INTERPRETIVE RULES: CAN THE AMOUNT OF DEFERENCE ACCORDED THEM OFFER INSIGHT INTO THE PROCEDURAL INQUIRY?

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INTRODUCTION 1303
I. INFORMAL RULEMAKING AND EXEMPTIONS 1305
A. *Informal Rulemaking Procedures* 1305
B. *Exemptions from Rulemaking Procedures* 1307
II. PROCEDURAL REVIEW: DETERMINING WHETHER A NONLEGISLATIVE RULE SHOULD HAVE BEEN PROMULGATED AS A LEGISLATIVE RULE 1310
A. *The "Legal Effects" Test* 1311
B. *The "Substantial Impact" Test* 1312
C. *The "Impact on Agencies" Test* 1313
D. *The* American Mining *Test and Subsequent Developments* 1314
E. *Some Scholarly Proposals* 1316
III. CONSIDERATIONS OF SUBSTANTIVE REVIEW 1318
A. *Deference Accorded to Nonlegislative Rules on Substantive Review* 1319
1. Overview of *Chevron* Doctrine 1320
2. Effects of *Christensen* and *Mead* and the Added Confusion of *Barnhart* 1322
IV. WHAT IF COURTS ACCEPTED AGENCY CHARACTERIZATIONS OF RULES AS INTERPRETIVE? 1325
CONCLUSION 1329

INTRODUCTION

Administrative agencies can make pronouncements in various ways. These pronouncements can have the force of law if the promulgating agency uses the machinery prescribed by Congress in the Administrative Procedure Act ("APA"). Alternatively, agencies may issue non-binding interpretations of statutes or other guidance without following the APA requirements. Courts have struggled to determine whether an agency rule promulgated without the APA's machinery should have been promulgated according to the congressionally mandated procedures for making law. In addition, there is some ambiguity regarding the level of deference that courts should give to agency pronouncements that do not carry the force of law.

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Without a simple way to determine the validity of agency rules promulgated without the procedural machinery required for binding pronouncements of agency policy, affected parties may waste resources trying to discern the precise effect of the rule and whether the agency has overstepped its bounds. Furthermore, confusion over the appropriate level of deference for a particular agency rule can translate into uncertainty regarding the extent to which that rule, while not technically binding, can have binding effect; the harder it is for a regulated entity to challenge a rule in court, the more compliant that entity will be.

For instance, consider a scenario in which the Securities and Exchange Commission ("SEC") releases, without notice or comment, an interpretation of one of its regulations regarding reporting requirements for public companies and points to the release without further inquiry each time the issue arises. If an affected company whose comments played no role in the SEC's rulemaking process believes it is entitled under the regulation to omit certain information from its periodic reports, but the interpretive release presents an opposing view, the company faces significant obstacles in determining the proper course of action. Because of the uncertainty regarding the amount of deference a court will give to the agency in an enforcement action if the company omits the information, the company has little way of knowing the extent to which it is bound by the agency interpretation. And because the procedural validity of the rule is ambiguous, the company will be left guessing about whether the agency may insist on strict compliance with the rule. In the end, the company would likely comply with the agency interpretation because of the uncertainty and risks of noncompliance, allowing the agency to bind its action without following the procedures prescribed by the APA for promulgating rules that carry the force of law.

This Note presents the issues of procedural and substantive review of these sorts of agency pronouncements and asks whether developments in substantive review in recent years might allow courts to simplify the analysis of procedural review. In Part I.A., I discuss rulemaking procedures generally. I describe the APA framework for notice-and-comment rulemakings and the developments brought about by the courts and Congress, which make rulemakings such elaborate and costly endeavors. In Part I.B., I introduce the APA's several exemptions from rulemaking procedures, focusing on how agencies use interpretive rules and policy statements.

In Part II, I attempt to shed light on how courts assess the procedural validity of these rules. I frame this inquiry in terms of determining whether a rule is a procedurally valid nonlegislative rule or a nonlegislative rule that should have been promulgated legislatively. Framing the distinction in this way avoids the multiple and potentially confusing labels that various courts have used in striking down nonlegislative rules on procedural grounds. I discuss several ways that courts have tried to determine the procedural validity of nonlegislative rules, as well as some scholarly proposals on how to reform this "fuzzy" subject.

In Part III, I begin with a brief overview of the substantive review of agency legal conclusions and the *Chevron* doctrine. I then discuss how *Christensen* and *Mead* affect the level of deference that courts should accord nonlegislative rules and how the Court's subsequent decision in *Barnhart* may have blurred whatever clarity *Christensen* and *Mead* seemed to offer on the subject.

Finally, in Part IV, I ask whether, in light of developments in the area of substantive review, courts could simplify the inquiry into the procedural validity of interpretive rules. I consider the possibility that courts could accept the agency's characterization of rules as interpretive as one approach to simplifying the analysis.

I. INFORMAL RULEMAKING AND EXEMPTIONS

A. *Informal Rulemaking Procedures*

When agencies promulgate rules through informal rulemakings,[1] they are subject to the notice-and-comment procedures set forth in the APA.[2] Although the APA itself provides for minimal procedures in informal rulemakings, a hybrid rulemaking doctrine has developed through case law and statutes that demands sophisticated procedures from agencies engaged in these proceedings. This hybrid rulemaking doctrine gives agencies more procedural hoops[3] through which to jump in order to promulgate a procedurally valid legislative rule. In the 1960s, courts, especially the D.C. Circuit, and Congress began to develop this approach, primarily in response to waning public confidence in agencies, in order to check agency abuses.[4]

Having these procedures in place "raises the stakes" for agencies[5] and increases the costs of compliance. The procedural stages for a notice-and-comment informal rulemaking prescribed by the APA are (1) the notice of proposed rulemaking; (2) the conduct of the rulemaking itself, which includes the comment period; and (3) the statement of basis and purpose. Because *Vermont Yankee*[6] had the effect of halting all procedural advances regarding the conduct of the rulemaking procedure itself,[7] courts have carried out the

[1] Because formal rulemakings are scarce in the modern administrative state, *see* GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 219-20 (4th ed. 2007), I refer only to informal rulemakings here.

[2] Administrative Procedure Act, 5 U.S.C. § 553 (2006) (providing for minimal procedural requirements including a general notice of proposed rulemaking, opportunity for interested parties to participate, and a concise general statement of basis and purpose).

[3] "Procedural hoops" is a term borrowed from Professor Lawson's lectures.

[4] LAWSON, *supra* note 1, at 274.

[5] *See id.* at 287.

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

[7] *See id.* at 558 (admonishing lower courts for expanding informal rulemaking procedures beyond those required by the language of the APA).

hybrid rulemaking agenda by enhancing the procedures required during the notice and the statement of basis and purpose stages.[8]

By the strict terms of the APA, it would be difficult for a party to challenge a notice of proposed rulemaking on procedural inadequacy grounds. All that is required by § 553 is "a statement of the time, place, and nature of public rule making proceedings," "reference to the legal authority under which the rule is proposed," and "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[9] Challenging the adequacy of a statement of basis and purpose under the strict language of the APA would be similarly ineffective, as the text requires only that "the agency . . . incorporate in the rules adopted a concise general statement of their basis and purpose."[10] Compounding the difficulty for parties bringing actions against agencies for inadequacy of procedure is the fact that informal rulemakings, by their nature, are not made "on the record." If the organic statute required a rulemaking "on the record," an agency would have to provide a formal rulemaking with all of the procedural requirements imposed by §§ 556 and 557 of the APA.[11] Absent the obligation to make decisions based on a record, agencies have significant latitude in their ability to issue rulemakings without providing "an elaborate analysis of the rules or of the considerations upon which the rules were issued."[12]

Perceiving the minimal requirements of the APA as inadequate, courts have prescribed more elaborate procedures for the notice of proposed rulemaking and the statement of basis and purpose. Modern agencies must provide enough detail and paint a sufficiently accurate picture of the proposed rule so that affected parties can offer meaningful and useful comments.[13] Failure to do so is "serious procedural error."[14] This is a much heavier procedural burden than seemingly required by a strict reading of the text of the APA, which requires merely a description of the subject matter of the rulemaking. In its discussion of the statement of basis and purpose, the court in *Connecticut Light & Power*, while making a minor concession that the statement need not be "comprehensive," wrote that the statement "must indicate sufficiently the agency's reasons for the rules selected, so that the reviewing court is not faced with the task of 'rummaging' through the record to elicit a rationale on its

[8] *See* LAWSON, *supra* note 1, at 273.

