

# COMMENTS

## THE RULEMAKING CONTINUUM

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The two papers we have before us<sup>1</sup> tell both descriptive and normative stories about current issues of rulemaking. Each suggests, in its field of attention, pressures that operate to increase proceduralization and agency responses to those pressures, as well as an attitude toward these developments. In rulemaking, as in other activities, discretion and order are in constant tension; one might find in that tension the very engine that makes the processes of public law go. Like the studies that assisted the move away from formal rulemaking,<sup>2</sup> and the perceptions underlying the Supreme Court's *Vermont Yankee* decision,<sup>3</sup> which quieted the judicial development of hybrid rulemaking, the descriptions here suggest that

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1. Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311 (1992); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992).

2. See Robert W. Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CAL. L. REV. 1276 (1972):

The actual agency experience with these procedural requirements raises serious doubts about their desirability . . . . It is surprising to discover that most agencies required to conduct formal hearings in connection with rulemaking in fact did not do so during the previous five years. . . . Thus, the primary impact of these procedural requirements is often not, as one might otherwise have expected, the testing of agency assumptions by cross-examination, or the testing of agency conclusions by courts on the basis of substantial evidence of record. Rather, these procedures either cause the abandonment of the program (as in the Department of Labor), the development of techniques to reach the same regulatory goal but without a hearing (as FDA is now trying to do), or the promulgation of noncontroversial regulations by a process of negotiation and compromise (as FDA historically has done and Interior is encouraged to do). In practice, therefore, the principal effect of imposing rulemaking on a record has often been the dilution of the regulatory process rather than the protection of persons from arbitrary action.

*Id.* at 1312 (footnotes omitted).

3. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

proceduralization may be perversely encouraging governmental lawlessness; as agencies struggle to meet public and political expectations about their responsibilities with constrained resources, heightened procedural responsibilities *here* encourage the struggle to escape *there*, or reduce the extent to which government can afford to tell the public how it means to structure the discretion with which it has been vested. The developments they recount, on the judicial side at least, are the product of case-by-case judicial accretion rather than of systematic thought about the overall activity of "rulemaking"—thought such as might only rarely be expected to occur judicially. The juxtaposition of these two papers affords a useful occasion to attempt an overview of the whole spectrum of activity that can be described in Administrative Procedure Act (APA) terms as "rulemaking."

Although constraints of time and circumstance limit this Comment to suggestive analysis, the reader will quickly work out that I believe the descriptive insights of both papers would be enhanced if they were seen as less-than-universal pronouncements, and that the normative judgments of Professor Anthony's paper are open to substantial doubt. The reader will need to accept that much of what follows flows from a general framework of understanding I will try to sketch out, supplemented by instincts there has not yet been the chance to track down and test out. Central to the concerns that underlie this writing is a tension perhaps not all will see and that consequently seems particularly useful to attempt to describe. What the APA defines as a "rule" may be binding or not, and may bind the issuing agency, members of the regulated public, neither, or both. The possibilities can be expressed in a matrix as follows:

	Gov't bound	Gov't not bound
Regulated party bound	A) Both parties bound	B) Regulated party only bound
Regulated party not bound	C) Gov't only bound	D) Neither party bound

Box A is simple—that is the situation produced by legislative rulemaking. Box D, in which there is *no* law, is of little concern. The tension reflects the possible contents of Boxes B and C.

We can imagine cases in Box C—historically perhaps not numerous in litigation, but nonetheless central to one's sense of what it means to have a government of laws—in which citizens who are not themselves bound by a governmental policy instrument seek to hold the government to the promise that the instrument seems to contain. As the United States Court of Appeals for the District of Columbia Circuit has stated,

“it is a familiar principle of federal administrative law that agencies may be bound by their own substantive and procedural rules and policies, whether or not published in the Federal Register . . . .”<sup>4</sup> The private litigants in such cases are ordinarily unconcerned with procedural sufficiency; those who are subject to regulation would prefer to have the government declare its position on some controvertible issue of law or policy and then to be able to hold the government to it. Whereas reasons of public policy may sometimes counsel against too-easy acceptance of limitations on governmental discretion,<sup>5</sup> the general instincts of a society that has set its face against “secret law” and encourages citizens to obtain pre-action advice from government officials<sup>6</sup> is that this is, normatively, a desirable state of affairs. Procedural rules that would inhibit reliable advice-giving, are, from this point of view, to be frowned upon.<sup>7</sup>

It is hard, on the other hand, to find desirable content to Box B, in which the citizen is bound but the government is not.<sup>8</sup> Pronouncements like the Environmental Protection Agency (EPA) disclaimer Professor Anthony quotes<sup>9</sup> seem the very antithesis of what we think of as the “rule of law.” If one includes within the notion of being “bound” situations in which, as a practical matter, citizens have few choices but to follow policies the government has announced, then one easily sees the normative engine of a contrasting analysis. Here is government not bound, the citizen constrained. The complaint that comes to judicial attention is voiced by a citizen who dislikes the governmental policy that has been implemented and who wants the opportunity to object to it.

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4. *Lucas v. Hodges*, 730 F.2d 1493, 1504 n.20, *vacated as moot*, 738 F.2d 1392 (D.C. Cir. 1984).

5. Thus, the potential for diverting limited resources from prosecution by encouraging side-show litigation may prompt judicial refusals to enforce standards on prosecutorial discretion, even if prosecutors have established and bureaucratically enforce among themselves standards respecting the grading of offenses. See *Heckler v. Chaney*, 470 U.S. 821 (1985); *United States v. Redondo-Lemos*, 955 F.2d 1296 (9th Cir. 1992). Similarly, “wrong” advice, however honestly given, does not establish a claim against the public treasury, lest conniving be rewarded and advice-giving inhibited. *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990).

6. *E.g.*, Declaratory Judgment Act, 48 Stat. 955 (1934) (codified as amended at 28 U.S.C. §§ 2201-2202 (1988)).

7. Different considerations, addressed neither by Professor Anthony nor by this Comment, may be present should the government and regulated interests use the development of informal guidance as a device to limit participation, such as by excluding interested consumer groups. See, *e.g.*, *Moss v. Civil Aeronautics Bd.*, 430 F.2d 891 (D.C. Cir. 1970).

8. The cases Professor Anthony describes have this character, although he and I would disagree whether the citizens in all of them would be “bound.” A government advisory as to what conduct will provoke a prosecution is threatening, illuminating, cautionary—but not binding; the underlying standard, to enforce which the action is brought, is what “binds.”

9. Anthony, *supra* note 1, at 1346.

The animating normative judgment for me is that of Box C. It expresses a legal state of affairs that I find plausible, desirable, and well-captured by the APA's provisions respecting interpretive rules and general statements of policy, *inter alia*. But one must see the citizen attempting to hold government to its promises to get that perspective; and when complaints are put in the posture of Box B, this paradigm is easily overlooked. Professor Anthony's paper is about the cases of Box B, written by judges who appear to have focused their attention on that context. What is needed is an analysis that also takes into account the traditions of holding government accountable to the law it creates for itself.

## I.

The place to start is with a brief outline of the spectrum of activities identified as rulemaking for APA purposes. Although commonly we speak of "rulemaking" as synonymous with the notice-and-comment procedures of informal legislative rulemaking under section 553, careful attention to the APA reveals four different species of activity that can produce an outcome that fits the definition of "rule" given in section 551(4): "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 . . . ."

