PUBLIC PARTICIPATION IN THE ADOPTION OF INTERPRETIVE RULES AND POLICY STATEMENTS

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The Internal Revenue Service ruled that private hospitals need not offer free or below-cost medical services to the poor in order to maintain their tax-exempt status.[1] This ruling reversed the Service's prior position and presumably resulted in a substantial reduction in the availability of affordable hospital care to poor people.[2] The United States Parole Board adopted guidelines establishing criteria for parole decisions and specifying the range of months a federal prisoner must serve before his release from prison.[3] The Immigration and Naturalization Service changed its instructions to district directors concerning the effect of an alien's marriage on his deportation. As a result of the new directive, the marriage of a deportable alien to a resident alien would no longer be the basis for an indefinite extension of deportation.[4]

Each of these administrative rules had important and immediate consequences for an appreciable number of persons. The rules had a definite impact on access to medical care, terms in federal prisons, and residency in the United States. Yet in none of these instances

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1. Rev. Rul. 69-545, 1969-2 C.B. 117.

2. *See* Eastern Ky. Welfare Rights Organization v. Simon, 506 F.2d 1278 (D.C. Cir. 1974), *revd. on other grounds*, 96 S. Ct. 1917 (1976), *discussed in* text at notes 145-57 *infra*.

3. 28 C.F.R. §§ 2.18-.20 (1975). *See* Pickus v. United States Bd. of Parole, 507 F.2d 1107, 1112 (D.C. Cir. 1974), *discussed in* text at notes 120-32 *infra*. *See generally* Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810 (1975).

4. *See* Noel v. Chapman, 508 F.2d 1023 (2d Cir. 1975), *cert. denied*, 423 U.S. 824 (1976), *discussed in* text at notes 82-87 *infra*.

did the agency give any prior notice that it was considering a new rule or permit the public to comment before its adoption. This lack of procedure contrasts sharply with the requirements for most rule-making under section 4 of the Administrative Procedure Act (APA),[5] which prescribes preadoption notice to the public and an opportunity for interested persons to comment on the proposed rule.

In each case, the agency's failure to involve the public in the formation of its rule had a plausible basis: the exceptions in the APA's rule-making provision for interpretive[6] rules or policy statements.[7] Although interpretive rules of general applicability and general policy statements must be published in the *Federal Register*,[8] the APA sets

5. (a) This section applies, accordingly to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 553 (1970).

6. Although the APA uses the term "interpretative," the author prefers the word "interpretive" for stylistic reasons. For an example of a statute using the word "interpretive," see Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. § 57(a)(1)(A) (Supp. V 1975).

7. *See* 5 U.S.C. § 553(b)(A), (d)(2) (1970).

8. 5 U.S.C. § 552(a)(1)(D) (1970).

forth no procedural formalities for their adoption.[9] For purposes of this article, an "interpretive rule" clarifies the meaning of language in statutes or other rules without creating legally binding rights or obligations, and a "policy statement" indicates how the agency will exercise a discretionary function. Both types of administrative pronouncements ("nonlegislative rules")[10] are to be contrasted with administratively enacted "legislative rules,"[11] which prescribe rights or obligations binding on both the agency and the public.

Section I of this article surveys the practices of a selected group of federal agencies in the adoption of interpretive rules and policy statements. It emphasizes the importance of these rules both to members of the public and to the administrative process. Section II analyzes the cases that have considered the APA exemption of interpretive rules and policy statements from preadoption notice and comment procedures. These cases are in disarray for several reasons. For one thing, the bright lines traditionally assumed to distinguish interpretive rules and policy statements from legislative rules have become blurred and indistinct. Moreover, the courts have become sensitive to the public's need to take part in the rule-making process and have increasingly required procedural innovations at the agency level. As section II shows, two inconsistent lines of case law have emerged. In one group of cases, the courts have analyzed the "legal effect" of the rule and have deferred to the agency's own categorization of its rule. In the second group, the courts have concentrated on the practical effect of the rule and have required preadoption procedures for rules that have a "substantial impact" on the public. Unfortunately, the

9. For discussion of this exemption, see K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES 138-66, 193-205 (1976); Bonfield, *Some Tentative Thoughts on Public Participation in the Making of Interpretative Rules and General Statements of Policy Under the A.P.A.*, 23 AD. L. REV. 101 (1971); Javaras, Krane & Levin, *Public Hearings for Private Rulings: A Dissent*, 50 TAXES 160 (1972); Koch, *Public Procedures for the Promulgation of Interpretative Rules and General Statements of Policy*, 64 GEO. L.J. 1047 (1976); Note, *Administrative Law—The Legislative-Interpretative Distinction: Semantical Feinting with an Exception to Rulemaking Procedures*, 54 N.C.L. REV. 421 (1976); Comment, *A Functional Approach to the Applicability of Section 553 of the Administrative Procedure Act to Agency Statements of Policy*, 43 U. CHI. L. REV. 430 (1976) (a particularly thoughtful comment); Comment, *Revenue Rulings and the Administrative Procedure Act*, 1975 WIS. L. REV. 1135.

10. There is no doubt that both policy statements and interpretive rules are "rules" under the APA. A "rule" is defined as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, *interpret*, or prescribe law or policy. . . . " 5 U.S.C. § 551(4) (1970) (emphasis added).

11. Although the term "substantive rule" appears more frequently in judicial decisions, the author prefers the term "legislative rule." The term "substantive," which implies a distinction from "procedural," is confusing in this context. None of the rules considered in this paper—interpretive rules, policy statements, or legislative rules—are procedural; rather, all relate to substance.

first group of cases fails to give sufficient attention to the public's need to participate in the rule-making process, while the second is difficult to reconcile with the APA and produces unpredictable results. Section III of this article returns to the problem of the distinction between legislative and interpretive rules and emphasizes the increasing irrelevance of the distinction. Finally, section IV proposes a new post-adoption procedure for the formulation of interpretive rules of general applicability and general policy statements. It is hoped that these procedures accommodate the conflicting needs of the public to influence agency nonlegislative rulemaking and of the agency to be free from excessive procedural rigidity.

I. The Role of Interpretive Rules and Policy Statements in the Administrative Process

This section of the article summarizes the nonlegislative rule-making practices of four representative federal agencies: the Internal Revenue Service, Immigration and Naturalization Service, Federal Communications Commission, and Federal Trade Commission.[12] This analysis should convey an understanding of the indispensability of interpretive rules and policy statements to effective administration and their enormous practical impact on the public.

A. *Rule-Making Practices of the Federal Agencies*

1. *Internal Revenue Service (IRS)*

In considering the rule-making procedures of the IRS, it is necessary to distinguish between "regulations" and other rules. The familiar IRS regulations[13] seem to be a mixture of legislative and interpretive rules, but this distinction has no procedural importance. The adoption of virtually all new or amended regulations on substantive tax matters is accompanied by prior notice and comment procedures. Thus, appellate courts concerned with the validity of IRS regulations

12. Some of the material presented in this section is drawn from interviews conducted at the four agencies. Interviews were also conducted with the staffs of six other agencies: the Food and Drug Administration, Federal Power Commission, Wage and Hour Division of the Department of Labor, Occupational Safety and Health Administration, Securities and Exchange Commission, and the United States Board of Parole. For a description of the rule-making practices of these agencies, see my consultant's report to the Committee on Rulemaking and Public Information of the Administrative Conference of the United States.

The interviews covered such matters as the purposes for which interpretive rules and policy statements are used, the procedures used in adopting them, and the staff's attitude toward the desirability of additional procedures. Reference is made to these interviews throughout the article without citation.

13. Treas. Reg. §§ 1.0-601.702 (1976).

seldom need to decide whether the regulation is legislative or interpretive.

However, the IRS adopts many other nonlegislative rules of general applicability. For example, it issues about 700 revenue rulings each year,[14] which typically apply tax statutes, regulations, or prior rulings to particular facts. These rulings, published in the *Cumulative Bulletin*, are adopted without prior notice or opportunity for public comment and bind the IRS as a matter of policy.[15] Although many rulings seem fairly trivial, others unquestionably have great public impact and most have significance for at least a few taxpayers. For example, the ruling mentioned at the beginning of this article,[16] which established that tax-exempt private hospitals need not give free or below-cost service to the poor, had a great impact on health care delivery. Other particularly important revenue rulings announced the Service's position on the deductibility of prepaid interest[17] and of expenditures for cattle feed,[18] and eliminated the popular educational benefit trust device.[19]

The Service also issues about fifty revenue procedures annually. These appear to be policy statements, since they indicate how the IRS intends to exercise its discretion. For example, a revenue procedure is often used to indicate the circumstances in which the Service will give a favorable private ruling.[20] Since such private rulings are virtually indispensable for certain kinds of transactions, the revenue procedure as a practical matter establishes law. The recent revenue procedures that set ground rules for the use of limited partnerships as tax shelters[21] are prime examples of policy statements that have a large practical impact on private affairs. Finally, the IRS Manual contains interpretive rules and policy statements along with many procedural instructions to the Service's staff.[22]

The interpretive rules and policy statements adopted by the IRS

14. *See generally* Comment, 1975 WIS. L. REV. 1135, *supra* note 9.

15. Rev. Proc. 72-1, §§ 6.013-.015, 1972-1 C.B. 694-95. *See generally* Rogovin, *The Four R's: Regulations, Rulings, Reliance, Retroactivity*, 43 TAXES 756 (1956).

16. *See* text at notes 1-2 *supra* & notes 145-57 *infra* and accompanying text.

17. *See* Rev. Rul. 68-643, 1968-2 C.B. 76; Andrew Sandor, 62 T.C. 469 (1974), *aff'd. per curiam*, 536 F.2d 874 (9th Cir. 1976).

18. Rev. Rul. 73-530, *reissued as* Rev. Rul. 75-152, 1975-1 C. B. 144. *See* Cattle Feeders Tax Comm. v. Shultz, 74-1 U.S. Tax Cas. 83,067 (W.D. Okla.), *revd. on other grounds*, 504 F.2d 462 (10th Cir. 1974).

19. *See* Rev. Rul. 75-448, 1975-2 C.B. 55.

20. *See, e.g.*, Rev. Proc. 74-26, 1974-2 C.B. 478.

21. *See* Rev. Proc. 74-17, 1974-1 C.B. 438; Rev. Proc. 72-13, 1972-1 C.B. 735.

22. *See* UNITED STATES INTERNAL REVENUE SERVICE, INTERNAL REVENUE MANUAL § 4562.2 (1975) (reasonable cause for filing of returns).

benefit both taxpayers and the agency. They guide IRS personnel in applying the law uniformly to taxpayers all over the country. In addition, by clarifying the law, they reduce the number of inquiries from taxpayers to which the IRS must respond. Finally, they conserve scarce IRS resources by deterring the very kinds of transactions that would most likely be audited and that would probably lead to litigation.

2. *Immigration and Naturalization Service (INS)*

Like the IRS, the INS utilizes preadoption notice and comment procedures when it adds to or alters both legislative and interpretive rules published in the *Code of Federal Regulations*. But it also makes extensive use of policy statements and interpretive rules by issuing annually hundreds of operating instructions to staff.[23] The INS has been gradually increasing the number of its rules that are exposed to prior public comment,[24] but most of the staff instructions are adopted without any public input.

The validity of adopting policy statements and interpretations concerning immigration matters without prior public notice and comment has been frequently litigated. In each case, the rule appears to have had a drastic impact on the affairs of significant numbers of people. One case, referred to at the beginning of this article,[25] involved an INS "operations instruction" concerning the effect of marriage on deportation. Another was a Labor Department field memorandum relating to live-in maids.[26] A third involved a Labor Department directive that revoked a convenient precertification procedure for aliens seeking visas to work in the United States.[27] And a fourth involved an INS rule affecting the exclusion of alien students from the labor certification provisions.[28] Finally, an operations instruction setting forth criteria for voluntary departure and indefinite

23. The Labor Department also issues many instructions and interpretations to guide the INS in administering the provisions relating to labor certification of aliens. They are generally adopted without any prior notice or comment procedures.

24. The INS personnel interviewed said that the input from the public was often quite helpful to the agency.

25. *See* Noel v. Chapman, 508 F.2d 1023 (2d Cir. 1975), *discussed in* text at note 4 *supra* & notes 82-87 *infra* and accompanying text; Yan Wo Cheng v. Rinaldi, 389 F. Supp. 583 (D.N.J. 1975); Dimaren v. INS, 398 F. Supp. 556 (S.D.N.Y. 1974).

26. *See* Pesikoff v. Secretary of Labor, 501 F.2d 757 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1038 (1975).

27. *See* Lewis-Mota v. Secretary of Labor, 469 F.2d 478 (2d Cir. 1972), *discussed in* text at notes 114-19, *infra*.

28. *See* Hou Ching Chow v. Attorney General, 362 F. Supp. 1288 (D.D.C. 1973).

extensions of voluntary departure[29] has had great practical importance in day-to-day deportation proceedings.

3. *Federal Communications Commission (FCC)*

While the FCC has long made extensive use of policy statements, it has been inconsistent in inviting public participation.[30] Among the many such FCC pronouncements that have had a dramatic effect on the interests of both licensees and the public are the chain broadcasting report held ripe for review by the Supreme Court in *Columbia Broadcasting System, Inc. v. United States*;[31] a 1965 statement on the criteria for selecting among applicants for a license in a comparative hearing,[32] and a 1970 statement prescribing license renewal criteria.[33] Other policy statements used by the FCC are more innocuous; they may simply be reminders to the industry of new statutes or well-established and noncontroversial points.[34]

FCC staff members claim that policy statements have been used because the policies lacked sufficient definitiveness to be expressed in legislative rules. They deny that the FCC uses the policy statement label to avoid the requirement of public participation or to facilitate subsequent deviations from the statement.[35] Sometimes, however, as in the case of the so-called personal attack rules,[36] legislative rules are employed to announce new policy so that the sanction of statutory forfeiture procedures can be invoked for violation of the rules.[37]

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29. IMMIGRATION & NATURALIZATION SERVICE OPERATIONS INSTRUCTIONS § 242.10.

30. For examples of policy statements in which public comments were solicited, see 40 Fed. Reg. 25,689 (1975) (concerning agreements between broadcast licensees and the public); 39 Fed. Reg. 39,395 (1974) (concerning children's television programs); 39 Fed. Reg. 26,371 (1974) (concerning the fairness doctrine and public interest standards).

31. 316 U.S. 407 (1942).

32. 1 F.C.C.2d 393 (1965).

33. 22 F.C.C.2d 424 (1970). *See* Citizens Communications Center v. FCC, 447 F.2d 1201, 1204 n.5 (D.C. Cir. 1971), which suggests in dictum that adoption of this policy statement without public participation might have been invalid.

34. *Cf.* Yale Broadcasting Co. v. FCC, 478 F.2d 594 (D.C. Cir.), *cert. denied*, 414 U.S. 914 (1973), involving the FCC's warning to licensees that they should screen recorded music for lyrics that encourage drug use. 31 F.C.C.2d 377 (1971). The court felt that the FCC was simply reminding licensees of an already existing duty.

35. Professor Tomlinson suggests that one recent FCC decision was in the form of a policy statement rather than a legislative rule so that it could be retroactive. *See* E. Tomlinson, Final Report in Support of Recommendation on Strengthening the Informational and Notice Giving Functions of the Federal Register 33 n.80 (Dec. 31, 1975) (unpublished report for Administrative Conference of the United States).

36. *See* 47 C.F.R. § 73.123 (1976). These rules were upheld in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

37. *See* 47 U.S.C. § 503(b) (1970); 18 F.C.C. 2d 240 (1969) (FCC's statement on employment nondiscrimination rules).

4. *Federal Trade Commission (FTC)*

In addition to its legislative trade regulation rules, the FTC issues a substantial number of interpretive rules in the form of industry guides.[38] These designate conduct that the FTC believes is unfair or deceptive; they typically have a substantial impact on commercial practices, since businesspersons in the affected industries generally conform to them. The staff puts comparatively little effort into the drafting of interpretive rules, which tend to be relatively vague and comprehensive, unlike legislative rules, which are tightly drawn, very specific, and cover relatively few points. Since 1958, the FTC has adopted industry guides only after giving public notice and inviting comments,[39] and interviews with the agency staff indicated that the comments received were frequently quite helpful.

The new FTC statute clearly distinguishes interpretive and legislative rules.[40] Violation of legislative rules gives rise to liability for steep civil penalties as well as to broad liabilities to the public,[41] but violation of interpretive rules cannot automatically trigger such liabilities.[42] In FTC adjudication, interpretive and legislative rules are sharply differentiated: If a person has violated an interpretive rule, the FTC proceeds under the statute, using the rule as a likely but not a necessary interpretation; but if the respondent has violated a legislative rule, the FTC proceeds under the rule.[43] Thus, adjudication under a legislative rule is considerably less complex than under an interpretive rule, since the agency must determine the meaning of the statute in the latter case. However, in such a case, the agency is almost certain to give great weight to its previously promulgated interpretive rule; it is doubtful therefore that the results of applying legislative and interpretive rules will often differ.

B. *The Interests of Agencies and the Public in Interpretive Rules and Policy Statements*

The preceding discussion of the practices of four agencies illus-

38. *See, e.g.*, 16 C.F.R. § 256 (1976) (guides for lawbook industry).

39. However, the FTC does not invite public comments before issuing its occasional enforcement policy statements, which indicate enforcement priorities for the staff. *See, e.g.*, 16 C.F.R. § 14.9 (1976) (foreign language advertising); 36 Fed. Reg. 12,058 (1971) (substantiation of advertising claims).

40. *See* Federal Trade Commission Act § 18(a)(1), 15 U.S.C. § 57a (Supp. V. 1975), which distinguishes interpretive rules and policy statements from legislative rules. The elaborate procedures prescribed for the adoption of legislative rules are more detailed than those generally required by the APA.

41. Federal Trade Commission Act § 5(m), 15 U.S.C. § 45(m) (Supp. V. 1975).

42. Interpretive rules are explicitly exempted from these provisions. 15 U.S.C. § 45(m)(1)(A) (Supp. V 1975).

43. *See* 16 C.F.R. § 1.5 (1976).

trates several fundamental points. First, interpretive rules and policy statements are of great importance to the public in alerting them to the agency's position on substantive matters. They frequently have a substantial impact on the affairs of large segments of the public because they definitively affect the behavior of agencies and interested persons or groups. In this respect they differ little from legislative rules.

Second, interpretive rules and policy statements are indispensable to proper administration. Agencies cannot perform effectively unless they clarify the law through interpretive rules and channel their discretion through policy statements. Both kinds of rulemaking are needed to guide the staff in administering the statute and in assisting regulated persons to comply with the law.[44]

Third, a number of agencies now make it their practice to provide notice and comment procedures for many or even most of their generally applicable interpretive rules and policy statements.[45] This practice has become prevalent at some agencies, appears occasionally in others, and is unknown in still others. The trend toward the voluntary use of public participation has been influenced by several considerations. In response to recent cases requiring public participation in the formulation of interpretive rules and policy statements that have a "substantial impact,"[46] personnel at some agencies have decided that the costs of notice and comment procedures are preferable to the uncertainties of litigation. Personnel at other agencies are genuinely convinced of the value of public participation. They believe it produces better rules, increases judicial deference, and enhances the acceptability of the rules to the public. Still, the voluntary use of preadoption procedures is spotty. Unless there is either additional clarification by the courts of the applicable definitional standard or congressional revision of the APA, many agencies will continue to make interpretive rules and policy statements without any public participation at all.