[9] 5 U.S.C. § 553(b) (2006).

[10] *Id.* § 553(c).

[11] *See id.*

[12] U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 32 (1947) [hereinafter ATTORNEY GENERAL'S MANUAL].

[13] *See, e.g.*, Conn. Light & Power Co. v. Nuclear Regulatory Comm'n, 673 F.2d 525, 530 (D.C. Cir. 1982) ("In order to allow for useful criticism, it is especially important for the agency to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules.").

[14] *Id.* at 530-31.

own."[15] The court's reference to the record as a means of facilitating judicial oversight is at odds with the notion of facilitating agency expertise that was predominant when Congress drafted the APA.[16] The statement of basis and purpose, acting as the primary focus of judicial review of agency rulemakings, is thus "a monstrously long and complex document" because a court is far more likely to overrule an agency for not providing enough details than for providing too many.[17] It is neither concise nor general. As a consequence, rulemakings are arduous processes that frequently require tens of thousands of man-hours over the course of years. This can have the effect of decreasing compliance and providing disincentives to amend existing obsolete rules.[18]

B. *Exemptions from Rulemaking Procedures*

There are some forms of rulemakings, however, which agencies may use to avoid hybrid rulemaking procedures. Agencies are happy to use such exemptions because they lower the costs of compliance. Affected parties, on the other hand, are apt to challenge exempted rulemakings in order to invalidate the rules or participate in the rulemaking process.[19]

The first set of exemptions applies to rules concerning particular subject matter. Section 553, by its terms, does not apply to "a military or foreign affairs function of the United States" or to "a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts."[20] Second, the APA provides a set of character exemptions, excluding interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, and rules promulgated without procedure for good cause.[21] The inquiry of this Note concerns interpretive rules[22] and general statements of policy.

Although the APA provides no definition of interpretive rules or policy statements, the 1947 *Attorney General's Manual on the Administrative Procedure Act* defined interpretive rules as "rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers,"[23] and policy statements as "statements issued by an

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[15] *Id.* at 534-35.

[16] *See* JAMES LANDIS, THE ADMINISTRATIVE PROCESS 155 (1938) ("The rise of the administrative process represented the hope that policies to shape such fields could most adequately be developed by men bred to the facts.").

[17] LAWSON, *supra* note 1, at 280.

[18] *See* Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547, 551 (2000).

[19] *See* LAWSON, *supra* note 1, at 287.

[20] Administrative Procedure Act, 5 U.S.C. § 553(a) (2006).

[21] *Id.*

[22] Although the APA uses the term "interpretative" rules, they are also commonly referred to as "interpretive" rules.

[23] ATTORNEY GENERAL'S MANUAL, *supra* note 12, at 30 n.3.

agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power."[24] In *Syncor International Corp. v. Shalala*,[25] the court framed interpretive rules as those rules which "reflect[] an agency's construction of a statute that has been entrusted to the agency to administer"[26] and policy statements as pronouncements by which "an agency simply lets the public know its current enforcement or adjudicatory approach."[27] Interpretive rules and policy statements are the main categories of nonlegislative rules, as distinguished from legislative rules.[28]

Legislative rules are rules that agencies "promulgate[] pursuant to statutory law-making authority and in accordance with the statutory procedures for making rules that carry the force of law."[29] Nonlegislative rules, on the other hand, are rules that agencies promulgate without such authority. If the agency promulgates a rule outside of the legislative-rule framework and the rule interprets statutory or regulatory language, the rule is interpretive.[30] If the agency makes a pronouncement outside of that framework and the pronouncement does not interpret statutory or regulatory language, then it is a policy statement.[31]

Nonlegislative rules can come in many forms, including agency manuals, guidelines, and memoranda.[32] Such rules can range in formality from those that the agency deems important enough to publish in the Federal Register or Code of Federal Regulations ("C.F.R."), to letters addressed to individuals providing guidance upon their request, to internal agency guidance documents.[33] They serve as an important tool for agencies by "enabl[ing] [them] to give advance notice to the regulated community and regulatory beneficiaries about the agencies' interpretations and policies."[34] Thus, they can be valuable in providing information to agency staff as well as the public.[35] In addition, such rules enable agencies to inform interested parties by means

[24] *Id.*

[25] 127 F.3d 90 (D.C. Cir. 1997).

[26] *Id.* at 94.

[27] *Id.*

[28] *See* Robert A. Anthony, *Interpretative Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1322 (1992) [hereinafter Anthony, *Interpretative Rules*].

[29] Robert A. Anthony, *"Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: Lifting the Smog*, 8 ADMIN. L.J. AM. U. 1, 2 (1994) [hereinafter Anthony, *Lifting the Smog*].

[30] *See* Anthony, *Interpretative Rules*, *supra* note 28, at 1324.

[31] *See id.*

[32] *See* Sekula v. FDIC, 39 F.3d 448, 457 (3d Cir. 1994).

[33] *See* William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1322-23 (2001).

[34] Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 MO. L. REV. 695, 702 (2007).

[35] *See* Anthony, *Interpretative Rules*, *supra* note 28, at 1317.

"significantly quicker and less expensive" than the notice-and-comment process.[36]

Although nonlegislative rules are, by definition, not binding on private parties, they can have the practical effect of binding.[37] Only legislative rules may legally bind parties, and to the extent that nonlegislative rules do so, regulated entities and the public are deprived of an opportunity to participate in the rulemaking process through notice and comment. The D.C. Circuit has criticized agency use of guidance documents in the form of interpretive rules and policy statements, recognizing the potential problem that "[l]aw is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations."[38] Especially with the "advent of the Internet," agencies can issue such guidance documents containing these exempt rules on their websites to ensure "widespread circulation."[39] For instance, the SEC issues "no-action letters"[40] in response to inquiries from regulated entities and posts these documents on its website for public viewing.[41] Courts have held that such no-action letters are in fact interpretive rules exempt from notice-and-comment procedures.[42] While other more formal, yet still nonlegislative, SEC releases might appear in the Federal Register and the C.F.R.,[43] no-action letters get no such treatment.

Although the SEC addresses no-action letters to particular recipients, because the letters are publicly disseminated on the SEC website, they have the effect of encouraging SEC-favored actions by other similarly situated entities and securities practitioners.[44] On one hand, such letters provide a useful source of information, allowing entities to rely on them because "the Commission appears to have never proceeded against the recipient of a no-action letter who acted in good faith on the letter's advice,"[45] and doing so without the expense to the Commission of notice-and-comment procedures. On the other hand, however, the inability to participate in rulemakings that can

[36] Johnson, *supra* note 34, at 701.

[37] *See* Anthony, *Interpretative Rules*, *supra* note 28, at 1327-28.

[38] Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020 (D.C. Cir. 2000).

