to the agency's interpretive guidance on the proper use of the grid's adjudicative framework to determine when claimants can and cannot make work adjustments. This would entail interpreting that guidance to mandate use of the grid occupational and job base numbers, and not ad hoc, adjudicative gestalt, as the proper measure of "significance" in the quantum of performable jobs below which a claimant is deemed unable to make a sufficient work adjustment. In turn, this would ensure greater fairness, consistency, and nonarbitrariness in the treatment of similarly situated claimants in grid and grid exception cases alike, give effect to statutory vocational factors and considerations of adaptability based on age, and prevent discrimination based on disability type.

Second, the Court should resolve the confused and particularly circuit-splitting issue of the proper approach to determining whether nonexertional limitations and other factors not within the grid's promulgation are sufficient to preclude direct application of the exertional grid rules in determining that claimants can make work adjustments. It should compel the agency to avoid undermining settled official notice doctrine in work adjustment determinations involving such limitations and factors. At a minimum, agency adjudicators must be precluded from taking irrebuttable administrative notice that the grid's job bases have not been significantly eroded by the presence of non-trivial, nonexertional limitations or other relevant non-grid factors.

While possessing obvious implementation and structural flaws, the grid represents a positive first step toward the improvement of the SSA's mass justice adjudicative processes. It is a significant advance over the entirely ad hoc approaches of ALJ intuition-based adjudicative official notice and vocational expert gestalt that predated the grid's promulgation. By taking the steps recommended above, the courts and the SSA can restore *Campbell*'s promise of improved consistency and fairness in systemic disability adjudication and further vindicate aspirations for bureaucratic justice and rationality.