Substituting Substantive for Procedural Review of Guidance Documents

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This Article proposes that courts substitute immediate substantive review for procedural review of agency guidance documents. The Article begins by reviewing the extensive literature about how courts should treat nonlegislative rules. Because such rules play an important role in assuring coherence and accountability of agency policies and interpretations and in communicating the views of agencies about such matters, the Article agrees with those who advocate ex post monitoring of agency use of rules issued without notice-and-comment procedures. Recognizing that ex post monitoring leaves much leeway for agencies to abuse guidance documents by depriving stakeholders of opportunities to participate in their development and of obtaining substantive judicial review of them, the Article advocates that nonlegislative rules generally should be subject to arbitrary and capricious review when issued. The Article proceeds to explain why other proposals to rein in agency discretion to use guidance documents—in particular, making the agency explain its decision to proceed by this mode and forcing the agency to consider timely petitions for reconsideration of such documents—are likely to have less effect with greater cost than its proposal for direct review of guidance documents.

In advocating for such review, however, the Article contends that courts will need to massage doctrines governing availability of review, such as those governing finality and ripeness of guidance documents. Even more significantly, the Article argues that review for reasoned decisionmaking will have to be modified to avoid seriously compromising the speed and procedural flexibility that make guidance documents an attractive means for agencies to communicate their views of policy and interpretation. It therefore develops a variant on arbitrary and capricious review that would require agencies to explain issuance of guidance in terms of factors that are relevant and alternatives that are plausible given the state of knowledge available to the agency when it acted. The Article concludes that such a doctrine can encourage agencies to solicit input even from stakeholders outside the issue networks affected by the guidance document, while preserving sufficient flexibility for the agency to issue the document quickly and without undue procedural burden.

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Introduction

Much ink has been spilled over the past three decades about the way federal agencies issue interpretive rules and statements of policy—which together are known as guidance documents or nonlegislative rules—and the way courts react to such documents.[1] Scholarship on guidance documents has developed into a debate between those who bemoan judicial doctrines that enable agencies to issue them too easily and those who complain that courts have imposed arbitrary barriers to their use,[2] with at least one recent participant intimating, in the vein of *Goldilocks*,[3] that courts have gotten it just right.[4] For the most part, scholarship has focused on procedural impediments to issuing guidance documents, with much of the debate addressing how courts should determine whether a rule is "legislative" rather than mere guidance.[5] This Article reviews this debate, explaining why those who favor giving agencies more leeway to use guidance documents have the better argument. More importantly, however, it illustrates that even this more defensible position is incomplete because it allows an agency to avoid stakeholder participation and judicial oversight and, thereby, to abuse issuance of guidance documents.

Some scholars have attempted to transcend this debate, suggesting solutions to the problems of agency abuse that do not depend on courts finding agency procedures defective. For example, one scholar has advocated that courts demand explanations from agencies about the choice of procedural mode by which they make policy—the choice to proceed by interpretative rule or policy statement rather than adjudication or legislative

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1. There has also been recent attention given to guidance documents in state administrative law. *See, e.g.*, REVISED MODEL STATE ADMIN. PROCEDURE ACT § 311 & cmt. (2010) (setting out model guidelines for the issuance and binding effect of guidance documents). Although many of the arguments I make have merit for state administrative law, this Article directly addresses only federal administrative law.

2. *Compare* 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, 1372 (1992) (concluding that numerous policy documents bind the public and therefore should have been issued as legislative rules), *with* Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 807 (2001) (criticizing the D.C. Circuit for unduly restricting agency use of guidance documents).

3. *See generally* JAMES MARSHALL, GOLDILOCKS AND THE THREE BEARS (1988).

4. *See* David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 324–25 (2010) (contending that current doctrine is better than competing approaches for determining whether rules are legislative). To be fair to Franklin, he does not argue that current doctrine is problem free. *See id.* at 324 (acknowledging all of the current doctrine's "smog and muddle").

5. *See, e.g.*, *id.* at 324–25 (concluding that current doctrine is better than competing approaches in determining whether a rule is legislative rather than mere guidance); William Funk, *When Is a "Rule" a Regulation? Marking a Clear Line Between Nonlegislative Rules and Legislative Rules*, 54 ADMIN. L. REV. 659, 671 (2002) (arguing that a "simple, notice-and-comment test works for determining whether a rule is a legislative" or not); Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705, 1719 (2007) (arguing that if notice-and-comment procedures were used, "the rule should be deemed legislative and binding . . . . If they were not, the rule is nonlegislative.").

rulemaking.[6] Another has focused on the hardships that use of guidance documents can cause to regulatory beneficiaries and has suggested allowing stakeholders to petition for amendment or repeal of a guidance document.[7] This Article evaluates these two proposals and demonstrates that they are unlikely to achieve their objectives because they fail to recognize that current doctrines of review must be modified to make them sufficiently rigorous to prevent agency abuse of guidance documents without so burdening their use as to forfeit the efficiencies that make them valuable regulatory tools.

Finally, and most significantly, this Article proposes to shift the debate from one of procedural requirements to one of substantive review of guidance documents. It advocates that courts modify their application of justiciability doctrines to allow stakeholders to obtain immediate review of nonlegislative rules under the Administrative Procedure Act (APA), including, most significantly, arbitrary and capricious review.[8] It also suggests how courts can tailor reasoned-decisionmaking review to discourage agencies from abusing guidance documents[9] and to encourage them to take more care and include more stakeholders in the development of such documents,[10] without unduly bogging down the issuance of these documents.

I. Modes of Policy Making and Interpretation

The Administrative Procedure Act (APA) defines a rule as "the whole or a part of an agency statement of . . . future effect designed to implement,

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6. *See* Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1385 (2004) (contending that courts do not permit agencies to select their preferred policy-making form without explanation—courts establish the standard of review under which the action will be assessed, determine who can bring a suit and when it can be brought, and "shape the procedures that an agency must follow when it relies on a policymaking tool").

7. Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 434 (2007).

8. 5 U.S.C. § 706(2)(A) (2006). Bill Funk made similar suggestions in a proposed bill he presented to the Administrative Law Forum. William Funk, *Legislating for Nonlegislative Rules*, 56 ADMIN. L. REV. 1023, 1024–26 (2004). The form of Funk's essay, however, precluded a comprehensive analysis of his proposal and the need to modify doctrine to allay concerns about immediate reviewability. *See id.* at 1024 (explaining that due to spatial constraints the author was unable to treat all of the issues in a holistic fashion). Furthermore, my proposal would obviate the need for Congress to amend the APA, a prospect that is unlikely.

9. The Supreme Court adopted the reasoned-decisionmaking approach to arbitrary and capricious review in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983). *See also* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 476–77 (2003) (noting that the Supreme Court adopted a version of the D.C. Circuit's "hard-look" standard, "ensuring that agencies respond to criticisms and explain their rejection of alternative solutions").

10. In one of his many articles on guidance documents, Professor Robert Anthony advocated that policy statements be substantively reviewed with less deference than that usually accorded under the hard-look test. Robert A. Anthony & David A. Codevilla, *Pro-Ossification: A Harder Look at Agency Policy Statements*, 31 WAKE FOREST L. REV. 667, 680 (1996). Anthony, however, does not address when such review should occur.

interpret, or prescribe law or policy . . . ."[11] It further provides that an agency must provide notice of a proposed rule and an opportunity for comment before the agency can promulgate a rule.[12] The APA, however, includes an exception from notice and comment for "interpretative [sic] rules," and "general statements of [agency] policy,"[13] that is, guidance documents.[14] These two classes of rules have been the subject of numerous judicial opinions that are confusing, inconsistent, and the subject of much scholarship that, while attempting to clear up the judicial mess, has itself spawned lively debate.

To those unversed in the peculiarities of administrative law, a rule is a mandate by the government with which entities subject to the rule are commanded to comply, often upon threat of sanction.[15] Such rules are known in administrative law as "legislative rules."[16] Guidance documents, however, differ from legislative rules because they do not command anyone to do anything.[17] That is, in a sense on which I will elaborate later, they do not have independent binding legal force.[18] They merely indicate how the agency intends, at the time the document is issued, to exercise discretion it may enjoy when the agency does take action with direct legal consequences.[19] Courts have reasoned that lack of legal force is what justifies the exemption from notice-and-comment rulemaking.[20]

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11. 5 U.S.C. § 551(4).

12. *Id.* § 553(b)–(c).

13. *Id.*

14. Originally, *guidance documents* referred to informal statements such as press releases, which seemed not to be included in the class of interpretive rules and policy statements. Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1468 (1992). Given that even press releases and instructions to staff generally inform regulated entities of an agency's current view of a policy or interpretation and come within the APA's definition of a rule, current parlance treats these documents as interpretive rules or policy statements. *See* Michael Asimow, *Guidance Documents in the States: Toward a Safe Harbor*, 54 ADMIN. L. REV. 631, 632 (2002) (calling interpretive rules and policy statements "guidance documents"); Mendelson, *supra* note 7, at 398–99 (explaining that she refers to interpretive rules and policy statements excepted from the APA notice-and-comment procedures as "guidance documents" and listing examples).

15. *See* Funk, *supra* note 5, at 659 (asserting that legislative rules have the force of law).

16. *See* Gersen, *supra* note 5, at 1709 (describing some confusion of terminology, but stating that usually "a rule is termed legislative if it is legally binding").

17. *See* Robert A. Anthony, *"Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: Lifting the Smog*, 8 ADMIN. L.J. AM. U. 1, 14 (1994) [hereinafter Anthony, *Lifting the Smog*] ("[An agency] cannot lawfully attempt to compel compliance through a mere bulletin or guidance or other nonlegislative document.").

18. *See infra* text accompanying notes 84–85.

19. *See* TOM C. CLARK, ATT'Y GEN., U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947) [hereinafter ATTORNEY GENERAL'S MANUAL] (defining interpretive rules as those "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers," and general statements of policy as those "issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power").

20. *See, e.g.*, Nat'l Ass'n of Broadcasters v. FCC, 569 F.3d 416, 426 (D.C. Cir. 2009) (citing Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 452 F.3d 798, 807 (D.C. Cir. 2006))

Unfortunately, beyond consensus that nonlegislative rules cannot be enforced in their own right, the precise notion of what force should distinguish legislative rules from guidance documents has confused the courts.[21]

To understand what is at issue in the debate about how to distinguish legislative from nonlegislative rules, it is helpful to summarize the various modes by which an agency can issue an interpretation or set policy. Agency actions that represent exercises of an agency's uniquely sovereign role include issuing legislative rules, issuing orders or permits in accordance with adjudication of particular cases, and prosecuting alleged unlawful conduct. Some agencies are statutorily authorized to take only one of these kinds of actions;[22] others are authorized to take two or even all three.[23]

A. Legislative Rulemaking

The canonical mode by which agencies define the meaning of statutes and regulations or establish policy is legislative rulemaking.[24] Under current

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(stating that in distinguishing a statement of policy from a legislative rule, "the court looks to the effects of the agency's action, asking whether the agency has imposed any rights and obligations or has left itself free to exercise discretion"); Appalachian Power Co. v. EPA, 208 F.3d 1015, 1024 (D.C. Cir. 2000) (stating that whether a rule is interpretive depends on "whether the interpretation itself carries the force and effect of law" (quoting Paralyzed Veterans v. D.C. Arena L.P., 117 F.3d 579, 588 (D.C. Cir. 1997))); Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974) (distinguishing a substantive rule from a statement of policy on the grounds that the latter "does not establish a 'binding norm'" (quoting Reginald Parker, *The Administrative Procedure Act: A Study in Overestimation*, 60 YALE L.J. 581, 598 (1951))).

21. *See, e.g.*, *Ctr. for Auto Safety*, 452 F.3d at 807 (comparing cases and concluding that the case law demonstrates that "it is not always easy to distinguish between those 'general statements of policy' that are unreviewable and agency 'rules' that establish binding norms or agency actions that occasion legal consequences that are subject to review").

22. *See, e.g.*, 7 U.S.C. § 136w (2006) (granting the Administrator of the EPA authority to issue rules to carry out provisions in the Federal Insecticide, Fungicide, and Rodenticide Act); 29 U.S.C. § 211 (2006) (granting the Administrator of the Wage and Hour Division prosecutorial power to bring all actions for injunctions to restrain violations of the Fair Labor Standards Act); *id.* § 659 (granting OSHRC authority to resolve contests of the Secretary of Labor's citations of violation under the Occupational Safety and Health Act); 42 U.S.C. § 2000e-5(f)(1) (2006) (granting the EEOC prosecutorial power to prevent violations of Title VII).

23. *See, e.g.*, 21 U.S.C. §§ 371–372 (2006) (granting the FDA regulatory, adjudicatory, and prosecutorial power under the Federal Food, Drugs, and Cosmetics Act); 29 U.S.C. §§ 156–161 (granting the NLRB regulatory, prosecutorial, and adjudicatory power under the National Labor Relations Act); 42 U.S.C. §§ 7601(a), 7605, 7607 (granting the EPA regulatory, prosecutorial, and adjudicatory power under the Clean Air Act); 47 U.S.C. § 154(i)–(j) (2006) (granting the FCC regulatory, prosecutorial, and adjudicatory power to regulate wire and radio communications under the Communications Act of 1954).

24. *See* SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194, 202 (1947) ("The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future."); KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 6.15, at 283 (Supp. 1970) ("The procedure of administrative rule making is one of the greatest inventions of modern government."); Glen O. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 505–06 (1970) (stating that "[t]here are . . . advantages in promulgating general regulatory policies in rulemaking proceedings," but then proceeding to show that in particular situations, there are reasons to allow agencies to use adjudication to announce policy).

standards of reasoned decisionmaking, an agency that adopts an interpretation or policy within a legislative rule has to explain why it did so given the record before it when it acted.[25] As already intimated, such rules carry independent force of law in the sense that, if valid, an entity can be punished for violating them without proof that it violated the letter or spirit of the statute pursuant to which the rule was issued.[26] Legislative rules also bind the agency, which must comply with its own rules.[27] If the agency wants to act in a manner inconsistent with a legislative rule, it first has to change the rule.

The advantages of legislative rulemaking for announcing interpretations or policy are several. First, because legislative rulemaking requires notice and comment,[28] entities affected by the rule have an opportunity to provide input, and the agency gets the benefit of the information they supply.[29] Although some argue that most meaningful participation occurs before a legislative rule is formulated,[30] agency consideration of such a rule generally

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25. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) (clarifying that even when an agency removes or changes a regulation, it must still supply a reasoned analysis for its decision); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971) (mandating that courts review agency decisions based on the record before the agency when it acted).

26. *See* Strauss, *supra* note 14, at 1466–67 (noting that violation of a legislative rule "may form the basis for penal consequences").

27. United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 265–67 (1954); *see also* Thomas W. Merrill, *The* Accardi *Principle*, 74 GEO. WASH. L. REV. 569, 596 (2006) (arguing that this principle has significance for how agencies and courts treat guidance documents).

28. Technically, an agency may adopt a legislative rule without using notice-and-comment procedures if it can show good cause for why it opted to skip this process. 5 U.S.C. § 553(b)(B) (2006) (stating that notice-and-comment rulemaking does not apply "when the agency for good cause finds . . . notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest"). Successful invocation of this exception, however, requires some situation-specific explanation by the agency of why notice and comment is "impracticable, unnecessary, or contrary to the public interest." *See* Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1780–81 & n.244, 1783 (2007) ("Courts are often skeptical of generic assertions of the need for immediate guidance . . . .").

29. Richard K. Berg, *Re-examining Policy Procedures: The Choice Between Rulemaking and Adjudication*, 38 ADMIN. L. REV. 149, 163–64 (1986) ("Rulemaking [provides regulated entities] wider notice and broader opportunities for participation . . . . Such broader participation also makes rulemaking more efficient as an information-gathering technique for the agency."); *see also* Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 414 & n.6 (2005) ("Agencies react to the notice-and-comment process by making changes in their proposed rules."); Susan Webb Yackee, *Sweet-Talking the Fourth Branch: The Influence of Interest Group Comments on Federal Agency Rulemaking*, 16 J. PUB. ADMIN. RES. & THEORY 103, 103 (2005) (finding that agencies are responsive to consensus in public comments and make changes in final rules in response to comments).

30. *See* David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 231–32 (stating that pressure on agencies to provide responses to comments has caused them "to complete the bulk of their work prior to the onset of the rulemaking process"); Cary Coglianese et al., *Transparency and Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924, 931–32 (2009) ("Many internal deliberations and policy discussions occur before an agency issues its NPRM, during a part

is known well before the agency publishes a notice of proposed rulemaking.[31] Therefore, such rules attract more attention, and agencies provide more opportunity for interest-group involvement in their formulation than agencies do for other means of developing policy or interpretations. Second, legislative rulemaking provides significant advance notice of the potential interpretation or policy that the agency may adopt. Notice of a proposed legislative rule must be meaningful in the sense of at least informing the public about what the final rule might entail.[32] Because a controversial legislative rulemaking usually takes years,[33] the announcement of a rule in the agency's regulatory agenda and the notice of proposed rulemaking essentially give entities several years to plan for compliance with the final rule that may result. In this sense, legislative rulemaking provides strong protection of reliance interests on current interpretations and policies.

The costs and long lead times for legislative rulemaking, however, have downsides as well. An agency may discover a loophole in its regulatory scheme or some dire scenario that was not envisioned when it adopted relevant legislative rules.[34] New information or changed circumstances may warrant a change in existing policy. A change in administration may also prompt a change in the significance placed on costs of compliance or the benefits of a regulatory scheme, encouraging a current agency to desire a change in policy or interpretation.[35] The delay inherent in legislative

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of the process that is least open and transparent."); Stephanie Stern, *Cognitive Consistency: Theory Maintenance and Administrative Rulemaking*, 63 U. PITT. L. REV. 589, 600 (2002) (discussing empirical evidence that agencies "lock in" to a rule once it is proposed).

31. *See* Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1956–57 (2008) (arguing that repeat players can provide input well before the agency issues a notice of proposed rulemaking (NOPR)). Agencies today frequently publish an advanced NOPR, which is intended to get public comment before the agency has committed to a particular proposed course of action. Barbara H. Brandon & Robert D. Carlitz, *Online Rulemaking and Other Tools for Strengthening Our Civil Infrastructure*, 54 ADMIN. L. REV. 1421, 1465–66 (2002).

32. *See* NRDC v. EPA, 279 F.3d 1180, 1186 (9th Cir. 2002) (explaining that a final rule may deviate from a proposed rule only when "'interested parties reasonably could have anticipated the final rulemaking from the [proposed rule]'" (quoting NRDC v. EPA, 863 F.2d 1420, 1429 (9th Cir. 1988))).

33. *See* Cornelius M. Kerwin & Scott R. Furlong, *Time and Rulemaking: An Empirical Test of Theory*, 2 J. PUB. ADMIN. RES. & THEORY 113, 124, 134–37 (1992) (reviewing data showing that major EPA rules took, on average, three years from the time the rule entered the agency's regulatory-development management system and the date the final rule was issued).

34. *See Chenery II*, 332 U.S. 194, 202–03 (1947) (allowing the SEC to adopt a policy by adjudication, in part because "problems may arise in a case which the administrative agency could not reasonably foresee"); *cf.* Jeffrey J. Rachlinski, *Rulemaking Versus Adjudication: A Psychological Perspective*, 32 FLA. ST. U. L. REV. 529, 551 (2005) (positing that the dynamic, adversarial nature of management–labor relations makes it "difficult for an agency to foresee the consequences of any rule it might adopt").

35. Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 953–54 (2008) (noting that, compared to independent agencies, executive agencies engage in much more regulatory activity in the last quarter of a president's term).

rulemaking imposes the foregone benefit of a better or more accountable policy or interpretation while the rule is being changed. In some instances, need for change in the policy or interpretation does not warrant agency investment of resources in a full-blown legislative rulemaking.[36] In such situations, notice and comment becomes an expensive proposition with fewer concomitant benefits.

B. Adjudication

For these reasons, shortly after the APA was adopted, the Supreme Court held that an agency may create new policy or issue a new interpretation as part of an adjudicatory proceeding.[37] The outcome of such a proceeding is an order that has binding force on parties named in it.[38] In that sense, orders, like rules, have independent legal significance. An entity that violates an agency order is subject to sanction as specified in the statute authorizing the agency to issue such orders.[39]

Some statutes require agencies to use formal trial-type procedures in adjudications.[40] Such procedures allow the entities facing the potential order to participate in the proceeding and to submit evidence and their views on relevant agency policies and interpretations.[41] In addition, liberal understandings of intervention and other participation rights in agency proceedings allow other interested entities avenues for participation and input into agency policies and interpretations at issue in a formal adjudication.[42] Agency adjudication, however, also includes the bulk of day-to-day decisions

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36. *See* E. Donald Elliott, *Re-inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992) (asserting that the wisdom of adopting policy by legislative rulemaking depends on, among other things, "how frequently the agency anticipates the question will come up").

37. *Chenery II*, 332 U.S. at 203.

38. Columbia Broad. Sys., Inc. v. United States, 316 U.S. 407, 418 (1942).

39. *See, e.g.*, 15 U.S.C. § 78ff (2006) (specifying penalties for violations of the Securities and Exchange Act of 1934); 33 U.S.C. § 1319 (2006) (specifying penalties for violations of the Clean Water Act); 47 U.S.C. §§ 501–502 (2006) (specifying penalties for violations of the Communications Act of 1934); 49 U.S.C. §§ 46301–46304 (2006) (specifying penalties for violations of airline safety regulations).

40. If a statute requires an agency to issue an order based on the record after opportunity for a hearing, the APA requires the agency to use trial-type formal procedures. 5 U.S.C. §§ 554, 556–557 (2006).

41. *Id.* § 556(d).

42. *See* Office of Commc'n of the United Church of Christ v. FCC, 359 F.2d 994, 1000–06 (D.C. Cir. 1966) (holding that a group whose members listen to a radio station have the right to participate in a hearing on whether to relicense the station); *see also* 5 U.S.C. § 555(b) ("So far as the orderly conduct of public business permits, an interested person may appear before an agency . . . for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding . . . ."). However, particular provisions of the statute authorizing the adjudication may restrict who may participate. *See, e.g.*, Envirocare of Utah, Inc. v. Nuclear Regulatory Comm'n, 194 F.3d 72, 75, 77–78 (D.C. Cir. 1999) (holding that even though a statute required an agency to grant intervenor status to "any person whose interest may be affected by the proceeding," the agency could deny such status to an already-licensed competitor of the entity seeking a license (internal quotation marks omitted)).

that result in orders, and for most of these, the APA and most statutes do not require that the agency use any procedure.[43] For such "informal adjudication," the interested entities' ability to provide input into the agency decision is reduced because many informal adjudications fly below the radar screen of interest groups that might want to participate in the formulation of relevant interpretations or policy. In addition, an agency may apply a new policy or interpretation in an adjudication without any prior notice of its intent to do so.[44] Such leeway is necessary to allow an agency to close loopholes in regulations. Moreover, an agency may need to develop a policy in reaction to various factual scenarios that it faces and may find a case-by-case approach more effective than attempting to foresee and address all factual variants in a synoptic rulemaking proceeding.[45] Hence, if the result of the new policy or interpretation would undermine legitimate reliance interests, an agency may have to choose between upsetting such interests and not adopting the policy or interpretation that it believes is best.