[39] *See id.*

[40] The SEC also promulgates formal, though nonlegislative, "releases" that "clarify the meaning or effect of existing statutes or rules, particularly those provisions containing vague standards or that rarely are subject to judicial interpretation." Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework*, 83 CORNELL L. REV. 921, 933 n.44 (1998).

[41] *Staff No Action, Interpretive and Exemptive Letters*, U.S. SECS. & EXCH. COMM'N, http://www.sec.gov/interps/noaction.shtml (last visited Feb. 21, 2009).

[42] *See, e.g.*, N.Y.C. Emps.' Ret. Sys. v. SEC, 45 F.3d 7, 13-14 (2d Cir. 1995).

[43] *See* Nagy, *supra* note 40, at 933.

[44] *See id.* at 946-47.

[45] *Id.* at 943.

have such a "profound impact on [their] behavior"[46] deprives regulated entities of "procedures [that] promote the legitimacy of administrative policies and protect against violations of the public trust by agency officials."[47]

Given the substantial costs associated with notice-and-comment rulemaking proceedings, which incentivize agencies to invoke exemptions, and the potential for nonlegislative rules to have practical binding effect while depriving interested parties from participating in the rulemaking process, it is important to have a sensible way of distinguishing between legislative and nonlegislative rules. Confusion over the status of a rule can lead to uncertainty in regulated entities as to the "reach and legal quality of the standards the agency has imposed,"[48] that is, the extent to which the APA contemplates that the rule should have binding effect. Unfortunately, the distinction is "enshrouded in considerable smog."[49] The D.C. Circuit has also called the line between the two "fuzzy."[50] Regardless, courts and commentators have attempted to find useful ways to differentiate between them.

II. PROCEDURAL REVIEW: DETERMINING WHETHER A NONLEGISLATIVE RULE SHOULD HAVE BEEN PROMULGATED AS A LEGISLATIVE RULE

When courts have the occasion to consider whether a nonlegislative rule should have been promulgated as a legislative rule, the same sorts of arguments tend to present themselves. An affected party may make a procedural inadequacy argument, in which it would claim that the rule in question is the sort that should have been promulgated with notice-and-comment procedures.[51] The agency would counter that the rule is nonlegislative and thus exempt from APA procedures.[52] This dispute frequently occurs in the enforcement context.[53] In a different type of case, an affected party might challenge an agency action as contrary to an alleged legislative rule, in which case the agency would counter that the rule was nonlegislative and thus nonbinding on the agency.[54] This dispute also frequently occurs in the enforcement context.[55]

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[46] Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN L. REV. 343, 344-45 (2009).

[47] *Id.* at 346.

[48] Anthony, *Interpretative Rules*, *supra* note 28, at 1317.

[49] Gen. Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984).

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

[51] *See* William Funk, *When Is a "Rule" a Regulation? Marking a Clear Line Between Nonlegislative and Legislative Rules*, 54 ADMIN. L. REV. 659, 660 (2002).

[52] *See id.*

[53] *See id.*

[54] *See id.* at 661.

[55] *See id.*

A. *The "Legal Effects" Test*

Courts have employed several methods to determine whether a nonlegislative rule should have been promulgated as a legislative rule using the notice-and-comment procedures of hybrid rulemaking. The first such method is the "legal effects" test. This approach asks whether the agency has used the nonlegislative rule to create a binding norm.[56] The D.C. Circuit applied this approach in *Pacific Gas & Electric Co. v. Federal Power Commission*[57] by looking to whether the agency had limited its discretion in future adjudications when it promulgated the rule.[58] In that case, the Federal Power Commission issued a rule entitled "Statement of Policy" – without following notice-and-comment procedures – that expressed the Commission's policy to assign "curtailment priorities" based on end use rather than prior contractual obligations when determining which natural gas customers deserved priority for pipelines in the event of a shortage.[59] Many natural gas customers, especially those assigned low priorities in the policy statement, petitioned for rehearing, arguing that the policy statement "[was] in effect a substantive rule which the Commission should have promulgated after a rulemaking proceeding under the Administrative Procedure Act."[60] In ruling that no notice-and-comment proceedings were necessary, the court reasoned that "[t]he critical distinction between a substantive rule and a general statement of policy is the different practical effect that these two types of pronouncements have in subsequent administrative proceedings."[61] The policy statement in question read that in particular cases the agency would not only apply the policy to the facts but would reexamine the underlying policy itself.[62] The court found that this manifested the agency's intent to treat the rule as a non-binding policy statement, giving weight to the agency's own characterization of the rule in determining that it was not the sort of rule that the Commission needed to promulgate through notice-and-comment procedures.

[56] *See* LAWSON, *supra* note 1, at 297 ("The legal effects test is easy to administer: if the agency wants to characterize a rule as nonsubstantive, and thus exempt from notice-and-comment procedures, it cannot use the rule as binding law in subsequent adjudications.").

[57] 506 F.2d 33 (D.C. Cir. 1974).

[58] *See* Funk, *supra* note 33, at 1333 ("If the policy statement in effect decides future cases, then it is almost indistinguishable from a legislative rule, which would legally decide future cases.").

[59] *Pac. Gas & Elec.*, 506 F.2d at 36.

[60] *Id.*

[61] *Id.* at 38.

[62] *See id.* at 50 ("When applied in specific cases, opportunity will be afforded interested parties to challenge or support this policy through factual or legal presentation as may be appropriate in the circumstances presented.").

Confusingly, the D.C. Circuit in *American Mining* calls the test it enunciates a test for determining legal effect as well.[63] That test does not inquire into whether the agency has limited its discretion in this manner, and as will be evident later, *American Mining* would limit the *Pacific Gas & Electric* approach to cases dealing with alleged policy statements.[64] In addition, Professor Funk has criticized the legal effects test because it merely "restates the conclusion that only legislative rules can be 'legally binding'" and "[i]t remains unclear how to determine whether a particular rule is legally binding."[65]

B. *The "Substantial Impact" Test*

The "substantial impact" test, an approach that courts once employed, entailed invalidating rules that, despite satisfaction of the legal effects test, had a substantial impact on regulated parties.[66] If the rule had a substantial impact, then the court would hold that it required notice and comment.[67] In the wake of *Vermont Yankee*, however, which forbade courts from requiring more procedures than those set forth in the APA,[68] this approach lost favor since it "engraft[ed] additional procedures on agency action beyond those contemplated by the APA."[69]

In *Cabais v. Egger*, the D.C. Circuit reversed the district court holding that the directives in the letters in question should have been promulgated through notice and comment because they had a substantial impact on recipients of unemployment insurance.[70] The lower court opined that "[o]nly rules without a substantial impact on the operation of the statute, i.e., statements of 'clarification or explanation of an existing statute,' are exempt from APA notice and comment procedures."[71] The implication of the District Court holding seems to be that rules that interpret cease to be interpretive rules exempt from notice-and-comment procedures if they have a substantial impact on regulated parties. The D.C. Circuit, reversing, noted that the term "substantial impact" appears nowhere in the APA[72] and remarked that "[s]imply because agency action has substantial impact does not mean it is

[63] Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993).

[64] *See infra* note 106 and accompanying text.

[65] Funk, *supra* note 51, at 662.

[66] *See, e.g.*, Lewis-Mota v. Sec'y of Labor, 469 F.2d 478, 482 (2d Cir. 1972).

[67] Funk, *supra* note 33, at 1325-26.

[68] *See* Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 558 (1978).

[69] Cabais v. Egger, 690 F.2d 234, 237 (D.C. Cir. 1982).

