

ARTICLES

RULEMAKING AND THE GUIDANCE EXEMPTION

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The Administrative Procedure Act imposes a general obligation on federal agencies to use notice-and-comment procedures when they adopt rules, but it contains an exemption, § 553(b)(A), for two kinds of rules that lack the force of law—“interpretative rules” and “general statements of policy.” Questions pertaining to the application of this exemption may constitute the single most frequently litigated and important issue of rulemaking procedure in the federal courts today. This article undertakes a comprehensive examination of issues presented by the exemption and offers a unified framework for resolving them. The article deals with procedural questions only and does not address judicial review issues pertaining to these rules.

The draftsmanship of § 553(b)(A) has generally been read to imply that interpretive rules and policy statements should be analyzed separately for purposes of the exemption, and, indeed, two separate lines of cases have developed. However, the track records of those two bodies of case law have not proved equally satisfactory. The courts’ approach to policy statements is essentially coherent—more so than many scholars acknowledge. It revolves around the issue of whether a statement creates a “binding norm,” either legally or in practical effect. Much of the case law on policy statements applies the exemption more narrowly than I would endorse, but the tensions in the precedents result from understandable tradeoffs among competing values. Many of those same values are also reflected in best-practices recommendations adopted by government bodies and professional organizations. In contrast, the case law on interpretive rules is highly unsatisfactory. It is generally understood that an interpretive rule explains existing law instead of creating new law. However, the approaches by which courts apply this criterion are not only vague, but also lack credible policy justifications that would enable courts and agencies to find their way past the vagueness. The

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courts have identified several circumstances in which they can comfortably conclude that a given document is not an interpretive rule, but they lack workable criteria for determining what documents do fit that description.

I propose a simple fix for this difficulty: The “binding norm” principles that courts now use in the policy statement context should, for the most part, apply in the interpretive rule context as well. This consolidation would tend to simplify the law and would bring judicial doctrine into line with the increasing tendency among administrative lawyers to refer to non-binding rules using the collective term “guidance.” Thus, we should think of these provisions in § 553(b)(A) as comprising, in a significant and not merely nominal sense, a single exemption—the guidance exemption.

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INTRODUCTION

Midway through the 1984 movie *Ghostbusters*, the sensible, down-to-earth Dana Barrett (Sigourney Weaver) abruptly turns into an eerie temptress and starts making amorous advances toward Dr. Peter Venkman (Bill Murray). He recognizes that a demon has taken control of her body, and he resists: “I make it a rule never to get involved with possessed people.” But, as she claps him in a passionate embrace, his will begins to weaken. “Actually,” he says, “It’s more of a guideline than a rule . . .”¹

The challenge of distinguishing rules from guidelines has puzzled not only ghost exterminators, but also much of the administrative law community. Indeed, the question of whether a supposedly informal pronouncement of an administrative agency is actually a rule that should have been adopted through notice-and-comment procedure may well be the single most frequently litigated and important issue of rulemaking procedure before the federal courts today.² Law review commentary on the issue is also voluminous. The standard view among commentators is that the subject is exceptionally

1. GHOSTBUSTERS (Columbia Pictures 1984); see also *Ghostbusters Quotes*, IMDB, <http://www.imdb.com/title/tt0087332/quotes?item=qt0475956> (last visited Apr. 28, 2018) (reprinting the quote).

2. One reason for the prevalence of this issue in the courts is that it is often used as the key to determining whether the document is a reviewable final agency action. See *infra* note 12 and accompanying text. It is a close call whether cases raising this issue are outnumbered by cases that consider whether a *final* rule differs too much from the *proposed* rule that an agency had announced earlier. See, e.g., *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007) (explaining that the final rule must be a “logical outgrowth” of the proposed rule). However, even if cases involving the latter issue do arise more frequently, the framework of analysis that courts use in resolving them is stable and essentially uncontroversial. Undoubtedly, therefore, questions about the meaning and application of the guidance exemption pose far greater interpretive challenges for administrative lawyers and judges.

perplexing and incoherent.³ The distinction between legislative rules and guidance is routinely described as “fuzzy,” “tenuous,” “blurred,” and “enshrouded in considerable smog.”⁴

This disputation grows out of the fundamental distinction in administrative law between legislative rules (also called regulations or substantive rules) and guidance (or nonlegislative rules). The essence of the distinction is that legislative rules have the force of law and guidance does not.⁵ In turn, the category of guidance is conventionally understood to comprise two subcategories: interpretive rules and policy statements. Interpretive rules are used to explain the meaning of an existing provision of law (usually a statute or regulation); policy statements are used to explain how the agency intends to use a discretionary power. This terminology is reflected in the Administrative Procedure Act (APA), which imposes a general obligation to use notice-and-comment in rulemaking but contains an exemption, § 553(b)(A), for “interpretative rules” and “general statements of policy.”⁶

In a 2014 opinion,⁷ Judge Brett Kavanaugh lamented that “all relevant parties should instantly be able to tell whether an agency action is a legislative rule, an interpretive rule, or a general statement of policy,” but in practice “[t]hat inquiry turns out to be quite difficult and confused.”⁸ Thus, he continued, achievement of that goal should be an “important continuing project for the Executive Branch, the courts, the administrative law bar, and the legal academy—and perhaps for Congress.”⁹ Although the judge’s aspiration to “instant” clarity and predictability may not be a realistic goal, this article undertakes to respond to at least part of Judge Kavanaugh’s challenge. It

3. See David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 278 (2010) (“There is perhaps no more vexing conundrum in the field of administrative law. . . . [I]t turns out to be maddeningly hard to devise a test that reliably determines which rules are legislative in nature and which are not.”); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 893 (2004) (“Among the many complexities that trouble administrative law, few rank with that of sorting valid from invalid uses of so-called ‘nonlegislative rules.’”).

4. *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (citations omitted); see also, e.g., Robert A. Anthony, “*Interpretive*” Rules, “*Legislative*” Rules and “*Spurious*” Rules: *Lifting the Smog*, 8 ADMIN. L.J. AM. U. 1, 4 n.10 (1994) [hereinafter Anthony, *Lifting the Smog*].

5. *Chrysler Corp. v. Brown*, 441 U.S. 281, 301–02, 302 n.31 (1979).

6. 5 U.S.C. § 553(b)(A) (2012). This article uses the briefer term “interpretive” rather than “interpretative,” but both are widely used. The same clause of the Administrative Procedure Act (APA) also exempts rules of “organization, procedure, or practice” from rulemaking requirements. *Id.* However, the procedural rules exemption is conceptually distinct from the exemption for guidance and is not within the scope of this article.

7. *Nat’l Mining Ass’n v. McCarthy*, 758 F.3d 243 (D.C. Cir. 2014).

8. *Id.* at 251.

9. *Id.*

presents a broad, though critical, analysis of § 553(b)(A) case law and proposes a synthesis of diffuse lines of precedent.

The draftsmanship of § 553(b)(A) has generally been read to imply that interpretive rules and policy statements should be analyzed separately for purposes of the exemption, and, indeed, two separate lines of cases have developed. I contend in this article, however, that this bifurcated analysis of the exemption is, and always has been, misdirected. The courts' approach to policy statements is largely sound (more so than many scholars give it credit for being), but their approach to interpretive rules is seriously flawed. To extend the smog metaphor, the case law on policy statements could be described as an "attainment area"—basically acceptable, although susceptible of improvement. The case law on interpretive rules, however, is more like a "nonattainment area," in which the smog problem is deeper and more severe.

I propose a simple fix for this difficulty: most of the principles that courts now use in the former context should apply in the latter one as well. Thus, we should think of the interpretive rule and policy statement components of § 553(b)(A) as comprising, in a significant and not merely nominal sense, a single exemption—the guidance exemption.

As background for this claim, the article's analysis commences in Part I with an examination of guidance on a non-doctrinal level. I focus on a period in the 1990s, when a substantial debate over the appropriate uses of guidance broke out, initially focused on policy statements alone. Two opposing positions were outlined. One focused on the ways in which agencies sometimes use guidance coercively, giving it the practical equivalent of the force of law, which it technically does not possess. The other perspective emphasized the benefits of guidance in providing advice to regulated entities and members of the public who need it, and also to agency personnel in the interest of transparency and predictability. The upshot of this debate has been a general recognition that both sides have some merit. The need for some constraints on agencies' ability to use such statements as though they were legislative rules (which would subvert the policies of § 553) must be accommodated with the need to facilitate agencies' ability to issue and use guidance efficiently. A strong professional consensus, visible most clearly in institutional pronouncements by broadly representative groups recommending best practices, acknowledges the need for such accommodation.

With this groundwork laid, the article turns to the judicial case law in Part II. It is generally understood that the policy statement exemption turns on what is sometimes called the binding norm test. According to that test, if the statement purports to bind private persons or the agency itself, or if it has the effect of doing so in practice, it is outside the exemption. Broadly speaking, this is a reasonably coherent approach that responds directly to the pruden-

tial issues just mentioned. In this discussion, I will criticize a number of specific applications of the binding norm test. But these problems, I will contend, are manageable within the basic framework that courts employ currently.

In Part III, the article examines the case law on the interpretive rules exemption, adopting a less conventional and more provocative perspective. I contend in that Part that administrative law has been mistaken in assuming that policy statements and interpretive rules require substantially different treatment—neither the text nor the legislative background of the APA requires that assumption. More particularly, courts and commentators frequently ask whether the substance of a supposed interpretive rule can be fairly described as interpretation as distinguished from the exercise of policy judgment. This type of analysis, I will argue, is not only vague, but has no credible policy justification. The case law has, at best, managed to identify several circumstances in which courts can comfortably conclude that a given document is *not* an interpretive rule; however, courts have not developed a coherent theory as to what an interpretive rule *is*.

The upshot of this analysis is that courts and agencies should evaluate both types of guidance pursuant to a single test, namely the binding norm test that they already apply to policy statements. The relevant distinction is between legislative and nonlegislative rules. This solution has logical appeal, because the binding norm test is not predicated on the nature of “policy” as distinct from “law.” Rather, it rests on the basis that the guidance lacks the force of law, a premise that is as true for interpretive rules as for policy statements. Only minor adjustments to the test would be required in order to apply it in the interpretive rules context.

This article’s perspective on the essential similarity of interpretive rules and policy statements, for purposes of the APA rulemaking exemption, has rarely been articulated in the law review literature,¹⁰ but it offers a number of potential benefits. Consolidation of the two criteria in the exemption into a single test would tend to make analysis of the guidance exemption simpler and more coherent. It would also take account of the reality that not all nonlegislative rules can be readily classified as one or the other. Indeed, much of the legal system appears to be moving toward this solution. The

10. In a pair of articles on guidance documents (which he calls publication rules), Peter Strauss noted that his analysis applied similarly to interpretive rules and policy statements. Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 815–16 (2001) [hereinafter Strauss, *Publication Rules*]; Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1478–79 (1992) [hereinafter Strauss, *Rulemaking Continuum*]. In each instance, however, his discussion of this overlap extended over only about a page. This article contains the first full-scale exposition of this proposition.

emerging tendency among administrative lawyers to refer to interpretive rules and policy statements collectively as “guidance”¹¹ reflects a sound intuition that the similarities between these two types of nonlegislative rules overshadow the differences.

Finally, in Part IV, I suggest that courts are not in an ideal position to lead the evolution of procedure regarding guidance. Agency rulemaking authority is a better vehicle, and I offer tentative speculation about how the legal system might make a transition to a regime that embodies this shift in emphasis.

An important caveat should be mentioned at the outset. Many cases have utilized the distinction between legislative rules and guidance not only to determine whether notice-and-comment proceedings are required, but also to determine whether a particular rule is appealable immediately upon its issuance¹² and what scope of review should apply to the court’s consideration of the merits.¹³ Indeed, Judge Kavanaugh’s challenge, which I mentioned at the beginning of this introduction, applied to all of these issues. However, the sole purpose of this article is to explore the distinction between legislative rules and guidance in the context of issues of procedure within the agency. The relevance of the distinction to judicial review has been sharply questioned in the secondary literature.¹⁴ Thus, a serious inquiry into *how* to apply the distinction in the context of judicial review would necessarily implicate questions of *whether* to apply that distinction. The latter question would require an examination of fundamentally contested judicial review doctrines

11. See, e.g., Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007) [hereinafter OMB Bulletin]. A leading APA revision bill pending in Congress—to be known as the Regulatory Accountability Act—would replace the words “interpretative rules” and “general statements of policy” with “guidance.” See S. 951, 115th Cong. (2017) (proposing new sections, §§ 551(15), 553(g)(1), to replace the current exemption). The ABA Section of Administrative Law and Regulatory Practice has endorsed this substitution. See Letter from Anna Shavers, Chair, ABA Section of Admin. Law & Regulatory Practice, to Sens. Thomas Carper & Tom Coburn 2 (Dec. 16, 2014), https://www.americanbar.org/content/dam/aba/administrative/administrative_law/s_1029_comments_dec_2014.authcheckdam.pdf.

12. See, e.g., Ass’n of Flight Attendants-CWA v. Huerta, 785 F.3d 710, 716 (D.C. Cir. 2015); Ctr. for Auto Safety v. Nat’l Highway Traffic Safety Admin., 452 F.3d 798, 806 (D.C. Cir. 2006).

13. See, e.g., Christensen v. Harris Cty., 529 U.S. 576 (2000).

14. Regarding access to judicial review, see William Funk, *Make My Day! Dirty Harry and Final Agency Action*, 46 ENVTL. L. 313, 330–31 (2016) [hereinafter Funk, *Make My Day!*]; Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331, 378–80 (2011). Regarding merits review, see, for example, David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 229–32.

that would carry us far afield. In contrast, the relevance of the distinction between legislative rules and guidance is not at all contingent or uncertain in relation to agency procedure, because that variable is the key to a provision of the APA itself. Judicial review issues will crop up here and there in the course of our inquiry into agency procedure, but I do not attempt to resolve them on their own terms.¹⁵

I. THE EVOLUTION OF PROFESSIONAL OPINION ABOUT GUIDANCE

A. *Early Years*

Professional thinking about the uses and abuses of guidance in administrative law has developed slowly and erratically. Although the distinction between legislative and interpretive rules was recognized by the early twentieth century,¹⁶ the enactment of the APA in 1946 established the basic structural categories that have dominated the field during most of its ensuing history. The *Attorney General's Manual on the Administrative Procedure Act*, the U.S. Department of Justice's widely respected explication of the Act, outlined definitions of the terminology that underlay the guidance exemption. The Manual defined substantive rules (today more often called *legislative* rules) as rules "issued by an agency pursuant to statutory authority and which implement the statute, as, for example, the proxy rules issued by the Securities and Exchange Commission (SEC) pursuant to section 14 of the Securities Exchange Act of 1934. Such rules have the force and effect of law."¹⁷ In contrast, "interpretative" rules were "rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."¹⁸ General statements of policy were "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power."¹⁹

15. As noted above, some courts—notably the D.C. Circuit—routinely rely on § 553(b)(A) criteria in determining whether a given document is a final agency action and therefore amenable to immediate judicial review. *See supra* note 12 and accompanying text. In this article, therefore, I rely on those courts' finality case law in order to infer how they would apply the rulemaking exemption. This reliance is not intended as an endorsement of that equation.

16. *See* Frederic P. Lee, *Legislative and Interpretive Regulations*, 29 GEO. L.J. 1, 2 n.1 (1940) (documenting early references).

17. U.S. DEP'T OF JUSTICE, *ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT* 30 n.3 (1947) (citations omitted) [hereinafter *ATTORNEY GENERAL'S MANUAL*].

18. *Id.* (citations omitted).

19. *Id.*; *see also* *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979) (endorsing these

Although these definitions have generally been considered authoritative, they did little to clarify the purposes behind the distinctions they drew. Nor did much else in the legislative history.²⁰ On the whole, therefore, the task of fleshing out the Manual's definitions was left to future interpreters.

As rulemaking grew in importance in the 1960s and 1970s,²¹ some courts and commentators took a skeptical view of the exemption and looked for ways to weaken it. Courts developed the thesis that an interpretive rule or policy statement should be subject to notice-and-comment if it had a *substantial impact* on members of the public.²² Bills to codify the substantial impact test were introduced in Congress.²³ Some commentators endorsed this trend²⁴ or other routes to narrowing. Charles Koch proposed that the exemption should be repealed entirely.²⁵ In the alternative, he suggested that courts should develop flexible procedures for guidance documents.²⁶

Influential figures in the administrative law world pushed back against these calls. Arthur Bonfield had led studies on behalf of the Administrative Conference of the United States (ACUS or Conference) to repeal or narrow other exemptions, but he wrote that the exemption for nonlegislative rules was worth keeping. He argued that agencies should be encouraged to publish informal statements for the guidance of the public; there were too few, not too many. Thus, rolling back the exemption would disserve the public interest.²⁷ Kenneth Culp Davis argued to similar effect.²⁸

definitions).

20. For discussion of the limited hints that the legislative history did contain, see *infra* notes 263–266, 281–286 and accompanying text.

21. See Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1148–49 (2001) (explaining this transition).

22. See Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520, 545–53 (1977) [hereinafter Asimow, *Public Participation*] (summarizing the case law).

23. See Arthur Earl Bonfield, *Some Tentative Thoughts on Public Participation in the Making of Interpretive Rules and General Statements of Policy under the A.P.A.*, 23 ADMIN. L. REV. 101, 117 (1971).

24. See Manning Gilbert Warren, III, *The Notice Requirement in Administrative Rulemaking: An Analysis of Legislative and Interpretive Rules*, 29 ADMIN. L. REV. 367, 397–98 (1977).

25. See Charles H. Koch, Jr., *Public Procedures for the Promulgation of Interpretive Rules and General Statements of Policy*, 64 GEO L.J. 1047, 1054 (1976).

26. *Id.*

27. Bonfield, *supra* note 23, at 118–19, 122–25. Bonfield also discounted the need for procedures because of the relatively broad judicial review to which interpretive rules are subject. *Id.* at 120–22. This rationale has not stood the test of time. For discussion, see *infra* notes 281–286 and accompanying text.

28. Bonfield, *supra* note 23, at 123–24 (quoting Davis).

Michael Asimow, an ACUS consultant, wrote a study that reinforced the arguments that interpretive rules and policy statements are vital elements of administration and should not be eliminated outright.²⁹ He recommended a more modest response to calls for broader public participation in agency interpretation and policymaking: a regime in which agencies would be urged to invite public comment on guidance documents either before or after their issuance.³⁰ This was a powerful, persuasive critique, and ACUS endorsed the thrust of his position.³¹

The Supreme Court's decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*³² gave further impetus to the government's side in this controversy. This case held that a court may not require an agency to follow rulemaking procedures other than those prescribed by statute or the Constitution.³³ It ruled out judicially invented procedures such as Koch had urged. It was also soon viewed as dooming the substantial impact test as too far removed from the APA's text and purposes.³⁴ Meanwhile, legislative efforts to institute the substantial impact test through amendment of the APA stalled amid criticisms that it would make application of the exemption highly unpredictable.³⁵ All of these developments suggested that the § 553(b)(A) exemption was going to survive intact, but not because defenders of the status quo had actually refuted the objection that the exemption operated in an arbitrary and unfair fashion.

During this early stage in the development of thinking about the guidance exemption, the distinction between interpretive rules and policy statements did not loom large in the scholarly literature. Asimow's articles did carefully explain that courts had developed separate lines of cases to apply the two exemptions, but he did not emphasize this point, which was not directly relevant to the theses he was developing.³⁶ Meanwhile, most discussion in the cases and commentary focused on the distinction between legislative rules

29. Asimow, *Public Participation*, *supra* note 22, at 575–77.

30. *Id.* at 578–84.

31. ACUS Recommendation 76-5, Interpretive Rules of General Applicability and Statements of General Policy, 41 Fed. Reg. 56,767, 56,770 (Dec. 30, 1976) [hereinafter ACUS Recommendation 76-5].

32. 435 U.S. 519 (1978).

33. *Id.* at 524.

34. *Friedrich v. Sec'y of Health & Human Servs.*, 894 F.2d 829, 836 (6th Cir. 1990); *Alcaraz v. Block*, 746 F.2d 593, 613 (9th Cir. 1984); *Cabais v. Egger*, 690 F.2d 234, 237 (D.C. Cir. 1982).

35. See Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 397–401 [hereinafter Asimow, *Nonlegislative Rulemaking*].

36. *Id.* at 390–97; Asimow, *Public Participation*, *supra* note 22, at 530–45.

and interpretive rules. The policy statement exemption was typically mentioned only fleetingly.³⁷ Sometimes, writers conflated the categories, referring to both types of guidance as interpretive rules.³⁸ Indeed, Koch suggested that “[a]lthough attempts have been made to distinguish the two [i.e., interpretive rules versus policy statements], there appears to be no analytical purpose served by such a distinction because the concepts that relate to these and other nonlegislative rules are the same.”³⁹

In hindsight, the emphasis on interpretive rules in the case law and scholarship may help to explain why so many administrative lawyers in this era regarded the guidance exemption as puzzling if not deeply questionable. They may well have been looking for coherence in all the wrong places. By the 1990s, however, this situation would change. Attention to the policy statement component of the exemption would burgeon. With it came a spirited policy debate, leading to a more sophisticated and durable literature on guidance documents than had prevailed previously.

B. “Practical Binding Effect”

An important turning point in the reassessment of guidance was a study that Professor Robert Anthony conducted for ACUS and published in 1992.⁴⁰ His article highlighted the concerns of regulated parties who felt that agencies used guidance documents—in particular, policy statements—in a coercive manner. In theory, a policy statement differs from a legislative rule in that it lacks the force of law; an agency is not supposed to treat it as dispositive of the issues it addresses. Anthony incisively argued, however, that the distinction tended to break down in practice. A nonlegislative document may prove to be coercive in practice because members of the public who may disagree with it will often lack the resources or nerve to challenge it within the agency; or if they do resist, the agency may turn a deaf ear to their objections. Thus, he said, a statement that cannot be legally binding may

37. See, e.g., Lee, *supra* note 16, at 3–4 (devoting only one paragraph to policy statements, here called permissive definitions or standards); Warren, *supra* note 24 (not mentioning policy statements).

38. See, e.g., 2 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 7:8 at 36 (2d ed. 1979) (“An interpretative rule is any rule an agency issues without exercising delegated legislative power to make law through rules.”); *id.* at 54 (“[R]ules are interpretative when the agency is not exercising . . . delegated power in issuing them”). For modern case examples, see *infra* note 386 and accompanying text.

39. Koch, *supra* note 25, at 1051–52.

40. Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 *DUKE L.J.* 1311 (1992) [hereinafter Anthony, *Interpretive Rules*].

nevertheless turn out to have a “practical binding effect.”⁴¹

Central to Anthony’s disapproval of this conduct was its tendency to undermine the values embedded in the APA rulemaking process. Those values, he explained, would include broad opportunities for public participation; the agency’s ability to inform itself through hearing others’ perspectives; rigorous analysis induced by the agency’s obligation to respond to comments; and agency accountability to external reviewers in the political and judicial spheres.⁴² By giving a policy statement practical binding effect, an agency can illicitly have the best of both worlds; it can impose policies of its choosing in a document that has never been subjected to the discipline of APA rulemaking.⁴³ Anthony contended, therefore, that when an agency issues a document that it intends to have binding effect, or that in practice has that effect or is reasonably perceived to be binding, it should adopt the document as a legislative rule, using all procedures appropriate to such a rule. Alternatively, if the agency does want the document to serve as a mere policy statement, it should scrupulously ensure that regulated persons are aware of its nonbinding character and that their opportunity to contest its legality and wisdom is as genuine in practice as it is supposed to be in theory.⁴⁴

In highlighting the importance of Anthony’s article, I do not mean to suggest that its conclusions were, or should have been, accepted uncritically. Its tone was argumentative, and its central organizing concept of “practical binding effect” tended to paper over a number of analytical complexities, which subsequent sections in this article will seek to untangle. However, the article did set an agenda for subsequent discussion, elevating it to a new level of sophistication. In contrast to the formalist distinctions commonly associated with the distinction between legislative rules and interpretive rules, Anthony’s indictment was concrete and functionally oriented. It carried the ring of truth to many members of the administrative law community, especially regulated persons that had experienced first-hand the sometimes-unwelcome pressures of nonlegislative rules. Thus, the article became a rallying point for these interests.⁴⁵

Anthony’s critique could be seen in a dual light. On one level, it was an

41. *Id.* at 1328–32.

42. *Id.* at 1373–74.

43. *Id.* at 1373.

44. *Id.* at 1316.

45. For examples of this response, see *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000); Randolph J. May, *Ruling Without Real Rules—Or How to Influence Private Conduct Without Really Binding*, 53 ADMIN. L. REV. 1303 (2001); Richard G. Stoll, *Court Strikes Heavy Blow to “Rulemaking” Through Informal Guidance Documents*, 31 ENV’T REP. 1284, 1285 (2000).

argument for interpreting the policy statement exemption in the APA to exclude documents that had “practical binding effect” on the regulated community (so that the notice-and-comment requirements would then apply to them). On another, it was an analysis of ways in which agencies sometimes misused guidance documents, even when such documents may have been properly characterized as policy statements. The latter perspective lent itself to the formulation of best-practice recommendations addressed to agencies, as opposed to doctrinal arguments addressed to courts.

Although these complementary perspectives were closely interwoven, I will focus in the remainder of Part I on the advisory, best-practice aspect of Anthony’s article. On this level, debates stemming from his critique have given rise to extensive agreement among administrative lawyers as to policies bearing on the proper uses and misuses of agency guidance. In Parts II and III, I will return to the APA and use that consensus as a reference point for evaluating the case law that has grown up around the guidance document exemption.

Of special interest for this article, Anthony expressly excluded interpretive rules from the scope of his indictment. He made this point repeatedly in his ACUS study⁴⁶ and in other writings.⁴⁷ He did recommend, in line with a past ACUS recommendation, that agencies *should* voluntarily allow notice-and-comment proceedings for interpretive rules that were expected to have a substantial impact on the public.⁴⁸ In his opinion, however, an agency could feel free to enforce an interpretive rule rigidly against a regulated party without offering that party any opportunity to contest the substance of the rule.⁴⁹

Overall, this aspect of Anthony’s reasoning has not survived in the executive, legislative, and organizational spheres in which rules governing guidance are established and best-practice recommendations are formulated. It has, however, had considerable staying power in judicial doctrine interpreting § 553(b)(A). That divergence will be the subject of some sharp criticism in Part III.

C. Reaction and Synthesis

Anthony’s warnings about the perils of policy statements met with a strong pushback by other authors. In particular, Peter Strauss emphasized in a pair of articles that guidance has affirmative benefits for the public as well as for agencies. His analysis expanded on themes that Bonfield and Asimow had

46. Anthony, *Interpretive Rules*, *supra* note 40, at 1313–14, 1314 n.6, 1324–25, 1375.

47. See, e.g., Anthony, *Lifting the Smog*, *supra* note 4, at 12–14.

48. Anthony, *Interpretive Rules*, *supra* note 40, at 1376–78; see ACUS Recommendation 76-5, *supra* note 31.

49. Anthony, *Interpretive Rules*, *supra* note 40, at 1375.

articulated in earlier years.⁵⁰ As he explained, the volume of guidance emanating from federal agencies vastly exceeds the number of legislative rules they can promulgate.⁵¹ Thus, a broad expansion in the procedural expectations associated with such documents would effectively force agencies to issue fewer of them.⁵² Such a curtailment, Strauss argued, would harm private persons who depend on agency guidance for instruction as to what they can do to satisfy their obligations or avoid liability under regulatory programs.⁵³ Thus, guidance documents should be sufficiently reliable to afford them confidence that the agency will stand by those positions over time. Furthermore, agencies use informal statements to exert control over their own staffs. This function is important as a means of preventing unguided discretion by low-level officials.⁵⁴ Other writers have also spoken up in support of agency guidance and its utility.⁵⁵

The upshot of this dialogue has been that contemporary scholarship recognizes that both sides have valid points to make. Guidance is widely seen as a normal tool of policy implementation. Indeed, many practitioners say that they depend on guidance and wish that the agencies before which they practice would provide more of it.⁵⁶ On the other hand, suspicion about the

50. See *supra* notes 27–31 and accompanying text.

51. Strauss, *Publication Rules*, *supra* note 10, at 805.

52. *Id.* at 850.

