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Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut

ABSTRACT. Courts have long struggled to distinguish legislative rules, which are designed to have binding legal effect and must go through the rulemaking procedure known as notice and comment, from nonlegislative rules, which are not meant to have binding legal effect and are exempted from notice and comment. The distinction has been called "tenuous," "baffling," and "enshrouded in considerable smog."

What is just as baffling is that prominent commentators such as John Manning, William Funk, Donald Elliott, and Jacob Gersen have proposed a simple solution to the problem – and courts have failed to take them up on it. Rather than inquiring into a rule's nature or effects to decide whether it must undergo notice and comment, these commentators urge, courts should turn the question inside-out and ask whether the rule has undergone notice and comment in order to determine whether it can be made legally binding. This proposal, which I call the "short cut," would economize on judicial decision costs. Moreover, its proponents say, it would not reduce oversight of the administrative process, because agencies would often opt to submit their rules to notice and comment ex ante in order to ensure that they are treated as legally binding ex post. Lately, proponents of the short cut such as Manning and Gersen have argued that their position is strengthened by the Supreme Court's 2001 *Mead* decision, which presumptively disqualifies nonlegislative rules from *Chevron* deference.

This Article explains not only why judges have resisted the short cut, but also why they have been wise to do so. It argues that caution is warranted for three reasons: the short cut inadequately protects the interests of those persons, particularly regulatory beneficiaries, whose interests are affected by deregulatory or permissive agency pronouncements; it stands in tension with the longstanding principle that agencies may choose to announce new policy through either adjudication or rulemaking; and it ignores important differences between public scrutiny at the promulgation stage and heightened judicial scrutiny at the enforcement stage. Nor, I argue, does the *Mead* decision lend decisive force to the arguments in favor of the short cut, because nonlegislative rules are often accorded substantial deference in practice. These, in short, are the perils of the short cut.

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INTRODUCTION

There is perhaps no more vexing conundrum in the field of administrative law than the problem of defining a workable distinction between legislative and nonlegislative rules. The problem is relatively easy to state. Under standard doctrine, these two types of rules differ from one another in both a substantive and a procedural sense. Substantively, legislative rules are designed to have binding legal effect on both the issuing agency and the regulated public; procedurally, the Administrative Procedure Act (APA) requires such rules to undergo the expensive and time-consuming process known as notice-and-comment rulemaking before being promulgated.[1] Nonlegislative rules, by contrast, are not meant to have binding legal effect, and are exempted from notice and comment by the APA as either "interpretative rules" or "general statements of policy."[2]

So far, so good. The problem arises when we leave the airy realm of theory and enter the untidy arena of litigation. Here is the usual sequence of events: a federal agency issues some sort of pronouncement—a guidance, a circular, an advisory—without using notice and comment; parties that believe that they are adversely affected by the new pronouncement go to court, perhaps before it has even been enforced against anyone; the challengers argue that the pronouncement is in fact a legislative rule and is therefore procedurally invalid for failure to undergo notice and comment.

Even by the standards of administrative law—a field in which uniform, predictable rules of black-letter law are hard to come by—the resulting litigation is considered notoriously difficult. The problem is not just that the Supreme Court has not supplied a test for distinguishing between the two types of rules, or that the APA does not define the exempt categories of interpretative rules and general statements of policy. The problem runs deeper: it turns out to be maddeningly hard to devise a test that reliably determines which rules are legislative in nature and which are not. Currently, courts do their best by examining the text, structure, and history of the rule, its relationship to existing statutes and rules, and the manner in which it has been enforced (if at all) in an effort to ascertain whether the rule was intended to have binding legal effect or instead was merely designed to clarify existing law or to inform the public and lower-level agency employees about the agency's intentions. Given the amount of indeterminacy built into this inquiry, it is no wonder that courts have labeled the distinction between legislative and

1. 5 U.S.C. §§ 553(b)-(c) (2006).

2. *Id.* § 553(b)(A).

nonlegislative rules "tenuous," "baffling," and "enshrouded in considerable smog."[3]

What seems just as baffling, however, is that for many years, administrative law scholars have proposed a simple solution to the problem of distinguishing between these two types of rules—and courts have failed to take them up on it. The scholars' proposal is disarmingly simple; indeed, it is not so much a solution as a way of making the problem disappear. It runs as follows: rather than asking whether a challenged rule was designed to be legally binding in order to determine whether it must undergo notice and comment, courts should simply turn the question inside-out and ask whether the rule has undergone notice and comment in order to determine whether it can be made legally binding. Rules that have been through notice and comment would be accorded the force of law in later enforcement actions; rules that have not been through notice and comment would be denied such force. No longer would a rule's substantive nature dictate its procedural provenance; instead, its procedural provenance would determine its substantive effect.[4]

This approach—which I will call the "short cut," for short—has tremendous appeal. Most attractively, it would economize on judicial decision costs by eliminating at one stroke the need for courts to divine the intrinsic nature or purpose of any challenged rule or to develop any elaborate test for distinguishing between legislative and nonlegislative rules. Instead, courts would simply shunt aside all challenges raising questions of procedural validity under the APA. At the enforcement stage, too, courts would merely need to ascertain the procedural provenance of the challenged rule—almost always a very simple task[5]—to determine the uses to which the rule could validly be put.

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3. *See infra* notes 46-50.

4. Even under this approach, there might still be exceptions. A rule subject to the APA but enacted without notice and comment could still be given legal effect if it dealt with an exempt subject matter such as military or foreign affairs, 5 U.S.C. § 553(a) (2006), or if the agency could show good cause for dispensing with notice and comment, *id.* § 553(b)(B). And an agency might choose to conduct notice and comment while making clear that the resulting rule is nonbinding. These additional possibilities are discussed *infra* text accompanying notes 161-163.

5. I say "almost always" because there can occasionally be dispute about whether notice-and-comment procedures were complied with, or whether noncompliance constituted harmless error. *See, e.g.*, Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 174-76 (2007) (considering and rejecting the argument that the Department of Labor's notice-and-comment process was inadequate); U.S. Telecom Ass'n v. FCC, 400 F.3d 29 (D.C. Cir. 2005) (holding that an FCC order setting conditions under which wireline telecommunications carriers were required to transfer telephone numbers to wireless carriers was a legislative rule but that the agency's failure to follow notice and comment was harmless error).

The most obvious objection to the short cut is that it would substantially diminish judicial and public oversight of the administrative process by leaving agencies free to eschew notice and comment at their unreviewable discretion. But the proponents of the short cut have a response to this objection. Agencies, they argue, would still need to submit their rules to robust scrutiny at some stage: either scrutiny by the public during the notice-and-comment period or, if the agency opts to dispense with notice and comment, enhanced scrutiny by the courts during judicial review of enforcement action.[6] This component of the short cut argument is crucial enough that it deserves its own name: the "trade-off." The trade-off asserts that agencies—recognizing that they must either "pay now or pay later"[7] in terms of defending their substantive policy choices—would decide, at least much of the time, to submit their rules to notice and comment ex ante in exchange for the assurance that those rules will be treated as legally binding ex post. As a result, say the proponents of the short cut, their proposal would not lead to any appreciable decrease in substantive oversight of the administrative state.

In recent years, advocates of the short cut have added another arrow to their quiver. The trade-off at the heart of the short cut, they argue, has been implicitly embraced by the Supreme Court in its decision in *United States v. Mead Corp.*,[8] which holds that nonlegislative rules are presumptively disqualified from deferential judicial review under the *Chevron* doctrine.[9] After *Mead*, the argument goes, it is clearer than ever that agencies cannot have their cake and eat it too by sidestepping expensive public input at the promulgation stage while also counting on lenient substantive review from courts at the enforcement stage.[10]

The federal courts themselves have never explained why they have not adopted the short cut in the face of these seemingly compelling arguments in its favor. This Article fills that gap by accounting for the continued judicial adherence to the now-traditional (if frustratingly indeterminate) enterprise of distinguishing between legislative and nonlegislative rules in order to adjudicate claims of procedural invalidity. But the Article has more than merely descriptive aims. It has a normative objective as well: it seeks to explain not

6. *See* E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1491 (1992).

7. *Id.* The D.C. Circuit has taken notice of this argument. *See* Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1111 (D.C. Cir. 1993).

8. 533 U.S. 218 (2001).

9. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

10. *See* Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705, 1720-21 (2007).

only why judges have resisted the short cut but also why they have been wise to do so.

Part I of the Article lays out in greater detail the problem of distinguishing between legislative and nonlegislative rules. Part II sets forth the short cut proposal, tracing its lineage back through the work of several prominent administrative law scholars to a seminal 1987 dissent by then-Judge Kenneth Starr. Part III demonstrates that courts have not adopted the short cut, conducting a brief tour through current case law with an emphasis on cases in which courts have confronted, either directly or indirectly, the logic of the short cut and the trade-off.

Part IV of the Article attempts to explain this judicial reluctance. Section IV.A argues that caution about the short cut is warranted in light of three factors, all of which take aim at the trade-off argument that is so central to the short cut's appeal. First, there are situations in which the trade-off relied upon by advocates of the short cut would not take place.[11] Second, the logic of the trade-off stands in strong tension with the longstanding administrative law principle that agencies are generally free to establish new policy through adjudication as well as through rulemaking.[12] Third, and most fundamental, the trade-off is problematic even when it operates as its advocates intend, because there are important differences between public scrutiny at the promulgation stage and heightened judicial scrutiny at the enforcement stage.[13] Because of the differences between these two types of oversight, courts adopting the short cut would often sacrifice the former without fully capturing the benefits of the latter.

Finally, Section IV.B rejects the contention that the *Mead* decision lends decisive force to the arguments in favor of the short cut, for three reasons. First, even under *Mead*, nonlegislative rules might still qualify for heightened deference under the *Chevron* doctrine.[14] Second, even if the deference owed to nonlegislative rules is diminished in theory after *Mead*, it is still often substantial in practice, particularly in technically complex contexts.[15] Third, an agency's interpretation of its own rules, even when promulgated in the form of a nonlegislative rule, continues to warrant an extremely lenient form of judicial review.[16] For all these reasons, it is unrealistic to derive assurance from *Mead*

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11. *See infra* text accompanying notes 161-182.
12. *See infra* text accompanying notes 183-209.
13. *See infra* text accompanying notes 210-223.
14. *See infra* text accompanying notes 226-235.
15. *See infra* text accompanying notes 236-240.
16. *See infra* text accompanying notes 241-248.

that rules will receive more exacting judicial scrutiny simply because they were promulgated without public input.

I. BACKGROUND: THE DISTINCTION BETWEEN LEGISLATIVE AND NONLEGISLATIVE RULES

The APA adopts an extraordinarily broad definition of "rule": it is "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."[17] The APA goes on to outline two techniques by which federal agencies may make rules.[18] The first technique, so-called "formal" rulemaking, involves onerous trial-type hearings and is rarely required unless a specific statute calls for rules to be "made on the record after opportunity for an agency hearing."[19] Far more common is the second technique, variously known as "informal," "notice-and-comment," or "section 553" rulemaking. Informal rulemaking, so far as the APA's text reveals, is quite a barebones affair. The agency is required to do only three things: issue a brief notice informing the public of "either the terms or substance of the proposed rule or a description of the subjects and issues involved,"[20] give interested persons "an opportunity to participate in the rule making through the submission of written data, views, or arguments,"[21] and ensure that any rules that are finally adopted are accompanied by "a concise general statement of their basis and purpose."[22]

In the 1960s and 1970s, federal courts of appeals—particularly the D.C. Circuit—began supplementing these three basic steps by imposing additional procedural requirements on agencies in cases governed by § 553.[23] In the 1978

17. 5 U.S.C. § 551(4) (2006). The definition is broad in more ways than one. For instance, the phrase "general *or particular* applicability," if taken literally, would suggest that case-specific orders also count as rules. *Id.* (emphasis added). This suggestion is put to rest, however, by the APA's definitions of "order" as "the whole or part of a final disposition . . . of an agency in a matter other than rule making," *id.* § 551(6), and of "adjudication" as "agency process for the formulation of an order," *id.* § 551(7).

18. Other, more specific statutory and regulatory provisions may supplement or supersede the techniques set forth in the APA. *Id.* § 559.

19. *Id.* §§ 553(c), 556, 557; *see* United States v. Fla. E. Coast Ry. Co., 410 U.S. 224 (1973).

20. 5 U.S.C. § 553(b)(3).

21. *Id.* § 553(c).

22. *Id.*

23. *See, e.g.*, HBO, Inc. v. FCC, 567 F.2d 9, 35-36 (D.C. Cir. 1977); O'Donnell v. Shaffer, 491 F.2d 59, 62 (D.C. Cir. 1974); Int'l Harvester Co. v. Ruckelshaus, 478 F.2d 615, 649 (D.C. Cir. 1973); Auto. Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968).

Vermont Yankee case, the Supreme Court not so politely told them to stop.[24] The Court held that "generally speaking [§ 553] established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures,"[25] adding that there was "little doubt that Congress intended that the discretion of *agencies* and not that of the courts be exercised in determining when extra procedural devices should be employed."[26]

In recent decades, however, Congress, the President, and the courts have all taken steps that have made the notice-and-comment rulemaking process increasingly cumbersome and unwieldy.[27] Congress has enacted statutes requiring agencies to review proposed rules for their impacts on the environment, small businesses, information collection, and state, local, and tribal governments.[28] The White House, for its part, has required executive branch agencies to submit major proposed rules to cost-benefit analysis and centralized review by the Office of Management and Budget (OMB).[29] And while *Vermont Yankee* put an end to explicit judge-made procedural impositions, courts have continued to put meat on § 553's bones by demanding that agencies demonstrate reasoned decisionmaking, respond to important public comments, issue final rules that are a "logical outgrowth" of their proposed rules, and generally take a "hard look" at significant objections and alternatives to their chosen actions.[30] As a result—and as anyone with

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24. Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519 (1978).

25. *Id.* at 524.

26. *Id.* at 546.

27. For a helpful chart assembling more than one hundred prerequisites to "informal" rulemaking, see Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 FLA. ST. U. L. REV. 533 (2000).

28. *See, e.g.*, Unfunded Mandates Reform Act, 2 U.S.C. §§ 1531-38, 1571 (2006); Regulatory Flexibility Act, 5 U.S.C. §§ 601-12 (2006); Truth in Regulating Act of 2000, 5 U.S.C. §§ 801-08 (2006); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-47 (2006); Paperwork Reduction Act, 44 U.S.C. §§ 3501-21 (2006).

29. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (requiring regulatory impact analyses and OMB review); *see* Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 4, 1999) (requiring a "federalism summary impact statement" for certain rules); Exec. Order No. 12,630, 3 C.F.R. 554 (1988) (requiring analysis and record-keeping for rules affecting private property).