[70] *See id.*

[71] Cabais v. Egger, 527 F. Supp. 498, 504 (D.D.C. 1981), *rev'd*, 690 F.2d 234.

[72] *Cabais*, 690 F.2d at 237 n.3.

subject to notice and comment if it is otherwise expressly exempt under the APA."[73]

Although the court in *Cabais* did not rule out the possibility of using "substantial impact on regulated parties" as a criterion for evaluating alleged policy statements, it unequivocally announced that the test is not appropriate in the context of interpretive rules.[74] After rejecting the substantial impact test, the court went on to state that substantive rules create law while interpretive rules are mere statements of what the administrative officer thinks the statute or regulation means.[75] This dichotomy, much like the "legal effects" test, is one that merely restates the definitions of "substantive rule" and "interpretive rule" and does not help to simplify the inquiry.

C. *The "Impact on Agencies" Test*

Another approach, which Professor Lawson calls the "impact on agencies" test,[76] asks not whether the rule impacts regulated parties but whether the agency treats the rule as binding when conducting its adjudications.[77] The principal difference between this approach and the one employed in *Pacific Gas & Electric* is that this approach requires the benefit of hindsight. In *United States Telephone*, the Federal Communications Commission ("FCC") set forth a specific schedule for imposing monetary forfeitures on licensees for violations of the Communications Act.[78] The FCC claimed that the standards were mere statements of policy and thus were exempt from the notice and comment obligation.[79] Judge Silberman wrote that the distinction between policy statements and substantive rules "turns on an agency's intention to bind itself to a particular legal policy position."[80] The FCC labeled the rule a policy statement, and on twelve occasions repeated that it retained discretion to depart from the schedule in particular cases.[81]

Despite the label, the court granted the petition for review and set aside the forfeiture standards, finding "little support for the Commission's assertion that

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[73] *Id.* at 237.

[74] *See id.* ("In other words, as an *independent* basis for determining the applicability of APA procedures, the substantial impact test has no validity.").

[75] *See id.* at 238.

[76] *See* LAWSON, *supra* note 1, at 308.

[77] *See, e.g.*, U.S. Tel. Ass'n v. FCC, 28 F.3d 1232, 1235 (D.C. Cir. 1994) ("But even if we resolved the ambiguity in the Commission's favor, that would mean that the Commission exercised discretion in only one out of over 300 cases, which is little support for the Commission's assertion that it intended not to be bound by the forfeiture standards.").

[78] *Id.* at 1233.

[79] *Id.* at 1234.

[80] *Id.*

[81] *Id.*

it intended not to be bound by [them]."[82] In deciding this case, the court had the benefit of three hundred adjudications, which demonstrated the agency's reliance on the alleged nonlegislative rule as if it were a legislative rule.[83] In nearly all of those adjudications, the FCC reached the conclusion provided by the forfeiture schedule.[84] In one such adjudication, *David L. Hollingsworth*,[85] the FCC's Common Carrier Bureau refused to consider a claim that the fine schedule was inequitable as applied to the petitioner's particular case and countered that the petitioner should have raised the argument in a petition to reconsider the policy statement.[86] The *United States Telephone* court replied that "'[w]hen 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.'"[87] Refusing to hear an argument challenging the applicability of the policy statement evinces the agency's intent to make the fine schedule binding and contradicts the agency's reiteration that it retains discretion to depart from the schedule in particular cases. This test, while relatively easy to apply in a case where courts can look to past adjudications to determine whether the agency has treated the rule as binding, has little to say about whether the rule is procedurally invalid when promulgated.

D. *The* American Mining *Test and Subsequent Developments*

In *American Mining*,[88] Judge Williams attempted to clear the "smog" between legislative and nonlegislative rules and formulated a test to judge the validity of the nonlegislative rule at the moment of promulgation. In this case, the Mine Safety and Health Administration ("MSHA") promulgated Program Policy Letters – without using notice-and-comment rulemaking procedures – stating that certain X-ray readings qualify as "diagnoses" of lung disease within the meaning of the Federal Mine and Safety Act.[89] The MSHA claimed that the policy letters were subject to the interpretive rule exemption. The policy letters were "intended to coordinate and convey agency policies, guidelines, and interpretations to agency employees and interested members of the public."[90] In determining that the policy letters were interpretive, the court articulated a four-part test; if any of the four inquiries is answered in the affirmative, "we have a legislative, not an interpretive rule."[91]

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[82] *Id.* at 1235.

[83] *Id.*

[84] *Id.*

[85] 7 F.C.C.R. 6640 (1992).

[86] *Id.* at 6640-41.

[87] *U.S. Tel.*, 28 F.3d at 1235 (quoting Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974)).

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

[89] *Id.* at 1107.

[90] *Id.*

[91] *Id.* at 1112.

The first step in determining whether the alleged interpretive rule has legal effect in the *American Mining* test is asking "whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties."[92] The court answered this inquiry in the negative because "[t]he . . . regulations themselves require reporting of diagnoses of the specified diseases, so there is no legislative gap that required the PPL as a predicate to enforcement action."[93] The second step is to ask "whether the agency has published the rule in the Code of Federal Regulations."[94] Here, the MHSA had not published the rule in the C.F.R.[95] Third, a court asks "whether the agency has explicitly invoked its general legislative authority."[96] The court also answered this in the negative.[97] Finally, the court asks "whether the rule effectively amends a prior legislative rule."[98] The court considered whether the rule might be a de facto amendment of prior rules and determined that it was not, even though it supplied "crisper and more detailed" lines than the rule that the agency interpreted.[99]

In subsequent years, courts have modified the *American Mining* test. The first such modification was made by the very same Circuit Judge Williams in *Health Insurance Ass'n of America, Inc. v. Shalala*.[100] He eliminated the second prong of his test on the grounds that publication of a rule in the C.F.R is no more than "a snippet of evidence of agency intent."[101] In addition, Professor Pierce proposes adding to the test one criterion that Judge Williams mentioned in *American Mining* but did not treat since it was not at issue in the case: "whether the legislative rule the agency is claiming to interpret is too vague or open-ended to support the interpretative rule."[102] In *Paralyzed Veterans of America*,[103] which came four years after *American Mining*, the D.C. Circuit added a twist on Judge Williams's fourth step: that a rule amending a prior *interpretive* rule should be promulgated legislatively.[104]

An interesting aspect of the *American Mining* approach is that it makes a distinction between interpretive rules and policy statements when articulating

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] 23 F.3d 412 (D.C. Cir. 1994).

[101] *Id.* at 423.

[102] *See* Pierce, *supra* note 18, at 560.

[103] Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579 (D.C. Cir. 1997).

[104] *See id.* at 586.

its test.[105] According to Judge Williams, when prior courts considered whether a rule was binding on the agency in the sense that the agency had limited its discretion in future cases, policy statements, not interpretive rules, were at issue.[106] He argues that asking whether an agency has limited its discretion is useful in the context of policy statements but says little about whether the rule is interpretive; he refers to the fact that "exercise of discretion" is mentioned in the *Attorney General's Manual* definition of policy statements but omitted in the definition of interpretive rules.[107] So, while *Pacific Gas & Electric* and *American Mining* are both examples of courts determining whether nonlegislative rules have "legal effect," Judge Williams would distinguish the former case, which examined whether the agency had limited its discretion, as useful only in the context of policy statements. The test that Judge Williams articulates, on the other hand, looks for "legal effect" by employing his multi-step inquiry and is useful in the context of interpretive rules.