Out of concern for reliance interests, the courts have limited agency ability to change policy or interpretations in adjudicatory proceedings. In *NLRB v. Bell Aerospace Co.*,[46] the Supreme Court held that the NLRB could change a long-standing interpretation of whether all buyers are "managerial" employees under the National Labor Relations Act.[47] The Court explained that rulemaking is the preferable route for changing long-standing interpretations of law and that agency decisions to use adjudication to change an interpretation are subject to review for abuse of discretion.[48] But *Bell* was very tolerant of the NLRB's use of adjudication, holding that the agency was not precluded from making such a change when the resulting order did not impose any substantial penalty.[49]

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43. *See* Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 653–56 (1990) (holding that the only requirements the APA imposes on informal adjudications are contained in § 555, which sets out "minimal requirements"). If the agency order denies liberty or property, then the Due Process Clause will mandate the minimum procedure that agency must use in the adjudication. *E.g.*, Mathews v. Eldridge, 424 U.S. 319, 332–33 (1976).

44. 5 U.S.C. § 535(b)(A) (stating that notice is not required prior to the issuance of "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice").

45. *See* Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 431–34 (1981) (analyzing when synoptic versus incremental approaches to regulation are appropriate).

46. 416 U.S. 267 (1974).

47. *Id.* at 294–95.

48. *Id.*

49. Essentially, *Bell* balanced the agency interest in proceeding by adjudication against the adverse consequences to reliance interests. The Court deferred to the implicit determination by the agency that retroactive application was sufficiently important and downplayed reliance interests because there was no showing "that the adverse consequences ensuing from such reliance are so substantial that the Board should be precluded from reconsidering the issue in an adjudicative proceeding." *Id.*

Over the years, the D.C. Circuit has tried to develop more meaningful standards governing when an agency may change long-standing interpretations by adjudication. Traditionally, that court has permitted retroactive changes to interpretations when the need for the retroactivity is clear, important, and not outweighed by legitimate reliance interests in the old interpretation.[50] Recent case law, however, has drifted to focus solely on whether an interpretation changed the law rather than interpreted existing law. Focus on "change in law" implicitly considers only the legitimacy of the regulated entity's reliance interests—in essence, the fairness to those regulated—rather than balancing those interests against the agency's interest in retroactive application.[51]

C. Guidance Documents

Announcing a new policy or interpretation in a guidance document promises significant social benefits when there is good reason not to make the announcement by legislative rulemaking. Notice-and-comment procedures are time-consuming and demanding of agency resources, which may make them an inefficient means of tweaking policy or interpretations already adopted by legislative rule.[52] In contrast, the APA requires only that an agency publish interpretive rules or statements of policy in the Federal Register,[53] and if a person against whom the agency seeks to use the document has actual notice of it, the agency pays no penalty even if it neglects to do that.[54] Hence, the process of issuing a guidance document can

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50. *See, e.g.*, Kieran Ringgenberg, United States v. Chrysler*: The Conflict Between Fair Warning and Adjudicative Retroactivity in D.C. Circuit Administrative Law*, 74 N.Y.U. L. REV. 914, 923 & nn.60–64 (1999) (summarizing cases in which the D.C. Circuit evaluated the retroactive application of changed agency interpretations).

51. *See, e.g.*, Epilepsy Found. of Ne. Ohio v. NLRB, 268 F.3d 1095, 1102 (D.C. Cir. 2001) (stating that retroactive application of interpretations are limited to "new applications of [existing] law, clarifications, and additions" (alteration in original) (citations omitted)); Verizon Tel. Cos. v. FCC, 269 F.3d 1098, 1109 (D.C. Cir. 2001) ("In the ensuing years, in considering whether to give retroactive application to a new rule, the courts have held that the governing principle is that when there is a substitution of new law for old law that was reasonably clear, the new rule may justifiably" [not be given retroactive effect, but] [b]y contrast, retroactive effect is appropriate for new applications of [existing] law, clarifications, and additions." (third alteration in original) (internal quotation marks omitted)); Williams Natural Gas Co. v. FERC, 3 F.3d 1544, 1554 (D.C. Cir. 1993) (holding that when an agency substitutes new law for old, "it may be necessary to deny retroactive effect to a rule announced in an agency adjudication in order to protect the settled expectations of those who had relied on the preexisting rule").

52. *See* Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520, 529–30 (1977) (noting that agency staff members universally oppose a statutory notice-and-comment requirement for guidance documents because they fear it would add to delay and agency costs, often with no concomitant benefit).

53. 5 U.S.C. § 552(a)(1)(D) (2006).

54. The APA provides that "[e]xcept to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be . . . adversely affected by[] a matter required to be published in the Federal Register and not so published." *Id.* § 552(a)(1). Additionally, a statement of policy or interpretation may be "used, or cited as precedent by an agency against a

be quicker and more flexible than adopting a legislative rule. Given the incentives facing agencies, the alternative to use of guidance documents often would be simply to announce policies and interpretations as part of adjudications.[55] In most cases, this would be unfortunate. Guidance documents apply prospectively; hence, using them protects reliance interests better than proceeding by adjudication.[56] In essence, regulated entities gain information about what the agency is considering from guidance documents. Compared to having to guess about how the agency might react to their conduct, regulated entities are in a much better position if they know the likely reaction.[57]

Guidance documents can also increase the consistency and accountability of agency action. Consider an agency that is responsible for prosecuting regulatory violations. Suppose that the agency employs numerous inspectors who, when they find what they believe to be violations, issue citations. If a citation is challenged, the agency is responsible for resolving whether a violation occurred. Suppose further that the agency learns that inspectors are not issuing citations even when they discover situations that the agency believes are regulatory violations, but the agency believes that the situations are not sufficiently imperative to devote the resources to adopt a legislative rule. The failure of inspectors to cite the problematic conduct then means that the conduct does not trigger an adjudicatory proceeding. Essentially, the agency is deprived of any means of informing its staff and the public of what it believes constitutes a violation. More generally, when the costs of monitoring individual adjudicatory outcomes is prohibitive, if an agency cannot issue a guidance document directing its inspectors when to issue citations, then pragmatically determining whether a particular factual scenario warrants prosecution is left to each inspector. Different inspectors will use their own judgment. Thus, an entity that engages in conduct that one inspector considers a violation worthy of prosecution will have to defend itself in court, while another that engages in the same conduct may face no ramifications.

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party . . . only if—(i) it has been indexed and either made available or published as provided by this paragraph; or (ii) the party has actual and timely notice of the terms thereof." *Id.* § 552(a)(2).

55. *See* Franklin, *supra* note 4, at 306 (arguing that too parsimonious a view of exceptions from notice and comment for guidance documents will induce agencies to shift to policy making through adjudication).

56. To the extent that investments made prior to announcement of new policy or interpretation may be undermined by the change, legislative rulemaking usually would protect reliance interests better than guidance documents because of the delay between notice of proposed rulemaking and the issuance of a final rule. But this is merely a silver lining to the cloud of delay inherent in notice-and-comment proceedings. Moreover, increased protection of reliance interests by legislative rules is somewhat arbitrary in that investments made after the NOPR, although often not in reasonable reliance on the old rule, will also be protected by the delay.

57. *See* Strauss, *supra* note 2, at 808 (arguing that citizens are better off knowing the instructions central officials give to those implementing the law than if implementation is "remitted to the discretion of local agents and to 'secret law'").

One might think that inconsistency will ultimately be resolved by judicial determinations of whether the conduct at issue is a regulatory violation. Such resolution, however, can take many years, and different courts might maintain different views about the bounds of the regulatory program. Moreover, if the policy is one of prosecutorial discretion not to enforce regulations against some who are technically in violation, then the courts will never get the opportunity to opine about the meaning of the regulations and, hence, cannot provide the desired consistency.[58] In that situation, the ultimate liability of the violator will depend on whether an inspector issued a citation, which in turn leaves to the inspector the evaluation of whether the matter is worthy of enforcement. Given that inspectors, unlike agency heads, are not generally subject to political monitoring, prosecutions might not only be inconsistent, but any policy that does emerge also will not be subject to meaningful political oversight.[59]

Guidance documents, however, are not a panacea. Because so little is required of the agency before issuing a nonlegislative rule, an agency may issue one with no input even from those with strong interests in it.[60] Often, however, in formulating guidance documents, agency staff perceives value in participation by those outside the agency or a need to consult with various stakeholders with whom staff interacts on a regular basis.[61] But these informal channels of participation work best for repeat players—or representatives of those with interests that are sufficiently focused—that they overcome free-rider problems and other disincentives to organize; groups that are neither repeat players nor organized representatives of focused interests are apt to be excluded from the formulation process.[62] One might

58. *See* Heckler v. Chaney, 470 U.S. 821, 832 (1985) (concluding that agency decisions not to bring particular prosecutions generally are exempt from review under the APA because they are "committed to agency discretion").

59. *See* Strauss, *supra* note 2, at 808 ("Agency administration is aided when central officials can advise responsible bureaucrats how they should apply agency law.").

60. *See* Asimow, *supra* note 52, at 574–75 (summarizing how public participation benefits rulemaking); Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 MO. L. REV. 695, 702–03 (2007) (arguing that public participation is important to prevent capture, provide information to agencies, and instill a sense of legitimacy).

61. *See* CORNELIUS M. KERWIN & SCOTT R. FURLONG, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 200 (4th ed. 2011) (reporting that agencies may seek information from interest groups that they believe have superior information); Asimow, *supra* note 52, at 575 (explaining that agencies need information gathered through public participation to interpret laws and regulations); Mendelson, *supra* note 7, at 426 (observing that the EPA's 2003 Public Involvement Policy seeks to engage the public on proposed policies by encouraging officials to reach out to the public).

62. Mendelson, *supra* note 7, at 424–25 (arguing that avoiding notice-and-comment procedures are more likely to exclude regulatory beneficiaries than regulated entities); William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66, 70 (2004) (observing that agency consultation with outside-interest representatives prior to issuing notices of proposed rules "was bounded by administrators' past experience and by their sense of who the significant players were").

counter that interested entities will have an opportunity to participate and influence the subject of the guidance document before an agency relies on it to take action that embodies the policy or interpretation in a rule, order, or a prosecution in court.[63] But once an agency has committed to guidance, the likelihood of participation altering its assessment of whether the guidance is worthwhile is small.[64] In addition, there are numerous scenarios under which such subsequent opportunities to influence the interpretation or policy will not arise.

For example, policy statements are generally not reviewable when issued.[65] Hence, a regulated entity has to decide whether to refuse to comply with the policy announced—saving the compliance costs but risking enforcement and a possible penalty for failing to meet statutory or regulatory standards. The alternative is for the entity to comply, bearing the costs of doing so but avoiding litigation and penalty costs.[66] If the rule is such that all regulated entities calculate compliance as the better course, then the policy will never be challenged in court, denying the entities and others any opportunity to influence the ultimate policy. Essentially, the policy becomes practically binding in that it induces compliance even though it does not command independent force of law.[67] Even more troubling, an agency might exploit the practically binding potential of policy statements to induce compliance with a policy that the agency believes is likely to succumb to political or legal opposition were it adopted using notice-and-comment procedures.[68]

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63. Essentially, this is analogous to the point made that even if guidance documents are not reviewable when issued, they will be subject to review when applied. *See, e.g.*, Gersen, *supra* note 5, at 1721 (arguing that the Supreme Court's decision in *United States v. Mead Corp.*, 533 U.S. 218 (2001), makes the legislative-rule doctrine consistent with agency choice and flexibility by providing incentives for using formal procedures in substantively important interpretations).

64. *See* Stern, *supra* note 30, at 597 ("The timing of rulemaking encourages agency lock-in by concentrating the bulk of decisionmaking in the pre-notice period.").

65. This is consistent with cases reviewing whether issuances of purported policy statements are procedurally invalid, because such review addresses whether the statement truly is a guidance document. *See, e.g.*, Cement Kiln Recycling Coal. v. EPA, 493 F.3d 207, 228 (D.C. Cir. 2007) (finding that an EPA guidance document was a nonbinding policy statement and that review of such was outside the court's jurisdiction); Gen. Elec. Co. v. EPA, 290 F.3d 377, 385 (D.C. Cir. 2002) (holding that an EPA guidance document was in fact a legislative rule rather than a policy document and that, as such, the EPA was required to comply with the procedural requirements of the APA).

66. *See* Johnson, *supra* note 60, at 703 (identifying the risk that nonlegislative rules might become law through exerting a coercive effect on the regulated community resulting in compliance or through agencies treating the nonlegislative rules as binding); Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. 343, 344–45 (2009) (using a hypothetical scenario to illustrate the potential coercive effect of guidance).

67. *See* Office of Mgmt. & Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3435 (Jan. 25, 2007) (explaining that guidance documents "could affect behavior in a way that might lead to an economically significant impact").

68. *See* James T. Hamilton & Christopher H. Schroeder, *Strategic Regulators and the Choice of Rulemaking Procedures: The Selection of Formal vs. Informal Rules in Regulating Hazardous Waste*, LAW & CONTEMP. PROBS., Spring 1994, at 111, 130–32 (hypothesizing that agencies will use informal rulemaking to avoid judicial oversight and political cost); Mendelson, *supra* note 7, at

The potential for agency abuse is exacerbated when agencies act to relieve regulated entities from regulatory burdens. Such relief by guidance document can cut off all avenues for beneficiary groups seeking increased regulatory stringency to pursue judicial reversal of the agency policy or interpretation.[69] Free from the threat of judicial review, an agency is also more apt to exclude representatives of such beneficiaries from the process of formulating the policy or interpretation. Consider, for example, a policy statement indicating that an agency intends to refrain from enforcing a statute against a class of entities arguably within its purview, because the agency interprets the statute not to include that class. The fallout from this policy statement is simply that the agency will not bring enforcement actions against entities in this class. The failure to bring such enforcement actions is not an agency proceeding in which those seeking enforcement can participate, and, unless the agency's authorizing statute explicitly provides criteria governing the decision to prosecute violations, the decision not to enforce is unreviewable under the APA because it is "committed to agency discretion."[70] Hence, there is neither an opportunity to provide input into the policy up-front nor any means to invoke the judiciary after the fact to keep the agency within its statutory bounds.

II. Procedural Review to Prevent Guidance Document Abuse

Debate about guidance documents dates back to the enactment of the APA.[71] In the 1970s, several scholars addressed the use and abuse of these documents,[72] but the current legal landscape did not emerge until after

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408 (concluding that agencies can use guidance documents to "obtain a rule-like effect while minimizing political oversight and avoiding the procedural discipline, public participation, and judicial accountability required by the APA").

69. *See* Franklin, *supra* note 4, at 308–09 (asserting that policies that ease potential regulatory burdens may be implemented without further judicially reviewable agency action); Mendelson, *supra* note 7, at 420–24 (same).

70. Heckler v. Chaney, 470 U.S. 821, 831–33 (1985).

71. During the early stages of developing the APA, the final report of the Attorney General's Committee on Administrative Procedure described general statements of policy as follows:

> Most agencies develop approaches to particular types of problems, which, as they become established, are generally determinative of decisions. . . . As soon as the "policies" of an agency become sufficiently articulated to serve as real guides to agency officials in their treatment of concrete problems, that fact may advantageously be brought to public attention by publication in a precise and regularized form.

ATT'Y GEN.'S COMM. ON ADMIN. PROCEDURE, FINAL REPORT 26–27 (1941). Dissenters from this report, however, proposed that "[w]here an agency, acting under general or specific legislation, has formulated or acts upon general policies not clearly specified in legislation, so far as practicable such policies shall be formulated, stated, published, and revised in the same manner as other rules." *Id.* at 225 (minority report).

72. *See, e.g.*, Asimow, *supra* note 52, at 578 (recommending in 1977 that Congress require "postadoption public participation for nonlegislative rules"); Charles H. Koch, Jr., *Public Procedures for the Promulgation of Interpretative Rules and General Statements of Policy*, 64 GEO. L.J. 1047, 1061 (1976) (arguing that fairness requires courts to prescribe additional procedures for formulating rules and policy).

Vermont Yankee Nuclear Power Corp. v. NRDC[73] prohibited courts from mandating procedures in addition to those required by the APA or their authorizing statutes.[74] Since *Vermont Yankee*, the debate has focused largely on the question of what constitutes a legislative rule, which requires notice-and-comment proceedings, as opposed to a guidance document, which does not. Loosely speaking, three schools of thought have developed regarding review of procedure as a means of resolving the tensions created by the use of guidance documents.

A. Legal Effect and the Distinction Between Legislative Rules and Guidance Documents

The first school to emerge, led by Robert Anthony, was motivated by a concern for agency abuse of guidance documents.[75] When agencies adopt rules with the force of law, they are supposed to use notice-and-comment rulemaking. Often, however, agencies will adopt policy statements or interpretive rules that in practice bind regulated entities without following notice-and-comment procedures.[76] Professor Anthony devoted a good part of his scholarship to advocating that courts should police such abuse by determining which purported guidance documents actually do create new, practically binding law and reversing them on grounds that they are really "spurious rules"—legislative rules issued improperly without notice-and-comment procedures.[77]

Anthony advocated different tests to determine whether purported policy statements, as opposed to interpretive rules, were spurious rules.[78] On

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73. 435 U.S. 519 (1978).

74. *Id.* at 543.

75. *See* Anthony, *supra* note 2, at 1317–18 (noting that the ease of issuing guidance documents and the ability to avoid public and judicial scrutiny have led agencies to abuse them).

76. *Id.* at 1332–55 (detailing numerous examples of guidance documents that Anthony thinks should have been adopted as legislative rules, if at all).

77. *See, e.g.*, Robert A. Anthony, Commentary, *A Taxonomy of Federal Agency Rules*, 52 ADMIN. L. REV. 1045, 1047 (2000) [hereinafter Anthony, *Taxonomy*] (approving of the invalidation of agency documents that obtain binding effect without having gone through notice-and-comment procedures); Anthony, *Lifting the Smog*, *supra* note 17, at 10 & n.31 (citing cases for the proposition that a noninterpretive agency document that is given binding effect will be invalidated if it was not issued through the use of legislative rulemaking procedures); Robert A. Anthony, *"Well, You Want the Permit, Don't You?" Agency Efforts to Make Nonlegislative Documents Bind the Public*, 44 ADMIN. L. REV. 31, 34 (1992) [hereinafter Anthony, *Want the Permit?*] (advocating the rejection of agency efforts to impose binding obligations on the public through nonlegislative documents); Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 57–58 (1990) (rebuking agency attempts to bind the public through documents that are exempt from public participation requirements). Courts, especially the D.C. Circuit, have been influenced by Anthony's scholarship. *See, e.g.*, *infra* notes 82–84, 98–103 and accompanying text.

78. *Compare* Anthony, *Lifting the Smog*, *supra* note 17, at 11–12 (proposing two key inquiries to be made in determining how to categorize a nonlegislative rulemaking document), *with id.* at 17 (lauding the four-step test to determine whether an interpretive rule has legal effect, which was set

the one hand, a policy statement is an indication of how an agency intends to exercise discretion that it is given to implement the statutes and regulations it administers. Policies do not follow from the language of these statutes and regulations, but to qualify as a policy statement, the document must not definitively identify the manner in which the agency will apply these sources of law.[79] An interpretive rule, on the other hand, is meant to explain preexisting legal obligations and relations that are embodied in the agency's authorizing statutes and regulations.[80] Hence, a document is a valid interpretive rule and needs not go through notice and comment if it follows from the language it is interpreting.

1. Statements of Policy.—For a policy statement, the "ex ante legal effect" school looks at whether the document was issued with intent to bind or otherwise had binding effect.[81] Indicia of such bindingness include, most importantly, definitive language indicating the course of action the agency would take when applying relevant statutes and regulations to particular situations.[82] Other factors that might indicate sufficient bindingness are whether the agency indicated a clear intent to follow the document when addressing particular cases, whether the agency published the document in the *Code of Federal Regulations*, and whether the agency expressly indicated that the document was meant to be a nonlegislative rule.[83]

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out by Judge Williams in *American Mining Congress v. Mine Safety & Health Administration*, 995 F.2d 1106, 1112 (D.C. Cir. 1993)).

79. *See* Anthony, *Taxonomy*, *supra* note 77, at 1047 (claiming that an agency document that establishes fixed criteria for decisions has binding effect and, consequently, cannot be a policy statement).

80. *See id.* at 1046 (claiming that interpretive rules merely spell out or explain inherent substance in the law that is being interpreted).

81. *See* Anthony, *Want the Permit?*, *supra* note 77, at 34 (arguing that a rule issued with intent to bind the public, or that practically does bind the public, is not exempt from notice-and-comment requirements); Franklin, *supra* note 4, at 288–89 ("[A]ll [proposals for reform] of . . . the legislative/nonlegislative distinction . . . require courts to divine the substantive nature of a rule—by examining its . . . effect.").

82. *See, e.g.*, Nat'l Mining Ass'n v. Sec'y of Labor, 589 F.3d 1368, 1372 (11th Cir. 2009) (highlighting a document's use of permissive language as indicative of policy statements); Appalachian Power Co. v. EPA, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (holding that a disclaimer at the end of a "guidance" document did not counteract obligations imposed by the document on regulators and regulated entities); Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 947 (D.C. Cir. 1987) (holding that language used by an agency to describe action levels indicated that those levels had a binding effect); Am. Trucking Ass'ns v. ICC, 659 F.2d 452, 463 (5th Cir. 1981) (holding that policy statements must allow agencies discretion in decision making); *see also* Anthony, *supra* note 2, at 1328–29 ("If the document is couched in mandatory language, or in terms indicating that it will be regularly applied, a binding intent is strongly evidenced." (footnotes omitted)).