53. *Id.* at 808. As he explained:

Agency administration is aided when central officials can advise responsible bureaucrats how they should apply agency law. Citizens are better off if they can know about these instructions and rely on agency positions, with the assurance of equal treatment such central advice permits, than if they are remitted to the discretion of local agents and “secret law.”

Id.; see also Strauss, *Rulemaking Continuum*, *supra* note 10, at 1481–83.

54. Strauss, *Rulemaking Continuum*, *supra* note 10, at 1484–86.

55. See, e.g., NICHOLAS R. PARRILLO, FEDERAL AGENCY GUIDANCE: AN INSTITUTIONAL PERSPECTIVE 28–35 (2017) (report for the Administrative Conference of the United States (ACUS)); Michael Asimow, *California Underground Regulations*, 44 ADMIN. L. REV. 43 (1992); Sam Kalen, *The Transformation of Modern Administrative Law: Changing Administrations and Environmental Guidance Documents*, 35 ECOL. L.Q. 657, 671–74 (2008); K.M. Lewis, *Informal Guidance and the FDA*, 66 FOOD DRUG COSM. L.J. 507, 538–43 (2011); Leigh Osofsky, *The Case for Categorical Nonenforcement*, 69 TAX. L. REV. 73, 101–07 (2015); Seidenfeld, *supra* note 14, at 340–42.

56. See Gary Endelman & Cyrus D. Mehta, *Will the Revised USCIS Q&A on Establishing the Employer-Employee Relationship in H-1B Petitions Save Staffing Companies?*, INSIGHTFUL IMMIGR. BLOG (Mar. 19, 2012), <http://blog.cyrusmehta.com/2012/03/will-revised-uscis-q-on-establishing.html> (“The absence of guidance is the lawyer’s worst nightmare. Without knowing how the game is played, the lawyer does not know when to advance or when to retreat. . . . The USCIS adjudicator is also at sea [and] looks in vain to Washington for clarity that does not

prevalence of guidance remains persistent in some quarters.⁵⁷ Sometimes the critiques turn polemical⁵⁸ or political.⁵⁹ Among opinion leaders in administrative law, however, those voices are relatively isolated. The weight of opinion favors a more restrained view that, while accepting the legitimacy of guidance as such, emphasizes the need for rules or norms to prevent misuses of this device.⁶⁰ The interplay between that critique and more benign attitudes toward guidance has, over time, brought about a reasonably stable equilibrium.

D. Institutional Pronouncements

One consequence of the policy debate about guidance documents that began gathering steam in the 1990s has been a series of statements on that subject adopted during the past two decades or so by nonjudicial institutions. I refer to this set of actions as “institutional pronouncements.” This section is devoted to a survey of these pronouncements.

The academic literature, which tends to focus on judicial case law, has paid relatively little attention to these statements. I will have much to say about the case law below, but the institutional pronouncements deserve serious attention because they come from consensus-oriented, broadly representative entities. Collectively, they bespeak a high degree of agreement within the administrative law community about proper and improper uses of guidance documents. The continuities among them have significance that transcends the import of any one of them considered in isolation.

come.”); PARRILLO, *supra* note 55, at 7, 35–37.

57. In about half of state APAs, guidance is subject to the same rulemaking requirements as legislative rules. Michael Asimow, *Guidance Documents in the States: Toward a Safe Harbor*, 54 ADMIN. L. REV. 631, 637–44, 651 (2002) [hereinafter Asimow, *Guidance Documents in the States*]. Some of the states that lack guidance exemptions may have deliberately decided to adopt a more cautious attitude toward administrative governance than prevails in the federal system; others may have simply failed to give much consideration to the issue of whether to provide for a rulemaking exemption for guidance documents. Regardless, federal law is the principal focus of the present article.

58. See, e.g., CLYDE WAYNE CREWS JR., COMPETITIVE ENTER. INST., MAPPING WASHINGTON’S LAWLESSNESS: AN INVENTORY OF “REGULATORY DARK MATTER” 18–33 (2017); Leslie M. MacRae & Kenneth E. Nicely, *Break the Rules and Run an Industry: Guidance Manuals More Destructive of the Rule of Law than Bad Accounting*, 11 U. BALT. J. ENVTL. L. 1 (2003).

59. See, e.g., *Examining the Use of Agency Regulatory Guidance, Part II: Hearing Before the Subcomm. on Reg. Affairs and Gov’t Mgmt. of the S. Comm. on Homeland Sec. and Governmental Affairs*, 114th Cong. (2016); see also Clearing Unnecessary Regulatory Burdens (CURB) Act of 2013, S. 1730, 113th Cong. (2013) (proposing to codify elements of the Office of Management and Budget (OMB) Good Guidance Practices bulletin).

60. For comprehensive analysis of factors that can induce regulated persons to comply with guidance, see PARRILLO, *supra* note 55, at 37–131.

I do not want to overstate the extent of the overlap among the institutional pronouncements. To some degree, each addresses subtopics that reflect the distinctive concerns of its originating entity. What I want to emphasize here, however, is their common attention to questions about the authoritative effect of guidance, as discussed in Parts I.B. and I.C. In other words, they all speak to this issue: to what extent should members of the public expect an agency to be open to departing from the positions expressed in its guidance documents, and to what extent should they expect the agency to adhere to those positions? Even with respect to that one issue, the various pronouncements do not all evince the same degree of concern about potential misuses of guidance documents. Moreover, any given pronouncement presumably comprises a synthesis of disparate opinions held by the persons who participated in its drafting.

Despite these necessary qualifications, however, the level of agreement among the institutional pronouncements is striking and instructive. All the pronouncements evince apprehensions about the possibility that an agency may improperly attempt to use a guidance document in a binding fashion. On the other hand, all of them also evince an effort to respond to that possibility in a measured manner, so that the legitimate advantages of guidance documents in the administrative process can be maintained.

1. *1992 ACUS Recommendation.* Responding directly to the consultant's report submitted by Professor Anthony, ACUS adopted Recommendation 92-2.⁶¹ It reflected some of his central themes. According to the recommendation, the Conference was "concerned . . . about situations where agencies issue policy statements which they treat or which are reasonably regarded by the public as binding and dispositive of the issues they address."⁶² Thus, "affected persons should be afforded a fair opportunity to challenge the legality or wisdom of [a policy statement] and to suggest alternative choices in an agency forum that assures adequate consideration by responsible agency officials."⁶³ Moreover, "[a]gencies should not allow prior publication of the statement to foreclose full consideration of the positions being advanced."⁶⁴

At the same time, however, the recommendation affirmed the Conference's belief that policy statements "are important tools for guiding administration and enforcement of agency statutes and for advising the public of agency policy."⁶⁵ In line with that belief, the recommendation contained

61. See ACUS Recommendation 92-2, Agency Policy Statements, 57 Fed. Reg. 30,101, 30,103 (July 8, 1992).

62. *Id.*

63. *Id.* at 30,104.

64. *Id.*

65. *Id.* at 30,103.

some important nuances. In the first place, it said that a rule may “be binding as a practical matter if the agency treats it as dispositive of the issue it addresses.”⁶⁶ By using this general phrasing, the Conference evidently intended to leave room for debate as to what “treat[ing]” a position as “dispositive” would mean in particular situations.⁶⁷ For example, the phrasing of the recommendation stopped short of suggesting that a guidance document should be suspect merely because agency staff would be likely to adhere to it. Indeed, the recommendation acknowledged an agency’s prerogative to make a policy statement “authoritative for staff officials in the interest of administrative uniformity or policy coherence.”⁶⁸ I will explore the ramifications of this latter suggestion in detail below.

Like Professor Anthony’s article, the ACUS recommendation was expressly limited to policy statements. The Conference was silent about interpretive rules, except for mentioning that the recommendation did not address them.⁶⁹

2. *ABA Recommendation.* Within a year of the issuance of the ACUS recommendation, the ABA Section of Administrative Law and Regulatory Practice successfully sponsored a similarly worded resolution in the Association’s House of Delegates. The resolution urged agencies to provide an opportunity for public comment on their nonlegislative rules, either before or after issuance of such documents. It also included language regarding binding effect that was quite similar in substance to that of the ACUS recommendation: “When an agency proposes to apply a nonlegislative rule in an enforcement or other proceeding, it [should] provide affected private parties an opportunity to challenge the wisdom or legality of the rule.”⁷⁰ Nor, according to the resolution, should an agency allow prior publication of a nonlegislative rule “to foreclose consideration of the positions advanced by the affected private parties.”⁷¹

Like the ACUS recommendation, however, the ABA resolution conspicuously presupposed the value of guidance to regulated persons. Indeed, the

66. *Id.* at 30,104 n.3; *see also id.* (describing a rule as “binding” when an agency “treats it as a standard where noncompliance may form an independent basis for action in matters that determine the rights and obligations of any person outside the agency”).

67. *See id.* at 30,103–04 (“Recognizing that each agency’s process differs, the choice of which procedures to change in implementing this recommendation remains in the discretion of each agency.”).

68. *Id.* at 30,104.

69. *See id.* at 30,103 (“This recommendation addresses use of agency policy statements. . . . [which] include all substantive nonlegislative rules to the extent that they are not limited to interpreting existing law.”).

70. *ABA Recommendation 120C*, 118-2 A.B.A. ANNUAL REP. 57 (1993).

71. *Id.*

resolution translated that attitude into a concrete expectation:

When an agency proposes to act at variance with a policy or interpretation contained in an established nonlegislative rule on which a private party has reasonably relied, the party [should] have an opportunity to request relief, and the agency [should] explain why it is departing from its established policy or interpretation.⁷²

Thus, the resolution was explicit about its objective to harmonize competing objectives regarding nonlegislative rules: an agency should presumptively follow its guidance documents, but the presumption should always be rebuttable.

The ABA statement differed from that of ACUS in that it applied equally to interpretive rules and to policy statements. Thus, insofar as ACUS may have tacitly assumed that those two forms of guidance were distinguishable in this context, that reservation was left behind within a year of its having been deployed. An interesting sidelight is that Professor Anthony was among the members of the Section Council who voted to forward this resolution to the House of Delegates.⁷³

3. *FDA's Good Guidance Practices.* In 1996, responding to a rulemaking petition from a manufacturer that objected to what Professor Anthony would call the practical binding effect of various Food and Drug Administration (FDA) guidances, the FDA proposed a regulation to codify an elaborate set of “good guidance practices” (GGPs).⁷⁴ Congress endorsed the gist of these principles in the FDA Modernization Act of 1997.⁷⁵ The agency then finalized its GGP regulation and put it into practice. Thus, this regime has been in place for two decades.⁷⁶

Like the other institutional pronouncements just discussed, the FDA's policy on GGPs strives for a balanced approach to defining the allowable effect of guidance documents on regulated persons, although it strikes that balance in somewhat different terms. The Modernization Act provided specifically

72. *Id.*

73. ABA Sec. of Admin. L. & Reg. Prac., Minutes of the 1993 Spring Council Meeting, at 4 & app. A (May 1, 1993) (on file with author).

74. See Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 167–70 (2000) (commending the proposal as a worthy experiment in striking a balance between formal and informal models of rulemaking).

75. See 21 U.S.C. § 371(h) (2012).

76. 21 C.F.R. § 10.115 (2016). For detailed assessments of the agency's good guidance practices (GGPs), see Lewis, *supra* note 55, at 538–43 (maintaining that GGPs operate to the benefit of all affected interests); Lars Noah, *Governance by the Backdoor: Administrative Law (lessness?) at the FDA*, 93 NEB. L. REV. 89 (2014) (critically reviewing experience under the GGPs); Lars Noah, *The FDA's New Policy on Guidelines: Having Your Cake and Eating It Too*, 47 CATH. U. L. REV. 113 (1997) [hereinafter Noah, *Having Your Cake*] (predicting that broad use of guidance would leave the agency with too much effective discretion and leverage).

that “guidance documents shall not be binding on the [agency].”⁷⁷ The rule elaborates on that proposition by reciting that “[g]uidance documents do not establish legally enforceable rights or responsibilities. They do not legally bind the public or FDA.”⁷⁸ Indeed, the GGP regulation rescinded a prior FDA rule that had flatly provided that guidance documents are binding on the agency.⁷⁹

At the same time, however, the GGP policy makes clear that the FDA did want regulated interests to be able to rely on guidance documents to a substantial extent, even if not conclusively. According to the text of the GGP rules, guidance documents “represent the agency’s current thinking.”⁸⁰ Therefore, “FDA employees may depart from guidance documents only with appropriate justification and supervisory concurrence.”⁸¹ This provision indicates, more broadly speaking, that the purposes of the GGPs include not only curbing misuse of guidance documents, but also regulating and validating their routine use. Both interpretive rules and policy statements are governed by the GGPs.⁸²

4. *OMB Bulletin on Good Guidance Practices.* In 2007, the Office of Management and Budget (OMB) adopted a “Final Bulletin for Agency Good Guidance Practices.”⁸³ In multiple ways it was modeled directly on the FDA’s policy. However, in recognition of “the broad application of this Bulletin to diverse agencies,”⁸⁴ the drafters of the document limited its scope so that its obligations apply only to “significant” guidance documents. That term is based on the phrase “significant regulatory action” in a longstanding presidential directive, Executive Order 12,866.⁸⁵ The order uses that phrase to refer to proposed rules that warrant review by the Office of Information and Regulatory Affairs (a subdivision of the OMB). In general, these are rules that would be expensive to implement, that could interfere with the program of another agency, that would have material budgetary implications, or that

77. 21 U.S.C. § 371(h)(1)(B).

78. 21 C.F.R. § 10.115(d)(1).

79. See Noah, *Having Your Cake*, *supra* note 76, at 120–30, 142 (lamenting this change in agency policy). This change in direction was prompted in part by a controversial D.C. Circuit decision. See Lewis, *supra* note 55, at 520–21; see also *infra* notes 175–178 and accompanying text (discussing *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943 (D.C. Cir. 1987) (per curiam)).

80. 21 C.F.R. § 10.115(d)(3).

81. *Id.*; see 21 U.S.C. § 371(h)(1)(B) (similar statutory provision).

82. 21 C.F.R. § 10.115(b) (“Guidance documents . . . describe the agency’s interpretation of or policy on a regulatory issue.”).

83. OMB Bulletin, *supra* note 11.

84. *Id.* at 3434.

85. Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,738 (Oct. 4, 1993).

would raise novel legal or policy issues.⁸⁶ The bulletin's definition of "significant" guidance documents is based on that same classification scheme.⁸⁷

The bulletin included a variety of managerial directives, but for present purposes I focus on those relating to the potential impact of guidance on members of the public. The preamble repeatedly referred to guidance documents as nonbinding.⁸⁸ The bulletin also drew attention to the FDA's standard formula reciting that its guidance documents "represent the [Agency's] current thinking." OMB recommended (but did not specifically direct) that other agencies consider incorporating similar language into their significant guidance documents.⁸⁹ Additionally, the bulletin directed agencies to designate an office to field complaints that the agency has implemented its significant guidance documents in an improperly binding fashion.⁹⁰ On the other hand, the bulletin also provided, in a close paraphrase of the language of the FDA policy, that "agency employees should not depart from significant agency guidance documents without appropriate justification and supervisory concurrence."⁹¹

5. *2010 MSAPA*. Unlike the federal APA, the 2010 Model State Administrative Procedure Act (MSAPA)⁹² expressly codifies principles regarding the proper and improper use of guidance documents. No state has yet enacted the relevant MSAPA provision, § 311, as part of its APA. If one did, however, its courts would be able to redress violations of that provision in the same manner as they do with other MSAPA violations. Several of the requirements of § 311 closely resemble positions articulated in the federal law pronouncements summarized just above. This is no coincidence. As the official comments to § 311 acknowledge, the Act's language was inspired directly by those pronouncements.⁹³ For example, the key provision in § 311(b) states: "An agency that proposes to rely on a guidance document to the detriment of a person shall afford the person an adequate opportunity to contest the legality or wisdom of a position taken in the document."⁹⁴ Further, "[t]he agency may not use a guidance document to foreclose consideration of issues

86. *Id.*

87. OMB Bulletin, *supra* note 11, ¶ I(4)(a).

88. *Id.* at 3433–38.

89. *Id.* at 3437.

90. *Id.* at 3440, ¶ III(2)(b).

91. *Id.* ¶ II(1)(b).

92. REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 311 (UNIF. LAW COMM'N 2010) [hereinafter 2010 MSAPA].

93. *Id.* § 311 cmt.; see Ronald M. Levin, *Rulemaking Under the 2010 Model State Administrative Procedure Act*, 20 WIDENER L.J. 855, 877–78 (2011) [hereinafter Levin, *MSAPA Rulemaking*].

94. 2010 MSAPA, *supra* note 92, § 311(b).

raised in the document.”⁹⁵ These proscriptions were taken almost verbatim from the ABA resolution and the ACUS recommendation; the official comment cited to those statements and to Professor Anthony’s work as well.⁹⁶

In other ways, however, the MSAPA expresses strong support for guidance documents. Most conspicuously, it does this by exempting them from normal notice-and-comment procedures in order to encourage agencies to adopt them.⁹⁷ Although lawyers whose background is in federal law might take the desirability of such an exemption for granted, only about half the states include such an exemption in their APAs,⁹⁸ and the corresponding exemption in the prior (1981) MSAPA was decidedly stingy.⁹⁹ Moreover, § 311(d) goes on to provide, much as the ABA resolution and OMB bulletin did, that when an agency proposes to act at variance with one of its guidance documents, it must provide a reasonable explanation for the variance.¹⁰⁰ Indeed, the MSAPA provision goes further than those federal law statements. It also specifies that the agency must explain why the need for the variance outweighs the interests of any persons who may have reasonably relied on the guidance document.¹⁰¹

6. *DOJ Memorandum*. On November 16, 2017, Attorney General Jeff Sessions released a memorandum captioned “Prohibition on Improper Guidance Documents.” Addressing all components of the Department of Justice (DOJ), the Attorney General declared that “[i]t has come to my attention that the Department has in the past published guidance documents . . . that effectively bind private parties without undergoing the rulemaking process.”¹⁰² But, he continued, “[t]he Department will no longer engage in this

95. *Id.*

96. *Id.* § 311 cmt.

97. *Id.* (discussing § 311(a)).

98. *See supra* note 57 and accompanying text.

99. Under the prior Model State Administrative Procedure Act (MSAPA), interpretive rules were exempt from rulemaking procedure only if the agency lacked legislative rulemaking authority. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 3-109 (UNIF. LAW COMM’N 1981). Even if that condition was satisfied, an agency that availed itself of the exemption would lose all judicial deference for the resulting interpretation. *Id.* Policy statements were not exempted at all. *See Asimow, Nonlegislative Rulemaking, supra* note 35, at 410–15 (criticizing this provision).

100. 2010 MSAPA, *supra* note 92, § 311(d).

101. *Id.*; *see Levin, MSAPA Rulemaking, supra* note 93, at 881–82 (noting that the impetus for the second requirement came from within the drafting committee).

102. U.S. DEP’T OF JUSTICE, MEMORANDUM ON PROHIBITION ON IMPROPER GUIDANCE DOCUMENTS 1 (2017) [hereinafter DOJ MEMORANDUM], <https://www.justice.gov/opa/press-release/file/1012271/download>.

practice.”¹⁰³ He directed, therefore, that “[g]uidance documents should clearly state that they are not final agency action [and] have no legally binding effect on persons or entities outside the federal government.”¹⁰⁴ The requirements of the memorandum applied to interpretive rules as well as policy statements.¹⁰⁵

In contrast with earlier pronouncements in this series, the Sessions memorandum was written in an argumentative, almost one-sided tone. Although it did expressly state that “agencies may use guidance documents to educate regulated parties through plain-language restatements of existing legal requirements or provide non-binding advice on technical issues,”¹⁰⁶ it did not directly discuss the social benefits of guidance. At a minimum, this strongly worded document suggested that the Attorney General wished to take a firm stand against abuses of guidance. Probably, however, the principles that it expounded were not intended to differ substantially from those set forth in other institutional pronouncements discussed above. Indeed, the memorandum declared that DOJ components should “implement these principles consistent with policies issued by [OMB], including its Final Bulletin for Agency Good Guidance Practices.”¹⁰⁷

7. *2017 ACUS Recommendation.* Last year, ACUS revisited the subject of agency policy statements. In Recommendation 2017-5, the Conference reaffirmed its concerns about de facto binding effect of guidance.¹⁰⁸ Relying on a thorough research report by Professor Nicholas Parrillo,¹⁰⁹ it cited multiple reasons why this effect may occur, even if the agency does not intend it. The Conference recommended that agencies should treat policy statements as nonbinding and should allow affected persons a “fair opportunity” to suggest alternatives or ask for modification or rescission of the document.¹¹⁰

At the same time, the Conference emphasized the advantages that result

103. *Id.*

104. *Id.* at 2.

105. *See id.* at 1 (“Nor should guidance create binding standards by which the Department will determine compliance with existing regulatory or statutory requirements.”).

106. *Id.* at 1.

107. *Id.* at 2. Two months later, Associate Attorney General Rachel Brand issued a second memorandum, instructing department lawyers to apply the same principles when litigating affirmative civil enforcement cases on behalf of client agencies. DEPT’ OF JUSTICE, LIMITING USE OF AGENCY GUIDANCE DOCUMENTS IN AFFIRMATIVE CIVIL ENFORCEMENT CASES (2018), <https://www.justice.gov/file/1028756/download>.

108. ACUS Recommendation 2017-5, Agency Guidance Through Policy Statements, 82 Fed. Reg. 61,734 (Dec. 14, 2017) [hereinafter ACUS Recommendation 2017-5].

109. PARRILLO, *supra* note 55.

110. ACUS Recommendation 2017-5, *supra* note 108, at 61,736.

from policy statements: “Policy statements are important instruments of administration across numerous agencies, and are of great value to agencies and the public alike.”¹¹¹ Thus, although the recommendation provided that agencies should also consider additional managerial initiatives to mitigate the coercive effects of policy statements, it suggested that agencies undertake these measures “subject to considerations of practicability and resource limitations.”¹¹²

Like the 1992 ACUS recommendation, the 2017 recommendation dealt almost exclusively with policy statements. Only in passing did it remark that “many of the recommendations herein regarding flexible use of policy statements may also be helpful with respect to agencies’ use of interpretive rules.”¹¹³ Indeed, the question of whether the recommendation should encompass both types of rules was debated on the floor of the ACUS assembly. The assembly declined to expand the recommendation to include interpretive rules, primarily because the members felt that they did not have sufficient information to opine on that subject.¹¹⁴ Professor Parrillo’s research had focused primarily on policy statements.¹¹⁵ Accordingly, the assembly adopted a relatively narrow recommendation but also passed a “sense of the Conference” resolution to the effect that ACUS should conduct a follow-up study of interpretive rules, which would lay the groundwork for a subsequent recommendation.¹¹⁶ Thus, ACUS’s views about the manner in which agencies should treat interpretive rules are currently in flux.¹¹⁷

8. *Summary.* Read together, the statements just described express a high degree of agreement on several propositions. Guidance documents are not supposed to have the force of law, and agencies should not treat them as if they were binding. Thus, agencies should find reasonable ways to put the public on notice of the non-binding nature of those pronouncements. Moreover, when the agency actually applies them, it should refrain from acting as though they do have the force of law. On the other hand, guidance is a legitimate tool of administration, and the expectations just stated should not be interpreted in a manner that would impede agencies from using these

111. *Id.* at 61,734.

112. *Id.* at 61,736.

113. *Id.* at 61,734.

114. See Emily Bremer, *A Rare Separate Statement (ACUS Update)*, YALE J. ON REG.: NOTICE & COMMENT (Jan. 11, 2018), <http://yalejreg.com/nc/a-rare-separate-statement-acus-update/>.

115. *Id.*; see PARRILLO, *supra* note 55, at 25–26.

116. Bremer, *supra* note 114.

117. *Id.*; see ACUS Recommendation 2017-5, *supra* note 108, at 61,737–38 (separate statement of Senior Fellow Ronald M. Levin) (urging ACUS to extend the recommendation’s principles to interpretive rules in the next phase of its inquiry).

documents to inform staff members, as well as the public, about the manner in which the agency contemplates implementing its programs. Indeed, agencies *should* adhere to the positions expressed in their guidance documents to the extent necessary to honor expectation interests. If these messages seem mixed, at least part of the explanation is that their authors have self-consciously sought to strike a balance among competing objectives. Finally, all of these statements (except those of ACUS, which is now reexamining this issue) have applied these principles to both interpretive rules and policy statements.

My claim in Parts II and III of this article will be that these propositions are also a sound point of reference for interpretation and application of the guidance exemption in the APA. That notion is not, of course, self-evident. Abstractly speaking, it is entirely possible to think that best-practice recommendations and nonjudicial obligations regarding guidance should have entirely different goals from those of § 553(b)(A) of the APA. However, especially in light of the general disarray that attends the current interpretation of that exemption, there is surely at least some appeal to the notion that the cumulative judgments of experienced professionals about the strengths and limitations of guidance documents are factors that courts should consider when performing their own reviewing responsibilities.¹¹⁸

In upcoming pages, I will argue that this benchmark justifies making at least limited adjustments in existing doctrine regarding policy statements, as well as major rethinking of doctrine regarding interpretive rules. If courts decide to remain on a different path, they should at least have clear reasons for doing so—and, I will argue, they do not seem to have such justifications now.

II. THE POLICY STATEMENT EXEMPTION

Although the institutional pronouncements just reviewed were not couched as expositions of judicial doctrine, the concept of a binding effect, which was so conspicuous in those statements, is also a key variable in the case law construing the exemption for “general statements of policy” in § 553(b)(A) of the APA. That case law is the subject of this Part. In simple terms, the message of the case law is that a document can qualify for the exemption if the agency articulates it in non-binding terms and also refrains from treating it as dispositive in practice.

118. See Gillian E. Metzger, *Administrative Law, Public Administration, and the Administrative Conference of the United States*, 83 GEO. WASH. L. REV. 1517, 1534–39 (2015) (advocating closer linkages between administrative law and public administration, particularly through contributions by ACUS).

The courts' general agreement about the fundamental premise of the policy statement exemption has not prevented the emergence of some serious disagreements about how the exemption should be applied. After all, one of the main goals of Professor Anthony's scholarship about "practical binding effects" was to argue for a revised, and relatively narrow, approach to the APA exemption.¹¹⁹ His work raised a host of questions about what "binding effect" should mean in various fact situations, and the case law has by no means finished sorting out its answers to these and related questions.

In this Part, I offer some of my own answers to those questions—generally favoring a broader approach to the exemption than Anthony's. The reader may or may not be receptive to that perspective. But even those who reach different conclusions on these issues will, I hope, agree that the framework of the binding effect paradigm is susceptible of working out answers to those questions. At least to that extent, I will contend, the judicial doctrines regarding the policy statement exemption are in fairly satisfactory shape.

This relatively benign assessment of the policy statement exemption case law will stand in contrast to the harsher view that now prevails in the judicial and academic literature.¹²⁰ That perspective could be summarized in the frequently quoted words of Professor Davis's crisp appraisal: "[T]he problem is baffling."¹²¹ Indeed, the "considerable smog" metaphor, now used to apply to guidance documents generally, or sometimes simply to interpretive rules,¹²² was originally aimed squarely at the case law on policy statements.¹²³ But those epithets were uttered more than three decades ago, and I propose to show that the modern case law on the exemption has become much less unruly. Probably the doctrine on policy statements suffers from guilt by association. It may be catching some of the blame for the defects of the case law on the interpretive rules exemption, which largely deserves the harsh criticisms it typically elicits, as well as further criticisms that this article will set forth below.

