2001

Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element

Peter L. Strauss
Columbia Law School, strauss@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship

Part of the Administrative Law Commons, Law and Economics Commons, and the Public Law and Legal Theory Commons

Recommended Citation

This Working Paper is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact donnelly@law.columbia.edu.
Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element

Peter L. Strauss
Columbia University
School of Law

March 1, 2001

This paper can be downloaded without charge from the Social Science Research Network electronic library at: http://papers.ssrn.com/paper.taf?abstract_id=262023

An index to the working papers in the Columbia Law School Working Paper Series is located at: http://www.law.columbia.edu/lawec/
Imagine a visitor who seeks to catalog the variety of written texts American government uses to communicate its powers and its citizens’ rights and obligations. She might organize those texts into the following pyramid:

A Constitution, adopted by “the people”

Hundreds of statutes, adopted by an elected Congress

Thousands of regulations, adopted by politically responsible executive officials

Tens of thousands of interpretations and other guidance documents, issued by responsible bureaus

Countless advice letters, press releases, and other statements of understanding, generated by individual bureaucrats

On inquiry she would find that we understand passably well the ordering and influence of the top three layers of this structure. Our legal system treats each of them as binding text, subject only to the requirements that it be authorized by the superior authority and appropriately adopted follow-
ing designated procedures; if valid, each of them has legislative effect on government and citizen alike, until displaced by another text validly adopted at the same or a higher level. She would find, too, that the innumerable items at the base of this pyramid, while often in fact influential on private conduct, are denied any formal jural effect. It is at the fourth level that she would find confusion – confusion whether these “publication rules,” as we will call them for reasons that will presently appear, are legitimate instruments of agency policy or a ruse to evade the higher procedural obligations associated with adopting regulations; confusion whether an agency may give them any jural effect and, if so, to what degree; and confusion whether and to what extent they must be respected by the courts.

This article seeks to explicate these publication rules – interpretative rules, statements of general policy, staff manuals, and the like – as an important element in the hierarchy of agency law. Publication rules, undoubtedly rules within the meaning of the Administrative Procedure Act,¹ are generally adopted at staff levels within an agency to guide both staff conduct and public knowledge, without following the notice and comment procedures of Section 553 of that act.² If they have been published, however, Section 552(a)(1) and (2)³ permit agencies to rely upon them in their dealings with the public. Publication rules would include the advice the Internal Revenue

---

¹ 5 U.S.C. 551.

² 5 U.S.C. 553. Staff offices preparing publication rules frequently do tell those likely to be affected that they are doing so, and provide an opportunity for exchange, but not within the formal structures of Section 553. See n. 108 within

³ 5 U.S.C. 552(a)(1) and (2).
publishes telling the public how it interprets IRS statutes and regulations; regulatory guidance from the Food and Drug Administration or the Federal Aviation Administration, spelling out in detail for manufacturers subject to their regulation courses of action the agency’s staff has decided it will accept as establishing compliance with FDA or FAA regulatory requirements; and manuals the Occupational Safety and Health Administration issues to its inspectors, instructing them how to perform inspections and how they should respond to particular conditions they may find – by seeking a fine, by asking for correction, and so forth.

These rules are common and generally salutary forms of informal agency action, in use well before the Administrative Procedure Act was enacted in 1946, and their volume greatly exceeds that of notice-and-comment regulation. [This article uses the word “rule” to connote any action meeting APA Section 551's definition of “rule,” and the word “regulation” to signify a rule that is adopted following Section 553's notice and comment procedures, that must be published in the Federal Register and that, if valid, has the effect of a statute on all actors.] To take just one example, consider the facts revealed by National Automatic Laundry and Cleaning Council v. Shultz, written three decades ago by Judge Harold Leventhal of the D.C. Circuit. He learned that the Department of Labor’s Wage and Hour Administration annually responded to 750,000 requests for advice about the interpretation and application of the Fair Labor Standards Act; 10,000

---


5 443 F.2d 689 (D.C. Cir. 1971).
of these responses were signed by the Administrator herself, and the rest by staff. These advisory letters were interpretative rules, he concluded; the question he had to decide was whether the letter before him was “final agency action” ripe for review.6

When the author of this article was General Counsel of the Nuclear Regulatory Commission in 1975-77 – the years, readers may recognize, just preceding the Supreme Court’s decision in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.7 – any regulation the Commission adopted was considered, often in detail, by the five Commissioners themselves. These Commission regulations generally set performance standards for nuclear safety, as even then was thought preferable, rather than specify the details of design – a difference often identified in the literature as that between having “standards” and having “rules.” The bulk of the work for one of the Commission’s five bureaus was continually to generate guidance for license applicants and others about technical design issues raised by these regulatory standards. It issued this guidance in a volume dwarfing the regulations; and these guidance instruments, which the Commission expected to be the product of informal consultation by responsible staff with affected parties, were supervised by the Commission in only a general way. Another Bureau, in charge of inspections and enforcement, produced copious guidance for the Commission’s inspectors. Both sorts of guidance, understandably, were earnestly sought out by those the Commission regulated and greatly influenced their conduct; from an internal perspective they also contributed to the disci-

---

6 See text infra at p. 24 et seq.

pline of staff action, its predictability and regularity. Similar practices and proportions, in re-
response to similar levels of public demand for guidance and central agency interest in controlling a 
far-flung staff, can be found at many if not all regulatory agencies. The result is an enormous 
output of publication rules, far greater than the pages of the Federal Register, and (in proportional 
terms) rarely challenged in litigation.

The provisions of the Administrative Procedure Act appear straightforwardly to acknowledge 
the existence of publication rules, and provide minimal procedures to govern their adoption. 
Section 553, which defines notice and comment procedures for regulations, has from the begin-
ing excepted from those procedures “interpretative rules, general statements of policy, or rules 
of agency organization, procedure, or practice.”8 Since the Freedom of Information Act was first 
enacted in 1966, Section 552(a)(2) has provided that “a final order, opinion, statement of policy, 
interpretation, or staff manual or instruction that affects a member of the public may be relied 
upon, used, or cited as precedent by an agency against a party other than an agency only if” it has 
been published and indexed as the statute provides, or the party has had actual and timely notice 
of it. The Congress that enacted this language was aware of the importance of publication rule 
practice, and chose only the requirement of publication as its legislative response; putting an end 
to secret law, not additional proceduralization, was its aim.9


9 ... [S]ubsection (b) of S. 1160 would require agencies to make available statements of policy, 
interpretations, staff manuals, and instructions that affect any member of the public. This material is the 
end product of Federal administration. It has the force and effect of law in most cases, yet under the
Just as the D.C. Circuit encrusted notice and comment rulemaking procedures with judicial “innovations” before the Vermont Yankee opinion emphasized its obligation to respect the decisions made by Section 553, in recent years that court – seeing only those cases citizens have cared to litigate about – has repeatedly required increasing formalization of publication rulemaking, and done so without any attention to the provisions of Section 552(a). Cases in that circuit now require the use of notice and comment rulemaking to set enforcement policy, if knowledge of that policy might be expected inevitably to shape private conduct. Other cases reason that once an agency has used a publication rule to interpret its regulations, any further, differing interpretation may be adopted only by the use of notice-and-comment rulemaking; and the most recent of these cases gives this formality-triggering characteristic to action that had been taken by staff in one

H.Rep. 89-1497, reprinted in West CCAN, 89th Cong. 2d Sess. at 2418, 2424-25 (1966). No controversy appears respecting the language of the Senate bill, which had previously been adopted by the Senate and was adopted without amendment by the House.

distant region, with the consequence of forbidding the agency's central administration from ever itself issuing an interpretive rule. Yet another case appears to go out of its way to denounce the practice of using publication rules, as if such rules were characteristic of lawless agency maneuvering.

It is not hard to find considerations supporting the outcomes of these decisions. Private parties may have acted in reliance on an understanding about the state of the law, which a publication rule subsequently undercut. The notorious ossification of notice-and-comment rulemaking in recent years, a response to the minority of regulations having major economic impact, has greatly increased the cost of notice-and-comment rulemaking at the same time as agencies have experienced increasing stringency in the resources available to them. The more costly it becomes to generate regulations, and the fewer resources agencies have available to pay those costs, the greater will be the temptation to find other means to generate policy – shortcutting a desirable, even necessary public process. The contested cases sometimes appear to result from clumsy lawyering or overreaching claims in court on agencies’ part. If an agency has instructed its in-

---


12 Appalachian Power Co. v. EPA, 208 F.3d 1015 (DC Cir. 2000). See n. 64 within.

13 Concrete measures of the phenomenon are hard to come by, though claims that the temptation is being yielded to are frequent. See, e.g., n. 64 within. For one thoughtful effort at measurement, see Todd Rakoff, n. 33 within, 52 Admin.L.Rev. at 168.
spectors to file complaints when they find certain precise factual conditions that agency higher-ups have concluded signal a violation of a standard embodied in its regulations, inspectors may carelessly allege the existence of the factual conditions, rather than a violation of the standard, as the basis on which they seek a fine. The proliferation of rules seeming to require courts to accept agency interpretations as binding upon them may encourage agency lawyers to claim more deferential ground for their client when these interpretations are challenged in court than they wisely should.

Without wishing to deny that these forces are at work, this paper draws its orientation from the explicit provisions of the APA, and from the proposition that the precedential force it permits interpretive and policy documents is grounded in sound policy considerations. Agency administration is aided when central officials can advise responsible bureaucrats how they should apply agency law. Citizens are better off if they can know about these instructions and rely on agency positions, with the assurance of equal treatment such central advice permits, than if they are remitted to the discretion of local agents and to “secret law.” Particularly in a society that has come to believe standards are a better instrument of regulation than detailed command-and-control rules, even an ideal level of rulemaking will generate an enormous range of issues on which interpretation and policy will be required. These are the predominant occasions for publication rulemaking, and the resulting publication rules very rarely reach the courts.

In discouraging their use or making it more expensive, the judicial responses threaten impor-
tant sources of information for citizens and important encouragements to agency regularity and 
even-handedness. As the House Committee remarked on reporting what is now §552(a)(2) to the 
floor,

... This material is the end product of Federal administration. It has the force and effect of 
law in most cases ... embodied in thousands of orders, opinions, statements, and instruc-
tions issued by hundreds of agencies. ... Subsection (b) would help bring order out of the 
confusion of agency orders, opinions, policy statements, interpretations, manuals, and in-
structions by requiring each agency to maintain for public inspection an index of all the 
documents having precedential significance ... ... [A]s an incentive to establish an effect-
tive indexing system, ... no agency action may be relied upon, used, or cited as a precedent 
against a private party unless it is indexed or unless the private party has adequate notice 
of the terms of the agency order.14

Changed approaches, moreover, are particularly likely after the inauguration of a new President, 
who will believe he has won a mandate to use executive power in a manner different from his 
predecessor. Unless the prior interpretations were put in place by regulation,15 characterizing 
these changes as lawless maneuvering begs important questions about what a change in adminis-
tration means; it seems at least contestable whether if President Clinton’s was the first administra-
tion informally to interpret an agency regulation, that fact condemns President George W. Bush’s 
and all succeeding administrations to do their interpreting by notice-and-comment rulemaking. 
These are the premises on which this paper proceeds.