In *Syncor*, which came four years after *American Mining*, the D.C. Circuit wrote approvingly of the distinction it previously made between interpretive rules and policy statements.[108] The primary distinction between a "substantive rule" and a policy statement, according to *Syncor*, "turns on whether an agency intends to bind itself to a particular legal position."[109] On the other hand, in order to distinguish between "substantive rules" and interpretive rules, the court employed the test set forth in *American Mining* and held that the rule in question was not interpretive because, under the third *American Mining* factor, the rule "uses wording consistent only with the invocation of its general rulemaking authority to extend its regulatory reach."[110]

E. *Some Scholarly Proposals*

Professor Anthony sets out to "lift the smog" with a two-step inquiry. One issue that he seeks to address is the courts' widespread misuse of the relevant terminology. For example, courts frequently conclude that invalid interpretive rules are legislative rules and are thus invalid because the necessary notice-and-comment procedures did not take place.[111] A better approach "differentiates interpretive rules from rules that should have been promulgated

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

[106] *See id.*

[107] *Id.*; ATTORNEY GENERAL'S MANUAL, *supra* note 12, at 30 n.3.

[108] Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 93-94 (D.C. Cir. 1997) ("Further confusing the matter is the tendency of courts and litigants to lump interpretative rules and policy statements together in contrast to substantive rules, a tendency to which we have ourselves succumbed on occasion.").

[109] *Id.* at 94.

[110] *See id.* at 95.

[111] *See* Anthony, *Lifting the Smog*, *supra* note 29, at 2-3.

legislatively."[112] Furthermore, Professor Anthony proposes calling nonlegislative rules that should have been promulgated legislatively "spurious" rules.[113] The inquiry, then, becomes whether a nonlegislative rule is an interpretive rule, a spurious rule, or an exempt policy statement.[114] The first step is to ask whether the rule interprets existing legislation.[115] If so, then it is an interpretive rule exempt from notice and comment, regardless of whether the agency treats it as binding.[116] Agencies, according to this proposal, may permissibly bind parties using interpretive rules.[117] The second step, relevant if the rule is not interpretive, is to ask whether the agency has in fact treated it as binding.[118] If so, then the rule is a spurious rule; if not, then the rule is an exempt policy statement.[119]

Professor Funk proposes a simple test for determining whether a rule is legislative or nonlegislative: "whether it has gone through notice-and-comment rulemaking."[120] A rule not promulgated through notice and comment is an interpretive rule or policy statement unless it falls under one of the other exemptions,[121] such as the subject-matter exemptions or those for good cause or procedural rules.[122] This test makes it abundantly clear to regulated parties, regulatory beneficiaries, and the agencies themselves that the rule is nonlegislative.[123] In addition, the test addresses a "common mistake" that courts make: they sometimes call the procedurally invalid nonlegislative rule a legislative rule even though a rule promulgated without notice and comment could technically never be legislative.[124] Under Professor Funk's test, courts would instead invalidate agency use of nonlegislative rules on the grounds that such use goes beyond the inherent limits of nonlegislative rules.[125] Though the difference between the outcomes is not immediately apparent, it lies in the status of the rule following its invalidation by the court. The former approach

[112] *Id.* at 3 (emphasis omitted). In this respect, Professor Anthony's framing of the distinction has informed the way this Note has identified the relevant distinction, as one between procedurally valid nonlegislative rules and nonlegislative rules that should have been promulgated legislatively.

[113] *Id.* at 10.

[114] *Id.* at 11.

[115] *Id.*

[116] *Id.*

[117] For Professor Anthony's explanation of the proposition that interpretive rules differ from other nonlegislative rules, which agencies may not treat as binding, see *id.* at 12-14.

[118] *Id.* at 11-12.

[119] *Id.* at 12.

[120] Funk, *supra* note 33, at 1324-25.

[121] Funk, *supra* note 51, at 663.

[122] *See supra* note 20 and accompanying text.

[123] Funk, *supra* note 51, at 663.

[124] *Id.* at 664.

[125] *Id.*

sets the rule aside as unlawful; Funk's approach, on the other hand, finds the agency's particular use of the rule unlawful, but the rule continues to exist as a guidance document. Should the agency continue to treat the rule as binding in subsequent cases, failing to reconsider the policies underlying the rule, then those agency actions would also be unlawful. In other words, although courts applying a legal effects test would find against the agency by "declaring the [rule] invalid and setting it aside," Funk's test would do so by "declaring invalid any actual use of the [rule] in an unlawful manner."[126] Professor Johnson agrees with Professor Funk on this point, remarking that "[i]f an agency treats an interpretive rule or policy statement as a binding rule . . . courts should strike down decisions that the agency makes in reliance on that rule as arbitrary and capricious, rather than invalidating the rule itself."[127]

Finally, Professor Johnson offers a proposal of his own. He would amend the text of the APA in two ways to address the problems surrounding nonlegislative rules. First, he would seek to enhance public participation for legislative and nonlegislative rules alike, recommending that the APA be amended to require that agencies "to the extent practicable, necessary, and in the public interest, provide opportunities for timely and meaningful public participation."[128] For interpretive rules and policy statements, such opportunities could include "public meetings or hearings."[129] This would expand opportunities for interested parties to participate in the promulgation of interpretive rules and policy statements while avoiding a bright-line rule that agencies must engage in hybrid rulemaking for all exempt rules.[130] In addition, Professor Johnson's proposed amendment would require agencies to designate interpretive rules or policy statements as such when promulgated.[131] Such a designation would clarify the effect that the rule may permissibly have by allowing agencies to determine such effect and announce it to the public.[132] Professor Johnson further clarifies the effect that courts should give these rules through proposed amendments regarding substantive review.[133]

III. CONSIDERATIONS OF SUBSTANTIVE REVIEW

Procedural considerations are inevitably bound up with substantive review of nonlegislative rules. The practical binding effect of these rules is directly related to the amount of deference accorded the substance of the rules. The extent to which rules can practically bind is "a function of the likelihood that

[126] *Id.* at 666.

[127] Johnson, *supra* note 34, at 707.

[128] *Id.* at 737.

[129] *Id.* at 738.

[130] *Id.*

[131] *Id.* at 739-40.

[132] *Id.*

[133] *See id.* at 740-42 (proposing basically a codification of *Skidmore* deference, with modifications).

[they] will be challenged in court, and then of the likelihood that the court will uphold [them]."[134]

In addition, the amount of weight that courts give to nonlegislative rules affects incentives for agencies deciding whether to promulgate a rule through notice-and-comment procedures or through the exemption for interpretive rules and policy statements. As the amount of deference increases, the agencies are less likely to use costly notice-and-comment procedures. On the other hand, if courts give an agency pronouncement embodied in an interpretive rule only weak deference, then the agency has a greater incentive to use the notice-and-comment machinery to give its pronouncement the legally binding effect of a legislative rule.

These incentives may also be considered in light of the availability of judicial review of the nonlegislative agency pronouncement at the pre-enforcement stage. During an enforcement proceeding, the regulated party would have an opportunity to challenge the nonlegislative rule. But if the agency pronouncement is non-reviewable until the agency enforces the rule, then the effects on agency incentives of deference accorded in substantive review may be diminished. If the rule is reviewable when promulgated, then the agency would be more likely to consider the weight given to its pronouncement when deciding whether to promulgate the rule legislatively or as a nonlegislative rule.[135]

A. *Deference Accorded to Nonlegislative Rules on Substantive Review*

Substantive review of nonlegislative rules falls into the broad category of review of agency legal conclusions. Courts apply the *Chevron*[136] doctrine to determine what level of deference is appropriate for a particular agency interpretation. That is not to say that *Chevron* deference applies to all agency legal conclusions. In fact, application of the steps outlined by *Chevron* and subsequent cases may mandate that a different level of deference is appropriate. The world of nonlegislative rules, especially in the wake of *Mead*,[137] is a world in which strong *Chevron* deference frequently does not apply.