First, what is usually called "formal rulemaking" under section 553 consists of procedures by which rules are "made on the record after opportunity for an agency hearing [following the procedures of] sections 556 and 557 of this title . . . ." <sup>10</sup> Such procedures are commonly employed for the setting of particular rates, but otherwise it is widely known that they are disfavored, and will be found mandatory only when a specific statute so requires in unmistakable terms. <sup>11</sup>

Second, what is usually called "informal rulemaking" requires, in the section's *explicit* terms, a brief and rather unspecific notice warning of "either the terms or substance of the proposed rule or a description of the subjects and issues involved," <sup>12</sup> followed by the affording to interested persons of "an opportunity to participate in the rule making through the submission of written data, views, or arguments" and concluded by an instrument of adoption that includes "a concise general statement of [the adopted rule's] basis and purpose." <sup>13</sup> An agency following this procedure can create a legal instrument that, if substantively

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10. 5 U.S.C. § 553(c) (1988).

11. *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973). For a persuasive and highly influential account of the failures of formal rulemaking, see Hamilton, *supra* note 2, at 1278-1313.

12. 5 U.S.C. § 553(b)(3) (emphasis added).

13. *Id.* § 553(c).

valid, has the force and effect of a statute on all those who are subject to it. It binds the agency, private parties, and the courts, and may preempt state statutes. If a statute so authorizes, its violation may form the basis for penal consequences. In formal contemplation, a valid legislative rule may be modified only by adoption of an amending rule or overruling statute. This style of rulemaking has been subject to considerable legislative and judicial elaboration in some settings, and we shall need to return to consider these developments. For the moment, one important characteristic to note about it is that this formal impact is purchased at the price of involvement at the agency's head: The adoption of legislative rules, an exercise of delegated legislative authority, is invariably an act of the particular individual or body to whom that authority has been delegated—the Secretary, the Commission, the agency Administrator.

Third, what I have elsewhere styled “publication rulemaking”<sup>14</sup> is typically effected by agency staff without participation at the agency's head. For these rules, the parameters are set not by section 553, which excepts them, but by sections 552(a)(1) and (2). The latter provisions require certain agency documents either to be published in the *Federal Register* before a person can “in any manner be required to resort to, or be adversely affected by” them, or to be indexed and made available for inspection and copying or purchase before the documents “may be relied on, used, or cited as precedent by an agency against a party other than an agency” to “affect[ ] a member of the public.” “Actual and timely notice” suffices to defend the rules' application in either case, however. Section 552(a) is explicit in identifying the documents being referred to as including “statements of general policy or interpretations of general applicability formulated and adopted by the agency,”<sup>15</sup> which may or may not be published in the *Federal Register* as the agency chooses, and “administrative staff manuals and instructions to staff that affect a member of the public,”<sup>16</sup> which are to be indexed and made available. Note that the rather elaborate language of section 552(a) contemplates that if the agency does follow the stated publication requirements it will be able to require people to resort to these instruments, and will be able to rely on them in proceedings in ways that “adversely affect” members of the public; yet more strikingly, it also strongly suggests that even if these steps

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14. PETER L. STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES 157 (1989).

15. 5 U.S.C. § 552(a)(1)(D).

16. *Id.* § 552(a)(2)(C).

are not taken, such materials may be “relied on, used, or cited as precedent” *against the agency* although they do not serve to bind the public.<sup>17</sup>

Fourth, and finally, comes the body of materials that fit the APA definition of “rule” and are in some respects the product of agency process, but that meet none of the procedural specifications of the preceding three classes. Here we encounter guidance documents that might be “publication rules” if appropriately made available or if timely and actual notice were given, and also other materials of lesser dignity—press releases and the like. The public cannot be adversely affected by such rules; but, to repeat, there is at least the implication that the agency may be so affected.

## II.

The critical implications of this taxonomy are greater for Professor Anthony’s analysis than for Professor McGarity’s, but before turning to that, a few more context-setting observations may be appropriate.

First, the four classes of rulemaking identified above form a natural progression in several respects.

- Of the four categories, formal rulemaking is the least frequent, the most stylized, and the most demanding of resources at the agency’s head.
- Informal rulemaking is what we are accustomed to thinking of when the subject of rulemaking is raised, but a moment’s reflection suggests that it, too, is in *relative* terms a rare occurrence. Even without regard to ossification or latter-day encrustations such as Regulatory Impact Analyses, it requires agency engagement from head to toe as a public process generating formally binding results, formally determined by the agency itself.
- No such engagement or formality attends the generation of “publication rules” such as technical guidelines or staff manuals. Staff offices

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17. Section 552(a) in its current form had its origin not in the original APA but in the 1966 (original) Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250. The legislative history of the provision reflects as an unchallenged premise that “policy, interpretations, staff manuals, and instructions . . . the end product of Federal administration . . . have the force and effect of law in most cases . . . .” H.R. REP. NO. 1497, 89th Cong., 2d Sess. 7 (1966), *reprinted in* 1966 U.S.C.A.N. 2418, 2424. The purpose of the new statute was to bring this body of hitherto “secret law” out in the open, where citizens could become aware of it and adjust their conduct to it, not to compromise its influence. See *Hearings on S. 1160 Before the Subcomm. on Administrative Practice & Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 365 (1966) (CAB Chairman Macey favors proposal that would “bind a person who had notice of the terms of a rule, statement of general policy or interpretation, irrespective of whether it is published in the Federal Register”); *id.* at 458 (Acting FCC Chairman Greenbaum characterizes policy statements as “of vital interest to those regulated by the Commission and are Commission standards and rules in every significant sense. . . . [N]o agency has the right to establish such standards . . . without making them public.”).

produce them in a profusion that overwhelms the more formal output. Here are three such comparisons that personal contacts permitted me to make with relative ease: (1) formally adopted regulations of the Internal Revenue Service occupy about a foot of library shelf space, but Revenue Rulings and other similar publications, closer to twenty feet; (2) the rules of the Federal Aviation Administration (FAA), two inches, but the corresponding technical guidance materials, well in excess of forty feet;<sup>18</sup> (3) finally, Part 50 of the Nuclear Regulatory Commission's regulations on nuclear power plant safety, in the looseleaf edition, consumes three-sixteenths of an inch, while the supplemental technical guidance manuals and standard reactor plans in the same format stack up to nine and three-fourths inches.<sup>19</sup> Informal conversations persuade me that these ratios are typical. Although they do not justify the practice, they do suggest that we will want to consider carefully what this extraordinary volume of standard-generating activity might be about, and what its consequences are or should be.

- No similar measure can easily be made of the unindexed materials of our fourth category, yet given the breadth of description and the substantial numbers of potential sources for such rules, we may be certain that they too are generated in vast numbers and with relative ease.<sup>20</sup>

Second, upon closer inspection the world of informal rulemaking may itself be found to fracture along lines roughly suggested by the "major rulemaking" category developed for the exercise of presidential oversight by the line of Presidents from Nixon through Reagan. Some legislative rules have a major impact on the economy generally, or on important industries or the like; in numerical terms, however, most legislative rules are much less significant. If we look carefully at the examples Professor McGarity uses and the statutes on which he draws,<sup>21</sup> we find that they embrace, almost exclusively, the former sort of rules—actions by the Occupational Safety and Health Administration (OSHA) or EPA or the National Highway Traffic Safety Administration (NHTSA) that impose impressive costs on one or more industries in the hopes of securing somewhat diffuse improvements in the affected environment.