This topic is hard to write about. This is, in part, because so many relationships are involved:


15 See National Family Planning, n.11 above.
the legislature, the courts, an agency, within the agency its various staff offices, and citizens subject to agency action. Within each of these relationships lie possibilities both of control and of influence, that we must explore. Difficulties also arise out of doctrinal considerations: issues of reviewability—finality and ripeness—need to be kept distinct from questions about required procedure, and these in turn differ from the issue what standards of review are appropriate. Within the framework of the standard of review question lurk issues about whether executive decisions respecting enforcement are reviewable at all,\(^{16}\) knotty problems of government estoppel and agency non-acquiescence, the application and meaning of the Supreme Court’s protem decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,\(^ {17}\) the Court’s recent revival of attention to *Skidmore v. Swift & Co.*\(^ {18}\) in *Christensen v. Harris County*,\(^ {19}\) the *Chevron-*analogs for reviewing agency interpretations of regulations, *Bowles v. Seminole Rock & Sand Co.*,\(^ {20}\) and *Stinson v. United States*,\(^ {21}\) and the Court’s usual insistence, respecting statutes, that once it has spoken on an interpretive question, the result can be changed only by statute.\(^ {22}\)

The analytic tools commentators employ can also be misleading. The anthropomorphic ten-

\(^{18}\) 323 U.S. 134 (1944).
\(^{19}\) ___ U.S. ___ (2000).
\(^{20}\) 325 U.S. 410 (1945).
In a widely publicized recent brouhaha, an OSHA official responded by letter (two years late) to an inquiry whether employers would be responsible for dangerous conditions in workers’ homes, if they had their employees work at home. He indicated a view that they would. Subsequently this letter was made generally available by posting on the OSHA web site. It was found there by another employer, who caused an eruption of congressional and public criticism that led to the withdrawal of the letter, and its eventual replacement by the opposite interpretation, now with the imprimatur of not only OSHA’s Administrator but also the Secretary of the Department of Labor.

From a certain perspective, this is a success story about the use of publication rules. It would be unreasonable to think the first moves acts of “the agency” in a strongly descriptive sense. The subsequent developments indicated both the availability of internal review and its effectiveness in a case of significant controversy. That the agency was willing to provide advice, that advice to individuals constituted a step distinct from advice to the public at large, and that advice to the public could be taken up the chain of command for effective review, all seem highly desirable features. Worlds without advice, or without distinctions as to the seriousness and breadth with which it is offered, or without internal checks on its accuracy, would seem quite a bit less desirable.

23 In a widely publicized recent brouhaha, an OSHA official responded by letter (two years late) to an inquiry whether employers would be responsible for dangerous conditions in workers’ homes, if they had their employees work at home. He indicated a view that they would. Subsequently this letter was made generally available by posting on the OSHA web site. It was found there by another employer, who caused an eruption of congressional and public criticism that led to the withdrawal of the letter, and its eventual replacement by the opposite interpretation, now with the imprimatur of not only OSHA’s Administrator but also the Secretary of the Department of Labor.
sion between the Supreme Court and that court, as both have

“struggled to balance some measure of restraint and accountability with efficiency in defining the proper power and scope of agency rulemaking. ... [T]he Supreme Court has increasingly moved towards a more ‘hands off’ approach, trusting the political process to ensure agency fairness, the D.C. Circuit has maintained a much more skeptical stance toward agency discretion.”

Almost a quarter century ago, the Supreme Court spoke to that tension in *Vermont Yankee*, forbidding that court from overriding the procedural instructions of the APA’s specification of notice-and-comment procedure for rulemaking. If we could imagine a similar outcome grounded in the APA’s express recognition that agencies are permitted to rely upon their publication rules, what might that instruction look like? The pages following suggest the following as a set of principles whose observance could avoid what is now a considerable threat to one of the major protections administrative law offers against arbitrary government:

Section 552 permits agencies to give publication rules precedential effect, reflecting the values both of effective supervision of the bureaucracy and of providing reliable notice to the public of agency policies and understandings.

Centrally generated publication rules likely significantly to affect private conduct are ordinarily ‘final agency action’ subject, if ripe, to judicial review.

In reviewing a publication rule, courts need give only *Skidmore* deference to an agency’s determination that its existing statutes and regulations authorize that rule.

In making the determination whether an agency’s existing statutes and regulations authorize a publication rule, a court may consider whether the agency’s regulations fail to articulate important policy conclusions it could reasonably have been expected to reach. Any

24 Connolly, n. 11 above, citing to the same effect Thomas, n.10 above.
conclusion that an agency’s regulations are insufficiently specific in some particular, however, must be made in the context of the agency’s array of statutes and regulations as a whole, and the predictable importance of that particular to the agency and those it regulates in the context of its general responsibilities.

Agencies may freely revise publication rules, subject to the usual constraint of having to justify changes in policy.

I. A Framing Case: Hoctor v. Department of Agriculture

The relatively simple facts of Hoctor v. US Department of Agriculture can help to frame the discussion. Hoctor had a game farm near Terre Haute Indiana, where he raised lions, tigers, and other big cats. The Animal Welfare Act of 1966 required the licensing of his operations by the Department of Agriculture. That Act authorized the Secretary "to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of [the Act]." standards "to govern the humane handling, care, treatment, and transportation of animals by dealers." These standards must include minimum requirements "for handling, housing, feeding, watering, sanitation," etc. The Department has adopted many regulations over the years – sometimes quite detailed, as in the case of dogs, cats, hamsters and the like; but for less commonly raised and exhibited animals like Hoctor’s, it produced more general standards. For example 9 C.F.R. 3.125(a), which governs the required structures for housing those animals, provides

---

25 82 F.3d 165 (7th Cir. 1996).

The facility must be constructed of such material and of such strength as appropriate for the animals involved. The indoor and outdoor housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals.

Plainly this doesn’t tell Hoctor exactly what to do – how high, for example, to build a perimeter fence around his property that will keep his lions and tigers out of the surrounding schoolyards and cattle lots. It only tells him what tests he will have to meet, and if he wants more detailed information he will have to get it elsewhere.\textsuperscript{27}

Subject to vagueness concerns, this characteristic is not a failing of the regulation, but an asset. The difference between rules and standards is commonplace in the literature, and the burden of discussion now is that standards are preferable. Almost twenty years ago, Colin Diver wrote a magisterial article with an evocative title, “The Optimal Precision of Administrative Rules.”\textsuperscript{28} That title nicely fits a theme of recent writings about regulatory reform – that detailed, central, top-down command structures, in which Washington bureaucrats tell citizens exactly how to build a ladder or in other ways order their lives, have proved ineffective and inefficient. The better way is to set a standard that the citizen is obliged to meet, and to leave it to the ingenuity of the citizen to decide exactly how to do so. Of course, it could be a better standard;\textsuperscript{29} the Depart-

\textsuperscript{27} The assumption here, as in \textit{Hoctor}, is that the Secretary was authorized to adopt containment rules to protect the surrounding environment from the animals being contained, as well as vice versa. As Judge Posner intimated, one could question whether an “Animal Welfare Act” in fact authorizes such rules.

\textsuperscript{28} 93 Yale L.J. 65 (1983).

\textsuperscript{29} Considerations of equal protection or due process arguably govern the precision required of standards,
ment might, for example, have added

A structure is in violation of this rule if found insufficient to prevent escape by an average animal of the species contained therein.

By saying more about the performance being required, that would make it easier to identify a violation, but it would still be a standard, not a rule.

Essential to this discussion is the proposition that, despite this characteristic, Section 3.125(a) is a valid regulation, and, at least unless its standard is so vague as to leave ordinary persons at sea about what is being required of them, the Department may sanction people it finds to have violated it.\(^{30}\) To preclude the Department’s approach, to require it to enact species-specific detail, would be to reject, pro tanto, the preference for standards. It might also be to inflict an unsustainable expectation of foresight or detail on agency rulemakers – as if they must anticipate just what animals are to be contained, what range of physical characteristic each possesses, and the like, all information much more readily at hand to (and properly demanded of) their keepers than of the Department’s central bureaus. In worlds of regulation intensely more technological and safety-concerned than the Department’s supervision of wild animal farms – say, nuclear power plant regulation, or airframe approval – the regulations for which the politically accountable leadership is responsible consistently frame standards, which are then elaborated in detail by

\(^{30}\)Cf. John Manning, n. 70 within, at 669-70 and n. 281, citing cases.
regulatory guidance documents generated by engineering staffs, usually after informal exchanges with the regulated industry. It is not, then, a proper complaint about the Department of Agriculture’s performance that its regulations failed in terms to require eight foot perimeter fences for big cats, rather than require a “facility ... constructed of such material and of such strength as appropriate for the animals involved ... structurally sound and ... maintained in good repair to protect the animals from injury and to contain the animals.”

Still, it will be helpful to the Hoctors of this world, and to the inspectors who patrol their compliance with rules like these, if safe harbors can be defined. From an agency perspective, uniformity of administration nationwide is a good, and it may doubt whether its pool of not-so-well-paid inspectors will be able to handle so much discretion. Adopting regulations would require the time of the agency’s limited top-level management and costly formality to create or alter. If the top of the agency’s hierarchy is not the place for generating species-by-species, cage-and-fence detail, nonetheless a central, responsible staff office may be. Having regulations that set standards virtually requires the emergence of advice to tell game park owners and departmental inspectors alike what kind of fence will be regarded as “structurally sound” to contain lions and tigers. Periodic advice from a responsible staff office can provide those who are disposed to cooperate with regulation with a framework for achieving compliance efficiently and confidently. It can create a framework for staff advice and enforcement that enhances both the agency’s internal discipline, and the regularity and equal treatment citizens experience.
In light of APA Section 552(a), this advice can take a variety of forms. One can imagine five different ways in which Hoctor might have discovered the Department’s specific judgment:

1) He might have found an interpretive rule stating that “facilities ... structurally sound ... to contain the animals,” requires, for big cats, an eight foot perimeter fence.

2) He might have found a policy document announcing that the Department had decided on the basis of recent studies and literature to seek fines and other sanctions against licensed dealers whose facilities for big cats lacked eight foot perimeter fences.

3) He might have found an inspectors’ manual directing the Department’s inspectors to accept eight foot perimeter fences as complying with the regulation, and/or to issue citations to dealers with lower or absent perimeter fences.

4) He might have found prior administrative adjudications deciding that the structural standard was met by eight foot perimeter fences but not by seven foot perimeter fences.

5) When seeking his license, he might have asked a local Department veterinarian, lacking further guidance from above, what height of perimeter fence would meet the regulation.

Note that this paper, here as elsewhere, treats all publication rules alike. Section 552(a) does not distinguish among interpretative rules, general statements of policy, or staff manuals (or, for that matter, agency adjudicative precedent) in its diction. The D.C. Circuit and some com-

31 E.g., Hudson v. FAA, 192 F.3d 1031, 1036 (1999), citing Syncor Int’l Corp. v. Shalala, 127 F.3d 90, 94 (1997). As in Hudson, further discussed at p. 27 within, the D.C. Circuit’s distinctions may be the product of understandable efforts to limit the harm done by other panels’ questionable holdings about “interpretative rules”; the alternative, under current practice, would be to force en banc consideration of the issue, a procedurally costly step.
mentators have devoted considerable effort to distinguishing among these forms. Rather than distinguish among the forms, this paper prefers to distinguish between two different settings in which agencies may try to use any of them: in the first setting, the publication rule purports to draw on some existing source of agency legal authority, statute and/or regulation; in the second, it does not. Todd Rakoff has persuasively characterized the difference between American and Japanese informal procedure as being, precisely, that Japanese administrative law contemplates legitimate informal agency action, what the Japanese term “guidance,” that is concededly beyond the reach of direct statutory or regulatory requirements, while American administrative law does not. As reflected throughout this paper, the question of authority is central to the analysis being offered. Nothing said here should be taken to suggest that a publication rule can have the influence permitted by Section 552(a), in the absence of some such relationship to a superior norm. Whichever form it takes, its permitted influence depends on its reasonable relationship to requirements enunciated in statute or regulation, which the publication rule serves to make more concrete in particular circumstances.