This Part will sometimes use the terms "policy statement" and "guidance

119. See *supra* notes 40–45 and accompanying text.

120. See, e.g., Seidenfeld, *supra* note 14, at 349, 351.

121. 2 DAVIS, *supra* note 38, § 7:5 at 32. Davis's comment related in part to the challenges of applying the publication provisions of the APA. In order to rely on an interpretive rule or policy statement to the detriment of a person, an agency must publish it or at least make it available to the person. 5 U.S.C. §§ 552(a)(1)(D), 552(a)(2)(B) (2012). To that extent, Davis was correct; those provisions are so broadly drafted that the courts have resorted to highly artificial, but largely unpersuasive, constructions in order to keep them within manageable bounds. See MICHAEL ASIMOW & RONALD M. LEVIN, *STATE AND FEDERAL ADMINISTRATIVE LAW* 325–27 (4th ed. 2014). This obligation, however, is outside the scope of the present article.

122. Anthony, *Lifting the Smog*, *supra* note 4, at 4 n.13.

123. *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir. 1975).

document” interchangeably. This usage reflects my view, developed in Part III, that the operative rules for interpretive rules and policy statements should be largely equivalent. Readers who do not accept this premise, or at least not yet, can mentally substitute “policy statement” for “guidance document” throughout without any change in meaning.

A. *Reclassification and Deference*

Before plunging into the case law, I will make some brief comments on the structure of the APA and the role of judicial deference in litigation regarding § 553(b)(A). This material will provide a backdrop for our exploration of the policy statement exemption (although it applies to the interpretive rules exemption as well).

One factor that may have contributed to the confusion surrounding the § 553(b)(A) exemption is that the APA is not well designed to provide a remedy for agency misuse of guidance. On their face, the notice-and-comment provisions of § 553 set forth preconditions for the promulgation of legislative rules—or substantive rules, as they are also called.¹²⁴ Under a literal reading of the statute, those provisions do not seem to impose any restrictions at all on the issuance or use of guidance documents. In the words of the statute, the subsection “does not apply” to such rules.

Of course, the law has not developed that way. To enforce the exemption, courts have regularly resorted to the artifice of holding that guidance documents that violate their interpretation of the exemption are actually legislative rules, to which notice-and-comment obligations therefore attach. The agency’s actual intentions turn out to be beside the point. Fictional though this technique has often been, it has proved very convenient as a means for courts to put teeth in the exemption.¹²⁵ In contrast with the now-discredited

124. The provisions do not actually use those words, but this meaning can be readily inferred from the fact that nonlegislative rules—interpretive rules and policy statements—are exempted. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 301–02 (1979). An early draft of § 553(b) did say that “substantive rules” were subject to notice-and-comment, but that term was omitted after criticism that it appeared to make the exemption of “procedural” rules redundant. See ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 248, 79TH CONG., at 17 (1946) [hereinafter APA LEGISLATIVE HISTORY] (reprinting 1945 Senate Judiciary Committee Comparative Print).

125. In his articles on the policy statement exemption, Professor Anthony offered a slightly different analysis of this issue. He forthrightly conceded that a statement that an agency has issued without using required rulemaking procedure cannot “be” a legislative rule. Anthony, *Lifting the Smog*, *supra* note 4, at 8. He proposed that a policy statement that has “practical binding effect” should be known as a “spurious rule.” *Id.* at 10. Under this terminology, a spurious rule would lose its claim to the exemption, and therefore the notice-and-

substantial impact test,¹²⁶ this analysis is not generally considered to be in tension with *Vermont Yankee*'s prohibition on judicially invented requirements in rulemaking, because the procedural obligations that these holdings effectively impose on agencies are conceived as based upon the APA itself.¹²⁷

Having made the point that courts will sometimes second-guess the agency's own characterization of a rule as legislative or otherwise, I must take note of the issue of how willing a court should be to defer to the agency's characterization.¹²⁸ That issue is not easy to address, because the cases diverge. Most of the case law affirms that the agency's label is a factor that a reviewing court should at least consider.¹²⁹ That proposition is an outgrowth of the presumption of procedural validity that courts ordinarily accord to administrative action. More concretely, it reflects the likelihood that the agency might be in the best position to shed light on relevant matters such as its reasons for issuing the document and the way it makes use of that document. At the same time, however, a controversy over the applicability of the guidance document exemption is in essence an APA case. As with other APA issues,¹³⁰ therefore, any deference that courts are prepared to give is "not

comment obligation would apply to it. He had a valid point. Logically speaking, as far as the statutory language goes, all a challenger really needs to show is that the document falls outside the exemption for "general statements of policy" (or, one could add, "interpretative rules") in § 553(b)(A). For better or worse, however, Anthony's term "spurious rule" has not found much, if any, acceptance in administrative law usage. Instead, courts have evidently been content to live with the inelegance of reclassifying as "legislative" documents that the initiating agency never intended to characterize as such.

126. See *supra* notes 22–35 and accompanying text.

127. Cass Sunstein has suggested that the practical binding effect doctrine violates *Vermont Yankee* because the APA term "general statements of policy" cannot legitimately be read to encompass that doctrine. I respond to his argument below. See *infra* Part II.E.4. That issue, however, is very different from the *Vermont Yankee* theory discussed in the accompanying text. If courts were to accept the latter theory, the APA could never be used to remedy any misuse of the guidance exemption—a result that I do not think Sunstein means to endorse.

128. In practice, this complication is asymmetric. If the agency calls a rule legislative, thereby taking on the burdens that accompany that characterization, a court would not be likely to say that the agency is misdescribing its own intentions. See *infra* Part III.D.1 (discussing *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106 (D.C. Cir. 1993)). The court might, of course, question whether the agency has the authority to issue such a rule or whether it followed all the steps necessary to fulfill that intention.

129. See *SBC Inc. v. FCC*, 414 F.3d 486, 495 (3d Cir. 2005) (stating that an agency's determination that an order is interpretive is "entitled to a significant degree of deference"); *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc) ("The agency's own label, while relevant, is not dispositive.").

130. See *United States v. Fla. E. Coast Ry.*, 410 U.S. 224, 235–36 n.6 (1973); *Collins v. NTSB*, 351 F.3d 1246, 1252 (D.C. Cir. 2003); *Am. Airlines, Inc. v. Dep't. of Transp.*, 202

overwhelming,”¹³¹ and some judges will bluntly refuse to accord any deference at all.¹³² The concrete reason for caution about deference in this context is the obvious risk that the agency’s claim that it intends a rule to be *nonlegislative*, and thus not subject to APA obligations, could be self-serving.

Both sides of this doctrinal dispute have some merit, and I do not think the discrepancies among the cases will be resolved any time soon. As a practical matter, courts have a good deal of latitude to decide how deferentially they will evaluate agencies’ invocations of the exemption, and one could debate whether their use of this de facto discretion has been anything more than window dressing.¹³³ Even assuming that this deference sometimes plays a significant role, it has little intrinsic relationship to the other factors that courts typically consider in determining whether to uphold a claim of exemption. Accordingly, although I expect that practitioners will continue to rely on precedents regarding deference that favor their respective sides, I will pay little attention to this factor in my analysis.

B. The Binding Norm Test and its Application to Regulated Parties

As already noted, the case law applying the policy statement exemption elaborates on what is sometimes called the binding norm test. The key inquiry is whether the document in question expresses or implements a policy judgment in a binding fashion. This comes down to asking whether the agency considers the stated position definitive or, instead, is open to reconsidering that position later.

*Pacific Gas & Electric Co. v. Federal Power Commission*¹³⁴ furnishes a classic exposition. Anticipating a shortage of natural gas supplies in coming months, the Federal Power Commission directed pipeline companies to file plans that would set priorities for their curtailment of supplies to customers during peak demand periods. To assist the pipelines in preparing such plans, the agency issued Order No. 467, a “statement of policy” that set forth the Commission’s own view of a proper priority schedule.¹³⁵ Pipeline companies sued for a declaration that the order had been a legislative rule, but the D.C. Circuit

F.3d 788, 796 (5th Cir. 2000).

131. *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 537–38 (D.C. Cir. 1986) (Scalia, J.) (“[T]here is deference and there is deference—and the degree accorded to the agency on a point such as this is not overwhelming.”).

132. *Iowa League of Cities v. EPA*, 711 F.3d 844, 872 (8th Cir. 2013) (advocating de novo review in § 553(b)(A) cases).

133. An occasional decision seems to give considerable weight to the agency’s characterization. See *Wilderness Soc’y v. Norton*, 434 F.3d 584, 596 (D.C. Cir. 2006). Apparently, the court saw no particular reason not to give the agency the benefit of the doubt.

134. 506 F.2d 33 (D.C. Cir. 1974).

135. See *id.* at 50–52 (reprinting the order).

agreed with the agency that the order was a bona fide policy statement. Generalizing broadly, the court wrote:

A properly adopted substantive rule establishes a standard of conduct which has the force of law. . . . A general statement of policy, on the other hand, does not establish a “binding norm.” It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy. A policy statement announces the agency’s tentative intentions for the future. When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued.¹³⁶

This analysis remains authoritative today,¹³⁷ but the phrasing of the binding norm test has evolved over time. In *American Bus Ass’n v. United States*,¹³⁸ decided a few years after *Pacific Gas*, the D.C. Circuit expressed the test as turning on two criteria. The first criterion was whether the pronouncement “acts prospectively. . . . [It] may not have a present effect [and] does not impose any rights and obligations”; the second was “whether a purported policy statement genuinely leaves the agency and its decisionmakers free to exercise discretion.”¹³⁹ More recently, however, the court has recognized that these two criteria overlap, because “if a statement denies the decisionmaker discretion in the area of its coverage, so that [the agency] will automatically decline to entertain challenges to the statement’s position, then the statement is binding, and creates rights or obligations.”¹⁴⁰ Thus, the tendency in the case law has been to think of these issues as two sides of the same coin, not discrete inquiries.¹⁴¹ The varying verbal formulas all share the underlying goal of elaborating on what it means to say that a policy statement,

136. *Id.* at 38.

137. *Nat’l Mining Ass’n v. McCarthy*, 758 F.3d 243, 253 (D.C. Cir. 2014).

138. 627 F.2d 525 (D.C. Cir. 1980).

139. *Id.* at 529.

140. *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 382 (D.C. Cir. 2002) (quoting *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988)).

141. Another ambiguity in the *Pacific Gas* opinion involved its use of the word “tentative.” This term could be read to mean “transitional.” That interpretation would imply that, in order to invoke the exemption, an agency would be obliged to show that it was in the process of firming up a definitive position. *Cf.* Edward A. Tomlinson, *Strengthening the Informational and Notice Giving Functions of the Federal Register*, 4 ADMIN. CONF. U.S. 427, 463 (1975) (suggesting this possible interpretation). Today, administrative lawyers have come to accept the possibility that the agency might issue guidance without any plan to replace it with a legislative rule. That revised understanding reflects greater appreciation for the obstacles to legislative rule-making that agencies often face. The courts’ reluctance to force agencies to undertake legislative rulemaking is reflected in classic administrative law cases such as *SEC v. Chenery Corp.*

in contrast to a legislative rule, lacks the force of law.

The rationale for the exemption is readily understood. If the policy expressed in a given document is going to bind members of the public subsequently (as a legislative rule would do), the only time at which they can be given an opportunity to be heard regarding that policy is at the time of its promulgation. But if they will have their chance later (as a policy statement should ensure), they do not need to receive one immediately. Professor Donald Elliott captured the essence of this tradeoff in an often-quoted analogy to the auto mechanic in a television commercial who warns viewers that they would be wise to invest in a new oil filter in order to avoid costly repairs in the future. As the mechanic says, the car owner can either “pay me now or pay me later.”¹⁴²

The binding norm test most often comes into play when a guidance document is alleged to be binding on regulated persons. Thus, I will initially examine in this part how the test operates in that context. In one prominent case, *General Electric Co. v. EPA*,¹⁴³ the D.C. Circuit has said that “an agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding . . . or is applied by the agency in a way that indicates it is binding.”¹⁴⁴ I will consider those two areas of controversy in turn, although I draw that distinction only for convenience in exposition. In practice, many cases implicate both types of contentions. In the next section, I will examine the subtler issues that arise when the gist of the argument on judicial review is that a document is binding on the agency alone, with potential consequences for third parties such as beneficiaries of regulation.

1. *Mandatory Language*

When an agency relies on the policy statement exemption to justify its issuance of a rule without prior notice-and-comment, courts often respond by

(*Chenery II*), 332 U.S. 194 (1947). At present, “tentative” is understood only to mean “pre-sumptive”—the agency intends to use the statement as a starting point, subject to reconsideration if a challenging party offers plausible reasons for doing so.

142. E. Donald Elliott, *Re-inventing Rulemaking*, 41 DUKE L.J. 1490, 1491 (1992). (For the ad, see *FRAM Oil Filter Commercial - 1972*, YOUTUBE (May 22, 2012), <https://youtu.be/OHug0AIhVoQ>.) In context, Elliott maintained that the agency should have a free choice: if the agency is willing to “pay later” by entertaining challenges to its policy statement at the implementation stage, a court should be foreclosed from holding that the agency erred by failing to “pay now” through notice-and-comment proceedings. See Elliott, *supra*, at 1491–92. I examine the merits of this position below. See *infra* Part II.E.2.

143. 290 F.3d 377 (D.C. Cir. 2002).

144. *Id.* at 383 (citations omitted); see also *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 596–600 (5th Cir. 1995) (describing a similar two-part inquiry).

carefully parsing the language of the disputed document for indications that the agency would not be open to reconsideration of the substance of its position. As one would expect, this sort of judicial inquiry can result in a variety of responses. At one end of the spectrum are cases in which the court finds the language of a particular statement to be mandatory, rendering the statement ineligible for exemption under § 553(b)(A) of the APA,¹⁴⁵ while other cases find the language of a challenged document to be only advisory, indicating that it is a bona fide policy statement.¹⁴⁶

The operative test is straightforward, and some cases at either end of the spectrum may be easy. To explore the kind of judgment calls that the test may implicate, however, let us consider a decision in which the court's characterization was at least debatable.

*CropLife America v. EPA*¹⁴⁷ involved the Environmental Protection Agency's (EPA's) use of third-party studies to evaluate the safety of pesticides. After environmentalists challenged its longtime use of such data, the EPA announced in a press release that it would examine its practice, but that, pending the results of that inquiry, it would refrain in the short run from making any use of such data.¹⁴⁸ The D.C. Circuit held that the press release was invalid because it constituted a "binding regulation" issued without notice-and-comment proceedings.¹⁴⁹

One's first reaction might be that the holding must be wrong, because a press release does not look very much like a regulation. However, *CropLife* is by no means the only decision in which courts have extended the "practical binding effect" concept to modes of expression that seem far removed from a typical rule or guidance document. This expansive approach follows logically from the functionally oriented reasoning that has come to dominate modern decisions in this area.¹⁵⁰

145. *Iowa League of Cities v. EPA*, 711 F.3d 844, 863–65 (8th Cir. 2013); *Sierra Club v. EPA*, 699 F.3d 530, 535 (D.C. Cir. 2012); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000).

146. *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252–53 (D.C. Cir. 2014); *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1071–73 (9th Cir. 2010); *Nat'l Mining Ass'n v. Sec'y of Labor*, 589 F.3d 1368, 1372 (11th Cir. 2009) (upholding letter that referred to factors that district managers "should" or were "strongly encouraged" to follow); *Catawba Cty. v. EPA*, 571 F.3d 20, 33–34 (D.C. Cir. 2009); *Sec. Indus. & Fin. Mkts. Ass'n v. CFTC*, 67 F. Supp. 3d 373, 417–20 (D.D.C. 2014).

147. 329 F.3d 876 (D.C. Cir. 2003).

148. *Id.* at 880–81 (quoting the press release).

149. *Id.* at 881–83.

150. *See, e.g., Iowa League of Cities*, 711 F.3d at 861–62 (holding that letters from the agency to a senator were rules because of their inflexible and thus "binding" nature); *Coal. for Common Sense in Gov't Procurement v. Sec'y of Veterans Affairs*, 464 F.3d 1306, 1317–18 (Fed.

Also disconcerting was the court's brusque rejection of the possibility, suggested by government counsel, that the EPA might later accept third-party evidence after all, if a regulated person asked it to do so.¹⁵¹ The language of the press release did sound unequivocal: "[T]he Agency will not consider or rely on any . . . human studies in its regulatory decision making." On the other hand, a press release, even if firmly worded, would seem to be, by its nature, the kind of ephemeral document that might express only an agency's current thinking, rather than a position that it is committed to upholding over time. Indeed, the agency had already been vacillating on this issue for several years; there was no evident reason why the agency might not change its mind again in the face of pressure from stakeholders. Despite the absence of any track record regarding the impact of the EPA's third-party studies announcement, however, the court was convinced that it expressed a firm policy.

CropLife thus raises questions about the extent to which adjudication of an exemption claim should turn squarely on the wording of the document in question. Whether or not the D.C. Circuit's understanding of EPA's intentions in *CropLife* was accurate,¹⁵² there are good reasons for courts to be circumspect about reading too much into the language of a policy statement. If they take too firm a stand against language that states a view confidently, agencies might respond by equivocating or hedging too much in their policy statements,¹⁵³ a result that could impair their capacity to use guidance documents to communicate their expectations and give useful advice to private persons who desire it.

In cases that are on the margins, therefore, courts ought to be willing—as they sometimes have been—to give agencies the benefit of the doubt by awaiting further developments before concluding that an agency will not be

Cir. 2006) (holding that a "Dear Manufacturer" letter was a substantive rule); *Tex. Children's Hosp. v. Burwell*, 76 F. Supp. 3d 224, 239–41 (D.D.C. 2014) (concluding that an "FAQ" answer on a website was a legislative rule).

151. *CropLife*, 329 F.3d at 883–84.

152. The court may also have been motivated by doubts about the wisdom of the policy itself. *Cf.* James W. Conrad, Jr., *The Reverse Science Charade*, 33 ENVTL. L. REP. 10,306, 10,313 (2003) ("Clearly, human subjects research, whether conducted by [Environmental Protection Agency (EPA)] or private parties, should meet agreed-upon ethical standards. Where studies have been performed under ethical standards applicable at the time, however, it is arbitrary and capricious for EPA not to consider the data they produce."). In fact, on remand the agency did rethink its position and has resumed using third-party studies, with exceptions for pregnant women and small children. *See* 40 C.F.R. pt. 26 (2016).

153. *Cf.* Strauss, *Rulemaking Continuum*, *supra* note 10, at 1485 (criticizing such equivocation).

open to revisiting the positions set forth in their policy statements.¹⁵⁴ Indeed, the leading case, *Pacific Gas*, was itself a case in which the court showed forbearance in not jumping to conclusions about the agency's intentions.¹⁵⁵ The Commission's statement did contain some language that could readily have been construed as mandatory.¹⁵⁶ However, by choosing to interpret the document as nonbinding when read as a whole, the court served the public interest by assisting the Commission's effort to give needed guidance to pipelines as to what kinds of curtailment plans would be favorably received, at least presumptively.¹⁵⁷

To some extent, agencies may be able to improve their chances of avoiding judicial invalidation of their guidance documents by expressly representing in such a document that, although they have no plans to reexamine the position taken there, they will do so if a private party chooses to contest it. Courts do sometimes give weight to such representations,¹⁵⁸ although they may decline to do so if they conclude that an assurance of open-mindedness is perfunctory boilerplate appended to an otherwise insistent statement.¹⁵⁹ In the absence of such assurances, the prevalence of holdings that mandatory

154. See, e.g., *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1057 n.4 (D.C. Cir. 1987) ("A policy initially classed as a general statement is not immunized from subsequent judicial review for conformity with the APA if later developments show the agency to be using it as binding policy. But . . . it is premature for us to make that determination in the absence of anything except speculation."); see also *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 253 (D.C. Cir. 2014); *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 17 (D.C. Cir. 2005) ("There have been no enforcement actions that indicate whether the [U.S. Fish and Wildlife Service] considers itself bound by survey results. Thus, there is insufficient evidence in the record to conclude that either of the Protocols binds the agency sufficiently to make it a substantive rule.").

155. 506 F.2d 33 (D.C. Cir. 1974); see *supra* notes 134–35 and accompanying text.

156. For example, the agency's statement said that, "Barring [extraordinary] circumstances, our review . . . convinces us that the priorities-of-delivery set forth below should be applied to all jurisdictional pipeline companies during periods of curtailment." *Pacific Gas*, 506 F.2d at 50.

157. Whatever the Commission's original intentions may have been, the court's decision settled any controversy about the nonbinding nature of the order. In later proceedings, the Commission acknowledged that it would have to support its curtailment decisions without merely relying on Order 467. See *Ark. Power & Light Co. v. Fed. Power Comm'n*, 517 F.2d 1223, 1227 n.11 (D.C. Cir. 1975) (noting the Commission's concession). Indeed, the Commission was not always able to muster such support. See *id.* at 1233–34 (holding that certain curtailment plans were invalid).

158. See, e.g., *Catawba Cty. v. EPA*, 571 F.3d 20, 34 (D.C. Cir. 2009) (giving weight to such a representation); *Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 227 (D.C. Cir. 2007) (same).

159. *Iowa League of Cities v. EPA*, 711 F.3d 844, 865 (8th Cir. 2013); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022–23 (D.C. Cir. 2000).

language in a document was intended to be binding is at least unsurprising.

2. *Binding Effects in Practice*

I now turn to the second component of the *General Electric* test¹⁶⁰ for determining whether a so-called policy statement is actually a legislative rule: whether the agency treats it as binding upon private persons. In other words, at this stage the focus of attention is not on whether the agency *expects* to use the document in a “binding” fashion, but instead on whether it actually does so. This inquiry does not easily comport with the language of § 553, which, as written, prescribes how an agency must promulgate rules, not how it must use them subsequently. In effect, the courts treat § 553 as authorizing them to police efforts by agencies to give unduly coercive effect to policy statements, regardless of whether the agency contemplated such misuse when it issued the document. However, if courts are going to strive at all to prevent agencies from giving “practical binding effect” to guidance documents, this mode of judicial reasoning has a certain pragmatic logic behind it. I wrote sympathetically in the preceding section about the attractions of giving an agency the benefit of the doubt when a policy statement is challenged on judicial review immediately after it is released; the courts’ willingness to consider how the document is used in subsequent practice is a natural complement to that approach.

Regardless, the lower courts have, for better or worse, embraced this somewhat artificial mode of analysis without much controversy, and they seem comfortable with it. I will, therefore, put aside any conceptual reservations about it and use this section to explore the practical challenges that can arise when courts undertake to put this component of the test into practice.

Those challenges grow out of the fact that “binding effect” is not a simple concept. Judicial implementation of this doctrine requires a court to draw subtle—sometimes elusive—distinctions regarding the meaning of “binding effect.” I quoted above the canonical language of *Pacific Gas*: an agency must be “prepared to defend its position as though the policy statement had never been issued.” In essence, this proposition means that an agency may not treat a policy statement as *determinative* of any significant issue.¹⁶¹ The agency must be prepared to defend its action on the basis of the provision that the document purports to implement. However, this formula has not usually been interpreted to mean—as an uncritical reading of the language might lead one to suppose—that the statement can play no role in the agency’s deliberations or written explanation. Customary practice is to the contrary,

160. See *supra* notes 143–144 and accompanying text.

161. *Simmons v. ICC*, 757 F.2d 296, 299–300 (D.C. Cir. 1985).

and the cases have recognized as much.¹⁶² Basically, the determination as to whether an agency has treated a guidance document as determinative (which is improper) or merely instructive (which is entirely proper) turns on whether it gave affected person a fair opportunity to contest the document and responded meaningfully to significant arguments—either by reaffirming the analysis in the guidance document or by supplementing it on points not previously addressed.

In short, despite *Pacific Gas*, a guidance document can legitimately play an *influential* role that does not rise to the level of being “binding.”¹⁶³ This distinction is important, because it enables the law to accommodate the manifold ways in which agency personnel and private interests consult and use guidance documents. This understanding of the functions of guidance harmonizes with the thrust of the institutional pronouncements from government entities and professional associations that I summarized in an earlier

162. *Steeltech, Ltd. v. EPA*, 273 F.3d 652, 655–56 (6th Cir. 2001) (upholding the decision of an administrative law judge (ALJ) who imposed penalties in accordance with the agency’s Environmental Response Policy (ERP) because she “expressly stated that the ERP was not a rule and that she had the discretion to depart from the ERP, if appropriate,” but nevertheless found that “the present case does not present circumstances that raise policy issues not accounted for in the ERP”); *Panhandle Producers & Royalty Owners Ass’n v. Econ. Regulatory Admin.*, 847 F.2d 1168, 1175 (5th Cir. 1988) (“Even though the [Economic Regulatory Administration (ERA)] looked to the Guidelines for presumptions and burdens of proof, the ERA responded fully to each argument made by opponents of the order, without merely relying on the force of the policy statement. . . . The ERA did not give the Guidelines undue weight by refusing endlessly to reconsider the principles established in [past] cases.”); *Panhandle Producers & Royalty Owners Ass’n v. Econ. Regulatory Admin.*, 822 F.2d 1105, 1111 (D.C. Cir. 1987).

163. *See Ass’n of Flight Attendants v. Huerta*, 785 F.3d 710, 718 (D.C. Cir. 2015) (“Even if the Notice arguably inclines aviation safety inspectors toward certain outcomes . . ., it does not constrain their discretion enough to create a binding norm.”); *Prof’ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 599 (5th Cir. 1995) (“[W]hat purpose would an agency’s statement of policy serve if agency employees could not refer to it for guidance?”); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 537 (D.C. Cir. 1986) (Scalia, J.) (“An agency pronouncement is not deemed a binding regulation merely because it may have ‘some substantive impact,’ as long as it ‘leaves the administrator free to exercise his informed discretion.’”) (quoting *Guardian Fed. Sav. & Loan Ass’n v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 666, 668 (D.C. Cir. 1978)); *see also* Ronald M. Levin, *Nonlegislative Rules and the Administrative Open Mind*, 41 DUKE L.J. 1497, 1501 (1992) [hereinafter Levin, *Open Mind*] (“*Pacific Gas* has not been read to mean that administrators must literally reconsider all the issues underlying a policy statement whenever it is implicated in subsequent cases. To the extent that the statement contains adequate answers to the challenger’s contentions, the agency certainly may consult it and cite to it, so long as the agency also gives full attention to any issues raised for the first time in the current proceeding.”).

section.¹⁶⁴ Those pronouncements have affirmed the positive functions that guidance documents serve in public administration, such as structuring internal conduct and showing members of the public what practices would be risky and which would be safe. This perspective also harmonizes with the substantial body of administrative law doctrine that supports protection for reasonable reliance interests. That doctrine has roots in due process¹⁶⁵ as well as the obligation to avoid arbitrary and capricious action.¹⁶⁶ Most of the doctrine originated in cases involving agency adjudication; but it is relevant here because, as scholars have noted, the role of guidance documents in agency decisionmaking is directly comparable to that of an agency's adjudicative precedents.¹⁶⁷

Although the nuanced approach of the case law just discussed is attractive on its own terms, it does give rise to challenges for courts that need to apply it in litigated cases. It means that they must make delicate inquiries into whether a document's "influential" effect rises to the level of being impermissibly "binding." Such an inquiry does not occur in a vacuum; it depends on the quality of the evidence of agency conduct in the judicial review record. Sometimes the evidence supplied by the parties is quite illuminating. The record may strongly support the "legislative rule" characterization by showing that the agency steadfastly adheres to the document despite all challenges, or that exceptions are rare and might be explained away.¹⁶⁸ Conversely, the

164. See *supra* Part I.D. Note that the MSAPA, venturing beyond prior federal law pronouncements, would expressly require an agency to explain why the need for its departure from established policies or interpretations outweighs private reliance interests. See *supra* note 101 and accompanying text.

165. See *FCC v. Fox Television Stations, Inc. (Fox II)*, 567 U.S. 239, 253 (2012).

166. *FCC v. Fox Television Stations, Inc. (Fox I)*, 556 U.S. 502, 515 (2009) (dictum); *Smiley v. Citibank*, 517 U.S. 735, 742 (1996) (dictum); *Heckler v. Cmty. Health Servs.*, 467 U.S. 51, 60 n.12 (1984) ("[A]n administrative agency may not apply a new [case law] rule retroactively when to do so would unduly intrude upon reasonable reliance interests."); *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 951 (9th Cir. 2007); *Epilepsy Found. of Ne. Ohio v. NLRB*, 268 F.3d 1095, 1102 (D.C. Cir. 2001); *Microcomputer Tech. Inst. v. Riley*, 139 F.3d 1044, 1050 (5th Cir. 1998); cf. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–27 (2016) (concluding that an agency's explanation for revising a regulation was too cursory and thus arbitrary, particularly in light of industry reliance on the prior version).