83. *See, e.g.*, Cement Kiln Recycling Coal. v. EPA, 493 F.3d 207, 226 n.14 (D.C. Cir. 2007) (noting that policy statements have no binding effect and leave decision makers free to exercise discretion); Gen. Motors Corp. v. EPA, 363 F.3d 442, 448 (D.C. Cir. 2004) (stating that the three factors that determine the nature of an agency document are how the document is characterized by the promulgating agency, whether the document was published in the *Code of Federal Regulations* or the *Federal Register*, and whether the document binds the agency or private parties). Generally, courts give little weight to an agency assertion that it intended a document to be guidance. *E.g.*,

A major problem for this ex ante approach is that binding legal force comes in many flavors and intensities, and it is not self-evident from the face of a policy statement how the agency will apply it in subsequent particular situations. As already noted, virtually everyone accepts that only legislative rules can have independent legal force.[84] This means that a person who is alleged to have violated an agency's regulatory law must be shown to have violated the underlying statute or legislative rule that an agency is implementing; it is not sufficient for the agency to demonstrate that the person violated a policy statement.[85] But Anthony advocates that documents that are practically binding should be deemed to be legislative rules as well.[86] This raises the question of what makes a rule practically binding.

Courts have ruled that a policy statement specifying precisely what a regulated entity can do to comply with agency legislative rules is binding.[87] Such a statement poses a dilemma for an entity about whether to comply with the announced policy or risk prosecution and potential penalties. To the extent it induces changes in the entity's conduct, the statement may appear sufficiently forceful to be a legislative rule that cannot be promulgated without notice and comment.

Some cases have also focused on the extent to which the agency itself will be bound by a purported policy statement in considering whether the statement is an invalid legislative rule.[88] A policy to which an agency binds itself can have an impact even though it does not have independent legal force. For instance, if an agency binds itself to a particular method of evaluating applications for a permit, an entity seeking the permit would be

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Appalachian Power, 208 F.3d at 1023 (disregarding a "boilerplate" disclaimer at the end of a purported EPA "guidance" document).

84. *See supra* notes 19–20 and accompanying text.

85. *See supra* notes 19–20 and accompanying text.

86. *See* Anthony, *supra* note 2, at 1328–29, 1383 (stating that a guidance document is practically binding "if the affected private parties are reasonably *led to believe* that failure to conform will bring adverse consequences, such as an enforcement action or denial of an application[;] . . . the document is couched in mandatory language, or in terms indicating that it will be regularly applied[;] . . . [or] private parties can rely on it as a norm or safe harbor by which to shape their actions" (footnotes omitted)).

87. *See, e.g.*, Gen. Elec. Co. v. EPA, 290 F.3d 377, 384 (D.C. Cir. 2002) (holding that particular directives in an EPA guidance document made the document "purport to bind applicants for approval of a risk-based cleanup plan"); *Appalachian Power*, 208 F.3d at 1023 (holding that the result of policies expressed in an EPA guidance document—requiring state regulators to search for and replace deficiencies in their monitoring regulations—was to create obligations on the part of state regulators and entities regulated by the states). *But see Nat'l Mining Ass'n*, 589 F.3d at 1372 (holding that language was permissive rather than mandatory because the statement used the terms "strongly encouraged" and "should" instead of "shall").

88. *See, e.g.*, Catawba Cnty. v. EPA, 571 F.3d 20, 34–35 (D.C. Cir. 2009) (holding that an agency memo creating a rebuttable presumption that preserved the agency's discretion did not bind the agency, thus freeing the memo from notice-and-comment requirements); *Gen. Elec.*, 290 F.3d at 385 (vacating a guidance document because it bound the EPA to accept a particular total toxicity factor from cleanup-plan applicants); Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 94 (D.C. Cir. 1997) (noting that a key distinction between a substantive rule and a policy statement is whether an agency intends to bind itself to a legal position).

inviting rejection of its request were it to ignore the policy statement and present its own methodology for evaluating whether it deserved the permit.[89] On the flip side, if an agency commits to refrain from prosecuting conduct that arguably constitutes a regulatory violation, it relieves a regulated entity from having to change such conduct. The concern with an agency binding itself is that consistent application of these policies essentially signals the conduct in which a regulated entity should engage or from which it should refrain.

Any inquiry into bindingness is further plagued by the fact that the extent to which an agency can bind itself to follow a policy can vary. At one end of the scale, an agency can follow a policy to the letter in every situation to which it is relevant. An agency, however, can bind itself to a lesser extent, for example, by creating a presumption in favor of application of the policy. Such a presumption imposes a burden on an entity adversely affected by the policy to present arguments sufficient to overcome the presumption. An agency may also rely on the policy as precedent. Because of the nature of arbitrary and capricious review of agency action, administrative precedent is not as strong as judicial precedent. Essentially, precedent merely relieves the agency from having to readdress arguments that it already resolved when it established the policy.[90] But the agency still has an obligation to justify any action it takes in terms of statutory and regulatory prescriptions, and therefore must remain open-minded to consider arguments about changing the policy if those arguments were not previously addressed by the agency.[91]

There is yet another notion that complicates any inquiry into whether an agency has bound itself: the head of an agency may not intend to bind himself to follow a policy in any respect but may intend that agency staff follow it in every case. For example, consider the Secretary of Agriculture's statutory responsibility to promulgate standards for the humane care of animals used in research, including the well-being of nonhuman primates.[92] The Secretary has adopted a regulation aimed at ensuring that primates get sufficient cognitive and social stimulation, which requires research facilities to provide housing in accord with "accepted professional standards as cited

89. *See, e.g.*, *Gen. Elec.*, 290 F.3d at 384 ("To the applicant reading the Guidance Document the message is clear: in reviewing applications the Agency will not be open to considering approaches other than those prescribed in the Document.").

90. *See* Ronald M. Levin, *Nonlegislative Rules and the Administrative Open Mind*, 41 DUKE L.J. 1497, 1501 & n.17 (1992) ("To the extent that [a policy] 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.").

91. *Cf. id.* at 1499–502 (arguing from the case law for an administrative "openmindedness" obligation). Administrative precedent may also allow an agency to avoid considering arguments that the petitioner could have raised in a prior challenge before the agency but did not. *E.g.*, NRDC v. EPA, 25 F.3d 1063, 1074 (D.C. Cir. 1994) (denying petition because a petitioner's "failure to raise a particular question of statutory construction before an agency constitutes waiver").

92. 7 U.S.C. § 2143(a) (2006).

in appropriate professional journals or reference guides."[93] The actual cognitive and social stimulation of a primate may depend on a multitude of interacting factors, an important one of which is whether the animal is housed with other members of its species.[94] The Secretary might issue a policy statement instructing its inspectors to institute an enforcement proceeding against any facility that houses nonhuman primates in isolation from fellow members of its species, and the Secretary may intend that its staff follow this statement in every instance. This statement, however, does not necessarily indicate that the Secretary believes that any such facility is in violation of his regulation. The Secretary may want to ensure that his central staff has an opportunity to consider whether a particular facility that houses a primate in isolation nonetheless is in fact providing sufficient stimulation.

Without identifying the nature of the legal force that characterizes legislative rules, it is impossible for courts to be consistent in determining what constitutes sufficient force. Even applying a consistent notion of legal force, a question would remain as to how binding a policy must be before a court will deem its announcement to be a legislative rule. On top of these vagaries, a reviewing court ultimately must make a prediction about how the agency will treat the policy in the future. For example, if the essence of a legislative rule is independent legal force, a court still must decide whether the agency, in subsequent proceedings, will apply the policy as if it has such force.[95] Unfortunately, when an agency issues a purported guidance document, there are no assurances about how the agency will apply it. The same is true for an inquiry into whether an agency will bind itself or whether it will require that its staff be bound. Because the binding-effect approach provides no demarcation of the kind of binding force required, the extent of binding force required, or how likely the agency must be to apply the statement with binding force for a court to conclude that the statement is a legislative rule, the resulting judicial decisions are inconsistent and seemingly ad hoc. The doctrine based on bindingness is so confused that courts and commentators alike describe the doctrine as engulfed in smog.[96]

2. Interpretive Rules.—The picture is slightly clearer for purported interpretive rules, although the distinction between interpretive and

93. 9 C.F.R. § 3.81 (2011).

94. *See, e.g.*, *id.* § 3.81(a) ("The environment enhancement plan must include specific provisions to address the social needs of nonhuman primates . . . .").

95. *See* William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1333–35 (2001) (reviewing judicial difficulty in predicting how agencies will apply policy statements and explaining how agencies game the law by couching definitive statements in tentative language).

96. *See, e.g.*, Noel v. Chapman, 508 F.2d 1023, 1029–30 (2d Cir. 1975) (describing the distinction between a "[legislative] rule . . . and a 'general statement of policy'" as "enshrouded in considerable smog"); *see also* Anthony, *Lifting the Smog*, *supra* note 17, at 4 n.10 (listing numerous cases stating that the distinction between legislative and interpretive rules is not clear); Richard W. Murphy, Hunters *for Administrative Common Law*, 58 ADMIN. L. REV. 917, 924 (2006) (noting "the infamously 'smoggy' nature of the distinction between legislative and interpretive rules").

legislative rules is still far from pellucid.[97] Again, the focus is on whether the rule "carries the force and effect of law,"[98] but the emphasis for evaluating an interpretive rule is whether the binding obligation is created by the rule rather than reflecting a preexisting obligation imposed by the statute or regulation the rule purports to interpret.[99] Operationally, this inquiry looks at the relation between the rule and the text it interprets.[100] For example, courts have stated that a rule is interpretive if it spells out a duty "fairly encompassed" within the regulation that the interpretation purports to construe.[101] The basis for this test is that a rule that is fairly encompassed does not create an independent legal obligation, but rather merely clarifies one that already exists. Similarly, courts have held that a rule that is inconsistent with, or amends, a legislative rule cannot be interpretive, because such a rule would impose new rights or obligations.[102] This standard, however, still leaves difficult line-drawing choices for determining whether the connection between an announced interpretation and the text being interpreted is sufficiently close to characterize the announcement as an interpretive rule. In fact, courts often deviate from the strictures of the doctrine they have created by holding that interpretations that are clearly not encompassed in the language being interpreted were, nonetheless, interpretive rules.[103]

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97. Gen. Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984). Courts will often characterize guidance documents that are not clarifications of language nonetheless as interpretive, and then uphold them even though they are sufficiently definitive that a court almost certainly would reverse them were they characterized as policy statements. *See* John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 926–27 (2004) (evaluating the D.C. Circuit's method of identifying "procedurally invalid nonlegislative rules" and observing that "the resulting inquiry has an air of arbitrariness to it").

98. Air Transp. Ass'n of Am., Inc. v. FAA, 291 F.3d 49, 55 (D.C. Cir. 2002) (quoting Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 588 (D.C. Cir. 1997)).

99. *E.g.*, Warshauer v. Solis, 577 F.3d 1330, 1337 (11th Cir. 2009) (reasoning that an interpretive rule "'typically reflects an agency's construction of a statute . . .' and does not '*modif[y]* or *add[]* to a legal norm'" (alterations in original) (quoting Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 94–95 (D.C. Cir. 1997))).

100. *Id.* Courts sometimes purport to consider other factors that bear on an agency's intent to create an independent legal obligation, such as whether the agency states that it is invoking its legislative rulemaking authority or whether it published the rule in the *Code of Federal Regulations*. *E.g.*, Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993). But in the absence of a telltale indication that the agency intended to invoke its legislative rulemaking authority, the relationship of the interpretation to the text being interpreted is dispositive. *See Air Transp. Ass'n*, 291 F.3d at 55–56 (analyzing an interpretive rule in relation to the pertinent statute and concluding that the rule "incorporate[s] both the statutory requirement . . . and required rest regulations" and therefore "does not require notice-and-comment rulemaking").

101. *Paralyzed Veterans*, 117 F.3d at 588.

102. *See, e.g.*, Appalachian Power Co. v. EPA, 208 F.3d 1015, 1023, 1028 (D.C. Cir. 2000) (setting aside an EPA guidance document in part because the guidance document imposes legal obligations).

103. *See, e.g.*, *Am. Mining Cong.*, 995 F.2d at 1112–13 (holding that Program Policy Letters of the Mine Safety and Health Administration are "interpretive rules" even though the court admits that it is possible that the Program Policy Letters are "a de facto amendment of prior legislative rules"); Fertilizer Inst. v. EPA, 935 F.2d 1303, 1307–09 (D.C. Cir. 1991) (reasoning that even

3. Evaluation of the Legal-Effect School.—As a positive matter, the legal-effect school would seem to deprive guidance documents of any practical effect, deeming any purported guidance document with such an effect to be a spurious legislative rule.[104] This seems contrary to notice provisions of the APA, which state that an agency cannot use a guidance document "against a party"[105] unless the document was published in the Federal Register or was made available to the public and the party had actual knowledge of its terms.[106] This implies, however, that an agency can use a guidance document against a party if either the publication or notice condition is met. One might argue that this provision, which was added to the APA by the Freedom of Information Act,[107] was meant to limit the ability of agencies to use particular actions against parties and should not be read to authorize such use. But, although the language of the provision may not itself authorize use of guidance documents against a party, its structure implies an understanding that they could be so used and, hence, potentially have some force.

As a normative matter, focusing on the extent to which a guidance document "binds" the public or creates "new law" is neither a manageable nor appropriate inquiry for courts because there is no a priori understanding of how binding is too binding or how much lawmaking is too much lawmaking for a rule to be nonlegislative.[108] Given that every guidance

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though the EPA's action had the "*effect* of creating new duties" beyond the language of the statute, the action was nonetheless interpretive because the agency did not "'*intend*[] to create new . . . duties'" (quoting Gen. Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984))).

104. *See supra* notes 84–86 and accompanying text.

105. The relevant language in full reads as follows:

> A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—
>
> (i) it has been indexed and either made available or published as provided by this paragraph [in the *Federal Register*]; or
>
> (ii) the party has actual and timely notice of the terms thereof.

5 U.S.C. § 552(a)(2) (2006). Peter Strauss reads this provision as indicating that guidance documents have precedential effect. *See* Strauss, *supra* note 2, at 823–24 (arguing that § 552(a)(2) permits an agency to give publication rules the force of precedent by listing them together with agency precedent and by describing the permitted effect "in a way that sounds like the treatment of precedent"). John Manning disagrees, noting that the point of the provision was to limit the effect of the various actions specified and that the provision does not state that each specified action has all of the specified effects. Manning, *supra* note 97, at 934–35 & n.207. Nonetheless, Manning agrees that Strauss's reading is consistent with this provision of the APA. *Id.* More significantly for my point, Manning's argument implies that each of the specified actions, including guidance documents, has to have at least one of the specified effects, which means that these documents must be capable of being used against a party.

106. 5 U.S.C. § 552(a).

107. Freedom of Information Act, Pub. L. No. 90-23, sec. 1, § 552(a), 81 Stat. 54, 54–55 (1967) (codified as amended at 5 U.S.C. § 552(a)).

108. *See* Gersen, *supra* note 5, at 1718–19 (proclaiming that the legislative-rule inquiry should center on whether notice-and-comment procedures were followed rather than if the rule is "tied closely enough to a preexisting regulation," because doing so would be "unnecessarily difficult");

document will have some effect and will reflect some exercise of agency discretion,[109] 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. This balance, in turn, hinges on such context-specific factors as the interference with reliance interests, the importance of information known to stakeholders but not to the agency, the benefits from implementing the policy or interpretation quickly, and the ability of the agency to devote resources to other action.

Focusing on the impact of the rule not only asks the wrong question, it threatens to invalidate virtually all guidance documents because all have some impact regardless of how they are worded or issued.[110] The inherent incoherence of judicial review under the legal-effect school thus can result in judicial reversal of many valuable guidance documents. Moreover, to avoid procedural reversal, agencies will announce more policies and interpretations via adjudication, even when advance information about the agency's views would be particularly valuable.[111] Hence, those who advocate characterizing any rule with practical force as a legislative rule would forfeit guidance documents' compelling administrative benefits by exposing agency action to confusing and seemingly arbitrary judicial oversight.

B. Ex Post Monitoring of Agency Use of Guidance Documents

The second school of thought on guidance documents developed in reaction to judicial doctrine's incorporation of ideas from the legal-effect school. Fearing that the incoherence of judicial doctrine unduly discourages agencies from using guidance documents, and that courts strike down such documents even when they are justified, this school advises that courts get out of the business of reviewing the procedural adequacy of adoption of purported guidance documents. Instead, this school advocates that a rule adopted without notice-and-comment procedures should be deemed a policy statement or interpretive rule,[112] and that courts should monitor the agency's

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Manning, *supra* note 97, at 926–27 (arguing that judicial inquiry into whether an agency should have used notice and comment is judicially unmanageable because no articulable standard determines how much agency policy-making discretion should mandate the use of notice and comment).

109. *See* Gersen, *supra* note 5, at 1719 (noting that all guidance documents will affect the public in some manner, which is why agencies issue them); Strauss, *supra* note 14, at 1479 (contending that nonlegislative rules can be argued to have a practical binding effect "in most, if not all, cases").

110. Presumably, an agency could issue a guidance document that is so ambivalent as to have no effect, but then it also would not convey anything about the agency's current view of the matter addressed. *See* Funk, *supra* note 95, at 1335 (noting that an agency's inclusion of language making a policy statement tentative renders the statement useless if taken at face value because it will "not communicate any intention at all").

111. *See supra* notes 55–57 and accompanying text.

112. *See* Funk, *supra* note 5, at 663 ("The simple test, which we will call the 'notice-and-comment test,' is simply that 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

reliance on these rules to ensure that it does not use them as if they have independent legal force.[113]

The proponents of ex post monitoring of agency use of guidance documents generally have concluded that any ex ante distinction between legislative rules and guidance documents is doomed to fail. They note that a rule that clarifies legal ambiguities or fills in statutory or regulatory gaps necessarily involves some exercise of discretion that results in a change in legal obligations—that is, every guidance document involves some lawmaking as opposed to mere law exposition.[114] Thus, they see the efforts of the legal-effect school as trying to determine, on a case-by-case basis, just how much lawmaking as opposed to law exposition is too much to tolerate in a nonlegislative rule. But such determinations are fraught with difficulty because they are outside the realm of the judiciary's institutional competence.

For example, John Manning reasons that such determinations are similar to those about how much lawmaking discretion Congress might delegate to agencies or about when an agency must make law by rulemaking rather than adjudication.[115] He notes that the Supreme Court both has explicitly stated that the nondelegation doctrine is not judicially administrable and has avoided reversing any agency adjudication because the agency should have proceeded by rulemaking instead.[116] Manning asserts that all three types of situations are different from other line-drawing standards that courts administer because

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basis."); Gersen, *supra* note 5, at 1719 ("Rather than asking whether a rule is legislative to answer whether notice-and-comment procedures should have been used, courts should simply ask whether notice-and-comment procedures were used."); *cf.* Elliott, *supra* note 36, at 1491 (contending that when an agency improperly relies upon a rule that was adopted without the proper notice-and-comment procedure, the rule should be treated like a nonbinding policy statement rather than being invalidated in its entirety by the court). Implicit in this test is that the rule is not otherwise exempt from notice-and-comment requirements for other reasons, for example, because the rule is procedural or the agency has explicitly availed itself of the good-cause exception. *See* 5 U.S.C. § 553(b) (2006) (exempting from notice and comment "rules of agency organization, procedure, or practice" and rules where "the agency for good cause finds [and explicitly states its reasons] that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest").

113. The D.C. Circuit at one time followed this approach. *E.g.*, Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974) ("The critical distinction between a substantive rule and a general statement of policy is the different practical effect that these two types of pronouncements have in subsequent administrative proceedings. . . . A general statement of policy . . . does not establish a 'binding norm.'"). Some judges occasionally suggest reinstating this approach. *See, e.g.*, Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 950, 951–52 (D.C. Cir. 1987) (Starr, J., concurring in part and dissenting in part) (lamenting the progress to a multifactor test and cajoling the D.C. Circuit to "reembrace" the *Pacific Gas* test).

114. *See* Gersen, *supra* note 5, at 1714–15 ("Some mechanism is needed to distinguish interpretation appropriate for informal settings from interpretation only appropriate for formal settings."); Manning, *supra* note 97, at 924 (explaining the insight of the *Chevron* doctrine as recognition that interpretation always involves some lawmaking and some law explication).

115. Manning, *supra* note 97, at 898.

116. *Id.* at 901 (citing Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–75 (2001)).

> when one asks a reviewing court to examine whether a legislature or agency has adopted a sufficiently precise policy, the inquiry has an irreducibly arbitrary feel to it because there is no measure of how much precision such an actor should be expected to supply. In other words, courts can make rough judgments about how precise a statute or regulation *is*; they have no basis for determining how precise it *should be* in order to satisfy the fairly abstract duty to make policy through a prescribed method.[117]

Those in the ex-post-monitoring school do not deny the potential for an agency to abuse its discretion by issuing a guidance document when a legislative rule would be more appropriate. For these scholars, however, the check on agency abuse comes when the agency relies on the document in subsequent proceedings.[118] If the agency resolves a matter by claiming that an entity violated a guidance document, the agency will be reversed on judicial review of that subsequent matter because the document can have no independent legal force.[119] The ex-post-monitoring school would not, however, deem the guidance document itself procedurally invalid. In short, under this approach, an agency can claim that a party in an adjudication or judicial proceeding that contravenes an interpretation or policy announced in a guidance document is violating a statute or legislative rule, but it has to prove such a violation, not merely that the party acted contrary to the guidance.

In addition, proponents of ex post monitoring also point out that the policy or interpretation announced in a guidance document will ultimately have to survive substantive review when an agency's application in subsequent adjudication is challenged. Thus, an agency will not escape having to defend the guidance as being within the agency's authority and not being arbitrary and capricious.[120] For challenges to the agency's statutory authority, the agency will face the scrutiny of *Skidmore v. Swift & Co.*,[121] rather than the more deferential *Chevron v. NRDC*[122] review, if the challenge is to the issuance of the guidance document or occurs in a proceeding that

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117. *Id.* at 912 (footnote omitted).

118. *See* Elliott, *supra* note 36, at 1491 ("[I]f an agency says initially that a policy statement is not a binding rule and then later treats it as if it were a binding rule by refusing to engage in genuine reconsideration of its contents in a subsequent case, a court should invalidate the agency's action *in the individual particular case* on the basis that the action lacks sufficient justification in the record.").

119. *See* Manning, *supra* note 97, at 930–31 (noting that courts can effectively enforce the distinction between legislative and nonlegislative rules by "assigning different legal effects to an agency's *application* of rules" adopted without notice and comment).

120. *See id.* at 932–33 (explaining how review under a reasoned-decisionmaking standard would prevent an agency from relying on a guidance document as if it had independent legal force).

121. 323 U.S. 134 (1944).