30. *See, e.g.*, Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227 (D.C. Cir. 2008) (holding that the agency had violated the APA by not disclosing studies relied upon by agency staff in promulgating rule); Chamber of Commerce v. SEC, 443 F.3d 890, 901-06 (D.C. Cir. 2006) (interpreting § 553's requirements to mean that agencies must articulate the content and basis of proposed legislative rules with enough detail to permit meaningful comment and objections); Int'l Union, United Mine Workers v. Mine Safety & Health Admin., 407 F.3d

experience in federal administrative practice can attest—completing a single "informal" rulemaking can often take many years and consume a great deal of agency and private resources.[31] This development has come to be known as the "ossification" of notice-and-comment rulemaking.[32]

Congressional committees, the White House, and academic commentators have expressed concern that ossification has driven agencies increasingly to avail themselves of the exemptions from notice-and-comment procedures provided for in § 553.[33] This conventional wisdom is not universal: a recent study concluded that agencies do not frequently use guidance documents "strategically" to avoid the rulemaking process.[34] This Article takes no position on how often agencies act sincerely when they invoke exemptions from notice and comment.[35] Its objective, rather, is to argue that courts would be unwise to

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1250, 1259 (D.C. Cir. 2005) (same); Am. Med. Ass'n v. Reno, 57 F.3d 1129, 1132-33 (D.C. Cir. 1995) (same); *see also* CSX Transp., Inc. v. Surface Transp. Bd., 584 F.3d 1076, 1079-82 (D.C. Cir. 2009) (holding that the agency violated the APA because its final rule was not a logical outgrowth of its proposed rule). For a discussion of "hard look" review, see *infra* text accompanying notes 217-221.

31. For commentary criticizing this development, see, for example, Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); and Richard J. Pierce, Jr., *Seven Ways To Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995). For critiques of the critics, see, for example, William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability To Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393 (2000); and Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 OHIO ST. L.J. 251 (2009).

32. Coinage of the term "ossification" has been credited to Donald Elliott. *See* McGarity, *supra* note 31, at 1386 n.4 (citing E. Donald Elliott, Remarks at the Duke University School of Law Symposium: Assessing the Environmental Protection Agency After Twenty Years: Law, Politics, and Economics (Nov. 15, 1990)).

33. *See* COMM. ON GOV'T REFORM, 106TH CONG., NON-BINDING LEGAL EFFECT OF AGENCY GUIDANCE DOCUMENTS, H.R. REP. NO. 106-1009, at 9 (2000) ("[A]gencies have sometimes improperly used guidance documents as a backdoor way to bypass the statutory notice-and-comment requirements for agency rulemaking and establish new policy requirements."); Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3432 (Jan. 25, 2007) [hereinafter Guidance Practices Bulletin] ("Because it is procedurally easier to issue guidance documents, there also may be an incentive for regulators to issue guidance documents in lieu of regulations."); Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 166 (2000) (asserting that agencies are "avoiding 'ossification' . . . by increased use of 'interpretative rules' and 'policy statements'").

34. Connor N. Raso, Note, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782 (2010).

35. Guidance documents undoubtedly serve several useful purposes, as described *infra* text accompanying notes 146-150.

abandon entirely the project of distinguishing legislative from nonlegislative rules in cases involving assertions of procedural invalidity.

Section 553 exempts from the notice-and-comment process rules involving military and foreign affairs;[36] "matter[s] relating to agency management or personnel or to public property, loans, grants, benefits, or contracts";[37] "rules of agency organization, procedure, or practice";[38] interpretative rules and general statements of policy;[39] and rules as to which the agency has good cause to conclude that notice and comment would be "impracticable, unnecessary, or contrary to the public interest."[40] In addition to being exempt from notice and comment, these categories of rules tend to be unencumbered by the other procedural requirements that have been imposed on the rulemaking process by Congress, the executive, and the courts.[41]

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36. 5 U.S.C. § 553(a)(1) (2006).

37. *Id.* § 553(a)(2).

38. *Id.* § 553(b)(A).

39. *Id.*

40. *Id.* § 553(b)(B).

41. *See, e.g.*, Guidance Practices Bulletin, *supra* note 33, at 3432 (noting that guidance documents are exempt from many procedures required for legislative rules); Raso, *supra* note 34, at 785 n.3 ("Guidance documents are exempt from executive orders and statutes governing the issuance of legislative rules . . . ."). Some procedural requirements continue to apply to rules that are exempt from notice and comment. For instance, any rule upon which an agency relies when dealing with the public must be published in the Federal Register. *See* 5 U.S.C. § 552(a)(1) (2006). In addition, in 2007 President George W. Bush for the first time mandated OMB review of some nonlegislative rules. *See* Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 18, 2007). Although this Executive Order was revoked in the early days of the Obama Administration, *see* Exec. Order No. 13,497, 74 Fed. Reg. 6113 (Jan. 30, 2009), OMB has indicated that it will continue to review significant guidance documents. *See* Memorandum from Peter R. Orszag, Dir., Exec. Office of the President, Office of Mgmt. & Budget, to Heads and Acting Heads of Exec. Dep'ts & Agencies (Mar. 4, 2009), *available at* http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-13.pdf. In addition, the OMB's Guidance Practices Bulletin requires notice and comment for any "economically significant guidance document," defined as guidance that "may reasonably be anticipated to lead to an annual effect on the economy of $100 million or more or adversely affect in a material way the economy or a sector of the economy." Guidance Practices Bulletin, *supra* note 33, at 3439-40. Finally, Congress has required the FDA to solicit public input before issuing guidance documents. FDA Modernization Act, 21 U.S.C. § 371(h)(1) (2006). *But see* Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 401 (2007) ("With the exception of these FDA procedures, however, no other statute requires procedures for agency guidance documents.").

This Article focuses on the exemptions for "interpretive rules" and "general statements of policy."[42] These two categories of exempt rules are often called "guidance documents" or "nonlegislative rules," to distinguish them from legally binding regulations, which are themselves often called "legislative rules."[43] Although the APA expressly exempts nonlegislative rules from notice and comment, it does not define the category. The "working definitions" set forth in the 1947 *Attorney General's Manual on the Administrative Procedure Act* say that legislative rules (the manual calls them "substantive rules") are "issued by an agency pursuant to statutory authority and . . . implement the statute"; interpretive rules "advise the public of the agency's construction of the statutes and rules which it administers"; and general statements of policy "advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power."[44] These definitions, while helpful in fleshing out the basic concepts, are of less help in resolving truly close cases. After all, virtually any substantive rule can be said to "advise the public" of the agency's interpretation of vague or ambiguous terms or the manner in which a discretionary power will be exercised, and many nonlegislative rules are issued "pursuant to statutory authority" in order to "implement [a] statute."

So courts have been left to struggle with the task of distinguishing legislative from nonlegislative rules. The most difficult cases – the ones that the short cut would eliminate altogether – arise when a party asserts that a document promulgated without notice and comment is really a legislative rule and is therefore procedurally invalid.[45] Courts have described the tests that

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42. 5 U.S.C. § 553(b)(A). The APA uses the word "interpretative," but in keeping with most other commentators I dispense with the extra syllable and use the word "interpretive."

43. *See, e.g.*, Mendelson, *supra* note 41, at 399 ("Guidance documents can closely resemble legislative rules, leading some to call them 'nonlegislative rules.'"). This Article uses the terms "guidance documents" and "nonlegislative rules" interchangeably.

44. TOM C. CLARK, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947) [hereinafter 1947 MANUAL]. The Supreme Court has often looked to the 1947 *Manual* for guidance in interpreting the APA. *See, e.g.*, Dir., Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 126-27 (1995); Chrysler Corp. v. Brown, 441 U.S. 281, 302 n.31 (1979); Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 546 (1978).

45. Even the terminology has been the subject of some struggle. Robert Anthony has repeatedly argued that the term "legislative rules" should be reserved for rules that have actually been promulgated in accordance with statutory requirements, such as notice and comment, for making rules that carry the force of law. *See, e.g.*, Robert A. Anthony, *A Taxonomy of Federal Agency Rules*, 52 ADMIN. L. REV. 1045, 1046 (2000). In a limited terminological sense, then, Anthony adopts the premise of the short cut: rules enacted with notice and comment are legislative rules by definition, and that is that. In a more important sense, however, Anthony firmly rejects the short cut, because he urges courts to reject on procedural grounds what he

govern these cases as "fuzzy,"[46] "tenuous,"[47] "blurred,"[48] "baffling,"[49] and "enshrouded in considerable smog."[50] Distinguishing legislative rules from interpretive rules has proven especially difficult.[51] Various doctrinal tests have been proposed: the "agency's label" test, which allows the agency to characterize its rule however it wishes;[52] the "substantial impact" test, which asks whether the challenged rule has a significant practical impact on the regulated community;[53] and the "legal effect" test, which asks whether the challenged rule creates new legal rights or duties as opposed to clarifying

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calls "spurious rules," which have practical binding effect but were not promulgated pursuant to legislative rulemaking procedures. *Id.* at 1048. Anthony recognizes, however, that many courts continue to use the term "legislative rules" as this Article does: to describe rules that are legally required to undergo statutory procedures such as notice and comment, whether or not such procedures were actually used. *See, e.g.*, Robert A. Anthony, *"Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: Lifting the Smog*, 8 ADMIN. L.J. AM. U. 1, 2-3 (1994).

46. Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1046 (D.C. Cir. 1987).

47. Chisholm v. FCC, 538 F.2d 349, 393 (D.C. Cir. 1976).

48. Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 946 (D.C. Cir. 1987).

49. *Id.*

50. Noel v. Chapman, 508 F.2d 1023, 1030 (2d Cir. 1975). These exemplary quotations are drawn from Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547, 547-48 (2000).

51. Pierce, *supra* note 50.

52. *See* Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 389-90 (proposing an "Agency's Label" test and collecting illustrative cases); *see also* Warshauer v. Solis, 577 F.3d 1330, 1337 (11th Cir. 2009) ("[A]lthough not dispositive, the agency's characterization of the rule is relevant . . . ."); SBC, Inc. v. FCC, 414 F.3d 486, 495 (3d Cir. 2005) ("[A]n agency's determination that 'its order is interpretative,' and therefore not subject to notice and comment requirements, 'in itself is entitled to a significant degree of deference.'" (quoting Viacom Int'l, Inc. v. FCC, 672 F.2d 1034, 1042 (2d Cir. 1982))). The Supreme Court seemed to reject the agency's label test in *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171-73 (2007), in which it concluded that a rule promulgated via notice and comment was legally binding even though it was included in part of a document entitled "Interpretations." *Long Island Care at Home* does not adopt the short cut, however: the Court's reasons for concluding that the rule was legislative were not limited to the presence of notice and comment. *Id.*

53. *See, e.g.*, Cent. Tex. Tel. Coop., Inc. v. FCC, 402 F.3d 205, 214 (D.C. Cir. 2005) (acknowledging that the court had previously used a substantial impact test to distinguish between legislative rules and those rules exempt from notice-and-comment requirements); Am. Transfer & Storage Co. v. ICC, 719 F.2d 1283, 1285 n.4 (5th Cir. 1983) (noting that the "relevant inquiry was . . . whether the rule will have a 'substantial impact' on those regulated" (quoting Brown Express, Inc. v. United States, 607 F.2d 695, 702 (5th Cir. 1979))); *see also* William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1325 (2001) (identifying "one line of cases [that] ha[s] looked at each claimed interpretive rule and assessed whether it had a substantial impact on the regulated community").

existing ones.[54] The legal effect test is currently the dominant approach among the federal courts of appeals for distinguishing interpretive from legislative rules,[55] but it has proven difficult to apply consistently.[56] As for distinguishing general statements of policy from legislative rules, courts tend to examine whether the rule is binding, either on the public or on the agency.[57] This approach, too, has proven difficult for courts to apply. For one thing, the degree to which a rule is binding may be hard to judge in the absence of a well-developed record of enforcement.[58] For another, challenged rules often contain disclaimers renouncing any binding effect.[59] Courts sometimes, however, hold these rules to be legislative nonetheless, depending on other language in the rule or the way in which the agency has invoked the rule in enforcement actions or litigation.[60]

Despite their evident differences, all of these approaches to the legislative/nonlegislative distinction have one thing in common: they require

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54. *See, e.g.*, Miller v. Cal. Speedway Corp., 536 F.3d 1020, 1033 (9th Cir. 2008) ("'[I]nterpretive rules merely explain, but do not add to, the substantive law that already exists in the form of a statute or legislative rule,' whereas legislative rules 'create rights, impose obligations, or effect a change in existing law pursuant to authority delegated by Congress.'" (quoting Hemp Indus. Ass'n v. DEA, 333 F.3d 1082, 1087, (9th Cir. 2003))); Haas v. Peake, 525 F.3d 1168, 1195-96 (Fed. Cir. 2008) (holding that a rule was interpretive because it did not have the force and effect of law).

55. *See* Funk, *supra* note 53, at 1326 (stating that, in place of the substantial impact test, most courts have adopted a legal effect test, which states that "if the questioned rule is legally binding, it cannot be an interpretive rule").

56. *See* Ronald M. Levin, *Nonlegislative Rules and the Administrative Open Mind*, 41 DUKE L.J. 1497, 1506 n.42 (1992) ("Given the intimate connection between interpretation and policymaking in the administrative process, courts making this distinction can easily reach unsatisfying, perhaps unprincipled, results."); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1435 (2004) ("Identifying the line between the creation of a new norm and the interpretation of an existing norm is a notoriously difficult enterprise and one that leaves a great deal of discretion in the hands of the court characterizing the agency's announcement.").

57. *See, e.g.*, Hudson v. FAA, 192 F.3d 1031, 1035 (D.C. Cir. 1999) ("Since the statement does not cabin agency discretion . . . it has the characteristics of a policy statement.").

58. *See, e.g.*, Colwell v. Dep't of Health & Human Servs., 558 F.3d 1112, 1128 (9th Cir. 2009) (holding a pre-enforcement procedural challenge to a policy statement to be unripe); Pub. Citizen, Inc., v. U.S. Nuclear Regulatory Comm'n, 940 F.2d 679, 683 (D.C. Cir. 1991) (same).

59. For a typical disclaimer, see 16 C.F.R. § 1.73 (2009) (presenting Federal Trade Commission interpretations of Fair Credit Reporting Act). *Id.* ("The interpretations are not substantive rules and do not have the force or effect of statutory provisions."). For a model disclaimer, see Guidance Practices Bulletin, *supra* note 33, at 3437.