167. See Levin, *Open Mind*, *supra* note 163, at 1501–02; Manning, *supra* note 3, at 934–37; Strauss, *Rulemaking Continuum*, *supra* note 10, at 1463, 1472–73, 1486 (cited with approval on this point in *United States v. Mead Corp.*, 533 U.S. 218, 232 (2001)).

168. *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 7 (D.C. Cir. 2011); *U.S. Tel. Ass'n v. FCC*, 28 F.3d 1232, 1234–35 (D.C. Cir. 1994); *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1324 (D.C. Cir. 1988); *Bellarno Int'l Ltd. v. FDA*, 678 F. Supp. 410 (E.D.N.Y. 1988).

record may show a significant number of instances in which the agency upheld departures from the terms of the policy or allowed addressees to depart with impunity. This would be taken as strong evidence that the document is a policy statement.¹⁶⁹

In still other cases, the record regarding the agency's implementation of a guidance document may be less clear, leading the court to dismiss the challenge on ripeness or finality grounds.¹⁷⁰ This third type of disposition leaves open the possibility that the challenger could return to court if subsequent experience shows more unambiguously that the document, although not binding on its face, has been treated as such in practice.¹⁷¹ In the short run, however, it does mean that the agency gets the benefit of the doubt and can go on using the guidance even if it has also been admonished to show more caution than may have been forthcoming until then.¹⁷²

Sometimes, the question of APA compliance arises in an enforcement proceeding in which the agency is accused of having given "practical binding effect" to a policy statement in the challenger's own case. In that situation, the issue of the statement's effects cannot be postponed until another day. Even then, however, the court might choose not to hold that the document is unlawful. Instead, it might remand the individual litigant's case with instructions that, unless the agency chooses to subject the document to rule-making proceedings, it must reconsider that case in a more "openminded" fashion—in other words, giving consideration to the litigant's arguments instead of treating the guidance document as dispositive of the issues.¹⁷³ This remedial disposition makes particular sense when the court has little or no information available as to the manner in which the agency uses a particular guidance document, except for its application to the appellant's own case.

169. *Sierra Club v. EPA*, 873 F.3d 946, 952 (D.C. Cir. 2017); *Catawba Cty. v. EPA*, 571 F.3d 20, 34–35 (D.C. Cir. 2009); *White v. Nicholson*, 541 F. Supp. 2d 87 (D.D.C. 2008) (lack of evidence of binding effect).

170. *Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1128 (9th Cir. 2009); *Fla. Power & Light Co. v. EPA*, 145 F.3d 1414, 1418–21 (D.C. Cir. 1998); *Municipality of Anchorage v. United States*, 980 F.2d 1320, 1323–25 (9th Cir. 1992); *Pub. Citizen v. NRC*, 940 F.2d 679, 683 (D.C. Cir. 1991).

171. Such a later challenge would likely be allowed even if the applicable judicial review statute contains a time limit that would generally require immediate appeal. See Ronald M. Levin, *Statutory Time Limits and Judicial Review of Rules: Verkuil Revisited*, 32 *CARDOZO L. REV.* 2203, 2215 & nn.60–61, 2218 n.80 (2011).

172. *But see* Franklin, *supra* note 3, at 301–02 (noting possible benefits from vacating the guidance).

173. *Interstate Nat. Gas Ass'n of Am. v. FERC*, 285 F.3d 18, 60 (D.C. Cir. 2000); *McLouth Steel Prods. Corp.*, 838 F.2d at 1324; *Simmons v. ICC*, 752 F.2d 296, 300 (D.C. Cir. 1985).

The court might determine that the agency used its policy statement in an impermissibly “binding” fashion in that proceeding, but this finding would not necessarily indicate that the agency commits the same error in other proceedings.¹⁷⁴ Under those circumstances, presumably, the statement will retain its status as a (legitimate) guidance document. This sort of disposition offers further confirmation that the court’s implementation of the exemption is often guided by pragmatism far more than by a literal interpretation of the language of the statute.

C. Binding Effects on Agency Personnel

This section takes up the question of whether, and how, courts should apply the “binding norm” approach if a guidance document allegedly binds the issuing agency or its employees but not members of the public. Cases have addressed this question in widely divergent ways. This section offers a critique of the cases and some suggestions as to how analysis in this area could be improved.

1. Framing the Issues

The well-known case of *Community Nutrition Institute v. Young (CNI)*¹⁷⁵ is illustrative. The case dealt with efforts by the FDA to regulate aflatoxin, a toxic substance that is unavoidably present in small quantities in corn. The FDA issued an “action level” stating that it would not bring enforcement proceedings against manufacturers that kept aflatoxin contamination in their products at or below a level of 20 parts per billion (ppb). However, Community Nutrition Institute (CNI), a public interest group, sued for a declaration that the action level was unlawful because the FDA had issued it without prior notice-and-comment. In a per curiam opinion signed by Judges Edwards and Mikva, the D.C. Circuit agreed with CNI and rejected the government’s reliance on the policy statement exemption in the APA.¹⁷⁶

To some degree, the court’s holding rested on grounds that closely resemble the arguments discussed in the preceding section of this article. The court

174. This might be especially true if decisionmaking is dispersed among multiple adjudicators. See *Sacora v. Thomas*, 628 F.3d 1059, 1070 (9th Cir. 2010) (“These regional differences demonstrate that the BOP’s rule allows staff to make individualized determinations and does not create a new binding rule of substantive law.”). For more on decentralization in federal programs, see Yishai Blank & Issachar Rosen-Zvi, *Reviving Federal Regions*, 70 STAN. L. REV. (forthcoming 2018); Jessica Bulman-Pozen, *Our Regionalism*, 166 U. PA. L. REV. 377 (2018); Dave Owen, *Regional Federal Administration*, 63 UCLA L. REV. 58 (2016).

175. 818 F.2d 943 (D.C. Cir. 1987) (per curiam).

176. *Id.* at 945–48.

mentioned several respects in which it thought that the action level would operate in a binding way on manufacturers.¹⁷⁷ However, the court seemed to acknowledge that these constraining effects on food producers would not, by themselves, justify a holding that the action levels were legislative rules. (Indeed, such a holding would be ironic, because the complaining parties in the case were consumer representatives, not food producers.) Thus, the court turned to an additional, more innovative line of argument, declaring itself “convinced that FDA has bound itself. As FDA conceded at oral argument, it would be daunting indeed to try to convince a court that the agency could appropriately prosecute a producer for shipping corn with less than 20 ppb aflatoxin.”¹⁷⁸

The court’s second rationale—that the action level was a legislative rule because the FDA had “bound itself”—has remained influential in later cases.¹⁷⁹ Notably, it played a prominent role in *Texas v. United States*,¹⁸⁰ the litigation over the validity of the Obama administration’s “deferred action” immigration program. A memo from the U.S. Department of Homeland Security announced that the department would entertain applications from certain immigrants for a status that would shield them from deportation proceedings for a limited period. The memo listed criteria that department officials were to consider in evaluating such applications, although it expressly provided that the criteria were not exhaustive.¹⁸¹ The memo was challenged in court by (among other plaintiffs) the state of Texas, which alleged that the work permits accompanying deferred action status would lead to increased expenses for the state, such as the cost of issuing driver’s licenses to the recipients. The district court upheld Texas’s standing on that basis¹⁸² and went on to hold that the department’s issuance of the memo without notice-and-comment had been unlawful. According to the court, department personnel would as a practical matter routinely grant applications; in that sense the memo had established a policy that was binding on agency staff.¹⁸³ The Fifth Circuit upheld this ruling,¹⁸⁴ which became final when it was affirmed by an equally divided Supreme Court.

177. For criticism of these arguments, see Richard M. Thomas, *Prosecutorial Discretion and Agency Self-Regulation: CNI v. Young and the Aflatoxin Dance*, 44 ADMIN. L. REV. 131, 149 & n.115 (1992).

178. *Cnty. Nutrition Inst.*, 818 F.2d at 948.

179. See Thomas, *supra* note 177, at 154–55 (compiling cases).

180. 809 F.3d 134 (5th Cir. 2015), *aff’d by equally divided Court*, 136 S. Ct. 2271 (2016).

181. 809 F.3d at 147.

182. *Id.* at 149.

183. *Id.* at 173–76.

184. *Id.* at 155–63 (standing), 176 (binding effect).

However, not all courts accept the idea that a guidance document becomes legislative if it binds agency personnel. In *Erringer v. Thompson*,¹⁸⁵ Medicare claimants argued that a “local coverage determination” was unlawful under § 553 because Medicare contractors (insurance companies) were required to follow them (although administrative law judges (ALJs) to whom the contractors’ decisions were appealable were not). The Ninth Circuit disagreed by saying that the correct inquiry was whether the decision was binding on persons *outside the agency*, and for this purpose the contractors should be considered “inside” the agency.¹⁸⁶ Similarly, in *Splane v. West*,¹⁸⁷ the Federal Circuit declared that the question of whether a rule has the force and effect of law refers to “the binding effect of [a] regulation on tribunals *outside* the agency, not on the agency itself.”¹⁸⁸

2. Critiques

The “binding itself” reasoning of *CNI* has met with severe criticism on the ground that it interferes with salutary efforts by agency leadership to prevent staff members from administering programs in an arbitrary or unequal fashion. In this view, policy guidance that structures the conduct of frontline officials should be encouraged, not discouraged. Richard Thomas, in a well-known commentary, argues that, under the reasoning of *CNI*,

[T]he more unstructured, variable and undisciplined the agency’s prosecutorial approach, the more shielded an agency’s prosecutorial discretion will be from public participation and, ultimately, judicial review. But, if regularity of agency enforcement action, centralized control of agency personnel, and imposition of public, agency-wide policy are desired—and they *are* desired by most critics of unchanneled agency discretion—then a rule that essentially penalizes an agency for restricting the discretion of its own personnel would appear to be counterproductive.¹⁸⁹

Amplifying on Thomas’s reasoning, Peter Strauss has drawn attention to the “general advantages of encouraging government regularity in accordance with published guidelines.”¹⁹⁰ He explains that, although an agency and its staff *should* depart from a position set forth in a guidance document if an affected person shows a reason to do so (in contrast with the binding effect of a legislative rule), they *should adhere* to it in the absence of such a showing: “The whole point of the exercise is to structure discretion, to provide warning

185. 371 F.3d 625 (9th Cir. 2004).

186. *Id.* at 631.

187. 216 F.3d 1058 (Fed. Cir. 2000).

188. *Id.* at 1064.

189. Thomas, *supra* note 177, at 155.

190. Strauss, *Rulemaking Continuum*, *supra* note 10, at 1484–85.

and context for efficient interaction between the agency and the affected public.”¹⁹¹

More recently, twelve administrative law professors filed an amicus curiae brief in the Supreme Court phase of the Texas immigration litigation, expanding on the foregoing analysis and drawing an explicit link to the § 553(b)(A) exemption.¹⁹² The brief asserted that the court of appeals in Texas had erred, because “promulgating binding guidance for lower-level agency officials is precisely what general policy statements are properly designed to do.”¹⁹³ Issuance of guidance to staff is a critical agency function, the brief continued, yet to superimpose a requirement of rulemaking procedure would be impractical.¹⁹⁴ Thus, an interpretation of the APA that would require such procedure would either leave lower level officials free to act in unpredictable ways, or would encourage agency leadership to issue instructions in informal documents or oral statements, to the detriment of transparency goals.¹⁹⁵ In short, the “APA does not require notice and comment for guidance that binds lower-level agency officials, and courts should not read it as such.”¹⁹⁶

As one of the signatories to this brief, I endorse its analysis but would add a few individual observations. First, although the reasoning just stated could potentially lead to the conclusion that the practical binding effect doctrine should be abandoned altogether,¹⁹⁷ it could also be applied more narrowly. Genuine difficulties of analysis can arise when an agency issues guidance that is nominally addressed to staff but is alleged to interfere with regulated persons’ ability to obtain full consideration of their contentions when the agency

191. *Id.* at 1486. For elaboration, see Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239 (2017).

192. Brief of Administrative Law Scholars as Amici Curiae in Support of Petitioners at 8–17, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674).

193. *Id.* at 8.

194. *Id.* at 13–15.

195. *Id.* at 15–16.

196. *Id.* at 16–17.

197. In a well-known separate opinion in *Community Nutrition Institute v. Young*, Judge Starr argued that the sole criterion for determining whether a so-called policy statement is really a legislative rule should be whether it would be dispositive in a subsequent enforcement proceeding. 818 F.2d 943, 950–53 (D.C. Cir. 1987) (Starr, J., concurring and dissenting). However, acceptance of Judge Starr’s position would amount to a complete repudiation of Anthony’s “practical binding effect” analysis, which has proved durable for more than two decades and is enthusiastically supported by many administrative law practitioners. I doubt that the courts will embrace the Starr position any time in the foreseeable future. For related discussion, see *infra* Part II.E.2.

later enforces the policy against them.¹⁹⁸ Regardless of that complication, however, *CNI* and *Texas* were not cases of that sort. The policy statements in those cases could never have coerced the respective plaintiffs, because there was no prospect that the policy could ever have been enforced against them. In each case, the plaintiffs established standing to sue to the court's satisfaction; thus, it was assumed that each litigant would be *affected* by the challenged policy statement if it were allowed to stand. But neither statement would have prevented the government from hearing from anyone who would otherwise have a right to be heard in its implementation proceedings. Because their situation would not implicate the problem that the practical binding effect doctrine was created to solve, *CNI* and *Texas* were especially weak cases for judicial intervention to enforce § 553.

Second, the *CNI* holding has been defended, or at least explained, as serving to give a voice in the administrative process to public-interest litigants who, as a practical matter, would never have a chance to be heard at the enforcement stage.¹⁹⁹ But the suggested interpretation of the guidance exemption would not leave the litigants without any opportunity to call the agency to account for a possibly misguided guidance document. They would still be able to file a rulemaking petition directly with the agency to request reconsideration of the guidance.²⁰⁰ The agency would be required to respond in writing, and a dissatisfied petitioner could seek judicial review.²⁰¹

198. See PARRILLO, *supra* note 55, at 26–27 (arguing that such indirect binding effects should not be allowed). The 2017 ACUS recommendation apparently endorses the same idea. ACUS Recommendation 2017-5, *supra* note 108, at 61,736.

199. Strauss, *Rulemaking Continuum*, *supra* note 10, at 1484–85. See generally Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397 (2007). Note, however, that the Food and Drug Administration's (FDA's) response to the court's decision was not to hold a rulemaking proceeding but instead to disavow more firmly any binding effect that might be ascribed to the action level. Thomas, *supra* note 177, at 153.

200. 5 U.S.C. § 553(e) (2012); Sean Croston, *The Petition is Mightier than the Sword: Rediscovering an Old Weapon in the Battles over Regulation Through Guidance*, 63 ADMIN. L. REV. 381 (2011); Aram A. Gavoor & Daniel Mictus, *Public Participation in Nonlegislative Rulemaking*, 61 VILL. L. REV. 759 (2016). Nina Mendelson supports the petition option in principle but questions whether the APA provides for it. See Mendelson, *supra* note 199, at 438–44. Those doubts, however, do not seem to be well taken. See Seidenfeld, *supra* note 14, at 371–72; ACUS Recommendation 76-5, *supra* note 31 (referring to “existing provisions of Administrative Procedure Act section 553(e), allowing any person to petition at any time for the amendment or repeal of a rule, including an interpretive rule or a statement of general policy”). Indeed, some of the drafters of the APA specifically contemplated such petitions. See *infra* note 263 and accompanying text.

201. *Massachusetts v. EPA*, 549 U.S. 497, 527–28 (2007); *Auer v. Robbins*, 519 U.S. 452, 459 (1997).

3. *Binding Effects on Subordinates Only*

The above suggestion that a guidance document should not be reclassified as a legislative rule if it binds the agency but not private persons may be hard for some to accept. It does go beyond existing precedent in at least some circuits. For those who may disagree with it, some of the institutional pronouncements discussed earlier may point the way toward a more broadly acceptable principle: an agency should be allowed, without resorting to notice-and-comment, to issue a guidance document that is binding on its staff if persons affected by the document will have a fair opportunity to contest the document at a later stage in the implementation process. The principle was foreshadowed in the 1992 ACUS recommendation, which stated that an agency should be allowed to “mak[e] a policy statement which is authoritative for staff officials in the interest of administrative uniformity or policy coherence.”²⁰² The OMB bulletin was more explicit: a significant guidance document should not contain “mandatory language . . . unless . . . the language is addressed to agency staff and will not foreclose consideration by the agency of positions advanced by affected private parties.”²⁰³ Even more specific was ACUS’s 2017 recommendation, which stated that “a policy statement could bind officials at one level of the agency hierarchy, with the caveat that officials at a higher level can authorize action that varies from the policy statement.”²⁰⁴

In a commentary on a similar provision in the MSAPA,²⁰⁵ I suggested what such criteria ought to mean in practical terms:

The idea here is that, even though a guidance document cannot carry the force of law, the agency should not be required to entertain challenges to it at every level of the implementation process. Low-level staff can be directed to advise challengers to speak to their supervisor or to appeal to a higher level. The staff should, however, be instructed not to tell a member of the public that the agency’s policy is set in stone, even

202. See *supra* text accompanying note 68 (discussing ACUS Recommendation 92-2).

203. OMB Bulletin, *supra* note 11, at 3436–37; *id.* at 3440 ¶ II.2.(h). This language was, in fact, suggested to OMB by the ABA Administrative Law Section in comments submitted on a draft of the bulletin. Letter from Eleanor D. Kinney, Chair, ABA Section of Admin. Law & Regulatory Practice, to Office of Information & Regulatory Affairs 6 (Dec. 15, 2005) (on file at https://georgewbush-whitehouse.archives.gov/omb/inforeg/good_guid/c-aba.pdf).

204. ACUS Recommendation 2017-5, *supra* note 108, at 61,736.

205. 2010 MSAPA, *supra* note 92, § 311(c) (“A guidance document may contain binding instructions to agency staff members if, at an appropriate stage in the administrative process, the agency’s procedures provide an affected person an adequate opportunity to contest the legality or wisdom of a position taken in the document.”).

if they personally have no discretion to depart from it.²⁰⁶

This line of reasoning offers an attractive justification for the holding in *Erringer v. Thompson*, the Medicare case discussed above.²⁰⁷ As noted, the agency's local coverage determination was binding on contractors, but this did not negate its status as a policy statement, because claimants had an opportunity to appeal to an ALJ, who was not bound by the determination.²⁰⁸

Incidentally, the proposition that an agency may issue internally binding guidance can apply to guidance given to ALJs themselves. Although the APA protects the independence of ALJs in their rulings on particular cases,²⁰⁹ the prevailing view is that an agency can require them to adhere to its guidance documents.²¹⁰ Accordingly, in *Warder v. Shalala*,²¹¹ the First Circuit rejected an argument that an interpretive ruling by the Health Care Financing Administration (HCFA) relating to reimbursement of Medicare expenses had to be adopted through notice-and-comment. Although the agency's ALJs were required to comply with the ruling, the court wrote: "An interpretative rule binds an agency's employees, including its ALJs, but it does not bind the agency itself."²¹² The court's statement seems too sweeping: sometimes a refusal to allow a party to contest a guidance document except on appeal from an ALJ decision would be too burdensome. But the choice that HCFA made should not be ruled out categorically.²¹³

206. Levin, *MSAPA Rulemaking*, *supra* note 93, at 880.

207. See *supra* text accompanying notes 185–186.

208. *Erringer v. Thompson*, 371 F.3d 625, 631 n.10 (9th Cir. 2004). The holding of *Splane v. West*, 216 F.3d 1058 (Fed. Cir. 2000), can be defended on a similar basis. The plaintiff's objection in that case was that the commission that had heard his case was, by statute, bound by a "precedential opinion" (which the court equated with an interpretive ruling) issued by the general counsel's office. Evidently, however, the plaintiff was not bound by the ruling at all levels of the department, because he could and did petition the general counsel's office to revoke the ruling. See *Wilderness Soc'y v. Norton*, 434 F.3d 584, 596 (D.C. Cir. 2006) (upholding management policies that were mandatory for employees but that the agency heads had retained complete discretion to waive).

209. 5 U.S.C. § 554(d)(1)–(2) (2012).

210. Ronald M. Levin, *Administrative Judges and Agency Policy Development: The Koch Way*, 22 WM. & MARY BILL RTS. J. 407, 409–12, 419–24 (2013) [hereinafter Levin, *The Koch Way*]. Indeed, the APA expressly provides that an ALJ's power to "make or recommend decisions" is "[s]ubject to published rules of the agency." 5 U.S.C. § 556(c)(10). This provision is not limited to rules that have the force of law.

211. 149 F.3d 73 (1st Cir. 1998).

212. *Id.* at 82.

213. See Levin, *The Koch Way*, *supra* note 210, at 427–29.

D. The Supreme Court's Contribution, or Lack Thereof

The reader may have noticed that the foregoing account of doctrine applying the policy statement exemption has lacked any discussion of Supreme Court case law. In fact, the Court has decided one case on point—but it was an unsatisfactory opinion that has had no real influence on later cases.

*Lincoln v. Vigi*²¹⁴ was a suit brought to challenge the closure of an Indian Health Service (IHS) pilot program in Albuquerque that for several years provided clinical services to disabled Indian children in the vicinity. The IHS closed the program in order to replace it with a nationwide treatment program. The Tenth Circuit held that the termination of the program was invalid and asserted that the IHS should have allowed notice-and-comment procedures, but the Court unanimously disagreed. In an opinion by Justice Souter, the Court quoted the definition of policy statements from the *Attorney General's Manual on the APA*: “statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.”²¹⁵ Without further reasoning regarding the meaning of the exemption, the Court announced this conclusion: “Whatever else may be considered a ‘general statement of policy,’ the term surely includes an announcement like the one before us, that an agency will discontinue a discretionary allocation of unrestricted funds from a lump-sum appropriation.”²¹⁶

Yet the policy statement exemption seems completely inapplicable to this situation. The agency’s closure announcement did not set forth a decisional framework that agency personnel would thereafter use in exercising discretion. Once the Albuquerque facility was closed, the agency obviously could not serve anyone in the area. Thus, the IHS decision was entirely “definitive” and “binding” with regard to the former beneficiaries of the program. Apparently, Justice Souter overlooked the crucial words “prospectively” and “proposes” in the *Attorney General's Manual* definition. It is hard to see how he could otherwise have arrived at such a patent misinterpretation of what the exemption is supposed to be about. The agency’s announcement described a present exercise of discretion, not a plan for future decisions.²¹⁷

In short, the opinion’s reasoning was far out of synch with established understandings, in lower court case law and secondary literature, as to what the policy statement exemption means. That, presumably, is why those courts

214. 508 U.S. 182 (1993).

215. *Id.* at 197 (citations omitted).

216. *Id.* at 197.

217. See Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 13–16 (1996) (calling the opinion “maladroit” and “breathtaking in [its] brusque crudeness”).

have all but ignored it.²¹⁸

E. Critiques of the Binding Norm Approach

In preceding sections, I have sought to take account of the ample scholarly literature that supports relatively broad or relatively restrictive applications of the binding norm test of § 553(b)(A). Complementing the many worthy articles in that category, however, are commentaries that argue for more sweeping revisions to, or replacements for, the prevailing model. This section responds to these critiques, although it will be more of a brief survey than a point-by-point rebuttal.

1. Broadening Procedural Requirements for Guidance Documents

At least in principle, one potential departure from the binding norm approach would be to eliminate the APA rulemaking exemption for interpretive rules and policy statements altogether. As seen above, proposals for such legislation were commonplace in the early years following the adoption of the APA. Today, this message is not prominent in the law reviews. However, some commentators offer less drastic proposals for measures that would add procedural requirements to the issuance of guidance documents, stopping short of a full notice-and-comment process.²¹⁹ Nevertheless, the perspective of this article is that courts have applied the binding norms approach more stringently than they should. From this standpoint, those proposals would be a step in the wrong direction.

2. Deregulation and the “Short Cut”

At the opposite end of the spectrum is what David Franklin has called the “short cut.”²²⁰ William Funk, a leading proponent of this approach, writes

218. A handful of cases have followed *Vigil* in closely related factual situations, albeit without analyzing its reasoning. *E.g.*, *Serrato v. Clark*, 486 F.3d 560, 569 (9th Cir. 2007); *United States v. McLean*, CR No. 03-30066-AA, 2005 U.S. Dist. LEXIS 42899, at *10 (D. Ore. Sept. 27, 2005).

219. See Steve Johnson, *In Defense of the Short Cut*, 60 KAN. L. REV. 495, 538–45 (2012) (proposing legislation that would, inter alia, require public participation for “significant” guidance); Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. 343, 398–405 (2009) (proposing that guidance be accompanied by a limited opportunity for post-adoption comment, with no response required, and a limited explanatory statement). Asimow, himself a strong supporter of the federal exemption model, has suggested a compromise for consideration by those states that currently have no exemption at all. Asimow, *Guidance Documents in the States*, *supra* note 57, at 655–57.

220. Franklin, *supra* note 3.

that under the doctrinal test he would prefer, “any rule not issued after notice and comment is an interpretive rule or statement of policy, unless it qualifies as a rule exempt from notice and comment on some other basis.”²²¹ Under this standard, courts would refrain from second-guessing the agency’s own characterization for its rule. In substance, it amounts to a call for repudiation, or at least drastic curtailment, of the “practical binding effect” doctrine. These theorists argue that the practical meaning of the “nonbinding” nature of a nonlegislative rule should be that, in an enforcement proceeding, the agency could not treat the document as determinative of liability. The agency would need to make a case for its position and give the opposing party a fair opportunity to contest it. But these theorists would foreclose litigants from bringing a pre-enforcement proceeding to challenge the validity of the document on the basis of predictions that the agency *would* treat the document as binding at the enforcement stage.

There are good arguments for the short cut theorists’ approach. As Funk argues, it is far simpler than the binding norm analysis. Although a principal theme of Part II of this article is that the standard critique of the binding norm test as baffling, smoggy, and so forth is greatly overstated, there is no doubt that the short cut requires fewer judgment calls and could be applied much more predictably. In addition, adoption of the short cut would tend to facilitate agencies’ ability to issue nonlegislative rules that provide effective management of agency staff and that give members of the public useful advice as to the agency’s interpretations and policies. On the other hand, the short cut does not accommodate the interests of regulated entities that may have serious doubts about the legality or wisdom of a guidance document but would be unwilling to risk incurring a conviction or other penalty by waiting to challenge it in an enforcement proceeding.²²²

Ultimately, the main reason why this article does not rely on the short cut approach is pragmatic. The “practical binding effect” ship has long since sailed, and in all likelihood it is now too far out of port to be recalled. More than twenty years’ worth of precedents have built up expectations among regulated persons that pre-enforcement relief should be available to alleviate the de facto coercive effects of many guidance documents. These expectations are also reflected in the institutional pronouncements summarized

221. William Funk, *When is a “Rule” a Regulation?: Marking a Clear Line Between Nonlegislative Rules and Legislative Rules*, 54 ADMIN. L. REV. 659, 663 (2002) [hereinafter Funk, *Marking a Clear Line*]. Donald Elliott is at least tacitly a supporter of this approach. See *supra* note 142 (discussing Elliott).

222. This is a frequently invoked rationale for allowing pre-enforcement judicial review of agency action. See, e.g., *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 490–91 (2010).

above.²²³ Those statements did not purport to state legal doctrine, but at least they are expressions of widely accepted professional norms. As such, they cast further doubt on the likelihood that the policy debate that began in the 1990s will end any time soon with total abandonment of the practical binding effect doctrine. Indeed, one would be hard pressed to identify a single sitting judge who has expressed interest in such a reassessment.²²⁴

In Part IV of this article, I will suggest some potential steps that agencies could take in order to make a curtailment of pre-enforcement review more palatable to the courts and the administrative law community, but I do not see that evolution as being on the horizon at present. Accordingly, a premise of this article is that, at least in the short run, a more realistic goal for those who tend to support agencies' use of guidance documents is containment of the doctrine rather than elimination of it.