Finally, the interviews at many agencies suggest that agency personnel almost unanimously oppose any statute that would require the standard preadoption notice and comment procedures for most or all interpretive rules and policy statements. The staffs repeatedly stressed that, if followed in good faith, such procedures would seri-

44. *See generally* E. Tomlinson, *supra* note 35, at 32-57.

45. For a discussion of the practices of the FCC and the FTC, see text at notes 30-43 *supra*. The Food and Drug Administration, Federal Power Commission, and Securities and Exchange Commission also frequently utilize notice and comment procedures in connection with nonlegislative rulemaking.

46. *See* notes 108-57 *infra* and accompanying text.

ously delay rulemaking and increase agency costs. Often the public would have nothing useful to contribute, yet a proposed rule could be delayed for many months, during which time uncertainty and confusion would exist. Interviewed agency personnel cautioned that the extra burdens of preadoption procedures would deter the promulgation of interpretive rules and policy statements and would force the agency to find alternative ways to achieve the same result.

This consensus should counsel caution in espousing a repeal of the present APA exemption for policy statements and interpretive rules. Nevertheless, the present statute excludes the interested and affected public from participation in the formulation of interpretations and policy, except when the agency voluntarily provides notice and comment procedures or a court intervenes. Therefore, a method must be devised that reconciles the justifiable claims of the agencies and the public whom they serve. After analyzing the confused case law in this area, this article will propose a system for postadoption public commentary that offers prospects of reconciling these demands.

II. Judicial Tests Used To Distinguish Legislative and Nonlegislative Rules

Under the APA, legislative and nonlegislative rules must be sharply distinguished, since the Act requires full-fledged notice and comment procedures prior to the adoption of legislative rules but imposes no such requirements upon the adoption of nonlegislative rules.[47] Yet the APA fails to define interpretive rules or policy statements, and, as a practical matter, it is often difficult to distinguish them from legislative rules except by recourse to the agency's label. For example, the FCC adopted a "policy statement" to prescribe the standard of service that a broadcaster must meet in order to have its license renewed[48] but adopted a "legislative rule" to prescribe the equal employment obligations of licensees.[49] Both pronouncements limited the FCC's discretion to decide what is in the public interest and both had a substantial practical impact upon broadcasters, yet the public was invited to participate only in the formulation of the legislative rule.

In recent years, members of the public have claimed that they were entitled to notice and comment before the adoption of a rule

47. However, there is no distinction between legislative and nonlegislative rules of general applicability on one important point; all must be published in the *Federal Register*. 5 U.S.C. § 552(a)(1)(D) (1970).

48. *See* 22 F.C.C.2d 424 (1970).

49. *See* 18 F.C.C.2d 240 (1969).

labelled by the agency as an interpretive rule or a policy statement. Courts responding to these claims have adopted one of two inconsistent lines of analysis. According to one line of cases, a rule is classified as legislative or nonlegislative on the basis of whether it alters the legal rights or obligations of members of the public. The courts in these cases generally defer to the agency's own categorization of the rule. The standard developed in these cases will be referred to in this article as the "legal effect" test. Courts in the second line of cases pay far less attention to the agency's label or to the legal effect of the rule; instead they decide whether the public was entitled to participate by weighing the public's need to do so. The standard used in these cases will be referred to herein as the "substantial impact" test.

A. *The Legal Effect Standard*

The legal effect test is based on the proposition that there exists a fundamental difference in the legal consequences of legislative and nonlegislative agency action. According to this test, legislative rules alter the rights and obligations of members of the public without further action by the agency. Nonlegislative rules, on the other hand, simply describe how the agency intends in the future to interpret law or exercise discretion. Even though nonlegislative rules may have drastic, self-executing effects on behavior, they nevertheless are not "the law." Of course, the most obvious way to ascertain whether a rule affects the public's rights and obligations is to determine how the agency describes its rule; thus the courts rely heavily on the agency's label. But the courts have also been guided by tests suggested by the reports of governmental committees, the legislative history of the APA, and commentators. For purposes of discussion, this section will treat separately the development of the legal effect standard in cases involving policy statements and interpretive rules.

1. *Policy Statements*

A recent Second Circuit decision remarked that the distinction between policy statements and legislative rules had become "enshrouded in considerable smog."[50] In a similar vein, the District of Columbia Circuit thought the distinction was a "fuzzy product."[51] No one who reads the cases that have wrestled with this

50. Noel v. Chapman, 508 F.2d 1023, 1030 (2d Cir. 1975), *cert. denied*, 423 U.S. 824 (1976).

51. Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33, 37 (D.C. Cir. 1974), *quoting* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 5.01, at 290 (1958). *See* Shapiro,

problem would disagree with these characterizations. Although the complaints are contemporary, the smog and fuzziness have been present from the outset, for it has never been possible clearly to distinguish policy statements from legislative rules.

a. *Tests suggested by committees and commentators.* One early standard under which the two types of rules might be distinguished[52] was offered in the seminal report of the Attorney General's Committee on Administrative Procedure. Recommending that general policy statements be published in the *Federal Register*, the Committee described them this way:

> Most agencies develop *approaches* to particular types of problems, which as they become established, are generally determinative of decisions. . . . As soon as the "policies" of an agency become *sufficiently articulated* to serve as real *guides to agency officials* in their treatment of concrete problems, that fact may advantageously be brought to public attention by publication in a precise and regularized form.[53]

This description is a helpful first effort, but it seems contradictory. What did the Committee mean by "approaches" to problems? If it meant that a policy statement is tentative, rather than definitive, the distinction may be workable. Yet confusion arises from the remainder of the Committee's description, which requires that the policy be "sufficiently articulated to serve as a real guide to agency officials . . . ." If the policy has reached that stage of concreteness, then there may be little to distinguish it from a legislative rule that also guides agency officials and the public.[54]

The Choice of Rulemaking or Adjudication in the Development of Administrative Policy, 78 HARV. L. REV. 921, 930 (1965).

52. For an interesting early case on a policy statement, see Standard Computing Scale Co. v. Farrell, 249 U.S. 571 (1919). State statutes provided for both a state superintendent and local inspectors of weights and measures. After an investigation, the state superintendent published a "bulletin" in which he said that scales "must" be equipped with a device to compensate for temperature changes. Local inspectors followed the bulletin and refused to "seal" plaintiff's scale, which lacked this device. The Supreme Court held that the "bulletin" was not a "rule" and thus not subject to any constitutional attack. It declared that the opinions and advice of those in authority are not a law or a regulation.

53. FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 26-27 (1941) (emphasis added) [hereinafter cited as ATTORNEY GENERAL'S COMMITTEE REPORT].

54. The discussion of the dissenting members of the Committee is even less helpful. They proposed that an agency be compelled by statute to formulate and publish a number of items including statements of policy: "Where an agency acting under general or specific legislation, has formulated or acts upon general policies not clearly specified in legislation, so far as practicable such policies shall be formulated, stated, published, and revised in the same manner as other rules." *Id.* at 225. This language was incorporated in the publication requirements of the legislation introduced to implement the Committee's report. *See* S.674, 77th Cong., 1st Sess. § 202(a), 87 CONG. REC. 333 (1941); S.918, 77th Cong., 1st Sess. § 302(b), 87 CONG. REC. 1150

The legislative history of the APA provides little guidance for developing a standard for defining policy statements, although it does provide a clear statement of the rationale for the statutory exemption for nonlegislative rules.[55] Presumably, the APA draftsmen were guided by the rather vague description of policy statements in the Attorney General's Committee report.[56]

The *Attorney General's Manual on the Administrative Procedure Act*[57] noted that general statements of policy are "statements issued by an agency to advise the public prospectively of the manner in which the agency *proposes* to exercise a *discretionary power*."[58] This definition is moderately useful. It uses the word "proposes," which again suggests that a policy statement is tentative rather than definitive. It emphasizes that a policy statement relates to a discretionary power, whereas an interpretive rule construes statutes or rules. Nevertheless, the definition tells little about how to distinguish policy statements from those legislative rules that also address discretionary functions.

Several commentators have proposed tests for identifying policy statements and distinguishing them from legislative rules. Professor Bonfield, for example, has suggested that policy statements are those rules addressed to the staff of the agency rather than to members of the public.[59] Professor Davis, in contrast, argued that the rules should be distinguished largely by reference to the label chosen by the agency.[60] In a recent study for the Administrative Conference of the United States, Professor Tomlinson suggested that policy statements are temporary measures designed to be replaced relatively quickly by more definitive legislative rules.[61] Drawing upon a number of recent cases, still another commentator suggested that, to

(1941), *quoted in Administrative Procedure: Hearings on S.674, S.675, and S.918 Before a Subcomm. of the Senate Comm. on the Judiciary*, 77th Cong., 1st Sess. 27 (1941) [hereinafter cited as *Hearings*].

55. *See* S. Doc. 248, 79th Cong., 2d Sess. 18 (1946), *reprinted in* LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, 1946, at 18 (1947) [hereinafter cited as APA LEGISLATIVE HISTORY], *quoted in* note 261 *infra*.

56. *See* note 53 *supra*.

57. ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947). The Manual was written in 1947, one year after the passage of the APA, to explain its purpose and effect to administrative officials.

58. *Id.* at 30 n.3 (emphasis added). The District of Columbia Circuit accorded this definition "considerable weight because of the very active role the Attorney General played in the formulation and enactment of the APA." Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33, 38 n.17 (D.C. Cir. 1974).

59. *See* Bonfield, *supra* note 9, at 115.

60. K. DAVIS, *supra* note 9, at 148.

61. *See* E. Tomlinson, *supra* note 35, at 50. For a similar view, see K. DAVIS, DISCRETIONARY JUSTICE 102 (1969).

determine which rules concerning discretionary functions should be considered legislative rules, courts must analyze the substantiality of a rule's effect on the public, the extent to which the public would have a subsequent opportunity to influence the agency, the extent to which public comment would help the agency, and considerations of agency efficiency.[62]

b. *Judicial definitions.* The first significant case to address the problem of identifying policy statements was *Airport Commission of Forsyth County v. CAB*,[63] which involved the requirement that general policy statements be published in the *Federal Register*. The Civil Aeronautics Board and the Federal Aviation Administration jointly issued a press release setting forth a new policy concerning the centralization of airline routes into a single airport serving several cities. However, the press release was not published in the *Federal Register*, seemingly a clear-cut violation of section 3 of the APA.[64] In an unpersuasive opinion, the Fourth Circuit held that publication was not required, observing that the press release did not set forth a rule that the public was required to obey or with which it had to avoid conflict. This test proved helpful to later courts seeking to distinguish policy statements from legislative rules through analysis of the legal effect of the rule.

A panel of the District of Columbia Circuit adopted the *Forsyth County* analysis in the important 1974 case of *Pacific Gas & Electric Co. v. FPC*.[65] The FPC required pipeline companies to file plans establishing priorities during periods in which gas deliveries were to be curtailed. The submitted plans reflected a wide range of views on whether curtailments should occur according to the relative efficiencies of the end use of the gas or according to prior contractual commitments. Consequently, the FPC issued Order 467, which it called a policy statement, explaining that curtailments should occur according to a detailed priority list based on the efficiency of the end use of the gas. There was no public participation in the formulation of Order 467, and the court held that none was required.[66]

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62. *See* Comment, 43 U. CHI. L. REV. 430, *supra* note 9.

63. 300 F.2d 185 (4th Cir. 1962).

64. Section 3(a)(3) of the APA explicitly required publication of "statements of general policy or interpretations of general applicability formulated and adopted by the agency for the guidance of the public." Administrative Procedure Act, ch. 324, § 3, 60 Stat. 238 (1946). Although the language is different, the requirements of the current version of the statute are the same. 5 U.S.C. § 552(a)(1)(D) (1970). *See* E. Tomlinson, *supra* note 35, at 47-48.

65. 506 F.2d 33 (D.C. Cir. 1974). *Accord*, Pacific Lighting Serv. Co. v. FPC, 518 F.2d 718 (1975).

66. *See* 506 F.2d at 38.

In reaching its decision, the court first spoke of the appropriate role of policy statements in the administrative process. Policy statements, it observed, are anterior to both rulemaking and adjudication; like press releases, they announce policy the agency hopes to implement in future rulemaking or adjudication. The publication of policy statements permits public dissemination of the agency's policies prior to actual application in particular situations and facilitates long-range planning within the affected industry.

Turning to the problem of characterizing the rule, the court relied on the *Forsyth County* test. It noted that a policy statement does not establish a binding norm or make a final determination of any issues or rights. The agency cannot apply or rely upon it as law and must be prepared to support the policy when it is applied as if the statement had never been issued.[67] Applying these principles, the court determined that Order 467 had no final, inflexible impact upon the petitioners. Deferring to the agency's characterization and description of its action, the court noted that it had been consistently described as a policy statement. The court also found it significant that the order expressly envisaged future proceedings. It emphasized as well the right of interested parties in subsequent adjudications to challenge or support the policy through factual or legal presentations.[68] The FPC declared that the order prescribed only initial guidelines as a means of facilitating curtailment planning and the adjudication of cases. Indeed, the court went out of its way to establish that Order 467 would not even shift the burden of proof in subsequent curtailment cases and that the burden would remain on the pipeline company.[69]

The decision reached in *Pacific Gas & Electric* seems correct if the standard for analysis is the legal effect of the policy statement. Application of the factors suggested by the Attorney General's Committee report, prior cases, and commentators seems to suggest, on the whole, the same result reached by the court:

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67. *See* 506 F.2d at 38.

68. *See* 506 F.2d at 40-41.

69. *See* 506 F.2d at 43. The court could easily have held that Order 467 shifted the burden of proof in subsequent proceedings to customers. Transwestern Pipeline Co., 50 F.P.C. 343 (1973), *affd. sub nom.* Pacific Lighting Serv. v. FPC, 518 F.2d 718 (9th Cir. 1975), involved customers who protested the priority system generally as well as the specific curtailment priorities. The FPC refused to order a hearing under section 4 of the Act, 15 U.S.C. § 717c(e) (1970), which would have given the pipeline company the burden of proving the reasonableness of its plan, and instead ordered a hearing under section 5, 15 U.S.C. § 717d (1970), which gave the challengers the burden of proof. 50 F.P.C. at 344. Thus, *Transwestern* could easily be read to indicate that Order 467 shifted the burden of proof and that the FPC had little interest in any prompt reconsideration of the matter. But the *Pacific Gas & Electric* court brushed *Transwestern* aside. *See* 506 F.2d at 43 n.28.

(1) the order did not set forth a rule that the public must obey;

(2) the FPC had consistently labelled the order as a policy statement;

(3) the order used many tentative words, which suggests it was a policy statement, although it was not clear whether the order was permanent or temporary;[70]

(4) it was not clear whether the statement was directed at the FPC staff or at the public; and

(5) aggrieved persons would have subsequent administrative proceedings in which they could seek to change the agency's policy.[71]

The discussion in *Pacific Gas & Electric* on the practical effect of Order 467 is disappointingly thin. The court alluded to *Columbia Broadcasting System, Inc. v. United States*,[72] in which a policy statement drastically impaired a network's contracts and organization, but said the "effect of Order 467 in the present case is not so direct or immediate"[73] because there was no present abrogation of contractual commitments. Such commitments would be affected only after actual curtailment plans were filed and approved by the FPC, and even then "[t]he possibility that petitioners might receive a lower curtailment priority at some future time as the result of a subsequent tariff filing does not compare with the significant and immediate impact of the regulations in *Columbia Broadcasting*."[74]

Admittedly, the effect of Order 467 was not as drastic as that of the policy statement in *Columbia Broadcasting*. But surely the impact of a policy statement should not have to reach that level of severity before adversely affected parties are given the right to pre-adoption participation. Order 467 had an immediate effect on all gas customers who had contractual commitments for deliveries, but low priorities, and who had every reason to take the FPC's pronouncement seriously. The chance of obtaining a waiver in subsequent proceedings would have appeared to them to be extremely slight.[75] Consequently, low priority customers had to begin an im-

70. These tests are suggested by Professors Bonfield and Tomlinson. *See* text at notes 59-61 *supra*.

71. *See* text at note 62 *supra*.

72. 316 U.S. 407 (1942).

73. 506 F.2d at 42.

74. 506 F.2d at 42.

75. A subsequent case, Consolidated Edison Co. v. FPC, 512 F.2d 1332 (D.C. Cir. 1975), *noted in* 17 B.C. INDUS. & COM. L. REV. 260 (1976), revealed that Order 467 would have an immediate effect. Both customers and pipeline companies who wished to continue interim plans that did not comply with Order 467 were summarily rejected by the FPC; thus, it was clear that filings in compliance with Order 467 would be accepted and all others would be suspended.

mediate search for alternative energy sources, to negotiate long-range commitments for other fuels, and to purchase equipment for burning them. All this might well impair profits and affect a vast range of investment decisions. Moreover, authoritative guidance from the FPC was absolutely imperative for the pipeline companies, since FPC approval of a plan abrogating existing contracts might be a defense to contractual liability in state courts.

The court also held that it had no jurisdiction to review Order 467 substantively[76] since the Order was not ripe for review under the two criteria set forth in *Abbott Laboratories v. Gardner*.[77] First, it had no immediate and significant impact on petitioners because it was tentative. There was no assurance that the Order would, in fact, be imposed on each customer and pipeline, and thus any attending hardships seemed remote. Second, the issues were not then deemed suitable for judicial review because there was no meaningful record. The contracts that were to be abrogated, for example, were not in the record. The court's analysis of the ripeness question is unsatisfactory. The fact that Order 467 did not have a binding legal impact on petitioners should not have been the sole criterion on the hardship issue. In several cases, practical business harm, together with reasonable assurances that the policy would not be reconsidered, has been considered a sufficient hardship.[78] The lack of a record is a far more serious objection; indeed, the court would have had considerable difficulty reviewing Order 467 since the FPC's basis for adopting it was never disclosed.[79] There was neither public comment, nor a statement of basis and purpose, nor any of the usual helpful material used in reviewing rulemaking.[80]

Pacific Gas & Electric clearly shows the inadequacy of the present statute and the legal effect test. Order 467 cried out for public participation, since great economic issues turned on it, and, as a practical matter, it was definitive. For that same reason, moreover, immediate

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76. Jurisdiction depended upon a statute that allowed review to "any party to a proceeding [who is] aggrieved by an order . . . ." 15 U.S.C. § 717r(b) (1970). Although the petitioners were considered "parties to a proceeding," Order 467 was held not to be an "order" under the statute. The court conceded that "order" includes both rules and adjudicative orders, and concluded that the standards for identifying an "order" should be the same as those used for deciding ripeness. 506 F.2d at 46-48.

77. 387 U.S. 136 (1967).

78. *See, e.g.*, National Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689 (D.C. Cir. 1971); text at notes 219-29 *infra*.

79. *See* 17 B.C. INDUS. & COM. L. REV. 260, *supra* note 75, at 280 & n.216.

80. For a discussion of the standards applied in judicial review of rulemaking, see Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974).

judicial review should have been available, yet the absence of a record made it infeasible.[81]

In 1975, a panel of the Second Circuit applied the legal effect test in *Noel v. Chapman*.[82] Noel was an alien residing in New York whose deportation had been ordered. He applied for and received the privilege of voluntary departure but failed to leave. He then married a resident alien and applied for an indefinite extension of voluntary departure. The effect of his marriage was to exempt him from the requirement of labor certification, but not to give him a preference over other Western Hemisphere aliens seeking visas. In essence, the indefinite extension he sought would have allowed him to remain with his wife until a visa became available.