60. *See, e.g.*, Appalachian Power Co. v. EPA, 208 F.3d 1015, 1023 (D.C. Cir. 2000).

courts to divine the substantive nature of a rule – by examining its language, purpose, or effect – in order to determine its procedural validity.

II. SLICING THROUGH THE SMOG? ENTER THE SHORT CUT

In a recent essay, Jacob Gersen proposes a simple way to resolve this seemingly insoluble doctrinal dilemma: do away with it altogether.[61] Gersen argues that the traditional judicial inquiry should be turned on its head:

> 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. If they were, the rule should be deemed legislative and binding if otherwise lawful. If they were not, the rule is nonlegislative. If the rule is nonlegislative, a party may challenge the validity of the rule in any subsequent enforcement proceeding; if the rule is legislative, the agency may rely on the rule in a subsequent enforcement proceeding without defending it.[62]

As Gersen himself notes,[63] his "[m]odest [p]roposal"[64] is only the latest entry in a long and distinguished line of writings advocating what I have dubbed the short cut.[65] John Manning, for instance, has also argued that courts should get out of the business of trying to label rules as either legislative or nonlegislative on their face.[66] Manning argues that "reviewing courts can effectively enforce [the] traditional distinction [between legislative and

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61. Gersen, *supra* note 10, at 1705.

62. *Id.* at 1719. It is not clear whether Gersen's proposal would apply to agency pronouncements classified by the agency as "general statements of policy" as well as to interpretive rules.

63. *Id.* at 1719 & n.83.

64. *Id.* at 1718.

65. I should make clear that I intend the term "short cut" not as a pejorative label but simply as shorthand for the view that courts should get out of the business of setting aside nonlegislative rules as procedurally invalid on the ground that they were really legislative rules to begin with. It should go without saying that adherents of what I call the short cut do not view their approach as an exercise in corner-cutting: they see it as a logical concomitant of the principle that agencies have discretion as to their modes of proceeding, and of the related notion that the legally binding effect of a rule should generally be a function of the procedures that generated it rather than the other way around. Nonetheless, from a judicial perspective, their approach would eliminate much of the befuddling litigation over the true nature or purpose of rules asserted to be procedurally invalid. Hence the term "short cut."

66. John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 929 (2004).

nonlegislative rules] simply by assigning different legal effects to an agency's *application* of rules that are adopted without notice and comment."[67] Like Gersen, Manning suggests that a rule adopted without notice and comment should not *by itself* be relied upon by an agency to support a particular adjudicative result, but he adds a twist, to which we shall return in Section IV.A: an agency, says Manning, should be able to rely on a nonlegislative rule to support an adjudicatory order if the rule is supported by sufficiently thorough reasoning.[68] Before Manning, William Funk[69] and Peter Strauss[70] also advanced arguments compatible with the short cut.[71]

Perhaps the most emphatic champion of the short cut is Donald Elliott, former general counsel of the Environmental Protection Agency (EPA). Elliott argues forcefully that administrative law proceeds from the premise that "an agency's action is what it says it is."[72] Accordingly, if an agency labels one of its pronouncements a general statement of policy—or, presumably, an interpretive rule[73]—courts should treat it as such. To be sure, he adds,

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67. *Id.* at 931.

68. *Id.* at 931-37. For discussion of this twist, see *infra* note 209.

69. Funk advocates

> a simple test for whether a rule is a legislative rule or a nonlegislative rule: simply whether it has gone through notice-and-comment rulemaking. . . . [I]f an agency gives a nonlegislative rule binding legal effect, then the agency has acted unlawfully, not because the nonlegislative rule was [a procedurally] invalid legislative rule, but because the nonlegislative rule cannot have the legal effect the agency accorded it.

Funk, *supra* note 53, at 1324-25; *see also* William Funk, *When Is a "Rule" a Regulation? Marking a Clear Line Between Nonlegislative Rules and Legislative Rules*, 54 ADMIN. L. REV. 659, 663 (2002) (restating this "simple test" and dubbing it the "notice-and-comment test").

70. *See* Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1467-68 (1992). Strauss stops short of advocating a pure short cut approach, arguing instead that courts should generally be reluctant to impose burdensome procedural prerequisites on interpretive rules and general statements of policy. (Strauss calls these "publication rules" because the Freedom of Information Act, 5 U.S.C. § 552 (2006), requires them to be published in the Federal Register before they may affect private parties. *Id.*) Like Manning, Strauss asserts that these nonlegislative rules should be accorded a legal impact comparable to that of agency adjudicatory precedent. *Id.* at 1472-73. *See also infra* note 209 (evaluating Strauss's and Manning's proposals).

71. For more recent commentary proposing a version of the short cut, see Sam Kalen, *The Transformation of Modern Administrative Law: Changing Administrations and Environmental Guidance Documents*, 35 ECOLOGY L.Q. 657, 694-95, 716 (2008).

72. Elliott, *supra* note 6, at 1490.

73. Elliott's article came in response to an article by Robert Anthony concerning the proper definition of the "general statements of policy" category, *see id.* at 1490 & n.1, so it did not

> [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.[74]

Elliott also provided the most vivid portrait of the trade-off at the heart of the short cut proposal: his approach, he writes, would give the agency the same choice faced by the automobile owner in the classic TV commercial in which a "repairman intones ominously 'pay me now, or pay me later.'"[75] In other words, says Elliott, the agency "can go through the procedural effort of making a legislative rule now and avoid the burdens of case-by-case justification down the road, or it can avoid the hassle of rulemaking now, but at the price of having to engage in more extensive, case-by-case justification down the road."[76]

We can trace the history of the short cut proposal back even earlier than Elliott's work. The ur-text of the short cut movement is a partial dissent by Judge Kenneth Starr in a 1987 D.C. Circuit case.[77] The primary question presented in the case was whether a pronouncement of the Food and Drug Administration (FDA) establishing an "action level" for a contaminant in corn called aflatoxin was procedurally invalid for failure to undergo notice and comment.[78] The pronouncement, the panel majority held, bound the agency *not* to take enforcement action against producers whose corn contained fewer than twenty parts per billion of aflatoxin.[79] As such, it was not a mere general statement of policy; rather, it counted as a binding legislative rule and should have been promulgated via notice and comment.[80]

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discuss the interpretive rule category. But it is fair to assume that Elliott would apply the same analysis to that category, and the D.C. Circuit has made that assumption. *See* Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1111 (D.C. Cir. 1993) (quoting Elliott's article in a case involving the definition of the "interpretive rule" category).

74. Elliott, *supra* note 6, at 1491.

75. *Id.*

76. *Id.*

77. Cmty. Nutrition Inst. v. Young, 818 F.2d 943 (D.C. Cir. 1987).

78. *Id.* at 945.

79. *Id.* at 948 ("The agency's own words strongly suggest that action levels are not musings about what the FDA might do in the future but rather that they set a precise level of aflatoxin contamination that FDA has presently deemed permissible.").

80. *Id.* at 948-49.

In dissent, Judge Starr contended that the court had erred by straying from the straightforward "legal effect" test that he believed was embodied in circuit precedent:

> The correct measure of a pronouncement's force in subsequent proceedings is a practical one: must the agency merely show that the pronouncement has been violated or must the agency, if its hand is called, show that the pronouncement itself is justified in light of the underlying statute and the facts.[81]

Judge Starr reasoned that the FDA's action level pronouncement would not qualify as a legislative rule under this test, and therefore in a subsequent enforcement proceeding the FDA would have to prove that the product was "adulterated" within the meaning of the statute and could not rest on a showing that the product's aflatoxin count exceeded twenty parts per billion.[82] While not expressly embracing the short cut, Judge Starr's analysis would lead to the same outcome: rather than invalidate nonlegislative rules prospectively as procedurally invalid, courts would simply deny them the force of law at the enforcement stage.[83] Judge Starr did recognize the potential danger that agencies, confident that their pronouncements would receive deference when eventually subjected to judicial review, would sidestep the inconvenience and scrutiny that attends notice-and-comment rulemaking, but in the end he dismissed this danger as "more theoretical than real" given Congress's power to require agencies to proceed by legislative rule.[84]

Recently, some advocates of the short cut have argued that the danger to which Judge Starr alluded has since been alleviated, if not eliminated altogether, by the Supreme Court's decision in *United States v. Mead Corp.*[85] Jacob Gersen, in particular, places heavy reliance on *Mead* in his essay in support of the short cut. In *Mead*, the Supreme Court vacated an informal tariff

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81. *Id.* at 952 (Starr, J., concurring in part and dissenting in part).

82. *Id.*

83. Judge Starr apparently did not fully embrace the short cut, as in a footnote he admitted that, in his view, the FDA's action level pronouncement "comes tantalizingly close to a substantive rule." *Id.* at 952 n.2.

84. *Id.* at 953.

85. 533 U.S. 218 (2001); *see also* Gersen, *supra* note 10, at 1720 (explaining that the concern "that the agency could avoid scrutiny on the front end by issuing policy as an interpretive rule and avoid scrutiny on the back end because of deference doctrine . . . is real, but its import has been significantly lessened by developments in other areas of administrative law . . . [such as] *United States v*[.] *Mead Corp.*").

classification ruling issued by a regional office of the Customs Service.[86] Building on a rather casual passage in an earlier case,[87] the Court stated that the expansive deference called for by its *Chevron* decision[88] is appropriate only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[89] The Court went on to specify that this prerequisite for *Chevron* deference would be present when Congress "provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."[90] It noted further that "the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication."[91]

Mead, in short, announced a presumption that nonlegislative rules would not receive *Chevron* deference. Instead, the Court held, such rules should presumptively receive the lesser and more malleable form of deference elucidated by Justice Jackson in his opinion for the Court in *Skidmore v. Swift & Co.*[92] According to that opinion, the deference owed to an agency interpretation "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[93]

According to Gersen, *Mead* lends force to the short cut approach by imposing a penalty on agencies that choose to forgo notice and comment: they forfeit their entitlement to heightened deference on substantive judicial review.[94] *Mead*'s presumptive denial of deference to nonlegislative rules

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86. *Mead*, 533 U.S. at 227.

87. *See* Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.").

88. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

89. *Mead*, 533 U.S. at 226-27.

90. *Id.* at 230.

91. *Id.*

92. 323 U.S. 134 (1944).

93. *Id.* at 140.

94. Gersen, *supra* note 10, at 1720-21 ("[J]udicial deference is much more likely when agency views are articulated using formal procedures like notice and comment. In the post-*Mead* world, an agency may still use nonlegislative rules to issue policy. But the probability of receiving judicial deference to views articulated in those rules falls substantially." (citation omitted)); *see also* Manning, *supra* note 66, at 940 (arguing that *Mead* helps distinguish

increases the costs of adopting such rules, the argument goes, thereby reducing the risk that agencies operating under a short cut regime would dispense with notice and comment when making important policy decisions.[95]

III. THE SHORT CUT NOT TAKEN: EXPLORING THE CURRENT JUDICIAL LANDSCAPE

In light of the short cut's obvious appeal, and the more than twenty years of powerful advocacy marshaled on its behalf by a distinguished array of scholars and judges, one would expect the proposal to have been embodied in at least some judicial decisions. Yet the reality is quite the opposite. In short, the short cut has not caught on. Instead, as noted briefly above,[96] courts continue to take the long road, attempting to draw distinctions between legislative and nonlegislative rules based on substantive criteria such as substantial impact, legal effect, and the agency's intent to bind itself and others.

To gain a more complete view of the legislative/nonlegislative distinction in action, it may be helpful to examine how courts apply the doctrinal tests that they have developed to map that distinction. A few cases can serve to exemplify not only the difficulties involved in applying those tests but also the reluctance of courts to embrace the short cut. In *Appalachian Power Co. v. EPA*,[97] for instance, a group of electric power companies and chemical and petroleum industry trade associations challenged the procedural validity of an EPA guidance document that they argued imposed new "periodic monitoring" requirements in connection with state-administered permit programs under the Clean Air Act.[98] At the outset of its analysis, the D.C. Circuit expressed severe skepticism about agencies' widespread use of guidance documents:

> The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations

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legislative from nonlegislative rules by generally withholding *Chevron* deference from the latter).

95. *See* Gersen, *supra* note 10, at 1721 ("But for *Mead*, agencies might well make critical interpretive choices using nonlegislative rules. But after *Mead*, this approach to policy is implausible, or at least less attractive."); Manning, *supra* note 66, at 941 (suggesting that after *Mead*, agencies have more incentive to "shift policymaking into notice-and-comment procedures").

96. *See supra* notes 46-60 and accompanying text.

97. 208 F.3d 1015 (D.C. Cir. 2000).

98. *Id.* at 1017.

> containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.[99]

This phenomenon, the court added, has been facilitated by the growth of the Internet, which allows instant posting and dissemination of guidance documents.[100] Agencies using guidance documents gain the benefit of increased efficiency, said the court—and perhaps they also believe that they thereby insulate their policies from judicial review.[101]

Not so fast, the court held. Though labeled a nonfinal, nonbinding document, the EPA's guidance on periodic monitoring "reads like a ukase. It commands, it requires, it orders, it dictates."[102] The court left little doubt about its reasons for holding that the guidance—in light of its language, purpose, and use by the agency—was a legislative rule:

> If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes "binding."[103]

The court vacated the guidance document in its entirety for failure to comply with the notice-and-comment requirements of the Clean Air Act,[104] which

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99. *Id.* at 1020.

100. *Id.*

101. *Id.*

102. *Id.* at 1023.

103. *Id.* at 1021.

104. *Id.* at 1028.

largely parallel those of the APA.[105] The alternative for the court, of course, was the short cut, under which the court would simply have noted that the guidance document—however it was worded, treated, or received—did not undergo notice and comment and therefore could not be treated as *legally* binding in any permit proceeding or other enforcement action.

A recent case in the Eleventh Circuit used comparable techniques to reach an opposite result.[106] The Labor-Management Reporting and Disclosure Act (LMRDA), administered by the Department of Labor (DOL), requires "employers" to file financial reports disclosing all payments or loans they make to labor unions.[107] In 2005, DOL published answers to "Frequently Asked Questions" (FAQs) on its website saying that the category of employers included "designated legal counsels" (DLCs)—lawyers recommended by unions to their members for representation in personal injury lawsuits.[108] The FAQs also stated that DOL's long-established de minimis exemption from the reporting requirements applied to transactions totaling $250 or less in value, the clear implication being that transactions above that amount would have to be reported.[109] Warshauer, a DLC, brought an action seeking to enjoin enforcement of the policies expressed in the FAQs because of DOL's failure to subject them to notice and comment.[110] After first upholding the challenged policies as sufficiently consistent in substance with the text and general purpose of the LMRDA,[111] the Eleventh Circuit rejected Warshauer's procedural challenge. The website advisory announcing that DLCs counted as employers was exempt from notice and comment as an interpretive rule, not only because it was labeled as such by the agency, but also because it was "drawn directly from the plain language of the statute," and "'only reminded affected parties of existing duties'" required by that language.[112] Nor could Warshauer insist that he had relied to his detriment on a preexisting, contrary agency interpretation, because any such earlier interpretation was not sufficiently "well-established, definitive, and authoritative" to give rise to a

105. *Compare* Clean Air Act, 42 U.S.C. § 7607(d) (2006), *with* Administrative Procedure Act, 5 U.S.C. § 553 (2006).