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[134] Robert A. Anthony, *Three Settings in Which Nonlegislative Rules Should Not Bind*, 53 ADMIN. L. REV. 1313, 1314 (2001) [hereinafter Anthony, *Three Settings*].

[135] For more information on the availability of judicial review for nonlegislative rules, see, for example, Funk, *supra* note 33, at 1335-41.

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

[137] United States v. Mead Corp., 533 U.S. 218 (2001).

1. Overview of *Chevron* Doctrine

The landmark case of *Chevron* established a major, though likely unintended, change to judicial review of agency legal conclusions.[138] In *Chevron*, the Court applied a two-step analysis that revolutionized scope-of-review doctrine. Pre-*Chevron*, a court would begin the scope-of-review analysis by determining whether the agency interpretation was a pure question of law or an application of law to facts.[139] When the issue was one of pure interpretation, agencies would get no deference because courts were presumed to be at least as well situated as agencies to determine the correct meaning of statutory terms.[140]

Confusing the neat pre-*Chevron* approach was *Skidmore v. Swift*,[141] a case that would remain relevant even following the arrival of *Chevron*. *Skidmore* introduced a sliding scale for the amount of deference that courts should give to agencies' legal conclusions. The Court wrote: "[T]he weight of [the administrator's] judgment in a particular case 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."[142] Although the Court's later opinion in *Chevron* would for a time relieve lower courts of the administrative burden imposed by *Skidmore*, "*Skidmore* deference" has reentered the scene, as will become clear later.[143]

At issue in *Chevron* was the EPA's interpretation of the term "stationary source" in the Clean Air Act.[144] The EPA regulation, a legislative rule, construed "stationary source" in a way that permitted states to treat all pollution-emitting devices within the same industrial grouping as if encased in a single "bubble."[145] The Natural Resources Defense Council sought judicial review of the agency's interpretation. Employing a two-step analysis, the Court ultimately determined that the EPA's interpretation of the term "stationary source" was based on a permissible construction of the statute and held in favor of the EPA.[146]

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[138] *See* LAWSON, *supra* note 1, at 442 (explaining that Justice Stevens likely did not intend a major change to scope-of-review law, but that lower courts began to apply the *Chevron* two-step analysis anyway).

[139] *Id.* at 423 (explaining the courts' disparate levels of deference given for "abstract legal questions" and "application of a statutory term to a particular set of facts").

[140] *See, e.g.*, NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 120-23 (1944).

[141] Skidmore v. Swift & Co., 323 U.S. 134 (1944).

[142] *Id.* at 140.

[143] *See infra* text accompanying notes 169-76.

[144] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 840 (1984).

[145] *Id.*

[146] *Id.* at 866.

The first step in the analysis outlined in *Chevron* is to ask "whether Congress has directly spoken to the precise question at issue."[147] Furthermore, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[148] The second step, only relevant if the statute is silent or ambiguous, is to ask "whether the agency's answer is based on a permissible construction of the statute."[149] In other words, "if the meaning of the statute is not *clear*, then courts must accept any *reasonable* agency interpretation."[150] The consequence of this strong deference is that agency interpretations have practical binding effect.[151] When *Chevron* deference applies and the agency interpretation is "consistent with the statute and reasonable,"[152] the interpretation is practically binding because, on substantive review, that interpretation will almost certainly prevail.[153]

Chevron deference, however, does not apply in every instance of an agency legal conclusion. Some have referred to the preliminary considerations used to determine whether to apply *Chevron* deference as "Step Zero."[154] In introducing the *Chevron* two-step analysis, Justice Stevens wrote: "[w]hen a court reviews an agency's construction of the *statute which it administers*, it is confronted with two questions."[155] There are at least two important conditions to the application of *Chevron* deference inherent in this introductory sentence. First, courts do not reach the two-step analysis when they are not reviewing an agency's construction of a *statute*. For instance, some courts have applied a different level of deference to agency interpretations of regulations.[156] In a recent case involving veterans' benefits, *Haas v. Peake*, the Court of Appeals for the Federal Circuit applied a level of deference stronger than *Chevron* deference, evaluating an agency's interpretation of its own regulation under a "'plainly erroneous or inconsistent with the regulation[]'" standard.[157] This

[147] *Id.* at 842.

[148] *Id.* at 842-43.

[149] *Id.* at 843.

[150] LAWSON, *supra* note 1, at 496.

[151] Anthony, *Three Settings*, *supra* note 134, at 1315 ("*Chevron* deference to an agency interpretation has the practical effect in most cases of giving the agency's position binding force, since the court reviewing under *Chevron* must accept the agency interpretation unless it finds it to be contrary to statute or to be unreasonable, which is quite unusual.").

[152] Randolph J. May, *Ruling Without Real Rules – Or How to Influence Private Conduct Without Really Binding*, 53 ADMIN. L. REV. 1303, 1308 (2001).

[153] *Id.* at 1307-08.

[154] *See, e.g.*, Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2006).

[155] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984) (emphasis added).

[156] *See, e.g.*, Haas v. Peake, 525 F.3d 1168, 1186-87 (Fed. Cir. 2008).

[157] *Id.* at 1186 (quoting Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 171 (2007)).

standard has sometimes been called "*Auer* deference," referring to a seminal case that affirmed this greater level of deference.[158] The court in *Haas* also acknowledged the limitation on this principle articulated by the Supreme Court in *Gonzales v. Oregon*,[159] which held that *Auer* deference is not appropriate when a regulation merely parrots a statute.[160] "An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language."[161]

Second, the two-step analysis applies to an agency's construction of a statute that it *administers*. For example, *Chevron* deference would not be appropriate if the FDA or the NLRB were to construe the APA because neither agency "administers" that statute.[162] If the agency lacks the power to implement the statute through the promulgation of rules or adjudication, then it is not eligible for *Chevron* deference.[163] Put differently, if Congress has not "charge[d] [the] agency with a statute's administration," then the agency may not authoritatively interpret that statute.[164]

As Professor Sunstein points out, however, a statement that *Chevron* applies "[w]henever an agency makes an interpretation of a statute that it administers" would be "implausibly broad."[165] In *Christensen* and *Mead*, the Supreme Court set out to more clearly define *Chevron*'s scope, and in doing so, the Court called into question the appropriate degree of deference for agency interpretations in the form of nonlegislative rules.

2. Effects of *Christensen* and *Mead* and the Added Confusion of *Barnhart*

In *Christensen v. Harris County*,[166] the Court refused to apply *Chevron* deference to the opinion letter at issue.[167] Justice Thomas distinguished the opinion letter from the EPA regulation interpreting "stationary source" in *Chevron*, finding significance in the manner in which the rules were promulgated: "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."[168] Instead, he applied *Skidmore* deference to such

[158] Auer v. Robbins, 519 U.S. 452, 461-63 (1997).

[159] 546 U.S. 243 (2006).

[160] *Id.* at 257.

[161] *Id.*

[162] Sunstein, *supra* note 154, at 208-09.

[163] Merrill & Hickman, *supra* note 154, at 837.

[164] *Id.*

[165] Sunstein, *supra* note 154, at 209 (emphasis omitted).

[166] 529 U.S. 576 (2000).

[167] *Id.* at 587.

