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Articles

*343 PROCEDURAL SAFEGUARDS FOR AGENCY GUIDANCE: A SOURCE OF LEGITIMACY FOR THE ADMINISTRATIVE STATE

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II. Agency Guidance

Agencies employ various means for establishing and implementing federal regulatory policy, including administrative adjudications, informal rulemaking, and guidance documents. Administrative procedures derived from the Constitution's Due Process Clause, the APA, and other statutes and regulations [FN15] generally control the manner in which agencies make decisions in each of these settings but for one--guidance documents.

The Supreme Court has long held that the protections of procedural due process under the Fifth and Fourteenth Amendments of the *349 U.S. Constitution [FN16] apply only to individuals whose interests are the subject of an administrative adjudication. [FN17] In addition, the APA sets forth specific procedural requirements governing administrative adjudications required by statute to be made "on the record," including notice of the proposed action and the grounds asserted, the right to submit evidence and receive notice of opposing evidence, an opportunity to present arguments against the agency's proposed action, and a prohibition against ex parte communications by the individual presiding over the matter. [FN18] The presiding individual also must include in the record a statement of his or her findings of fact and law, and the rationale in support of the decision. [FN19] Finally, the APA authorizes courts to review the agency's adjudicatory decision to determine whether it is supported by "substantial evidence." [FN20] Although the APA exempts from its protections administrative adjudications not required by statute to be made on the record, the statute or regulations governing specific regulatory programs often grant individuals various process rights. [FN21]

*350 Although those whose interests are the subject of administrative rulemaking have no right to procedural due process under the Constitution, Congress partially filled this void by imposing various procedural requirements on certain forms of administrative rulemaking. Administrative rulemaking involves the creation and application of rules that affect an entire class of individuals. [FN22] The APA requires agencies to engage in a public notice-and-comment process when issuing generally applicable rules that are substantive--or legislative rules. [FN23] Legislative rules implement a statute by creating new laws, rights, duties, or all three. [FN24] The notice-and-comment process consists of three steps. First, the agency issues a notice of proposed rulemaking that either sets forth the terms or substance of the rule under consideration or describes the subjects and issues involved. [FN25] Second, the agency solicits, receives, and reviews public comments on the proposed rule. [FN26] Third, the agency issues the final rule, which must include a statement of basis and purpose that adequately articulates the legal authority and policy reasons for the agency's rule. [FN27]

A wide range of agency rulemaking, however, is exempt from the APA's notice-and-comment requirements. [FN28] These exempt rules, known as nonlegislative rules, include policy statements and interpretative rules that clarify or explain existing laws, or advise the public and agency personnel as to an agency's construction of the statute and the rules it administers. In

addition, nonlegislative rules indicate how the agency intends to implement ***351** a particular statutory or regulatory regime. [FN29] Nonlegislative rules often are announced through agency manuals, advisory notices, internal guidance to agency field inspectors, and letters from government officials to regulated entities, collectively referred to in this Article as "agency guidance" or "guidance materials." These guidance materials do not have the force of law, meaning they are not binding on all persons, the agency, and the courts. [FN30] Nonlegislative rules therefore may be subject to challenge in agency enforcement proceedings. [FN31]

Despite their lack of legally binding effect, agencies have strong incentives to issue their rules through guidance rather than through notice-and-comment rulemaking. Issuing a rule through guidance is less costly and time-consuming than notice-and-comment rulemaking. [FN32] Moreover, because agencies operate in a world of imperfect information where they cannot anticipate all scenarios that may arise in the course of implementing a statutory and regulatory scheme, an agency cannot define and set forth in its legislative rules every nuance of its policies. [FN33] Guidance materials offer agencies an efficient means for explaining and supplementing their legislative rules and may be modified quickly in response to emerging issues or changes in policy. In addition, agencies "use guidance documents to experiment with new approaches to implementing a program before committing the policies to the binding, less flexible form of the legislative rule." [FN34] Internal guidance materials such as handbooks and directives also ***352** provide an inexpensive means by which the agency can supervise its employees, thereby promoting more accurate, consistent, and predictable decisions by agency personnel. [FN35]

Perhaps most significantly, guidance documents provide an efficient means for agencies to establish rules governing the conduct of regulated parties and beneficiaries of government programs. Although not legally binding, agencies' nonlegislative rules often have rule-like effects on affected parties, who generally comply with these rules. Because nonlegislative rules are not legally binding, courts generally will not entertain a legal challenge to a nonlegislative rule prior to an agency's reliance on the rule in an administrative adjudication. [FN36] If the agency's guidance appears legally vulnerable, a regulated entity or applicant may elect to challenge the agency's enforcement of its policy, particularly if compliance would be costly. [FN37] However, in a closer case where the agency's guidance arguably has some merit, the likelihood of successfully challenging the agency's guidance may be low, as courts afford a high degree of deference to the statutory and regulatory interpretations, factual determinations, and policy choices underlying an agency's nonlegislative rules. [FN38] In addition to the costs of mounting a legal challenge, failure to comply with agencies' guidance may have immediate adverse consequences for regulated entities and applicants, such as imposition of sanctions, disapproval of an application, or revocation of prior government ***353** approvals. [FN39] Challenging an agency's guidance also risks damaging a regulated party's or applicant's long-term relationship with regulators and may bring unwelcome media attention. [FN40] Given the potentially steep costs of noncompliance with agency guidance, regulated parties and applicants frequently choose compliance over a challenge, especially if the costs of compliance are low. [FN41]