122. 467 U.S. 837 (1984).

does not trigger *Chevron* review.[123] Proponents of ex post monitoring claim that this will encourage agencies to use notice-and-comment rulemaking.[124] For arbitrary and capricious challenges, an agency will have to explain in light of all relevant factors why it adopted the new policy, including an analysis of factual predicates and predictions that ensure to a reviewing court that the agency believes the policy or interpretation to be better than alternatives, including the original policy that the guidance document changed.[125] Given that courts will require agencies to address plausible stakeholder arguments, such review is likely to provide some discipline of agency solicitation of stakeholder input when issuing guidance documents.[126]

Some proponents of the ex-post-monitoring approach would also grant guidance documents precedential effect.[127] Because of the reasoned-decisionmaking nature of arbitrary and capricious review of agency action, allowing guidance documents to have such effect actually constrains, more than empowers, agencies. If guidance documents have precedential force, an agency cannot change the interpretation or policy the document announces

123. *See* Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 203, 205 n.3 (2004) (reporting that informal pronouncements that are not the product of rulemaking or adjudicatory proceedings may not be entitled to *Chevron* deference but may still receive a degree of judicial respect under *Skidmore*).

124. *See* Gersen, *supra* note 5, at 1720–21 (arguing that the agency incentive to avoid notice-and-comment procedures is mitigated by the less deferential review that guidance documents receive under *United States v. Mead Corp.*, 533 U.S. 218 (2001)); *cf.* Manning, *supra* note 97, at 943–44 (concluding that *Mead*'s rule of reduced deference for interpretations in guidance documents is not likely to have a major impact on agencies' choice of interpretive mode).

125. The courts have adopted a reasoned-decisionmaking approach to arbitrary and capricious review. *See* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1810 (2009) (emphasizing that an agency need only have some reasonable justification for its policy changes but that the Court will not subject these agency decisions to any more searching review); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) (noting that an agency "is obligated to supply a reasoned analysis" for policy changes); *see also* Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763, 774 (explaining that under the hard-look doctrine courts "examine an agency's decision to determine whether the agency has explained the basis for its rule"); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEXAS L. REV. 483, 491–92 (1997) (describing the operational demands of hard-look review); Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 181–82 (describing the development of hard-look review).

126. *See* Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1761 (2007) (examining the doctrine as applied in the 1970s, and arguing that "the hard look doctrine promoted participation by encouraging agencies to respond to criticisms and show why they had rejected alternative solutions"); *cf.* Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 546 (2002) (asserting that hard-look review forces an agency "to take into account perspectives that may be held by those with different professional training and whose work might focus on different effects of the rule").

127. *See* Manning, *supra* note 97, at 934–35 (arguing that precedential effect of guidance documents follows from the reasoned-decisionmaking requirement of judicial review); Strauss, *supra* note 14, at 1486 (suggesting that provisions of the Freedom of Information Act, included as part of the APA, indicate that guidance documents have precedential effect).

without justifying that change.[128] By the flip side of the reasoned-decisionmaking requirement, an agency cannot simply rely on interpretative or policy precedent to justify an action.[129] The agency must address all factors that the reviewing court finds relevant given the law and factual circumstances surrounding the action.[130] To illustrate the significance of the limited concept of administrative precedent, consider a challenge to an agency action raising arguments that a policy that the agency had adopted in a prior proceeding was arbitrary and capricious, or contrary to statute or agency regulation. The challenger raises plausible arguments that the agency did not address when it adopted the policy. If the agency relies on its prior adoption of the policy as precedent and thereby neglects to address the new arguments, it will not survive the arbitrary-and-capricious challenge.[131] The precedent does obviate the need for the agency to repeat any collection of facts and consideration of arguments it did consider in the first proceeding,[132] but that hardly gives the agency any advantage it did not already have. The agency could always have just repeated the explanation it previously gave for the policy in the new proceeding. In essence, administrative precedent is therefore merely a cross-referencing convenience.[133] Thus, according to the ex-post-monitoring school, the inability of agencies to give guidance documents independent legal force, along with the prospect of review upon application and the limitations imposed by administrative precedent, sufficiently constrains agency abuse of such documents.

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128. *See* Manning, *supra* note 97, at 935–36 (noting that the latitude afforded to agencies to reconsider policies adopted in adjudication is limited by the court-imposed reasoned-decisionmaking requirement that agencies "adhere to their precedents unless they offer a sufficient justification for departing from them").

129. *See id.* at 932–34 (illustrating by example that relying on agency precedent is insufficient and requires additional reasoning).

130. *See State Farm*, 463 U.S. at 46–47 (reasoning that the decision of the National Highway Traffic Safety Administration to eliminate a motor vehicle safety regulation was arbitrary and capricious because the agency did not consider modifying the regulation instead); Seidenfeld, *supra* note 125, at 485 ("[T]he agency cannot know in advance what issues and arguments a reviewing court will deem to warrant extended analysis and explanation."); Sunstein, *supra* note 125, at 182 ("The APA does not expressly require identification and consideration of alternatives, as do some statutes, but courts have held that it is nonetheless 'arbitrary' within the meaning of the APA to disregard plausible alternatives.").

131. Ignoring a plausible argument would contravene the Supreme Court's admonition that a decision is arbitrary and capricious if it fails to consider relevant factors. *See, e.g.*, *State Farm*, 463 U.S. at 53–54 (holding an agency decision to rescind an automobile-passive-restraint standard arbitrary and capricious in part because the agency failed to consider the effect of inertia on the likelihood that people would use automatic seatbelts); Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 241 (D.C. Cir. 2008) (reversing the agency because the Commission's conclusory statement that newly submitted data would not provide a convincing argument for modifying the analysis underlying its action "provides neither assurance that the Commission considered the relevant factors nor a discernable path to which the court may defer").

132. *See* Levin, *supra* note 90, at 1502 (suggesting that the agency can rely on facts learned when it developed the guidance document in defending its application).

133. Manning, *supra* note 97, at 934.

The ex-post-monitoring approach, however, is far from a perfect solution. As I have described above, many guidance documents are never subjected to ex post review.[134] Regulated entities face incentives to comply with them rather than challenge them ex post, and application of some guidance documents will result in nonenforcement of regulations and statutes. In addition, even if application of guidance documents necessitates an agency proceeding that will provide an opportunity for participation for stakeholders shut out of the initial guidance formulation, agencies are unlikely to be affected by such participation after the guidance is announced.[135] Hence, despite its procedural simplicity and support from many respected administrative law scholars over a long period of time, judges have not adopted this approach to the task of distinguishing guidance documents from legislative rules.[136]

C. Balancing Promotion and Discouragement of Guidance Documents

The most recent entry into the debate on distinguishing legislative rules from guidance documents is an article by David Franklin.[137] His basic thesis rebuts proponents of ex post monitoring, and he ultimately concludes that the current judicial approach is both understandable and, overall, good.[138] He does not ground this conclusion in any conceptual understanding of guidance documents, and, in fact, he acknowledges that judicial doctrine is neither coherent nor consistent.[139] He argues, nonetheless, that this very inconsistency and the uncertainty it generates for agencies about the permissible bounds of guidance documents allows courts to tailor their allowance of such means of announcing policy and interpretation to circumstances in which it is most appropriate.[140] Implicit in his argument is a belief that current doctrine sends a signal to agencies not to abuse guidance documents while simultaneously allowing the agency to use such documents when they are warranted.[141]

Franklin takes issue with scholars who advocate ex post monitoring, arguing that such judicial review is not an adequate safeguard against abuse.[142] He objects that many such guidance documents have practical and even legal effects but are never subject to review because they are not relied

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134. *See supra* notes 65–70 and accompanying text.

135. *See supra* note 30.

136. Franklin, *supra* note 4, at 294.

137. Franklin, *supra* note 4.

138. *Id.* at 324–25.

139. *Id.* at 278–79.

140. *Id.* at 325.

141. *See id.* at 324 (contending that under the ex-post-monitoring approach, agencies would "too often sidestep the public input that is necessary to protect the interests of regulatory beneficiaries, to lay the foundation for meaningful hard-look review, and, more generally, to ensure a relatively participatory and accountable form of regulatory governance").

142. *Id.* Franklin labels the ex-post-monitoring approach as "the short cut." *Id.* at 279.

on by agencies to justify reviewable actions.[143] Franklin further argues that under ex post monitoring, the benefits the agency foregoes by not issuing a legislative rule do not provide meaningful incentives for it to prefer notice-and-comment rulemaking because the agency secures those benefits anyway when it applies a nonlegislative rule.[144] Finally, Franklin addresses the contention that the agency pays a price for foregoing legislative rulemaking because, under *United States v. Mead Corp.*,[145] courts afford interpretations issued in guidance documents only *Skidmore* as opposed to *Chevron* deference.[146] He questions whether the difference between *Skidmore* and *Chevron* deference is significant.[147] He might also have contended that an agency does not sacrifice interpretive deference with respect to issues of statutory interpretation because, under the Supreme Court's recent decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,[148] the agency will obtain the higher level of deference if it subsequently adopts the same interpretation in rulemaking or formal adjudication.[149] With respect to interpretation of agency regulations, Franklin notes that *Mead* is irrelevant because courts review such interpreta-

143. *Id.* at 309.

144. Franklin labels the argument that ex post review will provide incentives for agencies to use legislative rulemaking the "trade off." *Id.* at 280. He concludes that ex post review's enhancement of efficiency does not justify the costs it imposes in terms of denial of public participation. *Id.* at 303–05. I find some of Franklin's arguments too dismissive of the costs the agency pays for avoiding legislative rulemaking. In particular, he does not sufficiently appreciate the potential burden an agency faces when, without a legislative rule, it is forced to defend the policy repeatedly against challenges that raise arguments unaddressed in prior cases or that depend on the particular factual circumstances of a party's dispute. *See, e.g.*, Shell Oil Co. v. FERC, 707 F.2d 230, 235 (5th Cir. 1983) (reversing the FERC's refusal to allow Shell new gas prices for "sidetracking" wells, because the FERC had not allowed Shell an opportunity to challenge factual assumptions made in the case establishing the policy). Franklin asserts that it is "very difficult for subsequent parties to dislodge [policies previously adopted in adjudications]," but cites no support for this proposition. Franklin, *supra* note 4, at 313.

145. 533 U.S. 218 (2001).

146. *Id.* at 229–30, 234–36.

147. Franklin, *supra* note 4, at 321.

148. 545 U.S. 967 (2005).

149. *See id.* at 1016 (Scalia, J., dissenting) (arguing that one interpretation of the majority's holding is that "judicial decisions [are] subject to reversal by executive officers"). Justice Scalia goes on to illustrate this assertion:

> Imagine the following sequence of events: FCC action is challenged as ultra vires under the governing statute; the litigation reaches all the way to the Supreme Court of the United States. The Solicitor General sets forth the FCC's official position (approved by the Commission) regarding interpretation of the statute. Applying *Mead*, however, the Court denies the agency position *Chevron* deference, finds that the *best* interpretation of the statute contradicts the agency's position, and holds the challenged agency action unlawful. The agency promptly conducts a rulemaking, and adopts a rule that comports with its earlier position—in effect disagreeing with the Supreme Court concerning the best interpretation of the statute. According to today's opinion, the agency is thereupon [entitled to *Chevron* deference and] free to take the action that the Supreme Court found unlawful.

Id. at 1016–17.

tions under the extremely deferential *Bowles v. Seminole Rock & Sand Co.*[150] standard regardless of the type of action in which the interpretation is announced.[151]

Essentially, Franklin tries to save current doctrine from the ex-post-monitoring critique by advocating pragmatic acceptance of the case law, defending it without either providing a conceptual foundation or disavowing its incoherence. Unlike the abstract doctrine created by the courts, actual case law does not eliminate all uses of guidance documents that have some new legal effect. Instead, for example, some courts creatively find that interpretations that do not relate to the language being construed are nonetheless clearly encompassed within that language.[152] Franklin argues that the uncertainty in the case law provides enough "play in the joints" to allow agencies to use guidance documents yet also provides a check against agency abuse of them.[153]

A problem with Franklin's pragmatic argument stems from the fact that the factors that courts consider do not correspond, even in a broad sense, with the costs and benefits of issuing guidance. Thus, the uncertainty in the judicial doctrine does not result from errors in balancing these costs and benefits. Such errors would complicate but not negate signals to agencies that guidance documents will be allowed when their use is most appropriate. Unfortunately for Franklin, such balancing involves evaluation and comparative weighting of a complex set of value-laden factors; it ultimately requires prioritizing the use of agency resources, a task for which courts are particularly ill suited.[154] Thus, it is for good reason that courts do not attempt such a

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150. 325 U.S. 410 (1945).

151. Franklin, *supra* note 4, at 322–23. I agree with Franklin that the entire debate over the influence of deference afforded to statutory interpretation seems overemphasized given that the difference in deference between the standards is not necessarily great. *See* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1275 (2007) (finding empirically that "*Skidmore* is relatively deferential as applied by the federal courts of appeals," which accept the agency's interpretation 60.4% of the time). Moreover, the question of *Chevron* versus *Skidmore* deference only arises for agency interpretations of statutes rather than regulations, and then only when such interpretations are subjected to judicial review. *Cf.* Manning, *supra* note 97, at 943 (concluding that "*Mead*'s net effect on agency deliberation may ultimately be quite small").

152. *See* Manning, *supra* note 97, at 926–27 (describing several cases in which courts have deemed rules interpretive despite the so-called interpretation not being tied to the language being interpreted).

153. Franklin, *supra* note 4, at 325 & nn.254–55.

154. *See, e.g.*, Heckler v. Chaney, 470 U.S. 821, 831 (1985) (listing factors that make a decision unsuitable for judicial review, including "whether agency resources are best spent on this [action] or another, whether the agency is likely to succeed if it acts, whether the particular . . . action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all"); Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 716 (1990) (stating that even proponents of broad judicial review "concede that the managerial nature of agencies' decisions about how they can best deploy scarce resources warrants considerable solicitude from the courts"); *cf.* Antonin Scalia, *Responsibilities of Regulatory Agencies Under Environmental Laws*, 24 HOUS. L. REV. 97, 106–07 (1987) (contending that it is not that courts cannot balance the factors as well as anyone else but

balancing.[155] Instead, courts look at the attributes of the document that suggest it might be binding,[156] which is a poor proxy for whether notice-and-comment procedures are warranted.

In fact, because judicial doctrine has perversely focused on nonlegislative rules' pragmatic force on those adversely affected, it has shortchanged guidance-document benefits. Not surprisingly, therefore, to the extent that judicial doctrine signals any message to agencies, it is to avoid guidance precisely when guidance is likely to be most valuable. Consider, first, judicial doctrine about policy statements. Under current case law, the more detailed and definitive the statement, and the more explicitly the agency indicates that its staff must follow the policy, the more likely a court is to reverse it as a spurious legislative rule.[157] But, the more clearly and precisely a document states what conduct the agency considers appropriate, the more definitely the entity knows whether its planned conduct will prompt an enforcement action and, therefore, the more valuable the information conveyed by the document. In short, the legal doctrine today discourages agencies from using policy statements precisely when those documents are apt to provide the greatest benefit.

For interpretive rules, the message from the courts is that the weaker the link between the interpretation and the text of the statute or regulation being interpreted, the less likely a court is to allow the agency to announce the

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rather that the balance is inherently political—justifying nonreviewability of regulatory priorities and use of resources).

155. This point, I think, is related to John Manning's argument that determining the tolerable extent of discretionary lawmaking without use of legislative rulemaking procedures is inherently judicially unmanageable. *See* Manning, *supra* note 97, at 896–97 (observing that the Supreme Court's "reluctance to impose even a mild rulemaking obligation upon agencies may reflect judicial administrability concerns similar to those that deter judges from enforcing the nondelegation doctrine"). Manning's argument depends on distinguishing this determination from other judicial line drawing. For me, the distinction is the complexity and value-laden nature of the factors that courts have to balance to determine for any particular rule whether notice-and-comment procedures should have been used. Manning's comparison with the nondelegation doctrine is apt because judicial enforcement of that doctrine would essentially require courts to prioritize those matters that are sufficiently important that they must be addressed by the legislature instead of being delegated to an agency. *See id.* ("To enforce a meaningful rulemaking requirement, reviewing courts would not only have to compel the adoption of rules, but would also have to tell the agency how precise such rules must be. Such analysis would closely approximate that which the Court has refused to take on in the nondelegation context . . . ."). The nondelegation issue too can be characterized as involving judicial prioritizing of a political branch's use of its resources.

156. *See, e.g.*, Gen. Elec. Co. v. EPA, 290 F.3d 377, 382–83 (D.C. Cir. 2002) (stating that an administrative rule is legally binding if either its language appears binding on its face or if the rule is implemented as binding by the agency); *see also* Funk, *supra* note 95, at 1326–31 (listing several factors courts have considered in determining whether a rule is "legally binding" and thus subject to notice-and-comment procedures).

157. *Compare, e.g.*, *Gen. Elec.*, 290 F.3d at 383–85 (striking down an EPA rule as legislative because it contained mandatory language requiring specific behavior from the agency and regulated entities), *with* Prof'ls & Patients for Customized Care v. Shalala, 56 F.3d 592, 601 (5th Cir. 1995) (upholding a rule as nonlegislative because its nonexclusive list of "broad, general, [and] elastic" factors for agency staff to consider was discretionary).

interpretation by guidance document.[158] But it is not particularly valuable for an agency to inform the public that it is adopting an obvious interpretation, as the public will assume this interpretation absent notice to the contrary. Assuming the interpretation is substantively valid,[159] it is precisely those interpretations that follow less obviously from the text about which regulated entities need to know.

Finally, judicial focus on proper procedures for guidance documents is much ado about nothing. Striking down a purported guidance document on procedural grounds does not stop the agency from subsequently applying the interpretation or policy the rule announced. As long as the interpretation or policy is substantively valid, the agency could implement it without the benefit of the guidance document. For example, an agency with adjudicatory responsibility could adopt the guidance in a subsequent adjudicatory proceeding.[160] Hence, declaring a guidance document procedurally invalid merely stops the agency from revealing to the public its intent to apply the policy or interpretation.

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158. *See* Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 530–31 & nn.2–3 (2006) (arguing that agencies engage in strategic substitution, trading administrative costs for increased judicial deference when facing strained "textual plausibility," because "courts often give an agency more substantive latitude when the agency promulgates an interpretive decision via an elaborate formal proceeding than when it announces its interpretation in a more informal context").

159. The less the interpretation follows from the language being interpreted, the more likely it is that a court will find it to be a substantively invalid interpretation. *Cf. id.* at 537–39 (suggesting that courts take the "textual plausibility" of statutory interpretations into consideration when deciding whether to uphold agencies' interpretations). But if the interpretation is not substantively valid, then the agency may not adopt it regardless of the mode used for the adoption. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1004 (2005) (Breyer, J., concurring) (observing that courts would not apply *Chevron* even when reviewing some formal proceedings "because Congress intended *not* to leave the matter up to the agency").

160. Ironically, this is the most salient point of the cases that Franklin analyzes to support his argument that ex post review provides little incentive for agencies to refrain from using guidance documents. Franklin, *supra* note 4, at 313–16. Both cases involved challenges to agency applications of interpretations announced in rules adopted without notice and comment. *See* Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 90 (1995) (evaluating a Medicare reimbursement guideline adopted without notice and comment); United States v. Cinemark USA, Inc., 348 F.3d 569, 580 (6th Cir. 2003) (evaluating a movie-theater quantitative-viewing-angles requirement under the ADA adopted without notice and comment). In both cases the reviewing courts held that interpretive rules were adequate because the agency could have proceeded by adjudication. *See Shalala*, 514 U.S. at 96–97 ("The APA does not require that all the specific applications of a rule evolve by further, more precise rules rather than by adjudication."); *Cinemark*, 348 F.2d at 580 (reasoning that the choice between rulemaking and adjudication is within agency discretion). In essence, these holdings reflect the understanding that striking down a guidance document for failure to use notice-and-comment proceedings would be fruitless because the agency would still be able to adopt the interpretation in the particular case. And given that the courts upheld the interpretations in both cases as ones that the agency could have adopted for the first time in the very case under review, they represent laudatory use of guidance documents to give parties notice and to assure consistency of the interpretations rather than springing them by surprise on regulated entities in enforcement proceedings.

A closely analogous point was the basis for the plurality opinion in *NLRB v. Wyman-Gordon Co.*[161] That case involved an interpretation of the National Labor Relations Act that the Board announced in an unfair-labor-practice proceeding against the Excelsior Underwear Company.[162] Because the interpretation changed the Board's prior reading, and because the company had no reason to know that the Board would adopt the new interpretation, the Board declined to apply it to Excelsior;[163] understandably, Excelsior did not appeal the Board's order. A few months later, however, the Board applied the new interpretation to Wyman-Gordon, citing the "*Excelsior* rule."[164] A four-member plurality of the Supreme Court concluded that because the announcement of the interpretation was applied prospectively only, it was a rule and therefore invalid because the agency had failed to use rulemaking procedures.[165] The plurality reasoned, however, that the procedural invalidity of the prior adoption of the interpretation did not stop the Board from applying the interpretation to Wyman-Gordon in its adjudicatory proceeding.[166] In addition, four other Justices indicated that had the NLRB evaluated the matter based on the particular facts of the *Wyman-Gordon* case and remained open to arguments about whether the *Excelsior* rule was improper, they would have voted to uphold the agency even if the order in *Excelsior* was procedurally invalid.[167] Analogous reasoning would allow an agency to apply an interpretation or policy in a particular adjudication even if courts had previously struck down a guidance document announcing that interpretation or policy on procedural grounds.

There are some circumstances when invalidating a purported guidance document on procedural grounds might constrain an agency from adopting

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161. 394 U.S. 759 (1969).

162. *Id.* at 761–62 (plurality opinion).

163. *Id.* at 763.

164. *Id.* at 766.

165. *Id.* at 764–66.

166. *Id.* at 766.