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18. Facsimile from Neil Eisner, Office of the General Counsel, U.S. Dep't of Transp. (Mar. 4, 1992).

19. Telephone Interview with Joseph F. Scinto, Deputy General Counsel for Hearing and Enforcement Administration, U.S. Nuclear Regulatory Comm'n (Feb. 11, 1992).

20. For example, the FAA generates approximately 215 feet of domestic and international notices yearly. *Id.*

21. See, e.g., McGarity, *supra* note 1, at 1403-07, 1414-17, 1423-24.

Further consideration suggests that as to these kinds of informal rulemakings, the President, the Congress, and the courts have been moving almost in lockstep to heighten the procedural requirements of rulemaking. The President has adopted various executive oversight mechanisms, notably Executive Order 12,291,<sup>22</sup> to impose additional rationalizing analysis and/or (you may take your pick) political controls over these highly significant decisions. Congress has regularly provided procedures in addition to those of section 553—indirectly, the Freedom of Information Act,<sup>23</sup> which quickly became a discovery vehicle for the underlying data of rulemaking; directly, special provisions for oral hearing with the possibility of cross-examination of witnesses, for substantial evidence review, and for other procedural elaborations from section 553 that signal recognition of the appropriateness of greater formality before such significant actions are taken. And the courts—in part taking their cue from Congress, in part voicing their own concerns—have converted the requirement to give notice of the “terms *or* substance . . . *or* a description of the subject and issues” into a requirement to give notice of *both* the precise proposal (so reversal may be had if the agency responds to comments by significantly changing its action)<sup>24</sup> *and* the full database on which the agency proposes to act.<sup>25</sup> Further, the courts have converted section 553’s requirement of a “concise general statement of . . . basis and purpose” into a requirement of explanation for all substantial judgments and for all actions on significant comments, sufficiently detailed to permit the court to understand the agency’s reasoning process.<sup>26</sup>

One need not disagree with either these changes or their characterization as “ossification” to note that they appear to have happened in what is much less than the full field of informal rulemaking, and that they appear to have happened with the concurrence of all three branches of the federal government. While it is hard to present proof, casual browsing in the *Federal Register* strongly suggests that informal rulemaking, generally, is *not* ossified. The Coast Guard continues to make its rules on drawbridge operation,<sup>27</sup> the Department of Agriculture on domestically produced peanuts,<sup>28</sup> in very little *Federal Register* space and in rather good time. The short average period of time rules remain

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22. 3 C.F.R. 127 (Comp. 1981), reprinted in 5 U.S.C. § 601 note (1988).

23. 5 U.S.C. § 552 (1988).

24. See *Shell Oil Co. v. EPA*, 950 F.2d 741, 750-52 (D.C. Cir. 1991).

25. See *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1211-12 (5th Cir. 1991).

26. See McGarity, *supra* note 1, at 1401.

27. 57 Fed. Reg. 24,189 (1992) (to be codified at 33 C.F.R. pt. 117).

28. *Id.* at 24,354 (to be codified at 7 C.F.R. pt. 998).



at the Office of Information and Regulatory Affairs for presidential review, the general brevity of notices and explanations, and the like, all suggest that ossification is a limited development. And the most salient characteristic of this development is that, in the general context where it has occurred, we have chosen it—we want it. One does not otherwise know quite how to understand the unanimity of the three controlling branches of our government—the President, the Congress, and the courts—in the direction they have chosen.

It is appropriate at this point to recall the wisdom of Louis Jaffe:

[I]t makes little sense to criticize an administration for failure to meet a critic's judgment of what the "public interest" requires. The action or inaction of an agency acting under a broad delegation is often the result of the political process operating on the agency, and is, after all, all that can be expected. Indeed, the criticisms of administration must be recognized as themselves a component of the political process, and critics' invocation of the "public interest" as a standard with readily discoverable content should be viewed as but a useful tactic in the political debate. . . . The key to success is the strong and persistent public opinion which demands a response to a given problem, which is sufficiently organized to press for the detailed legislative solution required, and which will ultimately keep the administration on the job of implementing it.<sup>29</sup>

It is hard to understand the changes, in the context in which they have occurred, as other than responses to a fairly "strong and persistent public opinion" about the utility of procedural checks on decisions of such high dimension. It might fairly be argued that particulars of the changes are excessive in their impact—that courts in particular have been insufficiently sensitive to the cumulative impacts of these changes and to the possibility that, for example, presidential oversight on matters of high prominence will be adequate in itself to assure close agency examination and politically responsive agency decisions.<sup>30</sup> But the general direction

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29. Louis L. Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1190-91 (1973); see also HERBERT KAUFMAN, RED TAPE: ITS ORIGINS, USES, AND ABUSES 98 (1977) ("We are ambivalent about the appropriate trade-offs between discretion and constraint, each of us demanding the former for ourselves and the latter for our neighbors.").

30. Peter L. Strauss, *Considering Political Alternatives to "Hard Look" Review*, 1989 DUKE L.J. 538; Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251 (1992).

One perhaps can find hopeful signs of judicial awareness of this problem in the recent practice, at least in the D.C. Circuit, to treat as a serious question the issue whether or not to suspend the operation of a rule being returned for further consideration on remand. When the court calls for additional briefs on that subject and then leaves a rule in place, *International Union, UAW v. OSHA*, 938 F.2d 1310, 1320-25 (D.C. Cir. 1991), or invites the agency to maintain the status quo through the exercise of emergency rulemaking powers, *Shell Oil Co. v. EPA*, 950 F.2d 741, 748-50 (D.C. Cir. 1991), or delays the issuance of a vacatur to permit adoption of revisions to a rule found deficient but probably relied upon, *United Mine Workers v. Dole*, 870 F.2d 662, 677 (D.C. Cir.

ought not to be surprising to us; and given the way in which it is occurring, ossification must be regarded as a political choice—wrongheaded, perhaps, but in an important sense what we want.

In any event, the end product is worth noting, as we turn to the problems of publication rulemaking. We have indeed developed a *tertium quid*, as Professor Stewart once described it,<sup>31</sup> for high-consequence rulemaking in the ground between formal rulemaking and the bare bones of sections 553(b) and (c). Presidential review, additional congressionally mandated procedures, and hard-look judicial review all conspire to make of such rulemaking a much more strenuous event than the informal rulemaking norm. On the one hand, it should not be surprising for agencies to try to escape this field of play, so expensive to their limited resources and so conducive to frustrating their choices about how to use those resources; an impulse to keep the agencies on that field is understandable. On the other hand, if the procedural consequences of forcing such rulemaking are high, we cannot fool ourselves that the requirement is a trivial one; in particular, we cannot imagine that a high volume of output will be achievable if these procedures are to be used. The process is one we designed to slow important decisions, and it has worked. Its effectiveness in slowing the rulemaking process is a cost (or a benefit, depending on who is counting) that will be present whenever the process is invoked. Thus it may be quite important to be accurate in identifying which rules must be adopted through this process, so that we catch only those "rules" for which an agency has inappropriately sought to escape informal rulemaking it was obliged to pursue. To impose not just informal rulemaking procedures but the heightened requirements of this *tertium quid* on publication rulemakings could significantly impair a kind of activity Congress has chosen, perhaps for good reason, to permit on a significantly less formal basis.