Not surprisingly, agencies increasingly are announcing far-reaching regulatory norms and expectations through guidance materials. [FN42] The volume of these guidance materials is massive and far exceeds the number of legislative rules promulgated through notice-and-comment rulemaking. [FN43] For example, the Centers for Medicare and Medicaid Services claims that it issues thousands of new or revised guidance documents annually, with "perhaps most" of the 37,000 documents on its website constituting guidance documents. [FN44] Its guidance manuals for plans participating in the Medicare Prescription Drug Program total over 884 pages, with additional manual chapters forthcoming, as compared to the 106 pages of regulations in the Code of Federal Regulations governing the plans' conduct. [FN45] Between 1996 and 1999, the Occupational Safety and Health ***354** Administration of the Department of Labor (OSHA) issued over three thousand guidance documents whereas the entire Department of Labor, including OSHA, issued only twenty "significant" rules subject to review by the Office of Management and Budget (OMB). [FN46]

Guidance documents often have a substantial impact on regulated parties, beneficiaries of government programs, and the public. As noted above, guidance documents often affect the behavior of regulated entities and applicants for government programs even though they are not legally binding. These impacts can be as significant as the impact of legislative rules promulgated through notice-and-comment rulemaking. [FN47] For example, the Environmental Protection Agency currently identifies 204 of its guidance documents as "significant guidance documents," [FN48] which include guidance documents likely to have an annual effect on the economy of at least $100 million or that materially alter the budgetary impact of enti-

tlements, grants, user fees, or loan programs. [FN49] The Department of Labor has identified 47 significant guidance documents. [FN50]

Although agency guidance materials have considerable consequences for ***355** regulated entities, applicants for government programs, and the public, interested parties generally have no legal entitlement to participate in their development. [FN51] Agencies may provide some regulated entities and other groups limited opportunities to participate informally in the agency's development of its nonlegislative rules, but these opportunities for informal participation are not consistently available to all interested parties on an equal basis. [FN52] In addition, agencies are not legally obligated to offer a statement of the basis or purpose of a nonlegislative rule or to respond to public comments on the guidance. [FN53] Consequently, agencies issue, through guidance, a wide range of important policies unconstrained by any constitutional or statutory procedural requirements. . . .

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[FN15]. A statute may set forth additional or alternative administrative procedures applicable to specific agencies or programs. See 5 U.S.C. § 559 (2006) (providing that the APA does not "limit or repeal additional requirements imposed by statute or otherwise recognized by law"). In addition, agencies often grant process rights applicable to administrative adjudications through regulation. See, e.g., 14 C.F.R. §§ 13.1-.401 (2008) (setting forth the administrative procedures applicable to investigative and enforcement actions instigated by the FAA); 42 C.F.R. §§ 422.641-.698 (2007) (setting forth administrative procedures applicable to reconsiderations and appeals of Medicare contract determinations under the Medicare Advantage program).

[FN16]. U.S. Const. amend. V ("No person shall be ... deprived of life, liberty, or property, without due process of law."); U.S. Const. amend. XIV, § 1 ("No State shall ... deprive any person of life, liberty, or property, without due process of law.").

[FN17]. In Londoner v. City and County of Denver, 210 U.S. 373 (1908), the Court held that a tax assessment against an individual landowner without prior notice and hearing violated procedural due process. In contrast, in Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441 (1915), the Court held that procedural due process did not require prior notice and a hearing when a tax increase applied across-the-board to all city landowners. In distinguishing the two cases, the Bi-Metallic opinion explained that "[w]here a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption," and that the interests of affected parties may be protected only through the exercise of "their power ... over those who make the rule." Bi-Metallic, 239 U.S. at 445. While Londoner and Bi-Metallic are not necessarily binding precedent today, the distinction they articulate between rulemaking and adjudication has been carried forward into modern due process jurisprudence.

Procedural due process applies only when the state seeks to deprive an individual of "life, liberty, or property." The Court has held that the individual possesses a property interest protected by procedural due process only if state law or administrative rules contain substantive standards that constrain the discretion of the government official, thereby creating a "legitimate claim of entitlement." Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577-78 (1972). Similarly, the Court's current procedural due process jurisprudence recognizes only those liberty interests created by statute or regulation unless clearly found within the four corners of the Constitution. See, e.g., Sandin v. Conner, 515 U.S. 472, 485-86 (1995) (holding that in the prison context, the states create a liberty interest protected by the Due Process Clause only when the interest created under state law also presents a "type of atypical, significant deprivation" that is a "dramatic departure from the basic conditions" of an inmate's confinement); Meachum v. Fano, 427 U.S. 215, 228-29 (1976) (holding that state prisoners have no cognizable liberty interest entitled to procedural due process protection in connection with their transfer from one state prison to another because under state law the transfers were subject to the discretion of prison officials).

[FN18]. 5 U.S.C. §§ 554, 556, 557(c), 557(d) (2006).

[FN19]. Id. § 557(c)(3).

[FN20]. Id. § 706(2)(E).

[FN21]. See supra note 15.

[FN22]. In contrast, administrative adjudications involve the creation and application of the law in the course of resolving individual cases. See Ernest Gellhorn & Glen O. Robinson, Rulemaking "Due Process": An Inconclusive Dialogue, 48 U. Chi. L. Rev. 201, 201 (1981).

[FN23]. If the governing statute requires an agency to make determinations "on the record after opportunity for an agency hearing," then the agency must promulgate its rules through a trial-type or adversarial process known as "formal rulemaking." 5 U.S.C. § 554. Formal rulemaking is governed by §§ 554, 556, and 557 of the APA. Id. §§ 554, 556, 557. Agencies rarely engage in formal rulemaking.