3. *Judicial Review-Oriented Critiques*

Some short cut proponents supplement their position by arguing that substantive judicial review can serve as a substitute for the procedural constraints that they believe should be relaxed.²²⁵ Mark Seidenfeld has advocated a reformist version of this argument. He agrees with the short cut theorists that pre-enforcement procedural challenges should be abandoned. In his view, the doctrines governing such challenges are too vague and subjective to be applied consistently.²²⁶ He rejects other procedure-based approaches to control of guidance documents as well.²²⁷ Instead, he proposes "to shift the debate" to a focus on substantive judicial review.²²⁸ In order to curb abuses of guidance documents, he argues, courts should lower existing barriers to obtaining judicial review of the merits of such documents, such as finality and ripeness, and should strengthen the merits tests they apply to their review of

223. See *supra* Part I.D.

224. Proponents of the short cut regularly rely on Judge Starr's separate opinion in *Community Nutrition Institute v. Young*, 818 F.2d 943, 950–53 (D.C. Cir. 1987) (Starr, J., concurring and dissenting); see *supra* note 197. However, that opinion was written thirty years ago, and within two years Judge Starr himself abandoned his protest. See *Alaska v. Dep't of Transp.*, 868 F.2d 441, 445–46 (D.C. Cir. 1989) (relying squarely on *CNI*).

225. In the introduction to this article, I noted that I do not undertake here to answer questions as to when guidance documents should be subject to judicial review and what standards of review courts should apply to them. This section explores the converse question—whether judicial review is relevant to resolving the procedural issues that the article does attempt to answer.

226. Seidenfeld, *supra* note 14, at 347–52.

227. *Id.* at 364–72.

228. *Id.* at 333, 373.

these rules.²²⁹

In my view, however, the procedural question of whether a guidance document should have been adopted through rulemaking procedures should be kept entirely distinct from the question of whether the document should survive judicial review on the merits. The purpose of the substantive judicial review provisions of the APA is to provide a remedy for agency actions that are unlawful, factually groundless, unreasonable, and so forth. The purpose of § 553 is to spell out procedural duties, and the § 553(b)(A) exemption delineates one of the outer boundaries of those duties. These purposes are complementary to a far greater extent than they are overlapping.²³⁰ Thus, while the substance of a guidance document might be plainly permissible, outside parties could have a strong interest in being given an opportunity to persuade the agency to make a different permissible choice. Conversely, a rule might fall squarely within the exemption yet fail to pass muster under substantive review.²³¹ In effect, Seidenfeld's proposals reduce concerns about "abuse" of guidance documents to a single dimension. In focusing on the costs and benefits of guidance in utilitarian terms, he seems to have little interest in defining circumstances under which the misuse of guidance may implicate the APA's procedural purposes.²³²

I agree with some of Seidenfeld's proposals regarding judicial review and am unconvinced by others. He offers some cogent criticisms of the ways in which current case law applies traditional doctrines of finality and ripeness to nonlegislative rules.²³³ More difficult to accept is his proposal that, in reviewing guidance documents on the merits, courts should require agencies to "acknowledge well-recognized debates in the relevant field about issues of fact and prediction and explain the substance of interpretations or policies announced in guidance documents in light of its resolution of those issues."²³⁴

229. *Id.* at 373–94.

230. To some extent, APA rulemaking procedure does serve the purpose of facilitating judicial review of the merits. A private person can use a notice-and-comment proceeding to build a record as the basis for a later court challenge. Indeed, principles of issue exhaustion and the *Chenery* doctrine often serve to force the party to take these steps. My point is simply that these incidental purposes should not eclipse the principal function of notice-and-comment—to influence the agency's own decisionmaking. One should not forget that the concept of a rulemaking record in notice-and-comment rulemaking, although now firmly established, is a modern innovation, unimagined by the authors of the APA.

231. *Fertilizer Inst. v. EPA*, 935 F.3d 1303, 1308–09 (D.C. Cir. 1991).

232. Seidenfeld, *supra* note 14, at 352 (asserting that "the propriety of issuing the document without engaging in notice and comment should turn on balancing the costs and benefits of proceeding by nonlegislative rulemaking").

233. *Id.* at 375–85; *see also* Funk, *Make My Day!*, *supra* note 14, at 330–31.

234. Seidenfeld, *supra* note 14, at 388.

One could have doubts about the manageability of this proposal,²³⁵ as well as about the risk that it would tend to deter agencies from issuing guidance in the first place.²³⁶ I will not elaborate on these critiques in view of the limited scope of this article. The main point to be made is that procedural and substantive controls on guidance documents are not mutually exclusive. To the extent that Seidenfeld's proposed changes regarding judicial review are good ones, the courts should adopt them for that reason alone; to the extent that they are questionable on their own terms, they should be rejected. That set of issues does not, itself, constitute a reason to depart from current doctrine on the guidance document exemption in § 553(b)(A), which this article contends is not as intractable and chaotic as he assumes.²³⁷

4. Vermont Yankee *Complications*

Finally, Cass Sunstein has recently suggested that the binding norm test,

235. According to Seidenfeld, the courts would identify these "well-recognized" debates by looking to "the general state of knowledge" from the perspective of "one who is familiar with the underlying predicates for the policy or interpretation." *Id.* As Franklin aptly asks, "how are courts to determine which debates in the field are well recognized? Should we rely on generalist judges to decide which factual considerations are salient . . . ?" David L. Franklin, *Two Cheers for Procedural Review of Guidance Documents*, 90 TEX. L. REV. SEE ALSO 111, 121 (2012).

236. In defending against the charge of burdensomeness, Seidenfeld argues that "the increase in costs should be far lower than that required for notice-and-comment procedures." Seidenfeld, *supra* note 14, at 393. That is not the right comparison, because no one is proposing to eliminate the guidance document exemption entirely (or at least no one whom he chooses to debate). A more appropriate reference point would be agencies' experiences with implementing the practical binding effect test. Agencies manage to cope with that challenge, but Seidenfeld's proposal would likely impose a much greater constraint.

237. In a line of reasoning that somewhat resembles Seidenfeld's, a few commentators have suggested that the procedural controls that the short cut would abolish may no longer be necessary, because recent changes in substantive judicial review doctrine may curb abuses of guidance documents equally well. Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705, 1720–21 (2007); Manning, *supra* note 3, at 937–44. The premise of their argument is that, under *United States v. Mead Corp.*, 533 U.S. 218, 229–30, 234 (2001), interpretive rules are now evaluated under the review standard of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), which is considered more intrusive than the review standard of *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), which generally applies to legislative rules. It is not at all clear that *Mead* has had the transformative impact that these commentators' argument presupposes. But even if one assumes that the impact of that case has been substantial, the above critique of Seidenfeld's position would apply. Moreover, *Mead* deals only with judicial review of legal issues; it has little relevance to the goal of curbing agencies' misuse of policy statements.

or more precisely its “practical binding effect” version, violates the principles of *Vermont Yankee*.²³⁸ As already discussed, that case stands for the proposition that courts may not force agencies to comply with procedural obligations beyond those prescribed in the APA, or other statutes, or the Constitution. Sunstein argues that, because the practical binding effect analysis is a modern innovation, not envisioned by the framers of the APA, it falls within the *Vermont Yankee* ban. He compares it with the proposition that an agency may not alter an existing interpretive rule without notice-and-comment rulemaking—a proposition that the Court rejected on the basis of *Vermont Yankee* principles in *Perez v. Mortgage Bankers Ass’n*.²³⁹

I know of no commentator other than Sunstein who has subscribed to this view. Presumably, the reason most administrative law authorities have not reached this conclusion is that they regard the practical binding effect doctrine as an interpretation of the APA itself. One can agree or disagree with that interpretation of the Act, but those who do agree with it would naturally not see *Vermont Yankee* as an obstacle to it. From this vantage point, the doctrine can be seen as simply an example of the courts’ longstanding propensity to construe the APA creatively in order to keep up with the developing needs of the rulemaking system.²⁴⁰

Sunstein is well aware that courts have frequently used this mode of reasoning to limit the sweep of *Vermont Yankee*.²⁴¹ He has, accordingly, offered four narrower arguments to show that the practical binding effect doctrine goes too far:

For present purposes, the central point is that as compared with [other familiar doctrines that seem to be in tension with *Vermont Yankee*], the practically binding test stands on exceptionally weak ground. Its elimination [1] would hardly wreak havoc with the fabric of administrative law, and [2] the Supreme Court has never said a positive word about it, let alone endorsed it. On the contrary, [3] *Lincoln v. Vigil* stands against it. And [4] its connection with the text of the APA is far more fragile than that of other doctrines that the Court has not yet been willing to question.²⁴²

I will address each of these four points.

238. 435 U.S. 519 (1978); see Cass R. Sunstein, “Practically Binding”: *General Policy Statements and Notice-and-Comment Rulemaking*, 68 ADMIN. L. REV. 491, 505–13 (2016).

239. 135 S. Ct. 1199, 1207 (2015); see Sunstein, *supra* note 238, at 505–06.

240. See Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253, 254–60 (1986) (tracing evolving interpretations of APA rulemaking provisions); Peter L. Strauss, *Changing Times: The APA at Fifty*, 63 U. CHI. L. REV. 1389, 1405–13 (1996) (same).

241. Sunstein, *supra* note 238, at 509–11.

242. *Id.* at 512.

Essentially, the first point raises the question of whether the practical binding effect line of cases has become too firmly entrenched to be uprooted. Although I doubt that a “wreak havoc” test is appropriate, I see room for reasonable differences of opinion on this score. I have already mentioned my own view that the weight of precedent and administrative practice makes a proposal like Sunstein’s unlikely to prevail,²⁴³ but readers can make their own judgments. I will, therefore, leave that elusive question to one side and turn to his other arguments, which can, I think, be more readily rebutted.

Sunstein’s argument that the textual support for the practical binding effect doctrine is “fragile” is curious, because the actual wording of the APA text under consideration is open-ended. The Act itself does not define “general statements of policy.”²⁴⁴ To fill this gap, Sunstein relies on the *Attorney General’s Manual on the APA*, which defines these documents as “statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.”²⁴⁵ One might wonder whether such strong reliance on adoption history is an appropriate method of applying *Vermont Yankee*, but I will accept it for the sake of argument. Even on that premise, the doctrine’s “textual” support does not strike me as a major stretch. The main point about the exemption is that a policy statement operates as a statement of *prospective* intentions—i.e., not operative here-and-now. That criterion seems at least susceptible of an evolving understanding as to what types of guidance are currently binding and thus not prospective in nature.

Nor do I think much weight can be ascribed to the fact that the Supreme Court has not yet commented on the practical binding effect test. In *Mortgage Bankers Ass’n*—on which Sunstein heavily relies—the Court mentioned in passing that “[a]n agency must consider *and respond to* significant comments received during the period for public comment.”²⁴⁶ The Court had never before articulated this duty to *respond* to public comments, which is by no means explicit in the APA. Yet this remark has attracted virtually no attention—presumably because it confirmed a proposition that the lower courts had already been enforcing for years.²⁴⁷ The Court’s gloss on § 553 was an unremarkable example of APA interpretation. The fact that the Court never articulated it until 2015 did not raise a *Vermont Yankee* problem.

243. See *supra* notes 178–79 and accompanying text.

244. Sunstein’s analysis is limited to policy statements; he excludes interpretive rules from consideration. See Sunstein, *supra* note 238, at 495 n.12.

245. ATTORNEY GENERAL’S MANUAL, *supra* note 17, at 30 n.3.

246. *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1203 (2015) (emphasis added).

247. See, e.g., *La. Fed. Land Bank Ass’n v. Farm Credit Admin.*, 336 F.3d 1075, 1080 (D.C. Cir. 2003); *Safari Aviation, Inc. v. Garvey*, 300 F.3d 1144, 1151 (9th Cir. 2002).

Finally, the problem with Sunstein's reliance on *Lincoln v. Vigil* is that the case itself is thoroughly unsatisfactory, as I have discussed above.²⁴⁸ It is true that the practical binding effect doctrine is incompatible with that decision. Tellingly, however, Sunstein does not identify any plausible interpretation of § 553(b)(A) with which that decision *would* be compatible. The announcement that the Court upheld in *Vigil* did not, in any sense, advise the public "prospectively" as to the manner in which the agency "propose[d] to exercise" its discretion, because the closure of the clinic made any future exercise of discretion in the patients' favor *factually impossible*. Insofar as it purported to apply the guidance exemption, the *Vigil* decision ought to be abandoned altogether—not used as a lever to overthrow a substantial body of case law that has sought, with at least mixed success, to adapt that exemption to meet modern challenges.

F. Summary

In the preceding overview of the case law on policy statements, I have found much to criticize. The decisions have their share of inconsistencies, particularly with regard to situations in which a guidance document is alleged to have been "binding on the agency itself." As they resolve exemption claims, the courts sometimes draw questionable inferences from the wording of particular documents or from patterns of agency behavior. Moreover, I have argued that they have too often undervalued the benefits of guidance documents in terms of dispelling uncertainty, promoting reliance interests, and facilitating management of agency staff.

Despite the imperfections in the precedents, however, I doubt that the distinction between policy statements and legislative rules has proved to be unrulier than what one can find in other typical issues in administrative law. Although the variations in judicial rulings discussed in this section are significant, they do not appear to reflect fundamental disagreements about the premises of the binding norm criterion. They do not seem especially incoherent or "baffling." Rather, they seem to reflect the kind of judgment calls that one should naturally expect to see in the case law applying an abstract statutory provision to a host of disparate factual contexts.

III. THE INTERPRETIVE RULES EXEMPTION

A. Introduction

In the abstract, the distinction between interpretive rules and legislative (or substantive) rules is straightforward. As the *Attorney General's Manual* said,

248. See *supra* Part II.D.

interpretive rules are “rules or statements issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.”²⁴⁹ They explain what existing law means, as distinguished from using authority to create law. Beyond these truisms, however, the doctrine runs into trouble.

Michael Asimow has concisely explained the conventional view regarding the distinction: “The prevailing standard for distinguishing legislative and interpretive rules can be described as the ‘legal effect’ test. If a rule explaining the meaning of language actually makes ‘new law,’ as opposed to merely interpreting ‘existing law,’ it is legislative.”²⁵⁰ But he immediately went on to point out the difficulty that arises in practice: “Because both legislative and interpretive rules frequently explain the meaning of language, there is no obvious way to determine whether an agency with legislative rulemaking power has made ‘new law’ or interpreted ‘existing law.’”²⁵¹

Commentators agree as to the difficulty. They have been scathing in their denunciations of the case law applying the interpretive rules exemption. For example, Asimow elsewhere called the distinction “exceptionally elusive” and “maddeningly indeterminate.”²⁵² To Elizabeth Magill, it is “a notoriously difficult enterprise.”²⁵³ According to Jacob Gersen, “To describe the legislative rule debate is to conjure doctrinal phantoms, circular analytics,

249. ATTORNEY GENERAL’S MANUAL, *supra* note 17, at 30 n.3.

250. Asimow, *Nonlegislative Rulemaking*, *supra* note 35, at 394. The word “frequently” in Asimow’s formulation is significant, because it does not encompass every situation. Cases in which a so-called interpretive rule does more than explain the meaning of language can sometimes be easy to resolve. For example, a rule that actually sets up a program can hardly be considered merely interpretive. *See* *Coal. for Common Sense in Gov’t Procurement v. Sec’y of Veterans Affairs*, 464 F.3d 1306, 1317–18 (Fed. Cir. 2006). Also note that Asimow limited his observation to apply to agencies “with legislative rulemaking power.” If an agency lacks that power, its rules are necessarily interpretive. *See, e.g.,* *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976); *Am. Tort Reform Ass’n v. Occupational Safety & Health Admin.*, 738 F.3d 387, 395–96 (D.C. Cir. 2013) (treating Occupational Safety and Health Administration rule on preemption as interpretive because the agency lacked power to preempt state law); *Cooper Techs. Co. v. Dudas*, 536 F.3d 1330, 1336 (Fed. Cir. 2008) (concluding that the U.S. Patent and Trademark Office’s rule was interpretive because the agency lacked substantive rulemaking authority). Cases in these categories are peripheral to this article’s main purposes, so I will not dwell on them.

251. Asimow, *Nonlegislative Rulemaking*, *supra* note 35, at 394.

252. Michael Asimow, *Public Participation in the Adoption of Temporary Tax Regulations*, 44 TAX L. 343, 353, 357 (1991).

253. M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1435 (2004).

and fundamental disagreement even about correct vocabulary.”²⁵⁴

Although in previous sections I have offered a qualified defense of the courts’ performance as regards policy statements, I share in the general dismay about the state of doctrine about interpretive rules. Indeed, I believe a fundamental reassessment is warranted. It is, and always has been, a mistake to assume that analysis of the exemption for interpretive rules should differ significantly from the analysis that applies to policy statements. The statute does not require that distinction; nor is there a good policy justification for it; nor have the cases that attempt to justify such a distinction proved coherent or satisfactory.

I can express my point in a slightly more concrete manner by identifying two distinct ways in which one might elaborate on the distinction between a rule that “creates law” and a rule that “interprets law”—i.e., the kind of “legal effect” that distinguishes a legislative rule from an interpretive rule. One of these methods is *procedural*—a legislative rule has the “force of law” in the sense that it is binding on members of the public and on the agency itself if validly adopted. This method would, in fact, be similar if not identical to the “binding norm” analysis that administrative lawyers apply to policy statements. The second method is *substantive*. This distinction rests on the premise that an interpretive rule merely explains a meaning that is already expressed in, or at least is latent or implicit in, the statute or other text that the agency is construing. Thus, the agency isn’t “creating” anything. At present, the substantive approach is the prevailing analysis. I will submit, however, that the courts took a wrong turn decades ago when they embraced that approach, and that the result has been bafflement ever since. It should, therefore, be abandoned.

Once this fundamental point is grasped, the legal system could move toward an elegant solution by absorbing interpretive rules into the extant, and reasonably workable, framework that has already been developed for the policy statement exemption. Application of § 553(b)(A) could revolve around a factor that interpretive rules and policy statements share—their lack of binding force—rather than any factor that differentiates them. This move would also enable the courts to catch up to the rest of the administrative law world, which routinely treats “guidance” as a single category for most purposes (though not for purposes of judicial review).

B. Statutory Analysis: An Unforced Error

Before turning to a critical evaluation of the case law on the interpretive

254. Gersen, *supra* note 237, at 1705. Although this remark refers generally to “the legislative rule debate,” Gersen’s article is concerned almost entirely with interpretive rules. He barely mentions policy statements.

rules exemption, I want to show that the APA itself does not embody an assumption that the doctrinal tests for identifying interpretive rules and policy statements should be different. If the current case law is misdirected, as I contend, the statute did not compel that error.

According to the key statutory provision, § 553(b)(A), the APA's notice-and-comment obligations do not apply to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." For present purposes, we can identify two discrete ways in which the clause could be read. First, it might identify three relevant categories: (i) interpretive rules, (ii) policy statements, and (iii) procedural rules. Second, it might identify two relevant categories: (i) nonlegislative rules, and (ii) procedural rules. In this second approach, the two subcategories of nonlegislative rules would be lumped together for doctrinal purposes—just as the subcategories of rules of agency organization, practice, and procedure are routinely lumped together into a single doctrinal category of "procedural rules."

For many years, administrative lawyers have *assumed* that the former of these two approaches is correct, with the distinction turning on whether the document in question relates to "interpretation" or to "policy." But why should they read the text that way? They have not understood the policy statement language as requiring them to ask whether a given guidance document embodies the quintessence of "policy." To the contrary, as we have seen above, they take it for granted that the subject matter can be the same as might be embodied in a legislative rule, but the policy statement is different because it is not intended to have the force of law. They could—and, I argue in this article, should—approach the interpretive rule branch of the exemption in the same manner.

Some commentators have suggested that the very fact that § 553(b)(A) mentions interpretive rules and policy statements separately is a sign that Congress expected them to be construed separately.²⁵⁵ This argument is not convincing, because the APA prescribes exactly the same legal principle for both—i.e., neither type of document is subject to notice-and-comment obligations. That would be an odd way of mandating *different* treatment. The inference that these commentators draw is further weakened by the fact that the APA also applies identically to these two types of guidance in every other context in which it mentions them.²⁵⁶ Presumably, the legislative drafters

255. See NATHAN A. OLSON, A WAYWARD CIRCUIT: THE DEVELOPMENT OF DUPLICATE POLICY STATEMENT EXCEPTION TESTS AMONG CIRCUITS AND THE NECESSARY CORRECTIVE ACTION (2013), <http://ssrn.com/abstract=2242047>. Dean Manning has suggested that there is force to this argument, although he did not squarely endorse it. Manning, *supra* note 3, at 917 n.129.

256. See 5 U.S.C. §§ 552(a)(1)(D), 552(a)(2)(B), 553(d)(2) (2012).

wrote the Act this way because the terms “interpretative rules” and “general statements of policy” were in common use in the 1940s²⁵⁷ and the generic terms “nonlegislative rules” and “guidance document” were not.

Other clauses of the APA also contain multiple subcategories that are conventionally lumped together for doctrinal purposes. I have already mentioned the procedural rule exemption. Another example is § 706(2)(A), which calls for agency actions to be set aside if they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” At least the first three of these terms comprise a single category in judicial review doctrine.²⁵⁸

Still another example is § 706(2)(C), which empowers a reviewing court to set aside an agency action that is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” The phrasing of this clause suggests the *possibility* of applying different tests to the various subcategories listed therein, but courts have never pursued that possibility. The example is a telling one, because the Supreme Court just recently considered a case in which the main question at issue was whether issues of statutory “jurisdiction” should be treated differently from other statutory questions for purposes of judicial review.²⁵⁹ The Court answered that question in the negative, in an opinion by Justice Scalia, but no Justice even mentioned the possibility that the language of § 706(2)(C) invited a distinction among its subcategories.²⁶⁰ To the contrary, as Professor Herz remarks:

If we take [the] wording [of § 706(2)(C)] seriously, it means that a reviewing court has the same authority (or lack thereof) to determine whether an agency has exceeded its statutory jurisdiction that it has with regard to reviewing other statutory limitations or authorization. That is a textual argument that the great textualist ignored.²⁶¹

In the same way, if the text of § 553(b)(A) casts any light on the issue now under discussion, it militates *against*, not in favor of, differing doctrinal tests for interpretive rules on the one hand and policy statements on the other.

257. U.S. DEP’T OF JUSTICE, FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE 26–27 (1941) [hereinafter FINAL REPORT] (listing “statements of policy” and “interpretations” as among forms of administrative information that should be published); Lee, *supra* note 16 (discussing interpretive rules throughout).

258. Ronald M. Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report*, 38 ADMIN. L. REV. 239, 292 (1986) (“No distinctions are drawn among the terms ‘arbitrary, capricious, [or] an abuse of discretion’ in § 706(2)(A).”).

259. See *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013).

260. See Michael Herz, *Chevron is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867, 1908 (2015) (“By referring separately to ‘jurisdiction’ and ‘authority,’ the APA indicates that they are two distinct things. Yet the basis of Justice Scalia’s entire opinion is that there is no distinction between them.”).

261. *Id.* at 1907–08.

Similar conclusions emerge if we shift our attention from legislative text to legislative context. As already mentioned, the most authoritative and frequently quoted gloss on the language of § 553(b)(A) is a footnote in the *Attorney General's Manual on the APA*. The Manual stated that interpretative rules are “rules or statements issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers,” while general statements of policy are “statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.”²⁶²

On a descriptive level, these definitions are straightforward. Intuitively speaking, interpreting law is different from exercising discretion. One could complicate that distinction by pointing out that a given document may contain both kinds of material, and indeed some agency assertions may contain pronouncements in which the agency engages in both activities at once, perhaps somewhat imprecisely. But the more fundamental point is that, even where we can cleanly characterize a statement as an interpretive rule or a policy statement, that characterization tells us nothing about the circumstances in which that distinction will be *relevant*. Sometimes it probably will be, such as in the contexts of substantive review and (perhaps) reviewability. But nothing in the Manual’s definitions says that the distinction necessarily should *matter* in the context of rulemaking procedure.

To be sure, the legislative history of the APA includes at least one passage that arguably supports drawing a distinction between interpretive rules and policy statements for purposes of § 553(b)(A). In the so-called “Comparative Print” of June 1945, the Senate Judiciary Committee explained the exemption in these terms:

The reason for the exclusion of rules of organization, procedure, interpretation, and policy is threefold: First, it is desired to encourage the making of such rules. Secondly, those types of rules vary so greatly in their contents and the occasion for their issuance that it seems wise to leave the matter of notice and public procedures to the discretion of the agencies concerned. Thirdly, the provision for petitions contained in subsection (c) affords an opportunity for private parties to secure a reconsideration of such rules when issued. Another reason, which might be added, is that “interpretative” rules—as merely interpretations of statutory provisions—are subject to plenary judicial review, whereas “substantive” rules involve a maximum of administrative discretion.²⁶³

The last sentence of the excerpt does at least suggest that the “plenary review” accorded to interpretive rules has a bearing on the issue of rulemaking

262. ATTORNEY GENERAL’S MANUAL, *supra* note 17, at 30 n.3.

263. APA LEGISLATIVE HISTORY, *supra* note 124, at 18 (reprinting the 1945 Senate Judiciary Committee Comparative Print).

procedure, and it has been so interpreted by some.²⁶⁴ For reasons I will discuss in the next section, the argument is not very persuasive. For the moment, however, the only point I want to make is that the authoritative force of the comment is by no means strong enough to require, or strongly press for, a decisive distinction between the two kinds of rules. Aside from the usual reservations about reliance on congressional committee reports,²⁶⁵ the Comparative Print does not, even on its face, undertake to justify a *different* rule of law for interpretive rules, on the one hand, and policy statements, on the other. The remark about judicial review reads like an afterthought, tacked on at the end of a series of policy arguments that were intended to apply to all nonlegislative rules (and procedural rules). Its thrust is merely to suggest an additional factor that, in the case of interpretive rules, justifies the *same* legal principle as governs policy statements.²⁶⁶

None of the discussion in this section is intended to maintain that the interpretive rules exemption *cannot* be justified on a basis other than applies equally to policy statements—only that the emergence of two discrete lines

264. See Bonfield, *supra* note 23, at 120–22.

265. Long before the modern skepticism about judicial reliance on legislative history, the enactment of the APA was singled out as a glaring example of contending interest groups loading up the committee reports with favorable language that did not necessarily reflect a consensus of the participants in the legislative struggle. Alfred F. Conard, *New Ways to Write Laws*, 56 YALE L.J. 458, 461 & n.13 (1947). Those reservations would seem to have particular force as applied to the rulemaking exemption language in the 1945 Comparative Print, because that language was later *edited out* of the committee reports that accompanied the Act upon final passage.

266. One other fragment of legislative history that arguably bears on this discussion is a floor comment by Senator Pat McCarran during a colloquy on the Senate floor:

The pending bill exempts from its procedural requirements all interpretative, organizational, and procedural rules, because under present law interpretative rules, being merely adaptations of interpretations of statutes, are subject to a more ample degree of judicial review, and because the problem with respect to the other exempted rules is to facilitate their issuance rather than to supply procedures.

APA LEGISLATIVE HISTORY, *supra* note 124, at 313. This remark is, if anything, even less probative than the Comparative Print. Even in past years, when courts looked more favorably on legislative history than they do today, isolated floor colloquies were considered less authoritative than committee reports. See *Garcia v. United States*, 469 U.S. 70, 76–78 (1984). That distinction was based at least in part on the idea that “Committee reports . . . presumably are well considered and carefully prepared, . . . [while] casual statements from floor debates [are] not always distinguished for candor or accuracy.” *Id.* at 76 n.3 (quoting *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395–96 (1951) (Jackson, J., concurring)). Indeed, Senator McCarran’s remark does bear signs of such imprecision, because it completely ignores the policy statement exemption; thus, it seems decidedly unhelpful on the question of the grounds, if any, by which such statements could be distinguished from interpretive rules.

of cases was not foreordained by the text or history of the Act. With that point in mind, I turn to a critical evaluation of the case law on its own terms.