Voluntary departure can be granted to a deportable alien at the discretion of the Attorney General.[83] By regulation, this authority is lodged within the sole discretion of the various district directors of the Immigration and Naturalization Service (INS).[84] Between 1968 and 1972, these directors followed markedly different policies in granting indefinite extensions to deportable aliens who had married resident aliens; the New York director had been particularly generous. Because of the adverse impact of indefinite extensions on the labor market, congressional pressure was exerted on the INS to be stricter about granting them. Consequently, the INS instructed all district directors that, as of July 31, 1972, such aliens should not routinely be granted extensions and that relief should be afforded only where warranted by compelling circumstances. On April 10, 1973, the instruction was amended in part so that the former New York policy would be applied nationwide. Unfortunately for Noel, however, the revised instruction applied only to marriages occurring

81. The *Pacific Gas & Electric* court made a dubious but intriguing observation related to the scope of judicial review of policy statements. The court pointed to the great deference accorded legislative rules by reviewing courts, and explained that this was the result of the public's role in formulating them. For discussion of the scope of judicial review accorded legislative rules, see text at notes 192-207 *infra*. But a policy statement adopted without public participation is fundamentally different, and its underlying wisdom may be reassessed by the reviewing court. *See* 506 F.2d at 40. This suggests that if a policy statement were adopted with public participation, the scope of its judicial review would be sharply narrowed. This dictum seems erroneous. If the agency has made a nonlegislative rule, plenary judicial review is appropriate, regardless of the procedural formalities attending its formulation. A narrow scope of review is appropriate only when the agency is exercising delegated legislative power. However, the degree to which the public participated could appropriately be considered by the court as one factor in deciding what deference it should pay to the agency's expertise. *See* text at notes 214-15 *infra*.

82. 508 F.2d 1023 (2d Cir. 1975), *cert. denied*, 423 U.S. 824 (1976).

83. *See* 8 U.S.C. § 1254(a) (1970).

84. *See* 8 C.F.R. § 244.2 (1975).

before April 10, 1973. Noel's marriage occurred three days too late, so he was not within the scope of the amendment.

Noel sought to have the instructions declared a legislative rule and therefore invalid for want of preadoption public notice and comment. Remarking that the distinction between policy statements and legislative rules was "enshrouded in considerable smog," the court agreed with the INS that they were policy statements, primarily because they imposed no obligation on the public.[85] The court was influenced by Professor Bonfield's view that policy statements are typically directed at the agency staff rather than at the public. If the criteria for assessing the legal effect of the rule are considered, however, it is unclear whether the court reached the correct result, since the criteria point in opposite directions:

(1) the INS instructions did not set forth a standard that the public had to obey, which suggests they amounted to a policy statement;

(2) the label given to the instructions was consistent with treating them as a policy statement;

(3) there was nothing tentative about the instructions, and they seemed permanent rather than temporary, which suggests they were a legislative rule;

(4) the instructions were directed at the staff, not the public, which suggests they were a policy statement; and

(5) aggrieved persons would have no opportunity to change the view of the personnel who were responsible for making the deportation decision because the instructions definitively forebade the staff from granting automatic extensions—a characteristic suggestive of a legislative rule.

The court recognized that several other courts had required public participation in the formulation of rules that have a "substantial impact." But it declared that there could be no substantial impact without a change in "existing rights or obligations," which it found lacking in the case before it.[86] As we shall see, however, the substantial impact cases do not require a change in *legal* rights or obligations. On the contrary, they turn on the presence of substantial *practical* impact.

Even if the *Noel* court were correct in its reading of the substantial impact cases, however, the INS instructions seem to have had an effect on the legal rights of individuals like Noel. To be sure, no alien ever had a legal right to require the district director to exercise discretion favorably to him. Yet the established practice in New York where

85. 508 F.2d at 1030.

86. 508 F.2d at 1030.

Noel lived had been routinely to grant indefinite extensions of deportation to married aliens. Before the agency terminated this practice for deportable aliens married after a certain date, marriage meant an indefinite extension, whereas afterwards marriage no longer sufficed. A valuable status initially created by administrative action had now been destroyed, in a manner and with an effect that surely resembles a change in legal rights. Moreover, unlike the persons adversely affected by the rules in *Forsyth County* and *Pacific Gas & Electric*, aliens such as Noel had no effective opportunity to protest the automatic application of INS policy in their cases. It would, therefore, have been wholly defensible for the court to have labelled the INS instructions a legislative rule even under the traditionally defined legal effect test.[87]

2. *Interpretive Rules*

Interpretation is a vital administrative function that consists of clarifying the meaning of statutes, prior regulations, case law, or other

87. If the definition of the phrase "general applicability and legal effect" provided in the regulation relating to the Federal Register Act were applied, the instructions in *Noel* might be considered to have had "legal effect." The phrase is defined as "any document issued under proper authority prescribing a penalty or course of conduct, *conferring* a right, *privilege*, authority, or *immunity*, or imposing an obligation, and relevant or applicable to the general public, members of a class, or persons in a locality, as distinguished from named individuals or organization." 1 C.F.R. § 1.1 (1975) (emphasis added). If the word "withdrawing" were substituted for "conferring," it would appear that the instructions in *Noel* indeed had "legal effect." By definitively altering the way in which a discretionary power could be exercised, the INS seems to have withdrawn a "privilege" or an "immunity."

It is also of some interest that the INS personnel interviewed thought that the instruction in *Noel* had a substantial practical impact on a significant class of aliens. This conclusion was shared by immigration lawyers who favor public participation in the making of INS instructions. Whether public participation would have served a useful purpose in the *Noel* situation, however, is uncertain. *See* Comment, 43 U. CHI. L. REV. 430, *supra* note 9, at 451-53 (a useful analysis of situations in which public participation is likely to produce helpful information for the agency). It is not clear, for example, how much the INS would have benefited from public exposure of the issues underlying the rule, such as the bona fides of marriages of deportable aliens, the impact of departure extensions on the labor markets, and the duration of the wait for visas. Certainly it is arguable that public debate would have been useful because the INS instruction had been the product of political concern over the competition for jobs between citizens and aliens that had been aggravated by a tight labor market. *Compare* Walter Holm & Co. v. Hardin, 449 F.2d 1009 (D.C. Cir. 1971) (oral argument required in rulemaking because of suspicion that agency favored domestic over foreign producers), *with* Consolidated Edison Co. v. FPC, 512 F.2d 1332 (D.C. Cir. 1975) (FPC's procedure that screened out public acceptable because its action apparently not favorable to regulated industry).

Other cases involving policy statements in which the legal effect test apparently was applied are Hunter v. Morton, 529 F.2d 645 (10th Cir. 1976) (alternative ground); Yale Broadcasting Co. v. FCC, 478 F.2d 594 (D.C. Cir.) *cert. denied*, 414 U.S. 914 (1973); Memphis Light, Gas & Water Div. v. FPC, 462 F.2d 853 (D.C. Cir.), *cert. denied*, 409 U.S. 941 (1972), *revd. on other grounds*, 411 U.S. 458 (1973) (semble); Yan Wo Cheng v. Rinaldi, 389 F. Supp. 583 (D.N.J. 1975); Dimaren v. INS, 398 F. Supp. 556 (S.D.N.Y. 1974).

law-declaratory material.[88] One important interpretive technique is the adoption by an agency of interpretive rules of general applicability. Interpretation also frequently occurs in the course of adjudication and through legislative rulemaking, as well as in less formal communications such as press releases, internal memoranda, or advice letters to members of the public.[89]

Consciousness of the difference between legislative and interpretive rules began to appear in the literature in the late 1920s.[90] Early administrative law writers had no difficulty making the distinction. Legislative rules were deemed to be those promulgated pursuant to a *specific* statutory delegation of rule-making power. For example, a statute might prohibit a certain action, if so provided in rules, or it might permit such action, except as provided in administratively enacted rules. Rules that were not based on a specific statutory delegation of power were considered interpretive.[91]

The writers of the 1941 report of the Attorney General's Committee on Administrative Procedure shared this understanding.[92]

88. *See generally* M. ASIMOW, ADVICE TO THE PUBLIC FROM FEDERAL ADMINISTRATIVE AGENCIES 80-82 (1973).

89. Interpretation can also occur through less formal means, such as informal adjudication, negotiation, speechmaking, dispensing of grants, and even the lifting of the administrative eyebrow.

90. *See* J. COMER, LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES ch. 5 (1927); F. VOM BAUR, FEDERAL ADMINISTRATIVE LAW 475-89 (1942); Alvord, *Treasury Regulations and the Whilshire Oil Case*, 40 COLUM. L. REV. 252 (1940); Lee, *Legislative and Interpretative Regulations*, 29 GEO. L.J. 1 (1940).

91. *See* ATTORNEY GENERAL'S COMMITTEE REPORT, *supra* note 53, at 27; Lee, *supra* note 90.

92. ATTORNEY GENERAL'S COMMITTEE REPORT, *supra* note 53, at 27.

The Committee discussed the legal attributes of interpretive rules:

> Most agencies find it useful from time to time to issue interpretations of the statutes under which they operate. These interpretations are ordinarily of an advisory character, indicating merely the meaning of applicable statutory language. They are not binding upon those affected, for, if there is disagreement with the agency's view, the question may be presented for determination by a court. But the agency's interpretations are in any event of considerable importance; customarily they are accepted as determinative by the public at large, and even if they are challenged in judicial proceedings, the courts will be influenced though not concluded by the administrative opinion. An agency's interpretations may take the form of "interpretative rules." More often they are made as a consequence of individual requests for rulings upon particular questions; but as "rulings" they are often scattered and not easily accessible.

Id.

While the Committee thus characterized legislative and interpretive rules differently, it was aware that these distinctions are often difficult to preserve in application:

> In addition to the power to enact legally binding regulations conferred upon many of the agencies, all of them may, if they wish, issue interpretations, rulings or opinions upon the laws they administer, without statutory authorization to do so. . . . Some agencies which issue interpretations couched in general terms rather than rulings upon particular facts are careful to distinguish them from regulations that have the force of law; other agencies simply promulgate their

However, their discussion also indicated a keen awareness of both the practical impact of interpretive rules and the deference paid to them by reviewing courts. The majority of the Committee favored the publication of all rules in the *Federal Register* but refrained from recommending specific procedures for rulemaking, partly because of concern that excessive hearings would be required when they were not needed.[93] When Congress returned to the task of prescribing uniform administrative procedures in 1946, it enshrined the difference between legislative and interpretive rules in the APA,[94] with the legislative history appearing to suggest an intent to adopt the legal effect test.[95]

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interpretations as regulations which are indistinguishable in form from those that have statutory force.

Administrative rulemaking, in any event, includes the formulation of both legally binding regulations and interpretative regulations. The former receive statutory force upon going into effect. The latter do not receive statutory force and their validity is subject to challenge in any court proceeding in which their application may be in question. The statutes themselves and not the regulation remain in theory the sole criterion of what the law authorizes or compels and what it forbids. An interpretative regulation even of long standing will be rejected if it is deemed to be in conflict with a clear and ambiguous statute.

The distinction between statutory regulations and interpretative regulations is, however, blurred by the fact that the courts pay great deference to the interpretative regulations of administrative agencies especially where these have been followed for a long time. . . . Although the courts at times avoid the effect of this doctrine by refusing to apply administrative interpretations which they consider inadmissible, the doctrine has sufficient weight to give much finality to the interpretative regulations of administrative agencies. Consequently, the procedures by which these regulations are prescribed become important to private interests and will be considered in this report.

Id. at 99-100 (footnotes omitted).

93. *Id.* at 108. Nevertheless, it strongly approved the various practices of consultation, conferences, and hearings that had developed by 1941. *Id.* at 103-08. The Committee recommended that all rules having "statutory effect" have a deferred effective date. *Id.* at 115. The minority members of the Committee would have required notice and comment procedures for all rules, legislative and interpretive. *Id.* at 228. In the legislative hearings that followed submission of the Report to Congress, there was relatively little discussion of the problem of interpretations. The testimony of Commissioner Healy of the SEC also indicates considerable confusion on the part of the Committee members. *See* Hearings, *supra* note 54, at 330.

94. It created a number of exemptions in addition to the one for nonlegislative rules. For an excellent critique of some of the other exemptions, see National Wildlife Fedn. v. Snow, 39 Ad. L.2d 705 (D.C. Cir. 1976); Bonfield, *Military and Foreign Affairs Function Rulemaking Under the Administrative Procedure Act*, 71 MICH. L. REV. 222 (1972); Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits or Contracts*, 118 U. PA. L. REV. 540 (1970). The Administrative Conference recommended repeal of these exemptions. *See* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS 69-8, 73-5 (1976).

95. The Judiciary Committee staff contended that there was no need to require procedural formalities for the adoption of interpretive rules since these are subject to plenary judicial review, whereas substantive rules are accorded maximum deference. *See* APA LEGISLATIVE HISTORY, *supra* note 55, at 18. During the Senate debate, Senator McCarran stated that there was no need for any special provision for interpretations since they are "merely adaptations [or] interpretations of statutes" and subject to a more intensive judicial review." *Id.* at 313.

Many judicial decisions have since weighed claims that the public should be allowed to participate in the formulation of rules that the agency asserts are interpretive under section 4 of the APA. Some of these cases involve agency interpretations of statutes, while others involve interpretations of prior rules. The cases that utilize the legal effect standard analyze the rule to determine whether it creates, by its own force, a legally binding standard of conduct. Highly relevant in this inquiry, of course, is the agency's chosen label.

A frequently cited case of this type is *American President Lines, Ltd. v. Federal Maritime Commission*.[96] According to the federal Shipping Act,[97] carriers can form a conference to establish uniform rates on the shipment of particular items. To deal with competition from nonparticipating carriers, the conference would "open" the rate on a particular item to competition. After a period of time, it would "close" the rate, thereby restoring uniformity. However, section 14b of the Shipping Act[98] posed a problem: If a conference "terminated" a contract rate system, it had to give ninety days notice of such action and could not reinstitute the rate without permission from the Federal Maritime Commission (FMC).

The FMC, without public participation, adopted a rule construing section 14b. The rule provided that the temporary "opening" of a rate was a "termination" under the Act that required ninety days notice, and that the "opened" rate could not be closed again without the FMC's permission. Carriers claimed the rule was invalid because the agency had failed to comply with section 4 procedures. In an opinion by Judge (now Chief Justice) Burger, the District of Columbia Circuit had little difficulty in characterizing the rule as interpretive, largely deferring to the label affixed by the agency. The court found persuasive the fact that the FMC had treated the rule as interpretive by denying that the rule had any "independent binding effect on carriers, and [by asserting that] the only penalties for action contrary to the rule are those penalties which were applicable before promulgation of the rule and independent of the rule, i.e., the penalties provided for violation of the Shipping Act itself."[99] The court adhered to the legal effect approach even though

A last helpful piece of commentary is the authoritative ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT, *supra* note 57, at 30 n.3, which defines interpretive rules as "rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."

96. 316 F.2d 419 (D.C. Cir. 1963).

97. 46 U.S.C. §§ 801-842 (1970).

98. 46 U.S.C. § 813(a) (1970).

99. 316 F.2d at 421-22. The court also held that the petitioner's objection to the lack of public participation was moot. 316 F.2d at 421.

it admitted that the rule would have significant practical impact:

> [T]his rule undeniably deals with a matter of great importance to petitioners' business activities . . . .
>
> . . . Whatever practical or psychological effect this rule may have on the conduct of petitioners—and we do not doubt that it may have some pragmatic consequences—its legal effect is essentially that of an opinion of the legal staff. Neither the affected parties nor the courts are bound by it unless they elect to adopt it as a correct interpretation of the statute.[100]

Frequently, a rule purports to interpret an earlier one. If the later rule only clarifies the earlier rule without amending it, no public participation is required.[101] If, however, the later rule amends the earlier one, APA rule-making procedures are obligatory.[102] It is quite difficult to determine whether a prior rule has actually been amended or merely interpreted. The leading case applying the legal effect test in this situation is *Gibson Wine Co. v. Snyder*.[103] At issue in *Gibson Wine* was a regulation that required wine derived from a particular fruit to be designated by the name of that fruit. The issue concerned boysenberry wine; since the boysenberry is a variety of blackberry, was boysenberry wine to be labelled as "blackberry wine" or "boysenberry wine"? After considerable vacillation, the deputy commissioner of the Internal Revenue Service finally ruled that it had to be labelled as "boysenberry wine." This ruling was particularly disadvantageous to bottlers of boysenberry wine, who protested that wines made from other varieties of blackberries could be labelled "blackberry wine." Plaintiff argued that this ruling was an amendment to the existing regulation, thereby requiring public participation under both the APA and a specific provision of the Intoxicating Liquor Law.[104]

The District of Columbia Circuit held that no public participation was required, since the rule was interpretive rather than legislative. The court used the legal effect test, remarking that legislative rules create law whereas interpretive rules state what the administrator thinks the law means. Since the ruling was merely the agency's

100. 316 F.2d at 421-22. Other cases that employ the legal effect test in analyzing the interpretive rule issue include Pesikoff v. Secretary of Labor, 501 F.2d 757, 763 n.12 (D.C. Cir.), *cert. denied*, 419 U.S. 1038 (1974); United States v. 353 Cases, 247 F.2d 473 (8th Cir. 1957), *cert. denied*, 358 U.S. 834 (1958).

101. If the subsequent rule is only interpretive of the earlier one, the later rule could be retroactive. *See* Fleming v. Van Der Loo, 160 F.2d 906, 913 (D.C. Cir. 1947). However, it would be substantively invalid if it was inconsistent with the earlier rule. *See* Barron Coop. Creamery v. Wickard, 140 F.2d 485, 488 (7th Cir. 1944).

102. Detroit Edison Co. v. EPA, 496 F.2d 244 (6th Cir. 1974).

103. 194 F.2d 329 (D.C. Cir. 1952), *noted in* 1 J. PUB. L. 491 (1952).

104. 27 U.S.C. § 205(f) (1970).

opinion as to the meaning of an existing regulation, it was held to be interpretive in nature. The court observed that interpretations receive a more intensive degree of judicial scrutiny than legislative rules, noted that the lower court had provided plenary review, and affirmed its holding that the interpretation was substantively correct.[105]

Judge Miller, in dissent, argued that the prior regulation was completely changed by the subsequent ruling. Previously all wine made from varieties of blackberry was permitted to be labelled blackberry wine; now the agency had created a special category for one "large and luscious" variety. He felt that this ruling could not be interpretive because the earlier rule was clear and did not need any interpretation. He added that the ruling had the force and effect of law[106] and also seemed to feel that due process considerations were involved.[107]

B. *The Substantial Impact Test*

In sharp contrast to the cases that distinguish between legislative and nonlegislative rules according to their legal effect are cases that consider the pragmatic effect of the rule determinative. It is not always clear from these cases whether the courts are rejecting the legal effect test as a definitional tool, or whether they accept it but require that notice and comment procedures be employed in the interest of fairness. Although the substantial impact cases are responsive to the public's need to participate in rulemaking, they furnish little predictable guidance to an agency that must decide what procedures to employ. In addition, the courts using the test have failed to explain how it is consistent with the language of section 4.

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105. *See* 194 F.2d 332-33.