This defining characteristic also eliminates any need here to plumb the issues of definition


34 [Cross-cites]
that have plagued some discussions. Regulations can only be made by using notice-and-comment rulemaking or qualifying for one of the exceptions to Section 553 of the APA that permit agencies to claim the force of statutes for their rules even if those procedures have not been used.

Nothing in the APA permits an agency to claim legislative force for a publication rule. If an agency wishes to claim that force for a rule, Section 552 is simply beside the point. If it does not claim that force for a rule, if it simply asserts that it may rely on its previously announced rule in dealings with citizens premised on authority or regulatory commands elsewhere grounded, then Section 553 is irrelevant. It may well be that such announcements will contribute to significant changes in private conduct; but if it is not the announcement itself that the agency relies upon should it attempt to command those changes, the fact of such reliance is no more than Section 552 anticipates. A bit more care from agency counsel about the precise source of authority an agency is claiming, within the agency and, especially, when judicial review is sought, could work wonders.

As Judge Posner reported the facts, Hoctor in fact chose the fifth of the routes listed above – the one that will prevail when an agency has not used publication rules, and consequently

35 A particularly useful recent discussion appears in American Mining Congress v. MSHA, 995 F.2d 1106, 1108-09 (D.C.Cir. 1993); see the discussion in Richard J. Pierce, Jr., n. 11 above.

36 See Akzo Nobel Salt, Inc. v. FMSHA, 212 F.3d 1301 (2000). This may be easier said than done, of course. An experienced correspondent, who directs the legal office responsible for regulation in a Department with many rulemaking bureaus, wrote after seeing a draft of this paper,

The problem of tying a violation to an agency handbook (even internal ones) rather than a rule, as you note ... is more common than it should be. No matter how many memos the General Counsel or I put out, no matter how often we raise it in training courses, I still hear "the [non notice-and-comment] guidance manual requires it."

E-mail of Jan. 11, 2001, on file with the author.
the one that leaves matters to the discretion of an uninstructed street-level bureaucrat. In 1982, an inspecting Department veterinarian told Hoctor that to get a license he would have to build a six foot perimeter fence around his whole property, in addition to pens for the big cats and a containment fence around their immediate area. Hoctor built all of these, and was licensed. In 1983, the following year, the Department added a provision to the manual it uses to instruct its inspectors, telling them to apply an eight-foot standard for perimeter fences for dangerous animals under its containment standard. It was not until seven years later, in 1990, that

Hoctor was cited by a Department of Agriculture inspector for violating ... the housing standard, by failing to have an eight-foot perimeter fence. Eventually the Department sanctioned Hoctor for this and other alleged violations, and he ... sought judicial review limited ... to the perimeter fence. ...

Although Judge Posner did not address it specifically, this element of reliance on local official advice in making an expensive investment complicates the analysis, and in my judgment tends to explain the cases fairly well. This turns out to be another of those contexts in which courts have struggled to free citizens from the death grip of the rule that the government cannot be estopped by the errors of its agents. But for the moment it will be useful to focus on the first four of these possibilities – interpretive rules, statements of general policy, staff manuals, and decisions in adjudicated cases – by which the Department’s view might be elucidated.
II. Finality and Ripeness

Judge Posner did not have to consider the reviewability of the manual provision at issue in Hoctor, because the case before him involved a concrete application of the understanding reflected there to impose a fine on a citizen. If the Department had given excessive jural force to its manual provision, treating it as if it were a regulation, the order imposing that fine – undoubtedly both final agency action and ripe for review – should be reversed. In other cases, however, citizens or the regulated may wish to challenge the validity of a publication rule in advance of its concrete application. As in the case of a regulation, in some circumstances conformity may be so simple and the consequences of disregarding a publication rule that would be upheld may be so severe, as to make those who learn of a publication rule unwilling to take the risk of its concrete application to them. Unless able to challenge it in advance of its application, that is, they will follow the course it requires, and its validity will never be assessed. In other circumstances, those who are the objects of regulation may welcome a publication rule, that members of the public believe inadequately protective of their interests; again, because the regulated will comply, there will never be a concrete application of the rule that could be tested on judicial review. This, for example, was the setting in CNI v. Young,37 where the FDA had issued enforcement guidelines setting a tolerance level for aflatoxin, a naturally occurring carcinogen unavoidably associated to some degree with corn; the guideline instructed its inspectors not to interfere with corn shipments

37 818 F.2d 943 (D.C.Cir. 1987).
having a lower aflatoxin level. This created a safe harbor grain merchants warmly desired; but the Community Nutrition Institute believed that the harbor was in fact not safe for the corn-consuming public, and successfully challenged its adoption as a publication rule rather than a regulation.

The reader may already have grasped that permitting review of publication rules prior to their application presents all the considerations associated with the Supreme Court’s opinion, increasingly controversial in some quarters, in *Abbott Laboratories v. Gardner.*\(^{38}\) Similarly, permitting review at the behest of those not subject to the rule raises ripeness controversies parallel to those that have sharply divided the Supreme Court and commentators in other settings in recent years.\(^{39}\) This is not the place to explore those controversies as they arise in the context of regulations produced by notice and comment rulemaking procedures. It is, however, necessary to address some additional considerations that can be adduced concerning publication rules. In addition to the arguments against the pre-application reviewability of regulations may be marshaled, also, the structural contingency of any publication rule. Unlike a regulation, which enjoys statutory effect and can be altered only by the relatively formal procedures of notice-and-comment rulemaking, a publication rule is merely influential; it can be freely altered at any point before it has been concretely applied – and, indeed, the agency issuing it must be prepared to treat it as provisional, in the sense that it must permit arguments for its alteration to be made in any pro-


ceeding to apply it. Whether, then, it is properly regarded as a “final agency action” is a more difficult question than appeared in *Abbott Laboratories*.

Important to the resolution of that question, moreover, are two additional considerations that tend to defeat conclusions for reviewability. First, and associated with the contingency of a publication rule’s proposition, would be understandings about the value, volume, and provenance of many such rules. Knowledge of an agency’s interpretations, policies, etc., is a positive good, and voluntary agency creation of publication rules therefore ought not be discouraged – as the prospect of easy review might tend to do. Given the volume at which publication rules appear relative to regulations, moreover, it is likely that most if not all will be generated at agency staff levels that make ascribing “finality” to them questionable within the agency’s own hierarchy; higher officials, that is, will rarely have had any occasion to consider and ratify the merits of the positions taken. Second is the frequent association of publication rules with questions of enforcement policy. Decisions about the allocation of agency resources and effort – viz., what concentration of an inevitable carcinogen in corn should lead agency inspectors to condemn a shipment as contaminated – are among the most frequent subjects of publication rules; and, the Supreme Court has said, judgments of that character are presumptively unreviewable, given the mischief secondary disputes about why an agency is doing this, rather than that, could wreak.40 Agency resources are already scarce, inevitably requiring such allocations; permitting judicial review of them con-

---

40 Heckler v. Chaney, 470 U.S. 821 (1970); see the analyses of Richard Thomas and Theresa Titolo, n. 10 above.
sumes more of those resources, and may delay other work.

Considerations like these animated Judge Leventhal’s decision in National Automatic Laundry and Cleaning Council, already briefly discussed.\textsuperscript{41} The advisory letters in that case were interpretative rules, he concluded; the question he had to decide was whether the letter before him was “final agency action” ripe for review. On the one hand, it was important not to “discourage the practice of giving such opinions, with a net loss of far greater proportions to the average citizen than any possible gain which could accrue” through making all such advice reviewable; on the other hand, the 10,000 signed by the administrator and “published” had a prominence that lay within the agency’s control, they were adopted at the highest levels in the agency, and the possibilities for private enforcement of the act practically bound the inquirer and others to pay attention to their terms. Unless the agency credibly branded its advice as “tentative,” then, advice given at the agency’s head – that is, the 10,000 letters she signed – would qualify as “final agency action” subject to judicial review.

\textit{National Automatic Laundry and Cleaning Council} remains one of the more thoughtful and balanced opinions written on the tensions animating publication rules questions – one of the very few to explore the dimensions of the practice, and the practical consequences of that practice not only for the party who may be complaining in a particular case, but also for the public generally in its dealings with the agency. The DC Circuit’s very recent opinion in \textit{Appalachian Pow-\textsuperscript{41} N. 5 above.
er,\textsuperscript{42} though less temperate or understanding in its diction about the practice,\textsuperscript{43} reaches the same result on the question of finality and ripeness, under factual circumstances that seem comparable. EPA’s publication rule in that case, produced in the upper echelons of the agency, spoke to state authorities; it could be expected to make them act in ways that would have expensive impacts on private industry, yet could not realistically be challenged at a later stage. “[W]hatever EPA may think of its Guidance generally, the elements ... petitioners challenge consist of the agency’s settled position, a position it plans to follow in reviewing State-issued permits, a position it will insist State and local authorities comply with in setting the terms and conditions of permits issued to petitioners, a position EPA officials in the field are bound to apply.”\textsuperscript{44} Neither temporary nor interlocutory, the publication rule “reflect[s] a settled agency position which has legal consequences both for State agencies administering their permit programs and for companies ... who must obtain Title V permits in order to keep operating.”\textsuperscript{45}

Balanced against the risks that permitting review inevitably raises – the risks animating Justice Fortas’s dissent in \textit{Abbott Laboratories} and, in some cases, those of \textit{Heckler v. Chaney} as well – are two factors that, if both are strongly present, warrant review nonetheless. The first is demonstrable and important concrete impact on private behavior. If citizens facing firmly held
agency views are likely to modify their conduct in ways expensive to them rather than face the consequences of having those views applied to them, as in Abbott, review will be available only in conjunction with the agency’s adoption of its publication rule. Our system’s general commitment to the justice of providing avenues of declaratory judicial relief in such circumstances supports a similar conclusion here. The second factor might be described as agency control. Reviewability is in effect a price the agency pays for giving prominence and concreteness to its publication rules. When a central agency office publishes notice that it is considering a matter and, after some exchanges with affected parties, then publishes its conclusions under the imprimatur of high officials and with indications that it expects to hold the public to its policy, the argument for review is strong; so also when it chooses 10,000 of 750,000 letters of advice to receive the administrator’s signature. When advice emerges from staff, when – even if published – the public can be expected to realize that top agency levels have not yet fully considered the matter, or when the publication rule itself is framed in a manner that indicates that issues remain open and administrative avenues remain available to pursue them, then one cannot conclude that agency action is final. Permitting review in such circumstances would threaten both a diversion of agency resources, perhaps into forcing final judgment about this question at a time when other issues have more important claims on agency resources, and work to discourage the practice of providing guidance at all. If the agency can in effect be given control over whether review is available or not, by having that question turn on its signals, this question of discouragement should be substantially resolved.
In *Hudson v. FAA*, the D.C. Circuit faced a challenge to the FAA’s changed policy for applying a regulation setting a safety standard for air frames; the standard required manufacturers to show that, for planes of a certain size, all passengers could be evacuated through emergency exits within ninety seconds, and further provided that “compliance with this requirement must be shown by actual demonstration ... unless the Administrator finds that a combination of analysis and testing will provide [equivalent] data ... .” For about twenty years, published FAA guidance required retesting of changed designs through actual demonstration if the change enlarged passenger capacity by more than five percent. New guidance was issued in 1998, after restudy prompted by injuries occurring during the resulting testing, dropping the five percent rule and making the adequacy of analytic data a question in each case; the guidance document also announced the FAA’s confidence that for two particular airframe expansions for which approval was then being sought “a wealth of full-scale evacuation data are available” and thus “conduct of additional full-scale evacuation demonstrations is not required to demonstrate compliance, if a satisfactory analysis is produced.” In what the panel characterized as “a rather unorthodox manner,” but one that in the writer’s experience is often employed and commenters have strongly urged, the FAA sought public comment on this change. Eventually, it found the air frames in question in compliance with its evacuation standard, on the basis only of data and analysis; and various persons who

---

46 192 F.3d 1031 (D.C.Cir. 1999).