Finally, as to context, the question of what legal effect to give to publication rules is *not* settled. Here is where the tension described in the introductory paragraphs of this Comment arises. As noted, the diction of section 552(a) is at odds with the position that bindingness "in practical effect" can be achieved only by following procedures at least as demanding as the notice-and-comment procedures of section 553; section 552(a) seems to imagine that the impact of a publication rule will be

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1989), we can understand it to be acknowledging the possibly excessive and disabling discouragement of being sent back to square one; the consequences of agency procedural failures have been moderated in ways that could significantly limit the ossification effect.

31. Richard B. Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act*, 62 IOWA L. REV. 713, 733 (1977).

rather like that of an agency adjudicatory precedent—not itself “law,” yet establishing a principle to which the public may be held unless the agency is persuaded not to apply it, and constraining the judgment of the agency itself in the absence of some demonstrated reason for departing from it. Beyond section 552(a) is the line of cases seeking to *enforce* publication rules, which suggest that an agency statement outside the context of adjudication *can* be binding without being a legislative rule. As the D.C. Circuit recently stated:

Our dicta on the subject—and that is all we have found—have split. Some of our opinions have implied that the established maxim requiring agencies to adhere to their own rules, *see, e.g., Vitarelli v. Seaton*, 359 U.S. 535, 539, 79 S. Ct. 968, 972, 3 L. Ed. 2d 1012 (1959); *Service v. Dulles*, 354 U.S. 363, 77 S. Ct. 1152, 1 L. Ed. 2d 1403 (1957), extends to policies or interpretive rules. *See, e.g., Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987) (“Although the FBI has no published regulation governing what factors may be utilized in selecting a special agent, internal guidelines and rules not formally promulgated have occasionally been held to bind agency conduct.”); *Lucas v. Hodges*, 730 F.2d 1493, 1504 n.20 (D.C. Cir.) (“it is a familiar principle of federal administrative law that agencies may be bound by their own substantive and procedural rules and policies, whether or not published in the Federal Register, if they are intended as mandatory”), *vacated as moot*, 738 F.2d 1392 (D.C. Cir. 1984); *Doe v. Hampton*, 566 F.2d 265, 281 (D.C. Cir. 1977) (remanding for determination of whether guidelines in Personnel Manual are “mandatory or precatory”); *Jolly v. Listerman*, 672 F.2d 935, 940-41 (D.C. Cir.), *cert. denied*, 459 U.S. 1037, 103 S. Ct. 450, 74 L. Ed. 2d 604 (1982); *Mazaleski v. Treusdell*, 562 F.2d 701, 717 n.38 (D.C. Cir. 1977).

Yet other cases suggest that a substantive agency statement cannot be binding on the agency if it is a mere policy statement or interpretive rule. In holding that the Secretary of Labor was not required to observe his department’s mine safety enforcement guidelines, for example, we stated: “It is axiomatic that an agency must adhere to its own regulations, . . . and that it need not adhere to mere “general statement[s] of policy[.]” *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 536 (D.C. Cir. 1986) (quoting *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974); (other citations omitted)).<sup>32</sup>

Cases like these arise when citizens try to hold the government to what it has apparently promised, rather than when they try to undercut a declared policy by suggesting that improper procedures have been followed. These cases call attention to the proposition that control of government discretion is an important good that administrative law seeks to deliver. Steps that make it easier for agencies to avoid such controls, or

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32. *Vietnam Veterans of Am. v. Secretary of the Navy*, 843 F.2d 528, 536-37 (D.C. Cir. 1988) (brackets, quotation errors, and citation errors in original).

discourage them from making the pronouncements that might make their actions more predictable and regular, have costs as well as possible benefits.

The difficulty of the question is reflected in the persistently painful body of law that addresses estopping government.<sup>33</sup> Government attorneys argue broadly, paralleling the arguments for sovereign immunity largely rejected by modern legislation, that the government can never be estopped by the representations of its civil servants. The courts, usually finding against estoppel in the particular, have rejected the claim so broadly made, hinting that "the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed [in some circumstances] by the countervailing interest of citizens in some minimum standard of decency, honor and reliability in their dealings with their Government."<sup>34</sup> In its most recent encounter with the subject, the Supreme Court held that estoppel could not be applied in cases where the result would be to require payment of money from the Public Treasury contrary to a statutory appropriation—the argument that underlies the residual availability of the sovereign immunity defense; other possibilities for estoppel were left open.<sup>35</sup> Treating interpretive rules and policy statements as binding on government often will require no direct expenditure of funds; and a straightforward reading of section 552(a) suggests that such treatment has, in any event, been consented to. Strikingly, the contrary arguments are prudential ones: Permitting judicial enforcement of "internal" instructions will only discourage the government from providing the instructions, and thus secure regularity of bureaucratic behavior in the usual case—that is, it is *not* that the instructions do not bind or should not bind the government officials to whom they are addressed, but that judicial as distinct from executive enforcement of their requirements threatens more harm (adventitious lawsuits, distraction of government efforts, discouragement to the announcement of policy) than good.<sup>36</sup> The estoppel problem is properly

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33. See *Portmann v. United States*, 674 F.2d 1155 (7th Cir. 1982); see also MICHAEL ASIMOW, *ADVICE TO THE PUBLIC FROM FEDERAL ADMINISTRATIVE AGENCIES* 68 (1973) ("The present case law involving estoppel of the government presents an uninspiring picture of injustice, anachronism, and rampant confusion."); Frank C. Newman, *Should Official Advice Be Reliable?—Proposals as to Estoppel and Related Doctrines in Administrative Law*, 53 COLUM. L. REV. 374 (1953); Joshua I. Schwartz, *The Irresistible Force Meets the Immovable Object: Estoppel Remedies for an Agency's Violation of Its Own Regulations or Other Misconduct*, 44 ADMIN. L. REV. (forthcoming 1992).

34. *Heckler v. Community Health Servs.*, 467 U.S. 51, 60-61 (1984).

35. *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990).

36. *Id.* at 433-34; see also *Schweiker v. Hansen*, 450 U.S. 785, 789 (1981); *United States v. Caceres*, 440 U.S. 741, 755-56 (1979).

the subject of another essay;<sup>37</sup> here, it seems enough to point out the tension that underlies it, and to see that the non-fiscal arguments for declining judicial enforcement of written government policies depend on precisely the same assessment of the *general* benefits to citizens of having advice as Professor Anthony omits from his analysis.

### III.

A study of the publication rule problem ought to 1) consider seriously the procedural judgments apparently embedded in sections 552(a)(1) and (2); 2) try to imagine why one might make such judgments; 3) examine the different internal structures for the generation of “policy statements” and “legislative rules”; and 4) try to identify positive benefits that might result from encouraging the adoption of publication rules. The pages remaining attempt to be suggestive about these enterprises, in support of the proposition that much publication rulemaking is of high value to the public, and that the public would, on balance, be harmed if it were suppressed or if agencies were signalled that such advice, once given, could easily be disregarded. This is not to deny the value of safeguarding against agency evasion of the (costly) procedures for high-consequence rulemakings: If the costs of those procedures excessively repress desired legislative rulemaking, the proper response—as Professor McGarity suggests<sup>38</sup>—is to modify those procedures back towards the original judgments of section 553(b) and (c), not to evade altogether the procedural responsibilities of lawmaking. But the APA sharply distinguishes between those rules that are formally binding and require the use of section 553 procedures, and others that do not formally bind but nonetheless may “adversely affect” or be used “against” a party or to which a party may be “required to resort.” Why might one assign lesser procedural specification to these?