167. Three Justices concurred, deeming the Board's procedures in *Excelsior* proper because the resulting "rule" was really just an interpretation validly announced as part of an order. *Id.* at 767–70 (Black, J., concurring). The concurrence did object to the plurality holding the *Excelsior* decision procedurally deficient while still allowing the Board to rely on it. *Id.* But the concurrence's objection hinged on the fact that the interpretation "was not adopted as an incident to the decision of a case before the agency." *Id.* at 769–70. Had the Board simply imported its reasoning from *Excelsior* to explain why its interpretation was appropriate in the context of the *Wyman-Gordon* case, presumably the concurrence would not have leveled this objection. Justice Douglas dissented because he deemed the *Excelsior* rule to have been adopted by improper procedures and believed that prevented the Board from relying on it. *Id.* at 776–77 (Douglas, J., dissenting). But he clearly states that had "the Board decided to treat each case on its special facts and perform its adjudicatory function in the conventional way, we should have no difficulty in affirming its action." *Id.* at 775–76. Only Justice Harlan would have prohibited the Board from adopting the *Excelsior* interpretation unless it did so by rulemaking, and then only because he deems such rulemaking necessary "where, as here, [the Board] has previously recognized that the proposed new rule so departs from prior practices that it cannot fairly be applied retroactively." *Id.* at 783 n.2 (Harlan, J., dissenting).

the policy except by rulemaking. Recall that some courts have held that, in adjudication, an agency may not retroactively apply a change to a long-standing contrary interpretation on which stakeholders may legitimately have relied.[168] These courts have expressed concerns about agencies applying interpretations unfairly—that is, in a manner that stakeholders could not foresee.[169] Presumably a guidance document giving regulated entities notice of the new interpretation before it is applied would alleviate the courts' concerns in such cases. The agency will therefore be able to apply the new interpretation without going through a notice-and-comment proceeding only if it can provide notice in the form of a guidance document.[170] Striking down the guidance document on procedural grounds arguably precludes the agency from relying on that document to provide the notice that permits it to change its long-standing interpretation. I use the word *arguably* quite consciously, however, because one might counter that a procedurally invalid statement provides the same notice that the agency intends to change its interpretation as one that is procedurally valid.[171] To state this point another way, if the point of restricting the agency from announcing the new policy in adjudication is to prevent surprise that undermines investment made under the old interpretation, a procedurally invalid interpretive rule eliminates the surprise as effectively as a valid one. Essentially, once the agency indicates that it intends to change the interpretation, by whatever means, the change is no longer a surprise.[172] In other words, striking a guidance document for proce-

168. *See supra* notes 46–51 and accompanying text.

169. *See, e.g.*, Verizon Tel. Cos. v. FCC, 269 F.3d 1098, 1109–10 (D.C. Cir. 2001) (describing how D.C. Circuit case law developed into a test that essentially "boil[s] down to a question of concerns grounded in notions of equity and fairness" (quoting Cassell v. FCC, 154 F.3d 478, 486 (D.C. Cir. 1998))).

170. Even this is not true if courts allow agencies to announce new policies and interpretations in adjudications but apply them prospectively only. *See, e.g.*, Epilepsy Found. of Ne. Ohio v. NLRB, 268 F.3d 1095, 1100–03 (D.C. Cir. 2001) (upholding the NLRB's new interpretation of an existing rule but reversing the NLRB's decision to give retroactive effect to its new interpretation). Such a tactic eliminates the fair-notice concern, leaving the agency free to announce any substantively valid new policy or interpretation by adjudication rather than by guidance document.

171. Admittedly, this seems to provide an agency with the benefits of the action that was procedurally invalid, which might prompt courts to deny that invalid rules can provide such notice. *Cf. Wyman-Gordon*, 394 U.S. at 769–70 (Black, J., concurring) (criticizing the plurality for giving effect to an invalidly adopted policy and thereby undermining the procedural provisions of the APA); *id.* at 776 (Douglas, J., dissenting) (stating that the plurality allows "the Board [to] 'have its cake and eat it too'"); *id.* at 781 (Harlan, J., dissenting) (claiming that the plurality decision trivializes the rulemaking procedures of the APA).

172. If a court credits the invalid rule as giving notice of the change, then the reliance issue becomes one of the substantive wisdom of applying the new interpretation without sufficient lead time, which may be grounds for a court to reverse the application as arbitrary and capricious. *See* Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 742 (1996) (reasoning that an agency interpretation "that does not take account of legitimate reliance on prior interpretation . . . may be 'arbitrary, capricious [or] an abuse of discretion'" (second alteration in original) (citations omitted) (quoting 5 U.S.C. § 706(2)(A) (2006))). Hence, courts can protect reliance interests even if they follow the suggestion of this Article to substitute substantive for procedural review of guidance documents.

dural invalidity would seem to further neither the purpose of discouraging agency abuse nor protecting legitimate reliance interests.

III. Prior Proposals to Mitigate Abuse of Guidance Documents

Thus far, my discussion indicates that there are both conceptual and practical problems with the legal-effect school and the defense of current doctrine's imperfect embodiment of that school. At the same time, the discussion also reveals that critics of the ex-post-monitoring school are correct that it would allow an agency to shut stakeholders out of the process of formulating guidance documents that have significant impact on them and leaves substantial leeway for agencies to abuse the use of guidance documents. Therefore, a direct comparison between the various schools on whether courts should review agency procedure for issuing guidance documents depends crucially on an empirical question for which there is no good answer: whether the benefits of guidance documents that are forfeited under current doctrine exceed the detriments of restricted stakeholder participation and opportunities for judicial review that flow from the ex-post-monitoring approach. Perhaps not surprisingly, several scholars have turned toward other means of mitigating guidance-document abuse. All, however, suffer because they still rely on procedural fixes that, although they have implications for substantive review of guidance documents, insufficiently address stakeholders' interests in knowing whether such a document is substantively valid when issued.

Two relatively recent articles propose solutions that transcend the debate about what constitutes a guidance document and warrant careful evaluation.[173] Liz Magill suggests that courts demand that agencies explain the choice of procedural mode by which they make policy.[174] She explains that other discretionary agency decisions are subject to review under a reasoned-decisionmaking standard, which requires that the agency explain its choices and in the process demonstrate that it considered all factors that are relevant to its decision.[175] She points out that current doctrine does review agency choice of mode for abuse of discretion but does not demand an explanation by the agency.[176] Instead, courts have independently evaluated

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173. Magill, *supra* note 6; Mendelson, *supra* note 7.

174. Magill, *supra* note 6, at 1414, 1446–47 (noting that an agency is not required to "supply a reasoned decision for its discretionary choice" of form and arguing that judicial review "*could* be effective in responding to" strategic choice of form by demanding a reasoned explanation). Magill does not limit her discussion to use of guidance documents; she addresses all choices of procedural mode, including the choice between legislative rules and adjudication. *Id.* at 1438–39. Her proposal to allow judicial review of choice of mode, although not explicit, is implicit in her arguments that judicial avoidance of such review is out of sync with judicial review of discretionary choices generally and her refutation of all possible normative justifications for treating agency choice of mode differently. *Id.* at 1416–25.

175. *Id.* at 1413–15.

176. *Id.* at 1415.

whether use of a particular mode is fair, and in the process have allowed agencies wide leeway to announce policy by adjudication.[177]

Magill's proposal is attractive on its face. It would direct the courts to focus on the relevant choice—the use of a guidance document rather than legislative rulemaking. Forcing the agency to explain this choice would do much to induce the agency to think about it more explicitly, and unpersuasive explanations might be a means for courts to ferret out illegitimately motivated uses of guidance documents.[178]

Nina Mendelson has suggested that Congress amend the APA to allow stakeholders to petition agencies to amend or repeal a guidance document with which they do not agree.[179] The agency would have six months to respond to such a petition, and its response would be judicially reviewable on grounds that it was arbitrary and capricious.[180] Moreover, to avoid an agency getting bogged down in multiple successive petitions, upon receipt of one petition, the agency could notice the matter and seek input from any others who have an interest in the guidance document.[181] Finally, to avoid forcing an agency to devote resources to a matter that does not warrant them, the agency can decline the petition by arguing that the submission does not require a substantive response.[182]

Mendelson's suggestion also has facially attractive aspects. It would explicitly provide an avenue for participation in the guidance decision for any stakeholder willing to take the trouble to petition for agency reconsideration, albeit an avenue that would open after the agency has initially decided the matter. It would also provide a record consisting of material placed before the agency by petitioners for amendment and those who respond to an agency call for input, as well as the material on which the agency relied to formulate its response to the petition. Thus, it seems to circumvent the denial of participation and the need to review an action with no public record before the court.

More careful reflection, however, reveals three problems common to both Magill's and Mendelson's suggestions: first, any avenue for

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177. *See supra* notes 46–51 and accompanying text.

178. *See* Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 553–55 & n.283 (1985) (explaining how hard-look review can "ferret out" an agency relying on illegitimate motives); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1569–70 (1992) (explaining how reasoned-decisionmaking review can identify decisions motivated by capture); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 469 (1987) ("The inquiry into arbitrariness is best understood as a means of 'flushing out' both serious errors of analysis and impermissible motivations for administrative behavior.").

179. Mendelson, *supra* note 7, at 438–44. This is only one of several "more palatable" solutions suggested by Mendelson, but it is the one that she identifies as having the most promise. *Id.*

180. *Id.* at 439–41.

181. *Id.* at 439.

182. *Id.*

stakeholders in a guidance matter to obtain review is uncertain; second, the very act of defending judicial challenges would likely mire the agency down and thereby significantly discourage appropriate use of guidance documents; third, assuming that stakeholders ultimately could obtain judicial review of guidance documents on grounds specified in these proposals, courts would be unlikely to impose sufficiently stringent review to deter or correct agency misuse of guidance.

The first problem stems from the courts' propensity to dismiss claims seeking review of guidance documents because they are not final or ripe for review.[183] Because ultimately both Magill's and Mendelson's proposals depend on the availability of judicial review, this propensity threatens to stymie each proposal. Because these problems also apply to my proposal advocating immediate judicial review of the substance of guidance documents, I will delay my detailed exposition of how courts should change applications of finality and ripeness to nonlegislative rules until I discuss my proposal.[184] For now, it suffices to note that the justiciability problems facing challenges to guidance documents run into trouble because courts hesitate to review such documents prior to applications that might reveal more about their impact.[185] Hence, under finality doctrine, guidance documents may not alter legal rights and obligations.[186] Under ripeness doctrine, they create no legally cognizable hardship for regulated entities because they do not provide an independent standard of conduct for which such entities can be punished.[187] By the converse, courts may find that regulatory beneficiaries suffer no hardship because guidance documents do not create an independent legal threat that will alter the behavior of regulated entities

183. *See* Funk, *supra* note 95, at 1335–41 (citing multiple cases in which courts declined petitions to review guidance documents based on the courts' findings that the documents were not final or ripe for review).

184. *See infra* subpart IV(A).

185. *See, e.g.*, Aulenback, Inc. v. Fed. Highway Admin., 103 F.3d 156, 167 (D.C. Cir. 1997) (concluding that even though an interpretive rule appeared to conflict with the authorizing statute, the rule was not ripe for review because the agency "might decline to follow the [rule's] language"); ACLU v. FCC, 823 F.2d 1554, 1577–78 (D.C. Cir. 1987) (proclaiming that the abstractness of interpretive rules that have not yet been applied makes them difficult to judicially challenge); Ark. Power & Light Co. v. ICC, 725 F.2d 716, 725 (D.C. Cir. 1984) (finding a policy statement unripe for review because its aim was not to set binding legal norms).

186. *See* Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 452 F.3d 798, 808 (D.C. Cir. 2006) (following the established principle that courts "lack authority to review claims under the APA 'where an agency merely expresses its view of what the law requires of a party, even if that view is adverse to the party'" (quoting Indep. Equip. Dealers Ass'n v. EPA, 372 F.3d 420, 427 (D.C. Cir. 2004) (internal quotation marks omitted))); *Indep. Equip. Dealers*, 372 F.3d at 427 (reasoning that an interpretation in an EPA letter was not final agency action because it did not announce a change in regulations and had no binding effect).

187. *See* Molycorp, Inc. v. EPA, 197 F.3d 543, 547 (D.C. Cir. 1999) (holding that a policy statement was not ripe for review because any enforcement would be based on the underlying regulation and hence the petitioner was no worse off for the EPA having issued the statement).

whose conduct harms beneficiaries.[188] Because Magill and Mendelson do not explicitly address these barriers to justiciability, their proposals are incomplete.

The second problem facing both Magill's and Mendelson's proposals is the likelihood that they will unduly bog down the issuance of guidance documents. Guidance documents are issued by officials at a multitude of levels of the agency hierarchy,[189] and agencies issue tens of thousands of them a year.[190] Under Magill's approach, an agency would have to explain why it chose to use the guidance mode to announce the policy or interpretation.[191] This adds an additional consideration to the issuance of every document, even those issued by field-office staff. For those from which the agency does not derive substantial benefit (but from which the public might), the agency is likely simply to forego announcing the policy or interpretation, leaving the matter to the vagaries of ad hoc decisions of its low-level investigators. This might be desirable if those documents that the agency simply did not issue were likely to be those which were substantively invalid. But, the correlation between an agency's willingness to jump through the hoop of explaining use of a guidance document and the validity of the document would be imperfect. While the costs of explanation may be greatest for those guidance documents that reflect agency abuse, the benefits to the agency using nonlegislative rules—saving on the devotion of resources and potentially sidestepping substantive review—may be greatest when the policy is invalid. Without some criteria to limit Magill's requirement of an explanation to those guidance documents whose overall impact warrants devotion of attention to the agency choice of mode, Magill's proposal is likely to deter both good and bad uses of guidance.

Mendelson's proposal avoids some of the problems of added burdens on agencies by restricting itself to those guidance documents that generate petitions for amendment or repeal. But, her proposal would mandate that, to avoid having to respond to successive petitions, the agency conduct what

188. *See, e.g.*, Pub. Citizen, Inc. v. Nuclear Regulatory Comm'n, 940 F.2d 679, 683 (D.C. Cir. 1991) (deciding that a policy statement was not ripe for review because its lack of legal force meant that a regulated party could not change its conduct under the policy until it secured an exemption through future rulemaking or licensing proceedings); NRDC v. EPA, 859 F.2d 156, 166 (D.C. Cir. 1988) (declaring that the fact that a policy statement may create uncertainty about legal requirements or prompt an entity to challenge the policy when applied is not sufficient hardship to make the statement ripe for review).

189. *See* Strauss, *supra* note 14, at 1467–68 (describing rules issued by staff other than the agency head that might affect later agency decisions in particular cases).

190. *See* Mantel, *supra* note 66, at 353 (observing that one agency alone issues thousands of guidance documents annually); Strauss, *supra* note 14, at 1469 (describing the "extraordinary volume" of publication rules and hypothesizing even greater volume of guidance documents that are not published in the *Federal Register*).

191. *See* Magill, *supra* note 6, at 1404–05 (asserting that courts' current practice of not requiring agencies to explain their choice of policy-making form is incongruent with the rest of judicial agency-review doctrine).

amounts to a full-fledged notice-and-comment-type proceeding.[192] The agency would have to notice the petition for amendment and allow those who have an interest in the matter to submit their petitions and, presumably, comments both in opposition and support of the current guidance.[193] This would then be substantively reviewable based on the record of such submissions under the accepted reasoned-decisionmaking standard courts apply to legislative rules adopted after notice and comment.[194] Most troubling, simply by petitioning essentially for reconsideration of a guidance document, a private stakeholder could commit the agency to a very costly and time-consuming process akin to a notice-and-comment rulemaking.[195] Given the limited resources available to agencies, I suspect that many would instruct their staff members to avoid issuing guidance documents unless the agency deemed the guidance to be absolutely necessary. The likely losers under such a mechanism would be those who most desire notice of agencies' likely future actions in implementing a statute or regulation.

To her credit, Mendelson anticipates this criticism, and admits that her proposal could be costly.[196] She tries to hedge against costly abuse by stakeholders by allowing an agency to argue that the petition does not warrant a substantive response.[197] The trouble with this hedge is that it would encourage courts to affirm an agency's rejection of a petition for reconsideration without meaningful review of the substance of the announced policy or interpretation because courts generally avoid involving themselves in prioritizing agency use of resources.[198]

This trouble segues into the third problem with the Magill and Mendelson approaches—they are unduly optimistic that courts would provide meaningful review of the agency choice of mode or the rejection of a petition for amendment or repeal. Because the decision to proceed by guid-

192. Mendelson, *supra* note 7, at 439 & n.223.

193. *See* 5 U.S.C. § 553 (b)–(c), (e) (2006) (requiring agencies to give notice of proposed rulemaking, opportunity for comment, and the right to petition for amendment).

194. Mendelson, *supra* note 7, at 440.

195. Courts have been reluctant to allow petitioners to force an agency to commence a notice-and-comment rulemaking by petitioning directly for legislative rulemaking under § 553(e). *See* Cellnet Commc'n, Inc. v. FCC, 965 F.2d 1106, 1111 (D.C. Cir. 1992) (acknowledging that judicial deference to an agency's refusal of petitions to commence rulemaking is "so broad as to make the process akin to non-reviewability"); WWHT, Inc. v. FCC, 656 F.2d 807, 817 (D.C. Cir. 1981) (applying an extremely deferential standard of review to an agency decision to deny petitions for rulemaking because that decision "'is inevitably based, in large measure, on factors not inherently susceptible to judicial resolution'" (quoting NRDC v. SEC, 606 F.2d 1031, 1046 (D.C. Cir. 1979))); *see also* Stephanie Tai, *Three Asymmetries of Informed Environmental Decisionmaking*, 78 TEMP. L. REV. 659, 695 (2005) ("[A]n agency's denial of the petition is subject to a very deferential standard of review.").

196. Mendelson, *supra* note 7, at 441 (recognizing that such costs might be "overwhelming").

197. *Id.* at 439.

198. *See* Heckler v. Chaney, 470 U.S. 821, 831 (1985) (attributing the general unsuitability of agency inaction for judicial review in part to each agency's unique capacity to determine whether taking a proposed action would align with its resources and priorities).

ance document reflects an agency's consideration of priorities for its limited resources, courts are not likely to provide sufficiently stringent review to detect agency abuse of guidance documents.

This problem is illustrated by the body of cases in which courts have reviewed agency denials of petitions for the agency to commence a rulemaking proceeding. Although such petitions are explicitly authorized by the APA,[199] they are immediately reviewable.[200] The ground for review usually is that the agency acted arbitrarily or capriciously, or abused its discretion in refusing to commence the proceeding.[201] But, unlike the usual judicial review under that standard, courts have applied a less stringent standard of review—cognizant that an agency's decision not to regulate reflects its determination that regulation is not of sufficient priority to warrant agency attention.[202] On occasion, a petitioner is successful in getting a court to force an agency to engage in legislative rulemaking but only when the petitioner can point to evidence that Congress expected the agency to address the matter underlying a petitioner's desire for a rule.[203] Essentially, courts recognize that commencing a rulemaking proceeding commits the agency to devote significant resources to adoption and implementation of a rule that it might think better used to address a different problem within the agency's regulatory ambit.

Mendelson simply elides this judicial reluctance, asserting that review of an agency refusal to modify or repeal a guidance document would involve application of the usual reasoned-decisionmaking standard of review.[204] But, her explicit recognition of the need for the agency option of explaining that the petition does not warrant a substantive response belies her assertion that the standard of review courts apply to such a refusal should be the same as that for substantive review of a legislative rule.

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199. *See* 5 U.S.C. § 553(e) (2006) (granting interested parties the right to petition an agency to issue a rule).

200. *Cf.* Massachusetts v. EPA, 549 U.S. 497, 527 (2007) (recognizing that an agency's denial of a rule-issuance petition is subject to judicial review).

201. *See, e.g.*, *Chaney*, 470 U.S. at 854 (Marshall, J., concurring) (reasoning that agency inaction is subject to review on the grounds that it was arbitrary, capricious, or an abuse of discretion, "unless Congress has manifested a clear and convincing intent to preclude review").

202. *See* NRDC v. SEC, 606 F.2d 1031, 1052–53 (D.C. Cir. 1979) (noting that denials of petitions for adoption of a rule are entitled to special deference even after an agency has seen fit to commence a notice-and-comment proceeding); *cf.* Prof'l Pilots Fed'n v. FAA, 118 F.3d 758, 763–64 (D.C. Cir. 1997) (explaining that a "more deferential standard of review is indicated, however, only when [an] agency has clearly shown that 'pragmatic considerations' would render the usual and somewhat more searching inquiry problematic because 'the agency has chosen not to regulate for reasons ill-suited to judicial resolution, e.g., because of internal management considerations as to budget and personnel or for reasons made after a weighing of competing policies'" (quoting Bargmann v. Helms, 715 F.2d 638, 640 (D.C. Cir. 1983))).

203. *See, e.g.*, Iowa *ex rel.* Miller v. Block, 771 F.2d 347, 351, 355 (8th Cir. 1985) (ordering the Secretary of Agriculture to commence a rulemaking where failure to do so would thwart "the clear intent of Congress to establish a program").

204. Mendelson, *supra* note 7, at 440.

Magill addresses courts' reticence to interfere with agency prioritization of resources but argues that unlike review of decisions whether to commence a rulemaking proceeding, choice of mode for announcing policy or interpretations does not involve agency priorities.[205] She contends that the fact that the agency has already acted indicates that it has already established that the matter is one warranting agency attention.[206] But this response ignores the fact that different procedural modes involve vastly different resource commitments. The agency has to balance those commitments against how much it desires a policy as part of choosing the mode by which it will announce it. For example, an agency might decide that one of its existing policies is unwise and should be changed. Because of reliance interests, however, the agency might not want to change the policy by adjudication and, in fact, such interests might prompt courts to prohibit the agency from using adjudication to announce the change.[207] But the policy may only affect a handful of people on an issue of slight importance to the agency. An agency in that situation would most likely change the policy by guidance document but almost certainly would not convene a legislative rulemaking.

A real-world example illustrates that agency choice of mode involves agency priorities and resource constraints. The example stems from an interpretive rule issued by the FAA declaring that a guide who takes hunters to remote areas by plane for pay and provides commercial air transportation must have a commercial pilot's license.[208] This interpretation, which reversed an existing interpretation by an FAA regional office, affected a handful of professional hunting guides in Alaska.[209] The D.C. Circuit reversed this interpretive rule, holding that agencies may not change long-standing interpretations by interpretive rule.[210] If Magill's understanding of agency priorities were correct, the FAA would have simply convened a rulemaking, which might take some time but clearly would allow it to impose its new interpretation. It never has and probably never will because the cost to the agency of instituting a notice-and-comment rulemaking is not worth the benefit the agency sees from the new interpretation.

There is also empirical evidence suggesting that Mendelson's proposal would have little effect on agency misuse of guidance documents. Currently, § 553(e) of the APA gives any "interested person the right to petition for the issuance, amendment, or repeal of a rule."[211] Because guidance documents clearly are rules under the APA, and the language and structure of § 553 in

205. Magill, *supra* note 6, at 1422.

206. *Id.*

207. *See supra* notes 168–69 and accompanying text.

208. The interpretive rule and the judicial reaction to it are described in *Alaska Professional Hunters Ass'n v. FAA*, 177 F.3d 1030, 1033–36 (D.C. Cir. 1999).