47 Id. at 1033.

48 Asimow
expected to have to travel in these planes then sought review, asserting, inter alia, that the policy change could be effected only by notice and comment procedure.

Because it was able to characterize the guidance document as a “general policy statement” rather than an interpretive rule, the panel was able to avoid circuit precedent precluding agencies from changing interpretations, once established, without engaging in notice and comment rulemaking; and on the substance of the matter, it found the guidance adequately supported. Before reaching these questions, however, it had to consider whether review had been timely sought, since petitioners had awaited and challenged concrete application of the guidance rather than seek review within 60 days of its issuance (as they would apparently have been obliged to do if asserting the procedural insufficiency of a regulation). Apparently, then, the government was arguing that the guidance document did constitute final agency action that would have been ripe for immediate review. One might think this a curious appearance of the sometime tendency of lawyers to argue whatever makes it more likely their client will prevail; arguments against the finality and/or ripeness of publication rules seem likely more often to appear from the government’s quiver. The panel easily found that, given the announcement in the guidance document of the pending approval proceedings in which the new approach might be applied, “we would likely have regarded petitioner’s APA challenge as premature if it had been brought before the issuance of the certificate, and so we do not agree that petitioners’ subsequent challenge is too late.”

49 See p.60 within

50 Id. at 1035.
Implicit in the whole discussion, however, is that for publication rules unmistakably representing an agency’s considered view and directly affecting citizen interests, the proper issue will much more often be ripeness than finality.

III. *Chevron Obedience and Skidmore Weight*

The Supreme Court’s recent decision in *Christensen v. Harris County*\(^{51}\) focused some attention on how one might articulate the way in which agency judgments on matters of law or policy should influence reviewing courts. Putting aside the possibility of treating agency views as simply irrelevant, two models live in the cases. These might be described as either “obedience” – courts encountering agency decisions they conclude the agencies were authorized to take must accept the conclusions they embody rather than displace them with their own independent judgment on the matter – or “weight” – the court is responsible for decision of a matter, but in deciding it will treat the agency views as constituent elements of its own decision, as persuasive if not controlling material whose force derives from the agency’s office and the dignity of its action. The “obedience” model is firmly associated in the Court’s canon with its decision in *Chevron USA, Inc. v. Natural Resources Defense Council*\(^{52}\) that within the possibilities of meaning a statute’s language could be given, a matter for the courts to decide, a reviewing court must accept any reasonable interpretation given that language by the agency Congress has empowered to

\(^{51}\) ___ U.S. ___ (2000).

\(^{52}\) 467 U.S. 837 (1984)
implement the statute. The “weight” model was best articulated by Justice Robert Jackson in *Skidmore v. Swift & Co.*,\(^5^3\) this was private litigation to enforce the Fair Labor Standards Act, in which the authority of interpretive advice given by the Administrator of the relevant division in the Department of Labor had been invoked:

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a 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.

*Christensen*, which arose in precisely the same context as *Skidmore*, held that *Skidmore* weight rather than *Chevron* obedience remained the correct measure of the force of agency upon judicial interpretation of text, where the agency interpretation was expressed in a publication rule.

The tendency of government lawyers to argue for more than perhaps they advisedly should may be nowhere more evident than in their arguments, especially post-*Chevron*, that publication rules have the same authority for reviewing courts as do statutes or regulations interpreting statutes – that once a court has found a publication rule authorized, it is bound to accept it. Section 552(a)(2), however, suggests a different way of understanding the force of publication rules. It treats agencies as permitted to give publication rules *in any form* the force of precedent, rather

\(^{53}\) 323 U.S. 134 (1944).
than statute. It does so in two ways: first, it lists them together with agency precedent, as if each of them had equal dignity. Second, it describes the permitted effect the agency may give its published precedents or interpretive rules, policy statements, manuals, and the like in a way that sounds like the treatment of precedent: “A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied upon, used, or cited as precedent by an agency against a party other than an agency only if” it has been published as the statute provides, or the party had actual and timely notice of it. The question for exploration here, in my judgment, is whether it is possible to distinguish this permitted precedential effect – permission to the agency to rely on its published position to the disadvantage of a party – from what we mean when we say that an agency judgment binds another – a private party, or a court.

The analysis here rests on fundamental agreement with a principal element in the scholarship of Robert Anthony on this subject. He started his scholarship on this subject thirteen years

54 As William Funk has pointed out to me, permission to rely on publication rules is given by 5 U.S.C. 552(a)(1), for those that are published in the Federal Register, as well as by 552(a)(2), for those that are otherwise published and indexed. The 552(a)(1) formulation does not in terms use the idea of precedent. Nonetheless, it remains an evocative way to describe the middle ground between legislative force, which regulations enjoy, and a total absence of jural force. The 552(a)(1) formulation, it may be observed, unmans the D.C. Circuit’s suggestion, in American Mining Congress v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993) that the simple fact that “the agency has published the rule in the Code of Federal Regulations” can be taken to demonstrate that a rule is a legislative, not an interpretive rule.

ago with *Chevron*, whose fundamental proposition is that, on some issues and within the zone of reasonableness, courts are significantly bound by – obliged to accept without the possibility of revising – agency judgments about legal issues that statutory language leaves open.\(^{56}\) Ronald Levin’s recent work has persuasively shown that one necessary condition of such judgments is that they be able to survive *Overton Park/State Farm* review.\(^{57}\) Another necessary condition, and this is Prof. Anthony’s assertion, is that they be the product of a delegated lawmaking process – whether formal adjudication or notice-and-comment rulemaking. If they constitute, simply, interpretive rules or statements of general policy, or a course of precedent developed through informal means, then – here we are at *Christensen* – a reviewing court may find it appropriate to give them some weight, the code name is *Skidmore* deference, but should not say that it was “bound” by the agency’s view. Whatever judgment is exercised, that is, is the reviewing court’s judgment – informed to whatever extent the circumstances warrant by the agency’s developed view.

Putting it this way should suggest that what is being invoked is the common law model of balancing. “Weight,” like “balancing,” metaphorically suggests the scales of justice, but few pretend to any very precise account of what goes on those scales. One has “more” or “less,” rather than “5” or “8.2.” Discussions of common law technique for dealing with analogy, or evaluating the law of different (but perhaps influential) jurisdictions produce evocative formulations. Justice Frankfurter argued in a variety of contexts that the absence of “a calculus of value,”

---


“talismanic words,” or “a table of logarithms” did not preclude but rather characterized judicial judgment;\textsuperscript{58} “it cannot too often be repeated that judges are not automata. The ultimate reliance for the fair operation of any standard is a judiciary of high competence and character and the constant play of an informed professional critique upon its work.”\textsuperscript{59} Justice Jackson’s \textit{Skidmore} formulation self-evidently draws on the same traditions.

Staying for the moment with the court model, we can observe that what we mean when we say a judicial judgment or rule is “binding” varies considerably with the subject of our inquiry.\textsuperscript{60} When we say precedents are binding on lower tribunals, we mean that the lower tribunals are powerless to revise them and subject to summary reversal for ignoring them; in a hierarchical system of courts, under a rule of \textit{stare decisis}, lower tribunals are without discretion to depart from the norms previously announced by superior authority.\textsuperscript{61} The equivalent of \textit{Skidmore} deference is what courts afford precedents of a coordinate, inferior, or foreign jurisdiction – if and to the extent they are persuasive, and bearing in mind the affirmative values of uniformity and how the legislature has assigned responsibility, they will be weighed.\textsuperscript{62} Courts in the First Department

\textsuperscript{58} The first two phrases are to be found in Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); the third in Some Reflections on the Reading of Statutes, 47 Colum.L.Rev. 527, 543 (1947); see also Rochin v. California?

\textsuperscript{59} Universal Camera, supra, 340 U.S. at ??


\textsuperscript{61} For a particularly strong statement in the context of statutory interpretation, Neal v. United States.

\textsuperscript{62} I owe to John Manning the suggestion to compare Salve Regina College v. Russell, 499 U.S. 225, 232-33 (1991)(discussing the basis, in an \textit{Erie} context, for courts of appeals to respect the knowledgeable views of district judges about the law of the states from which they are appointed).
of New York’s Appellate Division will pay attention to judgments in the Second Department or the Second Circuit, assessing their persuasiveness and coherence with other doctrine, but they will not say that they are “bound” by them. When a court is regarding the force of its own prior decisions, there is an intermediate ground: the court will depart from them only to the extent the present controversy was in fact not there decided (the cases can be distinguished) or it can be persuaded that its earlier judgment was seriously in error (the prior holding is overruled). While overruling is always possible, courts will say that it commands a showing considerably stronger than may have elicited the initial conclusion.63

Whether administrative agencies will think themselves “bound,” or will be thought by subsequent reviewing courts to have been “bound” by judicial decisions is a more complex question we know as the “nonacquiescence” question. When the agency has to know that the particular matter before it will come to the same appellate tribunal as has previously spoken, most thoughtful observers – and certainly that tribunal – can be expected to say that it is “bound.” Yet even this case is somewhat controversial.64 When the reviewing court might be one that has not yet spoken, the prevailing rule is that the agency is not bound, although it would be well advised to explain its reasons for refusing to accept the previous judicial instruction it received.

63 For courts like the federal courts of appeal, which sit in panels, the question of overruling established circuit law is generally reserved to the court sitting en banc.