[FN24]. See, e.g., Chao v. Rothermel, 327 F.3d 223, 227 (3d Cir. 2003); Hemp Indus. Ass'n v. Drug Enforcement Admin., 333 F.3d 1082, 1087 (9th Cir. 2003); N.Y. State Elec. & Gas Corp. v. Saranac Power Partners, L.P., 267 F.3d 128, 131 (2d Cir. 2001).

[FN25]. 5 U.S.C. § 553(b).

[FN26]. Id. § 553(c).

[FN27]. See id. (describing the notice-and-comment procedures and agency duties for rulemaking). Legislative rules, when properly promulgated through notice-and-comment rulemaking, have the force and effect of law, meaning they are binding on all persons, the agency, and the courts. See United States v. Mead, 533 U.S. 218, 227 (2001) (explaining that where Congress has delegated to an agency the authority to elucidate a specific statutory provision by regulation, the agency's regulation is binding unless procedurally defective, otherwise arbitrary and capricious, or contrary to the statute).

[FN28]. See 5 U.S.C. § 553(b)(3)(A) (addressing certain rules and statements exempt from notice-and-comment rulemaking requirements). In addition, the Supreme Court's decision in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc. bars the courts from invoking their common law authority to add procedural requirements to agency rulemaking, including agencies' promulgation of guidance materials, beyond those prescribed by the legislature. 435 U.S. 519, 524 (1978).

[FN29]. See Jeffrey S. Lubbers, A Guide to Federal Agency Rulemaking 75 (4th ed. 2006) (explaining the confusion between legislative and nonlegislative rules); see also Mendelson, supra note 7, at 399-400 (discussing how agencies use nonlegislative rules to detail their regulatory implementation strategies). As used in this Article, the term "nonlegislative rules" does not include procedural rules--rules that relate to an agency's methods of operation and do not establish, clarify, or interpret substantive law, rights, or duties.

[FN30]. See Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976) (holding that courts may give less weight to guidance materials than to binding regulations); Skidmore v. Swift&Co., 323 U.S. 134, 140 (1944) (holding that courts may look to guidance materials as a source of "experience and informed judgment" that nonetheless are not binding on courts); Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974) (holding that guidance materials are not binding precedential rules, but are merely public proclamations of intended actions).

[FN31]. See Thomas O. McGarity, Some Thoughts on "Deossifying" the Rulemaking Process, 41 Duke L.J. 1385, 1442 (1992) (stating that the legal and factual bases for nonlegislative rules usually can be challenged during judicial review of an enforcement action or a denial of a permit); see also Levin, supra note 10, at 1504 ("[I]nterpretive rules are nonbinding in a procedural sense: they cannot cut off the right of private parties to be heard in administrative proceedings.").

[FN32]. See Mendelson, supra note 7, at 408 (noting that issuing guidance is less resource-intensive than notice-and-comment rulemaking).

[FN33]. See id. at 410 (suggesting that the flexible nature of guidance documents makes them ideal for supplementing legislative rules in response to emerging and unforeseen issues).

[FN34]. Id. at 409-10.

[FN35]. See Mendelson, supra note 7, at 409 (noting that agencies use guidance materials such as handbooks and directives to supervise employees and streamline employee decisionmaking). Although legislative rules also could promote more accurate, consistent, and predictable decisionmaking among agency employees, "guidance documents allow the agency to supply information to lower-level employees more cheaply and without risking an outside suit based on later noncompliance with the legislative rule." Id. See generally Asimow, supra note 10, at 526, 529 (noting that guidance materials, in serving as staff regulations, are essential to the proper administration of day-to-day agency operations).

[FN36]. See generally Mark Seidenfeld, Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking, 75 Tex. L. Rev. 483 (1997) (arguing that agencies can use nonlegislative rules to avoid the rigorous judicial and political oversight that accompany legislative rulemaking).

[FN37]. See Mendelson, supra note 7, at 412 (examining regulated entities' risks and costs of challenging agency guidance enforcement).

[FN38]. See Christensen v. Harris County, 529 U.S. 576, 587 (2000) (holding that an agency's statutory interpretations announced in actions other than legislative rules or formal adjudications are due Skidmore deference; while not controlling, the agency's interpretation constitutes a body of experience and informed judgment to which the courts may resort for guidance); Williams v. United States, 503 U.S. 193, 201 (1992) (stating that an agency's general policy statement interpreting or explaining a legislative rule is an authoritative guide to the meaning of the applicable legislative rule); Mendelson, supra note 7, at 419 (arguing that the APA's "arbitrary and capricious" standard of review under § 706 of the APA is weak, with courts typically deferring to the agency's expertise with respect to the relevant evidence and policy considerations).

[FN39]. See Anthony, supra note 7, at 1328 (noting that guidance materials may have a binding effect if the regulated entities fear that agencies will take retributive actions); McGarity, supra note 31, at 1442 (arguing that the consequences of a failed challenge to agency guidance regulations may induce regulated parties to comply with nonlegislative rules).

[FN40]. See Mendelson, supra note 7, at 400 (noting that regulated entities may be unwilling to suffer the ill will of challenging an agency's guidance in court); cf. id. at 407 (noting that universities typically comply with the requirements of Title IX in the interest of maintaining a good long-term relationship with the Department of Education and avoiding negative media attention).

[FN41]. See Anthony, supra note 7, at 1327-32 (noting that guidance documents have a "practical binding effect" on regulated parties if the documents suggest a binding intent and the regulatees are reasonably led to believe that noncompliance carries consequences); Mendelson, supra note 7, at 407 (arguing that the rational regulatee will conform to guidance regulations if compliance is more cost effective than either refusing to comply with--or mounting a challenge to--guidance rules).

[FN42]. See Joel E. Hoffman, Public Participation and Binding Effect in the Promulgation of Nonlegislative Rules: Current Developments at FDA, 22 Admin. & Reg. L. News 1, 1 (1997) (arguing that agencies have responded to increasingly complex legislative rulemaking procedures with more nonlegislative rulemaking).