106. *See* 194 F.2d at 335 (Miller, J., dissenting). Presumably, Judge Miller meant that the subsequent rule was legislative, and, therefore, by definition, it had the force of law. It is also possible that he meant that the ruling had the force of law in a practical sense, since the sanctions for violations were sufficiently severe to induce compliance. If so, his opinion is a precursor of the substantial impact test that emerged twenty years later.

107. *See* 194 F.2d at 336 (Miller, J., dissenting). Other cases that classify subsequent regulations as interpretive, largely by reference to the agency's label, are Reeves v. Simon, 507 F.2d 455 (Emer. Ct. App. 1974), *cert. denied*, 420 U.S. 991 (1975) (dictum); Shell Oil Co. v. FPC, 491 F.2d 82 (5th Cir. 1974); National Assn. of Ins. Agents, Inc. v. Board of Governors of Fed. Reserve Sys., 489 F.2d 1268 (D.C. Cir. 1974); Garelick Mfg. Co. v. Dillon, 313 F.2d 899 (D.C. Cir. 1963); Mitchell v. Edward S. Wagner Co., 217 F.2d 303 (2d Cir. 1954), *cert. denied*, 348 U.S. 964 (1955); National Restaurant Assn. v. Simon, 411 F. Supp. 993 (D.D.C. 1976). *But see* Detroit Edison Co. v. EPA, 496 F.2d 244 (6th Cir. 1974) (subsequent regulation classified as legislative despite its label, since it changed obligations of a regulated company).

1. *Policy Statements*

The foundation of the substantial impact test was laid in *Texaco, Inc. v. FPC*,[108] in which the court's discussion of policy statements was tangential to its holding. In that case, suit was brought to challenge a Federal Power Commission (FPC) regulation amended without public participation to require compound interest rather than simple interest on refunds. To justify its lack of public procedures, the FPC first relied on the APA provision that permits an agency to dispense with notice and comment procedures if they are "unnecessary,"[109] but the court held this exemption was inapplicable. As an apparent afterthought, the agency tried to characterize its rule as a policy statement. This position was doomed to defeat since the agency's own conduct was inconsistent with it.[110] In analyzing this claim, the court first defined a policy statement in traditional terms—as "one that does not impose any rights and obligations on an operator."[111] Using this test, the court held that the amendment was not a policy statement since it imposed a new obligation for the payment of compound interest on refunds, one which an operator would have the burden of proving should not apply in any waiver or similar proceeding.[112]

It was, however, the ensuing discussion of the values of public participation in rulemaking that was seized upon by subsequent courts. According to the court, notice and comment procedures give the public an opportunity to participate and enable the agency to educate itself "before establishing rules and procedures which have a *substantial impact* on those regulated."[113] But the *Texaco* court

108. 412 F.2d 740 (3d Cir. 1969).

109. *See* 5 U.S.C. § 553(b)(3)(B) (1970) ("when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest").

110. The regulation was not placed with the agency's interpretations and policy statements in the *Code of Federal Regulations*. The agency had never relied on the policy statement exception, and the court felt that its review power was limited to testing the validity of the theory used by the agency. *See* 412 F.2d at 744 nn.8 & 9. Moreover, the compound interest rule seemingly was not a policy statement, since it did not relate to a discretionary function. It would have been more plausible to characterize it as an interpretive rule, since it explains the meaning of the word "interest" in section 4(e) of the Natural Gas Act, 15 U.S.C. § 717c(e) (1970).

111. 412 F.2d at 744.

112. *See* 412 F.2d at 743-44. The court apparently felt that a new obligation was imposed by reason of a shift of the burden of proof. *See* text at notes 65-69 *supra*.

113. 412 F.2d at 744 (emphasis added). The court apparently drew support from National Motor Freight Traffic Assn. v. United States, 268 F. Supp. 90, 95 (D.D.C. 1967) (three-judge court), *affd. per curiam*, 393 U.S. 18 (1968), which referred to the

did not use the substantial impact test to determine that the compound interest rule was not a policy statement. Instead, the phrase was dropped in connection with a general treatment of the importance of public participation in rulemaking.

The substantial impact analysis was elevated from dictum to doctrine in *Lewis-Mota v. Secretary of Labor*.[114] In order to issue a visa for permanent residence, the Secretary of Labor must certify that there is a shortage of domestic workers in the alien's trade and that his admission will not adversely affect the wages and working conditions of similarly employed American workers. To simplify the determinations involved, the Secretary published Schedule C, which listed occupations for which labor was in short supply and which was to be reviewed continuously. Aliens in the trades listed in Schedule C could be "precertified," meaning that they were excused from having to submit a specific job offer to receive a visa. Various versions of Schedule C were adopted with public participation under the APA, but the schedule was revoked by a directive on February 9, 1970, without any public participation. Plaintiffs were persons who had been precertified under the prior procedure, but whose visas had not yet been granted. In order to retain their priority after Schedule C was revoked, plaintiffs had to submit specific job offers; since they failed to do so, their labor certification was revoked.

The court had no difficulty characterizing the Secretary's directive as a rule rather than "a fact determination regarding the domestic labor market," as the district court had found.[115] The Secretary then argued that the rule was procedural, interpretive, or a policy statement, and therefore exempt from APA rule-making procedures. The court noted that labels were not conclusive and applied the same test to all three claims:

> [The rule] changed *existing rights and obligations* by requiring aliens of the class of appellants to submit proof of specific job offers as well as a statement of their qualifications; it thereby made it more difficult for employers to fill vacancies in the occupations no longer precertified. By virtue of this *substantial impact* both upon the aliens and the employers, notice and opportunity for comment by the public should first be provided.[116]

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impact of a rule in deciding whether it fell within the APA exception for procedural rules.

114. 469 F.2d 478 (2d Cir. 1972). Judge Hays dissented without a written opinion.

115. *See* 479 F.2d at 481, *quoting* 337 F. Supp. 1289, 1294 (S.D.N.Y. 1972). The court held that the directive fit the definition of a rule in the APA as "an agency statement of general or particular applicability and future effect designed to implement . . . law or policy. . . ." 5 U.S.C. § 551(4) (1970).

116. 469 F.2d at 482 (emphasis added). The court relied on *Texaco*, cases con-

It is not at all clear from this language whether the court found the rule procedurally invalid under the legal effect test, or whether it rejected the legal effect test in favor of the substantial impact test and found the rule invalid under the latter.

The confusion in the Second Circuit's decision is particularly striking when compared to the carefully reasoned decision of the district court.[117] The district judge pointed out that, while precertification at the time of application for the visa was a convenient procedure, the statute requires an analysis of the American labor market at the time of the alien's admission. Since the Secretary had no power to guarantee admission through precertification, the procedure could be considered a policy statement, a practice without legal effect, or an invalid legislative rule, any of which could be revoked without public participation.

The decision of the Second Circuit took an entirely different tack. It observed that the directive changed existing rights and obligations. This could not be correct, however, since, as the district court had shown, precertified aliens had no legal right to admission and the Secretary had no obligations toward them. Evidently, therefore, the court of appeals was concerned less with legally defined rights and obligations than with the practical effect of the revocation on the interests of both employers and alien employees. The Secretary had definitively terminated an advantageous status involving a substantial class of persons. Under the prior practice, precertified alien employees were protected from the burden of having to obtain and prove a specific job offer, both at the time of application for a visa and at the time of admission. Now they were no longer protected. Whether Schedule C and its revocation ever created or abolished any legal rights or obligations was obviously not determinative.

Lewis-Mota is well worth comparing with *Noel v. Chapman*, decided by a different panel of the Second Circuit in 1975, which also involved discretionary immigration determinations.[118] The *Noel* panel recognized the existence of the "substantial impact" test, but, quoting *Lewis-Mota*, it remarked that "ordinarily" the only rules that have a substantial impact are those that change "existing rights and obligations."[119] As we have seen, however, the rule in *Lewis-Mota* did not affect legal rights and obligations; rather it changed a status

struing the procedural exemption, and *Pharmaceutical Manufacturers, discussed in* text at notes 133-38, which involved interpretive rules.

117. 337 F. Supp. 1289 (S.D.N.Y. 1972).

118. *See* text at notes 82-87 *supra*.

119. 508 F.2d at 1030, *quoting* Lewis-Mota v. Secretary of Labor, 469 F.2d at 482.

of great practical importance. The instruction in *Noel*, which prevented the routine extension of deportation for a particular class of deportable aliens, operated in a like fashion. Thus, the two rules had similar practical effect, and those two Second Circuit immigration decisions appear to be sharply inconsistent.

The substantial impact test was forthrightly adopted by a panel of the District of Columbia Circuit in *Pickus v. United States Board of Parole*.[120] The parole board adopted rules concerning the criteria to be considered in granting parole.[121] Later it formulated more specific guidelines that prescribed the number of months customarily to be served before release, depending on the severity of the crime and the characteristics of the offender.[122] Although the rules and the guidelines were published in the *Federal Register*, they were adopted without public participation.

After finding that the Board of Parole is an agency covered by the APA,[123] the court held that neither the rules nor the guidelines could be treated as policy statements. Consequently, both were invalid.[124] The court registered its agreement with "several courts [that] have ruled that agency action cannot be a general statement of policy if it substantially affects the right of persons subject to agency regulations . . . . [The] outer boundary of the general policy exemption derives from congressional purpose in enacting section 4—that the interested public should have an opportunity to participate, and the agency should be fully informed, before rules having such substantial impact are promulgated."[125] Although the

120. 507 F.2d 1107 (D.C. Cir. 1974). *Accord*, Ramer v. Saxbe, 522 F.2d 695 (D.C. Cir. 1975) (Bureau of Prisons). *See* Pickus v. United States Bd. of Parole, 543 F.2d 240 (D.C. Cir. 1976) (subsequent decision denying prisoners right to comment orally on the rules).

121. 28 C.F.R. § 2.20 (1975).

122. 28 C.F.R. §§ 2.18-.19 (1975). *See generally* Project, *supra* note 3.

123. 507 F.2d at 111-12. According to staff of the Board of Parole, the Board's reason for contesting the *Pickus* case was its concern over whether the Board should be classified as an agency under the APA. It feared that an unfavorable precedent on this point might result in exposure of its quasi-judicial functions to the adjudication provisions of the APA. The Board was relatively unconcerned with whether the rule-making requirements of the APA were applicable to it. It has had little difficulty in complying with the *Pickus* decision.

124. *See* 507 F.2d at 1114. The court declared that this holding was not retroactive. Therefore, invalidly adopted regulations were allowed to determine the parole status of many prisoners. *But see* Addison v. Holly Hill Fruit Prods., Inc., 322 U.S. 607 (1944), *discussed in* note 237 *infra* and accompanying text.

125. 507 F.2d at 1112. The court relied on *Texaco* and *Lewis-Mota*, as well as on cases construing the procedural exemption. *See* National Motor Freight Traffic Assn. v. United States, 268 F. Supp. 90 (D.D.C. 1967) (three-judge court), *affd.*, 393 U.S. 18 (1968); Seaboard World Airlines, Inc. v. Gronouski, 230 F. Supp. 44 (D.D. C. 1964).

court spoke of "the rights of persons," the balance of its opinion made clear that it was speaking not of "rights" in the strict sense, for no prisoner has a "right" to parole, but rather of a "substantial effect on ultimate parole decisions,"[126] or "significant consequences."[127]

If the court had chosen to do so, it could easily have followed the traditional analysis of cases like *Pacific Gas & Electric*[128] to characterize both the rules and the guidelines as policy statements:

(1) the rules did not set forth a standard that the public must obey;

(2) the agency generally labelled them as policy statements and guidelines, although sometimes they were called rules;

(3) the orders used many tentative words and appeared to be temporary in duration;

(4) they were directed at the agency staff, not at the public; and

(5) aggrieved persons could try to persuade decisionmakers not to apply the rules in particular cases.

It seems clear that the *Pickus* decision squarely rejects the traditional legal effect test; instead, it distinguishes between legislative rules and policy statements by analyzing the practical effect of the rule.[129] Under this approach, if the public should have been involved in the formulation of the rule, it follows that the rule is to be deemed legislative.

The *Pickus* decision reached a sound result. The rules and guidelines enunciated by the United States Board of Parole had indeed sharply altered the discretionary powers of parole board decisionmakers. Considering the Board's massive caseload, the rules will, in effect, be dispositive in the great majority of cases. It follows that prisoners and other members of the public should have been involved in their promulgation. However, the reasoning of *Pickus* is open to serious criticisms. Most importantly, the court overlooked the fundamental point that the parole board had no legislative rule-making power.[130] Consequently, its rules and guide-

126. 507 F.2d at 1112-13.

127. 507 F.2d at 1113.

128. *Pacific Gas & Electric*, decided only four months before by a different panel of the D.C. Circuit, is discussed in text at notes 65-81 *supra*.

129. Other decisions have applied substantial impact analysis to rules that the agency sought to characterize as policy statements. *See, e.g.*, Citizens Communications Center v. FCC, 447 F.2d 1201, 1204 n.5 (D.D. Cir. 1971) (dictum); Nader v. Butterfield, 373 F. Supp. 1175 (D.D.C. 1974) (FAA memorandum permitting x-ray checks of baggage).

130. *See* K. DAVIS, *supra* note 9, at 150-54; Koch, *supra* note 9, at 1065. Both

lines could not be legislative rules. Moreover, the court simply failed to explain how its decision could be reconciled with the legislative history of section 4 of the APA, which seems to embrace the legal effect test.[131] As will be explained later in this article, the sound result in *Pickus* could have been achieved without doing violence to the statute.[132]

2. *Interpretive Rules*

An influential case applying the substantial impact test to a rule that interpreted a statute is *Pharmaceutical Manufacturers Association v. Finch*,[133] decided in 1970. The 1962 amendments to the Food, Drug and Cosmetic Act[134] require that manufacturers establish by "substantial evidence" the "effectiveness" both of new drugs and of those marketed between 1938 and 1962. The statute defines substantial evidence to mean "adequate and well-controlled investigations, including clinical investigations, by experts qualified by scientific training and experience to evaluate the effectiveness of the drug involved. . . ."[135]

In 1969, without public participation, the Food and Drug Administration (FDA) adopted a regulation[136] that purported to interpret the language of this statute. In addition to prescribing criteria for "adequate and well-controlled clinical investigations," the rule provided that other clinical tests and documented clinical experience were irrelevant. Moreover, the affected drug company would be entitled to a hearing only if it demonstrated in advance a likelihood that it could produce substantial evidence of the drug's effectiveness.

Plaintiff brought an action contending that the rule was invalid because of the agency's failure to provide preadoption notice and comment procedures. The FDA argued that the rule was both interpretive and procedural, but the court effectively disposed of both contentions. Refusing to be bound by the agency's labels, the court noted that the underlying policy of section 4 "at least requires that when a proposed regulation of general applicability has a substantial impact on the regulated industry, or an important class of the mem-

authors further criticize *Pickus* for applying the standard of judicial review applicable to legislative rules.

131. *See* text at notes 52-58, 90-95 *supra*.

132. *See* text at notes 174-76 *infra*.

133. 307 F. Supp. 858 (D. Del. 1970).

134. Federal Food, Drug and Cosmetic Act §§ 505(d)-(e), 21 U.S.C. §§ 355(d)-(e) (1970).

135. 21 U.S.C. § 355(d) (1970).

136. 34 Fed. Reg. 14,596 (1969).

bers or the products of that industry, notice and opportunity for comment should first be provided."[137] The court then analyzed in detail the immediate and substantial impact of the regulation on the drug industry and found that:

(1) the regulations were *pervasive* in scope, applying to thousands of drugs;

(2) the regulations had a *retroactive* effect since they threatened drugs already on the market;

(3) the FDA's position substantially narrowed its previous, more flexible stance on the issue, and thus it represented an important *change in position*; and

(4) the regulation caused substantial *confusion* in the industry, was extremely *complex*, and was intensely *controversial*.[138]

The substantial impact test has also been applied to rules that purport to interpret previously adopted rules. These decisions depart sharply from the legal effect test embraced in the *Gibson Wine* case discussed earlier.[139] One such case is the Eighth Circuit decision in *American Bancorporation v. Board of Governors of the Federal Reserve System*.[140] The Bank Holding Company Act prohibits a bank holding company from acquiring an interest in a nonbanking organization unless the Federal Reserve Board determines that the new business is "so closely related to banking . . . as to be a proper incident thereof."[141] A regulation, adopted after notice

137. 307 F. Supp. at 863. The court relied on *Texaco*, *see* text at notes 108-13 *supra*, which primarily involved the "unnecessary" exemption, as well as cases involving the "procedure" exemption, *e.g.*, National Motor Freight Traffic Assn. v. United States, 268 F. Supp. 90 (D.D.C. 1967) (three-judge court), *affd.*, 393 U.S. 18 (1968) (per curiam). Similar exemption cases, also cited by the court, are NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969) ("procedure" exemption), and Seaboard World Airlines v. Gronouski, 230 F. Supp. 44 (D.D.C. 1964) ("agency management" exception).

Professors Koch and Davis read *Pharmaceutical Manufacturers* as requiring additional rule-making procedures because of a perceived need for fairness, as distinguished from constituting a reclassification of the rules as legislative. *See* K. DAVIS, *supra* note 9, at 196-97; Koch, *supra* note 9, at 1062. The language employed by the court is vague and is fairly susceptible to either reading. However, as Koch concedes, the court did rely on *National Motor Freight*, which clearly used the substantial impact test.

138. *See* 307 F. Supp. at 864-66. Other cases that utilize substantial impact analysis to decide whether a rule is interpretive are Lewis-Mota v. Secretary of Labor, *discussed* in text at notes 114-19 *supra*; Cattle Feeders Tax Comm. v. Shultz, 74-1 U.S. Tax. Cas. 83,067 (W.D. Okla), *revd. on other grounds*, 504 F.2d 462 (10th Cir. 1974).

139. *See* text at notes 103-07 *supra*.

140. 509 F.2d 29 (8th Cir. 1974). *See* Note, *supra* note 9.

141. Bank Holding Company Act § 4(c)(8), 12 U.S.C. § 1843 (c)(8) (1970). For another case in which a second regulation interpreted an earlier one under this statutory scheme, see National Assn. of Ins. Agents, Inc. v. Board of Governors of Fed. Reserve Sys., 489 F.2d 1268 (D.C. Cir. 1974).

and comment, listed certain activities that the Board considered closely related to banking. A provision of that regulation permitted a holding company to act "as investment or financial adviser, *including* (i) serving as the advisory company for a mortgage or a real estate investment trust, and (ii) furnishing economic or financial information."[142]

Northwest Bancorporation (Banco) applied for permission to acquire a firm that specialized in advising state and local governments on financial matters. After the application was filed, the Board amended its regulation without public participation to allow holding companies to act "as investment or financial adviser *to the extent of* . . . providing financial advice to state and local governments."[143] Relying on the amended rule, the Board approved Banco's application.

The Eighth Circuit found the adoption of the second rule valid since it had no substantial impact on the competitors of Banco. The court's major reason for this conclusion was that, by substituting the language "to the extent of" for "including," the second rule had *narrowed* the original regulation, thereby making it more difficult for bank holding companies to expand. Additionally, the court pointed out that the entire subject matter had been fully canvassed in the initial rule-making hearings. Under the analysis first suggested in *Pharmaceutical Manufacturers*, the second regulation seemed neither complex nor pervasive, did not drastically change existing law, seemed to cause no confusion or controversy, and had no significant retroactive effect.[144]

C. *The Tests Clash*: Eastern Kentucky Welfare Rights

The divergent streams of analysis exemplified by the legal effect and substantial impact tests finally intersected in *Eastern Kentucky Welfare Rights Organization v. Simon*,[145] resulting in a six to three split in the District of Columbia Circuit. The case involved an attack on the validity of Revenue Ruling 69-545,[146] which interpreted the

142. 36 Fed. Reg. 10,777 (1971) (emphasis added).