106. Warshauer v. Solis, 577 F.3d 1330 (11th Cir. 2009).

107. *Id.* at 1332-33 (citing 29 U.S.C. § 433(a)(1) (code year omitted by the court)).

108. *Id.* at 1333-34.

109. *Id.* at 1334.

110. *Id.*

111. *Id.* at 1335-36.

112. *Id.* at 1338. *See generally id.* at 1337-38 (explaining the basis for the court's finding that the DLCs constituted an interpretive rule).

reliance interest.[113] As for the de minimis exemption, the fact that the website advisory placed a numerical dollar figure on the exemption did not make it any less interpretive.[114] Again, adoption of the short cut would have short-circuited this entire discussion: the court would have summarily rejected Warshauer's procedural challenge, perhaps taking a moment to remind the agency that it could not rely on the website advisories as the basis for later enforcement action.

Many similar examples could be offered. The D.C. Circuit, for example, has held that an EPA directive in a press release stating that the agency would no longer rely on third-party human studies in its regulatory decisionmaking was a legislative rule because it "'binds private parties [and] the agency itself with the force of law,"[115] that a Federal Communications Commission clarification concerning compensation of pay phone companies for completed calls was a legislative rule because it "change[d] the rules of the game,"[116] and that an EPA guidance document concerning risk assessment techniques for disposal of toxic chemicals was a legislative rule because it had practical binding effect.[117] The same court has held that an EPA memorandum setting forth criteria for reviewing state-submitted boundary designations for nonattainment areas under the Clean Air Act was a general statement of policy because it was not binding on the agency or private parties,[118] that National Highway Traffic Safety Administration guidelines covering regional recalls amounted to a policy statement because they did not "establish new rights and obligations for

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113. *Id.* at 1339.

114. *Id.* at 1340-41. On this numerical issue, *Warshauer* stands in contrast with *Hoctor v. U.S. Department of Agriculture*, 82 F.3d 165, 171 (7th Cir. 1996), discussed at length by Gersen, *supra* note 10, in which Judge Posner held that a rule requiring eight-foot-high enclosures for wild animals was legislative because there was no method that could reasonably be described as interpretive "by which the Department of Agriculture could have excogitated the eight-foot rule from the [pre-existing, generally worded] structural-strength regulation." At the same time, Judge Posner conceded in *Hoctor* that not all numerically precise regulations are for that reason legislative for APA purposes. *Id.* His concession is well illustrated by *American Mining Congress v. Mine Safety & Health Administration*, 995 F.2d 1106 (D.C. Cir. 1993), in which the D.C. Circuit upheld as interpretive (and therefore procedurally valid despite the agency's failure to perform notice and comment) an agency policy letter stating that a numerically defined x-ray reading would count as a "diagnosis" for purposes of federal mine safety reporting requirements.

115. Croplife Am. v. EPA, 329 F.3d 876, 883 (D.C. Cir. 2003) (alteration in original) (quoting Gen. Elec. Co. v. EPA, 290 F.3d 377, 382 (D.C. Cir. 2002)).

116. Sprint Corp. v. FCC, 315 F.3d 369, 374 (D.C. Cir. 2003).

117. *Gen. Elec. Co.*, 290 F.3d at 384-85.

118. Catawba Cnty. v. EPA, 571 F.3d 20, 33-35 (D.C. Cir. 2009).

automakers,"[119] and that a Federal Aviation Administration letter concerning rest time for crew members was an interpretive rule because it merely "spell[ed] out a duty fairly encompassed within" an existing regulation.[120] In the first group of cases, the challenged rule was vacated pre-enforcement for failure to undergo notice-and-comment procedures. In the second group, the procedural challenge failed because the pronouncement at issue was an exempt interpretive rule or general statement of policy or because it was deemed nonfinal agency action. But in all of them, the court reasoned from the substantive purpose and effect of the rule to its required procedural provenance, not the other way around. In short, in none of these cases was the short cut anywhere to be found.

Although the short cut has been a no-show, it should be noted that the basic logic of the trade-off—the idea that agencies ought to have wide latitude to choose between public scrutiny at the promulgation stage and enhanced judicial scrutiny at the enforcement stage—has made an occasional appearance in the case law, particularly in the D.C. Circuit. The most prominent example here is the 1993 *American Mining Congress* case, in which that court adopted the "legal effect" test for distinguishing between legislative and interpretive rules.[121] Writing for the court, Judge Stephen Williams began from the premise that a rule is legislative "only if Congress has delegated legislative power to the agency and if the agency intended to exercise that power in promulgating the rule."[122] Judge Williams proceeded to itemize four situations in which it can be said with some confidence that an agency intended to act with the force of law: when, "in the absence of a legislative rule by the agency, the legislative basis for agency enforcement would be inadequate,"[123] when an agency publishes a rule in the Code of Federal Regulations,[124] when an "agency has explicitly invoked

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119. Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 452 F.3d 798, 810 (D.C. Cir. 2006).

120. Air Transp. Ass'n of Am., Inc. v. FAA, 291 F.3d 49, 55-56 (D.C. Cir. 2002) (emphasis removed) (quoting Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 588 (D.C. Cir. 1997)).

121. Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106 (D.C. Cir. 1993). As for whether a rule binds the agency in the sense that it does not leave the agency free to exercise discretion in the future, the court explained that this factor was relevant to the distinction between legislative rules and general statements of policy, not between legislative rules and interpretive rules. *Id.* at 1111.

122. *Id.* at 1109.

123. *Id.*

124. *Id. But see* Health Ins. Ass'n of Am. v. Shalala, 23 F.3d 412, 423 (D.C. Cir. 1994) (describing publication in the Code of Federal Regulations as not "anything more than a snippet of evidence of agency intent").

its general legislative authority,"[125] and when a rule repudiates, amends, or is irreconcilable with a prior legislative rule.[126]

Overall, *American Mining Congress* made it somewhat more difficult than it had been previously in the D.C. Circuit to show that a rule was legislative as opposed to interpretive. For instance, the court intimated that an APA procedural challenge should succeed under the new test's first prong only when the agency truly "*needs* to exercise legislative power."[127] Explaining its reluctance to define the exempt category of interpretive rules more narrowly, the court invoked Elliott's "pay me now or pay me later" analogy:

> A non-legislative rule's capacity to have a binding effect is limited in practice by the fact that agency personnel at every level act under the shadow of judicial review. . . . Because the threat of judicial review provides a spur to the agency to pay attention to facts and arguments submitted in derogation of any rule not supported by notice and comment, even as late as the enforcement stage, *any* agency statement not subjected to notice-and-comment rulemaking will be more vulnerable to attack not only in court but also within the agency itself.[128]

In short, because agencies will need to face the music at some point, there is less need for robust judicial insistence upon notice and comment before promulgation. This is, certainly, the logic of the trade-off. Still, there is a great deal of difference between enhancing the availability of the interpretive rule exception and jettisoning APA procedural review altogether in favor of the short cut. No case, in the D.C. Circuit or outside of it, has *expressly* done the latter.

Still, we ought to investigate the possibility that courts have in effect adopted the short cut without saying so. Perhaps it is too much for short cut proponents to ask judges to renounce explicitly their longstanding practice of distinguishing legislative from nonlegislative rules. But if, as a matter of practice, courts are routinely rejecting pre-enforcement assertions that

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125. *Am. Mining Cong.*, 995 F.2d at 1112.

126. *Id.* at 1109 (citing Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan, 979 F.2d 227, 235 (D.C. Cir. 1992)). More recently, the D.C. Circuit has articulated a similar test for identifying legislative rules that turns on three factors: "(1) the Agency's own characterization of the action; (2) whether the action was published in the Federal Register or the Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency." Molycorp, Inc. v. EPA, 197 F.3d 543, 545 (D.C. Cir. 1999).

127. *Am. Mining Cong.*, 995 F.2d at 1110.

128. *Id.* at 1111.

particular rules are legislative in nature and must therefore undergo notice and comment, then one of the essential functions of the short cut—preserving agencies' methodological discretion—is already being served. And if the judicial tests used to achieve this result are sufficiently emphatic and predictable, then the short cut's other essential purpose—reducing litigation costs—is being achieved as well. This state of affairs could prevail even if courts in pre-enforcement actions made no explicit mention of the trade-off at the heart of the short cut proposal, so long as they enforced that trade-off in practice by refusing to allow agencies to predicate enforcement actions on rules that were never subjected to notice and comment.

An examination of the case law reveals, however, that this state of affairs does not in fact prevail. Courts have not adopted the short cut either openly or *sub rosa*. It is true that some cases have held that the question of whether a rule is legislative or nonlegislative is unripe for review at the pre-enforcement stage, a disposition that could be viewed as consistent with the short cut.[129] Occasionally, in such cases, the connection between a finding of unripeness and the logic of the short cut is made explicit.[130] Most of these cases, however, appear to involve claims by an agency that its rule was exempt from notice and comment as a general statement of policy. The finding of unripeness in such cases arises not from the logic of the short cut but from the notion that a rule's true nature as a general statement of policy cannot be ascertained until a series of enforcement actions has revealed whether the position expressed in the rule was tentative or binding on the agency.[131] Devotees of the short cut would forswear *any* examination of a rule's true nature, choosing instead to treat rules as nonbinding on the merits if they never underwent notice and comment. In short, declaring a challenge unripe is a far cry from holding that an agency has absolute discretion to dispense with notice and comment, subject only to more searching review at the enforcement stage.

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129. *See, e.g.*, Ass'n of Am. Med. Colls. v. United States, 217 F.3d 770, 780-85 (9th Cir. 2000); Ariz. Pub. Serv. Co. v. EPA, 211 F.3d 1280, 1296-97 (D.C. Cir. 2000); Municipality of Anchorage v. United States, 980 F.2d 1320, 1323-25 (9th Cir. 1992); New Jersey v. Dep't of Health & Human Servs., No. 07-4698, 2008 WL 4936933, at *11-13 (D.N.J. 2008).

130. *See, e.g.*, Interstate Natural Gas Ass'n of Am. v. FERC, 285 F.3d 18, 60 (D.C. Cir. 2002) (finding that the challenge to a general statement of policy was unripe, and noting that "[s]uch a characterization [as nonlegislative] comes at a price to the Commission; in applying the policy, it will not be able simply to stand on its duty to follow its rules").

131. *See, e.g.*, Colwell v. Dep't of Health & Human Servs., 558 F.3d 1112, 1128 (9th Cir. 2009); Pub. Citizen, Inc., v. U.S. Nuclear Regulatory Comm'n, 940 F.2d 679, 683 (D.C. Cir. 1991).

Moreover, the prevailing view is that pre-enforcement APA notice-and-comment challenges are indeed ripe for review.[132] While most such challenges do not succeed on the merits, plenty do,[133] and in any case the tests applied in these cases could scarcely be called emphatic or predictable.

By the same token, although some courts have held that nonlegislative rules do not constitute "final agency action"[134] subject to judicial review under the APA,[135] this holding, as with ripeness, hardly applies across the board.[136] Indeed, we have already seen an example to the contrary—the *Appalachian Power* case discussed above.[137] In that case, the D.C. Circuit noted that the EPA

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132. *See, e.g.*, Cohen v. United States, 578 F.3d 1 (D.C. Cir. 2009), *reh'g en banc granted in part, opinion vacated in part*, 599 F.3d 652 (D.C. Cir. 2010); Coal. for Common Sense in Gov't Procurement v. Sec'y of Veterans Affairs, 464 F.3d 1306, 1315-16 (Fed. Cir. 2006). *But see Cohen*, 578 F.3d at 21 (Kavanaugh, J., dissenting in part) (arguing that statutory restrictions and the ripeness doctrine "stand 'almost unyieldingly against pre-enforcement challenges to Treasury's regulations promulgated in violation of APA procedural requirements'" (quoting Kristin E. Hickman, *A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 76 GEO. WASH. L. REV. 1153, 1200 (2008))).

133. *See, e.g.*, Military Order of the Purple Heart v. Sec'y of Veterans Affairs, 580 F.3d 1293, 1297-98 (Fed. Cir. 2009) (holding that a new procedure for processing large claims was invalid because it was contrary to existing regulations and was not implemented through notice-and-comment rulemaking); Sprint Corp. v. FCC, 315 F.3d 369, 377 (D.C. Cir. 2003) (remanding to the FCC because it had failed to comply with notice-and-comment requirements); Croplife Am. v. EPA, 329 F.3d 876, 884 (D.C. Cir. 2003) (vacating an EPA press release because of the agency's "failure to engage in the requisite notice and comment rulemaking"); Gen. Elec. Co. v. EPA, 290 F.3d 377, 385 (D.C. Cir. 2002) (rejecting unripeness defense and vacating an EPA guidance document because of the agency's failure to engage in notice and comment); Appalachian Power Co. v. EPA, 208 F.3d 1015, 1023, 1028 (D.C. Cir. 2000) (holding that guidance was final agency action, but setting it aside because of the agency's failure to comply with notice and comment requirements imposed by the Clean Air Act).

134. *See* 5 U.S.C. § 704 (2006).

135. *See, e.g.*, Nat'l Ass'n of Home Builders v. Norton, 415 F.3d 8, 13-17 (D.C. Cir. 2005) (holding that Fish and Wildlife Service and Department of Interior survey protocols concerning endangered butterfly did not constitute final agency action); Pub. Serv. Co. of Colo. v. EPA, 225 F.3d 1144, 1147-49 (10th Cir. 2000) (holding that EPA opinion letters did not constitute final agency action); Colo. Farm Bureau Fed'n v. U.S. Forest Serv., 220 F.3d 1171 (10th Cir. 2000) (holding that a Forest Service agreement addressing a state plan to introduce Canadian lynx into Colorado was not final agency action); Taylor-Callahan-Coleman Cntys. Dist. Adult Prob. Dep't v. Dole, 948 F.2d 953, 957-959 (5th Cir. 1991) (holding that a letter from the Administrator of Wage and Hour Division was not final agency action).

136. For a discussion of the conflicting case law on finality and agency guidance documents, see generally Gwendolyn McKee, *Judicial Review of Agency Guidance Documents: Rethinking the Finality Doctrine*, 60 ADMIN. L. REV. 371, 407 (2008).