[FN43]. See Mendelson, supra note 7, at 398 (noting that agencies have issued far more guidance documents than formal or informal rules); Johnson, supra note 7, at 701 (arguing that agencies have increasingly turned to nonlegislative rulemaking because of its time and resource management advantages).

[FN44]. See Centers for Medicare & Medicaid Services, Executive Order Guidance Overview, http://www.cms.hhs.gov/EOG/01_Overview.asp (last visited Apr. 14, 2009) (noting that many guidance documents that the Centers for Medicare & Medicaid Services issues annually make individual determinations of economic significance difficult).

[FN45]. Centers for Medicare and Medicaid Services Medicare Prescription Drug Benefit Manual, http://www.cms.hhs.gov/manuals/downloads/Pub100_18.pdf (last visited Apr. 14, 2009); Voluntary Medicare Prescription Drug Benefit, 42 C.F.R. pt. 423 (2006).

[FN46]. See Comm. on Gov't Reform, Non-Binding Legal Effect of Agency Guidance Documents, H.R. Rep. No. 106-1009, at 5 (2000) (noting that OSHA released 3,374 guidance documents from 1996 to 1999); Mendelson, supra note 7, at 399 (discussing the large number of guidance documents released by agencies relative to the number of legislative rules produced).

[FN47]. See OMB Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3435 (Jan. 25, 2007) (noting that guidance documents may have a binding effect on regulated parties to the extent that they would alter their conduct in an economically significant way).

[FN48]. See Envtl. Prot. Agency, Significant Guidance Documents by Office, http://www.epa.gov/lawsregs/guidance/byoffice.html (last visited Apr. 14, 2009) (listing the available significant guidance documents according to EPA office).

[FN49]. The OMB Bulletin generally defines the term significant guidance document to mean a guidance document reasonably expected to

i. [l]ead to an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

ii. [c]reate a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

iii. [m]aterially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

iv. [r]aise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12,866, as further amended.

OMB Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3439 (Jan.25, 2007).

[FN50]. See Dep't of Labor, Department of Labor Significant Guidance Documents Subject to EO12866 and OMB's Bulletin for Agency Good Guidance Practices, http://www.dol.gov/asp/guidance/index.htm (last visited Apr. 14, 2009) (listing the Department of Labor's significant guidance documents according to division within the agency).

[FN51]. See 5 U.S.C. § 553(b)(A) (2006) (excepting interpretive rules and general statements of policy from the APA's notice-and-comment rulemaking requirements). However, Congress has directed that the FDA require public participation in the adoption of guidance documents. 21 U.S.C. § 371(h)(1).

[FN52]. See infra notes 224-25 and accompanying text (noting that agencies often restrict public participation and engage solely with familiar organizations, with limited opportunities for involvement by newly interested parties).

[FN53]. See 5 U.S.C. § 553(c) (requiring a statement of basis and purpose only for those rules subject to the notice requirements under 5 U.S.C. § 553(b)); see also Mendelson, supra note 7, at 410 (noting that nonlegislative rulemaking lacks the oversight and formal procedures of legislative rulemaking that require agencies to engage in public participation). The Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices requires agencies to solicit and respond to public comments on agency guidance documents deemed "economically significant"; however, the bulletin does not create any legal right of enforcement against agencies. OMB Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3438-40 (Jan. 25, 2007) (outlining agency duties with regard to notice-and-comment procedures for economically significant guidance documents).

[FN54]. Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020 (D.C. Cir. 2000).

[FN55]. John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 13 (1980).

[FN56]. Mendelson, supra note 13, at 578; see also Seidenfeld, supra note 13, at 1533 (explaining that pluralism defines the public interest as an aggregation of private values, and, therefore, considers debate about the legitimacy of values enhanced by government action unnecessary as long as the values reflect the bargain struck by the groups participating in the democratic process).

[FN57]. See Bernard Schwartz, Administrative Law 49 (3d ed. 1991) (noting that, since 1935, the Supreme Court has used broad standards to uphold Congress's ability to delegate power).

[FN58]. Richard B. Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667, 1675 (1975).

[FN59]. See Mendelson, supra note 13, at 580 (explaining the "transmission belt" model through which "agencies merely carry out Congress's statutory plan and do not themselves exercise political judgment"); Seidenfeld, supra note 13, at 1516 ("[T]he federal bureaucracy is necessary to implement Congress's political decisions."); Stewart, supra note 58, at 1672-76 (explaining that under the traditional transmission belt model, agency procedures should simply promote the accurate and impartial application of legislative directives).

[FN60]. Seidenfeld, supra note 13, at 1517.

[FN61]. See Lisa Schultz Bressman, Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State, 78 N.Y.U. L. Rev. 461, 470 (2003) (explaining that under the transmission belt model, administrative action was legitimated with reference back to the authority of the legislature); Mendelson, supra note 13, at 580 ("The question of democratic responsiveness and accountability then becomes essentially a principal-agent problem. On such a view, the central question therefore is whether the administrative agency will be obligated to implement faithfully the congressionally chosen policies."); Stewart, supra note 58, at 1675 ("[The transmission belt model] legitimates intrusions into private liberties by agency officials not subject to electoral control by ensuring that such intrusions are commanded by a legitimate source of authority--the legislature.").

[FN62]. See Mendelson, supra note 13, at 580 (explaining that the literature has abandoned the transmission belt model "in recognition of the breadth and vagueness of congressional delegations of authority to administrative agencies"); Stewart, supra note 58, at 1676 (noting that vague statutes create discretion that threatens the legitimacy of agency action under the transmission belt model).