In addressing these issues, the following discussion treats only publication rules that do not purport to bind private actors in a formal sense, but that a member of the public might regard as significantly limiting what an agency may lawfully do, or what that person is free to do in practice. Of course Professor Anthony is correct that only section 553

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37. For example, the *per curiam* opinion in *Schweiker*, 450 U.S. at 785, characterized Social Security Administration Manual provisions as not binding in the course of declining to find the government estopped by its employee’s failure to comply with a manual instruction of which the applicant was unaware. “If only he had followed instructions, I would have succeeded in my claim” has a different character to it than “I knew of and relied on the agency’s published policy, its departure from which was unexplained.” Making government explain departures from established policy is a common and in general highly desirable outcome. See *Diaz-Resendez v. INS*, 960 F.2d 493 (5th Cir. 1992).

38. See McGarity, *supra* note 1, at 1443-44.

states the procedures by which agencies may adopt standards that in formal terms have legislative force and effect. If an agency attempts to accomplish that result by publication rulemaking, it is simply in error; but this is easily enough understood, and no data suggest that it is a significant problem. The publication rules for which problems worth discussing arise are those he describes as binding in practical effect—rules that announce to the public, for example, what Internal Revenue Service (IRS) agents will apply as their understanding of the depreciation rules of the tax laws and regulations; or indicate that the Federal Energy Regulatory Commission (FERC) will accept a given set of provisions for emergency allocation of natural gas, in the event of shortage, as complying with its regulations requiring that every rate-filing by a natural gas pipeline include provisions on that subject; or state in detail certain design parameters for nuclear power-generating facilities that the staff of the Nuclear Regulatory Commission (NRC) will accept as meeting safe-operating requirements of its regulations. These publication rules are not formally binding. A Tax Court proceeding may ultimately find that other depreciation approaches are permissible under the statutes and regulations; a pipeline or a customer disfavored by the suggested allocation scheme might well be able to persuade FERC in a rate proceeding that some other allocation was preferable; a license applicant to NRC can seek to prove the safety of its own design. In practice, however, these options entail risks and impose costs that many will be unwilling or even unable to accept. Many if not most people will pay their taxes quietly rather than confront the IRS; the additional cost of qualifying a design for safety outside NRC's technical guidelines could easily run in the millions of dollars. Professor Anthony's analysis puts such publication rules in jeopardy; and in my judgment, that is a questionable outcome.

#### A.

One line of approach is suggested by the hierarchy of rulemaking procedures and activities already sketched. Informal rulemaking is both a less frequent and a more highly centralized form of rulemaking than is publication rulemaking. The relationship between these two forms of activity mirrors, within the agency, the relationship between legislation and rulemaking in the larger governmental context. One can imagine a framework of ever-increasing specificity, in which increasing detail is provided by procedures of diminishing rigorousness, adopted by actors of diminishing political responsibility. At the apex lies the Constitution, substantively the least specific yet the most directly adopted by the citizenry. Legislation is more specific, adopted not by citizens directly in

any sense, but by those whom they elect as representatives for the purpose. Yet we accept that, in a complex society, the standards Congress formulates will often accomplish little more than to establish large frameworks for the resolution of issues, leaving their actual resolution in detail to agencies created for the purpose, agencies whose political accountability is secured by appointment mechanisms and the possibility of presidential and/or congressional oversight.<sup>39</sup> And the agencies in turn find that complex subjects, required procedures, and the twenty-four-hour day limit the capacities of those at the very top of the agency to deal with their responsibilities; ideally, those at the head take the most important of decisions, creating an internal framework or structure of essential judgments, and then leave the inevitable further details to be worked out by their more numerous and expert staff—subject to techniques of control and oversight far more likely to be bureaucratic and procedural than directly political.

This rather conceptual scheme captures well enough a “physical” reality in which publication rules outnumber informal rules, which in turn dwarf statutes, which in turn dwarf constitutional provisions. As a general matter, we also see more and more particular focus by the decisionmaker as we descend into the details; Congress is more the generalist than EPA, and EPA’s Administrator is in turn more the generalist than the team of engineers and others who may have been asked to produce technical guidelines on solid waste handling prior to incineration. At one level, the use of section 553 procedures may be regarded as a signalling device by which the agency identifies for the world at large which of its policy determinations are of such significance as to have commanded the attention of the agency leadership itself for final determination.<sup>40</sup>

Formally, we recognize, these variations are appropriately reflected in the varying dignity and force of the legal instruments each process creates. The Constitution is supreme law; validly adopted statutes control unless legislatively changed, and judicial supervision of their validity is extremely sparing insofar as questions of authority and policy judgment are concerned. Legislative rules have the force of statutes if validly adopted, and remain in force until changed by legislative rulemaking, but

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39. Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369 (1989); Peter L. Strauss, *Legislative Theory and the Rule of Law: Some Comments on Rubin*, 89 COLUM. L. REV. 427 (1989).

40. See *National Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689 (D.C. Cir. 1971); Todd D. Rakoff, *The Shape of the Law in the American Administrative State*, in TEL AVIV UNIV. STUDIES IN LAW (forthcoming 1992).

courts will be much more aggressive in determining the authority question respecting legislative rules than statutes. Even in the wake of *Chevron*,<sup>41</sup> courts will independently determine the extent of statutory ambiguity within which an agency is privileged to formulate "reasonable" policy; and "hard look" review of an agency's policy formulations to determine, *inter alia*, whether they are indeed reasonable is appropriately more demanding than the "any rational basis" test applied to statutes. Publication rules, unlike legislative rules, are not binding on courts although they may be entitled to substantial deference;<sup>42</sup> the agency may change them without formal procedure, or may decide to depart from them in the course of a proceeding—at least where its doing so would not prejudice a private party who may have relied upon them.<sup>43</sup>

One possible way to imagine publication rules, then, is as a means for supplying additional detail unreasonable to expect at the level of the agency head, and in a form sufficiently flexible to permit relatively fast and easy change. If one were to take this perspective, the publication rule problem would become analogous to the delegation problem as it is conventionally expressed: Do (statutes and) legislative rules provide sufficient detail to persuade us that the agency head has done as much as it is reasonable to ask it to do, considering competing tasks, available resources, the public's interest in resolution, and the like? Seeing the issue as one of "filling in the details" responds to the same impulse as Professor Anthony's too-easy distinction between interpretive rules and general statements of policy,<sup>44</sup> but in my judgment his formulation improperly limits the publication rule format to interpretive activities as a lawyer might understand them. Absent that artificial limitation, the issue at root would be whether sufficient constraint embraces the decision made to permit us some comfort with the "law-full-ness" of the decision—that we could say if it were wrong, or if it were a usurpation of authority properly placed elsewhere on the political grid. It is hard to see how it could matter, in this context, whether what was being done was to give detailed content to a word, or to elaborate the physical showings that would be regarded as meeting a test stated in general terms. A publication rule could explain in detail what the Federal Reserve Board regards

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41. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

42. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *Pacific Gas & Elec. Co. v. Federal Power Comm'n.*, 506 F.2d 33 (D.C. Cir. 1974).