137. *See supra* text accompanying notes 97-105.

guidance document stated, "The policies set forth in this paper are intended solely as guidance, do not represent final Agency action, and cannot be relied upon to create any rights enforceable by any party."[138] The court went on to emphasize that this was a boilerplate disclaimer, inserted at the end of every guidance document issued by the EPA since 1991,[139] and had no difficulty rejecting it as nothing more than a "charade."[140] The guidance document, the court held, was final because it was practically binding, and was therefore subject to pre-enforcement review.[141] Again, as with the ripeness cases, even those courts that have deemed nonlegislative rules to be nonfinal have not come close to embracing the short cut.[142]

Finally, it might be asked what practical difference it makes for a court to vacate an agency's pronouncement on grounds of procedural invalidity as opposed to denying pre-enforcement review altogether on the understanding that the pronouncement will lack legal binding force in any later enforcement proceeding. In some instances, to be sure, the difference might be small—under current doctrine, the agency might respond to a vacatur by simply reissuing the pronouncement with a stronger disclaimer explaining that it really, truly is not binding.[143] But in many instances, the difference will be great. For one thing, the agency might decide not to reissue the pronouncement or might decide to submit the relevant policy decision to notice and comment. More importantly, however, vacatur gives the agency (and other agencies) greater incentive to submit comparable pronouncements to notice and comment in the future. As will be discussed below, courts are,

138. *Appalachian Power*, 208 F.3d at 1023.

139. *Id.* at 1023 (citing 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, 1361 (1992)).

140. *Id.* (quoting Strauss, *supra* note 70, at 1485).

141. *Id.* at 1020, 1023.

142. *See, e.g.*, Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 452 F.3d 798, 808 (D.C. Cir. 2006) (finding agency guidelines not to be final agency action or legislative rules because they "do not determine any rights or obligations, nor do they have any legal consequences"); Nat'l Ass'n of Home Builders v. Norton, 415 F.3d 8, 15-17 (D.C. Cir. 2005); Air Brake Sys., Inc. v. Mineta, 357 F.3d 632, 635 (6th Cir. 2004) (finding that agency letters were not binding and that they did not constitute final agency action); Taylor-Callahan-Coleman Cntys. Dist. Adult Prob. Dep't v. Dole, 948 F.2d 953, 957-59 (5th Cir. 1991) (determining that opinion letters were not final agency action by examining the effect of the letters on the regulated entity and the scope of the letters).

143. *See, e.g.*, Cement Kiln Recycling Coal. v. EPA, 493 F.3d 207, 228 (D.C. Cir. 2007) (noting that the EPA had responded to the *Appalachian Power* decision by adding additional disclaimers to its guidance document).

and should be, careful not to be too aggressive in policing procedural validity, lest they drive agencies out of rulemaking and into purely ad hoc adjudicatory mechanisms.[144] But that aspect of current doctrine only reinforces the present conclusion: administrative law is far from embracing the short cut, both as a legal and a practical matter.

IV. THE PERILS OF THE SHORT CUT: IN DEFENSE OF JUDICIAL SKEPTICISM

It remains for us to determine why the short cut has not caught on—why, as William Funk wistfully admits, "the courts have not adopted this simple and accurate test."[145] This Part of the Article does that, but it aims to do more: it seeks not only to discover why courts have been reluctant to embrace the short cut, but also to explain why their reluctance has been warranted. In order to do so, however, we must first examine the costs and benefits associated with agencies' use of guidance documents and other forms of nonlegislative rulemaking. Once we understand these costs and benefits, we can assess the central claim made by advocates of the short cut: that it allows agencies, courts, and the public to reap the benefits of nonlegislative rulemaking while avoiding most, if not all, of its costs.

The use of nonlegislative rules generates three fundamental benefits for agencies and the regulated public. First, it provides relatively swift and accurate notice to the public of how the agency interprets the statutes or rules that it administers and how it intends to carry out its statutory mandate.[146] In particular, the use of interpretive rules allows agencies to clarify their

144. See *infra* text accompanying notes 156-157.

145. Funk, *supra* note 53, at 1325. Stare decisis is not a sufficient explanation for the reluctance of courts to embrace the short cut. For one thing, the Supreme Court has not spoken with any clarity about the basis for distinguishing legislative from nonlegislative rules, so all thirteen federal circuits have been free to carve their own paths. For another, the relevant case law within the circuits has been, to say the least, sufficiently unstable and protean that a court of appeals could adopt the short cut without undue violence to the already ragged fabric of the law. For citations to changing circuit precedent, see *supra* notes 52-60.

146. *Id.* at 1323 (explaining that nonlegislative rules allow "an agency to communicate its views on the law and policy to the public, especially the regulated public, on a timely basis, so that they will not be surprised by agency action"); Kalen, *supra* note 71, at 673 (asserting benefits to the public from technical guidance documents); Pierce, *supra* note 31, at 82-83 (explaining that interpretive rules "provide affected members of the public and their elected representatives a valuable source of information with respect to the policies agencies are attempting to pursue"); Strauss, *supra* note 70, at 1481 ("By informing the public how the agency intends to carry out an otherwise discretionary task, publication rulemaking permits important efficiencies to those who must deal with government.").

understanding of ambiguous statutes or rules without initiating a new round of notice and comment.[147] As Nina Mendelson notes, agencies could use legislative rules for this purpose, but this route would be time-consuming and might expose the agency to subsequent lawsuits alleging noncompliance with the rule.[148] Second, nonlegislative rulemaking allows agency heads to inform lower-level employees promptly about changes in agency policy (through such means as staff manuals, guidance documents, advice letters, and the like) in order to ensure bureaucratic uniformity and regularity.[149] Third, nonlegislative rules avoid opportunity costs by freeing up agencies to redirect resources—resources that would otherwise be expended in the cumbersome process of notice-and-comment rulemaking—toward potentially more important priorities.[150]

All three of these primary benefits of nonlegislative rulemaking sound in concerns about administrative efficiency. (And of course, the short cut itself is justified as a judicial doctrine primarily in terms of adjudicatory economy: reducing decision costs by eliminating expensive litigation over the nature or purpose of particular rules.)[151] The cost side of the ledger, by contrast, is

147. *See, e.g.*, Manning, *supra* note 66, at 914 (noting that interpretive rules such as staff manuals and guidance documents "avoid (increasingly) cumbersome notice-and-comment procedures"); Mendelson, *supra* note 41, at 410 (noting that an agency issuing guidance documents can decide how much information to disclose and "is not obligated to respond to comments or to supply the 'concise statement of their basis and purpose'" (quoting 5 U.S.C. § 553(c) (2000))).

148. Mendelson, *supra* note 41, at 409.

149. *See, e.g.*, Kalen, *supra* note 71, at 671 ("Absent such [nonlegislative] documents, agency personnel could interpret or apply a particular regulation or statute inconsistently in various regional or field offices."); Manning, *supra* note 66, at 914-15 ("[N]onlegislative rules potentially allow agencies to supply often far-flung staffs with needed direction . . . ."); Mendelson, *supra* note 41, at 409 ("Agencies rely on handbooks, directives, and other similar guidance documents to ensure that lower-level employees complete forms correctly and make consistent (and thus more predictable) decisions."); Strauss, *supra* note 70, at 1482 ("Staff instructions, manuals, and other forms of publication rules are essential tools of bureaucratic management, by which the expertise of an agency is shared throughout its structure, and staff operatives are kept under the discipline necessary to the efficient accomplishment of agency mission.").

150. *See, e.g.*, Manning, *supra* note 66, at 914 (explaining that interpretive rules "represent a relatively low-cost and flexible way for agencies to articulate their positions"); Pierce, *supra* note 31, at 83 (agencies are "free to issue, amend, or rescind all [interpretive] rules quickly, inexpensively, and without following any statutorily prescribed procedures"); Strauss, *supra* note 70, at 1472 (legislative rules are "expensive to [agencies'] limited resources and so conducive to frustrating their choices about how to use those resources").

151. *See, e.g.*, Gersen, *supra* note 10, at 1715; Strauss, *supra* note 70, at 1478 n.44 (noting that any attempt to draw a line between, for example, rules that impose new legal obligations and

dominated by concerns about broad public participation. The use of nonlegislative rules comes at a serious cost from the standpoint of participation, because it enables agencies to make major policy decisions without observing the formal processes that Congress crafted to facilitate meaningful public input, commentary, and objection.[152] Often these policy decisions in effect command compliance from regulated industries and thus have substantial practical effects on the public, regardless of whether they are framed as mere guidances, interpretations, or tentative policy statements.[153] It would seem inconsistent with both legislative intent and democratic theory to allow agencies to make such decisions without public input whenever they wish.[154]

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rules that merely interpret existing obligations "can have the qualities of a shell game[, because] authorized interpretation frequently supplies judgments no one would pretend the enacting body considered" and citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), as an example).

152. *See, e.g.*, Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 MO. L. REV. 695, 735 (2007) ("[I]ncreased public participation in agency decisionmaking is more democratic and increases the legitimacy of agency decisions and public trust in the agencies.") (footnote omitted); Mendelson, *supra* note 41, at 424-25; Pierce, *supra* note 31, at 85-86.

153. *See, e.g.*, Gen. Elec. Co. v. EPA, 290 F.3d 377, 383 (D.C. Cir. 2002) (explaining that if a nonlegislative rule "is such that private parties can rely on it as a norm or safe harbor by which to shape their actions, it can be binding as a practical matter" (quoting Anthony, *supra* note 139, at 1328-29)); Guidance Practices Bulletin, *supra* note 33, at 3435 ("[A]lthough guidance may not be legally binding, . . . [it] can have coercive effects or lead parties to alter their conduct."); Anthony, *supra* note 139, at 1328 ("A document will have practical binding effect before it is actually applied 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."); Magill, *supra* note 56, at 1397 ("[E]ven when the agency acts in an advisory capacity, its views have unquestionable real-world consequences."); Mendelson, *supra* note 41, at 407 ("[G]uidance documents often have rule-like effects on regulated entities. Regulated entities often comply with the policies announced in guidance documents, thereby alleviating the agency's burden of enforcement."); Strauss, *supra* note 70, at 1465 (noting that citizens can be bound when, "as a practical matter, citizens have few choices but to follow policies the government has announced").

154. It is true that the White House's Office of Management and Budget (OMB) issued a Bulletin for Agency Good Guidance Practices in 2007 directing agencies to accept comments before issuing "significant" guidance documents. *See* Guidance Practices Bulletin, *supra* note 33. But the effect of the bulletin is unlikely to be significant for several reasons. It does not obligate agencies to respond to the comments they receive; agencies that violate it are accountable only to OMB, not in court; and, outside the relatively narrow category of "economically significant guidance documents," an agency can comply without casting the net broadly, seeking comments only from a small group of regulated entities with which it has an well-established relationship. For a discussion of the shortcomings of the OMB bulletin, with particular reference to the interests of regulatory beneficiaries, see Mendelson, *supra* note 41, at 447-50.

By the same token, however, there is good reason not to insist that *all* agency policymaking take place via notice and comment. Currently, agencies issue a far greater number of nonlegislative rules than legislative ones.[155] If courts construed the legislative rule category broadly, so that agencies were required to go through the arduous process of notice-and-comment rulemaking in order to promulgate a substantial portion of their policies, agencies might respond by not making rules at all. Current doctrine permits this: the Supreme Court has held that the decision whether to craft policy via rulemaking or case-by-case adjudication lies primarily in the informed discretion of the agency.[156] This aspect of current doctrine cautions against construing statutory exemptions from notice and comment too parsimoniously. If policymaking by rule becomes sufficiently costly, then agencies will shift to purely adjudicatory mechanisms—sacrificing in the process all of the potential benefits of the rulemaking mode, such as clear notice and broad public participation. As Judge Williams put it in his *American Mining Congress* opinion:

> The protection that Congress sought to secure by requiring notice and comment for legislative rules is not advanced by reading the exemption for "interpretive rule" so narrowly as to drive agencies into pure ad hocery—an ad hocery, moreover, that affords less notice, or less convenient notice, to affected parties.[157]

To put matters simply, one of the benefits of nonlegislative rulemaking, at least in contexts where notice and clarity are especially important, is that it is not pure adjudication.

The legislative versus nonlegislative rule debate thus poses a pragmatic challenge: how can courts strike the best balance between administrative efficiency and broad public participation in agency policymaking? Interpret the exemptions from notice and comment too narrowly, and you drive agencies

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155. *See* Johnson, *supra* note 152, at 695 n.1 ("In many agencies, more than ninety percent of the 'rules' are adopted through policy statements and interpretive rulemaking."); Strauss, *supra* note 70, at 1469 (noting that nonlegislative rules occupy many times more library shelf space than legislative ones).

156. NLRB v. Bell Aerospace Co., 416 U.S. 267, 292-94 (1974); SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194, 203 (1947). For further discussion of the "*Chenery II* principle" as it relates to nonlegislative rulemaking, see *infra* text accompanying notes 183-209.

157. Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993); *see also* Hoctor v. U.S. Dep't of Agric., 82 F.3d 165, 167 (7th Cir. 1996) ("It would be no favor to the public to discourage the announcement of agencies' interpretations by burdening the interpretive process with cumbersome formalities.").

into a purely adjudicative mode that offers less notice and less opportunity for widespread participation.[158] Interpret them too broadly, and you allow agencies to dispense with public input at the pre-promulgation stage as a matter of course. Some sort of middle path seems best.

The advocates of the short cut acknowledge this pragmatic concern. Indeed, all of them seem to recognize that an interpretation of the APA that resulted in wholesale abandonment of notice and comment by agencies would be unacceptable.[159] This is why they place so much emphasis on what I have called the trade-off argument. Recall the argument: as long as agencies know that they must submit their rules to meaningful scrutiny sooner or later, they will not abuse the discretion that the short cut gives them. Rather, agencies will choose, at least in some circumstances, to submit their proposed rules to public input via notice and comment in order to avoid increased judicial scrutiny at the enforcement stage. If this trade-off argument is persuasive, then the failure of courts to embrace the short cut is truly difficult to justify.[160] As the next section shows, however, the trade-off argument fails, for three reasons.

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158. Even when standing to intervene is generously awarded, see, for example, *Office of Commc'n of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966), adjudication does not provide as broad a framework for public participation as the APA's "interested persons" standard, 5 U.S.C. § 553(c) (2006).

159. *See, e.g.*, Gersen, *supra* note 10, at 1721; Manning, *supra* note 66, at 945. Elliott may be an exception here, because he discounts the benefits of notice and comment quite substantially. *See infra* text accompanying notes 213-215.