Now, still in the court context, how would we talk about the impact of precedent on the parties to litigation? Within the case – *res judicata*, the law of the case – the parties to that litigation are bound in the strong sense – judgments must be paid, contempt citations are possible. In some circumstances, we would expect courts to declare a party collaterally estopped from asserting in one litigation a proposition it had lost in another. On the whole, this is a proposition about disputed facts, not law. For agencies, moreover, it is essentially subsumed into the nonacquiescence issue; collateral estoppel, as estoppel generally, is not a powerful idea. In the *stare decisis* context, courts have occasionally voiced the idea that a precedent once established is binding even on those who were not parties to its generation; but what they seem to have meant is that the parties ought to have a high degree of confidence that the courts themselves will follow it, under the discipline of *stare decisis*, not that negative consequences (like contempt of court citations) could flow from the very fact of an attempt to contest it. In a theoretical sense, it is always possible to argue for the distinguishing or overruling of precedent in the court that set it. One can find in the literature elegant discussions of how long such efforts can properly endure before private litigants should understand that the effort is fruitless and that respect for the system of law requires that they simply comply. Even these discussions, however, suggest no independent penalty that would attach to a failure to accept the precedent – as one would, say, to the violation of a criminal statute – just a strong signal to parties and the lower courts that resistance is unlikely to be fruitful. They should be completely confident, that is, that the prior precedents will be the law applied to their cases even though, in theory, the opportunity of attempting a distinction or seeking an overruling is open to them. One might note, moreover, that this argument is rather weaker...
if one is speaking of agency rather than judicial precedent; considerations of protecting justified reliance interests aside, we generally expect and indeed approve fluidity of policy development in the agency context. Thus, one could expect agencies to assert considerably greater freedom of revision than courts think proper in their own practice.

What seems important to note here is that these ideas of legal obligation are a great deal more nuanced than we generally encounter in the statutory context. Statutes, if valid, are indisputable; and serious consequences attach directly to their violation. One can argue whether they are applicable or not; but the adjudicatory forum is not a place where you can argue for their revision. That can only happen if the legislature again acts in the constitutionally prescribed manner. Regulations adopted following statutorily commanded procedures are treated in just the same way. While courts entertain disputes about the validity of such regulations much more readily than they do for statutes, and with much more intrusive inquiry, a valid regulation is equally indisputable. It binds court, agency, and private actors alike, and revision can happen only through further rulemaking. Serious consequences may attach directly to its violation.

From a certain perspective this is a stunning result, since it means the courts will accord to valid executive action the same ultimate authority over their judgment as they do to valid legislative action. We are accustomed to thinking of judicial review as having much more purchase over executive action than legislative. But on further reflection, it ought not be so surprising. Where the greater control of executive action is exercised is in determining its validity. Here we return to the ways in which Professors Levin and Anthony understand *Chevron*. If the executive has
been authorized to act and has acted within the parameters of its authority – the courts determine
these questions, and even under *Chevron* they do so with a lot more attention than they pay to
the corresponding questions for statutes – then we have the valid action of a coordinate branch.
Why should it, any more than the authorized act of the legislature, be open to judicial revision?
The judges are bound. So, we might note, are all agency officials and citizens. Even before the
agency, citizens might seek a waiver or they might seek an interpretation; but what they cannot
seek, unless in a fresh rulemaking proceeding, is a revision. They, as the agency, as the court, are
bound.

For interpretive rules, statements of general policy, and the like, on the other hand, the
model Section 552 adopts is that of precedent. The agency may rely on these publications, which
is not quite the same as saying it is entitled to treat them as binding on the public. For reviewing
courts, *Christensen* tells us, echoing *Skidmore*, the conclusion is the same. The court exercises its
own judgment, informed in doing so by the conclusions the agency has reached. What about
lower tiers of authority within the agency – are they bound by the agency’s instructions? The
model of precedent here suggests a different kind of response; if the source of the published ad-
vice or instruction is hierarchically superior, one could suppose an agency inspector to be in just
the same position as a trial judge reading an appellate opinion. She is professionally obliged to
obey. If we approach these difficult questions from the model of “precedent” rather than “stat-
ute,” then, in my judgment we may be able to make some helpful progress in understanding.

When Hoctor was cited for violation, because he kept his tigers behind only a six-foot
fence, the formal state of affairs was that the agency had to demonstrate that he had not provided the “structurally sound” containment its regulations validly required. On a precedential model, we might say that the fact that the agency had told its inspectors to accept eight foot fences as complying with this standard could be taken to establish, prima facie, that his six-foot fence was a violation – but that would be a prima facie showing only, and the issue would remain whether Hoctor was in violation of the “structurally sound” containment requirement. The case is no different than if, in some prior adjudication to which Hoctor was not a party and in which another game park owner appeared without effective counsel, the agency had found that six feet was inadequate, and eight required. Hoctor gets to show that, in his case, six feet was enough; or, to challenge the prior outcome. Of course this may be costly and difficult to do; for most game park owners, as for most builders of nuclear power plants, the most cost-effective route may be to go along with what the staff has identified as a priori acceptable. In this way, the practical effect of the staff position may be quite substantial. Still it is the standard of structural soundness that must be satisfied; “eight feet” is no better than a provisional definition of what will meet it, and Hoctor should be free to follow his preferences if he has the confidence of his design.

Note, on this account, that someone may be being bound – not Hoctor, but the agency inspectorate, those who are down the chain of command from the office issuing this interpretation-policy-guidance. Hoctor is being somewhat disadvantaged, to be sure; assuming §552(a) has been complied with, the agency may rely on its definition in meeting its burden about structurally sound containment. But if Hoctor in fact has a well built eight foot fence, we might
The case is perhaps different for inspectors’ manuals, as for a district attorney’s manuals for police and prosecutors.  See text at n. 40 above; Hutcherson v. United States, F.2d , , (D.C. Cir.1965)(opinions of Burger, J. concurring and Bazelon, J., dissenting).

For an example of a court unselfconsciously treating a publication rule as binding upon the government, see Anastasoff v. United States, __ F3d __ (8th Cir. en banc, Dec. 18, 2000).  Facing a conflict in holding between two circuits on an issue of tax law, the government had published “a document styled Action on Decision” announcing its acquiescence in the taxpayer-favoring outcome.  This publication rule led an en banc panel of the Eighth Circuit to vacate the government-favoring outcome one of its panels had reached as moot – an outcome defensible only on the understanding that the government had in some respect bound itself by issuing the document.

As Judge Posner recognized,

Every governmental agency that enforces a less than crystalline statute must interpret the statute, and it does the public a favor if it announces the interpretation in advance of enforcement, whether the announcement takes the form of a rule or of a policy statement, which the Administrative Procedure Act assimilates to an interpretive rule.  It would be no favor to the public to discourage the announcement of agencies’ interpretations by burdening the interpretive process with cumbersome formalities. 67

65 The case is perhaps different for inspectors’ manuals, as for a district attorney’s manuals for police and prosecutors.  See text at n. 40 above; Hutcherson v. United States, F.2d , , (D.C. Cir.1965)(opinions of Burger, J. concurring and Bazelon, J., dissenting).

66 For an example of a court unselfconsciously treating a publication rule as binding upon the government, see Anastasoff v. United States, __ F3d __ (8th Cir. en banc, Dec. 18, 2000).  Facing a conflict in holding between two circuits on an issue of tax law, the government had published “a document styled Action on Decision” announcing its acquiescence in the taxpayer-favoring outcome.  This publication rule led an en banc panel of the Eighth Circuit to vacate the government-favoring outcome one of its panels had reached as moot – an outcome defensible only on the understanding that the government had in some respect bound itself by issuing the document.

67 At 167.  Compare with this formulation Judge Randolph’s disapproving characterization in the Appalachian Power case discussed at p. 25 above:
This seems particularly apt for interpretations that are primarily directed to the agency’s own staff – inspection manuals, for example – with the primary motivation of securing a desirable internal consistency of action. The interpretation in Hoctor’s case was embodied in such a manual, a manual that spoke to the inspector, not to Hoctor.

On this understanding, it would be an error for the Department to charge Hoctor with violating its eight foot rule. The agency has not adopted such a rule, and that charge would mistake the legal issue to be decided at the sanctions hearing. Of course, it may be appropriate to bear in mind the inadequacy, the complexity, of talking about an “agency,” as if it were a seamless, anthropomorphic entity. If the inspector’s complaint, that begins an enforcement proceeding, cites Hoctor for “Fence for tigers six feet high, not eight,” that may be a mistake only of syntax, one encouraged by the manual that appropriately directs her own conduct. So long as Hoctor is permitted to show, before the fine is assessed, that the containment he provided was in fact structurally sound and adequate to contain his tigers (a showing that might prove difficult if the precipitating cause of the citation was the presence of one of his tigers in farmer Johnson’s cattle yard), such a mistake would seem not to have been prejudicial.

The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. ... Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations. With the advent of the Internet, the agency does not need these official publications to ensure widespread circulation; it can inform those affected simply by posting its new guidance or memoranda or policy statement on its web site. ...
Judges are not always careful to observe the difference between “binding” in precedential and legislative terms, as may be suggested by a contrasting pair of excerpts – the first from Judge Posner’s *Hoctor* opinion, and the second from Judge Randolph’s opinion in *Appalachian Power*:

**Hoctor:** Had the Department ... said in the internal memorandum that it could not imagine a case in which a perimeter fence for dangerous animals that was lower than eight feet would provide secure containment, and would therefore presume, subject to rebuttal, that a lower fence was insecure, it would have been on stronger ground. For it would have been tying the rule to the animating standard, that of secure containment, rather than making it stand free of the standard, self-contain-ed, unbending, arbitrary.  

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

The Department could properly hope that “a document issued at headquarters [would be regarded by its staff as] controlling in the field” – *that is why it is issued*. Similarly, it will hope that – and the public will be best served if – its staff “bases enforcement actions on the policies or interpretations formulated in the document.” And an agency that is reliable in its advice will inevitably “lead[] private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document.” None of these treatments of

---

68 At 171.

DRAFT. All rights reserved.
Not for citation, quotation or further distribution without the author’s written consent.

a publication rule entail the conclusion that it has “treat[ed] the document in the same manner as

... a legislative rule.” That requires a further step.

In Hoctor, the Department had taken that step. It compounded its internal error by arguing to the courts as if they, too, were constrained by the agency’s approach.

The only ground on which the Department defends sanctioning Hoctor for not having a high enough fence is that requiring an eight-foot-high perimeter fence for dangerous animals is an interpretation of the Department's own structural-strength regulation, and "provided an agency’s interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" Stinson v. United States, supra, 508 U.S. at 44-46, 113 S.Ct. at 1919.\(^70\)

The Department, thus, appeared to be arguing that its interpretation, qua interpretation, bound both Hoctor and, in a sense arguably even stronger than Chevron,\(^71\) the court.

\textit{Stinson} is yet another outcropping of the proposition that an agency’s interpretation of its own rules has “controlling weight unless it is plainly erroneous or inconsistent with the regulation”\(^72\) — that “a reviewing court must accept ‘a plausible construction of the ... regulation’ even if it is not ‘the best or most natural one by grammatical or other standards.’”\(^73\) In his

\(^{70}\) At 168, 169.

\(^{71}\) Stinson review does not appear to include the consideration of agency reasonableness — the Overton Park and State Farm issues — that is an element of Chevron’s notorious second step.


remarkable first work, “Constitutional Structure and Judicial Deference to Agency Rules,” my colleague John Manning forcefully suggested a constitutional basis, grounded in separation of powers considerations, for concluding that the proper deference model for agency self-interpretations that are not in themselves the exercise of delegated lawmaking authority ought rather to be the Skidmore model. An increasingly rich literature unnecessary to imitate here has pointed in similar directions in recent years, and perhaps, as Richard Pierce has suggested, Christensen will be found to open the door to such a reconsideration. Although the last few lines of Christensen indicate that agency interpretations of their own rules may still be regarded as controlling if textually available, Manning’s arguments were not considered there; and it is becoming increasingly evident how much mischief the D.C. Circuit is being led into, in understandable squirming to avoid this particular hook.