[FN63]. See Bressman, supra note 61, at 470-71 (describing the transmission belt model as conceiving of agencies "as merely implementing clear legislative directives").

[FN64]. See Mendelson, supra note 13, at 569 (“Since the New Deal, agencies have received congressional delegations to make countless key policy decisions balancing competing values such as efficiency, equity, health, and cost.”); see also Seidenfeld, supra note 13, at 1517-18 (stating that, when Congress fails to make hard political decisions, agencies must do so when implementing the law). Scholars have identified numerous motives for Congress's delegation of broad authority to agencies: Congress may lack the expertise or time to develop the comprehensive policies demanded of the regulatory state; its size, combined with constitutional constraints, may impede a timely consensus and thus limit Congress's ability to respond effectively in an era of rapidly changing circumstances; and Congress may wish to abdicate responsibility for hard policy choices. E.g., Mendelson, supra note 13, at 569-70; Seidenfeld, supra note 13, at 1522. The Supreme Court has interpreted the Constitution as prohibiting Congress from delegating authority to administrative agencies in the absence of an “intelligible principle” guiding and limiting agencies' discretion. J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928). The nondelegation doctrine as applied has bowed to the practical realities of the modern regulatory state, necessitating broad delegation of the legislative function to agencies. The Court has consistently held that broad, ambiguous legislation that in reality provides little guidance to agencies nevertheless satisfies the intelligible principle requirement. See, e.g., Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001) (affirming broad delegation to the EPA to set air quality standards); Loving v. United States, 517 U.S. 748 (1996) (upholding delegation to the President to determine when a court-martial should impose the death penalty). In fact, since 1935, only twice has the Court invoked the nondelegation principle to strike down broad congressional delegations of authority to agencies. See Pan. Ref. Co. v. Ryan, 293 U.S. 388 (1935) (invalidating a section of the National Industrial Recovery Act (NIRA) delegating to the President the power to prohibit shipment of “hot oil” in interstate commerce in order “to eliminate unfair competitive practices” and “to conserve natural resources”); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (invalidating the NIRA's delegation to the President the power to approve detailed codes to govern all business subject to federal authority).

[FN65]. See Bressman, supra note 61, at 471 (explaining that the transmission belt model failed to legitimate agency action because “[i]t could not tie administrative action to legislative directives as a means for protecting individual liberty from arbitrary intrusion”); Seidenfeld, supra note 13, at 1517-18 (stating that the transmission belt model does not legitimate delegating to agencies the discretion to render fundamental or politically charged policy decisions); Stewart, supra note 58, at 1676 (“Vague, general, or ambiguous statutes create discretion and threaten the legitimacy of agency action under the ‘transmission belt’ theory of administrative law ... [because] major questions of social and economic policy are determined by officials who are not formally accountable to the electorate ....”).

[FN66]. See Stewart, supra note 58, at 1683 (“Today, the exercise of agency discretion is inevitably seen as the essentially legislative process of adjusting the competing claims of various private interests affected by agency policy.”).

[FN67]. See Cynthia R. Farina, The Consent of the Governed: Against Simple Rules for a Complex World, 72 Chi.-Kent L. Rev. 987, 987 (1997) (“Like an intriguing but awkward family heirloom, the legitimacy problem is handed down from generation to generation of administrative law scholars.”).

[FN68]. For a discussion of the constitutional legitimacy of agencies' policymaking activities, see, for example, Harold H. Bruff, On the Constitutional Status of the Administrative Agencies, 36 Am. U. L. Rev. 491 (1987) (analyzing the administrative state in light of the Supreme Court's separation of powers jurisprudence); Steven G. Calabresi, Some Normative Arguments for the Unitary Executive, 48 Ark. L. Rev. 23, 37-47 (1995) (arguing that a “unitary executive” is necessary to maintain the Constitution's separation of powers and to preserve the Framers' vision of an energetic and accountable president); David B. Rivkin, Jr., The Unitary Executive and Presidential Control of Executive Branch Rulemaking, 7 Admin. L.J. Am. U. 309, 317-20 (1993) (contending that an original understanding of the Constitution supports the “unitary executive” thesis because the Framers understood that “the Vesting Clause of Article II did place the totality of executive power with the President”).

[FN69]. Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16-23 (1962) (questioning the legitimacy of judicial review because it thwarts the choices of elected representatives who operate under public scrutiny and whose choices are assumed to reflect the will of a popular majority).

[FN70]. Farina, supra note 67, at 990 (quoting Calabresi, supra note 68, at 67).

[FN71]. Amy Gutmann & Dennis Thompson, Why Deliberative Democracy? 15 (2004).

[FN72]. See Mendelson, supra note 13, at 580 (characterizing the question of democratic responsiveness and accountability under the pluralism view as essentially a principal-agent problem).

[FN73]. See Bickel, supra note 69, at 19 (arguing that the judiciary works counter to the democratic theory of policymaking by publicly accountable institutions); see also Rebecca L. Brown, Accountability, Liberty, and Constitution, 98 Colum. L. Rev. 531, 539 (1998) (describing the majoritarian paradigm as adhering to the view that policy decisions must be made by politically accountable officials).

[FN74]. See Brown, supra note 73, at 534 (characterizing Bickel's theory as resting on the assumption that the purpose of political accountability is to effectuate majority will); Mendelson, supra note 13, at 578-79 (stating that the democratic character of an institution may be inferred if its membership is selected by the electorate, as those who fail to enact appropriate policies may be turned out of office).

[FN75]. See Evan J. Criddle, Fiduciary Foundations of Administrative Law, 54 UCLA L. Rev. 117, 166 (2006) ("When Congress delegates authority to an agency rather than resolve the disputed issue itself, it distances regulatory policy from majoritarian democratic processes.").