43. See *infra* text accompanying notes 56-57.

44. Distinguishing between "interpretation" and "lawmaking" can have the qualities of a shell game; authorized interpretation frequently supplies judgments no one would pretend the enacting body considered (*Chevron*, 467 U.S. at 837, is a prime example). Why that is not "making law" is impossible to explain. Neither § 552 nor § 553 draws the distinction Professor Anthony proposes, that permits interpretations to have a bite that policies are denied.



as a “bank,” or it could lay out in some detail the physical parameters of an airplane part that will be regarded by the staff of FAA as meeting a rule’s specification for resistance to metal fatigue. Calling one “interpretation” and the other “policymaking” does not change the relation of the two to the framework of statutes and regulations within which they occur.

The courts have confessed their inability to generate an administrable standard to distinguish, in general, proper from excessive delegations.<sup>45</sup> Could they any better define a test for what degree of legislative rulemaking by the agency head is sufficient then to permit their staffs to “fill in the details” by publication rulemaking, subject only to such corrections as may come retrospectively through petitions for rulemaking, consideration of such issues as may eventually arise in adjudications, or the like?

Putting the issue this way draws our attention to the proposition that relief from the impact of publication rules usually *will* be after-the-fact in character—securable, if at all, only through a rather long and burdensome course of proceedings that most persons subject to such rules would prefer to avoid. Consequently, “binding in practical effect” will be an arguable characterization for a publication rule in most, if not all, cases. If I go to the Post Office to mail a package, and the clerk, after consulting his manual, concludes that it meets the publication rule explanation of the “damaged packages” that he is required by legislative rule to refuse acceptance to the mails, that will usually be the end of it. We cannot imagine that the Post Office must permit its clerk to exercise discretion in every case, treating the manual provision merely as guidance; nor do we think it must supply me with access to an adjudicatory hearing in which I can contend that my package in fact meets the requirements of the legislative rule regarding “damaged packages.”<sup>46</sup> If I mail a lot of packages and frequently meet this inconvenience, I ought to (and do) have the opportunity to petition the agency to consider the matter, but hardly with assurance of effective future relief, and in any event with no

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45. See *Mistretta v. United States*, 488 U.S. 361 (1989).

46. The example just given seems useful for its accessibility; the United States Postal Service is no longer an administrative agency in the usual sense. See *Silver v. United States Postal Serv.*, 951 F.2d 1033 (9th Cir. 1991).

prospect of relief for this current mailing.<sup>47</sup> The question is whether legislative rules can sufficiently define "damaged packages"; or must informal rulemaking procedures, with involvement of the agency's head, also be used to "fill in the details" for the guidance of operational staff.

One could argue that little reason exists to think this issue any more tractable at the agency level than it has been for courts considering the issue of delegation. Yet the political stakes for courts in this question are not nearly what they are in the "delegation" context. Invocation of the delegation doctrine places them in confrontation with a coordinate branch of government, which they appear to be accusing of failing to do its work properly. No similar inhibitions would impede a judicial effort to encourage agencies to achieve what Colin Diver once described as "the optimal precision of administrative rules."<sup>48</sup> Just because the burdens imposed by the *tertium quid* procedures generate risks of evasion, one might think the effort worthwhile. Although it would suffer the hazards that generally attend the use of "standards" rather than "rules,"<sup>49</sup> judicial inquiry into the sufficiency of agency legislative rule guidance for publication rule activity would answer directly the recently expressed concerns about agency evasion of the obligation to make *some* legislative rules, without threatening to deny the continued utility of publication rules. Professor Anthony's proposed inquiry into whether such rules are binding in practice, would, in my judgment, almost certainly deny that utility, because publication rules so often are. The difficulties would be compounded by his apparent insistence that, to avoid the characterization as "binding in effect," an agency must both announce a publication rule's tentative character and provide a procedural opportunity to seek an alternative regime before the publication rule is applied.

## B.

Why would we prefer having publication rules to not having them? It seems appropriate to put the question this way, given the relative frequency of legislative and publication rulemaking<sup>50</sup> and the limits on the agency's resources at the top, where legislative rules are at least nominally made. Especially in the technically complex, procedurally larded

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47. 5 U.S.C. § 553(e). My opportunities to control the agency's judgment on the petition are sharply limited. See *American Horse Protection Ass'n v. Lyng*, 812 F.2d 1 (D.C. Cir. 1987); *WWHT, Inc. v. FCC*, 656 F.2d 807 (D.C. Cir. 1981).

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

49. See *Morrison v. Olson*, 487 U.S. 654, 697-733 (1988) (Scalia, J., dissenting); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 *CORNELL L. REV.* 488, 526 (1987).

50. See *supra* p. 1468.

world of the *tertium quid*, it would be unreasonable to expect that any significant portion of today's publication rules would appear if notice-and-comment rulemaking were required for their adoption. It may be useful here to recall Professor Hamilton's findings that the heightened procedural requirements for formal rulemaking had virtually eliminated the use of that modality, leading agencies to abandon programs, employ evasions, or attempt to achieve their ends by negotiated compromise: "In practice . . . the principal effect of imposing rulemaking on a record has often been the dilution of the regulatory process rather than the protection of persons from arbitrary action."<sup>51</sup> Apart from situations in which the agency is unable to act until it has completed some rulemaking (an unusual situation,<sup>52</sup> the practical outcome of which may be that it is unable to act), costly procedural requirements may encourage or even force the agency to act without rules.

Framing the issue in this manner quickly focuses our attention on the shaping and informing character of publication rulemaking. 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. Professor Anthony sees in a potential *complainant* about the policy judgments entailed in NRC's technical specifications for nuclear power plants, a party bound in practical effect by those guidelines; an applicant that wanted to strike its own course of attempted compliance with NRC's legislative regulations on safety in designing its plant, rather than follow the technical guides, would have to pay millions more to be able to convince the agency's staff of the wisdom and acceptability of its preferred alternative. But if the legislative regulations minus the technical specifications would be adequate to satisfy any obligation NRC has to "make law" on the subject of safety, should we not instead characterize the effect of the specifications as permitting most applicants to save millions they would otherwise have been required to spend in justifying the issuance of the licenses they seek? From the perspective of an applicant whose chief interest is to build a plant that will meet NRC standards, receiving such guidance from the agency where possible is strongly preferable to being left to speculate about the details of agency policies and to pay for case-by-case demonstration that it has met those policies' demands. The NRC *may* leave these issues to determination first in negotiations with uninstructed staff and then in the adjudicatory licensing proceedings in which the applicant

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51. Hamilton, *supra* note 2, at 1312-13.

52. Compare *Morton v. Ruiz*, 415 U.S. 199 (1974) (agency failure to make sufficient law prior to action, the unusual case) with *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974) (agency free to choose between prior rulemaking and adjudication in making policy, the more usual case).

bears the burden of showing that its design will satisfy safety requirements. Do we wish to encourage it to do so?