160. One might try to argue that the short cut is unsound as a matter of statutory interpretation because § 553 of the APA contemplates that some kinds of rules simply must undergo notice and comment, while others (for example, "interpretative rules" and "general statements of policy," 5 U.S.C. § 553(b)(A)) are exempt. That statement is true, but it does not preclude the short cut. After all, nothing in the APA says that *courts* rather than *agencies* should determine which rules are exempt. The fact that pre-enforcement judicial review did not become a reality until more than twenty years after the enactment of the APA, *see* Abbott Labs. v. Gardner, 387 U.S. 136 (1967), argues against the notion that Congress expected courts to sort procedurally valid from procedurally invalid rules based on their text or context. So does the principle, emphasized by John Manning, that agencies have virtually unreviewable discretion in their choice of policymaking mode—a principle that predates the APA. *See* Manning, *supra* note 66, at 901-14. In short, the APA's text and history are fully consistent with the view that notice-and-comment procedures create a kind of procedural safe harbor, to be entered at the agency's option, which allows the resulting rule to be treated as legally binding. The objective of this Article is to show that such a view is pragmatically undesirable, not that it is textually untenable.

A. Casting Doubt on the Trade-Off

First, the trade-off, while perhaps attractive in theory, would not always happen in practice. Indeed, the short cut—understood as a mechanism that treats the notice-and-comment process as a necessary and sufficient means of generating legally binding rules in accordance with the APA—would sometimes misfire in both directions, yielding both false negatives and false positives. The false negatives (cases in which the short cut would deny binding legal effect to rules properly understood as legislative) could theoretically occur in the context of rules such as those dealing with foreign or military affairs or agency practice and procedure—which are plainly entitled to the force of law under the APA, notwithstanding the absence of notice and comment.[161] To be fair, this outcome would seem unlikely, so long as courts supplemented the short cut with a sensitive understanding of § 553's subject-matter exemptions. A more serious concern is the risk of false positives—cases in which the short cut would grant binding legal effect to rules properly understood as nonlegislative. Agencies often conduct some version of notice and comment even when they do not intend the resulting statement of policy to be legally binding.[162] They might do so voluntarily in order to make a well-informed yet tentative decision, or because the policy statement in question qualifies as an "economically significant guidance document" under the OMB's bulletin on good guidance practices, in which case the agency must invite public comment at the draft stage.[163] A court that automatically equated notice and comment with binding legal effect would misclassify such policy statements as legislative rules, thereby denying the agency the discretion to depart in individual cases from a position that it had viewed as tentative. Worse still, such a classification would require the agency to initiate a full rulemaking proceeding to change its policy—a price that might chill agencies from voluntarily seeking public input in the first place.

But there is a deeper and more telling reason why the trade-off will often fail to take place. When an agency pronouncement sets forth the conditions

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161. *See supra* notes 36-40 (citing categories of exempt rules).

162. *See, e.g.*, Hudson v. FAA, 192 F.3d 1031, 1033-34 (D.C. Cir. 1999); Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 821 (2001) (asserting on the basis of his own experience that agencies often solicit public comment before adopting nonlegislative rules). The Administrative Conference of the United States recommended pre-adoption notice and comment for nonlegislative rules "likely to have substantial impact on the public." 1 C.F.R. § 305.76-5 (1992).

163. *See* Guidance Practices Bulletin, *supra* note 33, at 3440.

under which the agency will *not* take action—because the pronouncement either sets minimum criteria for triggering enforcement mechanisms or announces a general deregulatory policy or interpretation—there will usually be no later enforcement action in which the agency's views can be tested. In the case of such threshold or permissive rules, the short cut would guarantee neither public input at the promulgation stage nor judicial review at some later stage. Yet such rules can have substantial practical effects on regulated entities and, in particular, on the intended beneficiaries of regulation.

A good illustration here is *Community Nutrition Institute v. Young*,[164] the case in which Judge Starr's partial dissent first gave shape to the short cut proposal. Recall that in *Community Nutrition Institute* the D.C. Circuit vacated as procedurally invalid a pronouncement by the FDA setting an "action level" for aflatoxin at twenty parts per billion.[165] Although Judge Starr suggested that the appropriate judicial course was to wait until the FDA acted on its pronouncement, that solution would have offered no judicial redress to groups like the Community Nutrition Institute that believed the agency was failing to carry out its statutory mandate. After all, the FDA could "act on" its action level pronouncement only by *declining* to take enforcement action against producers whose corn contained less than twenty parts per billion of aflatoxin—but decisions by an agency not to take enforcement action are generally unreviewable.[166] In effect, then, the panel majority in *Community Nutrition Institute* held that an agency's wholesale nonenforcement decision was reviewable even though—indeed, to some extent *because*—its retail nonenforcement decisions would be unreviewable.

The *Community Nutrition Institute* case does not stand alone. As Robert Anthony detailed some years ago, agencies often use nonlegislative rules to create "safe-harbor polic[ies]" alerting regulated parties that they will not be deemed in violation if they comply.[167] Such policies may or may not specify whether enforcement action will be taken against noncomplying parties, but in any case they create practically binding norms whenever, as will often be the case, noncompliance is not a realistic option.[168] Thus, for example, in *Chamber of Commerce v. U.S. Department of Labor*,[169] the D.C. Circuit set aside as procedurally invalid a directive from the Occupational Safety and Health

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164. 818 F.2d 943 (D.C. Cir. 1987).

165. *Id.* at 945.

166. *See* Heckler v. Chaney, 470 U.S. 821 (1985).

167. Anthony, *supra* note 139, at 1339.

168. *Id.*

169. 174 F.3d 206 (D.C. Cir. 1999).

Administration promising not to inspect workplaces as frequently or thoroughly if the employer complied with certain newly articulated safety standards. The court reasoned that the burdens associated with inspections were so great that employers had no real choice but to take steps to avoid them, and that the directive was therefore practically binding.[170] The practical binding effect of such policies is particularly potent when the agency plays a gatekeeper role, granting or withholding permits or licenses that are essential to the livelihood or business survival of an applicant.[171] Thus, in an early nonlegislative rule case, the D.C. Circuit vacated a pronouncement issued by the Interstate Commerce Commission without notice and comment that loosened restrictions on motor carriers seeking permission to transport people and goods in and out of Canada, on the grounds that the pronouncement effectively established a "flat rule of eligibility."[172]

These examples call attention to a broader point. Doctrines such as standing, finality, ripeness, and nonreviewability of agency inaction combine to make it very difficult to obtain judicial review of permissive, deregulatory, or threshold-setting agency pronouncements.[173] As Nina Mendelson has pointed out, obtaining access to judicial review of such agency actions is especially difficult for regulatory beneficiaries – the diffuse and decentralized groups such as consumers, employees, or users of public lands who benefit when rules are enforced against others.[174] If such groups are unable to participate in the process of shaping and critiquing agency policy ex ante – because the agency has sidestepped notice and comment under a short cut regime – they may never get a bite at the apple ex post.[175] The result of the short cut, then, could be a regulatory scheme with a greater bias toward prominent regulated entities and

170. *See id.* at 211-13.

171. *See, e.g.*, Raso, *supra* note 34, at 803 (noting that agencies with "gatekeeping power," such as the FDA and FCC, can more readily induce voluntary compliance).

172. Am. Bus. Ass'n v. United States, 627 F.2d 525, 532 (D.C. Cir. 1980) (quoting United States *ex rel.* Parco v. Morris, 426 F. Supp. 976, 984 (E.D. Pa. 1977)).

173. *See, e.g.*, Colwell v. Dep't of Health & Human Servs., 558 F.3d 1112, 1128 (9th Cir. 2009) (holding that a pre-enforcement challenge to HHS guidance was not ripe unless and until challengers could provide an example "of the manner in which the HHS has used the Policy Guidance – as, for example, in an enforcement proceeding against one of them"); *see also* Mendelson, *supra* note 41, at 411 (noting finality and ripeness barriers to judicial review of guidance documents).

174. *See id.* at 420-24.

175. *See id.* at 424-33; *cf.* Strauss, *supra* note 162, at 817 ("[T]hose who are the objects of regulation may welcome a publication rule, that members of the public believe [to be] inadequately protective of their interests; again, because the regulated will comply, there will never be a concrete application of the rule that could be tested on judicial review.").

other repeat players who have both informal access to agency decisionmakers at the policymaking stage[176] and a greater likelihood of obtaining judicial review at the enforcement stage.[177] To be sure, courts should be mindful not to overenforce norms of procedural formality because of the danger that agencies would be driven to greater use of ad hoc adjudication.[178] Safe harbors are helpful, after all.[179] But the asymmetrical effect of standard-setting nonlegislative rules on regulatory beneficiaries provides a powerful reason to resist the short cut, which calls upon courts to abandon pre-enforcement procedural review of such rules altogether.

If permissive or threshold-setting rules were the only context in which we could reliably predict that the trade-off would not take place, the remedy would be simple—apply the short cut but make an exception for these types of rules. This, however, is not the case: even in instances where agencies issue "traditional" nonlegislative rules concerning positive criteria for enforcement action, the trade-off often fails to take place. This is because many regulated entities choose, as a practical matter, to comply with nonlegislative rules rather than incur the expense and uncertainty associated with pre-enforcement challenges or the risks associated with noncompliance.[180] As Peter Strauss notes, although regulated entities may theoretically retain the option of challenging the substantive validity of nonlegislative rules during licensing, ratemaking, or other enforcement proceedings, "[i]n practice . . . these options entail risks and impose costs that many will be unwilling or even unable to accept."[181] The risks of noncompliance might decrease somewhat under a short

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176. *See* Mendelson, *supra* note 41, at 429 (noting that agencies tend to reach out to known regulated entities "as a sounding board for policy development" and to maintain good long-term relationships).

177. To be sure, even under current doctrine, deregulatory or threshold-setting rules are sometimes treated as nonlegislative, *see, e.g.*, *Warshauer v. Solis*, 577 F.3d 1330 (11th Cir. 2009)—or, more questionably, not as rules at all, *see Ass'n of Irritated Residents v. EPA*, 494 F.3d 1027, 1031-34 (D.C. Cir. 2007) (holding EPA's agreement not to take enforcement action against animal feeding operations to be an unreviewable exercise of enforcement discretion rather than a rule). But the short cut would go much further by precluding all procedural review of such rules.

178. *See supra* text accompanying notes 155-157.

179. *See* Strauss, *supra* note 162, at 814.

180. *See* Anthony, *supra* note 139, at 1328; Pierce, *supra* note 31, at 90-91 (explaining that unless the probability of judicial invalidation of a rule is significant, a regulated party will likely comply with a rule when the cost of compliance is less than the cost of noncompliance).

181. *See, e.g.*, Strauss, *supra* note 70, at 1476; *see also* Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals To Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 489 (1997) ("[B]y using policy statements to coerce compliance with a desired standard, an agency can circumvent the safeguards the three branches of

cut regime (if enforcement actions became more vulnerable to successful challenge because nonlegislative rules lacked the force of law), but there is no reason to believe that they would drop to zero—and good reason to doubt that they would drop substantially.[182] The trade-off, simply put, makes more sense in theory than in practice.

Second, the trade-off, even when it did occur, would not significantly constrain agencies' ex ante incentives. Recall that under current doctrine, agencies are generally free to develop new policy through adjudication.[183] Though often criticized,[184] this so-called "*Chenery II* principle" has been reaffirmed by the Supreme Court on several occasions.[185] Under current law, therefore, an agency can develop and impose a new interpretation of its enabling statute or its existing regulations during the enforcement process itself. This interpretation is, of course, subject to judicial review at the behest of the party against whom enforcement action has been brought.[186] But, assuming the agency proceeded via formal adjudication, the interpretation will be upheld in court so long as it is a reasonable interpretation of an ambiguous statute or regulation,[187] and the resulting order may be cited by the agency in enforcement actions against similarly situated entities.[188]

To be sure, agency adjudicative precedents are formally binding only on the parties to the adjudication in which they were announced, and parties in subsequent actions are not precluded from challenging their factual or legal

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government have developed to ensure that the agency's policy is legally, economically, and politically justified.").

182. *See infra* Section IV.B (questioning the proposition that deference doctrines would produce substantial incentives for agencies to opt for notice and comment under a short cut regime).

183. SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194 (1947).

184. For what is still the most trenchant criticism of the principle, see *Chenery II*, 332 U.S. at 216-18 (Jackson, J., dissenting). For a more recent critique of *Chenery II*, on the grounds that it is inconsistent with other aspects of modern administrative law, see Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 535-36 (2003).

185. *See, e.g.*, Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 96-97 (1995); NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

186. That is, if the targeted entity chooses to challenge the enforcement action, which is not a sure thing. *See supra* text accompanying notes 181-188.

187. *See* United States v. Mead Corp., 533 U.S. 218, 230-31 (2001) (noting that formal adjudications are entitled to *Chevron* deference).

188. *See* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 766 (1969) (plurality opinion) ("Subject to the qualified role of *stare decisis* in the administrative process, [adjudicatory orders] may serve as precedents.").

predicates both before the agency and in court.[189] Thus, an agency must be prepared to support the validity of its precedent, and a precedential "rule" grounded in the adjudicative facts of a particular case may not be applied to a new case whose facts are materially different.[190] Nonetheless, as a practical matter, agencies frequently advance important policy objectives via adjudication, and if the resulting precedent is based on broadly applicable legislative facts and is upheld on judicial review, it will prove very difficult for subsequent parties to dislodge.[191] Short cut proponents therefore overstate the costs to agencies of being unable to "rely" on nonlegislative rules because agencies can generally advance the very same interpretation as part of their reasoning in support of an enforcement action without reducing it to any sort of rule. When this is so, the trade-off does not achieve a great deal, for it merely exacts from agencies as the price of doing without notice and comment something that they did not need in the first place.

A couple of examples may help flesh out the point. In *Shalala v. Guernsey Memorial Hospital* (*Guernsey*),[192] a hospital sought Medicare reimbursement for losses associated with a refinancing of its bonded debt. In accordance with an informal reimbursement guideline, the Secretary of Health and Human Services (Secretary) determined that the losses had to be amortized over the life of the hospital's old bonds.[193] The hospital argued that the reimbursement guideline effected a substantive change in the existing regulatory framework by

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189. I am grateful to Ron Levin for emphasizing this point in communications with me. His article, Levin, *supra* note 56, at 1501-02, contains a useful discussion of the nonbinding nature of agency precedent, from which the examples in the next footnote are drawn.

190. *See, e.g.*, Jersey Cent. Power & Light Co. v. FERC, 810 F.2d 1168, 1184 (D.C. Cir. 1987) (en banc); Shell Oil Co. v. FERC, 707 F.2d 230, 235-36 (5th Cir. 1983); NLRB v. St. Francis Hosp. of Lynwood, 601 F.2d 404, 414-16 (9th Cir. 1979).