[FN76]. See Steven Croley, White House Review of Agency Rulemaking: An Empirical Investigation, 70 U. Chi. L. Rev. 821, 831 (2003) ("Agencies might advance their own visions of good regulatory policy, but, electorally unaccountable, those visions lack political legitimacy."); Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 Colum. L. Rev. 1, 94 (1994) (arguing that the President should have control over agencies to preserve accountability). Bickel also questioned the legitimacy of judicial review by unelected judges empowered to overturn the legislative decisions of government officials who represent and answer to the people. See Bickel, supra note 69, at 18 (questioning the legitimacy of judicial review by unelected judges).

[FN77]. See infra Part II.C for a discussion of the interest group representation model--a model for the administrative state which reflects the pluralist's emphasis on participatory bargaining.

[FN78]. See infra Part II.C for a discussion of the presidential control model--a model for the administrative state which promotes procedures that enable the President to monitor and influence agency action.

[FN79]. Dan M. Kahan, Democracy Schmemocracy, 20 Cardozo L. Rev. 795, 796-97 (1999).

[FN80]. Seidenfeld, supra note 13, at 1515. Civic republicans also advocate for deliberative processes that engage citizens themselves. In their view, public deliberations not only would produce decisions informed by the values of all citizens, but would enable citizens "to reach consensus on the common good." Id. at 1514. However, in our large, heterogeneous society, it is difficult to imagine that public debate on most issues will reveal a clear consensus to guide agencies' policy choices. Cf. Farina, supra note 67, at 995 (questioning whether, for most issues, the diversity of viewpoints will resolve itself into a consensus through public debate, with this consensus then available to the President).

[FN81]. Gutmann & Thompson, supra note 71, at 19; see also Seidenfeld, supra note 13, at 1528-29 (arguing against "equat[ing] the public good that legitimates government action with majority rule" in favor of finding legitimacy in government action that reflects thoughtful consideration "about what is best for the community as a community" (emphasis omitted)).

[FN82]. See Gutmann & Thompson, supra note 71, at 13-14 (contrasting deliberative democracy, which asks for justifications and considers the reasons offered in support of a chosen policy, from the aggregative conception, which does not ask for jus-

tifications and seeks only an outcome that is fair and optimal).

[FN83]. The ABA Committee on Government Standards described this trust as follows:

The fiduciary, or steward, is one to whom power is given in order that his knowledge and skill can be brought to bear for the benefit of another.This defining characteristic of stewardship illuminates the characteristic of government service that has definitive ethical significance: the entrusting of power by "We, the People" to those who govern for us.

Because we understand ourselves to be a legitimately self-governing People, we recognize that this transfer of power is neither a desperate confession of inability to rule ourselves, nor an unconditional submission to some outsider's superior claim to rule us. Those who receive the power to govern have no inherent right to it. Rather, the power that a free and willing citizenry gives to those who govern comes indelibly impressed with the duty to serve the interests of that citizenry.

ABA Comm. on Gov't Standards, Keeping Faith: Government Ethics & Government Ethics Regulation, 45 Admin. L. Rev. 287, 291-92 (1993) (Cynthia R. Farina, Reporter).

[FN84]. See Bressman, supra note 61, at 496 (arguing that arbitrary administrative decisionmaking may affect individual liberty in the personal sense, such as by "target[ing] a specific individual for unfavorable treatment without good reason," or in the collective sense, such as by "impair[ing] a statutorily protected public good ... without a sufficient[] public purpose").

[FN85]. Cf. id. at 470 ("Legislative directives protect individual liberty by confining administrative decisionmaking within identifiable and determinate bounds. Simply put, they reduce opportunities for arbitrariness by providing agencies with specific instructions rather than general licenses.") (citation omitted).

[FN86]. See Farina, supra note 11, at 228 (noting that the doctrine of due process ignores the common understanding that public officials are given power to pursue "comprehensible, identifiable objectives" and not so "that they might indulge their personal predilection or caprice").

[FN87]. See Hans A. Linde, Due Process of Lawmaking, 55 Neb. L. Rev. 197, 225 (1976) ("[Agencies] are obliged to justify their actions in instrumentalist terms, as means toward a goal within the scope of their assignment."); cf. Edward L. Rubin, Due Process and the Administrative State, 72 Cal. L. Rev. 1044, 1158 (1984) ("[P]articular action should be allowed only insofar as it is necessary to carry out the state's established goal.").

[FN88]. See T.M. Scanlon, Due Process, in Due Process: Nomos XVIII 94, 96 (J. Roland Pennock & John W. Chapman eds., 1977) (stating that we achieve "some assurance of nonarbitrariness by requiring those who exercise authority to justify their intended actions in a public proceeding by adducing reasons of the appropriate sort and defending these against critical attack"); Jerry L. Mashaw, Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State, 70 Fordham L. Rev. 17, 29 (2001) ("The administrative state ... is drowning in rationality requirements because it can legitimate itself only by appeals to rationality.").

[FN89]. See Bressman, supra note 61, at 496 (defining arbitrary administrative decisionmaking as "generat[ing] conclusions that do not follow logically from the evidence"); Mashaw, supra note 88, at 22 ("Authority [for administrative action] must be combined with reasons, which usually means accurate fact-finding and sound policy analysis.").

[FN90]. See Stewart, supra note 58, at 1679-80 (explaining that the doctrine of reasoned consistency in agency decisionmaking might require that agencies articulate reasons for their decisions and that they justify departures from established policies in order to "ensure that the agency's action is rationally related to...some permissible societal goal").