Permitting the discretion left open by its legislative rulemakings to be structured by publication rulemaking is valuable to the NRC (or to the FERC or to the FAA) and to the general public, as well as to the private parties most directly concerned. Case-by-case adjudication is inefficient for NRC too; it threatens not only expense but also undesirable variation in individual cases—and particularly so in the staff negotiations that will inevitably set the table for any formal proceeding. 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. These instructions need not be from the top in any formal sense, and usually are not. In any moderately complex bureaucratic structure, policy formulation of this character is made the responsibility of what may be a fair number of relatively small offices, each staffed by experts in a particular field of action. What is often a much larger body of operatives apply these policies to particular cases. Because the policies are set for them, the operatives need not aspire to expertise. If the policies were not there, and these operatives were required to act on the basis of their own knowledge and judgment, agency staffing would be a much more complex matter; even if it could be successful, substantial variation would be expected. Finally, with such policies in place, the agency head needs only to watch for signals of distress about them, not to reach an unending series of discretionary judgments; as a result, its task of control and its possibilities of effective conversation with its staff are considerably enhanced.

Putting the matter this way also suggests the high stakes for the public, including the regulated public, in encouraging the adoption of publication rules. The usual interface between a member of the public and an agency does not involve the agency head, but a relatively low-level member of staff; earlier we used the example of the postal clerk,<sup>53</sup> but the welfare worker, the District Forester, the IRS examiner, the Food and Drug Administration (FDA) inspector, or the application desk officer each suggest the same result—responsibility for initial processing of the public's business. Absent, again, some basis for a judgment that the agency's body of legislative rules are inadequate in themselves to permit the agency to function, the choice the public faces is between having the clerk apply his own interpretation of the agency's legislative rules, or

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53. See *supra* text accompanying note 46.

having his decisions and actions further controlled by the agency's publication rules. As any reader who has faced an audit will likely attest, bureaucratic rationality is a major protection for the public having to deal with a bureaucracy, as well as an occasional annoyance. While recognizing the irritations, the affected public (especially the repeat players among them) will almost certainly prefer a state of affairs in which such instructions are publicly given and may be relied upon—that is, the lower-level bureaucrats are to follow them, and higher levels are to depart from them only with an explanation. Such instructions may not “bind” a member of the public (although like agency caselaw they may affect or be cited against the public); binding agency staff is their very rationale.<sup>54</sup>

A difficulty, of course, is that these satisfied consumers of publication rules tend not to appear in court, and the valuable functions publication rules perform, especially in constraining the behavior of agency operatives, consequently appear in court opinions only as asides. Consider, for example, the following excerpt from *Community Nutrition Institute v. Young*,<sup>55</sup> one of the D.C. Circuit opinions underlying Professor Anthony's analysis:

We recognize that [written guidelines agencies develop to aid their exercise of discretion] have the not inconsiderable benefits of apprising the regulated community of the agency's intentions as well as informing the exercise of discretion by agents and officers in the field. It is beyond question that many such statements are non-binding in nature and would thus be characterized by a court as interpretative rules or policy statements. We are persuaded that courts will appropriately reach an opposite conclusion only where, as here, the *agency* itself has given its rules substantive effect.<sup>56</sup>

The guideline in question indicated that FDA would bring no enforcement action for the sale of corn contaminated by aflatoxin, an unavoidable natural poison, unless it exceeded an “action level” of twenty parts per billion. The substantive effect given the rule was precisely (and only) that the agency regarded itself as bound. While FDA conceded and the court agreed that

FDA would be obliged to prove that the corn is “adulterated,” within the meaning of the FDC [Food, Drug, and Cosmetic] Act, rather than merely prove non-compliance with the action level . . . FDA has bound itself. As FDA conceded at oral argument, it would be daunting indeed to try to convince a court that the agency could appropriately

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54. See *supra* text accompanying notes 33-37.

55. 818 F.2d 943 (D.C. Cir. 1987).

56. *Id.* at 949.

prosecute a producer for shipping corn with less than 20 ppb aflatoxin.<sup>57</sup>

Why would one choose to prevent the agency from binding itself in this fashion? The suit was brought not by corn merchants but by persons interested in nutritional values whose purpose was either to characterize the agency's substantive policy as arbitrary or to defeat the effective setting of a tolerance level. Initially, they had succeeded in the D.C. Circuit on the ground—for which much support existed in statutory language—that the Food, Drug, and Cosmetic Act forced FDA to set tolerance levels by formal rulemaking if it set them at all.<sup>58</sup> That judgment was overturned 8-1 in the Supreme Court, a resounding if not necessarily convincing defeat, and the case was sent back to the D.C. Circuit on the premise that the Act did not force FDA to act by legislative rule.<sup>59</sup> On remand the court considered two issues—the one under discussion, and also the question whether it could review a particular decision FDA had made not to challenge the sale of corn that had been blended into compliance with its action level by mixing corn with excessive aflatoxin and corn that was well below threshold levels. The latter issue, the court concluded, was unreviewable as an exercise of enforcement discretion.<sup>60</sup> Similarly, each individual decision not to proceed against a corn merchant for selling corn with some, but less than 20 ppb, aflatoxin, would be unreviewable; so also if the practice “became known”; giving published instructions to its enforcement agents and promising that they will be respected, however, is the point beyond which the agency cannot go.

In holding that FDA must use “notice-and-comment procedures in promulgating” action levels,<sup>61</sup> the D.C. Circuit might be thought to have found a halfway house between the requirement to employ formal rulemaking it had previously discovered in the Food, Drug, and Cosmetic Act and the *carte blanche* the Supreme Court appeared to have given FDA. More generally, perhaps the judges were playing out the implications of public interest representation approaches to issues of administrative law. That is, the difficulty with permitting FDA to give self-binding signals about its enforcement policy rather than requiring notice-and-comment rulemaking might be thought to be that, if those signals are unreasonable, consumers who may be harmed by them will have little if any opportunity to test that exercise of discretion in court. Requiring

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57. *Id.* at 948 (citations omitted).

58. *Community Nutrition Inst. v. Young*, 757 F.2d 354, 357-58 (D.C. Cir. 1985).

59. *Young v. Community Nutrition Inst.*, 476 U.S. 974, 979-81 (1986).

60. *Community Nutrition*, 818 F.2d at 950 (citing *Heckler v. Chaney*, 470 U.S. 821 (1985)).

61. *Id.* at 949.

rulemaking, even if the agency intends to bind only its staff, it would be argued, assures these interest groups a procedural platform (the rulemaking proceedings) from which to make their viewpoints heard; and the absence of *assurance* about non-prosecution to regulated interests unless rulemaking is undertaken is a sort of *quid pro quo* for the difficulties the consumer groups then face in getting their interests heard. Such an explanation is suggested by the court's citation to an opinion in which such concerns were explicit.<sup>62</sup>

The other side of this way of looking at matters, however, is that agencies may not only be discouraged from giving guidance,<sup>63</sup> but worse, may be encouraged to put such guidance as they do give in a form that cannily reserves the possibilities for future lawlessness. Consider the EPA boilerplate that Professor Anthony quotes shortly after his discussion of these cases, properly identifying it as a lawyer's rational response to them:

NOTICE: The policies set out in this [document] . . . are intended solely as guidance. They are not intended, nor can they be relied upon, to create any rights enforceable by any party in litigation with the United States. EPA officials may decide to follow the guidance . . . or to act at variance with [it] . . . . The Agency also reserves the right to change this guidance at any time without public notice.<sup>64</sup>

The best face one can put on such a notice is that it is a charade, intended to keep the proceduralizing courts at bay while the affected parties are given to understand that it is these threats of vacillation rather than the announced policies that stand empty. Although the public interest representation argument is not without force, it entails a difficult balance of advantage and cost, even disregarding these incentives to official lawlessness. When the specific language of section 552(a) and the general advantages of encouraging government regularity in accordance with published guidelines are put in the balance, they strongly suggest that cases like *Community Nutrition* are taking the D.C. Circuit in just the wrong direction.<sup>65</sup>

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62. *Id.* at 948 (citing *Nader v. Civil Aeronautics Bd.*, 657 F.2d 453 (D.C. Cir. 1981)); see also *supra* note 7.