143. 12 C.F.R. § 225.4(a)(5) (1976) (emphasis added).

144. An additional portion of the opinion remanded the case for a trial-type hearing on adjudicatory facts involved in Banco's application.

Other cases that apply substantial impact analysis to determine whether a second regulation is interpretive or legislative are Continental Oil Co. v. Burns, 317 F. Supp. 194 (D. Del. 1970); Anderson v. Butz, 37 Ad. L.2d 852 (E.D. Cal. 1975).

145. 506 F.2d 1278 (D.C. Cir. 1974), *revd. on other grounds*, 96 S. Ct. 1917 (1976). The Supreme Court held that the complaint should have been dismissed because the plaintiffs lacked standing to sue.

146. 1969-2 C.B. 117.

word "charitable" in a tax provision[147] exempting charitable organizations from income tax. In this ruling, the IRS reversed itself, expressly abrogating an earlier ruling[148] that had conditioned the tax-exempt status of a private hospital on its provision of free or below-cost medical treatment to indigents. As is customary for published rulings, the IRS did not provide for public notice and comment for either ruling.[149] The district court upheld the plaintiff's substantive attack on the second ruling,[150] without reaching the issue of whether it was invalid under the APA for lack of public participation.

The court of appeals reversed, holding that the ruling was not contrary to congressional intent. It also disagreed with plaintiff's procedural argument. Adopting the traditional legal effect test, the majority concluded that the ruling was interpretive and that notice and comment procedures were not required. Because the rule interpreted the meaning of the word "charitable" in the statute, the court was not bound by the ruling, although it might choose to accept the ruling as a proper interpretation.[151]

In a footnote, the court confronted the substantial impact test. It recognized the impact of the ruling on the poor, the Service's lack of expertise concerning the problem of medical care delivery, and the Service's sharp reversal of position, but concluded: "[W]hile these factors have been considered by the courts with respect to whether notice and hearing are required by the APA, they are not determinative here where a ruling is clearly interpretative in nature and has no legally binding effect."[152] This footnote is disingenuous; the cases relying on the substantial impact test used it even though a rule was clearly interpretive of words in a statute or regulation and even though it had no legally binding effect.[153] Thus, the majority did not distinguish the substantial impact test but rather squarely rejected it.

In dissent on this point, Judge Wright observed that, while the ruling portended a substantial change in the availability of hospital services for the poor, neither the poor nor anyone else was given

147. I.R.C. § 501(a), (c)(3).

148. Rev. Rul. 56-185, 1956-1 C.B. 202.

149. However, the IRS has recently invited public comment and provided for deferred effectiveness in regard to a proposed revenue procedure. Announcement 75-42, 1975-19 I.R.B. 138. Revenue procedures relate to IRS policy and discretion or provide procedural instructions, while revenue rulings interpret the tax code.

150. *See* 370 F. Supp. 325 (D.D.C. 1973).

151. *See* 506 F.2d at 1290. The court relied on *Gibson Wine, discussed in* text at notes 103-07 *supra.*

152. 506 F.2d at 1291 n.30.

153. *See* text at notes 133-44 *supra.*

notice or allowed to comment. He pointed out that the IRS is not expert in health care delivery problems and that, consequently, experts in this field should have assisted the IRS in reaching an informed decision whether to relax the obligations of private hospitals to the poor.[154]

Rehearing en banc was denied, although Judges Wright and Robinson and Chief Judge Bazelon voted for it. Chief Judge Bazelon's brief opinion pungently criticized the use of the legal effect test, since the majority had failed to make a de novo examination of the substantive issues involved but had merely deferred to the agency. As he put it,

> [T]he majority tells the plaintiffs that it will not be bound by the [IRS] interpretation of the term "charitable" and then turns right around and upholds the Service interpretation as a permissible exercise of discretion on the basis of factual assumptions which are not supported by a record and which plaintiffs have not had an opportunity to rebut.[155]

The majority probably was correct in characterizing the ruling as an interpretive rule under traditional legal effect analysis. IRS rulings make no definitive changes in the tax law; they have always been treated by the agency as interpretive and courts often grant them remarkably little deference.[156] In one important respect, however, a ruling like Revenue Ruling 69-545 is different from most revenue rulings. Generally, a ruling unfavorable to taxpayers is unlikely to have any legal effect, and taxpayers have ample opportunity to challenge it before the agency as well as the courts. But Revenue Ruling 69-545 is *favorable* to the taxpayer and unfavorable to poor persons needing hospital services. Those adversely affected will have no opportunity to persuade the IRS that its ruling was incorrect, for there will be no subsequent administrative proceedings, since they are not adversely affected as taxpayers. Indeed, in its decision in *Eastern Kentucky*, the Supreme Court held that the poor persons challenging the ruling lacked standing to obtain judicial review. Under these circumstances, it could be argued that a revenue ruling that will not be subject to any further administrative proceedings might have sufficient legal effect to be characterized as a legislative rule.

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154. *See* 506 F.2d at 1291-92.

155. 506 F.2d at 1293 (footnotes omitted).

156. *See, e.g.*, Stubbs, Overbeck & Assoc., Inc. v. United States, 445 F.2d 1142 (5th Cir. 1971); Grace E. Lang, 64 T.C. 404 (1975). For a case according some deference to revenue rulings, see Gino v. Commissioner, 538 F.2d 833 (9th Cir.), *cert. denied*, 97 S. Ct. 490 (1976). *See* Comment, 1975 WIS. L. REV. 1135, *supra* note 9, at 1140 n.34

If substantial impact is the test, however, it would be difficult to find a clearer case in which public participation should be mandatory.[157] The Service's ruling apparently had a profound effect on the availability of health care for poor people, it amounted to a complete reversal of the Service's previous position, the matter was highly controversial, and the IRS was functioning in an area where it had no expertise.

D. *A Critique of Present Case Law*

As we have seen, the courts have fashioned two dissimilar methods of determining if the agency must give notice and invite comments before adopting what the agency considers to be an interpretive rule or a policy statement. The legal effect approach generally yields more predictable results and is more solidly grounded in the APA. The substantial impact test is more responsive to the public's need to participate in the formulation of important rules, but it is rather unpredictable and lacks an adequate statutory basis.

Although the legal effect test usually furnishes predictable results, this is not always so.[158] Many policy statements, for example, arguably have legal effect because they confer or withdraw a "privilege" or an "immunity."[159] If a policy statement assures a favorable or unfavorable exercise of agency discretion, does it not confer or withdraw a privilege or an immunity? If so, it would seem to have the requisite legal effect and thus should properly be treated as a legislative rule. Moreover, the other factors sometimes used in applying the legal effect test are not particularly helpful. Distinctions based on tentativeness or temporariness are elusive, and a rule might be addressed either to the staff or to the public without any real difference in impact.[160] Furthermore, it is difficult to clas-

157. One impact of the ruling was that it aborted congressional consideration of the issue. *See* 506 F.2d at 1289.

158. For example, even if the traditional legal effect test is adopted, it is difficult to determine how the FCC's 1970 policy statement on license renewal criteria should be classified. Although labelled as a policy statement, it appeared to work a definitive and permanent change in renewal proceedings. Similarly, the policy statement on children's television appears to impose new obligations on licensees. *See* 39 Fed. Reg. 39,395 (1974).

159. *See* 1 C.F.R. § 1.1 (1976).

160. Many discretionary rules can be directed to either the staff or the public. For example, many of the policy statements of the CAB are directed to airlines or cities but could just as easily have been addressed to the staff. *See, e.g.*, 14 C.F.R. §§ 399.11, 399.45, 399.80 (1976). The FPC rule involved in *Pacific Gas & Electric*, *see* text at notes 65-81 *supra*, which set priorities for natural gas allocations, could easily have been an instruction addressed to pipeline companies on how to allocate the gas. It could also have been a directive to the staff concerning the acceptance

sify a rule by making judgments about the adequacy of subsequent administrative redress.

Similarly, it is frequently difficult to decide whether a rule that construes particular statutory language is interpretive or legislative.[161] As will be discussed more completely in the next section of this article,[162] generalized rule-making power in the statute is sufficient to confer the authority to adopt legislative rules. Moreover, the agency may have neglected to label the rule, and it may not be clear whether the agency views the rule as binding on the public. Interpretive rules are usually neither tentative nor temporary. Finally, even if their effect on regulated parties is subject to a probably illusory administrative reconsideration, their effect on others, such as consumers or competitors, may be definitive and virtually unreviewable.[163]

In situations where a rule interprets a prior rule, there is no intelligible way to ascertain whether the prior rule has been amended or only modified. Of course, if the two are wildly inconsistent, it is fairly obvious that the second rule was an amendment. More typically, however, the second rule introduces new and perhaps unexpected classifications, distinctions, or emphases in the first rule.[164] Whether the first rule has been changed or only interpreted cannot be determined in a principled manner.

Moreover, the traditional test relies to an unacceptable degree on the label used by the agency. Yet that label might have been chosen precisely for the purpose of avoiding public participation, permitting retroactivity,[165] or discouraging preenforcement judicial review.[166] We have been cautioned not to place excessive reliance on labels,[167] and that warning is particularly appropriate when the

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of filings. By the same token, many legislative rules relating to discretionary matters seemingly could have been written as instructions to staff rather than to the public. *See, e.g.*, Johnson's Professional Nursing Home v. Weinberger, 490 F.2d 841 (5th Cir. 1974).

161. *See, e.g.*, 39 Fed. Reg. 20,723 (1974) (FCC notice respecting access by political candidates to prime time); Baird, *Prospective Interpretative Rule-Making by the SEC*, 25 Bus. L. 1581, 1603-09 (1970).

162. *See* text at notes 178-91 *infra*.

163. The rule in *Eastern Ky. Welfare Rights* was of this nature. *See* Independent Broker-Dealers' Trade Assn. v. SEC, 442 F.2d 132, 140 (D.C. Cir.), *cert. denied*, 404 U.S. 828 (1971).

164. *See* Yellow Transit Freight Lines, Inc. v. United States, 221 F. Supp. 465 (N.D. Tex. 1963) (three-judge court) (judges disagreed sharply over whether the second rule constituted an amendment or merely an interpretation of the prior rule).

165. *See* text at notes 233-53 *infra*.

166. *See* text at notes 192-218 *infra*.

167. *E.g.*, Columbia Broadcasting Sys. v. United States, 316 U.S. 407 (1942); Independent Broker-Dealers' Trade Assn. v. SEC, 442 F.2d 132, 140-41 (D.C. Cir.),

issue is the opportunity for those affected by the rule to contribute to its formulation.[168]

Unlike the traditional analysis, the substantial impact test is attentive to the need for public participation. Its approach is straightforward: the public should participate in the making of rules that have a substantial impact on its interests. It does not matter whether the interest damaged or enhanced is a legal right or obligation; it could be a status, an expectation, or a business or personal practice or relationship.

However, the substantial impact test suffers from the serious defect of unpredictability of result.[169] Much depends upon the strength of a plaintiff's claim that the rule has a substantial impact on himself and others similarly situated. Also significant is the court's intuition as to whether the litigant is playing an obstructionist role or can make a worthwhile contribution in the formulation of the rule. Some courts have employed a collection of factors in determining the substantiality of the impact of a rule, such as the rule's complexity, the pervasiveness of its impact, the degree of controversy surrounding it, the seriousness of its retroactive effect,[170] the abruptness of change in the agency's position, or the agency's need for instruction and guidance. Each of these factors is vague and can be readily manipulated.[171]

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cert. denied, 404 U.S. 828 (1971); Bristol-Myers Co. v. FTC, 424 F.2d 935, 939 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970). As Chief Justice Warren once wrote, "[h]ow simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of labels pasted on them!" Trop v. Dulles, 356 U.S. 86, 94 (1958). *But see* K. DAVIS, *supra* note 9, at 148.

168. For example, all of the rules adopted by agencies that have no rule-making power, such as the EEOC, are, by definition, interpretive or policy statements. The public is never entitled to participate in any of the rulemaking of these agencies, no matter how critical the rules are in implementing the statutory scheme.

169. Professor Koch suggests that courts might require agencies to use whatever pre- or postadoption procedures the court finds appropriate in the interests of fairness. *See* Koch, *supra* note 9, at 1066-68. In my view, this proposal magnifies the unpredictability of the substantial impact test. It is probably better to require the agencies to observe the section 4 procedures, rather than a tailor-made procedure, if its nonlegislative rules have a substantial impact.

170. If a rule is more likely to be legislative if it has retroactive effect, an interesting anomaly is presented. Generally, under the traditional analysis, interpretive rules were retroactive and legislative rules were prospective. *See* text at notes 233-53 *infra*. Thus a retroactive rule is likely to be classed as interpretive by a court using traditional analysis but as legislative by a court using substantial impact analysis.

171. A recent commentary attempts to synthesize the factors that a court should consider in assessing substantial impact. *See* Comment, 43 U. CHI. L. REV. 430, *supra*, note 9. The author focuses on the need to protect outsiders, the extent to which they will have subsequent opportunities to challenge the rule, the extent to which the agency could utilize public input, and considerations of administrative ef-

The substantial impact test also contains a flaw considerably more fundamental than unpredictability. The cases applying the test have utterly failed to explain how it is consistent with section 4 of the APA. The history of the nonlegislative rule exemption of the APA indicates that Congress shared the understanding of contemporaneous commentary[172] that drew the distinction in terms of legal effect. The difference between legislative rules on the one hand and interpretive rules and policy statements on the other was well understood in 1946. Whether a rule was legislative depended upon whether it was binding on the public, not upon its practical effect. Unfortunately, the decisions that define non-legislative rules by an assessment of their impact on the public have supplied no analysis of the consistency of that test with the APA. As a consequence, the substantial impact test, in its present form, seems an unlikely candidate to survive Supreme Court review.[173]

Nevertheless, the legislative history of the nonlegislative rule exemption does supply a solid foundation for use of the substantial impact test as a method of assuring fair procedures rather than as a definitional tool. It admonishes the agencies that they were not precluded from using notice and comment procedures and emphasizes that, on the contrary, they could utilize such procedures at their discretion. As the Senate Judiciary Committee noted:

> Agencies are given discretion to dispense with notice (and consequently with public proceedings) in the case of interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice. This does not mean, however, that agencies should not—where useful to them or helpful to the public—undertake public procedures in connection with such rule-making.[174]

This legislative history provides fertile soil in which the substantial impact test could take root. It suggests that an agency should not treat all of its nonlegislative rules alike. Instead, it should decide in each case whether public participation is desirable. Such partici-

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ficiency. However, the vagueness of these factors diminishes the usefulness of this analysis.

172. *See* notes 52-58 and 90-95 *supra* and accompanying text.

173. *See* K. DAVIS, *supra* note 9, at 193-95; Koch, *supra* note 9. Both Professors Koch and Davis criticize the substantial impact text as a definitional tool. An interpretive rule or policy statement that has a substantial impact does not become a legislative rule for that reason. But both authors agree with the results of the substantial impact cases, viewing them as attempts by courts to impose extra-statutory procedural requirements on the agencies in the interests of fairness. Koch argues that the courts should design an appropriate procedure tailor-made for each case. *See* Koch, *supra* at 1065-67. In addition, see Independent Broker Dealers' Trade Assn. v. SEC, 442 F.2d 132, 144 (D.C. Cir.), *cert. denied*, 404 U.S. 828 (1971).

174. *See* APA LEGISLATIVE HISTORY, *supra* note 55, at 187.

pation would be particularly appropriate when the agency staff knows, or has reason to know, that the procedures might significantly protect the public and educate the agency. In short, preadoption procedures should be used whenever the rule would have a substantial impact upon an appreciable segment of the public.[175] If the agency failed to provide notice and comment procedures, despite the fact the rule would have a substantial impact on the public, a court could readily find the omission reversible error. Its holding would not be that the rule was legislative despite its lack of legal effect but rather that the agency's chosen rule-making procedure amounted to an abuse of discretion. This abuse could be rectified by the courts in the same way they correct other reviewable abuses of discretion—that is, by identifying the abuse and creating an appropriate remedy. The remedy could include abrogating the rule until notice and comment procedures have been observed, or leaving it in effect and requiring postadoption procedures.[176]

In many situations, it would not be an abuse of discretion for the agency to omit preadoption procedures even though the rule would have a substantial impact on the public. For example, emergency conditions might require immediate action. Even if the rule were legislative, the agency could appropriately dispense with the section 553 procedure by making a "good cause" finding that they were "unnecessary, impracticable, or contrary to the public interest."[177] In such situations, the reviewing court would surely hold that the omission of these procedures was not an abuse of discretion.

III. Blurring the Line Between Interpretive and Legislative Rules

As we have seen, the APA rule-making provisions require that courts and agencies draw a sharp distinction between interpretive and legislative rules. According to traditional theory, this distinction

175. Recommendation 76-5, adopted by the Administrative Conference of the United States on December 9-10, 1975, is in agreement with this position. For the text of this and other suggestions in Recommendation 76-5, see note 266 *infra*.

176. *Cf.* National Assn. of Independent Television Producers & Distribs. v. FCC, 502 F.2d 249 (2d Cir. 1974), in which an FCC legislative rule providing for an eight-month pre-effectiveness period was held arbitrary and unreasonable. A longer pre-effectiveness period was required, even though the APA only sets forth a minimum period of 30 days. *See* 5 U.S.C. § 553(a) (1970). Similarly, it might be argued that, although the APA exemptions generally allow interpretive rules and policy statements to be adopted without any public participation, the absence of such procedures would be arbitrary and unreasonable when a rule is likely to have a substantial impact.

177. 5 U.S.C. § 553(b)(B) (1970).

is easily made and has a number of significant consequences. But recent developments of fundamental significance in administrative law have begun to make the distinction more difficult to draw and increasingly irrelevant. These developments parallel, and seem consistent with, the cases that have required agencies to provide notice and comment procedures before adopting interpretive rules that have a substantial impact.

A. *The Power To Make Legislative Rules*

The expansion of agency power to promulgate legislative rules is a development of extraordinary importance in administrative law. It has left in utter shambles the comfortable notion[178] that interpretive and legislative rules are easy to distinguish by examination of an agency's rule-making power. The traditional view was that a legislative rule could be adopted only pursuant to a *specific* statutory delegation of authority. Rules made pursuant to general rule-making powers were automatically deemed interpretive. Today, however, it is universally accepted that agencies can adopt legislative rules pursuant to general rule-making powers.

For many years, the Supreme Court has been generous in its construction of agency rule-making powers.[179] Similarly, the agencies have consistently been upheld when they have adopted rules that circumvented adjudicatory hearings required by statute.[180] The most striking example of the broad construction of general rule-making powers is the case of the Federal Trade Commission (FTC). The statute establishing the FTC contained only a general rule-making power buried among its procedural and investigatory provisions,[181] and for many years the agency conceded that it had no power to make legislative rules. Indeed, the legislative history of the FTC statute seemed to establish rather convincingly that Congress meant to deny the FTC such power, intending that it rely solely on adjudication to flesh out the contours of "unfair or deceptive acts or practices" and "unfair methods of competition."[182] Stung by criticism of its ineffectiveness, the FTC finally decided that it had au-

178. *See* ATTORNEY GENERAL'S COMMITTEE REPORT, *supra* note 53, at 27; Lee, *supra* note 90.