C. *The Substantive Approach*

1. *The Fundamental Problem*

The most prominent judicial approach to applying the interpretive rules exemption focuses on the substance of the position expounded in the rule and asks whether it can credibly be defended as an “interpretation” of the text that it purports to construe.²⁶⁷ The cases have expressed this thought in various ways. For example, a court might say that a true interpretive rule “‘reminds’ affected parties of existing duties”²⁶⁸ or “‘spells out a duty that is ‘fairly encompassed’ within the [statute or] regulation that the interpretation purports to construe.”²⁶⁹ I call this a “substantive” approach in order to contrast it with the “procedural” approach that courts typically use in analyzing the policy statement exemption. I do not mean to suggest that every decision follows the substantive approach. However, this method is so widely used that I should address it before turning to alternatives.

A serious objection to the substantive approach is that it can be highly indeterminate. As Judge Williams said in *American Mining Congress v. Mine Safety & Health Administration*,²⁷⁰ a well-known case about which I will have much more to say later, “[t]he difficulty with the distinction [between ‘construing’ a statute and ‘supplementing’ it] is that every rule may seem to do both.”²⁷¹

An excellent article by Dean John Manning has argued that the advent of

267. See JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 73–77 (5th ed. 2012) (describing this approach as “the modern test”); William S. Jordan, III, *Rulemaking*, in DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE 2016, 123, 129–30 (Michael Tien ed. 2016).

268. *Warshauer v. Solis*, 577 F.3d 1330, 1337 (11th Cir. 2009) (“[A]n interpretive rule . . . reminds affected persons of existing duties.”) (citation omitted); *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc).

269. *Air Transp. Ass’n of Am. v. FAA*, 291 F.3d 49, 55–56 (D.C. Cir. 2002); see also *Catholic Health Initiatives v. Sebelius*, 618 F.2d 490, 494 (D.C. Cir. 2010) (“The substance of the derived proposition must flow fairly from the substance of the existing document.”).

270. 995 F.2d 1106 (D.C. Cir. 1993).

271. *Id.* at 1110; see also Gersen, *supra* note 237, at 1719 (“[T]he very existence of the line [determining whether an allegedly interpretive rule is tied closely enough to a preexisting regulation] is unstable. Virtually all agency statements interpret preexisting law and policy; virtually all agency statements alter the behavior of regulated parties.”).

the *Chevron*²⁷² standard of review has made the situation even worse.²⁷³ The *Chevron* regime openly recognizes that much of what is commonly called “interpretation” of an ambiguous statute is essentially policymaking. In this light, Manning contends, distinctions between acceptable and unacceptable intrusions of policymaking into interpretation can only be a matter of degree—a line that courts cannot draw in a coherent fashion.²⁷⁴ Manning compares this dilemma with earlier efforts by courts to draw lines between permissible and impermissible statutory delegations of authority to agencies, as well as efforts to determine when an agency must make policy through rulemaking rather than adjudication. He argues that federal courts have essentially abandoned those projects because of a lack of judicially manageable standards, and the attempt to distinguish interpretation from policymaking for purposes of the § 553(b)(A) exemption must likewise fail. “Much like the judgments of degree that a robust nondelegation or mandatory rulemaking doctrine would necessitate, the resulting inquiry has an air of arbitrariness about it.”²⁷⁵

Manning’s analysis is appealing because it is compatible with scholarship that emphasizes that the so-called second step of *Chevron* analysis substantially overlaps with—if it does not entirely coincide with—the analysis that courts have long conducted in determining whether an agency action is arbitrary and capricious.²⁷⁶ However, I do not want to overemphasize this point, because courts and commentators were well aware of the coherency problem long before *Chevron*.

The charge of incoherence seems compelling, and one could ask why administrative lawyers have not heeded this critique by turning to a different doctrinal approach. One reason may be that courts assume (questionably, as I suggested above) that the text of the APA requires them to give some distinctive meaning to the word “interpretive.”

But I want to suggest a further reason: they have evidently failed to notice that the critique by Asimow, Manning, and others, powerful as it is, actually understates the problem. The distinction that the substantive approach

272. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

273. Manning, *supra* note 3.

274. Manning, *supra* note 3, at 926 (“[I]f one does accept the deeply embedded premise that interpretive rules can be used to clarify statutory or regulatory ambiguity, then the . . . analysis of the distinction between legislative and nonlegislative rules necessarily reduces to one of degree.”).

275. *Id.* at 926–27.

276. Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1267–69 (1997). For case law illustrating the overlap, see, for example, *Judulang v. Holder*, 132 S. Ct. 476, 484 n.7 (2011); *Verizon Commc’ns, Inc. v. FCC*, 535 U.S. 467, 527 n.27 (2002).

draws is not only incoherent—it is also pointless. That is to say, there is no satisfactory, or even mildly persuasive, explanation as to why a guidance document that is “derived from the [underlying statute or] regulation by a process that is reasonably described as interpretation”²⁷⁷ is less deserving of notice-and-comment than a guidance document that is not so derived. Therefore, the substantive approach offers no background normative framework that would provide a foundation for resolving borderline cases.

In this respect, the problem is different from that presented by the non-delegation and mandatory rulemaking issues to which Manning compared it. In each of those latter areas, administrative lawyers have a general sense of what values are implicated on each side of the question. Thus, if federal courts did undertake to play a more active role in applying those doctrines—as a number of state courts do now²⁷⁸—those competing values would at least supply points of reference for resolving a given case. But courts that apply the substantive approach to the interpretive rules exemption have no such framework, and that gap makes resolution of questions under the exemption especially arbitrary.

This difficulty has elicited little attention in the judicial and scholarly literature. The case law is strewn with unilluminating verbal formulas: an interpretive rule must be “based on specific statutory provisions,”²⁷⁹ or the distinction between interpretive and substantive rules “likely turns on how tightly the agency’s interpretation is drawn linguistically from the actual language of the statute.”²⁸⁰ As explications of what the word “interpretive” means, these phrases have some intuitive appeal. The question that needs answering, however, is why a statement that is based on “specific” provisions or is “tightly drawn” from statutory language is more deserving of exemption from APA requirements than one that is based on “less specific” language or is “loosely drawn” from the statute.

Indeed, only occasionally have administrative law authorities tried to identify the purpose of distinguishing interpretation from policymaking in the § 553(b)(A) context, and the answers they have given are disappointing. In the next section, I will examine those efforts.

2. *Seeking Possible Normative Justifications*

One potential candidate to justify an exemption for interpretive rules, as

277. *Hector v. USDA*, 82 F.3d 165, 170 (7th Cir. 1996); *see infra* Part III.C.3 (discussing the case in detail).

278. *See ASIMOW & LEVIN, supra* note 121, at 406–08 (mandatory rulemaking), 450–56 (nondelegation).

279. *United Techs. Corp. v. EPA*, 821 F.2d 714, 719–20 (D.C. Cir. 1987).

280. *Syncor Int’l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) (quoting *Paralyzed Veterans of Am. v. D.C. Arena, L.P.*, 117 F.3d 579, 588 (D.C. Cir. 1997).

contrasted with policy statements, is a sentence from the legislative history of the APA. As I mentioned in the preceding section, the “Comparative Committee Print” published by the Senate Judiciary Committee in June 1945 mentioned several rationales for exempting all guidance from rulemaking procedure, and then added this: “Another reason, which might be added, is that ‘interpretative’ rules—as merely interpretations of statutory provisions—are subject to plenary judicial review, whereas ‘substantive’ rules involve a maximum of administrative discretion.”²⁸¹ The logic of the remark seems to be that, because erroneous interpretive rules can readily be corrected in court, the need for procedural restraints on their issuance is low if not nonexistent. In practice, however, this theory has never gotten much traction in debates over the exemption, and it is easy to see reasons why it has not.

In the first place, the theory’s premise about “plenary” review was somewhat overstated, because it did not take account of the role of judicial deference to agency interpretations.²⁸² The drafters of the APA would likely have been at least somewhat aware of that phenomenon, because the influential 1941 Report of the Attorney General’s Committee on Administrative Procedure had pointed it out.²⁸³ The uncertain status of “plenary” review may help to explain why they phrased the sentence as almost an afterthought and did not include this idea in the final legislative reports on the Act. Today, of course, the relevant judicial review doctrine has become more explicit and well-defined. Interpretive rules are evaluated according to the *Skidmore*²⁸⁴ standard,²⁸⁵ which is (theoretically) less deferential than *Chevron* but should not be equated with a truly “plenary” form of review.²⁸⁶ Furthermore, the

281. See *supra* note 263 and accompanying text.

282. Commentators have long noticed this flaw in the committee’s reasoning. See Kevin W. Saunders, *Interpretative Rules with Legislative Effect: An Analysis and a Proposal for Public Participation*, 1986 DUKE L.J. 346, 367–68; Warren, *supra* note 24, at 379 (“The [idea that] plenary judicial review to be provided interpretative rules [would] constitute ample protection against administrative abuse . . . may no longer be sound in view of the increasing judicial deference to administrative rulemaking.”).

283. FINAL REPORT, *supra* note 257, at 100 (“[The] distinction between statutory regulations and interpretative regulations is . . . blurred by the fact that the courts pay great deference to the interpretative regulations of administrative agencies, especially where these have been followed for a long time.”); see also *id.* at 27 (“courts will be influenced though not concluded by the administrative opinion”).

284. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

285. See *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000).

286. See Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 30 (2017) (presenting empirical data suggesting that agencies win more often when *Skidmore* applies than when courts review de novo). According to another study, most appellate

potential availability of judicial review offers little benefit to regulated persons who would not be prepared to face the expense, delay, and travail of seeking vindication in court but who seek an opportunity to persuade the agency internally.

To be sure, modern doctrine does recognize a relationship between the ability of agencies to adopt interpretive rules without notice-and-comment procedure and the scope of judicial review of those rules, but the connection does not operate in a manner that would allow it to serve as a guide to applying the APA exemption. Rather, as just stated, it operates in the opposite direction. When an agency issues a guidance document without notice-and-comment, courts will rely on that circumstance as a reason to give the interpretation reduced deference—i.e., applying *Skidmore* rather than *Chevron*. But the courts do not also rely on the relatively broad scope of review as a reason to find a given rule to be exempt. Indeed, that reasoning would be decidedly circular.

If the APA's legislative history does not shed useful light on the question of why an interpretive rule should be exempt from rulemaking procedural obligations, in a sense that would not be equally true of policy statements, what does? Professor Anthony addressed that question in his principal article on the § 553(b)(A) exemption.²⁸⁷ As discussed above,²⁸⁸ he was a leading critic of agencies' propensity to adopt "general statements of policy" without notice-and-comment and then to apply them in a coercive fashion. But his critique did not extend to interpretive rules. In his view, an agency may adopt an interpretive rule without rulemaking procedure and thereafter "relentlessly compel compliance with it up to the point that a court orders it to do otherwise."²⁸⁹ Why the disparity? His explanation was that, "[b]y its interpretation, the agency (at least in theory) is simply applying existing law and not creating new law."²⁹⁰ I addressed this point in an article I published at that time:

Notwithstanding the quaint fiction that an interpretative rule merely 'reminds' citizens

cases interpret *Skidmore* as meaning that reviewing courts generally owe *deference* to an agency interpretation, although the extent of it varies according to circumstances; these decisions far outnumber cases that interpret *Skidmore* to mean that a court need not uphold an agency interpretation unless it is independently persuaded that the interpretation is correct. Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1251–59 (2007).

287. Anthony, *Interpretive Rules*, *supra* note 40.

288. See *supra* notes 40–45 and accompanying text.

289. Anthony, *Interpretive Rules*, *supra* note 40, at 1375; see *supra* notes 46–49 and accompanying text.

290. Anthony, *Interpretive Rules*, *supra* note 40, at 1376.

of their legal obligations, it is obvious that the task of ascribing meaning to the complex and confusing mandates that Congress has entrusted to the agencies is a distinctly creative process. The discipline of having to respond to the perspectives of interested private parties is bound to enhance the quality of the legal interpretations that agencies adopt. Further, an agency's willingness to listen and respond to parties' arguments should bolster the legitimacy of its ultimate stances.²⁹¹

That riposte is, I believe, still well taken.

One might argue, in this connection, that *some* interpretations of statutes or regulations are so completely straightforward and noncontroversial that an agency ought to be free to incorporate them into an interpretive rule without burdensome formalities. One might then extrapolate that perspective into a defense of the exemption as a whole, saying that the task of distinguishing between obvious and non-obvious interpretations is not worth the trouble. However, aside from the dubiousness of the cost-benefit comparison implicit in that line of reasoning, the rationale just mentioned would be demonstrably erroneous, because a true "no-brainer" interpretation would be exempt from rulemaking requirements anyway. The APA has a separate exemption for situations in which public procedures would be "unnecessary," meaning that members of the public would have no interest in commenting on the rule in question.²⁹² For practical purposes, therefore, the interpretive rules exemption matters only in relation to *debatable* issues of interpretation. As to those issues, any notion that the agency's chosen interpretation must be already implicit in (discernible from) the underlying statute or regulation is an exercise in question-begging. Indeed, the agency will likely have issued the interpretive rule *because* affected persons have previously disagreed about its subject matter.

One other aspect of Anthony's analysis bears attention here. He did not ignore the interests of persons who might disagree with an agency's interpretive rule, but he minimized them: "Implicit in the doctrine that notice-and-comment procedures are not required for interpretations is a notion that affected parties are in some sense continuously on notice of any imaginable interpretation, and that it is their business (or their counsel's) to anticipate and guard against all possibilities."²⁹³ This statement would seem to be in serious tension with the fair notice concerns embodied in recent case law on

291. Levin, *Open Mind*, *supra* note 163, at 1504–05.

292. 5 U.S.C. § 553(b)(B) (2012). Both the House and Senate reports on the APA explained that in this exemption "[u]nnecessary" means unnecessary so far as the public is concerned, as would be the case if a minor or merely technical amendment in which the public is not particularly interested were involved." APA LEGISLATIVE HISTORY, *supra* note 124, at 200 (Senate Judiciary Committee report), 258 (House Judiciary Committee report); see *Mack Truck, Inc. v. EPA*, 682 F.3d 87, 94 (D.C. Cir. 2012).

293. Anthony, *Interpretive Rules*, *supra* note 40, at 1376.

due process and abuses of discretion.²⁹⁴ More fundamentally, the traditional presumption that everyone knows the law does not seem adequate to meet the larger questions of participation and legitimacy involved. It doesn't mean that members of the public lack a legitimate interest in having a say in the agency's decision as to *which* possible interpretation it will adopt.

Judge John Rogers, writing for the Sixth Circuit, offered a different argument in *Dismas Charities, Inc. v. U.S. Department of Justice*.²⁹⁵ The case involved a Justice Department opinion that took a narrow view of a statute that identified the circumstances in which federal prisoners would be entitled to serve part of their sentences in halfway houses. He wrote:

The distinction [drawn between substantive rules and interpretive rules in § 553(b)(A)] reflects the primary purpose of Congress in imposing notice and comment requirements for rulemaking—to get public input so as to get the wisest rules. That purpose is not served when the agency's inquiry or determination is not “what is the wisest rule,” but “what is the rule.” The interpretative rule exception reflects the idea that public input will not help the agency make the legal determination of what the law already is.²⁹⁶

I do not see how this argument can be correct. Surely, the Sixth Circuit, which constantly decides cases that raise issues of law, does not take the view that briefs addressing those issues are worthless. The utterly normal practice of tribunals in this country is that they resolve interpretive questions (like other questions) after considering competing arguments from interested persons. Thus, the suggestion that public input on such questions would not be helpful to an administrative agency seems startling. The *best* justification for the exemption would be that the agency does not need to offer the public an opportunity to be heard when an interpretive rule is issued because that opportunity will be made available later in the administrative process. But, as I will discuss later, Judge Rogers went on to say that the agency *may* make its interpretive rule binding within the agency.²⁹⁷ That argument makes his claim about the value of public input all the more difficult to accept.

3. *Hocor v. U.S. Department of Agriculture*

To round out our survey of the substantive approach, I will closely examine the Seventh Circuit's opinion in *Hocor v. U.S. Department of Agriculture*.²⁹⁸ This case has become a focal point for academic discussion of the interpretive

294. See *supra* notes 165–166 and accompanying text.

295. 401 F.3d 666 (6th Cir. 2005).

296. *Id.* at 679–80.

297. See *infra* Part III.E.

298. 82 F.3d 165 (7th Cir. 1996).

rules exemption,²⁹⁹ probably because of its vivid facts, its extensive discussion of the exemption, and the eminence of its author, Judge Richard Posner.

Hector arose under the Animal Welfare Act, which authorizes the U.S. Department of Agriculture (USDA) to adopt rules “to govern the humane handling, care, treatment, and transportation of animals by dealers.” Using notice-and-comment procedure, USDA adopted a rule entitled “Structural Strength,” which required that a facility housing animals “must be constructed of such material and of such strength as appropriate for the animals involved.” USDA later adopted an internal memorandum addressed to its inspectors, in which it said that all dangerous animals must be kept inside a perimeter fence at least eight feet high. Mr. Hector, a dealer in big cats, was penalized because the perimeter fence surrounding one of his pens was only six feet high. He argued that the memorandum should have been adopted through notice-and-comment, but USDA defended it as an interpretive rule.

On appeal, the Seventh Circuit vacated the sanction. Judge Posner expressed doubt that the eight-foot criterion was consistent with the regulation that it implemented, but he did not rest his decision on the basis that it was invalid on the merits.³⁰⁰ Instead, he found that the memo could not qualify as an interpretive rule. To satisfy that requirement, the criterion would have to “be derived from the regulation by a process reasonably described as interpretation,”³⁰¹ and it could not meet that test:

At the other extreme from what might be called normal or routine interpretation is the making of reasonable but arbitrary (not in the “arbitrary or capricious” sense) rules that are consistent with the statute or regulation under which the rules are promulgated but not derived from it, because they represent an arbitrary choice among methods of implementation. A rule that turns on a number is likely to be arbitrary in this sense. There is no way to reason to an eight-foot perimeter-fence rule as opposed to a seven-and-a-half foot fence or a nine-foot fence or a ten-foot fence. None of these candidates for a rule is uniquely appropriate to, and in that sense derivable from, the duty of secure containment.³⁰²

Professor Pierce has criticized the *Hector* opinion for disparaging the value of interpretive rules that contain specific numerical values or benchmarks.³⁰³ Such rules, he submits, often supply helpful guidance to regulated parties. That point is well taken, but I want to focus here on the court’s more basic

299. See, e.g., Funk, *Marking a Clear Line*, supra note 221, at 660, 664–66; Gersen, supra note 237 *passim*; Strauss, *Publication Rules*, supra note 10, at 812–14, 816–17, 829–32, 842–43.

300. *Hector*, 82 F.3d at 168.

301. *Id.* at 170.

302. *Id.*

303. 1 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 6.4 at 348–49 (4th ed. 2002); see also Strauss, *Publication Rules*, supra note 10, at 842–43 (making a similar point).

premise that application of the exemption should turn on whether the agency's position can be (or was) reached through a process "reasonably described as interpretive." The use of numbers may be at the end of the spectrum of what Judge Posner calls non-interpretive judgments, but this does not matter unless the premise itself stands up.

As I discussed earlier, one concern about the distinction is that it would often be difficult to manage.³⁰⁴ Judge Posner's references to USDA's "arbitrary" choice do not seem helpful. He would have done better to call that choice "discretionary."³⁰⁵ Moreover, he later concedes that "in scientific and other technical areas, where quantitative criteria are common, a rule that

304. In a later decision, the D.C. Circuit, applying the *Hector* framework, held that a rule can be "interpretive" within the meaning of § 553(b)(A) even if the interpretation rests primarily on the context and purposes of the underlying statute rather than its language alone. *Cent. Tex. Tel. Coop. v. FCC*, 402 F.3d 205 (D.C. Cir. 2005). As a matter of statutory construction methodology, I prefer that premise to a more exclusively textualist approach. But this relatively loose methodology highlights the elusiveness of the distinction between interpreting and policymaking that inheres in the substantive approach to the exemption.

305. Judge Posner declares that courts see the selection of arbitrary choices as a *legislative* function: "Legislators have the democratic legitimacy to make choices among value judgments, choices based on hunch or guesswork or even the toss of a coin, and other arbitrary choices." *Hector*, 82 F.3d at 170. However, an agency's function differs fundamentally from that of a legislator, because it is subject to review for abuse of discretion. Under basic principles of administrative law, an agency is expected to arrive at specific conclusions by making reasoned judgments from the provision it is implementing (in this instance the structural strength regulation). *Compare* *Warshauer v. Solis*, 577 F.3d 1330, 1340–41 (11th Cir. 2009) (upholding \$250 threshold as a reasonable interpretation of regulation that exempted gifts of "insubstantial value" from reporting requirements), *with* *United Steel Workers Int'l Union v. Fed. Highway Admin.*, 151 F. Supp. 3d 76, 88–90 (D.D.C. 2015) (holding that numerically defined exemptions from "Buy America" requirements were unexplained and hence arbitrary). Although the choice between alternatives that differ only trivially from each other might properly be "arbitrary" in the sense of needing no explanation at all, *Am. Trucking Ass'ns, Inc. v. ICC*, 697 F.2d 1146, 1150–51 (D.C. Cir. 1983) (Scalia, J.), the difference between six feet and eight feet was obviously not trivial as far as Mr. Hector was concerned. Thus, if the author of the memo had specified a manifestly excessive number such as twenty feet or had simply picked a number out of the air by saying "it sounds right" or "eight is my lucky number," the memo would have been considered arbitrary and capricious. Presumably, however, the memo at least purported to rest on the department's expertise or informed experience with animal care. Judge Posner seems to recognize this point two paragraphs later when he indicates, less hyperbolically, that the Agriculture Department rule was "arbitrary" in the sense that "it could well be different without significant impairment of any regulatory purpose." *Hector*, 82 F.3d at 171. Such a judgment would be more precisely described as "discretionary" than as "arbitrary." In order to critique Judge Posner's argument in its most favorable light, I will assume in the following discussion that "discretionary" is what he meant.

translates a general norm from a number may be justifiable as interpretation.”³⁰⁶ On policy grounds, this is an appealing concession, but such rules do not appear to be any more (or less) “interpretive” than the USDA eight-foot-fence requirement. Nevertheless, I would agree that in many cases the distinction that Judge Posner has in mind would be easy to draw. The question remains: Is there any good reason for wanting to draw it?

At first glance, it is curious to see Judge Posner, widely known for his iconoclasm and fondness for debunking conceptualism, embracing an abstract distinction between interpretation and arbitrary (or discretionary) choice. He makes clear that he is doing so because he believes the APA requires it: “[O]ur task in this case is not to plumb the mysteries of legal theory; it is merely to give effect to a distinction that the Administrative Procedure Act makes, and we can do this by referring to the purpose of the distinction.”³⁰⁷ We need to ask, however, whether his “purposive” justification is convincing.

A close reading of the opinion indicates that he does not succeed in that task. In defending the interpretive rules exemption, he relies on arguments that are, or would be, common to *all* nonlegislative rulemaking, juxtaposing them with arguments that support enforcing notice-and-comment obligations with respect to legislative rules. But these arguments do not fare well in justifying the distinction between interpretive and non-interpretive guidance.

He starts with some factors that tend to support the exemption:

[U]nless a statute or regulation is of crystalline transparency, the agency enforcing it cannot avoid interpreting it, and the agency would be stymied in its enforcement duties if every time it brought a case on a new theory it had to pause for a bout, possibly lasting several years, of notice and comment rulemaking.³⁰⁸

Relatedly, as he noted earlier in the opinion, “[i]t would be no favor to the public to discourage the announcement of agencies’ interpretations by burdening the interpretive process with cumbersome formalities.”³⁰⁹ These observations as to why the agency has an interest in proceeding expeditiously when it engages in “routine interpretation” are well taken—but it has that same interest when it engages in routine policy judgments.

Continuing, Judge Posner writes:

Besides being unavoidably continuous, statutory interpretation normally proceeds without the aid of elaborate factual inquiries. When it is an executive or administrative agency that is doing the interpreting it brings to the task a greater knowledge of the regulated activity than the judicial or legislative branches have, and this knowledge is

306. *Hector*, 82 F.3d at 171.

307. *Id.* at 170.

308. *Id.*

309. *Id.* at 167.

to some extent a substitute for formal fact-gathering.³¹⁰

In other words, agencies can, up to a point, draw on their expertise as they engage in statutory interpretation, obviating to that extent the need for public proceedings. There is some truth to this. But so too do agencies have expertise in policy matters. When they write non-interpretive guidance (including policy statements), one could say in that context, just as easily as Judge Posner does, that “this knowledge is to some extent a substitute for formal fact-gathering.”

On the other side of the coin, Judge Posner explains why the public has an interest in having input on “non-interpretive” decisions:

There are thousands of animal dealers, and some unknown fraction of these face the prospect of having to tear down their existing fences and build new, higher ones at great cost. The concerns of these dealers are legitimate and since, as we are stressing, the rule could well be otherwise, the agency was obliged to listen to them before settling on a final rule and to provide some justification for that rule. . . . The greater the public interest in a rule, the greater reason to allow the public to participate in its formation.³¹¹

Those are good points. But these reasons also have force with regard to guidance documents that do “interpret,” in whatever the relevant sense may be, (unless the statute being construed is of “crystalline transparency,” in which case the agency’s rule would be exempt from rulemaking obligations anyway, as explained above³¹²). A choice among competing interpretations is still a choice, even if circumscribed, and the public has an interest in weighing in on those choices, which are often hotly contested. As I discussed above, the notion that the interpretation needs no formalities because it can be conceived as “merely spelling out what is in some sense latent in a statute or regulation”³¹³ begs the question, because the public has an interest in being heard on the issue of what the latent messages may be.

We saw in Part II that when policy statements are involved, the public’s interest in being heard is reconciled with the exemption from notice-and-comment procedure on the ground that affected persons can be heard at the implementation stage instead of at the time when the statement is promulgated. One might think that the same reasoning should apply to interpretations as well. And, indeed, at the end of his opinion Judge Posner appears to recognize this point:

Had the Department of Agriculture said in the internal memorandum that it could not imagine a case in which a perimeter fence for dangerous animals that was lower than eight feet would provide secure containment, and would therefore presume, subject to

310. *Id.* at 170.

311. *Id.* at 171.

312. *See supra* note 292 and accompanying text.

313. *Hector*, 82 F.3d at 171.

rebuttal, that a lower fence was insecure, it would have been on stronger ground.³¹⁴

He contrasts such a presumptive rule with an “unbending” requirement. In this instance, “the eight-foot rule in its present form is as flat as they come.”³¹⁵ The fact that USDA treated its rule as irrebuttable—thus preventing dealers from being heard at any point in the administrative process—may be the best way to justify the court’s holding.³¹⁶

Judge Posner did not directly acknowledge the similarity between the “presumptive” approach that might have salvaged the eight-foot rule and the policy statement exemption, which he had mentioned only fleetingly earlier in his opinion.³¹⁷ Nevertheless, this aspect of his analysis could be seen as laying the groundwork for an approach in which the validity of a guidance document turns on whether it has a binding effect rather than on whether its substance can be “reasonably described as interpretation.”³¹⁸ I will undertake to articulate such an approach below.

D. American Mining Congress v. Mine Safety & Health Administration—*A Minimalist Approach*

This discussion of the case law on interpretive rules would not be complete

314. *Id.*

315. *Id.*

316. See Strauss, *Publication Rules*, *supra* note 10, at 842–43 (explaining the *Hector* holding on this ground).

317. *Hector*, 82 F.3d at 169 (contrasting a rule that is “intended to bind” with “a tentative statement of the agency’s view, which would make it just a policy statement”).