As Prof. Anthony has long argued, an agency ought not be able to claim for its interpretation the capacity to overcome judicial judgment about its authority unless it has used the procedures for lawmaking to adopt it. As made here, this argument is based simply on the diction

74 Id.


76 Cf. Richard J. Pierce, Jr., Distinguishing Legislative Rules From Interpretative Rules, 52 Admin.L.Rev. 547, 574 (2000); the bulk of Christensen discussion, however, concerned the agency’s interpretation of a statute, not an agency rule.

77 Id.; see also Comment, United States v. Chrysler: The Conflict Between Fair Warning and Adjudicative Retroactivity in DC Circuit Administrative Law, 74 NYU L Rev 914 (1999).
of Section 552 and the understanding it suggests, responsive to the levels of formality involved, of the difference in effect between publication rules and regulations. Publication rules may be binding within an agency hierarchy, as precedents are binding on the lower tribunals of a judicial system; but “influence” seems the better account to give of their permitted force over others. 

*Skidmore* deference, not *Stinson* or *Chevron* obedience, is the right model for judges to deploy.78

*Skidmore* deference, it might be added, is not an empty idea, albeit it leaves the judge with more responsibility for decision than the alternatives. As Justice Jackson put the proposition in that case, the judge’s obligation is to accord the agency’s view the weight properly owing “a body of experience and informed judgment to which courts and litigants may properly resort for guidance,” taking into account “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 the power to persuade, if lacking power to control.” Respect for the agency’s view, given its responsibilities and knowledge, is commanded by good administration; rejection of the considered view of an agency “made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case” should be “justified by very good reasons.”79

Judged against this explanation, readers of Justice Thomas’s opinion in *Christensen* might

---

78 See John Manning, n. 70 above.

fairly think it gives little more than lip service to *Skidmore*. Like both *Skidmore* and *National Automatic Laundry and Cleaning Council*, that case had presented a question of meaning under the Fair Labor Standards Act, on which the Administrator had expressed a view in a manner reflecting relatively careful consideration. Yet Justice Thomas’s opinion never considers the Administrator’s view as if it had “weight” owing to its being the view of an official to whom Congress had given responsibility and who had a superior ability to assess the importance of the issue raised to overall program. Rather, he presents the statutory question as argued by the advocates before the Court, characterizes the government’s arguments as “unpersuasive” and shows how he believes the statutory question should be resolved. Only then does he turn to the question of the Department’s opinion letter, and after explaining why *Skidmore* deference rather than *Chevron* obedience is the proper model, his full discussion is this: “As explained above, we find unpersuasive the agency’s interpretation of the statute at issue in this case.” Justice Jackson’s factors and considerations nowhere appear.

The idea of giving an agency’s reasoning and judgment weight without according them controlling force is not an empty trope, but a familiar judicial construct. The contrast may be seen in *Chevron* itself. Step one of the *Chevron* analysis requires the court to delineate for itself, to the extent it can, the judgments Congress has made, using “traditional tools of statutory construction.” Then, having decided for itself what the statute *could* mean, with the responsibility

---

80 The letter in *Christensen* was signed by the Acting Administrator of the Division, see. p. 41 above, and published, __ U.S. at __ [¶ I-B-2].

81 At n. ___.

Interpretive rules.wpd, draft of March 9, 2001
to reject “administrative constructions which are contrary to clear congressional intent”\(^{82}\) – that is, outside this judicially delineated range of possible meaning – the court is obliged to accept reasonable agency constructions that are within the range of possibilities it has independently found. This second step, the one that has attracted so much attention in the literature, is the step at which \textit{Chevron} obedience is called for. But the Court has long described the “traditional tools of statutory construction” to be independently deployed by the courts at step one to include consideration of agency interpretations. “The interpretation of the meaning of statutes,” the Court sixty years ago confirmed in \textit{United States v. American Trucking Assns},\(^{83}\) is “exclusively a judicial function.” Yet, the Court later observed in the same opinion,

\begin{quote}
In any case [in which questions of statutory construction arise that have also been confronted by an agency responsible for administration of the statute in question, its] interpretations are entitled to great weight. This is particularly true here, where the interpretations involve ‘contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.’ Furthermore, the [agency’s] interpretation gains much persuasiveness from the fact that it was the [agency] which suggested the provisions’ enactment to Congress.\(^{84}\)
\end{quote}

\footnotesize
\(^{82}\) Ibid. This way of putting the \textit{Chevron} proposition was recently confirmed in Whitman v. American Trucking Assn., ___ U.S. ___ (2/27/2001), where the Court thus summarized its statutory reading: "We conclude, however, that the agency’s interpretation goes beyond the limits of what is ambiguous, and contradicts what in our view is quite clear." [IV(B)][1]

\(^{83}\) 310 U.S. 534, (1940).

\(^{84}\) Id. at ___, quoting Norwegian Nitrogen Prod. Co. v. United States, 288 U.S. 294 (1939); compare SEC v. Collier, 76 F 2d 939 (2d Cir. 1939)(per L. Hand, J.) (Testimony at hearing by government official does not control interpretation, but supports it); Universal Camera Co. v. NLRB, 340 U.S. 474 (1951)(NLRB is not appellate tribunal in relation to hearing officer’s conclusions, but nonetheless those conclusions have weight in the record on the basis of which its judgment is to be reviewed).
“Weight” means that they are factors to be worked into the analysis alongside other traditional tools, such as independent reading of the text. The unmistakably judicial task of limning the statute’s possible meaning is incorrectly performed if they are not considered – just as it would be incorrectly performed if the text, or coordinate statutes, or other “traditional tools” were not considered. It is precisely here that, in practice, the majority opinion in *Christensen* failed to deliver on its *Skidmore* promise. It treated the agency’s view of its authority as if it were merely the argument of an advocate’s brief, and not vital evidence of meaning that should inform its own decision.

Justice Scalia, in a lonely concurrence, distanced himself from *Skidmore*. The *Chevron* rationale, he argued, was not limited to the context of regulations, and subsequent holdings had applied *Chevron* to a variety of “authoritative agency positions” that were not the product either of notice and comment rulemaking or of formal agency adjudication. *Chevron* therefore had displaced *Skidmore*. It is remarkable to find a Justice who in the past has been so attentive to arguments about the precise basis of agency power\(^\text{85}\) so accepting of the proposition that agency actions not constituting an exercise of delegated procedural authority could so restrict judicial decision.\(^\text{86}\) As he clearly regards such actions as the exercise of executive authority,\(^\text{87}\) his view

\(^{85}\) E.g., Mistretta v. United States, 488 U.S. 361, (1988)(Scalia, J., dissenting) (stressing the importance of judicial attention to authority given the failures of the delegation doctrine).

\(^{86}\) Compare the works of Robert Anthony, n. 52 above and accompanying text.

\(^{87}\) Justice Scalia wrote for the majority in Whitman v. American Trucking Assns, __ U.S. __ (2/27/01), characterizing as executive, not legislative, power the EPA’s challenged authority to adopt regulations in that case; compare the separate opinions of Justice Thomas and Justice Stevens (with Souter) on precisely this point. *A fortiori*, giving guidance must be an executive activity.
may be grounded in the expansive visions of presidential authority (and hesitations about judicial authority) he has voiced in other contexts.88 Yet it is striking that decisional responsibility in Christensen inevitably lay in the courts; as had been the case in Skidmore, this was litigation between “private” parties (one of them a county) about their rights and duties under federal law; the federal administrator, who had not purported to act in any other than an advisory capacity, had no formal role in this dispute and was not a party to it. At times, Justice Scalia has seemed to enjoy playing the bull in the administrative law china shop. Thus, in Allentown Mack Service and Sales, Inc. v. NLRB,89 he blithely overlooked half a century’s understanding that the Court would not itself perform substantial evidence review.90 In ADAPSO v. Board of Governors of the Federal Reserve System,91 an opinion he wrote while sitting on the D.C. Circuit, he denied possibilities for different standards on judicial review of agency fact-finding of equal pedigree.92 Distrusting the capacity for judicial judgment,93 he appears to be uncomfortable with the idea of “weight,” as distinct from control. In the habits of a common law judiciary, however, it is the
most familiar of ideas.

Note that the analysis here goes only to the issue of authority – whether a publication rule is ultra vires the agency’s statutory and regulation framework, and not whether it constitutes sound policy. The impulse underlying the formulations in *Seminole Rock*, *Stinson*, and the like is the defense of agencies from judicial intrusions into the policy arena – an impulse that pervades the judicial oeuvre on judicial review, as in *Chevron* itself. Whether an agency has authority to act is not, in itself, a question of policy; careful attention to the question of authority, then, does not preclude accepting an agency’s initiative within the arena in which its authority is secure. Authority having been found, the judicial respect for agency responsibility taught by *Seminole Rock* and *Stinson* can take full hold.

**IV. The Problem of Authority for Publication Rules**

That an administrative agency must have authority to act in a manner adversely affecting private interests is a central proposition of American administrative law. If *Skidmore* deference for an agency’s determination that its constitutive statutes and regulations authorize a publication rule is a necessary element in analyzing that question, nonetheless the inquiry – like *Chevron*’s first step – is an independent one. A number of considerations suggest, as well, that it be seri-

---

94 Thus, in *Hudson v. FAA*, discussed in text at p. 27 above, once the Court had concluded that the FAA’s publication rule was authorized, it characterized its standard of review for the reasonableness of that rule as less demanding than would have attended a regulation, given its informality. See also *Whitman v. American Trucking Assns*, ___ U.S. ___, supra.

95 See Todd Rakoff, n. 33 above.
ously undertaken, in particular that courts need not hesitate so much as they would with statutory
text to find a regulation insufficiently precise to authorize challenged agency action.96

Questions about the adequacy of statutory precision, whether described in terms of vague-
ness or of delegation, are freighted with separation of powers considerations restricting their use.
For a court to review the sufficiency of the legislative effort is both legally and politically a haz-
ardous enterprise. When confronting Congress’s choices about the extent to which it should
legislate, and the extent to which it will leave matters to others, the courts are, by confession,
lacking in judicially manageable standards.97 The prohibition against excessive delegation of
legislative authority, although frequently enough mentioned, is rarely enforced; “[o]nce it is
conceded, as it must be, that no statute can be entirely precise, and that some judgments, even
judgments involving policy considerations, must be left to the officers executing the law and to
the judges applying it, the debate over unconstitutional delegation becomes a debate not over a
point of principle but over a question of degree.”98 For coordinate institutions sharing
constitutional authority, the Congress and the Court, this conclusion drives the resulting
emptiness of the doctrine; the courts could hardly undertake continuously to instruct Congress
how better to perform its business without “expressing lack of the respect due coordinate

98 Mistretta v. United States, 488 U.S. 361, (1989)(Scalia, J., dissenting); the majority opinion, at
[Yakus/Sunshine Anthracite] is to the same effect.
branches of government.99 For statutes, “vagueness” too is a constitutional construct, and a
collection that a statute is impermissibly vague equally criticizes the legislative effort, asserting
that better work could have been done. Accordingly, the citizen’s claim to better definition than
Congress has given must be deeply grounded, and does not prevent Congress from assigning
significant responsibilities to administrative agencies.