179. *See, e.g.*, National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

180. *See, e.g.*, FPC v. Texaco, Inc., 377 U.S. 33 (1964); United States v. Storer Broadcasting Co., 351 U.S. 192 (1956).

181. Federal Trade Commission Act, ch. 311 § 6(g), 38 Stat. 722 (1914) (current version at 15 U.S.C. § 46(g) (Supp. V 1975)).

182. Shapiro, *supra* note 51, at 960.

thority to adopt legislative rules.[183] Judicial affirmation of this claim would furnish a significant procedural advantage to the Commission, for it could then proceed against a respondent for violation of a rule rather than the statute and thereby preclude relitigation of the underlying factual and policy basis of the rule. The FTC's power to adopt legislative rules was ringingly upheld by the District of Columbia Circuit in *National Petroleum Refiners Association v. FTC*, and certiorari was denied.[184]

A similar development occurred in connection with the rule-making of the Food and Drug Administration (FDA). The FDA has many clear grants of legislative rule-making authority[185] and also has a general rule-making power under section 701(a) of its organic statute.[186] For many years, it was not clear whether section 701(a) conferred legislative rule-making power.[187] Although the point had been canvassed by the lower courts,[188] the Supreme Court, in *Abbott Laboratories v. Gardner*,[189] seemed to assume that regulations adopted under section 701(a) were legislative, and passed on to its landmark analysis of ripeness. Recently, the Second Circuit squarely confronted the issue.[190] It noted that attempts to draw a hard and fast line between legislative and interpretive regulations had been rather unrewarding because the line of demarcation is far from clear. But the court recognized that if the administrative proc-

183. Earlier, the FTC had adopted a middle course. In the famous cigarette labeling opinion in 1964, the FTC investigated the economics of the tobacco industry and the hazards of smoking. It adopted an interpretive rule requiring health warnings, and declared that it would take official notice of the results of its investigation in subsequent adjudications against noncomplying cigarette manufacturers. *See* 29 Fed. Reg. 8324 (1964). However, there was doubt whether the FTC could preclude relitigation of the factual bases of its interpretive rule. *See* K. DAVIS, *supra* note 51, § 5.04, at 258-63 (Supp. 1970); Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 491-96 (1970); Shapiro, *supra* note 51, at 964-68.

184. National Petroleum Refiners Assn. v. FTC, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

185. *See, e.g.*, 21 U.S.C. § 341 (1970).

186. Federal Food, Drug, and Cosmetic Act § 701(a), 21 U.S.C. § 371(a) (1970).

187. *See* Forte, *The GMP Regulations and the Proper Scope of FDA Rulemaking Authority*, 56 GEO. L.J. 688 (1968). *See generally* Cody, *Authoritative Effect of FDA Regulations*, 24 FOOD, DRUG & COSMETICS L.J. 195 (1969); Shapiro, *supra* note 51, at 967-71.

188. *See* Abbott Laboratories v. Celebreeze, 352 F.2d 286 (3d Cir. 1965), *revd.*, 387 U.S. 136 (1967) (regulations held to be interpretive); Toilet Goods Assn. v. Gardner, 360 F.2d 677, 686-87 (2d Cir. 1966), *affd.*, 387 U.S. 158, 167 (1967) (irrelevant whether regulations are deemed interpretive or legislative).

189. 387 U.S. 136, 151-52 (1967).

190. National Nutritional Foods Assn. v. Weinberger, 512 F.2d 688 (2d Cir. 1975).

ess is to be effective, specific regulations under general statutory delegations of power have to be treated as authoritative, regardless of whether they are labelled legislative or interpretive, especially in areas where the agency possesses expertise not shared by the courts. Where once it might have demanded proof of specific delegation of legislative rule-making authority, the court stated that it had learned from experience to accept a general delegation of power as sufficient in certain areas of expertise.[191]

In light of this trend, a theoretical distinction between legislative and interpretive rules assumed to be present by Congress when it approved the APA has been effectively erased. It would appear that any agency having a general rule-making power can successfully assert the power to adopt legislative regulations after notice and comment procedures, and thus take advantage of the truncated adjudications and narrowly circumscribed judicial review that attend legislative rules.

B. *Scope of Review*

There exists a fundamental difference in the scope of judicial review accorded legislative and interpretive rules. Indeed, one reason the APA exempted interpretive rules from the preadoption requirements was that such rules were thought to be subject to plenary judicial review.[192] As Congress understood the difference in 1946, interpretive rules were simply the agency's legal opinion, as to which a court was free to substitute its judgment. Legislative rules, on the other hand, were upheld if they were not arbitrary or capricious and were rationally related to the purpose of the underlying statute.[193] If the validity of a regulation depended upon factual premises, the presumption of regularity required the court to assume facts supporting the regulation.[194]

Recent developments have sharply narrowed the gap between the intensity of judicial review accorded legislative rules and that accorded interpretive rules. In the case of legislative rules, the verbal formulation of the scope of the review has not changed,[195] but the actual scrutiny has become far more searching. This is not the place

191. *See* 512 F.2d at 696.

192. *See* note 55 *supra*.

193. *See* ATTORNEY GENERAL'S COMMITTEE REPORT, *supra* note 53, at 115-20; F. VOM BAUR, *supra* note 90, at 489. This remains the standard today under section 706(2)(A) of the Act. *See, e.g.*, Mourning v. Family Publications Serv. Inc., 411 U.S. 356, 369 (1973).

194. *See, e.g.*, Pacific States Box & Basket Co. v. White, 296 U.S. 176 (1935).

195. *See* note 193 *supra*.

for an extended discussion of this trend, but a sketch of some recent developments is illuminating.[196] No longer are factual premises always assumed to support the agency's policy decision. On the contrary, the whole record is rigorously examined to see whether they do.[197] Under various verbal formulations, such as "clear error of judgment,"[198] the "hard look doctrine,"[199] or the requirement of "principled decision-making,"[200] the rule must be a justifiable exercise of the agency's discretion. The agency must consider the comments directed toward it[201] and must disclose and permit scrutiny of its methodology.[202] Various procedural innovations have been imposed on the agency to improve its decisionmaking and to facilitate review.[203] Its notice to the public must adequately alert those with an interest at stake.[204] Its statement of basis and purpose has to provide a comprehensive explanation of its reasoning.[205] The

196. *See* K. DAVIS, *supra* note 9, at 646-87.

197. *See, e.g.*, Hooker Chem. & Plastic Corp. v. Train, 537 F.2d 620 (2d Cir. 1976); City of Chicago v. FPC, 458 F.2d 731 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972). The court in the latter case specifically argued that the scope of review of legislative regulations had to be searching so that the agency would not be rewarded for casting its lawmaking in the form of rules rather than adjudications. *See generally* Currie & Goodman, *Judicial Review of Federal Administrative Action: The Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 39-52 (1975); Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38 (1975); Verkuil, *supra* note 80.

198. Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415-16 (1971); Appalachian Power Co. v. EPA, 477 F.2d 495, 507 (4th Cir. 1973).

199. Portland Cement Assn. v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

200. O'Donnell v. Shaffer, 491 F.2d 59, 62 (D.C. Cir. 1974); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 651 (D.C. Cir. 1973) (Bazelon, C.J., concurring); Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971).

201. *See* Rodway v. United States Dept. of Agriculture, 514 F.2d 809, 814 (D.C. Cir. 1975), *noted in* 44 FORDHAM L. REV. 402 (1975).

202. *See* Portland Cement Assn. v. Ruckelshaus, 486 F.2d 375, 392-93 (D.C. Cir. 1973); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 643 (D.C. Cir. 1973).

203. *See* Thompson v. Washington, 497 F.2d 626, 643 (D.C. Cir. 1973); Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1263 (D.C. Cir. 1973); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 650 (D.C. Cir. 1973); Appalachian Power Co. v. EPA, 477 F.2d 495, 507 (4th Cir. 1973); Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1305-15 (1975); Williams, *"Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401, 425-26 (1975); Note, *The Judicial Role in Defining Procedural Requirements for Agency Rulemaking*, 87 HARV. L. REV. 782, 782-83 (1974).

204. *See* Maryland v. EPA, 530 F.2d 215, 220 (4th Cir. 1975), *cert. granted*, 96 S. Ct. 2224 (1976); Rodway v. United States Dept. of Agriculture, 514 F.2d 809, 814-15 (D.C. Cir. 1975); Wagner Elec. Corp. v. Volpe, 466 F.2d 1013, 1019-20 (3d Cir. 1972).

205. *See* National Assn. of Food Chains, Inc. v. ICC, 535 F.2d 1308, 1314 (D.C. Cir. 1976); Amoco Oil Co. v. EPA, 501 F.2d 722, 739 (D.C. Cir. 1974); Rodway

agency can be compelled to clarify the portions of the rule that the court considers too vague.[206] Finally, the statute and its legislative history are closely and critically scrutinized in order to ascertain whether the regulation is truly a reasonable implementation of the statutory design.[207] Surely, this intensification of judicial review of legislative regulations is a development in administrative law of fundamental significance.

At the same time, the judicial review accorded interpretive regulations is far less intense than traditional statements about substitution of judgment would indicate.[208] In fact, the courts nearly always defer to interpretive regulations and to an agency's interpretation of its own regulations.[209] Indeed, the standard of judicial review is sometimes stated in terms of whether a rule reasonably implements the statute—exactly the same test accorded legislative rules.[210] Consider, for example, this wholly typical quotation, from a case involving a rule relating to administration of the public land laws:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." . . . When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.
> . . . If therefore, the Secretary's interpretation is not *unreasonable*, if the language of the orders bears his construction, we must reverse the decision of the Court of Appeals.[211]

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v. United States Dept. of Agriculture, 514 F.2d 809 (D.C. Cir. 1975); Citizens Assn. v. Zoning Commn., 477 F.2d 402, 408 (D.C. Cir. 1973).

206. *See* Hooker Chem. & Plastic Corp. v. Train, 537 F.2d 620, 633, 639 (2d Cir. 1976); National Assn. of Independent Television Producers & Distribs. v. FCC, 516 F.2d 526, 539, 541 (2d Cir. 1975).

207. *See, e.g.*, Morton v. Ruiz, 415 U.S. 199, 213-29 (1973); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 379-86 (1969); Zemel v. Rusk, 381 U.S. 1, 8-11 (1965). When constitutional issues are implicated, the court's scrutiny of the statutory basis for a regulation is particularly strict. *See, e.g.*, Hampton v. Mow Sun Wong, 422 U.S. 88, 105-14 (1976).

208. *See* note 55 *supra*.

209. *See, e.g.*, Northern Indiana Pub. Serv. Co. v. Porter County Chapter, 423 U.S. 12 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413-14 (1945); Gueory v. Hampton, 510 F.2d 1222, 1223-24 (D.C. Cir. 1974); Philbeck v. Timmers Chevrolet, Inc., 499 F.2d 971, 977 (5th Cir. 1974).

210. Much the same result is achieved by treating agency interpretations as questions of fact reviewable under the reasonableness approach of the substantial evidence test. *See, e.g.*, NLRB v. Coca-Cola Bottling Co., 350 U.S. 264, 269 (1956).

211. Udall v. Tallman, 380 U.S. 1, 16, 18 (1965) (emphasis added). In tax

Of course, interpretive rules are occasionally subjected to plenary review and sometimes invalidated by the courts. But generally it appears likely that those regulations would have been equally invalid if they had been legislative[212] because the invalidity of the rule seems conclusively mandated by the legislative history and policy.[213] Courts seldom employ the sort of free-wheeling substitution of judgment that the traditional model permits.

There are a number of factors that are generally considered important in assessing the degree of deference that should be accorded an interpretive rule.[214] Among other factors,[215] an interpretive rule is more likely to be considered valid if it has been longstanding, was contemporaneous with the adoption of the statute, has been consistently adhered to, or has been called to the attention of Congress which approved it or reenacted the statute without change. The fact that courts frequently focus on these criteria might suggest that the process of review of interpretive rules is fundamentally different from the review accorded legislative rules, where these factors are not expressly employed. But many of these factors are, in fact, quite relevant in determining the validity of a legislative regulation that might or might not reasonably implement the statutory design.[216] Further, many of the factors seem to be used as makeweights: Having decided whether the interpretive regulation is valid, the court mentions all the factors it can muster that tend to support its decision.[217]

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cases, the courts also uphold interpretive rules if they implement the statute "in some reasonable manner." United States v. Correll, 389 U.S. 299, 307 (1967). *See* Coca-Cola Bottling Co. v. United States, 487 F.2d 528, 532 (Ct. Cl. 1973) (legislative tax regulation seemingly given same scope of review as interpretive regulations). *But see* Allstate Ins. Co. v. United States, 329 F.2d 346, 349 (7th Cir. 1964) (special deference to legislative tax rule).

212. *See* H.M. Hart & A. Sacks, The Legal Process 1320 (Tent. ed. 1958) (unpublished), which suggests that the task of statutory construction is the same whether an interpretive or legislative rule is being reviewed.

213. *See* Espinoza v. Farah Mfg. Co., Inc., 414 U.S. 86 (1974); United States v. Cartwright, 411 U.S. 546 (1973); Wilderness Socy. v. Morton, 479 F.2d 842 (D.C. Cir.), *cert. denied*, 411 U.S. 917 (1973); Kurzner v. United States, 413 F.2d 97 (5th Cir. 1969).

214. For a comprehensive discussion see 1 K. Davis, *supra* note 51, §§ 5.05-5.07, at 314-38.

215. In Skidmore v. Swift & Co., 323 U.S. 134 (1944), the Court considered whether the interpretation was made in the course of the administrator's official duties, whether it was based upon specialized experience and broad information and investigation, the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and "all those factors which gave it power to persuade, if lacking power to control." 323 U.S. at 140.

216. 1 K. Davis, *supra* note 51, § 5.06, at 329.

217. *See, e.g.*, Helvering v. Reynolds, 313 U.S. 428 (1941).

Although the techniques of reviewing interpretive and legislative rules are converging, it would be undesirable if the differences were wholly to disappear. Interpretations, after all, take many forms. Some are carefully considered interpretive rules published in the *Federal Register*, or closely reasoned legal conclusions reached in formal adjudications. But other interpretations, such as advice letters in response to inquiries from the public, generally receive much less thoughtful analysis from the agency staff. In reviewing various interpretive material, the courts should not be limited to the narrow scope of review applicable to a legislative rule. Instead, they should retain their power to substitute judgment on issues of law, giving deference to the administrative interpretation when appropriate, but substituting judgment when the court's superior ability in statutory construction or its broader policy perspective is called for.[218] Nevertheless, the evolution in the intensity of judicial review of both interpretive and legislative rules has seriously undermined the judgment of the APA's draftsmen that the public should be excluded from interpretive rulemaking because the rules receive plenary judicial review.

C. *Ripeness*

Another important development in contemporary administrative law is the increasing availability of judicial review of rules prior to their enforcement in adjudication.[219] There is authority for the view that interpretations generally, and interpretive rules in particular, are not ripe for preenforcement review.[220] Much of this authority, however, predates the Supreme Court's landmark analysis of ripeness in *Abbott Laboratories v. Gardner*,[221] which contributed greatly to the withering away of the ripeness doctrine as an obstacle to preenforcement review of administrative rules. Under the *Abbott Laboratories* standard, the ripeness of agency action depends on the degree of practical harm to plaintiff from a delay in review, the fitness of the issues for immediate review, and the injury to the public from immediate re-

218. However, if the public has participated in making the rule, and the agency appears to have considered carefully the input it received from the public, the rule might appropriately be given considerable deference by a reviewing court.

219. *See generally* Vining, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law*, 69 MICH. L. REV. 1443 (1971).

220. *See, e.g.*, Abbott Laboratories v. Celebrezze, 352 F.2d 286 (3d Cir. 1965), *revd. on other grounds*, 387 U.S. 136 (1967) (interpretive rule); American President Lines, Ltd. v. FMC, 316 F.2d 419 (D.C. Cir. 1963) (interpretive rule); Helco Prods. v. McNutt, 137 F.2d 681 (D.C. Cir.), *cert. denied*, 320 U.S. 671 (1943) (advisory letter).

221. 387 U.S. 136 (1967).

view.[222] Applying the *Abbott Laboratories* analysis, the courts have found that interpretive rules,[223] as well as policy statements[224] and all sorts of informal agency action,[225] are susceptible to immediate judicial review. For example, the District of Columbia Circuit held the revenue ruling in the *Eastern Kentucky* case to be interpretive but nevertheless reviewed it before it was applied.[226] Similarly, in *National Automatic Laundry & Cleaning Council v. Shultz*,[227] an opinion letter from the agency head to a trade association was held ripe for review.

Interpretive rules, as well as policy statements, will be frequently unripe for preenforcement review[228] because the practical harm caused by an interpretive rule is often less serious than that caused by a legislative rule. But *Eastern Kentucky* and *National Automatic Laundry*, among other cases, illustrate that interpretive rules can cause immediate practical harm that justifies immediate review.[229] Further, interpretive rules adopted without public participation may not be suitable for review because of the lack of a record.[230] This shortcoming is not conclusive, however, since some regulations

222. 387 U.S. at 148-56.

223. *See, e.g.*, Frozen Foods Express v. United States, 351 U.S. 40 (1956); Independent Bankers Assn. v. Smith, 534 F.2d 921 (D.C. Cir. 1976); Toilet Goods Assn. v. Gardner, 360 F.2d 677 (2d Cir. 1966), *affd. on other grounds*, 387 U.S. 158, 167 (1967); Gordon v. Federal Reserve Sys., 317 F. Supp. 1045 (D. Mass. 1970). For the view that *Frozen Foods* involved preenforcement review of an interpretive rule, see M. ASIMOW, *supra* note 88, at 115-17; L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 405-06 (1965); Vining, *supra* note 219, at 1463 n.73. *See also* National Assn. of Ins. Agents v. Federal Reserve Sys., 489 F.2d 1268, 1271 (D.C. Cir. 1968), in which the court, although acknowledging that interpretive rules are usually unreviewable, indicated that a strong showing of immediate and inescapable effect might permit preenforcement review.

224. *E.g.*, Continental Air Lines v. CAB, 522 F.2d 107, 124 (D.C. Cir. 1975); Citizens Communications Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971).

225. *E.g.*, Independent Broker-Dealers' Trade Assn. v. SEC, 442 F.2d 132 (D.C. Cir.), *cert. denied*, 404 U.S. 828 (1971) (seemingly cited with approval in Gordon v. New York Stock Exch., 422 U.S. 659, 690 n.15 (1975)); Medical Comm. for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972); Moss v. CAB, 430 F.2d 891 (D.C. Cir. 1970); Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093, 1098 (D.C. Cir. 1970).

226. Eastern Ky. Welfare Rights Organization v. Simon, 506 F.2d 1278 (D.C. Cir. 1974), *revd. on other grounds*, 96 S. Ct. 1917 (1976). However, in a dissenting opinion, Justice Brennan argued that the ruling was not ripe for review. *See* 96 S. Ct. at 1928.

227. 443 F.2d 689 (D.C. Cir. 1971).

228. *See* Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33 (D.C. Cir. 1974); Continental Oil Co. v. Burns, 317 F. Supp. 194 (D. Del. 1970).

229. For a discussion of the practical harm caused by informal SEC action, see Independent Broker-Dealers' Trade Assn. v. SEC, 442 F.2d 132 (D.C. Cir. 1971).