191. It should be mentioned that agency staff and attorneys sometimes overpress by treating adjudicative precedent as though it were formally binding—just as they sometimes commit the same error with respect to nonlegislative rules. *See, e.g.*, McLouth Steel Prods. Corp. v. Thomas, 838 F.2d 1317 (D.C. Cir. 1988) (holding that because the EPA had refused to entertain objections to its policy, that policy was functioning as a legislative rule; and that, on remand, the agency must initiate notice and comment or stand ready to entertain objections to the policy); Pac. Gas & Elec. Co. v. FERC, 506 F.2d 33, 38 (D.C. Cir. 1974) ("When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued."); Strauss, *supra* note 162, at 816 ("A bit more care from agency counsel about the precise source of authority an agency is claiming . . . could work wonders.").

192. 514 U.S. 87 (1995).

193. *Id.* at 90. The Secretary conceded that the guideline was not a legislative rule, so the Court had no occasion to address the baffling question of how to distinguish between legislative and nonlegislative rules.

departing from generally accepted accounting principles (GAAP) and was void for failure to undergo notice and comment.[194] The Supreme Court disagreed in a 5–4 decision. The Court held that the existing regulations did not require the Secretary to follow GAAP.[195] Most pertinent for present purposes, however, the Court held that the Secretary was entitled to proceed via a combination of adjudication and interpretive rulemaking.[196] The reimbursement guideline represented a reasonable interpretation of existing law, not a substantive change to it. As such, it could be given effect as part of an enforcement action: "The APA does not require that all the specific applications of a rule evolve by further, more precise rules rather than by adjudication."[197]

Take another example: in *United States v. Cinemark USA, Inc.*,[198] the federal government brought an action against a movie theater owner, Cinemark, for allegedly violating the Americans with Disabilities Act.[199] Specifically, the government claimed that Cinemark had failed to comply with a Department of Justice (DOJ) regulation mandating that "*[w]heelchair areas . . . shall be provided so as to provide* people with disabilities . . . *lines of sight comparable to those for members of the general public.*"[200] The regulation was promulgated pursuant to notice and comment, but Cinemark argued that the enforcement action was based on DOJ's understanding that its regulation required wheelchair-using patrons to enjoy lines of sight that were at least as good as the median seat in the theater and that this additional quantitative requirement had never gone through notice and comment and thus could not be legally binding.[201] The Sixth Circuit rejected Cinemark's argument on the same two grounds on which the Supreme Court relied in *Guernsey*. First, it noted that under the *Chenery II* principle the government was entitled to enforce the statute (and its own regulation) via litigation without any further rulemaking.[202] Second, it concluded that DOJ's quantitative interpretation of its own regulation qualified as an interpretive rule in any event, such that notice-and-comment procedures

194. *Id.*

195. *Id.* at 95.

196. *Id.* at 96-97.

197. *Id.* at 96.

198. 348 F.3d 569 (6th Cir. 2003).

199. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. § 12,101 (2006)).

200. *Cinemark*, 348 F.3d at 573 (quoting 28 C.F.R. pt. 36, app. A, § 4.33.3 (emphasis added and code year omitted by the court)).

201. *Id.* at 580.

202. *Id.*

were not necessary.[203] The government's enforcement action was warranted, the court held, because the agency's interpretation of the lines-of-sight regulation was a reasonable one—particularly in light of the deference that agencies deserve when interpreting their own regulations.[204]

How, if at all, would a short cut regime alter the incentives for agencies in situations like those in *Guernsey* and *Cinemark*? Not much, in all likelihood. True, under the short cut, the Secretary and DOJ would know ex ante that they would not be able to treat their reimbursement or median-seat guidelines as legally binding because they had not submitted them to notice and comment. But it is not clear that this would make any difference in the agency's conduct as compared with the actual *Guernsey* and *Cinemark* cases. In neither case did the agency or the reviewing court rely on a nonlegislative rule in any legally binding sense. Rather, the courts in both cases held that the agency had advanced a reasonable interpretation of the underlying statutory and regulatory framework—and both courts emphasized that the agency could have done so for the first time during the enforcement process without publishing any sort of rule in advance. The *Cinemark* court even gestured in the direction of the short cut, concluding its discussion by noting that "if the [enforcement] action were not warranted, then enforcement should be denied on that ground alone, and any APA notice-and-comment argument would be surplusage."[205]

The trade-off is therefore of doubtful efficacy, since it asks agencies, as the price of forgoing notice and comment, to surrender something—the ability to "rely" on a nonlegislative rule at the enforcement stage—that they rarely needed in the first place. Granted, the *Chenery II* principle has some limits: in a smattering of cases, courts have rejected an agency's use of adjudication as an abuse of discretion when the agency applied its new policy retroactively to the detriment of parties that had relied on a longstanding contrary policy.[206] But for the most part, unless the short cut were combined with an overruling of *Chenery II* (something that short cut proponents do not appear to call for[207]) we could expect agencies under a short cut regime to dispense with notice and comment at least as often as they do now, confident that they could give effect to their newly promulgated interpretations during the ordinary course of

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203. *Id.* at 580 n.8.

204. *Id.* at 578-79.

205. *Id.* at 580-81.

206. For a discussion of these cases, see William D. Araiza, *Agency Adjudication, the Importance of Facts, and the Limitations of Labels*, 57 WASH. & LEE L. REV. 351, 365-76 (2000).

207. Indeed, John Manning relies on an analogy to *Chenery II* as one of the principal rationales *in favor* of the short cut. *See* Manning, *supra* note 66, at 901-14.

enforcement.[208] Meanwhile, proceeding by nonlegislative rule will often be more attractive to agencies than proceeding by adjudication alone, if only because the agency is spared the expense associated with investigation and development of a factual record. Whether increased use of nonlegislative rules is normatively attractive or not is beside the present point. The point, rather, is that the short cut would not appreciably alter agencies' incentives, contrary to the trade-off argument advanced by its proponents.[209]

The third objection to the trade-off is the most fundamental. It asserts that the public scrutiny that comes with notice and comment and the judicial scrutiny that comes with post-enforcement review are fundamentally dissimilar. Proponents of the short cut rely on a simple trade-off between these mechanisms, but in fact they serve distinct functions and promote distinct values. Accordingly, agencies that eschewed notice and comment under a short cut regime would not simply "pay later" in the form of enhanced judicial review—or, rather, they would pay in a very different currency, and the distinct values of notice and comment would be lost in the transaction.

Those distinct values have already been mentioned: the mechanism of notice and comment was designed to ensure an opportunity for interested members of the public to participate in the process of agency policymaking by

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208. *See, e.g.*, West Virginia v. Thompson, 475 F.3d 204, 209-10 (4th Cir. 2007) (relying on *Chenery II* in rejecting the argument that the Secretary of Health and Human Services could establish criteria defining the scope of undue hardship waivers only through notice-and-comment rulemaking).

209. John Manning and Peter Strauss have suggested versions of the short cut under which nonlegislative rules would be given precedential (or quasi-precedential) effect as opposed to no legal effect whatsoever. *See* Manning, *supra* note 66, at 934 (arguing for a "reasoned decisionmaking framework" under which "nonlegislative rules would . . . merit something resembling the level of obligation of an adjudicative precedent"); Strauss, *supra* note 162, at 843-49 (proposing a similar framework for what Strauss calls "publication rules," *see id.* at 804); Strauss, *supra* note 70, at 1467-68. To a large extent, such an approach would simply formalize the rationale employed by the *Guernsey* and *Cinemark* courts: interpretive rules would be upheld to the extent that they represented a reasonable outcome that could have been reached through adjudication. Manning's and Strauss's proposals, however, would work a change in current law in one respect: agencies would have to justify adequately any *departure* from a nonlegislative rule (even a general statement of policy), just as they must now justify any departure from an adjudicative precedent. This burden of adequate justification is hard to quantify, *compare* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1810-12 (2009), *with id.* at 1830-32 (Breyer, J., dissenting), but does seem greater than the burden that agencies must currently carry in order to depart from a nonlegislative rule. This version of the short cut, while superior to the "pure" version, does little to respond to the interests of regulatory beneficiaries, *see* Mendelson, *supra* note 41, at 445-47, or to the asymmetry between pre-promulgation notice and comment and post-enforcement judicial review, *see infra* text accompanying notes 210-221.

making comments, raising objections, and suggesting alternatives to proposed rules.[210] While post-enforcement judicial review can mimic these features, it cannot fully recreate them because it occurs in the factual context of a particular enforcement action, before generalist judges, and at the behest of the regulated entity against whom that action has been taken.[211] Judge Williams may be correct that "the threat of judicial review provides a spur to the agency to pay attention to facts and arguments submitted in derogation of any rule not supported by notice and comment, even as late as the enforcement stage . . . ."[212] But even with liberal intervention standards, the "facts and arguments submitted" at the post-enforcement stage are likely to exclude some that would have been aired during the process of notice and comment.

Some observers contend that notice and comment does not really serve the function of ensuring public participation in rulemaking. These observers note that nowadays most rules have in effect been finalized long before the agency issues its notice of proposed rulemaking.[213] As former EPA general counsel Elliott memorably put it:

> No administrator in Washington turns to full-scale notice-and-comment rulemaking when she is genuinely interested in obtaining input from interested parties. Notice-and-comment rulemaking is to public participation as Japanese Kabuki theater is to human passions—a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues.[214]

For Elliott, the only function that notice-and-comment rulemaking truly serves is that of compiling a record for judicial review.[215]

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210. *See, e.g.*, Trans-Pac. Freight Conference of Japan/Korea v. Fed. Mar. Comm'n, 650 F.2d 1235, 1245 (D.C. Cir. 1980) ("[Notice-and-comment rulemaking] allows all those who may be affected by a rule an opportunity to participate in the deliberative process, while adjudicatory proceedings normally afford no such protection to nonparties."); Asimow, *supra* note 52, at 402 ("The APA notice and comment procedure infuses the rulemaking process with significant elements of openness, accountability, and legitimacy.").

211. *Cf.* Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883 (2006) (suggesting that the requirement of a concrete case distorts the development of the common law).

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

213. *See, e.g.*, Elliott, *supra* note 6, at 1495 ("[R]eal public participation—the kind of back and forth dialogue in which minds (and rules) are really changed—primarily takes place in various fora well in advance of a notice of proposed rulemaking appearing in the *Federal Register*.").

214. *Id.* at 1492.

215. *Id.* at 1492-94.

Even on this skeptical view, however, there is still value in allowing courts to insist on public input before rules are promulgated. At the very least, robust public participation in notice and comment enhances the later process of judicial review by bringing to light technical issues that generalist judges might not otherwise spot, thereby enabling courts to engage in meaningful scrutiny of the resulting rules.[216] This scrutiny, often categorized by courts under the broad umbrella of "hard look" review, demands that agencies offer thorough justifications for the rules that they promulgate, including responses to any meaningful objections or alternatives aired during the comment period.[217] There is a vigorous and longstanding debate over the value of hard look review, and in particular over whether it ought to take a "substantive" form (under which the reviewing court takes a hard look at the agency's reasoning) or a "procedural" form (under which the court aims to ensure that the *agency* has taken a hard look at competing proposals and considerations).[218] That debate need not be resolved here. It is sufficient to note that the Supreme Court has given its blessing to hard look review, at least of the procedural type,[219] and that neither type would be fully practicable without the public input elicited by notice-and-comment procedures.[220] A court's determination of whether an agency "entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency"[221] is ineluctably shaped by the facts and arguments that were offered for the agency to consider at the time it crafted its policy.

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216. *Cf.* Pierce, *supra* note 31, at 84 ("Because courts lack the voluminous record available as the basis for reviewing a legislative rule, it is difficult for them to detect arguable flaws in interpretative rules or in policy statements.").

217. *See, e.g.*, Natural Res. Def. Council, Inc. v. EPA, 824 F.2d 1258, 1284-86 (1st Cir. 1987); Conn. Light & Power Co. v. Nuclear Regulatory Comm'n, 673 F.2d 525, 530-31 (D.C. Cir. 1982); United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252-53 (2d Cir. 1977).

218. For critical commentary on hard look review, see the sources collected in Seidenfeld, *supra* note 181, at 483 n.1. For the *locus classicus* of substantive hard look review, see *Ethyl Corp. v. EPA*, 541 F.2d 1, 68-69 (D.C. Cir. 1976) (Leventhal, J., concurring). For the *locus classicus* of procedural hard look review, see *id.* at 66-68 (Bazelon, J., concurring).

219. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 46-51 (1983); Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). A narrow majority in the *State Farm* case appeared to endorse substantive hard look review as well. *See State Farm*, 463 U.S. at 51-57.

220. *Cf.* Asimow, *supra* note 52, at 403 ("[B]y generating a record of public comment and agency response, the notice and comment system facilitates pre-enforcement hard-look judicial review, an important check on factually unsupported or arbitrary regulation.").

221. *State Farm*, 463 U.S. at 43.

The argument here is not that pre-enforcement review is superior to post-enforcement review; that debate is unlikely ever to be definitively resolved.[222] The argument is, rather, that the facts and arguments aired during notice and comment, no matter when they are ultimately dealt with by a court, may differ in kind from those aired during post-enforcement judicial review of a nonlegislative rule. This is particularly true with respect to facts and arguments raised by regulatory beneficiaries, who may – and often do – submit their views to agencies during comment periods, but who are generally unable to obtain judicial review of permissive or threshold-setting nonlegislative rules. Even regulated entities may be less able or willing to make persuasive objections to a nonlegislative rule once they have invested in compliance and the agency has invested in enforcement.[223]

Proponents of the short cut might respond that post-enforcement judicial review was never meant to be a perfect substitute for pre-promulgation public input – that the trade-off is not a literal transaction but a rough equivalency designed to show that agencies' ex ante incentives under a short cut regime would not tip too far in the direction of eschewing notice and comment. What short cut proponents have not shown, however, is that their favored regime would protect the values served by notice and comment, especially where technical complexity or the presence of highly diffuse regulatory beneficiaries make post-enforcement judicial review a poor substitute.

B. Mead *Does Not Rescue the Short Cut*

As we have seen, the case for the short cut is not as strong as its supporters claim. Recall, however, that those supporters have one additional argument up their sleeves – the idea that the Supreme Court's decision in *United States v. Mead Corp.*[224] decisively strengthens their case.[225] This additional argument fails for three reasons.

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222. For a (concededly inconclusive) attempt to define the circumstances under which post-enforcement review is superior, see 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).

223. *See id.* at 107-08.