Assuring sufficient precision in regulations is a less threatening task, for the performance
of which, given the existence of statutory as well as constitutional instructions, a court has more
tools at its disposal. Agencies are not constitutionally coordinate institutions with the courts,100
nor do their actions come with the political legitimacy statutes enjoy. The agency’s statute and
the general framework of its administration provide a context within which the reasonable
possibility of drafting regulations of greater specificity can be more confidently assessed; and there
is no constitutionally grounded inhibition to making that assessment. Congress, moreover, can
only legislate; unlike an administrative agency, it possesses no less formal means by which to
generate norms significantly influencing private conduct. For this reason, it has a motivation for
optimizing the precision of its statutes that agencies lack for their regulations.101 Policing the
adequacy of regulations to support subsequent publication rulemaking, then, both poses fewer
institutional threats, and offers safeguards against agency abuses. “A substantive regulation must

100 Cf. State Farm, jump cite saying a regulation is not a statute.
101 See Manning, n. 70 above.
have sufficient content and definitiveness as to be a meaningful exercise in agency lawmaking. It
is certainly not open to an agency to promulgate mush and then give it concrete form only
through subsequent less formal ‘interpretations.’”102

Permitting courts to supervise the adequacy of agency’s regulatory effort is hardly
without hazard. The task is unmistakably connected with agency business, and the chance that an
independent judicial reading will blunder through incomprehension, or intrude the judiciary into
what is properly the agency’s policy realm, is correspondingly increased. There is, as always, the
sometimes difficult judicial obligation to respect Congress’s assignments of responsibilities for
decision. These responsibilities include allocating the agency’s finite resources in support of its
effort, and judges will often find it hard to identify or appreciate that resource constraint.103

Particularly important, then, is that the reviewing court approach any question about the
adequacy of an agency’s drafting effort – whether it has done better than to produce “mush” –
with an appreciation for the full task the agency faced. Litigation is a poor setting in which to
attempt to understand the context in which challenged particulars have appeared to an agency.
Parties present a particular detail of the regulatory scheme that has impinged on them. Avoiding a
disproportionate response requires the effort to see the issue in the frame of the agency’s time and
resources. Just as procedural due process analysis must be “shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions,” consideration of the adequacy of an agency’s rulemaking effort must be shaped by the effort in general, not just some particular outcome about which complaint is later made. In Hoctor, for example, the adequacy of the Department’s containment standard for big cats is better seen in the context of its full complement of regulations under the Animal Welfare Act, in which common species are provided for in much more detail, than as the isolated question, “Could the Department have done more here?” The answer to the isolated question will always be “Yes,” yet a court finding a general effort to regulate in some detail ought more properly to understand the resource constraints and priority choices an agency will have faced, and to assess the adequacy of the particular regulation being challenged in that context.

Also essential is the acceptance of “standards” rather than “rules” as an adequate performance of the obligation to create sufficiently specific regulations. A standard, we can note, is precisely the kind of rule that is most familiar to, and comfortable within, the world of common-law precedent. Issues of negligence are issues about the behavior of “reasonable people.” An individual facing liability for some past act or having to plan future conduct is not thought unfairly treated when her behavior is measured against this very generalized prescription – having attention, of course, to the detailed characteristics of her behavior in its context, as well as to the

104 Cf. Vermont Yankee (“Monday morning quarterbacking” jump cite.)

results that have been reached in applying the same standards to other congeries of fact. Nor is it thought unfair in any sense, that other juries and judges in other cases have had no more precise instructions, and that the parameters of her enforceable obligation emerge hazily and imprecisely from their practice.106

V. “Rules” Explicating “Standards”

Is it an independent problem that the inspector’s manual underlying Hoctor departed from the standard-based approach of the regulation, and embodied a norm that we would recognize as a rule – eight feet? One can easily understand why, either in instructing its inspectors or in creating safe harbors for those it regulates, the Department would prefer to give exact parameters; the impulses are, respectively, to control the discretion of a distant employee in her dealings with the public, and to give the public the assurance of a clear definition. Waxing jurisprudential, Judge Posner seemed to find this shift troubling in and of itself, calling attention to the differences between courts, developing law case-by-case through precedent, and legislatures, and suggesting that the Department’s instructions could not properly be called interpretive.

At the other extreme from what might be called normal or routine interpretation is the making of ... rules that are consistent with the statute or regulation under which the rules are promulgated but not derived from it … . There is no way to reason to an eight-foot perimeter-fence rule as opposed to a seven-and-a-half foot fence or a nine-foot fence or a ten-foot fence.

The reason courts refuse to create statutes of limitations is precisely the difficulty

106 Compare n. 29 above.
of reasoning to a number by the methods of reasoning used by courts. Hemmings v. Barian, 822 F.2d 688, 689 (7th Cir.1987). One cannot extract from the concept of a tort that a tort suit should be barred unless brought within one, or two, or three, or five years. The choice is arbitrary and courts are uncomfortable with making arbitrary choices. They see this as a legislative function. Legislators have the democratic legitimacy to make choices among value judgments, choices based on hunch or guesswork or even the toss of a coin, and other arbitrary choices. When agencies base rules on arbitrary choices they are legislating, and so these rules are legislative or substantive and require notice and comment rulemaking, a procedure that is analogous to the procedure employed by legislatures in making statutes. The notice of proposed rulemaking corresponds to the bill and the reception of written comments to the hearing on the bill.107

But, as he quickly recognizes, this approach is unsustainable; if it is preferable that rulemaking have the adjudicatory quality of announcing standards rather than rules, a staff’s identification of a safe harbor in any scientific or technological matter will often have rulish qualities – it will set parameters the staff have concluded meet the agency’s standards.

   Even in a nontechnical area the use of a number as a rule of thumb to guide the application of a general norm will often be legitimately interpretive. Had the Department of Agriculture said in the internal memorandum that it could not imagine a case in which a perimeter fence for dangerous animals that was lower than eight feet would provide secure containment, and would therefore presume, subject to rebuttal, that a lower fence was insecure, it would have been on stronger ground. For it would have been tying the rule to the animating standard, that of secure containment, rather than making it stand free of the standard, self-contained, unbending, arbitrary.108

   “Self-contained, unbending” is the key; the agency tied the claim of violation not to the rule, but to the “interpretation.” To reason in that way is to abandon the hierarchical and malleable

---

107 At 170-71.

108 At 171.
precedential model for the rigid and universally binding model of legislation. To have that effect on external worlds, private or judicial, the agency must act with the formality of notice and comment rulemaking or adjudication. But had it retained the standard as the ultimate basis for enforcement, no problem would have arisen from a choice to supplement that standard with an explanatory rule.

VI. Reliance, Non-Acquiescence, Estoppel, and other Confusions

Now it seems appropriate to turn to the complicating issue of reliance, of investment-backed expectations. Hoctor built his perimeter fence to six feet on the advice of the Department’s local veterinarian. Isn’t he entitled to rely on that advice? The stated facts, indeed, make it appear that the Department left him alone for seven years before asserting that he had not provided the required secure containment, so perhaps it thought he was owed at least a certain amount of credit for his reliance. The low perimeter fence was but one of a range of violations it asserted – suggesting the possibility that his facility had become seriously deficient (or that he had encountered the misfortune of a throw-the-book-at-im inspector). Note, however, that if we take this road we are binding the Department to an interpretation – the 1982 interpretation given Hoctor by its local veterinarian – with no sign that that interpretation ever acquired the dignity of departmental policy.

---

109 A different question would be presented if one believed that the regulation, uninterpreted, simply failed to give the level of notice required to sustain an agency fine. See Manning, n. above, 96 Colum L Rev at 670 n. 281.
Similar issues also figure importantly in another recent decision about interpretive rules and policy statements that is otherwise quite hard to understand. In *Alaska Professional Hunters Assn v. FAA*, the question concerned interpretation of an FAA rule specifying the equipment required of commercial operators in aviation. In 1963, the Civil Aeronautics Board had in agency adjudication interpreted the CAB’s similar rule not to reach Alaskan hunting guides who flew clients on hunting excursions from their camps as part of tour packages. FAA’s Alaska regional office then began acting on the same interpretation of the FAA’s rule. It never committed that interpretation to writing, and there is no indication that the FAA’s national office knew of it. Beginning in 1990, the national office of the FAA began to study the matter, with informal input from the Association, and in 1998 it published a notice announcing it would henceforth interpret its regulations to treat professional hunting guides, in Alaska as elsewhere, as commercial operators. The D.C. Circuit held that the regional office’s prior practice constituted a “definitive interpretation” of the FAA regulations involved, and that since the FAA had already interpreted its regulations through the actions of its Alaska regional office, it could not reinterpret them without engaging in notice and comment rulemaking.

Note that two propositions are implicit here: the first, that a series of actions in remote agency offices, neither known to nor sanctioned by its central offices, can constitute a “definitive

---

110 177 F.3d 1030 (D.C. Cir. 1999).

111 As here, the courts confronting publication rules take no notice, save perhaps for wonder or criticism, that the actions they criticize, as here, seem often to be taken after extensive discussions with affected groups, and after time intervals that could be thought at least an implicit recognition of reliance factors. Similar consultations preceded the EPA’s rule challenged in the *Appalachian Power* case, that spawned the language quoted at n. 64 above.
interpretation” of its regulations; and, second, that such an interpretation, once informally adopted, freezes the state of agency law, which cannot subsequently be altered without notice and comment rulemaking.¹¹²

Does a policy that was never advertently adopted by any central office of the agency as a whole, formally or informally, count as agency law, that could be binding on anyone? To ask the question that way is to invoke yet another collection of confused and unsatisfactory pages about agency behavior. On the one hand, one can point to a number of private litigants’ campaigns, generally unsuccessful, to discover a course of conduct that has developed here and there within an agency and then attempt to claim the benefit of this “secret law” on the basis of requirements of consistency. Associated with these failures is the hoary doctrine that an agency will not be estopped by the error of some functionary – Mr. Merrill could not collect on his crop insurance, albeit he had paid the premium to a local officer of the Department of Agriculture, who had unconditionally accepted it. The understanding here is that government is large and complex, and its individual agents imperfectly controlled, humanly capable of error, even on occasion corrupt. Holding government bound by the errors of its functionaries, even in individual dealings marked by strong reliance, would open too wide the doors of chicanery and adventitious dispute.¹¹³ On the other hand, an agency that has consistently followed a given policy ought at the minimum

¹¹² Richard J. Pierce, Jr., n. 11 above, is a powerful critique of this aspect of the case, reaching similar conclusions by a somewhat different route.

¹¹³ In direct dealings with individuals they have advised, many agencies find it useful to assure the reliability of their advice, and statutes also often provide a safe harbor for those individuals.
explain the basis for any change. The authority to make and implement policy, often to the substantial disadvantage of private individuals, carries with it an obligation of evenhandedness and demonstrable reason. In some circumstances, the propriety of reliance on the policy as it is even precludes changes that attach negative consequences to past, completed behavior.