230. *See* Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33, 39-40 (D.C. Cir. 1974).

present strictly legal issues and can be reviewed without a record;[231] in other cases, the court could remand to the agency for the purposes of building a record.[232]

The fact that interpretive rules are susceptible to preenforcement judicial review has a significant bearing on the issue of public participation. First, the decline of the ripeness doctrine marks the end of yet another characteristic of interpretive rules traditionally assumed to distinguish them from legislative rules. Second, the record produced would help the courts gauge more accurately the practical impact of the rule and thus the need for preenforcement judicial review. Finally, the existence of a record facilitates substantive review of the rule. The public's comments, and the agency's response to them in its concise statement of basis and purpose, are of great value to the reviewing court. Even though the court frequently defers to the agency's policy judgment, the existence of a record tends to assure the court that the agency has thoroughly considered all aspects of the rule.

D. *Retroactivity*

Another traditional difference between legislative and interpretive regulations is that legislative rules are generally prospective in application[233] while interpretive rules are frequently retroactive.[234] The theory was that a statute or legislative rule states the law; the interpretive rule simply clarifies law that has existed all along.

This distinction is still meaningful, but the difference is less significant than the theory would suggest. First, legislative regulations are often retroactive, either in their practical or their legal effect. For example, a prospective legislative rule can destroy business relationships that had been established in reliance on prior law.[235] Moreover, like statutes,[236] explicitly retroactive legislative regulations occasionally are valid. Thus in *Addison v. Holly Hill*

231. Surely, all legislative rules adopted without public participation because of the military and foreign affairs exemption and proprietary functions exemption, 5 U.S.C. § 553(a)(1)-(2) (1970), are not immune from preenforcement review.

232. *See, e.g.*, Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970).

233. *See* Greene v. United States, 376 U.S. 149, 160 (1964); Arizona Grocery Co. v. Atchison, T. & S.F. Ry., 284 U.S. 370, 389 (1932).

234. *See* Dixon v. United States, 381 U.S. 68 (1965).

235. *See* Mulford v. Smith, 307 U.S. 38 (1939); South Terminal Corp. v. EPA, 504 F.2d 646, 678 (1st Cir. 1974); Robinson, *supra* note 183, at 517-18; Shapiro, *supra* note 51, at 933-34.

236. *See* Usery v. Turner Elkhorn Mining Co., 96 S. Ct. 2822 (1976).

Fruit Products Co.,[237] an originally promulgated regulation had been found invalid and a replacement was adopted. Under these circumstances, the replacement regulation could be retroactive. In *Thorpe v. Housing Authority*,[238] the Supreme Court held that new regulations requiring notice and procedural protections for tenants evicted from public housing must be applied retroactively by the local housing authority to evictions occurring before they were adopted. Still, these cases are exceptional; generally, agencies do not seek to make their legislative regulations retroactive.

In accordance with traditional theory, interpretive regulations, like decisions reached in adjudication, can legally be retroactive.[239] However, it seems reasonably clear that an agency can choose to make an interpretive rule prospective only,[240] and many of them have done so.[241] Indeed, the definition of "rule" in the APA strongly suggests that all rules, interpretive and legislative, should be of "future effect,"[242] and new interpretations are explicitly required to be prospective by statutes applicable to the Equal Employment Opportunities Commission, the Securities and Exchange Commission, and the Wage and Hour Division of the Department of Labor.[243] Courts may construe an ambiguous interpretation to have

237. 322 U.S. 607 (1944). More frequently, the courts deal with this situation by ordering the invalidly adopted regulations to remain in effect until new ones can be adopted. *See, e.g.*, Rodway v. United States Dept. of Agriculture, 514 F.2d 809, 817 (D.C. Cir. 1975).

238. 393 U.S. 268 (1969). *See* Maceren v. INS, 509 F.2d 934 (9th Cir. 1974); General Tel. Co. v. United States, 449 F.2d 846 (5th Cir. 1971); Certified Color Indus. Comm. v. Flemming, 283 F.2d 622 (2d Cir. 1960); Steert v. Morgenthau, 116 F.2d 301 (D.C. Cir. 1940). *See generally* Note, *Retroactive Operation of Administrative Regulations*, 60 HARV. L. REV. 627 (1947).

239. *See* United States v. Zenith-Godley Co., 180 F. Supp. 611 (S.D.N.Y. 1960), *affd. per curiam*, 295 F.2d 634 (2d Cir. 1961).

240. *See* Pressed Steel Car Co. v. Lyons, 7 Ill. 2d 95, 104-05, 129 N.E.2d 765, 770 (1955); 1 K. DAVIS, *supra* note 51, § 5.09; Note, *supra* note 238, at 633-34. Helvering v. Wilshire Oil Co., 308 U.S. 90 (1939), can be interpreted as approving a prospective rule. Still, it is not definitely settled that interpretive rules can be confined to prospective application. *See* Baird, *supra* note 161; Berger, *Estoppel Against the Government*, 21 U. CHI. L. REV. 680, 698-707 (1954).

241. *See generally* M. ASIMOW, *supra* note 88, at 7-8, 30-31; Baird, *supra* note 161.

242. 5 U.S.C. § 551(4) (1970).

243. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-12(b) (1970); Securities and Exchange Act of 1934 § 23(a), 15 U.S.C. § 78w(a) (Supp. V 1975) (*amending* 15 U.S.C. § 78w(a) (1970)); Securities Act of 1933 § 19(a), 15 U.S.C. § 775(a) (1970); Wage & Hour Division Act, 29 U.S.C. § 259 (1970). These statutes protect persons relying on interpretations from retroactive changes. *See generally* Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281, 1294 (2d Cir. 1973); M. ASIMOW, *supra* note 88, at 30, 147, 185-86. Section 7805(b) of the Internal Revenue Code authorizes the IRS to make all interpretations prospective. Under this statute retroactive interpretations can be set aside as an abuse of discretion. *See*

exclusively prospective effect,[244] and, according to the Supreme Court, an interpretive regulation can create a reliance interest that precludes a criminal prosecution for violation of the statute.[245]

Another inhibition to retroactive changes in interpretive rules is the principle that the agency is bound by its own rules. It cannot depart from them in individual cases.[246] Although this doctrine usually is applied to procedural provisions, it seems equally applicable to interpretive rules.[247]

Yet another barrier to retroactive changes in interpretive rules are the doctrines of equitable estoppel and apparent authority. Slowly but surely, these private law rules are becoming applicable in actions against the government. Although strong Supreme Court authority stands against this trend,[248] the lower courts on numerous occasions have found ways to circumvent this authority in order to prevent retroactive changes in position by the government from disturbing well-founded reliance interests.[249] The principles of estoppel and apparent authority probably will most frequently be applicable to cases of individual advice by the agency, rather than to interpretations of general applicability, since courts might be reluctant to extend an estoppel to an unpredictably large group of persons. But estoppel and apparent authority issues are equitable notions; their application depends on a comparison of the detriment to the plaintiffs from enforcing the rule with the harm to the public from enjoining it. If the equities demand it, a court could easily hold that the government abused its discretion by making, or was estopped to make, a retroactive change in an interpretive rule of general applicability.

Chock Full O' Nuts Corp. v. United States, 453 F.2d 300 (2d Cir. 1971). *See generally* Lynn & Gerson, *Quasi-Estoppel and Abuse of Discretion as Applied Against the United States in Federal Tax Controversies*, 19 TAX. L. REV. 487 (1964); Comment, *Limits on Retroactive Decision Making by the Internal Revenue Service: Redefining Abuse of Discretion Under Section 7805(b)*, 23 U.C.L.A. L.REV. 528 (1976).

244. *See, e.g.*, Crespo v. United States, 399 F.2d 191 (Ct. Cl. 1968).

245. *See* United States v. Pennsylvania Indus. Chem. Co., 411 U.S. 655 (1973).

246. *See* Gardner v. FCC, 530 F.2d 1086, 1089-90 (D.C. Cir. 1976).

247. *See, e.g.*, Vogt v. United States, 537 F.2d 405, 412-13 (Ct. Cl. 1976); Nader v. Nuclear Regulatory Commn., 513 F.2d 1045, 1051 (D.C. Cir. 1975); Distrigas of Mass. Corp. v. FPC, 517 F.2d 761, 765 (1st Cir. 1975); United States v. Ewig Bros. Co., 502 F.2d 715, 725 n.34 (7th Cir. 1974). *But see* Brennan v. Ace Hardware Corp., 495 F.2d 368 (8th Cir. 1974) (guidelines in manual not binding on agency); Davis, *Administrative Law Surprises in the Ruiz Case*, 75 COLUM. L. REV. 823, 840 (1975). *Cf.* United States v. Nixon, 418 U.S. 683, 694-96 (1976).

248. *See* M. ASIMOW, *supra* note 88, at 33-37.

249. *See* United States v. Wharton, 514 F.2d 406 (9th Cir. 1975); M. ASIMOW, *supra* note 88, at 37-59; Asimow, *Estoppel Against the Government: The Immigration and Naturalization Service*, 2 CHICANO L. REV. 4 (1975).

Moreover, it seems clear that retroactive changes in the law resulting from *adjudication* may be set aside as an abuse of discretion. As explained in *SEC v. Chenery Corp.*,[250] a retroactive adjudicatory change might be invalidated if the damage to reliance interests outweighed the mischief of allowing a particular case to escape the administrative clutches. Recently, in *NLRB v. Bell Aerospace*,[251] the Supreme Court permitted a retroactive change resulting from adjudication, but made it clear that such changes are not always permissible. Lower courts have occasionally set aside retroactive changes reached through adjudication.[252] If retroactive changes resulting from adjudication can be an abuse of discretion, it surely is clear that retroactive changes in interpretive rules can also be set aside.[253]

E. *Waivers of Legislative Rules*

It is often said that the effect of interpretive and legislative rules differs when they are applied in subsequent adjudication. If the rule is legislative, the agency applies the rule. If the rule is interpretive, the agency applies the statute. This distinction is significant, but once again its importance can easily be overstated.

When a legislative rule is applied in adjudication, an agency must permit parties to petition for a waiver of the rule.[254] This means that the agency must consider whether it is appropriate to apply the rule in the particular case. Similarly, when an interpretive rule is applicable in an adjudication, the agency must decide whether to follow the rule, find it inapplicable to the particular case, or even revoke it. In practical terms, therefore, this difference between legislative and interpretive rules is more illusory than real. In each case, the agency will probably apply its rule to the parties before it, but the agency must first consider whether application of either a legislative or an interpretive rules is inappropriate.

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250. 332 U.S. 194 (1947).

251. 416 U.S. 267, 294 (1974).

252. *See, e.g.*, NLRB v. Majestic Weaving Co., 355 F.2d 854 (2d Cir. 1966); NLRB v. Guy F. Atkinson Co., 195 F.2d 141 (9th Cir. 1952). *See generally* Berger, *Retroactive Administrative Decisions*, 115 U. PA. L. REV. 371 (1967).

253. It is somewhat anomalous, therefore, that law changes made in adjudications probably cannot be made prospective only. *See* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 774-75 (1969). Evidently, changes in policy, if they are to be prospective, must come through rulemaking.

254. *See* United States v. Southwestern Cable Co., 392 U.S. 157 (1968); United States v. Storer Broadcasting Co., 351 U.S. 192, 205 (1956); Southwest Pa. Cable Television, Inc. v. FCC, 514 F.2d 1343, 1347 (D.C. Cir. 1975); Claggett, *Informal Action—Adjudication—Rulemaking: Some Recent Developments in Federal Administrative Law*, 1971 DUKE L.J. 51; Fuchs, *Agency Development of Policy Through Rulemaking*, 59 NW. U.L. REV. 781, 804 (1965).

F. *Summary*

There remains a fundamental difference between legislative and interpretive rules. Legislative rules are made pursuant to delegated legislative power, but interpretive rules represent the agency's view of the meaning of the law. Notwithstanding this clear conceptual difference, much has occurred since 1946 to make the distinction between legislative and interpretive rules extremely blurry and, in many situations, downright unnecessary. Since legislative rule-making powers are broadly construed, many regulations once thought to be interpretive are now legislative. The formerly clear differences with respect to intensity of judicial review, ripeness, and retroactivity have sharply narrowed. Since these traditional barriers are crumbling, it should not be surprising that the courts have begun to erase still another line by requiring notice and comment procedures before the adoption of what traditionally would have been considered interpretive rules.

IV. A Proposal for Postadoption Procedures for Nonlegislative Rules

As we have seen, the courts have repeatedly dealt with claims that the public should be entitled to participate in the making of interpretive rules and policy statements. The resolution of these claims has been unsatisfactory. Under the legal effect test, the results are relatively predictable, but the courts have been oblivious to the public's need to take part in the formulation of many rules. Under the substantial impact test, the courts have been attentive to the needs of the public, but the results have been unpredictable and the conceptual basis of the decisions unclear. The problem thus seems resistant to solution by ad hoc judicial decisions. Consequently, it seems worthwhile to consider whether the problem might better be resolved through congressional amendment of the APA. Before turning to an evaluation of proposed statutory changes, it is helpful to summarize the values of public participation in rulemaking.

A. *The Importance of Public Participation in Rulemaking*

The APA introduced the concept of mandatory public participation in federal rulemaking. The concept of notice and comment procedure is widely accepted as a truly progressive contribution to better government.[255] The advantages of public participation in

255. *See, e.g.*, K. Davis, *supra* note 61, at 65-68.

rulemaking have been enumerated so often that there is little need for this article to dwell on them in great detail.[256]

The primary reason that public participation leads to better rules is that it provides a channel through which the agency can receive needed education. Agencies are not omniscient and do not have all relevant economic and social data. They cannot anticipate all of the consequences and problems that will flow from the adoption of their rules. This sort of data is obtained by requiring the agency to solicit and consider public comments. The interviews conducted in connection with this study repeatedly indicated the practical value that agency personnel attach to public commentary, including that obtained in the course of adopting interpretive rules and policy statements. Public input also contributes to better rulemaking by offsetting institutional biases that may exist in favor of or against the regulated group. Moreover, the public may be more likely to accept and less likely to sabotage a rule if it has been allowed to participate in its formulation.[257]

Public participation in rulemaking also has values that transcend these instrumental ones. In our system of representative government, participation in governmental decisionmaking by persons affected by it is an affirmative good. This is particularly true in the case of administrative agencies, which are not as politically responsive as the legislature or the executive. Although theoretically subject to a variety of legislative, executive, and judicial controls, most agency action, and particularly rulemaking, is not supervised at all.[258] Agencies make laws affecting many interests behind closed doors; their impartiality and freedom from pressures are frequently questioned.[259] Notice and comment procedures in rulemaking are ideally tailored to increase the responsiveness of the agency and to facilitate democratic participation. They permit public participation at a critical moment in administration when law and policy are about

256. *See* Bonfield, *supra* note 94, at 540-42; Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525, 527-32 (1972); Comment, *Due Process Rights of Participation in Administrative Rulemaking*, 63 CALIF. L. REV. 886, 893-98 (1975). *But see* Koch, *supra* note 9, at 1077-78.

257. For example, the parole board, while it did not find comments from prisoners particularly helpful in developing parole guidelines, indicated that the prisoners' participation in formulating guidelines made the guidelines more acceptable to them.

258. *See* Cutler & Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395 (1975).

259. In response to this concern, the House Judiciary Committee, during the 94th Congress introduced a bill that would require congressional scrutiny of regulations before they become effective. H.R. 12048, 94th Cong., 2d Sess., 122 CONG. REC. 1280 (1976). However, the bill was rejected in the House.

to crystallize, and they provide a powerful tool by which persons who will be adversely or favorably affected by agency action can seek to influence that action in an open fashion.

Public participation is no less necessary in the formulation of interpretive rules and policy statements than in legislative rulemaking. The agency is as much in need of information when it interprets its law or regulations, or when it formulates guidelines for exercising its discretion, as it is when it imposes binding norms on the public.[260] As we have seen, the impact of many interpretations or policy statements can be as great as that of legislative rules. And the democratic values of public participation are as well served by requiring preadoption procedures in the formulation of nonlegislative rules as in the formulation of legislative rules. Consequently, if the problem is to be left to judicial resolution, I favor the use of the substantial impact test, despite its uncertainty of application. However, perhaps the best solution lies in congressional amendment of the APA, a possibility that will now be considered.

B. *Repeal of the Exemption*

One obvious statutory solution entails repeal of the exemption for nonlegislative rules from the APA. This would open the process to public participation and eliminate the need to distinguish between legislative and nonlegislative rules. This proposal is ill-advised, however, since two of the reasons for originally adopting the exemption still seem persuasive. The APA draftsmen wished to encourage the adoption of interpretive rules and policy statements by not requiring burdensome procedures. They were also concerned by the inappropriateness of mandating a single, rigid procedure for the many forms that nonlegislative rulemaking may take.[261]

Interviews with many agency personnel indicate nearly unanimous opposition to expansion of preadoption procedures to all interpretive rules and policy statements. This opposition is similar to

260. *See* Popkin, *A Critique of the Rule-Making Process in Federal Income Tax Law With Special Reference to Conglomerate Acquisitions*, 45 IND. L.J. 453, 492-513 (1970) (criticism of IRS published rulings).

261. The Senate Judiciary Committee staff wrote:

> First, it is desired to encourage the making of such rules. Secondly, those types of rules vary so greatly in their contents and the occasion for their issuance that it seems wise to leave the matter of notice and public procedures to the discretion of the agencies concerned. Thirdly, the provision for petitions contained in subsection (c) affords an opportunity for private parties to secure a reconsideration of such rules when issued. Another reason, which might be added, is that 'interpretative' rules—as merely interpretations of statutory provisions—are subject to plenary judicial review, whereas 'substantive' rules involve a maximum of administrative discretion.

APA LEGISLATIVE HISTORY, *supra* note 55, at 18.

that voiced when Congress contemplated repeal of the exemptions in the 1960's and to objections eloquently expressed by Professors Kenneth Davis and Arthur Bonfield.[262]

The objections to an extension of notice and comment procedures focus on a comparison of the proposal's costs and benefits. One significant cost is that the proposal will substantially delay adoption of nonlegislative rules. As a practical matter, it is difficult to nurse a controversial rule through the statutory procedures in less than six months to a year. During that period, there is uncertainty about whether the new rule will be adopted, and a less desirable interpretation or policy may remain in effect. A second cost is the substantial increase in workload that will result from a good faith evaluation of a large volume of public comments. For example, organized letter-writing campaigns occasionally swamp the agency. These burdens may divert agency personnel from more worthwhile tasks. A third, related cost is that the agency may decide that nonlegislative rulemaking is not worth the trouble. It might simply refuse to adopt the interpretation or policy and instead deal with the particular problem through case-by-case adjudication, private advice letters, individual contacts with the public, or informal internal communication. This would deny the public the benefit of a generally applicable and well-publicized rule. If legislation seriously inhibited the adoption of interpretive rules and policy statements, it would not serve the public interest.

These problems are particularly acute in agencies that issue substantial numbers of interpretations and policy statements. Consider, for example, the operations instructions of the Immigration Service or multi-volume staff manuals of the Internal Revenue Service or Occupational Safety and Health Administration. Many items that could be considered interpretations of general applicability or general policy statements are mixed in with merely procedural instructions. If the agency were required to follow public notice and comment procedures

262. Professor Davis, expressing his opposition to the proposed legislation in testimony before Congress, argued that it would discourage the adoption of interpretive rules and policy statements. *See Administrative Procedure: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 150, 174 (1965). For the views of Professor Bonfield, see Bonfield, *supra* note 9. Interestingly, Professor Bonfield favored the elimination of exemptions under the Iowa statute. *See* Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, The Rulemaking Process*, 60 IOWA L. REV. 731, 858-60 (1975). Professor Bonfield indicated that his change of position was motivated partly by a desire to see whether the agencies would in fact substitute adjudication for rulemaking. Moreover, he noted that the Iowa legislators were unalterably opposed to the exemption. Letter from Arthur Bonfield to Michael Asimow (August 26, 1975).

each time it wanted to amend its manual, its operations would be seriously rigidified.