[FN91]. See Ely, supra note 55, at 100 (arguing that the pursuit of liberty entails an "elaborate scheme" that ensures that decisionmakers are "held to a duty to take into account the interests of all those their decisions affect"); Jerry L. Mashaw, Administrative Due Process: The Quest for a Dignitary Theory, 61 B.U. L. Rev. 885, 899 (1981) (stating that the equality value demands that "the techniques for making collective decisions not imply that one person's or group's contribution (facts, interpretation, policy argument, etc.) is entitled to greater respect than another's merely because of the identity of the person or

group"); Seidenfeld, supra note 13, at 1531 ("The civic republican condition that political participants not be subservient to one another mandates that government decisionmakers have equal regard for all interests."); cf. Criddle, supra note 75, at 131 ("Where a fiduciary relation involves multiple beneficiaries, the duty of loyalty takes on an antidiscrimination aspect: Unless otherwise provided for by contract, fiduciaries are bound to render an equal measure of fidelity to each beneficiary.").

[FN92]. Seidenfeld, supra note 13, at 1531.

[FN93]. See Criddle, supra note 75, at 121 ("To minimize the risk that agencies will abuse their discretion through opportunism or negligence, each political branch monitors agency activity and retains some residual control to correct agency mismanagement.").

[FN94]. Cf. Mendelson, supra note 13, at 586 (describing civic republican theories as seeing "presidential control not as the central source of legitimacy, but as a safeguard against poor outcomes or skewed deliberation").

[FN95]. See, e.g., Seidenfeld, supra note 13, at 1515 (arguing that politically accountable institutions play a role under the republican conception of the administrative state by ensuring that the bureaucracy carries out its civic republican promise); cf. Lisa Schultz Bressman, Procedures as Politics in Administrative Law, 107 Colum. L. Rev. 1749, 1766-67 (2007) (explaining that legal scholars generally divide into two groups--those favoring procedures and those favoring political accountability--but that those in the former group do not say that political accountability is irrelevant).

[FN96]. See Daniel P. Rathbun, Note, Irrelevant Oversight: "Presidential Administration" from the Standpoint of Arbitrary and Capricious Review, 107 Mich. L. Rev. 643, 650 (2009) (noting that the transmission belt model, the first model of the administrative state, lost its credibility "as agencies' independent discretion became clear").

[FN97]. See Seidenfeld, supra note 13, at 1519 (describing the expertise model as "a faith that the 'professional spirit' of New Deal regulators would deter them from setting unwise or excessively intrusive policy").

[FN98]. See id. at 1518-19 (stating that the expertise model envisioned that the application of regulators' knowledge and experience would yield successful solutions to regulatory problems, with regulators' "professional spirit" deterring them "from setting unwise or excessively intrusive policy"); Gerald E. Frug, The Ideology of Bureaucracy in American Law, 97 Harv. L. Rev. 1276, 1320-21 (1984) (explaining that the expertise model depicts agency decisionmaking as trustworthy because the agency's purpose is to exercise its expertise for the common purpose, constrained only by "the limits of professionalism, expertise, and competence").

[FN99]. See Bressman, supra note 95, at 1759 ("By reducing discretion, more elaborate procedures would diminish room for expert judgment of the sort that the New Dealers preferred.").

[FN100]. See Criddle, supra note 75, at 147 ("[T]he delicate framework of regulatory governance can easily decay into corruption, cronyism, factionalism, capriciousness, and waste."). As Criddle further explains,

> As stewards over vast public resources and powerful regulatory regimes, administrative agencies face extraordinary pressures from both within and outside government--not all of which are conducive to conscientious administration, to put it mildly. For decades, political scientists have decried the so-called "iron triangles" between private industry, agency administrators, and congressional committees, which institutionalize factionalism, entrenching narrow interests in opposition to broad-based progressive reforms. Public resources pooled under agency control may also become breeding grounds for rent-seeking bureaucrats and unscrupulous lobbyists.
>
> Bureaucratic mismanagement can be equally insidious, leading to arbitrary, uninformed, and wasteful policies.

Id. at 147-48; see also Bressman, supra note 61, at 472 ("However expert administrators were, they too often decided matters without a hearing, on the basis of matters outside their purview, with preformed biases, and without regard to the combination of functions that might impugn their impartiality-- such as the combination of rulemaking, investigation, and prosecution.").

[FN101]. 5 U.S.C. § 706(2)(A) (2006).

[FN102]. See Asimow, supra note 10, at 574 (noting that agency personnel attach practical value to public commentary); Farina, supra note 11, at 226 (suggesting that exchanges with affected individuals can be helpful to agencies); see also Jim Rossi, Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking, 92 Nw. U. L. Rev. 173, 185-86 (1997) ("[A]s information makes its way inside the bureaucratic process to the actual decisionmakers, it contributes to the rationality of the final decision by improving the information base utilized in setting agendas, developing alternatives, and making final policy decisions.").

[FN103]. See, e.g., Indep. U.S. Tanker Owners Comm. v. Lewis, 690 F.2d 908, 919 (D.C. Cir. 1982) (invalidating an agency rule because of the agency's inadequate response to comments); La. Fed. Land Bank Ass'n, FLCA v. Farm Credit Admin., 336 F.3d 1075, 1080 (D.C. Cir. 2003) (remanding a rule where the preamble to the final rule said "almost nothing" about comments received by the agency).

[FN104]. Bressman, supra note 61, at 473; see also Criddle, supra note 75, at 153 (describing the APA's notice-and-comment procedures as minimalist procedural safeguards intended to reinforce the fiduciary duties of care and loyalty).

[FN105]. See Bressman, supra note 61, at 465 ("[T]he majoritarian premise almost intuitively explains the transition from the early models of administrative law to the most recent ones.").