209. *Id.* at 1033.

210. *Id.* at 1034–36.

211. 5 U.S.C. § 553(e) (2006).

its entirety clearly indicates that § 553(e) applies to guidance documents,[212] the APA already seems to permit what Mendelson's proposal seeks.[213] If Mendelson's proposal truly would be an effective way for regulatory beneficiaries to hold agencies more accountable for guidance documents, one would expect to see many such petitions by beneficiaries and numerous cases in which petitioners seek review of a denial of those petitions. In fact, there are only two reported cases addressing claims seeking judicial review of denials of modification of guidance documents.[214]

Mendelson asserts that § 553(e) does not apply to guidance documents. Arguing that § 553 is not a paradigm of clarity, she claims that "the few courts to opine on the issue have flatly and unanimously [agreed]."[215] She cites three of these opinions.[216] But they are hardly sufficient to support her claim that the inapplicability of § 553(e) has been judicially resolved. Only one of those decisions was by a court of appeals, and in that case the statement arguably was dicta.[217] In one of the two district court cases, the

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212. Subsection 553(a) provides that "[t]his section [entitled "Rule making"] applies, according to the provisions thereof." *Id.* § 553(a). It then exempts certain matters relating to military and foreign affairs and management of personnel and property from all of § 553. *Id.* Subsection 553(b) requires an agency to provide notice of proposed rulemaking, but exempts guidance documents from "this subsection." *Id.* § 553(b). Subsection 553(c) provides that "[a]fter notice required by this section, the agency shall give interested persons an opportunity to [file comments on the proposed rulemaking]." *Id.* § 553(c). Because notice is not required for guidance documents, there is a consensus that the comment requirement in subsection (c) does not apply to such documents. *See* ATTORNEY GENERAL'S MANUAL, *supra* note 19, at 28 ("Subsections (a) and (b) of § 4 must be read together because the procedural requirements of subsection (b) apply only where notice is required by subsection (a)."). Subsection 553(d) requires agencies to publish a rule "not less than 30 days before its effective date" but again specifically exempts "interpretative rules and statements of policy." 5 U.S.C. § 553(d). Subsection 553(e) covers all rules and makes no exception for guidance documents. *Id.* § 553(e). Read in isolation, it might be possible for one to interpret the exception in § 553(b) as intending to exempt guidance documents from all of § 553. But, the second explicit exemption in subsection (d) and the fact that subsection (a) lays out the exemptions to the entire section deprive this interpretation of any plausibility.

213. This is explicitly the understanding of the *Attorney General's Manual* of 1947, which states that § 553(e) "applies not only to substantive rules but also to interpretations and statements of general policy." ATTORNEY GENERAL'S MANUAL, *supra* note 19, at 38.

214. *See* Atchison, Topeka & Santa Fe Ry. Co. v. Peña, 44 F.3d 437, 442, 445 (7th Cir. 1994) (en banc) (mentioning briefly § 553(e) in granting railroads' petitions for review of the actions of the Federal Railway Commission (FRC) and vacating the FRC's orders); Nat'l Wrestling Coaches Ass'n v. U.S. Dep't of Educ., 263 F. Supp. 2d 82, 126 (D.D.C. 2003) (recognizing the availability of judicial review for plaintiffs' § 553(e) claim), *aff'd on other grounds*, 366 F.3d 930, 948 (D.C. Cir. 2004). It is possible that other cases have not arisen because the current law does not limit the time within which an agency must respond. But time limits on agency action in other contexts have hardly been sufficient to actually force an agency to act within the allotted time frame. *See infra* note 221.

215. Mendelson, *supra* note 7, at 439–40.

216. *Id.* at 440 n.227 (citing *Atchison*, 44 F.3d at 442; *Nat'l Wrestling Coaches*, 263 F. Supp. 2d at 128; United Transp. Union v. Del. & Hudson Ry. Co., 977 F. Supp. 570, 574 n.2 (N.D.N.Y. 1997)).

217. The Seventh Circuit in *Atchison* stated that "interested parties do not have the right to petition the agency for review of its interpretive rulings as they do with respect to agency rules." *Atchison*, 44 F.3d at 442 (citing 5 U.S.C. § 553(e)). But the court need never have addressed that

statement was also dicta.[218] In the remaining district court case, the holding was affirmed by the court of appeals on different grounds.[219] Most significantly, the statements in all these opinions were made in passing, and none of these opinions considered the specific language, structure, or legislative history of the APA's treatment of guidance documents. There is, in addition, a D.C. Circuit opinion suggesting, to the contrary, that § 553(e) does apply to guidance documents.[220] In light of the clear language and the nondefinitive judicial treatment of the applicability of the right to petition for modification to guidance documents, the dearth of cases in which stakeholders attempted to petition for modification of such a document seems to reflect an assessment that such a strategy is unlikely to succeed in getting courts to hold the agency accountable for the guidance document, rather than a belief that the strategy was precluded by the APA.[221]

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right because it struck down the interpretive rule on the merits. *Id.* at 445. The one-sentence mention of the right to petition for modification was made as part of a discussion of how much deference interpretive rules were due. *Id.* at 441–43. The sentence was included as part of the court's unremarkable explanation that, in general, the APA treats legislative rules differently from interpretive rules. *Id.* at 442.

218. *See United Transp. Union*, 977 F. Supp. at 574 & n.2 (stating the same language as *Atchison* while also considering the degree of deference due interpretations in guidance documents). In this case, however, there was not even a petition seeking issuance or amendment of a guidance document so, necessarily, the statement was dicta.

219. *See* Nat'l Wrestling Coaches Ass'n v. U.S. Dep't of Educ., 366 F.3d 930, 948–49 (D.C. Cir. 2004) (dismissing the claim for unlawful denial of a petition for rehearing or review as not ripe), *aff'g on other grounds*, 263 F. Supp. 2d 82, 128 (D.D.C. 2003) (dismissing the claim in part because the guidance document did not intend to revisit the substance of a previous policy).

220. *See* Guardian Fed. Sav. & Loan Ass'n v. Fed. Sav. & Loan Ins. Corp., 589 F.2d 658, 668 (D.C. Cir. 1978) (discussing in dicta the availability of § 553(e)). After carefully analyzing the language of § 553 of the APA, Judge Leventhal opined that if the agency began applying the guidance document like a legislative rule,

> the interests affected would at least have the opportunity to invoke subsection 553(e) of the APA to petition for a modification, an opportunity in effect to assure some agency consideration of comments. . . . When there has been no procedure for comment in the first instance, a petition to modify may serve an appropriate objective. On the other hand, this is definitely not to be construed as an invitation or authority to an institution to file a petition every time it feels aggrieved by some policy or instruction.

Id.

221. Mendelson's proposal, which includes a six-month deadline for the agency to respond to a petition to modify a guidance document, may counter the potential for agency delay that could deny petitioners meaningful relief from a guidance document. Unfortunately, experience has shown that even a statutory deadline will often be ineffective to prevent agency delay because petitioners have to wait for the deadline to pass to sue to get the agency to respond, and courts are so solicitous of administrative discretion about how to deploy agency resources that they usually grant agencies substantial time after the deadline to comply. *See, e.g.*, Rosemere Neighborhood Ass'n v. EPA, 581 F.3d 1169, 1171–72 (9th Cir. 2009) (describing the six-year process for petitioner to get a court to order the EPA to rule on a complaint that by regulation the EPA was required to accept or reject within twenty days); Forest Guardians v. Babbitt, 174 F.3d 1178, 1193 (10th Cir. 1999) (ordering the Secretary to designate critical habitat for an endangered species "as soon as possible," despite the fact that the deadline had passed years before, reasoning that "any order now to impose a new deadline for compliance must consider what work is necessary to publish the final rule and how quickly that can be accomplished").

IV. Review of Guidance Documents for Reasoned Decisionmaking

Having identified problems with procedural approaches to constrain misuse of guidance documents and rejected other approaches that aim to cure these problems, I turn now to develop a mechanism of substantive review that I think best balances agencies' need for guidance documents against their misuse of those documents. At the outset, I should make clear that I am convinced by the arguments of the ex-post-monitoring school that courts should get out of the business of trying to distinguish nonlegislative from legislative rules ex ante. My proposal, therefore, is to add some version of direct substantive review to the elimination of ex ante procedural review.

In considering the balance between the need for guidance and the potential for abuse, I am guided by two beliefs: first, that any official issuing a guidance document that takes effect without further agency action should first seriously consider its consequences; second, that a stakeholder adversely affected by such a guidance document is entitled to an explanation for the official's decision. While such thought and explanation may take time and effort, they are inherently more reasonable and less burdensome than requiring the official to follow any particular procedure or to allow public participation in developing a record regarding issuance of the guidance document.[222] To ensure that agency officials satisfy these criteria, I advocate that courts more readily engage in meaningful substantive review of guidance documents *when they are issued*.

In the context of agency actions other than guidance documents, meaningful substantive judicial review—by which I mean some variant on requiring reasoned decisionmaking—encourages agencies to consider relevant information carefully before acting.[223] Review for reasoned decisionmaking has also helped transform the informal rulemaking process into one that allows stakeholder input that agencies must address before acting.[224] As putative beneficiaries of regulation have organized into interest groups, this transformation has helped balance the influence of such benefi-

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222. *See* Stuart Minor Benjamin & Arti K. Rai, *Fixing Innovation Policy: A Structural Perspective*, 77 GEO. WASH. L. REV. 1, 69–75 (2008) (concluding that hard-look-type review can provide benefits for government innovation without imposing the costs of notice-and-comment proceedings).

223. *See* Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1660–61 (2004) (contending that reasoned-decisionmaking review would discourage agency action that "does not reflect the manner in which good government should operate"); Seidenfeld, *supra* note 126, at 547 (remarking that the psychology of accountability suggests that reasoned-decisionmaking review would improve the quality of agency rules).

224. *See* Bressman, *supra* note 126, at 1761–62 (noting that "the hard look doctrine promoted participation by encouraging agencies to respond to criticisms and show why they had rejected alternative solutions," but also remarking that the doctrine was not entirely successful in equalizing participation by various stakeholders); Rossi, *supra* note 125, at 818 ("[T]he hard look doctrine ensures participation by precluding agencies from giving one interest the rubber-stamp in the rulemaking process, only to ignore the objections of other interests.").

ciaries against that of regulated entities even to the point of inducing agencies to change the composition of their rulemaking teams responsible for shepherding legislative rules through the notice-and-comment process.[225] Moreover, immediate review of agency legislative rules relieves regulated entities from the dilemma of whether to comply with regulations that they believe to be invalid or risk significant penalties for noncompliance.[226] By seeking review before the rule takes effect, they can obtain a judicial determination of its validity prior to having to comply.

Some of the benefits of substantive judicial review, however, depend on the APA requirement that the agency allow stakeholders to participate in creating a record for the agency action.[227] In addition, courts are reluctant to apply hard-look-type review to an action for which an agency has not created such a record.[228] But much of the value of guidance documents stems from the speed and ease with which agencies can issue them. This flexibility will be compromised if agencies have to engage in something akin to notice-and-comment procedures before issuing such documents.[229] Therefore, if substantive review is to provide similar benefits in the context of guidance documents, it will have to be tailored to do so despite the fact that the APA requires no procedures or public agency record for the development of an interpretive rule or policy statement.[230]

In addition, judicial review for reasoned decisionmaking has been criticized for ossifying the rulemaking process.[231] While the significance of this critique is debatable,[232] there is little doubt that such review adds to the

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225. *See* Seidenfeld, *supra* note 125, at 493 & n.59 (noting that agencies have added new professionals to their organizations to better understand judges' concerns and to convince courts of the merits of their decisions).

226. *See* Abbott Labs. v. Gardner, 387 U.S. 136, 152–53 (1967) (noting that delaying judicial review of a rule mandating conduct until the agency enforces the rule poses a dilemma for regulated entities).

227. *See* Stuart Minor Benjamin, *Evaluating E-Rulemaking: Public Participation and Political Institutions*, 55 DUKE L.J. 893, 909–13 (2006) (identifying potential ways in which increased participation can improve rulemaking quality).

228. *See, e.g.*, Aviators for Safe & Fairer Regulation, Inc. v. FAA, 221 F.3d 222, 229–30 (1st Cir. 2000) (deferring to the agency's explanation of a rule because it was "commonsense" and opining that if the petitioner had evidence that might undermine the explanation, it could introduce that evidence as part of a petition to amend the regulation); *see also supra* notes 211–21 and accompanying text.

229. *See supra* note 222 and accompanying text.

230. *See* 5 U.S.C. § 553(b)(3)(A) (2006) (exempting interpretive rules and policy statements from APA notice-and-comment rulemaking procedural requirements).

231. *See, e.g.*, JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 225 (1990) (listing agencies that have found their activities halted by judicial review); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1400–03, 1419 (1992) (explaining the time-consuming nature of drafting rules to withstand judicial scrutiny); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 65–66 (1995) (listing doctrinal shifts courts have made to reduce rulemaking ossification).

232. *See* Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 OHIO ST. L.J. 251 (2009) (examining the consequences of hard-look review); *see also* William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review*

time and resource commitment that an agency must devote to taking action.[233] Moreover, many guidance documents are issued by staff members, sometimes even those significantly below the agency head.[234] It would be difficult for an agency to police all the guidance issued by staff members to ensure that it can satisfy hard-look review. Without some protection from full-fledged hard-look review, opening guidance documents to more immediate judicial review would increase the expected costs of issuing them and, therefore, likely discourage issuance even of guidance documents that are valuable.[235]

A. The Timing of Review—Finality and Ripeness of Guidance Documents

Currently, doctrines of finality and ripeness often shield the agency from the potentially paralyzing effects of "direct" substantive judicial review of guidance documents—that is, review of such documents when issued. Thus, maintenance of some form of these doctrines will be essential to avoid increasing the costs of such documents so greatly as to unduly chill their use. These doctrines, however, can also stymie review necessary to discourage agency misuse of guidance documents. Thus, crafting direct substantive review that provides the promised benefits without miring the issuance of guidance documents in unnecessary process will require carefully massaging finality and ripeness.[236]

1. Finality.—The APA provides for review of all actions made reviewable by an agency's authorizing statute or action that is otherwise final.[237] Because statutes do not generally provide for review of guidance documents, such documents are reviewable only if they are final agency action. To be final, agency action first must be the "consummation of the agency's decisionmaking process"[238] and second must be one "by which rights or obligations have been determined, or from which legal conse-

Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?, 94 NW. U. L. REV. 393, 440 (2000) (reporting that agencies in most instances were able to reinstate the substance of rules that courts had reversed as arbitrary and capricious).

233. *See* McGarity, *supra* note 231, at 1401 (noting the "Herculean effort" rulemakers must undertake so that rules will withstand judicial scrutiny).

234. Strauss, *supra* note 14, at 1467.

235. *See id.* at 1472 (arguing that the procedural- and hard-look-review requirements "could significantly impair a kind of activity [(the issuance of guidance documents)] Congress has chosen, perhaps for good reason, to permit on a significantly less formal basis"); *cf.* Emerson H. Tiller & Pablo T. Spiller, *Strategic Instruments: Legal Structure and Political Games in Administrative Law*, 15 J.L. ECON. & ORG. 349, 351–52 (1999) (modeling how the threat of judicial reversal may discourage an agency from adopting its preferred policy).

236. For a theoretical analysis of the benefits and detriments of preenforcement of rules, see generally Mark Seidenfeld, *Playing Games with the Timing of Judicial Review: An Evaluation of Proposals to Restrict Pre-enforcement Review of Agency Rules*, 58 OHIO ST. L.J. 85 (1997).

237. 5 U.S.C. § 704 (2006).

238. Bennett v. Spear, 520 U.S. 154, 177–78 (1997) (quoting Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948)) (internal quotation marks omitted).

quences will flow."[239] Judicial inquiry under current doctrine is case specific, and there are a good number of cases in which courts have found guidance documents to be final agency action.[240] Nonetheless, the dual inquiry that governs finality predisposes courts to determine that guidance documents are not final more often than is warranted.

Using the first criterion, occasionally courts have reasoned that because an agency can change a guidance document on a moment's notice without any required process, guidance documents do not represent the consummation of the agency's consideration of the announced interpretive or policy question.[241] Courts have also found determinations expressed in letters or other informal documents to be tentative when stated in the context of particular facts, suggesting that the outcome in actual cases might be different because the facts might differ.[242] In either type of case, the ease with which agencies can change these actions seems to have led some courts to express uncertainty about whether the actions truly represent the ultimate agency decision on the relevant issue.[243] This reasoning, however, fails to understand the underpinnings of this criterion.

The foundation for the consummation criterion is avoidance of judicial interference with agency decision making until the agency has completed its own resolution.[244] Therefore, the key to the consummation determination should not be how likely the agency is to change its mind, but whether the agency is actively considering doing so in the context of the action under review. The mere fact that an agency can change its mind is not a good indi-

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239. *Id.* at 178 (quoting Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970)) (internal quotation marks omitted).

240. *See, e.g.*, NRDC v. EPA, 643 F.3d 311, 320 (D.C. Cir. 2011) (concluding that an EPA guidance document qualified as final agency action when the guidance document made a binding change to existing law); Venetian Casino Resort, L.L.C. v. EEOC, 530 F.3d 925, 931 (D.C. Cir. 2008) (holding that the EEOC's decision to adopt a policy within one of its guidance documents constituted final agency action); Gen. Elec. Co. v. EPA, 290 F.3d 377, 380 (D.C. Cir. 2002) ("[I]t is clear that the Guidance Document is final agency action because it marks the consummation of the EPA's decisionmaking process and it determines the rights and obligations of both applicants and the Agency.").

241. *See, e.g.*, Taylor-Callahan-Coleman Cntys. Dist. Adult Prob. Dep't v. Dole, 948 F.2d 953, 957 (5th Cir. 1991) (holding that advisory interpretations of the Wage and Hour Administrator are not final agency actions because "they are expressly issued subject to change by the Administrator").

242. *See, e.g.*, Air Brake Sys., Inc. v. Mineta, 357 F.3d 632, 639 (6th Cir. 2004) (describing the NHTSA Chief Counsel's letter explaining why a manufacturer's product did not meet the agency's safety requirements as tentative and, hence, not final action in part because it was based on initial facts the agency learned from the manufacturer).

243. *See, e.g., id.* at 639 (describing the "conditional" nature of the NHTSA Chief Counsel's letter as sufficient to suggest that the letter is nonfinal and nonreviewable); *Taylor-Callahan-Coleman*, 948 F.2d at 957 (observing that agency interpretations were subject to change and, thus, not subject to judicial review).

244. *See* RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS § 5.7.1, at 190 (4th ed. 2004) (explaining that the concept of finality "is designed to avoid premature judicial involvement in the agency decision making process" that would take from the agency the initial decision-making power granted by the legislature).

cation that it is actively considering doing so. Otherwise, even legislative rules would be subject to arguments that they are not final, because the agency is free to change them as well, albeit only by notice-and-comment procedures.[245] Rather, courts should look at the language of the guidance document and the circumstances surrounding its creation to determine whether the agency has completed its current consideration. They should recognize that a document that states an agency belief in a particular interpretation or policy sends a signal to agency staff that the agency has resolved the issue and that they are to act in accordance with it.

Courts have also held that a guidance document does not represent the consummation of the agency's decision-making process when issued by staff members below the agency head who are not authorized ultimately to determine agency policy or interpretation.[246] This use of the consummation criterion makes sense when the document reflects the opinion of a subordinate official and does not commit the agency to the guidance, because it must be applied in a subsequent action, such as a legislative rule or an adjudication, before formally taking effect.[247] In such a situation, the agency head has not indicated whether she agrees with the guidance given by the subordinate, and she will have the opportunity to consider whether to adopt or reject the guidance in the subsequent proceeding. Especially in light of fears of overly discouraging guidance documents,[248] it seems best that courts treat such guidance documents as not representing the consummation of agency consideration. The analysis changes, however, for a guidance document issued by a subordinate official that takes effect without further agency action—for example, a decision by the director of an enforcement office of an agency to refrain from enforcing a regulatory or statutory provision, or interpreting such a provision to protect conduct that arguably is contrary to

245. Funk, *supra* note 95, at 1336; *see also* Nat'l Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689, 701 (D.C. Cir. 1971) (holding a lengthy letter from the Administrator of the Wage and Hour Division of the Department of Labor that explained an interpretation to an association of retail stores to be final agency action even though his decision could be changed in the future).

246. *See, e.g.*, *Air Brake*, 357 F.3d at 640 (concluding that the NHTSA Chief Counsel's determinations regarding safety standard compliance did not constitute final agency action because the Chief Counsel was not delegated the authority to make such decisions); *see also* Franklin v. Massachusetts, 505 U.S. 788, 797 (1992) (stating in dicta that "agency action is not final if it is only 'the ruling of a subordinate official'" (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 152 (1967))). *But see* W. Ill. Home Health Care, Inc. v. Herman, 150 F.3d 659, 663 (7th Cir. 1998) (holding that a letter from an "obviously . . . subordinate official at the DOL" of a "relatively low position within the Department" did not preclude the court from finding the letter final and reviewable agency action because "[l]egal consequences flow[ed] from it").

247. *See Nat'l Automatic Laundry*, 443 F.2d at 700 (discussing the difference between a letter from an agency head and one by a subordinate official and noting that the consummation criterion is not required "when the interpretive ruling is signed by the head of the agency").

248. *See supra* note 235 and accompanying text.

it.[249] Such a document has immediate formal consequences in that it will dictate the conduct of those members of staff subject to supervision by the official and, hence, commit at least part of the agency to a course of conduct. And these consequences will occur without subsequent consideration of the matter by the agency head. Therefore, if the circumstances surrounding a staff member's issuance of such a document indicate that the member has completed his consideration of the matter, it is sensible to deem the agency to have resolved the matter upon issuance of the guidance.[250]

As noted above, monitoring guidance documents issued by field staff would be a daunting task, so it is potentially problematic to hold the agency responsible for guidance given by a subordinate staff member. But an agency can alleviate this problem by adopting a procedural rule requiring a person seeking to challenge an otherwise-final guidance document to petition for reconsideration before going to court to challenge it. As long as the agency provides that the guidance document does not take effect while the petition is pending, the decision by the lower-level official will not be final agency action under the APA.[251] This clarification of the consummation criterion applied to guidance documents issued by staff members not only makes sense in terms of the purpose of that criterion, it also has the salutary effect of allowing immediate review only when shielding review of such documents would effectively preclude review altogether because the guidance operates even in the absence of subsequent agency action.