224. 533 U.S. 218 (2001).

225. *See* Gersen, *supra* note 10, at 1720-21; Manning, *supra* note 66, at 940 ("By denying *Chevron* deference to nonlegislative rules, the Court [in *Mead*] makes them nonbinding in practice. Such a default position, moreover, meaningfully distinguishes nonlegislative from legislative rules without the confusing form of inquiry that direct judicial review of that distinction has thus far entailed."). *But see id.* at 943 ("*Mead*'s net effect on agency deliberation may ultimately be quite small.").

First, *Mead*'s presumption that nonlegislative rules are ineligible for *Chevron* deference is just that—only a presumption. In *Mead* itself, the Court conceded that it had accorded *Chevron* deference to some nonlegislative rules in the past[226] and suggested that it might do so again.[227] The 2002 case of *Barnhart v. Walton* bore out this suggestion.[228] In *Barnhart*, the Court confronted a provision of the Social Security Act that defined a disability as an "inability to engage in any substantial gainful activity by reason of any . . . impairment . . . which has lasted or can be expected to last for a continuous period of not less than 12 months."[229] Without notice and comment, the Social Security Administration (SSA) issued an interpretation of this statute (and of its own intervening regulations) stating that a claimant was not disabled if "within 12 months after the onset of an impairment . . . the impairment no longer prevents substantial gainful activity."[230] In other words, according to the SSA's interpretation, a claim for benefits would be denied if the claimant's inability to work lasted less than a year, even if the underlying impairment lasted longer than a year.

In upholding the SSA's denial of benefits in *Barnhart*, the Court went out of its way to reject the claimant's argument that the agency's interpretation was not entitled to deference because it had initially been issued without notice and comment. *Mead*, the Court emphasized, did not hold that nonlegislative rules were automatically excluded from *Chevron* deference.[231] "In this case," the Court concluded,

> the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.[232]

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226. *Mead*, 533 U.S. at 231 ("[W]e have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.") (citing NationsBank of N.C. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256-257, 263 (1995)).

227. *See, e.g.*, *Mead*, 533 U.S. at 231 (stating that the fact that the ruling at bar "was not a product of such formal process does not alone . . . bar the application of *Chevron*").

228. 535 U.S. 212 (2002).

229. 42 U.S.C. § 423(d)(1)(A) (2006).

230. 65 Fed. Reg. 42,774 (2000).

231. *Barnhart*, 535 U.S. at 221-22.

232. *Id.* at 222.

In essence, the Court conflated the newer *Chevron* standard with the older *Skidmore* standard,[233] using the factors from the latter to determine the applicability of the former. Not surprisingly, this has led to confusion in the lower federal courts.[234] Regardless of the confusion created by *Barnhart*, however, one thing is clear: nonlegislative rules are not automatically disqualified from receiving *Chevron* deference.[235]

Second, even if the Court were to unravel the *Barnhart* tangle and hold clearly that legislative rules are entitled to *Chevron* deference while nonlegislative rules are reviewed under *Skidmore*, it is not at all clear that this distinction between levels of scrutiny would substantially affect agency incentives in practice.[236] That is because *Skidmore* review can be quite deferential, especially in technical contexts where courts are likely to view agencies as having a comparative advantage in expertise. A recent study demonstrated that agencies prevailed in more than sixty percent of cases in which the *Skidmore* standard was applied by the federal courts of appeals over a five-year period.[237] To be sure, *Skidmore* review might prove less favorable to

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233. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

234. For an account of this confusion, see Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005). *Compare* Krzalic v. Republic Title Co., 314 F.3d 875, 879 (7th Cir. 2002) (noting that *Barnhart* "suggests a merger between *Chevron* deference and *Skidmore*'s"), *with id.* at 882 (Easterbrook, J., concurring) ("I do not perceive [in *Barnhart*] any 'merger' between *Chevron* and *Skidmore*, which *Mead* took such pains to distinguish." (citation omitted)).

235. *See, e.g.*, Gonzales v. Oregon, 546 U.S. 243, 258-69 (2006) (entertaining at length the possibility that an interpretive rule might be eligible for *Chevron* deference); Edelman v. Lynchburg Coll., 535 U.S. 106, 114 (2002) (stating that "deference under *Chevron* . . . does not necessarily require an agency's exercise of express notice-and-comment rulemaking power"); Kruse v. Wells Fargo Home Mortg., Inc., 383 F.3d 49, 59-61 (2d Cir. 2004) (applying *Chevron* deference to a general statement of policy issued without notice and comment); *cf.* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1004 (2005) (Breyer, J., concurring) (reading *Mead* as holding that "the existence of a formal rulemaking proceeding is neither a necessary nor a sufficient condition for according *Chevron* deference to an agency's interpretation of a statute").

236. For an early post-*Mead* expression of skepticism on this score, see Ronald M. Levin, Mead *and the Prospective Exercise of Discretion*, 54 ADMIN. L. REV. 771, 796 (2002) (doubting that the distinction between *Chevron* and *Skidmore* "is so powerful that it is likely to exert a strong influence on agency behavior," and noting that "the difference between the two standards of review is so elusive that most people can barely understand it").

237. Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1259-60, 1275 (2007); *see also* Hickman, *supra* note 132, at 1200 ("[E]ven under the purportedly less deferential *Skidmore* review standard, judicial review of interpretations of the [Internal Revenue Code] advanced in connection with refund claim denials and deficiency notices may be quite deferential.").

nonlegislative rules if courts were to emphasize the aspect of that standard that turns on "the thoroughness evident in its consideration."[238] Still, in light of the overall agency success rate in *Skidmore*-deference cases, it seems less likely that an agency considering how to announce a policy or interpretation would voluntarily embark on the expensive process of notice and comment for fear that its announcement would otherwise receive "only" *Skidmore* as opposed to *Chevron* deference.[239] Moreover, to echo the discussion above,[240] the marginal benefits of *Skidmore* from the standpoint of regulatory oversight seem lowest in precisely those complex technical settings in which notice and comment would best serve its core function of facilitating hard look review.

Third, even if *Mead* were consistently interpreted to mean that agency *statutory* interpretations embodied in nonlegislative rules receive less deference than those embodied in legislative rules, it would do nothing to disturb the extraordinary deference accorded to agencies' interpretations *of their own rules.* This deference—often called *Seminole Rock* deference, after a case in which the Court held that an agency's interpretation of its own regulation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation"[241]—is at least as powerful as *Chevron* deference.[242] Thus, to take just two examples, the Supreme Court's decision in *Barnhart v. Walton* to uphold SSA's denial of benefits was based to a large extent on the principle that "[c]ourts grant an agency's interpretation of its own regulations considerable legal leeway,"[243] and the Sixth Circuit in *Cinemark* emphasized that "[w]hen an

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238. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

239. *See* Hickman & Krueger, *supra* note 237, at 1276-78 (noting that comparative analysis of government success rates under *Skidmore* and *Chevron* is difficult to perform, for reasons that include selection bias, but concluding that "*Skidmore* is substantially more agency-friendly than other scholars conducting post-*Mead* analysis have supposed"); Levin, *supra* note 236, at 797 n.113 (reporting anecdotally that a government attorney could remember only one instance in eleven years of agency service in which he and his colleagues even discussed eventual standards of judicial review in determining what procedures to use for rulemaking).

240. See *supra* text accompanying notes 213-221.

241. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945). This form of deference is sometimes called *Auer* deference, after the case in which the Court reaffirmed *Seminole Rock*. *See* Auer v. Robbins, 519 U.S. 452, 461 (1997).

242. For comparative discussion of *Chevron* and *Seminole Rock*, see, for example, John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 627-31 (1996); and Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 899-900 (2001).

243. Barnhart v. Walton, 535 U.S. 212, 217 (2002) (citing *Auer*, 519 U.S. at 461); *see also* Udall v. Tallman, 380 U.S. 1, 16-17 (1965).

agency is interpreting its own regulations, even greater deference is due to the agency's interpretation."[244]

Crucially, this greater deference applies even when the agency interpretation in question is embodied in a nonlegislative rule.[245] Indeed, the Supreme Court reaffirmed the vitality of *Seminole Rock* deference in a case in which the agency's interpretation of its own regulations was embodied in nothing more formal than an amicus curiae brief.[246] Because much, if not most, agency policymaking turns on interpretations of existing regulations in addition to (or rather than) interpretations of statutes,[247] *Mead* does less to encourage the use of notice-and-comment procedures than may at first appear, as Justice Scalia recognized in his *Mead* dissent.[248]

The idea that *Mead* has not made a decisive difference with respect to the viability of the short cut should come as no surprise. After all, both *Mead*'s holding and its effect on judicial review of administrative action are notoriously unclear.[249] One comprehensive, recent study concludes that the Supreme Court applies *Chevron* in only a tiny minority of cases involving agency statutory interpretations – and usually does not apply *Chevron* even when the Court's

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244. United States v. Cinemark U.S.A., Inc., 348 F.3d 569, 578 (6th Cir. 2003).

245. *See, e.g.*, United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 220 (2001) (upholding an informal revenue ruling as an agency's reasonable interpretation of its own regulations); Miller v. Cal. Speedway Corp., 536 F.3d 1020, 1028 (9th Cir. 2008); Smith v. Nicholson, 451 F.3d 1344, 1349-50 (Fed. Cir. 2006).

246. *See Auer*, 519 U.S. at 461; *see also* Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 171 (2007) (granting *Seminole Rock* deference to an agency's interpretation of its own regulations set forth in an internal memorandum to agency staff that was generated in response to litigation).

247. *See* Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020 (D.C. Cir. 2000) (noting a frequent pattern by which agencies issue vaguely worded legislative rules that they subsequently interpret through nonlegislative rules); Manning, *supra* note 242, at 614-15 (noting that "regulations frequently play a more direct role than statutes in defining the public's legal rights and obligations").

248. *See* United States v. Mead Corp., 533 U.S. 218, 246 (2001) (Scalia, J., dissenting) ("Agencies will now have high incentive to rush out barebones, ambiguous rules construing statutory ambiguities, which they can then in turn further clarify through informal rulings entitled to judicial respect.").

249. *See generally* Bressman, *supra* note 234 (demonstrating that the Supreme Court's decisions in *Mead* and *Barnhart* have sowed confusion in the courts of appeals); Adrian Vermeule, *Introduction:* Mead *in the Trenches*, 71 GEO. WASH. L. REV. 347 (2003) (arguing that *Mead* has led to flawed and incoherent D.C. Circuit decisions).

own holdings render it applicable.[250] Instead, the study concludes, *Chevron* coexists uneasily in the Court's case law alongside *Skidmore*, *Seminole Rock*, and several other deference regimes, and in most cases the Court does not invoke any particular deference regime at all.[251] These findings tend to substantiate the oft-echoed lament of two early commentators that the Supreme Court's deference doctrines "have no more substance at the core than a seedless grape."[252] More empirical work remains to be done, in particular to ascertain whether deference regimes have a more determinate effect or a more predictable scope in the lower federal courts, where most judicial review of federal agency action takes place.[253] What we do know, however, casts serious doubt on the suggestion that *Mead* tips the scales decisively in favor of the short cut.

CONCLUSION

By now, the perils of the short cut should be clear enough. Because of the shortcomings of the trade-off argument, agencies under a short cut regime 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. At the same time, however, proponents of the short cut are right to warn against any test that would call for notice and comment every time (or even most of the time) agencies make what pass for rules under the APA. Such an approach would present agencies with a Hobson's choice between expensive full-blown rulemaking and pure ad hoc adjudication.

Once these options are eliminated, what is left is a middle ground that more or less describes current doctrine, with all of its smog and muddle. Agencies may issue nonlegislative rules so long as they do not intend their rules to have legal effect, or so long as they do not bind themselves or others, or so long as they are merely interpreting existing legal obligations rather than creating new ones.

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250. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1090 (2008).

251. *Id.*

252. Ernest Gellhorn & Glen O. Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771, 780 (1975).

253. Eskridge & Baer, *supra* note 250, at 1096-97.

It is not the object of this Article to defend every aspect of current doctrine. No doubt courts could eliminate some of its ambiguities and indeterminacies by turning a few more square corners. And few observers would dispute that current doctrine sometimes errs in the direction of overincentivizing procedural formality by classifying rules as legislative that were never intended to be binding. Yet the lack of a cut-and-dried test for distinguishing between legislative and nonlegislative rules has its advantages, not only for the courts but also for the regulated public. A doctrine with some play in the joints allows courts to tailor the requirement of notice and comment to circumstances in which factors such as technical complexity or significant effects on regulatory beneficiaries make public input more valuable—in a case like *Appalachian Power*, for example[254]—while allowing agencies to dispense with notice and comment when such factors are absent—for example, in a case like *Warshauer*.[255]

A rough analogy can be made to the distinction between facial and as-applied challenges in constitutional adjudication.[256] A court engaged in the traditional task of ascertaining whether a challenged rule is legislative or nonlegislative—determining the rule's procedural validity in light of its text, structure, and purpose—is, in essence, performing facial review.[257] A court that adopted the short cut—waiting until a rule was enforced and then determining its legal effect in light of its procedural provenance—would be performing as-applied review.[258] In the constitutional context, the Supreme Court has repeatedly declared a strong preference for as-applied adjudication, but in practice it has often engaged in facial review, whether overtly or covertly.[259] That is because the as-applied model in its strongest form has proven unduly rigid, leading the Court to depart from that model when circumstances (such

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254. Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000). For discussion, see *supra* text accompanying notes 97-105.

255. Warshauer v. Solis, 577 F.3d 1330 (11th Cir. 2009). For discussion, see *supra* text accompanying notes 106-114.

256. I have written at length about this distinction elsewhere. *See* David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 IOWA L. REV. 41 (2006); David L. Franklin, *Looking Through Both Ends of the Telescope: Facial Challenges and the Roberts Court*, 36 HASTINGS CONST. L.Q. 689 (2009).

257. The analogy, as stated in the text, is only a rough one: for instance, current doctrine looks beyond the face of the rule to patterns of enforcement in determining whether a rule is a general statement of policy. *See supra* note 131 and accompanying text.

258. *Cf.* Manning, *supra* note 66, at 933 (labeling his version of the short cut "an as-applied reasoned decisionmaking framework").

259. *See generally* sources cited *supra* note 256 (discussing the distinction between facial and as-applied challenges).

as a perception of improper legislative purpose) seemed to require it.[260] In the administrative law context, as this Article has shown, the short cut is likewise too rigid: it would deprive courts of the flexibility to insist, as a facial matter, on notice-and-comment rulemaking when circumstances seem to require it. If the price of that flexibility is a little doctrinal smog, it is a price that courts, agencies, and litigants ought to be willing to pay.

260. *Id.*