The benefits attending such a vast expansion of preadoption procedures would be slight. In all likelihood, the vast majority of interpretations and policy statements would elicit no public interest at all. They would be either obviously correct, trivial in importance, or utterly noncontroversial. Some nonlegislative rules, of course, are quite important and would generate significant commentary; such commentary could well result in the modification of some rules. From the point of view of both the public and the agency, however, the costs seem clearly to outweigh the benefits of requiring preadoption procedures for all nonlegislative rules.

One response to these arguments, however, is that an agency can eliminate some or all of the procedures for rulemaking if it finds in good faith that such procedures are "unnecessary, impracticable, or contrary to the public interest."[263] By making this finding, the agency could dispense with required notice and comment when the rule is trivial or when it must be made effective immediately. Yet the good cause exemption is not a complete answer to the problem, since an issue of whether the agency had abused its discretion would be raised each time the exemption was claimed.[264] An obstructionist litigating strategy would be open to anyone aggrieved by the rule,[265] and the uncertainty of whether the good cause exemption was proper might itself inhibit its use.

On the other hand, there might well be such massive utilization

263. 5 U.S.C. § 553(b)(B), 553(d)(3) (1970). *See generally* Bonfield, 71 MICH. L. REV. 222, *supra* note 94, at 291-315; Bonfield, 118 U. PA. L. REV. 540, *supra* note 94, at 588-608.

264. Generally, courts have upheld good cause findings. *See, e.g.*, Nader v. Sawhill, 514 F.2d 1034 (Emer. Ct. App. 1975); Reeves v. Simon, 507 F.2d 455, 458 (Emer. Ct. App. 1974), *cert. denied*, 420 U.S. 991 (1975); De Rieux v. Five Smiths, Inc., 499 F.2d 1321, 1322 (Emer. Ct. App.), *cert. denied*, 420 U.S. 991 (1975); Durkin v. Edward S. Wagner Co., 115 F. Supp. 118, 121-22 (E.D.N.Y. 1953), *affd. sub nom.* Mitchell v. Edward S. Wagner Co., 217 F.2d 303 (2d Cir. 1954), *cert. denied*, 348 U.S. 964 (1955). However, good cause findings have also been rejected, either because they were not explicit or the court disagreed with the agency's reasoning. *See, e.g.*, Detroit Edison Co. v. EPA, 496 F.2d 244, 248 (6th Cir. 1974); Texaco, Inc. v. FPC, 412 F.2d 740, 743 (3d Cir. 1969); American College of Neuropsychopharmacology v. Weinberger, No. 75-1187 (D.D.C. July 3, 1975); New York v. Diamond, 379 F. Supp. 503, 517 (S.D.N.Y. 1974); Kelly v. Interior Dept., 339 F. Supp. 1095, 1101 (E.D. Cal. 1972).

265. *But see* Koch, *supra* note 9, at 1057. Professor Koch's view that the overall amount of litigation would not be increased since procedural challenges would simply be appended to substantive challenges to the rules is not persuasive. Many interpretive rules and policy statements are not ripe for immediate substantive review, *see* text at notes 219-32 *supra*, but would be ripe for procedural challenges. Moreover, many rules, which would not be challenged on substantive grounds, would be subject to attack on procedural grounds because the likelihood of success is greater. Thus, increased litigation would result.

of the good cause exemption that its use would become mechanical. Consequently, the public might, in the end, be invited to participate in the making of very few interpretive rules and policy statements. Thus, by employing the good cause exemption, the agencies could probably avoid the costs of public participation in their rule-making processes, but only by returning to a pattern of exclusion that the reform was designed to remedy in the first place.

C. *Postadoption Notice and Comment*

This article recommends that Congress amend the APA to require postadoption public participation for nonlegislative rules.[266] Under the recommended procedure, the agency could issue, amend, or repeal its interpretive rules of general applicability and general policy statements without giving any prior notice, allowing the public to comment prior to adoption, or delaying the rule's effectiveness for a specified period.[267] However, publication of the rule in the *Federal Register* or some other generally available form, like the

266. This proposal has been approved in substance by the Administrative Conference of the United States in Recommendation 76-5. This recommendation, addressed to the agencies rather than Congress, suggests that postadoption commentary would be good practice but does not suggest that the Act be amended:

> 1. Before an agency issues, amends, or repeals an interpretive rule of general applicability or a statement of general policy which is likely to have substantial impact on the public, the agency normally should utilize the procedures set forth in Administrative Procedure Act subsections 553(b) and (c), by publishing the proposed interpretive rule or policy statement in the Federal Register, with a concise statement of its basis and purpose and an invitation to interested persons to submit written comments, with or without opportunity for oral presentation. If it is impracticable, unnecessary, or contrary to the public interest to use such procedures the agency should so state in the interpretive rule or policy statement, with a brief statement of the reasons therefor.
>
> 2. Where there has been no pre-promulgation notice and opportunity for comment the publication of an interpretive rule of general applicability or a statement of general policy, even one made effective immediately, should include a statement of its basis and purpose and an invitation to interested persons to submit written comments, with or without opportunity for oral presentation, within a following period of not less than thirty days. The agency should evaluate the rule or statement in the light of comments received. Not later than sixty days after the close of the comment period, the agency should indicate in the Federal Register its adherence to or alteration of its previous action, responding as may be appropriate to significant comments received. An agency may omit these post-adoption comment procedures when it incorporates in the interpretive rule or policy statement a declaration, with a brief statement of reasons, that such procedures would serve no public interest or would be so burdensome as to outweigh any foreseeable gain.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATION 76-5 (Dec. 10, 1976).

267. For a similar proposal, see L. WRIGHT, NEEDED CHANGES IN IRS CONFLICT RESOLUTION PROCEDURES 67-68 (1971). The procedure has occasionally been employed by the agencies. *See, e.g.*, 40 Fed. Reg. 30,936 (1975). However, the procedure appears to be unacceptable under present law if notice and comment procedures are otherwise required. *See* American College of Neuropsychopharmacology v. Weinberger, No. 75-1187 (D.D.C. July 3, 1975).

Internal Revenue Bulletin, would be accompanied by an invitation to the public to comment on the rule.[268] Comments would be received for a substantial period of time, such as a minimum of sixty days. The rule would also include a concise statement of its basis and purpose, as is presently required for legislative rules.[269]

The agency staff would then be required to evaluate the comments received and publish its response to them. As a result of public reaction, the rule might be amended, repealed, or left intact, but in any event, the agency would be obligated to defend its rule by replying to the comments, as is presently required for conventional legislative rulemaking.[270] The statute would set a deadline for the agency's reply, perhaps sixty days from the end of the comment period. During the postadoption period, the rule would be in full force, unless the agency chose to give it a deferred effective date.

This proposal has a number of advantages. First, it would permit the issuance of nonlegislative rules without delay. This would be beneficial to both the agency and the public. It would minimize confusion and uncertainty and allow the agency's chosen interpretation or policy to be applied immediately. Second, it would encourage the participation of the public by making it clear that the agency would be required to consider interested persons' comments and reply to them, and that a reviewing court would take the comments and replies into account. Third, it would supply a record that would facilitate judicial review. Fourth, it seems unlikely that this procedure would deter the agency from adopting interpretive rules and policy statements. Finally, this approach seems a far better solution than an abolition of the exemption for nonlegislative rules coupled with reliance on the good cause exemption. If the rule is trivial or

268. A good cause exemption similar to those presently contained in sections 553 (b)(B) and 553(d)(3) of the Act should apply to the new procedure. Of course, no postadoption comments need be solicited if the agency employed the preadoption notice and comment procedure. One difficult issue is whether the postadoption procedure should apply to interpretive rules or policy statements adopted in *adjudication*. The Administrative Conference recently adopted a recommendation that rules adopted in adjudication be published in the *Federal Register*. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATION 76-2 (1976). However, interpretive rules and policy statements adopted in adjudication probably should not be subjected to mandatory posteffective public commentary. The parties to the adjudication have already furnished some input on the subject. Although the public probably could contribute additional insights, given the present development of administrative law concepts, it seems premature to insist on rule-making procedures for rules adopted in adjudication. An introductory paragraph of Administrative Conference Recommendation 76-5 specifically excludes rules adopted in adjudication from postadoption procedures. *See* note 266 *supra*.

269. *See* note 5 *supra*.

270. *See* text at note 205 *supra*.

noncontroversial, nobody will comment on it, but if the rule is needed because of an emergency, the agency can adopt it immediately without fear that a court will disagree with its finding of emergency.

There are, of course, objections to this proposal. The most important criticism is that postadoption public commentary is far less meaningful than preadoption commentary. According to this criticism, once an agency has adopted a rule in final form, the thinking of its staff may have rigidified. Thus, the staff's reply to postadoption commentary might be a mere articulation of an already hardened position rather than a principled response to suggested modifications of the rule.

This objection is less persuasive than it might initially appear to be. As a practical matter, it frequently happens that a proposed rule has undergone extensive review by the staff before public notice is given in compliance with preadoption procedures. Often the minds of the staff are made up before the public is ever invited to participate. In such cases, the public's commentary is viewed more as an annoyance than as a significant contribution. Nevertheless, it must be admitted that postadoption commentary is less likely to influence the final product than is preadoption commentary. However, if the staff acts in good faith, it will reconsider its position in light of postadoption comments; it must, after all, draft credible responses to them that may well be scrutinized by a reviewing court.

A second criticism of a postadoption procedure is that it depends upon the agency's publishing the rule in the *Federal Register* or in some other generally available form. Although publication is already required by the APA,[271] agency compliance with the provision is spotty[272] and the courts do not strictly enforce it.[273] Moreover, a good many interpretations and policy statements are in the form of manuals or instructions to staff that need not be published but only made available to the public.[274]

This objection has some validity, but the problem of nonpubli-

271. 5 U.S.C. § 552(a)(1)(D) (1970).

272. *See* E. Tomlinson, *supra* note 35, at 34-41; Newman, *Government and Ignorance—A Progress Report on Publication of Federal Regulations*, 63 HARV. L. REV. 929, 934-43 (1950).

273. *See, e.g.*, Pesikoff v. Secretary of Labor, 501 F.2d 757 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1038 (1975); Airport Comm. of Forsyth County v. CAB, 300 F.2d 185 (4th Cir. 1962); Noel v. Chapman, 508 F.2d 1023 (2d Cir. 1975), *cert. denied*, 423 U.S. 824 (1976). In Morton v. Ruiz, 415 U.S. 199 (1974), the Court held that a legislative rule is ineffective without publication in the *Federal Register*. While refusing to follow the agency's interpretation because it was inconsistent with the congressional purpose, the court appeared willing to treat the rule as a validly adopted interpretive rule even though it had not been published.

274. 5 U.S.C. § 552(a)(2)(C) (1970).

cation seems solvable. If the agency knows that its interpretive rules and policy statements could be held invalid for want of public participation, and that participation can be triggered only by publication, the agencies will have to reconsider their publication practices. Similarly, to the extent that instructions to staff contain generally applicable policy statements and interpretations,[275] these should be extracted and published separately as rules. Here again, a little judicial enforcement would go a long way.

Many agencies will, no doubt, voice a third objection, that the creation of postadoption procedures will increase their workload. Staff must read, collate, evaluate, and respond to the public's comments, and they must adhere to a statutory time schedule in doing so. Of course, even under present law, the public can always petition for the issuance, amendment, or repeal of a rule,[276] and agency response to such petitions takes time. Still, a systematized form of postadoption public commentary will likely generate more comments than does the existing petition provision and agency costs will no doubt be increased by it. However, the increase will be far less than would occur if the present exemptions were simply repealed. Overall, the benefits to the public from postadoption commentary outweigh the modest additional costs that would be imposed on the agency.

A fourth objection is that the proposal will fail to solve the definitional problem raised by section 4 of the APA. There will continue to be uncertainty about whether a rule is legislative, so that preadoption procedure is required, or whether it is an interpretive rule or a policy statement, so that postadoption procedure is sufficient.[277] The definitional problem can be greatly alleviated, how-

275. Since instructions to staff and manuals are now public information, *see* Stokes v. Brennan, 476 F.2d 699 (5th Cir. 1973); Hawkes v. IRS, 467 F.2d 787, 795-97 (6th Cir. 1972), the fact that they contain interpretive rules and policy statements of general applicability will come to light. Persons aggrieved by them could argue that they are invalid for lack of *Federal Register* publication and public participation.

276. 5 U.S.C. § 553(e) (1970). Indeed, it could be argued that postadoption procedures establish nothing more than is already provided in section 553. However, there is a vast difference between a right to petition the agency and an invitation by the agency for comments, together with an assurance that the agency will read and respond to the comments within a fixed period of time.

277. Definitional problems exist on another level as well. Courts have determined that some agency behavior should not be treated as a rule at all. *See, e.g.*, National Ornament & Elec. Light Christmas Assn. v. Consumer Prod. Safety Commn., 526 F.2d 1368 (2d Cir. 1975) (program in which volunteer deputies would instruct retailers on how to test Christmas lights for defects, and report them to the Commission, and inventory the lights was held not to be a rule); Illinois Citizens Commn. for Broadcasting v. FCC, 515 F.2d 397, 402 (D.C. Cir. 1975) (speeches by individual agency members were not treated as rules). Furthermore, some staff

ever. For example, the statute could provide that if the agency made a good-faith error in characterizing a new rule, the court could treat the postadoption commentary procedure as an adequate substitute for the usual preadoption procedures. Thus, the agency's failure to utilize preadoption procedures need not be grounds for declaring the rule invalid and requiring a new and probably fruitless cycle of rulemaking. It would often be better if the court could say to the agency: "You have erred. This is a legislative rule, not a policy statement or interpretive rule, but your error seems to have been in good faith. The postadoption procedures that you used were a close enough substitute for the usual preadoption procedures. Consequently, your error was not prejudicial and the rule will be allowed to stand." The court would also have the option, of course, of ordering a new cycle of preadoption rule-making procedure, and it would clearly want to do so if the agency seemed to make it a practice to misuse postadoption procedures.

In fact, a new statute might even disapprove the substantial impact test entirely, causing the courts to return to the much clearer legal effect test. This amendment might adopt the legal effect standard, so that it would never be an abuse of discretion for the agency to dispense with preadoption procedures for rules that are labelled as interpretive or policy statements, regardless of their impact. Although such an approach would clarify the law, it would do so at a significant cost, and thus it is not recommended. The courts should retain the power to impose additional preadoption procedural requirements on agencies seeking to enact unusually significant nonlegislative rules.

Finally, opponents of any proposal to impose procedural requirements on nonlegislative rulemaking might complain of unclear consequences for agency failure to follow the required procedures. Suppose the invalidly adopted rule reflects the best interpretation or policy, or even the only correct one. Would the agency be required to substitute an inferior interpretation for the proper one, or to exercise its discretion in a manner inconsistent with its well-considered policies? Would the court always have to remand to the agency for a new rule-making procedure, even though the result is a foregone conclusion?

There is no simple answer to these questions and different courses of action would seem appropriate in different situations. Assume, for example, that an invalidly adopted rule represents a

positions might be classified as not having been "adopted by the agency." *See* M. ASIMOW, *supra* note 88, at 85-88.

change in prior law or practice that might upset legitimate reliance interests or impose considerable individual hardship. Assume also that there would be little or no harm to the public in a holding that the new rule is invalid and the old one continues in effect. In this situation, the reviewing court could well find the new rule invalid and require the agency to comply with statutory procedures. The two immigration cases discussed in this article, *Lewis-Mota v. Secretary of Labor*[278] and *Noel v. Chapman*,[279] are illustrations of such situations. Nothing prevents the court from requiring the agency to retain its prior law or practice until a change is effected with proper procedures.[280]

There might also be cases in which the courts should refuse to allow an invalidly adopted interpretive rule or policy statement to be considered in litigation. The agency would therefore lose the advantage of judicial deference customarily accorded its interpretations or policies.[281]

Finally, consider the situation in which the new interpretation or policy is undoubtedly a correct one—perhaps the only correct one—and its adoption is therefore inevitable. Assume further that it represents no change in prior law or policy and that no private reliance interests could be based upon a contrary position. In this situation, the court could easily decide to let the invalidly adopted rule or policy stand. The agency might have erred, but its error was not a prejudicial one, and it would be a waste of time and effort to remand to the agency.[282] A possible illustration is the press release involved in *Airport Commission of Forsyth County v. CAB*,[283] where it would have been absurd to reverse the CAB's determination, which was so obviously correct, in order to start anew a process that could only yield the same result.

All that can be said is that reviewing courts must decide on a case-by-case basis precisely how to deal with invalidly adopted inter-

278. *See* text at notes 114-19 *supra.*

279. *See* text at notes 82-87 *supra.*

280. *See* City of New York v. Diamond, 379 F. Supp. 503 (S.D.N.Y. 1974); Gardner v. Tarr, 341 F. Supp. 442 (D.D.C. 1972).

281. A bill, which has been favorably reported by the House Judiciary Committee, contains a provision in respect to rules adopted without appropriate procedures that "no person shall be required to resort to or be adversely affected by such a rule, nor may such a rule be admitted into evidence or considered in any agency proceeding or any judicial review of such proceeding . . . ." H.R. 12048, 94th Cong., 2d Sess. (1976). See H.R. Rep. 94-1014, pt. 1, 94th Cong., 2d Sess. 51 (1976).

282. *See* NLRB v. Wyman-Gordon Co., 394 U.S. 579 (1969); NLRB v. APW Prods. Co., 316 F.2d 899 (2d Cir. 1963).

283. *See* text at notes 63-64 *supra.*

pretations and policy statements. Just as courts have found a variety of ways to prevent retroactive changes in agency positions,[284] so too can they compel the agency to adhere to an interpretation or a policy that the agency wants to change. In other situations, such a result would be absurd; the court could permit the change, with or without a remand for a new rule-making proceeding.

V. Conclusion

The courts have pursued inconsistent theories in evaluating claims by the public that preadoption procedures should have been employed in the adoption of interpretive rules and policy statements. Some of them have looked only to legal effects and labels; this achieves some predictability of result, but at the cost of rejecting well-founded claims that the public was wrongfully excluded from the agency's deliberative processes. Other courts have considered only the practical impact of the rule. This approach insures public participation in rulemaking but injects an element of unpredictability.

Abolition of the present statutory exemption would not serve the interests of the public or the agency. Repeal of the exemption would have an adverse effect on the functioning of the federal government; its disadvantages would clearly outweigh its advantages. Moreover, repeal would probably lead to overuse of the good cause exemptions, thereby inviting obstructionist litigants to abuse the system and possibly excluding the public to nearly the same degree as it is presently excluded. It would be far better to create a new system for postadoption comment and mandatory agency responses. Such a provision would realize most of the benefits of preadoption commentary without imposing severe costs and delays and possibly driving much rulemaking underground. As part of a needed reform of the rule-making provisions of the APA, such a system deserves sympathetic consideration by Congress.

284. *See* text at notes 244-53 *supra.*