The second finality criterion poses a more significant hurdle for review of guidance documents. The terms *rights or obligations* and *legal consequences* suggest that agency action must have binding legal effect if it is to be final. Recall, however, that courts often define guidance documents as rules that do not require notice-and-comment proceedings because they have no legal force—that is, they do not create new legal obligations or have any binding effect.[252] Thus, not surprisingly, numerous courts have reasoned

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249. This would not include agency actions that initiate further proceedings, such as the filing of an administrative complaint, given that the matter will be presented to the agency head as part of the initiated proceeding. *See* FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 241 (1980) (holding that the FTC's averment of "reason to believe" that Standard Oil of California was violating the Federal Trade Commission Act was merely a threshold determination that a complaint should initiate further proceedings, and not a definitive statement of position); *cf.* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 157–58 (1975) (holding that memoranda from NLRB General Counsel regarding whether the agency should file unfair-labor-practice complaints are final agency action subject to disclosure under FOIA if the agency dismisses the complaint).

250. *Cf.* Funk, *supra* note 95, at 1340 (asserting that courts are more apt to find a nonlegislative rule that relieves an entity from a potential regulatory burden to be ripe for review when challenged by the regulatory beneficiaries).

251. *See* 5 U.S.C. § 704 (2006) (stating that an agency action is not final if the agency "requires by rule and provides that the action . . . is inoperative" upon an application "for an appeal to superior agency authority"); Darby v. Cisneros, 509 U.S. 137, 152 (1993) (asserting that the purpose of § 704 was to allow an agency to mandate an appeal of an examiner's initial decision, which the APA otherwise made final).

252. *See supra* note 20 and accompanying text.

that the lack of such force weighs against deeming guidance documents to be final agency action.[253]

There are serious questions as to whether this prong really should be part of determining finality of a rule under the APA. The Court in *Bennett v. Spear*[254] incorporated the language from holdings regarding finality of agency orders (as opposed to other actions such as rules) under the Administrative Orders Review Act.[255] And it is not even clear why the Court did so, given that it has never relied on the second prong to dismiss any claim for review under the APA for lack of finality.[256] In *Bennett v. Spear* itself, the Court held that a Fish and Wildlife Service Biological Opinion (the Biological Opinion) was final agency action despite the fact that the Biological Opinion was advisory only, and therefore did not formally bind the Department of the Interior.[257] The Court reasoned that the Biological Opinion altered the legal regime because an agency that ignores it risks being penalized for taking an endangered species if it incorrectly determines that its action does not adversely affect such a species.[258] In essence, the Court reasoned that the Biological Opinion does not mandate agency action but does create a safe harbor for the agency and therefore has legal consequences.[259] But this is essentially the same effect that a guidance

253. *See, e.g.*, New Jersey v. U.S. Nuclear Regulatory Comm'n, 526 F.3d 98, 102–03 (3d Cir. 2008) (holding that an NRC statement detailing approaches acceptable to its staff was a policy statement because it explicitly disavowed being a binding regulation); Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 452 F.3d 798, 807–10 (D.C. Cir. 2006) (concluding that NHTSA's letters to auto manufacturers outlining guidelines for regional recalls were not final agency actions because they were not binding rules); Air Cal. v. U.S. Dep't of Transp., 654 F.2d 616, 620–21 (9th Cir. 1981) (holding that a letter from DOT's general counsel threatening an airport with withholding of federal funds for violating the statute was not final because it lacked the "status of law"). In some cases, however, courts have found pragmatic impacts sufficient to render agency action final. *See, e.g.*, Manufactured Hous. Inst. v. EPA, 467 F.3d 391, 397–98 (4th Cir. 2006) (holding that an EPA policy regarding the submetering-oversight programs of states qualifies as a final action based on EPA's prior threats and involvement in state decision making, and the policy's chilling effect on certain corporate owners).

254. 520 U.S. 154 (1997).

255. *Id.* at 177–78 (quoting Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948); Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970)); *see also* Gwendolyn McKee, *Judicial Review of Agency Guidance Documents: Rethinking the Finality Doctrine*, 60 ADMIN L. REV. 371, 403–04 (2008) (showing that the legal-rights-and-obligations prong of finality evolved from a statute-specific limitation on review of orders that had to be enforced by bringing an action in court and arguing that the prong does not serve any of the purposes of the finality limitation on review).

256. In *National Park Hospitality Ass'n v. Department of the Interior*, 538 U.S. 803 (2003), the Court ruled that a policy statement was not ripe for review because it had no legal impact. *Id.* at 809. But its rationale was that the document was not final agency action and therefore its impact did not create hardship sufficient to make the action ripe. *Id.* at 809–10. It is not clear what the importation of finality concerns into ripeness added to the analysis.

257. *Bennett*, 520 U.S. at 177–78.

258. *Id.* at 169–70.

259. *See id.* at 178 ("[T]he Biological Opinion and accompanying Incidental Take Statement alter the legal regime to which the action agency is subject, authorizing it to take the endangered species if (but only if) it complies with the prescribed conditions.").

document has: the document does not mandate conduct, but the entity subject to it potentially will face penalties if it decides to flout the guidance and ultimately the policy or interpretation is upheld.

Perhaps more significantly, this second prong of the finality doctrine has no logical relation to the aim of preventing unnecessary judicial intervention into ongoing agency rulemaking.[260] The doctrine might make sense were its aim to limit review under the APA to actions that have legal impacts, a narrower class of actions than those for which a petitioner might have standing to sue and for which suit might be ripe.[261] But the Court never explained why the term *final agency action* should be read to impose such an impact-based restriction on petitions for review brought under the APA, let alone pointed to any indication that finality required by the APA meant to impose a limit beyond that necessary to protect ongoing agency considerations.

In addition, reliance on nonlegislative rules' lack of legal force brings us full circle to the distinction between guidance documents and legislative rules. The same incoherence that attends to a priori determinations of which rules have sufficiently legal effect to be legislative is resurrected in judicial consideration of whether such rules are final agency action. Moreover, were courts to adopt the ex-post-monitoring approach to distinguishing legislative from nonlegislative rules, which I support, guidance documents would have legal consequences—in particular, the force of precedent as well as of providing notice allowing agencies to change an interpretation or policy via adjudication.[262] All of these considerations suggest that courts should refrain from applying the second prong of the finality standard and conclude that a guidance document's lack of independent legal force should not render the document nonfinal per se.

2. Ripeness.—Ripeness, like finality, poses a barrier to judicial review of guidance documents, although seemingly less of one for interpretive rules than for statements of policy. While ripeness is a pragmatic and factually

260. This lack of relation makes the prong especially problematic in cases where agency action clearly both represents the consummation of agency decision making and causes direct harm. *See, e.g.*, Trudeau v. FTC, 456 F.3d 178, 190–91 (D.C. Cir. 2006) (going to great pains to avoid deciding whether a press release that allegedly defamed the plaintiff but had no legal impact was final agency action).

261. *See* McKee, *supra* note 255, at 406 (describing how the second prong fractures proper and efficient judicial review by providing two instances for a court to address the hardship prong of the ripeness doctrine).

262. *See supra* notes 127, 133 and accompanying text (describing the legal effect of guidance documents under the ex-post-monitoring school). At least one case has relied on the notice that agency action provided to conclude that it has legal consequences. W. Ill. Home Health Care, Inc. v. Herman, 150 F.3d 659, 663 (7th Cir. 1998) (holding that a letter had "legal consequences" because it established the legal obligation that would subject the petitioner to penalties should it not prevail in an enforcement proceeding).

based inquiry,[263] with respect to challenges to legislative rules, courts have distinguished between rules that directly address regulated entities' conduct, which almost always are ripe, and those that have only secondary effects on conduct, which are not.[264] There is nothing about guidance documents that suggests abandoning this distinction. Frequently, however, courts have found guidance documents, unlike legislative rules, to be unripe even when they address primary conduct.

In evaluating the ripeness of challenges to guidance documents, I borrow loosely from Robert Anthony's notion of practically binding nonlegislative rules, focusing on rules that pragmatically are likely to affect regulated-entity behavior.[265] As I will develop below, challenges to nonlegislative rules that specify how the agency views a matter of policy or interpretation generally should be ripe. Courts should not impose a requirement that a policy statement be so clear as to specify precisely how the policy will operate before it can be challenged. Nor should they find a document unripe because the agency has indicated that it retains discretion about whether and when to apply it. With this understanding of what it means to be pragmatically binding, I address why such rules should be ripe for review and some concerns that this might pose for direct judicial review.

For agency action to be ripe, the issues raised on review must pose a hardship on parties to the judicial challenge and be fit for judicial decision.[266] On occasion, the lack of independent legal force that characterizes guidance documents has led courts to determine that they do not impose any hardship. Essentially, these courts reason that a document without legal force does not mandate any conduct by a stakeholder and hence does not create a hardship of the kind that warrants petitioners utilizing the courts to interfere with the administrative matter.[267]

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263. *See* Abbott Labs. v. Gardner, 387 U.S. 136, 149–50 (1967) (noting that cases interpret the "'finality' element in a pragmatic way" and analyzing cases that demonstrate the "flexible view of finality"); Madeline Fleisher, *Judicial Decision Making Under the Microscope: Moving Beyond Politics Versus Precedent*, 60 RUTGERS L. REV. 919, 935, 943 n.89 (2008) (describing ripeness as a "fact-centered prudential inquiry" unlikely to be determined by citation to factually analogous cases).

264. *Compare Abbott Labs.*, 387 U.S. at 152–53 (noting that regulation puts the petitioner on the horns of a "dilemma" of having to choose between costly compliance or risk of penalty for noncompliance), *with* Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 164–65 (1967) (distinguishing *Abbott Laboratories* because the regulation at issue in *Toilet Goods* did not impose any legal requirement on the primary conduct of the petitioner).

265. Anthony, *supra* note 2, at 1328. My definition of *pragmatically binding* differs from Anthony's in that I would look simply to whether the text of the rule specifies a determinate policy or interpretation of the agency. Doing so avoids much of the difficulty in distinguishing between guidance documents that are practically binding and those that are not under Anthony's approach.

266. *Abbott Labs.*, 387 U.S. at 149. Some courts have read *Abbott Laboratories* to require that either prong be met, while others have required both to be met, at least to some extent. *See* Neb. Pub. Power Dist. v. MidAmerican Energy Co., 234 F.3d 1032, 1038–39 (8th Cir. 2000) (describing this debate among appellate courts).

267. *See, e.g.*, Nat'l Park Hospitality Ass'n v. Dep't of the Interior, 538 U.S. 803, 810–11 (2003) (reasoning that the National Park Service's (NPS) interpretation of the Contracts Dispute Act

Despite this reasoning, there is no doubt that pragmatically binding guidance documents often greatly affect the conduct of regulated entities and putative regulatory beneficiaries. Such a document can put a regulated entity on the same horns of a dilemma as a legislative rule. If an agency adopts a policy statement announcing that it intends to enforce a regulation in a particular way, an entity subject to the regulation faces likely prosecution if it disregards the statement. And if the agency ultimately prevails on a judicial challenge to its policy, the entity will face penalties or denial of a requested agency action for violating the regulation. One might respond that the agency could have enforced the regulation in the same manner without issuing the policy statement, and therefore that the entity is better off knowing of the policy than not. But this ignores the pragmatic impact of the policy statement—that agency staff is now likely to apply the policy where it would not have before—as well as the legal effects—that the statement provides notice and precedent for subsequent agency action.[268]

Putative beneficiaries of regulatory schemes also will face pragmatic hardships if an agency adopts a policy or interpretation that relieves a regulated entity from compliance with a regulation. If they cannot obtain judicial review to resolve disputes about the substantive legitimacy of agency guidance, beneficiaries have to decide whether to continue to engage in the conduct that puts them at risk of the harm that they believe the regulatory scheme was meant to alleviate. For example, if an agency issues a policy statement refusing to enforce limits on emissions of a potentially harmful substance because the agency determines that exposure to the substance does not endanger the public health, a person who is exposed because he uses a product or lives in a certain locale will have to decide whether to stop using the product or to move to avoid exposure. The putative beneficiary may have a tougher time establishing standing and ripeness than would an entity directly regulated by the rule, because the beneficiary would have to show that the manufacturer of the product that includes the substance or the polluter in her locale would have lowered levels of the substance but for the statement.[269] But this is true of the beneficiary of a legislative rule as well.[270]

(CDA) did not impose a hardship on existing park concessioners because the NPS was not authorized to administer the CDA, even though the NPS construction of the CDA would affect concessioner negotiations with the NPS); Munsell v. Dep't of Agric., 509 F.3d 572, 586 (D.C. Cir. 2007) (holding that an inspection policy that targeted meat processors that did not sample meat for E. coli contamination was not ripe because the processors were not required to engage in any conduct); Truckers United for Safety v. Fed. Highway Admin., 139 F.3d 934, 938 & n.3 (D.C. Cir. 1998) (reasoning in part that the legal impact of a Federal Highway Administration statement indicating that trucking companies would be liable for violations of rules by their drivers did not create a hardship because counsel stated at argument that the companies could not change their conduct to avoid such liability).

268. *See* Franklin, *supra* note 4, at 303, 305 (explaining that agencies use nonlegislative rules to announce how they intend to carry out their statutory mandates and that these nonlegislative rules affect regulated industries and the public generally regardless of how they are characterized).

269. *See, e.g.*, Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., 366 F.3d 930, 936–39 (D.C. Cir. 2004) (denying standing to petitioners challenging a DOE statement setting out the agency's

Perhaps one difference (and the only difference) for the beneficiary between a legislative rule and a guidance document is the probability that the entities directly subject to the guidance will flout it and risk prosecution by the agency. Thus, like the hardship on those directly regulated, the hardship on the beneficiary also hinges on an evaluation of how likely the guidance is to influence the conduct of those subject to it. In short, when an agency issues a guidance document declaring that it intends to outlaw (or alternatively to allow) specific conduct because such conduct is prohibited by statute or regulation (or alternatively is not prohibited by statute or regulation), in many instances hardship on stakeholders pragmatically is not different from that generated by a legislative rule or an agency precedent in an adjudication.

In addition to questions about hardship, courts often find that arbitrary and capricious challenges to guidance documents are not fit for review.[271] The major hurdle posed by the fitness requirement stems from courts' propensity to find that guidance documents do not indicate clearly when and how agencies will apply them.[272] Courts explain that they will have a better

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enforcement policy because they could not show that those regulated by the DOE would change the conduct that led to petitioners' injuries if the DOE rescinded that statement); *cf. Truckers United for Safety*, 139 F.3d at 938 & n.3 (denying the hardship prong of the ripeness inquiry in part because counsel stated at oral argument that the regulated beneficiaries could not change their conduct in response to the agency's guidance).

270. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 561–62 (1992) (explaining that for suits by regulatory beneficiaries, causation of injury hinges on the response of third parties to regulation and noting that when the plaintiff is not the object of the regulation, standing is "substantially more difficult to establish" (internal quotation marks omitted)); Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 680 (2006) (acknowledging that courts are more reluctant to find challenges to regulations by beneficiaries ripe than challenges by regulated entities); Marla E. Mansfield, *Standing and Ripeness Revisited: The Supreme Court's "Hypothetical" Barriers*, 68 N.D. L. REV. 1, 46–47 (1992) (describing the difficulty for beneficiaries of showing ripeness under the *Lujan* standard—specifically, the difficulty of showing that the challenged rule requires behavior modification when it is the regulated party, not the beneficiary, who must modify its behavior).

271. *See, e.g.*, *Nat'l Park Hospitality Ass'n*, 538 U.S. at 812 (holding that agency action was not fit for judicial review because of the lack of a "concrete dispute"); Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 162 (1967) (declining to review an administrative regulation on the merits because it was not fit for judicial resolution); Ass'n of Am. Med. Colls. v. United States, 217 F.3d 770, 780–82 (9th Cir. 2000) (concluding that agency action was not fit for judicial review); *see also* Teva Pharm. USA, Inc. v. Sebelius, 595 F.3d 1303, 1308 (D.C. Cir. 2010) ("The 'fitness' prong of the [ripeness] analysis generally addresses 'whether the issue is purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final.'" (quoting Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 440 F.3d 459, 463 (D.C. Cir. 2006))).

272. *See, e.g.*, Interstate Natural Gas Ass'n of Am. v. FERC, 285 F.3d 18, 58–61 (D.C. Cir. 2002) (holding that a challenge to FERC's policy allowing gas pipelines to file seasonally variable rates was not ripe because the FERC left it to pipelines to propose specific variable rates as part of their tariff filings and thus there was no factual record that showed how this policy might be applied); Fla. Power & Light Co. v. EPA, 145 F.3d 1414, 1421 (D.C. Cir. 1998) (finding the EPA's interpretation about its authority under the Resource Conservation and Recovery Act to require cleanup of releases from certain waste facilities unripe because "it remains uncertain whether, or on what grounds, EPA would even apply this rule to clean-closed facilities"); Dietary Supplemental Coal. Inc. v. Sullivan, 978 F.2d 560, 562–65 (9th Cir. 1992) (holding that issuance of "regulatory

sense of how the guidance will operate in cases challenging a particular application when the agency action in a concrete setting might clarify these issues.[273] Uncertainty, however, does not distinguish those guidance documents that are pragmatically binding from legislative rules. Legislative rules often are opaque about how they will be applied,[274] and agencies retain discretion about whether to enforce them in particular cases; yet courts rarely reject arbitrary and capricious challenges to them as unripe.[275] It is true that agency policy statements may be less clear because agencies often write them in nonmandatory language to avoid having them struck down as legislative rules.[276] But in most cases, their precatory language does not hide how the agency intends for the rule to operate. Moreover, it seems perverse to allow agencies to escape review of a rule by couching it in language that essentially permits them greater leeway in applying it.[277]

The upshot of my analysis of finality and ripeness is that courts can and should modify those doctrines to facilitate their reaching the merits of arbitrary and capricious challenges to guidance documents. Allowing direct

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letters . . . informing recipients that CoQ_{10} was an unapproved food additive whose continued marketing subjected its sellers to enforcement actions" was not ripe for review—even though the FDA had seized products containing CoQ_{10}—reasoning that since the FDA's position on CoQ_{10} was not a final agency action, it was not bound by that position).

273. *See, e.g.*, Colwell v. Dep't of Health & Human Servs., 558 F.3d 1112, 1128 (9th Cir. 2009) ("If and when the parties are able to provide examples of the manner in which the HHS has used the Policy Guidance . . . we will be in a better position to determine whether [it] functions as a substantive rule or as a general statement of policy."); Munsell v. Dep't of Agric., 509 F.3d 572, 586 (D.C. Cir. 2007) (stating that the court had no way to evaluate the "'myriad circumstances that' will arise in connection with USDA enforcement actions taken pursuant to [the Directive]" (quoting City of Hous. v. HUD, 24 F.3d 1421, 1431 (D.C. Cir. 1994))).

274. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 655–60 (1996) (arguing that judicial deference to agency interpretations of their own regulations encourages agencies to adopt unclear regulations and observing that under *Seminole Rock*, "an agency can safely select words having 'so little color of their own that they can be made to take almost any hue'" (quoting Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 884 (1930))). *See generally* Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983) (contending that transparency is one desired trait of agency rules that often is traded off against congruency of rules to the desired outcomes and minimization of rulemaking costs).

275. *See, e.g.*, Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1037–40 (D.C. Cir. 2002) (entertaining an arbitrary and capricious challenge to an FCC decision not to repeal broadcasting ownership rules even though there was no indication what rules the FCC would adopt to replace the ownership rules were it to repeal them); JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 179 (1997) (asserting that preenforcement review of legislative rules is now the norm); Diver, *supra* note 45, at 412 (noting that Congress has reinforced the norm of preenforcement review of rules by prohibiting collateral attacks on rules in enforcement proceedings).

276. *See* Anthony, *supra* note 2, at 1362 (bemoaning the fact that because vague rule statements are less likely to be treated as "legislative," agencies are "rewarded" for making rule statements ambiguous); *supra* note 82 and accompanying text (citing four cases from three circuits involving agency-issued policy statements in which their binding qualities made them rule-like).

277. *Cf.* Anthony, *supra* note 2, at 1361 (making the related point that allowing agencies to avoid notice-and-comment procedures if they retain discretion in applying a guidance document "leave[s] the private party in the worst of possible worlds").

review of the merits of guidance documents holds the potential for encouraging agencies to consult with stakeholders who are not repeat players or politically powerful groups when developing guidance, as well as to seriously consider the impacts of such guidance on these stakeholders. But, as I develop in the next subpart, access to the courts alone will not suffice to induce these salutary changes in how agencies develop guidance.

B. Arbitrary and Capricious Review of Guidance Documents

The foremost challenge to developing meaningful arbitrary and capricious review for guidance documents is creation of a standard that prevents agency abuse and encourages involvement of stakeholders and agency deliberation without bogging the agency down in the process. The attractiveness of guidance documents depends greatly on agencies being able to issue them quickly and without devotion of undue agency resources.[278] But, at least at first glance, many benefits of reasoned-decisionmaking review appear to derive from requiring an agency to develop a public record and explain itself in light of that record. Public comments provide valuable information that enables a reviewing court to determine whether an agency ignored questions about the basis for, or the impact of, the action under review.[279]

In addition, courts hesitate to demand meaningful reasoned decisionmaking when an agency adopts a rule without developing a public record. For example, courts review agency denials of petitions to adopt rules on grounds that the denials were arbitrary and capricious.[280] But the standard the court applies depends greatly on whether the agency happens to have created a record for a court to review. When the agency denial occurs on the merits after the agency has engaged in notice-and-comment procedures, courts have little problem applying the reasoned-decisionmaking standard.[281] When, however, the agency has not developed such a record, for instance where the agency refuses even to commence a rulemaking proceeding,

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278. *See supra* notes 52–54 and accompanying text.

279. *See* Coglianese et al., *supra* note 30, at 946 (asserting that public participation provides information that helps create a more complete record for judicial review); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2271 n.90 (2001) ("[A]n extensive record of public comments and responses helps a court to review the adequacy of an agency's decisionmaking process."). *See generally* William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38 (1975) (discussing the relationship of the rulemaking record to the benefits provided by judicial review).

280. *See, e.g.*, Prof'l Drivers Council v. Bureau of Motor Carrier Safety, 706 F.2d 1216, 1223 (D.C. Cir. 1983) ("Review of an agency's denial of a rulemaking petition is under the arbitrary and capricious standard . . . ." (internal quotations omitted)).