318. Another case that can be interpreted as pressing in the same direction is *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490 (D.C. Cir. 2010). There, the court invoked the *Hector* reasoning but also noted that the manual provision under review constituted a “detailed—and rigid—investment code.” *Id.* at 495–96. In addition, the court remarked that “[if] the rule cannot fairly be seen as interpreting a statute or a regulation *and if (as here) it is enforced*, ‘the rule is not an interpretive rule exempt from notice-and-comment rulemaking.’” *Id.* at 494 (emphasis added) (quoting *Cent. Tex. Tel. Coop. v. FCC*, 402 F.3d 205, 212 (D.C. Cir. 2005)).

In this connection, the court in *Catholic Health Initiatives* cited Judge Henry Friendly for the proposition that “when an agency wants to state a principle ‘in numerical terms,’ terms that cannot be derived from a particular record, the agency is legislating and should act through rulemaking.” *Id.* at 495 (quoting Henry J. Friendly, *Watchman, What of the Night?*, in *BENCHMARKS* 144–45 (1967)). Actually, however, Judge Friendly’s point was not about the nature of interpretation; it was precisely about the benefits that legislative rulemaking can deliver by virtue of its *binding effect*. Friendly, *supra*, at 145 (stating that in this situation legislative rulemaking would serve the agency’s “desire not to be obliged to determine in each case what number would be ‘reasonable’ or even whether circumstances would warrant departing from the usual number, and its belief that those subject to its regulation will benefit from such certainty”).

without an analysis of Judge Stephen Williams's opinion for the D.C. Circuit in *American Mining Congress v. Mine Safety & Health Administration*.³¹⁹ This opinion has been widely hailed as a particularly incisive judicial pronouncement on the interpretive rules exemption,³²⁰ and it is often cited as authoritative.³²¹ I agree that it is the best analysis in the case law. Even if it ranks at the top of its class, however, it should not be graded solely on the curve. The opinion also has some significant limitations, which I will endeavor to explain.

At issue in *American Mining* was a "program policy letter" in which the Mine Safety & Health Administration stated that if the chest x-ray of a miner measured 1/0 or higher (the fourth most severe of twelve possible ratings), it would be regarded as a "diagnosis" of black lung disease that would trigger reporting obligations.³²² The court discerned in its precedents and the APA's legislative history a general message that the key determinant of an interpretive rule is whether the agency intended for it to have a "legal effect," or the "force of law."³²³ The court then turned to prior case law in order to identify various circumstances in which it could infer that an agency intended to exercise its legislative power, thus negating the exemption. After extensive further discussion, the court summarized its analysis as follows:

Accordingly, insofar as our cases can be reconciled at all, we think [we should apply the exemption] almost exclusively on the basis of whether the purported interpretive rule has "legal effect", which in turn is best ascertained by asking (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule. If the answer to any of these questions is affirmative, we have a legislative, not an interpretive rule.³²⁴

Upon finding that the program policy letter transgressed none of these four criteria, the court upheld it as a valid interpretive rule.³²⁵

319. 995 F.2d 1106 (D.C. Cir. 1993).

320. Anthony, *Lifting the Smog*, *supra* note 4, at 5–6; Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretive Rules*, 52 ADMIN. L. REV. 547, 554–55 (2000).

321. *E.g.*, *Erringer v. Thompson*, 371 F.3d 625, 630 (9th Cir. 2004) (citing *Hemp Indus. Ass'n v. Drug Enf't. Agency*, 333 F.3d 1082, 1087 (9th Cir. 2003)); *Allina Health Servs. v. Burwell*, 201 F. Supp. 3d 94, 105 (D.D.C. 2016); *Sec. Indus. & Fin. Mkts. Ass'n v. CFTC*, 67 F. Supp. 3d 373, 416 (D.D.C. 2014).

322. *Am. Mining Cong.*, 995 F.2d at 1108.

323. *Id.* at 1109.

324. *Id.* at 1112.

325. *Id.* at 1112–13.

1. *What American Mining Gets Right*

The *American Mining* opinion deserves its excellent reputation insofar as it relied on the four factors just listed. Although the formula may be strained as an explication of the words “legal effect,” each criterion is intrinsically sound as a guidepost to implementation of the interpretive rules exemption—in contrast to the “substantive approach” examined in the preceding section. In this section I will examine justifications for these factors and explore ways in which they have been elaborated, and then I will turn to my critique of the opinion.

a. Intransitive Statutes. The “first and clearest” case in which an agency’s intent to exercise legislative rulemaking power can be discerned, according to Judge Williams, “is where, in the absence of a legislative rule by the agency, the legislative basis for agency enforcement would be inadequate.”³²⁶ He referred to the example of the SEC’s proxy authority under the Securities Exchange Act, which forbids giving a proxy “in contravention of such rules and regulations as the Commission may prescribe.”³²⁷ Thus, as the court said, the statute itself prohibited nothing until such time as the Commission exercised that authority. In the absence of an implementing regulation, there would be nothing for a so-called interpretive rule to interpret.³²⁸

The distinction between laws that do and do not create obligations of their own force is familiar in the law. Laws that do so are sometimes called “self-executing.”³²⁹ Edward Rubin refers to them as “transitive.”³³⁰ In this terminology, the SEC’s proxy statute was “intransitive.” In *Hoctor*,³³¹ which was analyzed at length in the preceding section of this article, Judge Posner acknowledged the same reasoning Judge Williams did: The USDA eight-foot wall directive could not possibly have been upheld as an “interpretation” of the Animal Welfare Act, because that Act was intransitive and created no obligations until the USDA promulgated implementing rules, such as the “structural strength” regulation that had in fact been the asserted foundation for the directive.³³²

The logic of the intransitivity analysis is inescapable, but it has not been

326. *Id.* at 1109.

327. *Id.* at 1109 (quoting 15 U.S.C. § 78n(b) (2012)).

328. *See* *Mendoza v. Perez*, 754 F.3d 1002, 1021–23 (D.C. Cir. 2014) (applying a similar analysis).

329. *See generally* Adam M. Samaha, *Self-Executing Statutes in the Administrative State*, in *THE TIMING OF LAWMAKING* ch. 9 (Frank Fagan & Saul Levmore eds., 2017).

330. Edward L. Rubin, *Modern Statutes, Loose Canons, and the Limits of Practical Reason: A Response to Farber and Ross*, 45 *VAND. L. REV.* 579, 582 (1992).

331. *Hoctor v. USDA*, 82 F.3d 165 (7th Cir. 1996).

332. *Id.* at 169–70.

extended beyond the minimum that this logic requires. Once an agency has engaged in *some* rulemaking to implement an intransitive statute, it can then issue guidance to interpret the regulation. Even if the agency's exercise of the rulemaking authority looks decidedly perfunctory, the courts do not normally use the rulemaking provisions of the APA to foreclose such guidance.³³³ An agency may have very legitimate reasons for using statutory language as a placeholder instead of fleshing out some of the provisions of its rulemaking authority. It may, for example, wish to await further fact-finding or other developments in the regulatory environment, or it may simply lack an internal consensus about what specific policies should be formally locked into place. Courts have a strong tradition of deferring to administrative preferences in this regard.³³⁴

At the same time, limitations do exist. The courts have used judicial review principles to prevent agencies from exploiting this latitude to their advantage. The Supreme Court and lower courts have held that when an agency adopts a legislative rule that essentially "parrots" the underlying statute, they will afford no deference to the agency's interpretation of the regulation, or at least no more than the agency would have received if it had been interpreting the statute.³³⁵ This makes sense, because these circumstances would tend to indicate that the agency gave that aspect of the regulation no meaningful consideration when adopting it. Alternatively, if Congress has specifically indicated that it wants an agency to resolve the precise point at issue *by regulation*, the court will enforce that requirement.³³⁶ However, with

333. *But see* Elec. Privacy Info. Ctr. v. Dept. Homeland Sec., 653 F.3d 1, 7 (D.C. Cir. 2011), in which the court stated that "the purpose of the APA would be disserved if an agency with a broad statutory command . . . could avoid notice-and-comment rulemaking simply by promulgating a comparably broad regulation . . . and then invoking its power to interpret that statute and regulation in binding the public to a strict and specific set of obligations." Whether the court's remark about the breadth of the regulation was significant is a moot point, because guidance that "bind[s] the public to a strict and specific set of obligations" should be impermissible in any event.

334. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974); *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194 (1947); William D. Araiza, *Agency Adjudication, the Importance of Facts, and the Limitations of Labels*, 57 WASH. & LEE L. REV. 351, 365–76 (2000); Aaron Nielson, *Beyond Seminole Rock*, 105 GEO. L.J. 943, 961–62 (2017).

335. *Gonzales v. Oregon*, 546 U.S. 243, 256–58 (2006); *Pearson v. Shalala*, 164 F.3d 650, 660–61 (D.C. Cir. 1999); *Mission Group Kan., Inc. v. Riley*, 146 F.3d 775 (10th Cir. 1998); *United States v. Picciotto*, 875 F.2d 345 (D.C. Cir. 1989); *see also* *Glover v. Standard Fed. Bank*, 283 F.3d 953, 961–62 (8th Cir. 2002) (applying *Skidmore* deference in this situation and upholding agency's interpretation); *Cunningham v. Scibana*, 259 F.3d 303, 307 & n.1 (4th Cir. 2001) (same).

336. In *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29 (D.C. Cir. 2005), the issue was whether a

very rare exceptions, the cases have not suggested that interpretive rules that explicate the agency's view of the meaning of a parroting regulation are perforce ineligible for the § 553(b)(A) exemption.³³⁷ Such a view would, for no good reason, deprive the public of the benefits that the issuance of guidance can provide. In other words, the public should have the benefit of knowing what the agency's interpretation is, even if that interpretation will carry no weight in the event of a judicial challenge.

b. C.F.R. Publication. The second factor in Judge Williams's test was that "an agency seems likely to have intended a rule to be legislative if it has the rule published in the Code of Federal Regulations [(C.F.R.)]."³³⁸ As he noted, a provision in the Federal Register Act limits publication in that code to rules that have "general applicability and legal effect."³³⁹ Subsequently, Judge Williams himself appears to have had second thoughts about this criterion. In a 1994 decision, *Health Insurance Ass'n v. Shalala*,³⁴⁰ he acknowledged that the D.C. Circuit has never "taken publication in the Code of Federal Regulations, or its absence, as anything more than a snippet of evidence of

Federal Communications Commission (FCC) regulation should be interpreted as allowing "location portability" of mobile telephone numbers. Judge Garland was unwilling to accept the FCC's interpretive rule construing the regulation, in part because Congress had instructed the Commission to resolve the portability issue by regulation. He acknowledged that, "[o]f course, even when a statute requires an agency to proceed by implementing regulations, it need not develop legislative rules to 'address every conceivable question.'" *Id.* at 38. In this instance, however, the definition of location was "a crucial statutory element of the portability requirement." *Id.* The point to notice here is that the Commission erred by violating the substantive statute, *not* the APA rulemaking requirements as such.

337. Professor Pierce has proposed that courts should stand in the way of such a course of action: "[A]n agency should not be allowed to draft its legislative rules in such a broad manner that they are susceptible to an extraordinarily wide range of interpretations." Pierce, *supra* note 318, at 559. However, the cases on which Pierce relied dealt with issues of whether the interpretation in dispute should be upheld on its merits, not with whether an agency had violated § 553. The same point can be made about the D.C. Circuit's much-quoted phrase that "[i]t is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal 'interpretations.' That technique would circumvent section 553, the notice and comment procedures of the APA." *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 584 (D.C. Cir. 1997). The court's remark was intended as a policy argument against deference to an interpretive rule under the conditions the court mentioned, not as an assertion that the interpretive rule itself was unlawful due to lack of APA compliance.

338. *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993).

339. *Id.* (citing 44 U.S.C. § 1510).

340. 23 F.3d 412 (D.C. Cir. 1994).

agency intent.”³⁴¹ That concession would seem to have been well advised; as Professor Pierce has pointed out, some agencies do publish important interpretive rules in the C.F.R. (presumably giving a broad reading to the phrase “legal effect”).³⁴² As a result of the comment in *Health Insurance Ass’n*, the role of the second *American Mining* factor has, at the very least, been “deemphasized” in subsequent case law.³⁴³ Some cases do continue to mention and give weight to C.F.R. publication as a factor suggesting that a particular rule is legislative.³⁴⁴ Nevertheless, it seems significant that no case has ever treated this factor as determinative standing alone. If it has any future, it will probably be as a “snippet” that has some limited probative value regarding the third *American Mining* factor, discussed just below—whether the agency viewed the rule as legislative in nature when it adopted the measure.

c. Explicit Invocation of Legislative Authority. In *American Mining*, Judge Williams commented that “an agency may for reasons of its own choose explicitly to invoke its general legislating authority.”³⁴⁵ “In that event,” he said, “even if a court believed that the agency had been unduly cautious about the legislative background, it would presumably treat the rule as an attempted exercise of legislative power.”³⁴⁶ Although he did not elaborate at any length, his analysis seems well taken. Essentially, it means that the court should take the agency at its word, as articulated at the time the rule was issued. This course of action would follow logically from the *Chenery* doctrine, an axiomatic principle of administrative law: in general, a court may not uphold an agency’s exercise of discretionary power on a basis that the agency did not invoke at the time of its decision.³⁴⁷ Thus, if the court were to uphold the statement as an interpretive rule even though the agency had called it legislative, it would effectively find itself substituting its own analysis for that of the officials who have been invested with authority to implement the statutory scheme.³⁴⁸ A

341. *Id.* at 423.

342. Pierce, *supra* note 318, at 560.

343. Pharm. Research & Mfrs. of Am. v. U.S. Dept. of Health & Human Servs., 43 F. Supp. 3d 28, 46 n.17 (D.D.C. 2014) (dictum); see *Erringer v. Thompson*, 371 F.3d 625, 630 (9th Cir. 2004) (relying on *American Mining* but treating only the other three factors as authoritative); *Sweet v. Sheahan*, 235 F.3d 80, 91 n.8 (2d Cir. 2000).

344. *Steinhorst Assocs. v. Preston*, 572 F. Supp. 2d 112, 124 (D.D.C. 2008); *Nat’l Ass’n of Mfrs. v. DOL*, No. 95-0715 (RCL), 1996 U.S. Dist. LEXIS 10478 (D.D.C. July 22, 1996).

345. *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1110–11 (D.C. Cir. 1993).

346. *Id.* at 1111.

347. *SEC v. Chenery Corp.*, 318 U.S. 80 (1943); see Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952, 960–81 (2007).

348. *Cf. Kelley v. EPA*, 15 F.3d 1100, 1109 (D.C. Cir. 1994) (remanding a rule despite petitioners’ concession that it could possibly be sustained as a policy statement, because the

contention by government counsel that the rule had actually been interpretive all along would likely be dismissed as an impermissible “post hoc rationalization.”³⁴⁹

d. Inconsistency with a Legislative Rule. The fourth *American Mining* criterion was that “[i]f a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative.”³⁵⁰ This test is well supported by judicial authority,³⁵¹ including the Supreme Court’s decision in *Shalala v. Guernsey Memorial Hospital*,³⁵² and its rationale is straightforward. A legislative rule has the force of law, and therefore the agency is bound by it until the rule is rescinded or invalidated.³⁵³ There is room to question whether this gloss on the guidance document exemption is necessary at all. In any situation in which it could potentially be invoked, the reviewing court could avoid resting on a procedural requirement by simply holding that the rule is invalid *on the merits*, due to its inconsistency with the text that it purports to interpret.³⁵⁴ However, that point is academic, because nothing turns on which of these two rationales the court chooses to invoke (unless reliance on the APA gives the court some rhetorical advantage in appearing apolitical).³⁵⁵

For about fifteen years, some courts supplemented this straightforward doctrine by embracing a far more controversial one. This development began in 1978 when, in *Paralyzed Veterans of America v. D.C. Arena L.P.*,³⁵⁶ the D.C. Circuit held that an agency may not use an interpretive rule to repudiate a

Environmental Protection Agency (EPA) had not asked that the rule be regarded as such).

349. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962).

350. *Am. Mining Cong.*, 995 F.2d at 1109 (quoting *Nat’l Family Planning & Reprod. Health Ass’n v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992)).

351. *E.g.*, *El Encanto, Inc. v. Hatch Chile Co.*, 825 F.3d 1161, 1165–66 (10th Cir. 2016) (Gorsuch, J.); *Hemp Indus. Ass’n v. Drug Enf’t. Agency*, 333 F.3d 1082, 1090 (9th Cir. 2003); *Nat’l Family Planning*, 979 F.2d at 235.

352. 514 U.S. 87 (1995).

353. *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979); *United States v. Nixon*, 418 U.S. 683 (1974); Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 473–84 (2013); Thomas W. Merrill, *The Accardi Principle*, 74 GEO. WASH. L. REV. 569 (2006).

354. *See* 5 U.S.C. § 706(2)(A) (2012) (providing that an agency action shall be set aside if “not in accordance with law”).

355. Judge Wald once recounted that in *National Family Planning*, which concerned abortion policy, her panel had purposely relied on the APA rather than a construction of the enabling legislation so as to *appear* to be taking no stand on substantive issues. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1415–16 (1995).

356. 117 F.3d 579 (D.C. Cir. 1997).

prior *interpretive* rule. Ultimately, most other circuits rejected that principle; it never had serious support from scholars; and in 2015 the Supreme Court unanimously disapproved it in *Mortgage Bankers Ass'n*.³⁵⁷ This should not be surprising: An interpretive rule does *not* have the force of law, so the grounds on which the agency could be considered bound by it were never very clear.³⁵⁸ Regardless, the *Paralyzed Veterans* doctrine is now defunct.

2. *Where American Mining Falls Short*

In the previous section, I argued that the *American Mining* approach to applying the interpretive rules exemption is analytically defensible on its own terms (at least if the C.F.R. factor is deemphasized, as subsequent cases have said it should be). If a rule is “legislative” according to the tests articulated in that case, it should not qualify for the exemption. The unified approach that I propose below incorporates these limitations. However, interesting questions can be raised as to whether the scope of the exemption should *also* be limited by any other criteria.

As a starting point for this discussion, notice that the *American Mining* test is decidedly narrow from a challenger’s point of view. Relatively few rules that an agency describes as interpretive will be filtered out by application of Judge Williams’s criteria alone. The intransitivity test does not apply at all to rules issued as interpretations of “transitive” or “self-executing” statutes; and, as discussed above, once an agency has issued legislative rules to implement an intransitive statute, guidance documents that interpret those rules will virtually always survive a procedural challenge founded on the intransitivity test.³⁵⁹ Similarly, it is probably rare for an agency to contend that its rule is interpretive even though it earlier published the rule in the Code of Federal Regulations or otherwise described it as a legislative rule. In fact, Judge Williams himself did not cite any past cases in which this had occurred.³⁶⁰ Finally, although the inquiry into whether the challenged rule is inconsistent with an extant legislative rule does have some bite, it does not come into play in the great majority of cases in which a litigant challenges a

357. 135 S. Ct. 1155 (2015).

358. See generally Richard W. Murphy, *Hunters for Administrative Common Law*, 58 ADMIN. L. REV. 917 (2006) (surveying this doctrine).

359. See *supra* notes 333–337 and accompanying text.

360. More often, these factors are mentioned negatively—a court infers that a rule is *not* legislative, in part because the agency neither described it as such nor published it in the C.F.R. *E.g.*, *Nat’l Mining Ass’n v. McCarthy*, 758 F.3d 243, 252–53 (D.C. Cir. 2014); *Ctr. for Auto Safety v. Nat’l Highway Traffic Safety Admin.*, 452 F.3d 798, 808–09 (D.C. Cir. 2006). This line of argument seems to be a variation on the theme of deference to the agency’s label, which, as already noted, can be helpful to the government but is rarely determinative.

purported interpretive rule as having been issued in violation of § 553. Usually the rule is at least consistent with existing regulations, and when it is not, it would be vulnerable to invalidation through substantive review anyway. Accordingly, *American Mining* can be fairly described as having set forth a minimalist approach to the interpretive rules exemption.

The minimalist label does not, of course, necessarily determine whether the *American Mining* approach is desirable. Presumably, lawyers who believe that agencies should have broad freedom to issue guidance for the benefit of the public and their own staffs would tend to favor its relatively lenient approach for exactly that reason.³⁶¹ Conversely, lawyers who believe that agencies too often use guidance oppressively or abusively would have straightforward reasons for wanting to distance themselves from Judge Williams's reasoning. These perspectives are understandable, but the paramount goal of this article is to develop a coherent framework of analysis for the guidance document exemption as a whole. From that standpoint, a more probing discussion is required.

In that regard, notice again that the *American Mining* criteria are phrased in terms of inquiries that serve to identify rules that are, or need to be, *legislative* rules. This excellent opinion—widely esteemed as the leading case on the interpretive rules exemption—rests on no affirmative concept of what makes a rule “interpretive” or what the purpose of the exemption is. To confirm this observation, one could simply ask whether the four criteria would apply any differently if an agency described its document as a policy statement rather than as an interpretive rule. Surely, the agency's ability to avoid notice-and-comment by relying on the policy statement exemption would run into trouble if (a) the statute were intransitive and the agency had never issued regulations to implement it; or (b) the agency had published the document in the Code of Federal Regulations;³⁶² or (c) the agency had actually described the document as legislative when issuing it; or (d) the document were inconsistent with an extant legislative rule.

In practice, courts tend not to make this inquiry when a putative policy statement is being challenged. Presumably, the reason is that they already have a reasonably well-functioning (if imperfect) test for determining the validity of those statements. They lack such an established doctrinal formula

361. This probably helps to explain why the government embraced *American Mining* in its briefing in the Supreme Court in *Perez v. Mortgage Bankers Ass'n*. See Reply Brief for Petitioners at 10, *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199 (2015) (No. 13-1052).

362. In fact, Judge Williams based the C.F.R. portion of his analysis on a prior decision that had involved the policy statement exemption. *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993) (citing *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986) (Scalia, J.)).

for evaluating the validity of interpretive rules, and the *American Mining* case has emerged for want of anything better. In principle, however, the criteria could apply equally to both.

The fact that the *American Mining* analysis does not revolve around any aspect of interpretive rules that sets them apart from policy statements is a plus insofar as the court avoided the labored and unwieldy “substantive” distinctions examined in Part III.C. above.³⁶³ But the minimalism of Judge Williams’ criteria also raises the question of whether he has left out anything important. More particularly, it raises the question of whether the doctrinal test for the interpretive rules exemption should, like the corresponding exemption for policy statements, incorporate consideration of whether the rule has binding effect on members of the public. Recall that Judge Williams began his analysis with the premise that the test for interpretive rules should turn on whether they have “legal effect”—i.e., “the force of law.”³⁶⁴ If the “substantive” approaches to explicating that requirement do not work, and the *American Mining* criteria standing alone seem underinclusive, a more “procedural” analysis would seem to be the obvious alternative.³⁶⁵

At first blush, Judge Williams’s treatment of this question in *American Mining* looks superficial. After acknowledging that some D.C. Circuit authority had, in fact, focused on whether a contested rule had “binding effect” on the public, he dismissed that theory: “[W]hile a good rule of thumb is that a norm is less likely to be a general policy statement when it purports (or, even better, has proven) to restrict agency discretion, . . . restricting discretion tells one little about whether a rule is interpretive.”³⁶⁶ This remark begged an important question. By its nature, an interpretive rule does not deal with discretion, but this passage doesn’t explain why, if at all, an agency issuing a guidance document should have a freer hand to make binding statements about law than about discretion.

Actually, the court’s analysis of this issue was more nuanced than the observation just quoted would lead one to think. As Judge Williams went on to

363. One would think that the Mine Safety and Health Administration chest x-ray rule could scarcely have qualified for the interpretive rules exemption under a test that confines the exemption to “legal” reasoning as opposed to creative elaboration through numerical benchmarks. Admittedly, in *Hocor*, Judge Posner did attempt to reconcile the holding of *American Mining* with his main line of argument, stating that “[e]specially in scientific and other technical areas, where quantitative criteria are common, a rule that translates a general norm into a number may be justifiable as interpretation.” *Hocor v. USDA*, 82 F.3d 165, 171 (7th Cir. 1996). But that assertion seems strained, casting further doubt on the coherency of his “fairly described as interpretation” criterion.

364. See *supra* note 323 and accompanying text.

365. See *supra* Part III.A.

366. *Am. Mining Cong.*, 995 F.2d at 1111.

explain, a guidance document can have only limited binding effect, because “agency personnel at every level act under the shadow of judicial review. If they believe that courts may fault them for brushing aside the arguments of persons who contest the rule or statement, they are obviously far more likely to entertain those arguments.”³⁶⁷ If the agency has not responded to those arguments at the issuance stage (through notice-and-comment rulemaking), it will have to do so at a later stage, such as in an agency enforcement proceeding or in court. This reasoning was at least reminiscent of the binding norm analysis associated with the policy statement exemption. Strictly speaking, however, the court’s discussion of binding effect in this context referred to the agency’s potential vulnerability in its defense of the substance of a guidance document, rather than to a basis for a procedural challenge under § 553. The former is not a complete substitute for the latter—particularly in circumstances in which an affected person is unlikely ever to seek judicial review. The next section will argue that binding effect should matter in the § 553 context as well.

E. Interpretive Rules and the Binding Norm Test

The preceding sections have challenged the prevailing assumption that, for purposes of § 553(b)(A), interpretive rules must stand on a fundamentally different legal footing from general statements of policy. The assumption is not required by the language or history of the APA and has not worked out satisfactorily in practice, due to the inadequacies of the theories used in the interpretive rules context. A reader who is prepared to look beyond that assumption should consider the case for applying a binding norm test to interpretive rules in roughly the same fashion as it is already applied to policy statements. To be sure, there has long been significant case law support for the proposition that an interpretive rule lacks the force of law and thus is not binding on anyone.³⁶⁸ My concern here is to respond to authorities that assert otherwise.

As Part II discussed, the basic reason why an agency is permitted to announce a general statement of policy without using notice-and-comment procedure is that an affected person will be permitted to contest the agency’s position at a later stage in the agency’s implementation process. The agency must “pay now or pay later.”³⁶⁹ The “practical binding effect” case law has

367. *Id.*

368. *See, e.g.,* Viet. Veterans of Am. v. Sec’y of the Navy, 843 F.2d 528, 537–38 (D.C. Cir. 1988) (“[T]he agency remains free in any particular case to diverge from whatever outcome the policy statement or interpretive rule might suggest. . . . In such a case, any affected private party is free to appeal to the agency for such a divergent result.”); Nat’l Latino Media Coal. v. FCC, 816 F.2d 785, 788 (D.C. Cir. 1987)

369. *See supra* note 142 and accompanying text.

taken these premises to mean that, in a pre-enforcement suit, the agency will not qualify for the § 553(b)(A) exemption if the court concludes that the agency would not (or in actual experience does not) permit such contestation to occur.

This same reasoning should apply to interpretive rules. After all, the prevailing test applied to general statements of policy has always been rooted in the insight that those statements do not have the force of law—and the same can be said about interpretive rules. It should be unacceptable to argue that, where interpretive rules are concerned, the agency should get the metaphorical oil filter for free, without having to “pay” at either the promulgation or enforcement stage. Moreover, on a practical level, the policy considerations affecting both the agency and members of the public are not easy to distinguish on the basis of whether a policy statement or an interpretive rule is involved.³⁷⁰ The agency has an interest in advising the public of its positions and inducing its staff to adhere to those positions; members of the public have individual interests in receiving a fair opportunity to persuade the agency to alter its view, as well as a collective interest in inducing the agency to come to terms with perspectives other than its own.

Some may find this line of argument difficult to accept, at least initially, because of ambiguities about what it means to say that an interpretive rule is or is not “binding.” One aspect of this ambiguity is exemplified by Dean Manning’s remark that nonlegislative rules may be “binding . . . in the derivative sense that they interpret a binding statute or legislative rule.”³⁷¹ Yet the function of an interpretive rule—its only reason for existing—is to specify *which* of various imaginable meanings of the underlying statute or regulation the agency considers correct. Thus, to say that, because the statute is binding, the interpretation that the agency happens to have selected must also be binding begs the question.