63. See the superb discussion of the *Community Nutrition* case in Richard M. Thomas, *Prosecutorial Discretion and Agency Self-Regulation*, 44 ADMIN. L. REV. 131 (1992).

64. Anthony, *supra* note 1, at 1361.

65. See Thomas, *supra* note 63, at 155:

In short, under those cases following the reasoning of *CNI II*, the more unstructured, variable and undisciplined the agency's prosecutorial approach, the more shielded an agency's prosecutorial discretion will be from public participation and, ultimately, judicial review. But, if regularity of agency enforcement action, centralized control of agency personnel, and imposition of public, agency-wide policy are desired—and they *are* desired by most critics of unchanneled agency discretion—then a rule that essentially penalizes an





proportion of letters signed by the Administrator, unless plainly marked as tentative, were "final agency action" ripe for APA review.<sup>69</sup>

The court's conclusion carried with it no consequences for internal agency procedures—merely the fact of reviewability. Even so, the court was careful to assure itself that the advising function would not be interfered with. As an earlier panel had concluded in resisting review of an interpretive ruling of the FDA, it insisted upon avoiding an outcome that might "discourage the practice of giving . . . opinions, with a net loss of far greater proportions to the average citizen than any possible gain which could accrue."<sup>70</sup> The court continued, "advisory opinions should, to the greatest extent possible, be available to the public as a matter of routine; it would be unfortunate if the prospect of judicial review were to make an agency reluctant to give them."<sup>71</sup> The conclusion about reviewability reflects, in effect, an assessment of the force of the agency's precedent; the ruling signed by the Administrator is, like the interpretive rule published in the *Federal Register*, one whose practical impact may warrant present review.

Judge Leventhal's care counsels severe caution about Professor Anthony's proposal. The inhibition attributable to the possibility of judicial review, while real, will be considerably less than that attributable to a requirement of rulemaking—and this would be so even if barebones section 553 procedures were required, much less the heightened procedures of the *tertium quid*. Review of a publication rule threatens possible delay and the costs of going to court *only if it occurs*—an event necessarily less frequent than publication rulemaking itself would be, and one that will produce reversal only if the advice appealed from was wrong on the merits. Requiring internal procedures as the cost of giving advice or creating structure is a cost imposed *in every case*; and reversal will be automatic if proper procedures were not followed. Careful attention needs to be paid to the costs of "mak[ing] an agency reluctant to give [such notice of its views]."<sup>72</sup>

#### IV.

This essay is itself a tentative opinion; invited as a comment and written in consequent haste, it cannot pretend to the grounding in research that underlie the essays Professors Anthony and McGarity have

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69. *See id.* at 697.

70. *Id.* at 699 (citing *Helco Prods. Co. v. McNutt*, 137 F.2d 681, 684 (D.C. Cir. 1943)).

71. *Id.* at 699-700.

72. *Id.* at 700. For a cogent account of these costs in one state where Professor Anthony's proposals were statutorily adopted, see Michael Asimow, *California Underground Regulations*, 44 ADMIN. L. REV. 43 (1992).

written.<sup>73</sup> It does not attempt to say how to tell an interpretive rule from a legislative rule—rather, just to indicate that the stakes seem both higher than and different from those that the cases and Professor Anthony have generally discussed, and that a “binding in practical effect” approach will sweep with undesirable breadth.<sup>74</sup> It will have succeeded if it promotes thought about the benefits of receiving advice, and the costs of inhibiting that by proceduralisms—thought that at the moment seems to me missing from the analysis. The courts seem to be seeing particular “trees,” individuals who have complaints about the impact on them of advice they do not like. They seem not to be seeing the general advantages of receiving advice, the benefits of bureaucratic regularity, and the ways in which their approach may undercut both.

Undoubtedly, it is desirable for agencies to engage in consultation as they develop important interpretations—advice repeatedly given, for example, by the Administrative Conference of the United States<sup>75</sup>—and indications are that this is often done. Consultation can be helpful to an agency that may wish its advice to be well informed, respected, and understood. But perhaps no *Federal Register* notice appears, or in some other ways a shortcut is taken past the usual regimes of section 553 or the *tertium quid*.<sup>76</sup> Imposing the procedural requirement in the latter terms will have consequences beyond promoting good practice. Undoubtedly too, cases will remain in which courts will conclude that legislative rulemaking is required for work that an agency is trying to accomplish by publication rules. The Supreme Court’s enigmatic decision in *Morton v. Ruiz*<sup>77</sup> may be an example of a case in which the agency

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73. Such research does underlie Thomas, *supra* note 63, and Asimow, *supra* note 72.

74. The Administrative Conference of the United States recently adopted two recommendations that bear on my debate with Professor Anthony—Recommendations 92-1 and 92-2. Recommendation 92-2 is reprinted as an appendix to Professor Anthony’s Article in this issue of the *Duke Law Journal*. Focusing on the references to “independent basis” in note 3 and Part III of Recommendation 92-2, I would argue that I won; but Professor Anthony might claim he did. What is clear is that the Recommendation applies to the situations Professor Anthony and I agree about—where the agency tries to treat its policy as an *independent* source of obligation. His wish to extend the rule to “practical effect”—our disagreement—was in my judgment rejected.

75. *E.g.*, Administrative Conference of the United States, Recommendation No. 92-1, The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements (to be codified at 1 C.F.R. § 305.92-1); Administrative Conference of the United States, Recommendation No. 92-2, Agency Policy Statements (to be codified at 1 C.F.R. § 305.92-2); Administrative Conference of the United States, Recommendation No. 76-5, Interpretive Rules of General Applicability and Statements of General Policy, 1 C.F.R. § 305.76-5 (1992).

76. This was the procedural posture of the *Community Nutrition* case, discussed *supra* text accompanying notes 55-62.

77. 415 U.S. 199 (1974); see WALTER GELLHORN ET AL., ADMINISTRATIVE LAW 312-14 (8th ed. 1987); Ralph F. Fuchs, *Development and Diversification in Administrative Rulemaking*, 72 NW. U. L. REV. 83, 101-02 (1977).

had not sufficiently employed legislative rulemaking to permit the use of publication rules; or it may reflect, more simply, a failure of adequate publication of what might have been a proper publication rule (a manual provision embodying the challenged interpretation). In my judgment, however, its most important thrust lies in its insistence that *ad hoc* decisionmaking by low-level bureaucrats must be avoided. The regrettable and perverse impact of strongly discouraging publication rulemaking would be sharply to diminish the effective resources available to control the exercise of low-level discretion.