281. *See* Prof'l Pilots Fed'n v. FAA, 118 F.3d 758, 763–64 (D.C. Cir. 1997) (resolving to apply the usual searching standard of review unless the agency decision reflects pragmatic considerations such as resource constraints that render such review problematic); NRDC v. SEC, 606 F.2d 1031, 1045–46 (D.C. Cir. 1979) (noting that considerations of review interfering in an agency's execution of its programs are more compelling when the agency has denied an initial petition to commence a rulemaking than when it has held extensive rulemaking proceedings).

judicial review generally is not very demanding of the agency.[282] This suggests that arbitrary and capricious review of a nonlegislative rule is unlikely to induce the agency to engage in meaningful consideration of the consequences of the rule, at least when the agency has issued the rule without public involvement in its development.

One might counter that the recent Supreme Court decision *Massachusetts v. EPA*[283] signals that courts are now willing to take a harder look at whether such denials are arbitrary and capricious. First, however, one must concede that *Massachusetts v. EPA* can be read as a sui generis response to an agency's seeming perversity in refusing to recognize scientific consensus on an issue that had dominated public discourse over several years.[284] In any case, if *Massachusetts v. EPA* signals more searching judicial inquiry into agency actions for which the agency was not required to develop a record, it does not lay out any operational mechanism for such inquiry.

One way out of this conundrum would be for courts to treat the record as that information the agency considered in making its decision. Then a court would evaluate the agency explanation for a guidance document based on the information that was before the agency when it acted. Although an agency should be expected to take into account the information before it when it acts, in the absence of a requirement that an agency develop a public record, limiting the record to such information would create a perverse incentive for an agency to restrict the collection of relevant information to increase its chances of surviving judicial scrutiny. Additionally, the absence of a public record would undermine one foundational rationale for the reasoned-decisionmaking rubric, at least if that rubric is applied without modification to review of guidance documents. The genesis of the hard-look test suggests that it was meant to equalize the influence of various stakeholders in the process by forcing the agency to take seriously the views of groups with diffused interests, such as regulatory beneficiaries.[285] Thus, the hard-look variant of reasoned decisionmaking requires that agencies

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282. *See* Tai, *supra* note 195, at 695 ("Although under APA § 553(e), a party may petition an agency to initiate a rulemaking, such petitions carry very little force because an agency's denial of the petition is subject to a very deferential standard of review." (footnote omitted)); Raymond Murphy, Note, *The Scope of Review of Agencies' Refusals to Enforce or Promulgate Rules*, 53 GEO. WASH. L. REV. 86, 87 (1984) (reporting on numerous cases reviewing petitions to initiate rulemaking in which the courts applied a standard "considerably less demanding than the review afforded adoptions of rules").

283. 549 U.S. 497 (2007).

284. For example, Jody Freeman and Adrian Vermeule argue that this perversity led the Court to distrust the agency science as improperly co-opted by politics, and that the case is one of several expressing distrust of administrative politics. Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 52.

285. Bressman, *supra* note 126, at 1761; Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1756–60 (1975) (describing how the "adequate consideration" doctrine was meant to implement an "interest representation" model of administrative law).

explain their actions in light of all considerations and alternatives to their chosen action that the court finds relevant, potentially including those that the agency may wish to ignore.[286] But this test would provide no check on the agency ignoring information that cuts against its action if the agency gets to decide what information it need consider when acting.

My solution to this seeming conundrum hinges on the recognition that much can be gained by requiring an agency to explain its actions even in the absence of a specified mechanism for creating a decision-making record.[287] Dicta from the familiar *Vermont Yankee* case, albeit on an issue for which the case is not well-known (the bounds of the National Environmental Policy Act's (NEPA) requirement that an agency consider alternatives to its action),[288] provides a blueprint for how such review without a specified process for creating a record might work. Petitioners claimed that the Atomic Safety Licensing Board had failed to comply with NEPA when licensing several nuclear power plants because it had not considered conservation as an alternative way to meet power demands.[289] An environmental group opposed to the licensing of a power plant in Michigan raised conservation as one of a multitude of contentions.[290] The Court held that although an agency has an obligation under NEPA "to consider every significant aspect of the environmental impact of a proposed action, it is still incumbent upon intervenors who wish to participate to structure their participation so . . . that it alerts the agency to the intervenors' position and contentions."[291] In a preface to this holding, the Court explained,

> Common sense . . . teaches us that the "detailed statement of alternatives" cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man. Time and resources are simply too limited to hold that an impact statement fails because the agency failed to ferret out every possible alternative, regardless of how uncommon or unknown that alternative may have been at the time the project was approved.[292]

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286. Kagan, *supra* note 279, at 2380; *see also* Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 761 (2008) ("The [hard-look] doctrine found its origins in judicial decisions requiring administrative agencies to demonstrate that they had taken a 'hard look' at the underlying questions of policy and fact. Hence agencies were required to offer detailed, even encyclopedic, explanations for their conclusions, to respond to counterarguments, to justify departures from past practices, and to give careful consideration to alternatives to the proposed course of action." (footnote omitted)).

287. I would apply my modified version of reasoned decisionmaking to review of guidance documents whether or not the agency actually used notice-and-comment procedures to develop them, to avoid deterring the agency from using such procedures.

288. Vt. Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 551–55 (1978).

289. *Id.* at 552.

290. *Id.* at 531.

291. *Id.* at 553.

292. *Id.* at 551.

The Court then discussed the status of conservation as an alternative to power-plant construction when the Board approved the nuclear plant, and found that "it is largely the events of recent years that have emphasized not only the need but also a large variety of alternatives for energy conservation."[293] In short, although the Court held that conservation was not sufficiently well recognized when the Board acted in 1969 to warrant serious consideration at that time, its opinion intimates that had the Board hearing occurred when the Court decided the case in 1977, the Board would have been remiss not to have considered conservation alternatives. Moreover, the discussion of the understanding of conservation in 1977 does nothing to suggest that the Board's obligation to consider alternatives it should have known to be plausible when it acted would only be triggered if those alternatives were raised by participants in the proceeding.

By analogy to NEPA's requirement that agencies consider plausible alternatives to their proposed action whether or not those alternatives are raised by participants in the environmental-evaluation process,[294] reasoned decisionmaking of guidance documents could mandate that agencies explain actions in terms of factors that are relevant and alternatives that are plausible given the state of knowledge available to the agency when it acted.[295] Essentially, agencies would have 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. This limitation of issues should not be confined to the state of knowledge of a general member of the public; otherwise, the agency would be able to avoid having to consider factual and predictive questions that it knows are relevant. Rather, the general state of knowledge should be that of one who is familiar with the underlying predicates for the policy or interpretation, but should not include information privy only to a few stakeholders because of their unique relation to the matter. Moreover, stakeholders should not be able to game the system by proffering private information either directly to agency staff or in contexts outside of agency proceedings such as in public statements or petitions for

293. *Id.* at 552.

294. The statute requires a "detailed statement" of any "alternatives to the proposed action." 42 U.S.C. § 4332(C) (2006). There is no indication that this is limited by the outcome of the evaluation process.

295. The D.C. Circuit formulated hard-look review at the same time that it developed the obligations that NEPA imposed on agencies, and many of these obligations are mirrored in obligations mandated by hard-look review. *See* Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1300–08 (1986) (detailing how NEPA review sowed the seeds of hard-look review in the D.C. Circuit). Thus, it should not be surprising that NEPA, which does not mandate significant involvement of the public in development of a record if the agency finds that its action will have no significant environmental impact, provides the template for applying reasoned decisionmaking when an agency acts with no need to develop a public record. Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 919 (2002).

judicial review. Otherwise, agencies could be forced to factor into their guidance decisions all input of stakeholders, which would turn judicial review into a backdoor mechanism for forcing virtual notice-and-comment proceedings.[296] By the same token, considerations would not strictly be limited to the record before the agency when it issued the guidance, as that would encourage an agency predisposed to a desired outcome to purposely ignore data and arguments that the agency should have known to be relevant. In addition, those challenging a guidance document should be able to have the reviewing court consider arguments that directly address the accuracy of information and the plausibility of analyses on which the agency relied in formulating the document. This will deter an agency from justifying the document using noncredible data or flawed analyses, whether intentionally or simply from carelessness or laziness.[297]

As an example of how reasoned decisionmaking on this limited record might work, one can look to the final part of the Supreme Court's opinion in *Massachusetts v. EPA*. In that case, the EPA argued that even if it had authority to regulate greenhouse gases, the uncertainty about the impact of such man-made emissions on global warming justified its decision not to regulate greenhouse-gas emissions from automobiles.[298] But, the Court emphasized the scientific consensus that greenhouse-gas emissions have contributed to global warming[299] and held that under the relevant provision of the Clean Air Act, the EPA could not simply refuse to evaluate the causal connection but, rather, must explain why it believed there either was no connection or as a matter of science it could not, or should not, evaluate the connection.[300]

Reasoned-decisionmaking review on such a limited record would directly constrain agency abuse of guidance documents. Such abuse occurs

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296. Strategic use of petitions for rulemaking proceedings is a concern that dates back to the adoption of the APA in 1946. *See, e.g.*, Foster H. Sherwood, *The Federal Administrative Procedure Act*, 41 AM. POL. SCI. REV. 271, 279 (1947) (viewing the right to petition for a rulemaking as having "doubtful value" because agencies might be "swamped by frivolous requests having delay as their sole objective").

297. The use of such data or analyses raises the same concerns that courts have addressed by requiring agencies to make data and analyses on which they rely to justify legislative rules available as part of the notice-and-comment process. *See, e.g.*, United States v. N.S. Food Prods. Corp., 568 F.2d 240, 251 (2d Cir. 1977) ("If the failure to notify interested persons of the scientific research upon which the agency was relying actually prevented the presentation of relevant comment, the agency may be held not to have considered all 'the relevant factors.'"); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393 (D.C. Cir. 1973) (stating that the purposes of rulemaking are undermined when an agency "promulgate[s] rules on the basis of inadequate data, or on data that, [in] critical degree, is known only to the agency").

298. Massachusetts v. EPA, 549 U.S. 497, 513 (2007).

299. *Id.* at 521 (concluding that "[t]he harms associated with climate change are serious and well recognized").

300. *Id.* at 533. Although the EPA had engaged in notice-and-comment proceedings, the Court repeatedly emphasized the publicly available scientific reports and the consensus that global warming is a problem, and it did not rely on the EPA's failure to address any issue in the record. *Id.* at 507–09, 521.

when an agency, believing that it would not survive judicial review were it to issue a legislative rule, instead issues a guidance document in a context where those adversely affected would either have no opportunity or insufficient incentive to challenge the document's announced policy or interpretation. In other words, abuse is characterized by agency knowledge that calls into question the validity of the announced policy or interpretation. If guidance documents were subject to immediate review based on information available to the agency, the agency would have to defend the policy or interpretation against the very arguments that it fears would raise the threat of judicial reversal.

Even if an agency issues a guidance document with a good-faith belief that it could defend it upon review, the fact that there actually might be review is likely to sharpen the agency's consideration of potential counterarguments.[301] Judicial review can provide a powerful tonic to agency staff members' propensities to take shortcuts and ignore factors that might undermine their predilections about the wisdom of a policy or interpretation.[302] Review is more likely to provide an effective tonic when it seeks an explanation rather than a particular outcome and the agency is not aware of the outcome preferred by the reviewer.[303] Reasoned decisionmaking by a panel of judges whose identity is not known when the agency makes its decision fits the criteria for effective review well, whether there is a notice-and-comment record or simply the information available to the agency without the benefit of formal public input.[304] So structured, review balances staff members' personal incentives to dispose of a problem with the least amount of effort against their aversion to being reversed. Even though the actual time and resources needed to reconsider a guidance document that a court has held to be arbitrary and capricious may not be great, I suspect that staff members, like most individuals, experience discomfort with being told that their work was inadequate and, hence, will work to avoid such an outcome.

Perhaps the most difficult question is whether reasoned-decisionmaking review without a notice-and-comment record will do anything to encourage participation by a broader array of stakeholders in the development and issuance of guidance documents. Many familiar with notice-and-comment rulemaking contend that frequently the most important input of stakeholders into a rulemaking proceeding occurs during development, prior to the issuance of a notice of proposed rulemaking.[305] This is consistent with the

301. *See* Pierce, *supra* note 231, at 68 ("[T]he duty [to engage in reasoned decisionmaking] may have a systemically beneficial effect on agency decisionmaking to the extent that it induces agencies to consider issues and values agencies otherwise would be tempted to ignore.").

302. Seidenfeld, *supra* note 126, at 522–23.

303. *Id.* at 517.

304. *Id.* at 516–17.

305. *See* KERWIN & FURLONG, *supra* note 61, at 81, 196, 200 (describing the importance of rule development before a rule is proposed); Scott R. Furlong, *Interest Group Influence on Rule*

evidence that even without a consultation requirement, agencies often seek out input from a variety of stakeholders before formulating a policy or interpretation.[306] Thus, it is not rare for an agency to voluntarily use something akin to notice-and-comment procedures before issuing a significant guidance document.[307] Even when agencies do not, they often obtain the views on the matter from those stakeholders with whom they deal regularly because such stakeholders can affect the ease with which the agency can implement its regulatory goals.[308] Sometimes repeat players, like representatives of the regulated industry, can do so via a threat of political pressure;[309] sometimes they can affect agency action because they can make life difficult for the agency by denying it access to information,[310] forcing it to consider information or alternatives the agency would otherwise ignore,[311] or ultimately threatening the agency with a judicial challenge when the agency tries to apply the guidance.[312] The availability of direct judicial

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Making, 29 ADMIN. & SOC'Y 325, 334–35 (1997) (reporting that interest groups believe that informal contact prior to a rule being proposed is one of the most effective ways to influence rulemaking).

306. Mendelson, *supra* note 7, at 425 (noting that some agencies "regularly seek outside views on significant guidance and policy documents" and may do so for a variety of reasons, including identifying problems with the policy or detecting potential political opposition early).

307. *Id.* at 425–26.

308. *Id.* at 427–29; Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1380–83 (2010); *see also* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEXAS L. REV. 15, 23–24 (2010) (explaining that because so much expertise lies with industry, it is only natural for agencies to turn to them for the information needed to develop sound policy); Cary Coglianese et al., *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277, 333 (2004) (describing how agencies can "improve the reliability of information by fostering closer and longer relationships with industry").

309. *See* Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 834 (2003) (describing how powerful legislative constituents get Congress to put pressure on agencies to regulate to their benefit); Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1, 18 (1994) (describing how administrative proceedings can be stacked to favor a prevailing legislative coalition by enacting policies and procedures that give interest groups influence through political pressure, participation, and judicial review).

310. Wagner, *supra* note 308, at 1380 ("Interest groups with extra knowledge or facts relevant to a rule are likely to enjoy special participatory advantages in the process and may even find themselves working side-by-side with the agency as it develops its proposed rule."); *see also* Croley, *supra* note 309, at 834 (asserting that agencies can be biased toward certain stakeholders "because agencies rely so heavily on information about the consequences of regulatory alternatives from the very interests most affected by regulation"); Clayton P. Gillette & James E. Krier, *Risks, Courts, and Agencies*, 138 U. PA. L. REV. 1027, 1066 (1990) (describing how interest groups can influence agency action by providing information, among other things).

311. *See* Wagner, *supra* note 308, at 1381 (arguing that agency staffers consider information and issues raised by industry in order to increase the prospect that a rule will survive judicial review if challenged).

312. *See id.* at 1380 (highlighting the need for an agency to "engage in due diligence and reach out to the most knowledgeable stakeholders" in order to avoid having these groups "torpedo its final rule"); *see also* Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 DUKE L.J. 1015, 1026 (2001) (arguing that the threat to

review at the behest of those outside the industry levels the playing field by enabling these stakeholders, who may be interested only in the outcome of a single policy or interpretive matter, to threaten to make implementation difficult by availing themselves of such review.

A possible response to this argument is that if a stakeholder cannot contribute to the record on which the agency guidance document will be evaluated, it cannot mount a credible threat of judicial review. But review for reasoned decisionmaking leaves much uncertainty about what issues a reviewing court will consider sufficiently well accepted that the court will deem them worthy of agency attention, especially given the variation in perspectives of judges who might be assigned to the reviewing panel. Similarly, an agency rule issued without the benefit of notice and comment will expose the agency to uncertainty about arguments petitioners might present that directly undermine the agency explanation for the guidance document. These uncertainties provide an advantage to challenges because the agency will not have had an opportunity to respond to contentions based on information that petitioners had no opportunity to present to it.[313] The agency would therefore have an incentive to ferret out the likely claims that might be raised in an arbitrary and capricious suit and the information supporting such claims. By involving stakeholders in the development of guidance documents, the agency can learn of the issues and arguments it needs to address to ensure that it survives judicial review regardless of the panel of judges the suit happens to draw.[314]

In addition, providing review on a limited record can facilitate discourse directly through the challenge process. Recall that a judicial decision that an agency action is not arbitrary and capricious does not shield the rule from a subsequent arbitrary and capricious challenge based on issues not addressed by the decision.[315] Thus, those who have information not generally found in public debate that bears on the wisdom of agency guidance may still raise issues based on that information, if and when the agency applies the guidance.[316] Similarly, a decision that an agency rule is arbitrary and

challenge agency rules allows stakeholders to extract concessions as part of settlements of such suits).

313. This might partially explain the suggestion by Matthew Stephenson that courts are less deferential to decisions that are made without the benefit of public input. *See* Stephenson, *supra* note 158, at 530 (arguing that courts are more likely to defer to an agency decision made "via an elaborate formal proceeding").

314. Galle & Seidenfeld, *supra* note 31, at 1939–40.

315. *See supra* notes 148–49 and accompanying text.

316. Courts should not circumvent such challenges by applying general statutory time limits on rule challenges to nonlegislative rules. Because agencies adopt nonlegislative rules without formal opportunity for stakeholders to raise issues for agency consideration, under my proposal, post-enforcement review would be the only opportunity to raise an issue that, although relevant, was not deemed so based on the state of knowledge available to the agency when it acted. Thus, allowing suits upon application of the guidance that occurs after statutory time limits for review is consistent with the principle that such time limits should not apply when the petitioner would have been unable to bring suit within the specified period. *See* Eagle-Picher Indus., Inc. v. EPA, 759 F.2d 905,

capricious does not preclude an agency from adopting the same rule based on an amended record or additional explanation that addresses the initial lack of support or logical gaps in the agency reasoning.[317] Therefore, in some sense an arbitrary and capricious challenge can begin a dialogue between stakeholders and the agency about the wisdom or legality of the guidance document. And agencies are apt to take that dialogue seriously, if for no other reason than that adverse judicial decisions add to their burdens if they want to stick to their initial policies or interpretations.

Of course, such review, like any review, will increase the cost of issuing guidance documents because the agency will have to formulate an explanation that it hopes will satisfy the reviewing court that the agency considered all relevant factors, even when those factors are limited to those of which the agency is or should have been aware without the benefit of a notice-and-comment proceeding.[318] But the increase in costs should be far lower than that required for notice-and-comment procedures for two reasons. First, because no particular procedural mechanism is mandated, the agency retains flexibility to develop the information it believes it needs to meet the standard of review by the means it chooses. Hence, it need not spend an inordinate amount of time collecting, sifting through, and preparing to respond to mountains of unhelpful comments.[319] Second, the agency need not pay close attention to every detail of every piece of information it gleans from stakeholders. The standard of review only holds it responsible for explaining its decision in light of information known by those generally familiar with the underlying factual issues related to the matter at hand.[320] In sum, holding agencies to a standard of reasoned decisionmaking on a record limited to information generally known when the agency acts provides incentives for

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911 (D.C. Cir. 1985) (noting that the court has "entertained untimely claims only in a limited number of exceptional circumstances where the petitioner lacked a meaningful opportunity to challenge the agency action during the review period"); Consolidation Coal Co. v. Donovan, 656 F.2d 910, 914–15 (3d Cir. 1981) ("Where the right to petition for review within 30 days after promulgation of a regulation does not provide an adequate remedy, alternative means may be utilized to bring a claim . . . ." (quoting Inv. Co. Inst. v. Bd. of Governors, 551 F.2d 1270, 1281 (D.C. Cir. 1977))).

317. *See* Jordan, *supra* note 232, at 424 (expounding on an empirical study reporting that for several major rules reversed as arbitrary and capricious, the agency subsequently adopted the same rule by providing additional adequate explanation).

318. *See supra* notes 228–35 and accompanying text.

319. *See* KERWIN & FURLONG, *supra* note 61, at 115–16 (listing potential drawbacks to widespread public comment, providing examples of overwhelmingly massive public outpouring, and concluding that "[t]he volume of public comment . . . can slow the process and interfere with decision making"); Cary Coglianese, *E-Rulemaking: Information Technology and the Regulatory Process*, 56 ADMIN. L. REV. 353, 361 (2004) ("[T]he tasks of gathering, processing, analyzing, and communicating information make up most of the administrative costs associated with rulemaking."); Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 225 (1997) ("[T]he large amounts of information provided by participants may adversely affect the decisionmaking process by impairing the quality of the analysis and polarizing participants' preferences.").

320. *See supra* text accompanying notes 294–97.

agencies to seek input from a wide array of stakeholders and to take care in formulating policy and interpretations without unduly bogging down the issuance of such policy or interpretations.

Conclusion

This Article has reviewed the extensive literature about how courts should treat nonlegislative rules. Recognizing that such rules can play an important role in assuring coherence and accountability of agency policies and interpretations, and in communicating the views of agencies about such matters, the Article agrees with those who advocate ex post monitoring of agency use of documents that an agency issues without notice-and-comment procedures. At the same time, recognizing that the ex-post-monitoring approach leaves much leeway for agencies to abuse guidance documents by issuing them in contexts that deprive stakeholders of opportunities to participate in their development and to obtain substantive judicial review of them, the Article advocates that courts generally make guidance documents substantively reviewable when they are issued. The Article explains why other proposals to rein in agency discretion to use guidance documents—in particular making the agency explain its decision to proceed by this mode and forcing the agency to consider timely petitions for reconsideration of such documents—are likely to have less effect with greater cost than my proposal for direct review of guidance documents.

In advocating for such review, however, the Article recognizes that courts will need to massage doctrines governing availability of review, such as those governing finality and ripeness of guidance documents. Even more significantly, the Article recognizes that the very mechanism of reasoned decisionmaking will have to be modified to avoid seriously compromising the speed and procedural flexibility that make guidance documents an attractive means for agencies to communicate their views of policy and interpretation. It therefore develops a variant on arbitrary and capricious review that would require agencies to explain issuance of guidance in terms of factors that are relevant and alternatives that are plausible given the state of knowledge available to the agency when it acted. The Article concludes that such a doctrine can encourage agencies to solicit input even from stakeholders outside the issue networks affected by the guidance document, while preserving sufficient flexibility for the agency to issue the document quickly and without undue procedural burden.