A renewed look at *Dismas Charities, Inc. v. U.S. Department of Justice*,³⁷² a case examined earlier, will illustrate this point. The dispute in *Dismas* arose out of

370. See *supra* Part III.C.3.

371. Manning, *supra* note 3, at 931; see also *id.* at 925 (“[I]f an agency wishes . . . to adopt a legally constraining interpretative rule . . . , it must be able to ascribe the policies reflected in the resulting document not to its own discretion, but to the commands emanating from . . . legislation or notice-and-comment rulemaking.”); Gersen, *supra* note 237, at 1711 n.42 (“[T]he interpretive rule’s force derives from the existing legal duty inherent in the existing legislative rule or statute.”). Manning himself considers this reasoning unworkable in the modern world because *Chevron* has blurred the line between interpretation and policymaking. Although I agree with him (see *supra* notes 273–276 and accompanying text), the concept is also unsatisfactory for the more basic reason discussed in the text.

372. 401 F.3d 666 (6th Cir. 2005).

a Bureau of Prisons (BOP) memorandum that endorsed a narrow interpretation of the circumstances in which federal prisoners could lawfully be allowed to serve all or part of their sentences in halfway houses. The Bureau adopted this statutory interpretation on the basis of guidance from the Office of Legal Counsel (OLC) and the Deputy Attorney General, abandoning a more permissive interpretation that a previous administration had followed. Judge Rogers's opinion for the Sixth Circuit rejected the argument that the memorandum should have been adopted through notice-and-comment. Responding specifically to the contention that the BOP memorandum was "binding" and therefore legislative, he declared that this argument "mistakes the extent to which a reviewing *court* is bound by a regulation with the extent to which an *agency* is bound."³⁷³ Although the interpretation would not be binding on a court, he continued, "[a]n interpretative regulation is binding on an *agency* . . . not by virtue of the promulgation of the regulation (as in the case of a legislative regulation), but by virtue of the binding nature of the interpreted statute."³⁷⁴

Judge Rogers's conclusion did not follow from his premises. Because of the "binding nature of the interpreted statute," the Department would of course be expected to adhere to its reading of the statute, notwithstanding any policy disagreements it might have with that reading. But this truism does not dispose of the anterior question of whether it had an obligation to allow Dismas (a halfway-house operator) or prisoners themselves to attempt to persuade it to alter that interpretation. The merits of the interpretation were, in fact, debatable. An earlier OLC opinion had espoused exactly the opposite interpretation, and the Bureau's revised view soon encountered a "firestorm" of criticism in the courts.³⁷⁵ Although an appeal to the Department to alter its interpretation might well have been futile in the short run, it is plausible to think that the advent of a new administration, or simply the accumulating weight of judicial criticism, could at some point induce the Department to reconsider. Thus, the court should not have equated the status of the interpretive rule with that of a legislative rule, which the agency would have been obliged to obey until it was rescinded. Because the court assumed that the government would *not* permit a later challenge, the court's reasoning did not show why the Bureau should not be required to adopt it through notice-and-comment procedures (as it eventually did³⁷⁶).

373. *Id.* at 681.

374. *Id.*; *see also* *Metro. School Dist. v. Davila*, 969 F.2d 485, 493 (7th Cir. 1992) ("All rules which interpret the underlying statute must be binding because they set forth what the agency believes is congressional intent. Could an agency announce, 'We think Congress intended this when it enacted this statute, but you don't have to do it?'").

375. *Levine v. Apker*, 455 F.3d 71, 75 & n.1 (2d Cir. 2006).

376. *Id.* at 75–76.

Interpretive rules and policy statements do differ in one respect that is important to mention in this discussion. By its nature, an interpretive rule will often be expressed in mandatory terms: citizens *must* do X or *may not* do Y. As Judge Williams observed in *American Mining*,

Interpretation is a chameleon that takes its color from its context; therefore, an interpretation will use imperative language—or at least have imperative meaning—if the interpreted term is part of a command; it will use permissive language—or at least have a permissive meaning—if the interpreted term is in a permissive provision.³⁷⁷

If the agency reads the law as mandatory, it should not have to equivocate about its position. However, the fact that the agency takes the *position* that a statute contains a certain command does not necessarily mean that it should be entitled to enforce that position without allowing persons who disagree with its view to contest it at the administrative level. Rather, it only means that in the interpretive rule context, as distinguished from the policy statement context, a court would have a greater need to look at the larger situation, including the agency's actual practices and procedures, when it seeks to determine whether the rule will be applied as a binding norm.³⁷⁸

377. *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1111 (D.C. Cir. 1993).

378. This analysis might appear to conflict with certain language in the OMB Good Guidance Practices Bulletin, but a careful reading of the bulletin will show that it actually supports this analysis. The bulletin provides that agencies should, when drafting guidance, generally refrain from using “mandatory language such as ‘shall,’ ‘must,’ ‘required,’ or ‘requirement,’ unless the agency is using these words to describe a statutory or regulatory requirement.” OMB Bulletin, *supra* note 11, at 3440; *id.* at 3436. It is important to note, however, that the bulletin does *not* say that the agency should, overall, be free to impose an interpretive rule without allowing a subsequent challenge by persons who might disagree with it. On the contrary, all other provisions in the bulletin treat guidance documents the same way, regardless of whether they are regarded as interpretations, expressions of discretion, or both. *See id.* at 3440 (requiring agency to provide a means for requesting modification or revocation of significant guidance); *id.* (requiring agency to maintain an office to field complaints that a significant guidance document is being treated as binding).

The Department of Justice's “Prohibition on Improper Guidance Documents” reflects a similar understanding. *See DOJ MEMORANDUM, supra* note 102. Although that document condones the use of mandatory language when an agency is “restating . . . clear mandates contained in a statute or regulation,” *id.* at 1, its overall message is that guidance—including interpretive rules—must not be binding. *See id.* (declaring that guidance should not “create binding standards by which the Department will determine compliance with existing regulatory or statutory requirements”).

The 2017 ACUS recommendation also borrows from the OMB language, stating that “[a] policy statement should not include mandatory language unless the agency is using that language to describe an existing statutory or regulatory requirement.” ACUS Recommendation

It could be argued that, in any event, an agency should not be expected to *say* that persons who disagree with a particular interpretive rule are free to contest it in agency proceedings, because that concession would tend to communicate doubts that the agency may or may not actually entertain. However, this is another non sequituri. The agency should indeed be free to state its *position* forcefully. There is simply no contradiction if it also permits members of the public to challenge those positions within the agency (as well as in court). Mixed messages of this kind are commonplace in our legal system. When agencies render an adjudicative decision, they routinely advise the respondent about its right to contest that decision at higher levels of the agency (or in court). For that matter, courts themselves find no contradiction between interpreting the law and permitting litigants to argue that a given dictum or even holding in a prior decision should be reconsidered.

Presumably, agencies would react with mixed feelings if the courts were to accede to the analysis of this article. They probably would welcome it insofar as it would mean that their interpretive rules would no longer be at risk of being set aside on procedural grounds because of a court's conclusion that the rule had strayed too far from the text it interprets. The only remaining constraints in that regard would be principles of substantive judicial review, administered with whatever level of judicial deference the circumstances required.

On the other hand, the agencies would be unlikely to welcome the potential advent of judicial holdings that their obligation to be "openminded"—to allow opportunities for challenge at the administrative level—should be extended to encompass interpretive rules as well as policy statements. Such reservations would be quite understandable, but one can point to several factors that could serve to mitigate them. First, the obligation would be largely the same one that agencies now bear with regard to policy statements. They have spent years acquiring institutional knowledge as to how to fulfill that responsibility. Second, this article has made several suggestions as to how current doctrine regarding the binding norm test could and should be applied flexibly. For example, courts should recognize the legitimate uses of precedent and should be particularly hesitant to apply the doctrine to directives addressed to lower-level staff.

Third, practical considerations may make it easier for agencies to satisfy the binding norm test with regard to interpretive rules. I wrote about this possibility years ago:

2017-5, *supra* note 108, at 61,736. This sentence seemingly blurs the distinction between policy statements and interpretive rules. As noted above, however, ACUS is continuing to examine its position on interpretive rules and may ultimately resolve this contradiction. *See supra* notes 113–117 and accompanying text.

If anything, an agency's obligation to remain "openminded" as it implements an interpretive rule should generally be less burdensome to the agency than if a policy statement were involved. The reasons are pragmatic, not conceptual. When purely legal questions are at issue, the parties normally should only need to submit briefs, not build a record. Furthermore, legal issues by their nature tend to revolve around a limited body of data (the statute, legislative history, etc.). Once the agency has thoroughly analyzed that data in an interpretive rule, it need not keep repeating itself; in responses to challenges to the rule, the agency can simply cite the rule's original analysis. A challenger who raises new arguments, however, deserves a fuller response, and the administrator's failure to address such contentions may bode ill for the agency in the event of judicial review.³⁷⁹

As I mentioned, a specific concern regarding interpretive rules is that they are often phrased in imperative language. Courts that review claims under the interpretive rules exemption should be willing to look beyond such language to the broader context in which the language is found.³⁸⁰ Correspondingly, agencies issuing such rules would be well advised to be particularly scrupulous about clarifying how they would allow an interested person to ask the agency to reexamine its position. For example, the agency could adopt a regulation that would expressly spell out a pathway by which an interested person who wishes to dispute the correctness of the interpretation could do so. Part IV of this article elaborates on this suggestion.

F. The Aspiration to a Unified Guidance Exemption

Over and above the inherent justifications for incorporating a "binding norms" aspect into analysis of the interpretive rules exemption, an attractive feature of such incorporation is that it would set the stage for a unification of the two branches of what we could now call the *guidance exemption*. This development would harmonize with the thrust of the most recent of the institutional pronouncements discussed earlier.

379. Levin, *Open Mind*, *supra* note 163, at 1506–07.

380. In the short run, some courts may well have difficulty with this concept. Consider, for example, the district court opinion that preliminarily enjoined the Obama administration's "Dear Colleague" letter regarding the rights of transgender students. *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016). One basis for the injunction was that the letter should have been adopted through notice-and-comment procedures. *Id.* at 828–31. Rejecting the defense that the letter was an interpretive rule, the court emphasized that the defendant agencies "confirmed at the hearing that schools not acting in conformity with Defendants' Guidelines are not in compliance with Title IX." *Id.* at 830. Moreover, defendants "have concluded Plaintiffs must abide by the Guidelines, without exception, or they are in breach of their Title IX obligations." *Id.* Thus, "[t]he Guidelines are, in practice, legislative rules . . . because they set clear legal standards." *Id.* Yet it is difficult to see how an interpretive rule exemption can exist at all if courts are going to hold that the mere act of *stating* an interpretation turns it into a binding norm.

In this unified approach, the most important feature would be that the binding norms approach would be extended to interpretive rules. A secondary aspect would be that the *American Mining* factors, currently considered to apply only to interpretive rules, should also be applied to policy statements. I will not belabor this point, because those factors are not particularly controversial on their own terms and because, by their nature, they do not cut very far into the agencies' freedom of action. The key point for present purposes is that the reasoning by which the court in *American Mining* explained them applies just as fully to policy statements as to interpretive rules.

A consideration that should make the unification proposed here particularly attractive is that the dividing line between interpretive rules and policy statements has always been rather contrived. The current bifurcated approach to applying § 553(b)(A) presupposes that a given guidance document can be characterized as being one or the other. In reality, however, a particular document can contain both legal interpretations and policy positions;³⁸¹ indeed, some individual determinations can easily be characterized as *either* law or policy.³⁸² The haziness of the distinction can be illustrated by the Supreme Court's decision in *National Park Hospitality Ass'n v. Department of the Interior*,³⁸³ in which six Justices characterized the agency rule before them as a general statement of policy,³⁸⁴ and two dissenters claimed that it was an interpretive rule instead.³⁸⁵ Because this disagreement arose in the context of a dispute over ripeness for review, not an alleged APA violation, its merits need not be examined here; nevertheless, it does highlight the fact that the classification of a particular document may not be easy and may be susceptible to manipulation.

In the context of § 553(b)(A), one can find traces of the uneasiness of the distinction between interpretive rules and policy statements in judicial decisions that have seemed to conflate this distinction³⁸⁶ or have rejected agencies' reliance on the guidance exemption without specifying which branch of

381. *See, e.g.*, *Sec. Indus. & Fin. Mkts. Ass'n v. CFTC*, 67 F. Supp. 3d 373, 423–24 (D.D.C. 2014).

382. *See, e.g.*, *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980) (“Particular actions combine the qualities of interpretative rules, policies, internal procedures, and legislative rules.”); DAVIS, *supra* note 38, at 25–26 (“Are not many agency pronouncements both general statements of policy and interpretative rules, even though some may fit one label better than the other?”). This overlap brings to mind the often-remarked overlap between so-called *Chevron* step two and arbitrary and capricious review. *See supra* note 227 and accompanying text.

383. 538 U.S. 803 (2003).

384. *Id.* at 809.

385. *Id.* at 820 (Breyer, J., dissenting).

386. *See, e.g.*, *Erringer v. Thompson*, 371 F.3d 625 (9th Cir. 2004); *Bellarno Int'l Ltd. v. FDA*, 678 F. Supp. 410 (E.D.N.Y. 1988).

the exemption might otherwise have applied.³⁸⁷ The fact that this article's approach would tend to bypass the need to use such labels is an indication that it is on the right track.

At least one recent case does seem to follow the approach supported here. In *Ass'n of Flight Attendants-CWA v. Huerta*,³⁸⁸ the Federal Aviation Administration issued guidance advising aviation safety inspectors to take a more accommodating stance regarding airline passengers' handling of "personal electronic devices" during takeoff and landing. The flight attendants' union sued to challenge the guidance, but the D.C. Circuit held that the document was not reviewable final agency action. As it customarily does, the court framed "the finality inquiry as the question of whether the challenged agency action is best understood as a non-binding action, like a policy statement or interpretive rule, or a binding legislative rule."³⁸⁹ More unusually, the court continued: "In this case, *it really does not matter whether Notice N8900.240 is viewed as a policy statement or an interpretive rule.*"³⁹⁰ The court found that the language of the document was "precatory, not mandatory" and "does not constrain [inspectors'] discretion enough to create a binding norm"³⁹¹—arguments characteristic of the policy statement case law. Additionally, the court considered whether the document was inconsistent with a prior regulation—an inquiry drawn from *American Mining* and usually associated with the case law on interpretive rules.³⁹² To proclaim that the court's fusion of the two lines of precedents necessarily represents the wave of the future would be premature, but at a minimum the *Flight Attendants* case suggests that the case law retains enough flexibility to allow for movement in the direction this article proposes.

It should be recognized, however, that even if the courts and agencies were to accept the basic argument of this article, they would not necessarily erase *all* distinctions between interpretive rules and policy statements in the application of the § 553(b)(A) exemption. Because of practical differences between these two types of guidance documents, which I mentioned in the preceding

387. See, e.g., *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021–22 (D.C. Cir. 2000) (explaining that, even if EPA was correct in describing its guidance as, in part, a non-binding policy statement, the portions under challenge in that proceeding were intended to be binding); *Alaska v. Dept. of Transp.*, 868 F.2d 441, 445–46 (D.C. Cir. 1989).

388. 785 F.3d 710 (D.C. Cir. 2015).

389. *Id.* at 716.

390. *Id.* (emphasis added); see also *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1341 & n.8 (4th Cir. 1995) (stating that the Attorney General's interim rule was a general statement of policy because it "did not create a binding norm," and adding that "the result is the same [if] the rule is characterized as an interpretive rule").

391. *Flight Attendants*, 785 F.2d at 718.

392. *Id.*

section, one could anticipate the development of two overlapping lines of authority; courts might cross-cite between them in most instances, while distinguishing between them in a handful of others. All this case law refinement, however, could occur within a single framework. As such, it could go far toward satisfying the article's objective of promoting coherence in the courts' approach to the guidance exemption.

IV. BEYOND JUDICIAL DOCTRINE

Previous parts of this article have made a case that the binding norms approach is fundamentally coherent and could serve satisfactorily as a broadly unifying principle for application of the guidance document exemption in § 553(b)(A). Skeptical readers may think, however, that this assessment is too upbeat. They could argue with considerable force that, whatever its relative virtues may be when it is compared with other approaches, the binding norm analysis is woefully indeterminate. As the reader may recall, this article began by referring to Judge Brett Kavanaugh's challenge to the administrative law community to "get the law into such a place of clarity and predictability" that "all relevant parties should instantly be able to tell whether an agency action is a legislative rule, an interpretive rule, or a general statement of policy."³⁹³ Even if one limits the scope of discussion to procedural issues (as this article has done) and discounts the judge's declared objective of "instant" predictability as somewhat extravagant, many readers may doubt that a focus on binding norms can live up to the judge's challenge.

These doubts would not be groundless. One underlying source of the difficulty is that lawyers and judges depend heavily on judicial case law in defining the proper uses and abuses of guidance documents, but courts may not always have enough information or perspective to assess the elusive variables that bear on "practical binding effect." The questions that may arise include: Under what circumstances has an agency offered the addressees of a guidance document a meaningful opportunity to contest it? To what extent might the procedures prescribed to afford such opportunities tend to deter agencies from issuing guidance at all? How much influence may the document exert over agency staff or the public without being characterized as exerting "practical binding effect"?³⁹⁴ These normative difficulties might be

393. *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014); *see supra* notes 7–9 and accompanying text.

394. Appraisal of these implementation questions would bear at least a faint resemblance to the function that courts frequently perform in applying the familiar due process balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976). That test involves, at least in part, weighing the adequacy of an individual's opportunity to be heard against competing government interests. Even in that context, however, the courts' comparative qualifications vis-à-vis

compounded by a predictive one: In a pre-enforcement context in which the agency's invocation of § 553(b)(A) is at issue, how is the court supposed to know, with any degree of confidence, how fully the challenger's contentions *would* be considered in a future enforcement proceeding?³⁹⁵

Even if one does not think that the practical binding effect doctrine actually violates *Vermont Yankee*,³⁹⁶ the dynamic about which the Court warned in that case may still occur: agencies may tend to bend over backward to provide more procedure, because they cannot predict how a reviewing court might react to an otherwise reasonable decision to rely on guidance as opposed to legislative rulemaking. Among other pressures, the risk-averse agency may have good reasons to fear that, in a proceeding in which the guidance document exemption is at issue, the perspectives of challengers who object to the agency's reliance on guidance will generally be voiced more loudly than the perspectives of other members of the public who benefit from the issuance of guidance that tells them where the agency stands on issues of law or policy that fall within its sphere of responsibility.³⁹⁷

In principle, a good Supreme Court opinion or two could do a great deal to alleviate the diffuseness in the case law. However, the Court has been decidedly cautious about plunging into this subject area.³⁹⁸ This reticence

agencies are open to debate. Compare Adrian Vermeule, *Deference and Due Process*, 129 HARV. L. REV. 1890, 1919–30 (2016) (arguing for agencies' superior institutional competence), with Ronald M. Levin, *Administrative Procedure and Judicial Restraint*, 129 HARV. L. REV. F. 338, 338–42 (2016) (expressing mild reservations about Vermeule's analysis).

395. See *supra* notes 168–174 and accompanying text. The courts' lack of reliable information may be even more troubling when questions about an agency's likely future conduct are raised in a motion for a stay or other preliminary relief. In those situations, the record for review may be especially thin. For discussion of illustrative cases, see *supra* notes 180–184, 380 and accompanying text.

396. See *supra* Part II.E.4 (discussing Sunstein's critique).

397. Strauss, *Rulemaking Continuum*, *supra* note 10, at 1483 (“[S]atisfied consumers of publication rules [i.e., guidance] tend not to appear in court, and the valuable functions publication rules perform, especially in constraining the behavior of agency operatives, consequently appear in court opinions only as asides.”).

398. See *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1204, 1210 (2015) (refusing to reach the question of whether the so-called interpretive rule involved in the case could be more properly characterized as legislative). In *United States v. Texas*, 136 S. Ct. 2271 (2016), *aff'g by equally divided Court* 809 F.3d 134 (5th Cir. 2015), the government's loss in district court rested squarely on an alleged § 553(b)(A) violation, and the issue was fully briefed in the Supreme Court, but no Justice asked a single question about that issue during oral argument. (The Court's subsequent tied vote in that case does not show that any of the Justices had wanted to take a stand on this issue. The four who voted to affirm may have considered the deferred action program to be unlawful on the merits; the four who voted to reverse may have concluded that the plaintiffs lacked standing to sue.)

may have been justified, because its track record in handling questions regarding the exemption has been mixed at best. Its opinions on the interpretive rule exemption in *Guernsey*³⁹⁹ and *Mortgage Bankers Ass'n*⁴⁰⁰ have been well reasoned, although narrowly drawn. On the other hand, its sole venture into defining the policy statement exemption, in *Vigil*, was a blunder.⁴⁰¹ Thus, while an intervention by the Court could potentially be helpful, one should not count on it.

A better solution would be for courts to encourage, or at least look with favor on, agency exercises of rulemaking authority to regularize the procedures by which they will allow affected persons to contest their guidance documents at the enforcement stage. The institutional pronouncements highlighted in Part I.D. have already set forth relevant principles at a high level of generality. The next logical step would be for individual agencies to adapt and amplify on those or similar principles in relation to their respective programs. The FDA has already done this on an across-the-board basis, and other agencies have acted similarly in a more ad hoc manner.⁴⁰² Other agencies could follow their lead.⁴⁰³ If they act by regulation, the procedures would of course bind the agency;⁴⁰⁴ but even if the action is by guidance, it would have a constraining effect thereafter.⁴⁰⁵

This procedure could serve to alleviate the unpredictability objection to the binding norms test if the courts were to cooperate with it. They could do so by holding that a guidance document falls within the exemption if the agency has committed itself to providing an adequate opportunity for contestation, in conformity with the principles adopted earlier. In other words, if the agency spells out an adequate process by which it will “pay later,” its guidance should not be vulnerable to attack because of the agency’s failure to “pay now.” The judicial task of enforcing the boundaries of § 553(b)(A) would be less concerned with parsing the text of a guidance document in search of arguably coercive language or receiving evidence about the

399. *Shalala v. Guernsey Mem. Hosp.*, 514 U.S. 87 (1995); see *supra* note 352 and accompanying text (discussing the case).

400. 135 S. Ct. 1199; see *supra* note 357 (discussing the case).

401. See *supra* Part II.D.

402. Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 ADMIN. L. REV. 565, 612–13 (2012).

403. Jill E. Family, *Easing the Guidance Document Dilemma Agency by Agency: Immigration Law and Not Really Binding Rules*, 47 U. MICH. J.L. REFORM 1, 38–48 (2013) (proposing Good Guidance Practices for the United States Citizenship and Immigration Services).

404. See *supra* note 353 and accompanying text (discussing binding nature of legislative rules).

405. See *supra* notes 161–167 and accompanying text (discussing abuse of discretion cases).

agency's behavior patterns; instead it would be more concerned with ascertaining that the agency has adopted procedures that would afford a fair opportunity for contestation. Such regulations or policies could provide the best evidence of "openmindedness" in the sense that counts. Such a "safe harbor" approach would ameliorate both the unpredictability and the information deficits.⁴⁰⁶

This is not to say that the court should give the agency a blank check. Rather, the proposal assumes that courts could review the regulations for compliance with the essence of the binding norm analysis—that is, whether the stated procedures could be expected to give the challenger a fair opportunity to contest the agency's position as stated in the document. Presumably the court would set outer boundaries on agency discretion—not necessarily "best practices," but at least the minimum that is implicit in the guidance document exemption. To the extent that the agency's stated policies survive judicial review, agencies would have a basis for relying on them in future cases, although private persons may have valid arguments that their situation is distinguishable.⁴⁰⁷

To the extent the policies run into criticism, the agencies could revise them to meet the criticism, or they could stand their ground and hope for vindication in other judicial forums. Eventually, however, precedents could afford both agencies and practitioners an increasingly clear sense of what a fair opportunity for challenge would be. ACUS and bar groups could also contribute to the dialogue, as they have done in the past;⁴⁰⁸ "best practices" advice will not necessarily be coextensive with the requirements of the APA, but it can be instructive as a source of insight.

406. *Cf.* Faragher v. City of Boca Raton, 524 U.S. 775, 806–08 (1998) (stating that an employer's establishment of effective workplace policies to prevent and correct sexual harassment may provide a basis for an affirmative defense to Title VII liability).

407. The drafters of the MSAPA contemplated a similar procedural regime:

An agency may use its rulemaking authority to set forth procedures that it believes will provide affected persons with the requisite opportunity to be heard. To the extent that these procedures survive judicial scrutiny for compliance with the [duty to provide that opportunity], the agency will thereafter be able to rely on established practice and precedent in determining what hearing rights to afford to persons who may be affected by its guidance documents. As new fact situations arise, however, courts should be prepared to entertain contentions that procedures that have been upheld in past cases did not, or will not, afford a meaningful opportunity to be heard to some persons who may wish to challenge the legality or wisdom of a particular guidance document.

2010 MSAPA, *supra* note 92, at § 311 cmt.

408. *See, e.g.*, ACUS Recommendation 2017-5, *supra* note 108, at 61,736. The research report underlying this recommendation contains a wealth of information about guidance practices at multiple agencies. *See* PARRILLO, *supra* note 55.

Even assuming that judicial cooperation with the type of tradeoff envisioned here could be forthcoming, I do not mean to suggest that every agency would or should elect to specify in advance the manner and circumstances in which affected persons could contest the substance of a guidance document. Administrative law has recognized for decades that agencies may often have legitimate reasons for preferring not to engage in rulemaking on a particular subject.⁴⁰⁹ In this specific context, some agencies may simply feel that their clientele is not particularly litigious and the uncertainty inherent in the case law on § 553(b)(A) has not worked out particularly poorly for them. Other agencies, seeking the “optimal precision of administrative rules,”⁴¹⁰ might opt for a middle ground between a clear-cut policy and the status quo, perhaps by establishing a presumptive procedure that is nevertheless subject to adjustment over time. One can imagine a spectrum of possible ways in which an agency might declare its willingness to entertain a challenge to the substance of a guidance document. By choosing a location on this spectrum, an agency would be able to limit its exposure to liability under § 553(b)(A) to the extent that it wishes, provided it is willing to pay the corresponding procedural price in terms of a loss of flexibility at the implementation stage.

CONCLUSION

Having begun with a quotation from *Ghostbusters*, this article may as well conclude with another cinematic reference. In the first film in the *Pirates of the Caribbean* series, Elizabeth Turner (Keira Knightley) embarks on a pirate voyage after Captain Barbossa (Geoffrey Rush) refuses to return her to shore. She protests that the Pirate Code provides for her return, but he waves away her plea because “the Code is more what you’d call ‘guidelines’ than actual rules.”⁴¹¹ On a later voyage, however, the non-binding nature of the Code seems to have evaporated. Resisting Barbossa’s claim that, under the Code, only the pirate king may declare war, one of the mates exclaims: “Hang the Code!” The new keeper of the Code, Captain Teague (Keith Richards), promptly declares that “Code is the Law” and shoots him through the heart.⁴¹²

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

410. See generally Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983).

411. PIRATES OF THE CARIBBEAN: THE CURSE OF THE BLACK PEARL (Walt Disney Pictures 2003); see also *Pirates of the Caribbean: The Curse of the Black Pearl Quotes*, IMDB, www.imdb.com/title/tt0325980/trivia?tab=qt&ref_=tt_trv_qu (last visited Apr. 29, 2018) (reprinting the quote).

412. PIRATES OF THE CARIBBEAN: AT WORLD’S END (Walt Disney Pictures 2007); see also

Although the consequences of disputing a purported guideline are usually not quite as dire as that, this article has proceeded from the premise that agencies' misuse of interpretive rules and policy statements is a challenge that administrative law should continue to address. Those who apply the guidance exemption should remain cognizant of that problem as well as the affirmative benefits that the judicious use of guidance can make possible.

More specifically, this article has suggested that current doctrines regarding the policy statement exemption strike this balance credibly, although imperfectly; but the doctrines regarding the interpretive rules exemption could benefit from a serious overhaul. Judicial attention to the insights that administrative lawyers have developed outside of the courts can contribute substantially to this reconstruction.