From the perspective of the system of judicial precedent, the opinion of a single trial judge or coordinate judicial tribunal, even if not challenged by government attorneys, would not control the decisions of other trial judges or, particularly, appellate courts in subsequent cases. That police and prosecutors have rarely bothered with people driving more slowly than 65 miles per hour in a 55 mile per hour zone, and that fact leads a large number of drivers to set cruise control at 64, does not preclude a speeding ticket for going 64 – even if one could find a memo from the responsible chief enforcement officer instructing the police to not to pursue such drivers. Certainly we wouldn’t think that if the Commandant of the State Police discovered that Troop K, responsible for a distant and unpopulated part of the state, had a policy of arresting only people exceeding 85 miles per hour, that made the speed limit in that part of the state, much less the whole state, 85 – irrespective of how many citizens of Troop K’s counties knew of its practice and had bought Lamborghiniis. We would be concerned if we found patterns of, say, racial discrimination underlying differential enforcement; but absent such special circumstances, the speed limit for all of us would remain at 55 – and it would remain there even if the occasional trial judge in Troop K’s county acquitted a speeder charged with doing 70. Should the FAA’s

114 See, e.g., Troy Corp. v. Browner, 120 F.3d 277, 286-87 (D.C.Cir. 1997).
position be any different?

This question, in turn, breaks into two parts: respecting past conduct, while the policy is in place, our response may be influenced by considerations of reliance, and the instincts about unfairness that attach to them. If the policy was widely known, however inappropriate, and if it was characterized by investment-backed expectations, punishing behavior permitted by that policy raises questions for an agency, that can act prospectively, that are not faced by a court. Respecting future conduct, however, the only questions are about the modality of change. For Troop K’s policy, never affirmatively adopted at Headquarters, at best known and tolerated, isn’t it hard to imagine that more than an expression of disapproval is required? The agency has never acted in those modes that officially work to create agency “law”; even if we are willing to say that such law has in some sense accreted from conduct in the regions, trial judgments, and the like, treating that conclusion as the equivalent of formal agency adoption of the policy runs all the risks the conventional government estoppel doctrine stands against. When the DC Circuit says, as it did, that the FAA can alter the informal but longstanding policy of its Alaska regional office only by engaging in notice-and-comment rulemaking, it stands conventional ideas about precedential systems on their head: now the hierarchical superior is “bound” by the actions of an inferior tribunal in a most powerful way – it is required to expend procedural resources to control the judgments of inferior offices who followed no procedure to adopt a position they had no authority to adopt.

As one who has sharply criticized the Supreme Court for its failure to respect the steady
and uncontroversial accretion of law in the circuit courts of appeal,\textsuperscript{115} I should be careful to
distinguish between an obligation to identify and promulgate a preferred policy – to which, in my
judgment, the FAA can properly be held – and an obligation to do so following procedures more
formal than need have attended its initial formulation. If one interpretation of its enabling statutes
and/or rules has come to be accepted, even in just a part of its domain, it can be held to announce
and explain a new interpretation. But if that prior interpretation did not require notice-and-
comment rulemaking to take effect, indeed was simply the product of lower-level inertia and
practice over time, requiring the FAA to follow those procedures inflicts an unsustainable
formality on the relationship between the FAA and its inferior offices – empowers the regions,
weakens the center, imposes a requirement of vigilance, of detailed oversight and control, with
evident implications for how the agency expends its resources. Whatever might be the reliance
equities of the particular individuals who were the beneficiaries of the initial action, it is hard to
imagine a compelling case for placing the agency in such a procedural straightjacket.

Even when the first interpretation has come from national headquarters, a rule restricting
the agency to one interpretive bite at the apple seems more likely to be the product of fears about
Chevron or Stinson effects than sensible appreciation for the bureaucratic situation within the
agency. There may of course be an obligation to explain, to justify, the agency’s changed
course;\textsuperscript{116} but unless one believes the new course to be binding in a strong sense – to be capable of


\textsuperscript{116} E.g., INS v. Yang, 519 U.S. 26 (1996).
serving in and of itself as the basis for a determination of violation, to “bind” a subsequent reviewing court – such strait-jacketing of an agency’s policymaking would be unsupported in either the APA or *Chevron’s* explicit recognition of the appropriateness of agency revisions over time. Indeed, one could imagine its impulse as being to suppress rather than to encourage agency interpretation. In an earlier decision from which *Alaska Professional Hunters* drew supportive dicta, powerfully criticized by Professor Pierce, the Department of Justice had been silent about the interpretation it would give a regulation adopted under the Americans with Disabilities Act – whether it would interpret that regulation’s requirement of unimpaired sight lines for wheelchair-bound sports spectators to include moments when the crowd had leapt to its feet or not. A stadium was sued after it built to the less expensive negative interpretation, the Department having subsequently taken the more demanding view. The demanding view prevailed, but only, the court said, because the Department had “never authoritatively adopted a position.” Had it done so, “to allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment would undermine [the APA’s rulemaking] requirements.” This puts a high price indeed on ever giving interpretive advice.

Perhaps what this aspect of the two decisions draws on is the bromide expressing strong judicial reluctance to revisit issues of *statutory* interpretation, once they have been finally decided. That, the courts have generally insisted, is Congress’s business. A kind of conscious parallelism

---

117 N. above.

applied to rulemaking would hold, too, that once a rule had been “interpreted,” its revision was for the legislature – that is, for rulemaking rather than further interpretation. But the parallel here is a false one – particularly as we see that what gets denominated an interpretation for these purposes need never have attracted the attention of national officials, may indeed only have been in effect in one remote region. Congress and Court are co-equal branches of government, and the bromide is generally defended on bases that have at best imperfect agency analogs: the final interpretation that can have this judiciary-binding effect is *only* one that comes from the Supreme Court, but agency interpretations can flow from a wide range of offices, perhaps (as here) never even taking written form; the bromide reflects the greater legitimacy of Congress over the courts as a source of national law, but there is no corresponding division in the world of the administrative agency – rather, general considerations of hierarchical authority which this approach tends to defeat; the bromide also assumes something about interpretation in relation to a statute, that it derives a compelled or logically justified position from the language it interprets, yet the very existence of Section 552(a), and also much judicial doctrine, supposes that neither agency statutes nor agency regulations entail such singular meanings. Agency interpretations can change.

---


120 See, e.g. Chevron at .

121 In the concluding paragraphs of his majority opinion in *Christensen*, almost as an aside, Justice Thomas included the following language, unaddressed in any other opinion:

But [strong deference to an agency’s interpretation of its own regulation] is warranted only when the language of the regulation is ambiguous The regulation in this case, however, is not ambiguous – it is plainly permissive. To defer to the agency’s position would be to permit the agency, under the guise of Interpretive rules.wpd, draft of March 9, 2001
This brings us squarely back to the issues of reliance. At least two substantial difficulties would attend this approach. The first is that under the standard, albeit often criticized, estoppel doctrine, Hoctor had no right to rely on the advice offered by a local official of the Department. 122 Second, even were the earlier advice the product of departmental policy – a prior edition of the inspector’s manual, say – it is difficult to imagine a persuasive claim to more than “time to conform” (which Hoctor apparently had) for a change in interpretation grounded in safety, and which the agency was otherwise free to make. Suppose, in the nuclear context, that staff interpreting a Nuclear Regulatory Commission rule requiring containments for nuclear power plants to meet certain safety standards had expressed its opinion that welds of a certain description would satisfy that requirement. While that interpretation remains among the Commission’s regulatory guidance, it provides a safe harbor for plant owners. Suppose, however, that subsequent events persuade the staff that its judgment was wrong, and that to meet the same standards a more elaborate weld is required. The owner of a plant who had invested millions in those welds would have to be afforded the opportunity to show that its welds in fact met the

122 OPM v. Richmond, 496 U.S. 414 (1990), reaffirming Federal Crop Insurance Co. v. Merrill, 332 U.S. 380 (1947). While the facts of both cases concerned claims on the Treasury, and the inappropriateness of such claims figured in the reasoning, Richmond reserves as an open question only “whether there are any extreme circumstances that might support estoppel in a case not involving payment from the Treasury” (emphasis added) and observes broadly that “a rule of estoppel might create not more reliable advice but less advice. ... The inevitable fact of occasional individual hardship cannot undermine the interest of the citizenry as a whole in the ready availability of Government information.”
unamended standard; but it would no longer have any claim that it had satisfied the regulation just because it had satisfied the parameters of the first interpretation. Writings in this context imagine a balance between governmental and private interests, one unlikely to be resolved in a safety context by constructing an interminable, vested right to continue in a course now believed to be unsafe. Perhaps for these reasons, Judge Posner in *Hoctor* attached no express value to reliance considerations, even though expressing in a variety of ways considerable doubt about the safety merits.

**VII. Conclusion**

An agency that well understood the approaches explored here would restrict itself to using its guidance, interpretive and policy documents in a precedential way. It would never claim for them the force that we associate with statutes – either when it was in court, or when it was dealing face-to-face with citizens. It would accept, even encourage, the appropriateness of citizen reliance on advice once given, defeating that reliance only in the face of demonstrably greater public need for change. Of course, this would not end all issues. The costliness of notice-and-comment rulemaking these days, if unremedied (as it appears likely it will be), will continue to generate pressure on agencies to attempt to do by indirection what they cannot afford to do as they should.

---

Yet fear of this phenomenon, however well-based, ought not to tempt the courts, as it
unfortunately has, into locutions that discourage advice-giving or provoke agencies into
accompanying their advice with warnings that it cannot be relied upon.\textsuperscript{124} That is indeed a
perverse teaching for the agency, and outcome for the public. The Supreme Court has told us,
emphatically, that agency conclusions about enforcement priorities are, and for important reasons
of state, as remote from judicial control as the actions of the administrative state can be.\textsuperscript{125}
Nonetheless, the DC Circuit has, and more than once, told an administrative agency that adoption
and public explanation of an enforcement policy can only be achieved by notice and comment
rulemaking.\textsuperscript{126} These, too, are complicated questions, and they are best left for full discussion
elsewhere.\textsuperscript{127} What they have in common with today’s question, in my judgment, is a certain
confusion about what it means to interpret or to set a policy – a confusion also encouraged by our
ideas about reliance, and by fear that propositions calling for respect for agency judgment entail
judicial powerlessness. Recalling \textit{Skidmore}, the model of precedent, of influence rather than

\textsuperscript{124}Compare Hudson v. FAA, 192 F.3d 1031 (D.C. Cir. 1999), in which an FAA policy was accepted, apparently
because the agency had taken pains to show that it was “not in any way binding \textit{on the agency},” at 1034 (emphasis added).

\textsuperscript{125}Heckler v. Chaney, 470 U.S. 821 (1985).

\textsuperscript{126} In Chamber of Commerce v. U.S. Department of Labor, 174 F.3d 206 (D.C. Cir. 1999), the court
found that OSHA was required to use notice and comment rulemaking to adopt nationwide an enforcement policy
(stressing inspection of sites unwilling to cooperate with voluntary, collaborative safety programs) that OSHA had
found in state trials significantly improved worker safety while reducing regulatory costs; in Community Nutrition
Institute v. Young, 818 F.2d 943 (D.C. Cir. 1987), the FDA was found required to use notice and comment rule-
making to set an “action level” for unavoidable contaminants in corn, beneath which it had advised its inspectors
and the regulated industry it regarded enforcement as inappropriate.

\textsuperscript{127} For insightful discussion, see Theresa Titolo, \textit{The Aftermath of Chamber of Commerce v. United States
Department of Labor} and Its Implications for OSHA Reform, manuscript on file with author, and Richard Thomas,
Prosecutorial Discretion and Agency Self-Regulation: \textit{CNI v. Young} and the Aflatoxin Dance, 44 Admin.L.Rev.
command, may serve to alleviate these concerns and reclaim for publication rules their intended, and valued, place.