[168] *Id.*

nonlegislative rules.[169] As previously discussed,[170] *Skidmore* deference is a sliding scale that gives the agency decision as much weight as it has power to persuade. The Court found the opinion letter at issue unpersuasive under this standard.[171]

In his concurring opinion, Justice Scalia rejected the majority's revival of *Skidmore*, calling *Skidmore* deference an "anachronism" that ceased to be an applicable standard after the Court decided *Chevron*.[172] He contended that *Chevron* deference was only inapplicable when a statute is unambiguous, the agency administering the statute has not issued an interpretation, or the interpretation is "not authoritative, in the sense that it does not represent the official position of the expert agency."[173] Justice Breyer, on the other hand, in his dissenting opinion, disagreed with Scalia's rejection of *Skidmore*.[174] For Breyer, *Chevron* did not displace *Skidmore*, but rather provided an additional reason to give deference to an agency interpretation: Congress delegates authority to agencies to make certain determinations.[175] *Skidmore* "retains legal vitality," for example, "where one has doubt that Congress actually intended to delegate interpretive authority to the agency."[176]

In *United States v. Mead Corp.*,[177] the Supreme Court considered another nonlegislative rule: a tariff classification ruling.[178] As in *Christensen*, the Court determined that the rule did not deserve *Chevron* deference but was entitled to *Skidmore* deference.[179] The Court held that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference 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."[180] A "very good indicator" that *Chevron* deference is appropriate is an express congressional authorization for the agency to engage in rulemaking or adjudication, but rules promulgated without such procedures may still be eligible for *Chevron* deference.[181] Furthermore, the Court held that

[169] *Id.*

[170] *See supra* text accompanying note 141.

[171] *Christensen*, 529 U.S. at 587.

[172] *Id.* at 589 & n.∗ (Scalia, J., concurring).

[173] *Id.* at 589 n.∗.

[174] *Id.* at 596 (Breyer, J., dissenting).

[175] *Id.*

[176] *Id.* at 597.

[177] 533 U.S. 218 (2001).

[178] *Id.* at 221.

[179] *Id.* at 234-35.

[180] *Id.* at 226-27.

[181] *Id.* at 229-31 ("That said, and as significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have

"interpretive rules . . . enjoy no *Chevron* status as a class."[182] Again, as in *Christensen*, the Court explained that where *Chevron* deference is not appropriate, that does not mean that the rule deserves no deference; rather, *Skidmore* deference applies.[183] In making a *Skidmore* claim, the Customs Service could point to "[the rule's] writer's thoroughness, logic, and expertness, [the rule's] fit with prior interpretations, and any other sources of weight."[184] The Court reaffirmed its holding in *Christensen* and again rejected Justice Scalia's invitation to award *Chevron* deference as long as interpretations are "authoritative," finding that *Chevron* left *Skidmore* deference intact in situations where either statutory circumstances indicate that Congress did not intend to give an agency the authority to make rules with the force of law or where an agency does not invoke such authority.[185]

One year later in *Barnhart v. Walton*,[186] Justice Breyer, writing for the Court, held that some rules promulgated without notice-and-comment procedures could receive *Chevron* deference.[187] The Court, in considering an interpretation initially adopted in an interpretive rule and later promulgated in a regulation, cited several rationales favoring *Chevron* deference for the agency's initial interpretation, including the "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."[188] Justice Scalia criticized the Court for failing to point out why the nonlegislative interpretations were "authoritative enough (or whatever-else-enough *Mead* requires) to qualify for deference."[189] The factors presented by the Court seem to resemble the sorts of factors that courts might consider in deciding how "persuasive" an agency interpretation is under *Skidmore*, yet the Court introduced them as a means of determining whether rules deserve *Chevron* deference.[190] As Professor Sunstein points out, lower courts struggle with the tension between *Mead* and *Barnhart*, at times giving *Chevron* deference to nonlegislative rules.[191] Some courts follow *Mead*, analogizing

sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.").

[182] *Id.* at 232.

[183] *Id.* at 234 ("*Chevron* did nothing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form . . . .").

[184] *Id.* at 235.

[185] *Id.* at 237-38.

[186] 535 U.S. 212 (2002).

[187] *Id.* at 221-22.

[188] *Id.* at 222.

[189] *Id.* at 227 (Scalia, J., concurring).

[190] *See* Amy J. Wildermuth, *Solving the Puzzle of* Mead *and* Christensen*: What Would Justice Stevens Do?*, 74 FORDHAM L. REV. 1877, 1895 (2006).

[191] *See* Sunstein, *supra* note 154, at 219-21.

nonlegislative rules such as IRS Revenue Rulings to tariff classifications, and therefore apply *Skidmore* deference.[192] Other courts look at the factors posed in *Barnhart* to determine that, although not promulgated legislatively, some rules, such as HUD policy statements, deserve *Chevron* deference.[193]

Regardless of this confusion, it remains clear that *Skidmore* deference has been reintroduced as an alternative standard to *Chevron* deference. A study on the effect of applying *Skidmore* deference in post-*Mead* cases shows that during the six months following *Mead*, of the seventy cases citing *Mead*, forty-one percent applied *Skidmore* deference.[194] In addition, while before *Christensen* an agency interpretation to which *Skidmore* deference was applied would be upheld in seventy-five percent of cases, during the four months following *Mead* courts upheld such interpretations only thirty-one percent of the time.[195] Professor Wildermuth conducted a more recent survey in which she determined that where courts cite *Skidmore* and engage in "more than a cursory analysis," agencies win only thirty-nine percent of cases.[196] Despite these studies, however, Professor Sunstein argues that the choice between *Chevron* deference and *Skidmore* deference frequently does not matter.[197] In most cases, he contends, the choice is not material, and the case can be resolved without determining the precise level of deference.[198]

IV. WHAT IF COURTS ACCEPTED AGENCY CHARACTERIZATIONS OF RULES AS INTERPRETIVE?

When agencies decide to make pronouncements through interpretive rules, they risk sacrificing deference from courts on review. Rather than receiving strong *Chevron* deference, as an agency would almost certainly get from a court if it were to promulgate the rule using notice-and-comment rulemaking, nonlegislative rules in the wake of *Christensen* and *Mead* are likely to receive only weak *Skidmore* deference. To the extent that the practical binding effect of nonlegislative rules is a function of the amount of deference afforded agency interpretations on judicial review, choosing to make a pronouncement nonlegislatively reflects a choice that the pronouncement should have less effect. For instance, in *New York City Employees' Retirement System v. SEC*,[199] the plaintiffs argued that if the court were to hold that the SEC no-action letter in question was an interpretive, rather than "substantive," rule,

[192] *Id.* at 221.

[193] *Id.*

[194] Erick R. Womack, *Into the Third Era of Administrative Law: An Empirical Study of the Supreme Court's Retreat from* Chevron *Principles in* United States v. Mead, 107 DICK. L. REV. 289, 325 (2002).

[195] *Id.* at 327-28.

[196] Wildermuth, *supra* note 190, at 1899.

[197] *See* Sunstein, *supra* 154, at 229-30.

[198] *Id.*

[199] 45 F.3d 7 (2d Cir. 1995).

then the SEC would be able to make binding law while escaping notice and comment.[200] The court answered in terms of deference.[201] The binding effect that the plaintiffs complained about was limited by the fact that the no-action letter, since it was interpretive, would get closer scrutiny by courts.[202] In fact, the no-action letter was entitled to even less deference because of its informal nature and thus had a lesser binding effect than other interpretive rules.[203] If agencies want to make pronouncements that are binding, they must use the machinery of notice-and-comment rulemaking. If they fail to use that machinery, then their pronouncements will be legally nonbinding and only as practically binding as an application of *Skidmore* deference on substantive review allows.

This analysis is complicated by the lack of clarity with respect to the appropriate level of deference on substantive review of nonlegislative rules. From the *Christensen* and *Mead* decisions, it appeared clear that interpretive rules deserved *Skidmore*, not *Chevron*, deference because they were not promulgated as rules that carry the force of law. *Barnhart* introduced some circumstances under which a nonlegislative agency interpretation, nonbinding by definition, could be made practically binding through the application of strong *Chevron* deference. Such a practice could have the effect of circumventing the notice-and-comment procedures prescribed by the APA. Perhaps for this reason alone, and not foreclosing other potential rationales, following *Christensen* and *Mead* in this instance would appear to be the proper course.

Because of the effect of these considerations of substantive review, and assuming that *Skidmore* deference is the appropriate standard for nonlegislative rules, less would turn on the distinction between procedurally valid interpretive rules and interpretive rules that should have been promulgated legislatively. One scenario in which courts have had to make the distinction is in the context of an enforcement action where an agency relies on the rule and the adverse party claims that the rule is procedurally invalid. If the rule in that case deserved *Chevron* deference, then the chances of the challenging party winning a substantive challenge would not be good. The party would have to prove that the agency interpretation is unreasonable or outside the zone of plausibility, and it is very rare for an agency to lose when accorded *Chevron* deference. Thus, if *Chevron* applied, the challenging party would need to bring a procedural challenge in order to make an effective claim against the agency. However, if in that case the agency interpretation only gets *Skidmore* deference then the agency only gets deference to the extent that its interpretation has the power to persuade. This diminishes the weight of the agency interpretation and does not require the affected party to demonstrate that the agency

[200] *Id.* at 14.

[201] *Id.*

[202] *Id.*

[203] *Id.*

interpretation is unreasonable. Thus, if *Skidmore* applies, the challenging party can make an effective substantive claim and the need for a procedural claim is diminished.

The second principal type of scenario in which courts have had to distinguish between procedurally valid interpretive rules and interpretive rules that should have been promulgated through notice-and-comment procedures occurs when an agency takes an action contrary to an alleged procedurally valid nonlegislative rule, and the affected party claims that the rule is actually a legislative rule that binds the agency. Applying *Skidmore* deference to nonlegislative rules diminishes the need for the procedural challenge in this scenario as well. If *Chevron* deference were to apply, there would be no room for courts acting within the *Chevron* framework to consider agency consistency. The challenged interpretation would go through the two-step analysis and, as long as the interpretation is reasonable, courts would uphold it. Furthermore, there can be more than one reasonable interpretation. Thus, if *Chevron* were to apply, then affected parties would need a procedural challenge in order to make an effective claim against the agency interpretation. However, where *Skidmore* applies, courts should consider, among other things, "consistency with earlier and later pronouncements"[204] when determining the appropriate amount of weight to give an agency interpretation. A contrary earlier pronouncement, then, should decrease the amount of deference that courts afford the agency on judicial review. The review of the agency's subsequent interpretation would be more searching and more akin to determining whether the agency reached the correct interpretation rather than merely whether the agency's interpretation is reasonable. This puts the challenging party and the agency on more equal footing as they argue not about the reasonableness of the subsequent agency interpretation, but rather about which is the correct interpretation. As is the case in the first scenario, applying *Skidmore* rather than *Chevron* deference to the agency interpretation gives the affected party a better chance of winning a substantive claim, reducing the need for the procedural claim.

Because applying *Skidmore* deference reduces the need for the confusing analysis to determine the procedural validity of the rules, courts could consider accepting agency characterizations of rules as nonlegislative.[205] Affected parties would not be left guessing about whether a rule is interpretive or substantive, and they would not be forced to make the argument in court that a rule is actually substantive despite the lack of procedures used in its promulgation. It would be clear upon promulgation that the rule is legally nonbinding, because only after notice-and-comment procedures could a rule be binding, and it would not be practically binding, because *Skidmore* deference is weak.

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[204] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[205] This proposal most closely resembles Professor Funk's notice-and-comment test. *See supra* note 120 and accompanying text.

While the possibility of accepting the agency's characterization of its rule is most appealing when nonlegislative rules as a class get *Skidmore* deference, courts that apply the *Barnhart* factors might actually see similar results. The *Barnhart* factors provide reasons why a nonlegislative rule might receive strong *Chevron* deference. The presence of one or more of those reasons on an application of *Skidmore* deference may lead courts to determine that the rule is entitled to a great deal of respect. *Skidmore* deference may generally be weaker than *Chevron* deference, but in the presence of certain factors that entitle the agency's pronouncement to respect, the result of the court's analysis may not be much different under *Skidmore* than under *Chevron*. *Barnhart* does not instruct courts to apply *Chevron* deference to nonlegislative rules as a class; rather, courts should apply *Chevron* only in limited circumstances. Thus, the practical binding effect, for courts that run nonlegislative rules through the *Barnhart* analysis, may not be much different from the practical binding effect under *Skidmore*.

Accepting an agency's characterization of a rule as nonlegislative is not an entirely foreign concept for courts. For instance, the Court of Appeals for the Third Circuit took this approach in *Cerro Metal Products v. Marshall*.[206] In that case, OSHA labeled an amendment to its regulation as an interpretive rule.[207] The district court's approach was "to distinguish between interpretative and legislative rules and then to strike down the latter if found to be masquerading as the former."[208] On appeal, the Third Circuit identified and applied an alternative approach: "[i]f an agency that has the statutorily delegated power to issue legislative rules chooses instead to issue an interpretative rule, the court accepts that characterization of the rule but is free to arrive at its own interpretation."[209] Furthermore, the court identified the differing effects of legislative rules and interpretive rules on review, explaining that the former is subject to review only under an arbitrary and capricious standard while the latter are not technically entitled to deference, but courts frequently defer to agencies' interpretations nevertheless.[210] It is possible that the court of appeals in *Cerro Metal* rejected the district court's analysis because of the recent admonishment from the Supreme Court in *Vermont Yankee* and the subsequent abandonment of the substantial effects test. Regardless, in deciding to accept the agency's characterization of the rule on the grounds that legislative and nonlegislative rules are treated differently on substantive review, the court of appeals makes an interesting point.

[206] 620 F.2d 964 (3d Cir. 1980).

[207] *Id.* at 981.

[208] *Id.*

[209] *Id.*

[210] *Id.* at 982 (citing Joseph v. U.S. Civil Serv. Comm'n, 554 F.2d 1140, 1153 n.26 (D.C. Cir. 1977)).

CONCLUSION

Agencies frequently make pronouncements nonlegislatively. The current state of the law of procedural review leaves affected parties with uncertainty as to whether the rule is interpretive or substantive. When a procedural challenge gets to the courts, they have a hard time trying to determine whether the rule is one that the agency intends to have the force of law. In terms of the substantive review of these rules, it would appear from *Christensen* and *Mead* that rules not promulgated pursuant to an agency's rulemaking or adjudicatory authority should be accorded *Skidmore*, not *Chevron*, deference. The Court's decision in *Barnhart* adds some ambiguity into this area but by no means suggests that all or even most nonlegislative rules are within *Chevron*'s domain. Although nonlegislative rules may have the practical effect of binding in a world where such rules get *Chevron* deference, because the extent to which rules can practically bind is a function of the amount of deference they get from courts, the practical effect is significantly discounted in a world where *Skidmore* deference applies. This Note has asked whether courts can accept an agency's characterization of its rules as nonlegislative now that it is somewhat clear that the rules would be entitled to something less than full *Chevron* deference. Such a course of action could promote clarity for affected parties, since they would be able to ascertain the effect of a rule upon its promulgation, as well as eliminate the "fuzzy" inquiry into whether the rule is procedurally valid. Given the amount of confusion in this area, courts and Congress should consider this suggestion for reform.