[FN106]. See id. (arguing that the emerging interest group representation model was premised on majoritarian values and sought to ensure that administrative decisionmaking "reflected the policy preferences of participants in agency proceedings").

[FN107]. See Stewart, supra note 58, at 1712 (explaining that the interest group representation model seeks to replicate the legislative process, thereby affording agency decisions "legitimacy based on the same principle as legislation").

[FN108]. See Bressman, supra note 61, at 475 ("Through an interest group representation model, agencies' decisions would gather legitimacy 'based on the same principle as legislation.' In the absence of an objective basis for administrative judgment, such judgment would reflect the preferences of all affected parties."); Mendelson, supra note 13, at 587 (describing pluralist theories of interest group participation in agency decisions as a "microcosm of the legislative process, generating policies that coincide with the popular will" based on the aggregation of the preferences communicated to agencies by interest groups); Stewart, supra note 58, at 1712 (explaining that the interest group representation model has an implicit assumption that "legislation represents no more than compromises struck between competing interest groups" and, therefore, "if agencies were to function as a forum for all interests affected by agency decisionmaking, bargaining leading to compromises generally acceptable to all might result, thus replicating the process of legislation").

[FN109]. See Bressman, supra note 61, at 485 ("Critics claimed that agencies did not merely aggregate the preferences of the competing interests but served 'self-interests deeply entangled with narrow private interests.'" (quoting Martin Shapiro, Administrative Discretion: The Next Stage, 92 Yale L.J. 1487, 1498 (1983))); Stewart, supra note 58, at 1712 ("The viability in practice of such a pluralist theory of legitimacy is challenged at the outset by the predominant contemporary critique of the administrative process: that agencies are biased in favor of regulated and client groups, and are generally unresponsive to unorganized interests." (internal citation omitted)).

[FN110]. See Croley, supra note 76, at 834 (stating that under one variation of the agency capture thesis, agencies may be "co-opted by interest groups because they depend on those groups for so much of the information on which their regulatory decisions rest"); Mendelson, supra note 13, at 587 (same); Stewart, supra note 58, at 1713 (same).

[FN111]. See Seidenfeld, supra note 13, at 1564 (noting that agency officials can use their regulatory power to trade benefits to interest groups in return for future jobs).

[FN112]. See Bressman, supra note 61, at 485 ("Creating an idealized legislative process was expensive and complicated, if done right.").

[FN113]. See infra Part II.D.3.b.

[FN114]. See Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2331-36 (2001) (arguing that the administrative state should be accountable to the public, and that if a model "[takes] the President out of the equation," "what remains are individuals and entities with a far more tenuous connection to national majoritarian preferences and interests"); cf. Croley, supra note 76, at 831 (stating that the unitary executive thesis contends that the absence of presidential control leaves insufficient checks on agency decisionmakers and thus allows unelected, and therefore politically unaccountable, decisionmakers to implement their own visions of good regulatory policy).

[FN115]. See Bressman, supra note 61, at 489 (describing the unitary executive theory as seeking to legitimate the administrative state by bringing its decisions under popular control through presidential control).

[FN116]. See Croley, supra note 76, at 831 ("Because the president's constituency is a national one, the president can best aggregate and balance competing interests in the course of developing sound regulatory policy."); Mendelson, supra note 13, at 582-83 (explaining that under the presidential control model, the electorate expresses its policy preferences when it elects a new president).

[FN117]. See Bressman, supra note 61, at 490-91 (describing the unitary executive theory as resting on the belief that the President's policies presumably represent the majority; if not, then the next election cycle will ensure that the new President's policies do); Kagan, supra note 114, at 2335 (arguing that the President is likely to consider the preferences of the general public given his desire for re-election in his first term and the election of a chosen successor in his second term, as well as his ambition for achievement and historical legacy); Mendelson, supra note 13, at 582-83 ("[The President] will remain responsive to electoral views through her term to increase the chances of her reelection or to maintain her party's continued control of the presidency.").

[FN118]. See Bressman, supra note 61, at 489 ("Once Congress relinquishes the power to determine the details of regulatory policy, the President should assume it because the Constitution requires an elected, focused governmental official to exercise that power rather than a bunch of bureaucrats."); cf. Croley, supra note 76, at 831-32 ("[B]ecause the Constitution contemplates that the executive power of the United States resides in the president, agencies not closely overseen by and answerable to the president lack constitutional moorings.").

[FN119]. Exec. Order No. 12,291, 3 C.F.R. 127 (1982), revoked by Exec. Order No. 12,866, 3 C.F.R. 638 (1994); Exec. Order No. 13,258, 3 C.F.R. 204 (2003); Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 23, 2007) (amending Exec. Order No. 12,866), revoked by Exec. Order No. 13,497, 74 Fed. Reg. 6113 (Jan. 30, 2009). Within the Office of Management and Budget (OMB), the Office of Information and Regulatory Activities (OIRA) was responsible for review of agencies' major rules.

[FN120]. See Exec. Order No. 13,422, 72 Fed. Reg. at 2763-65.

[FN121]. See Exec. Order No. 12,866, 3 C.F.R. 638.

[FN122]. See Kagan, supra note 114, at 2281-99.

[FN123]. 467 U.S. 837 (1984).

[FN124]. See id. at 843-44 ("In such a case, a court may not substitute its own construction of a statutory provision for a rea-

sonable interpretation made by the administrator of an agency.").

[FN125]. Id. at 865-66.

[FN126]. 533 U.S. 218 (2001).

[FN127]. See id. at 227-35 (explaining that agency rules that fall outside Chevron's purview are still entitled to some levels of deference under Skidmore and clarifying that "Chevron did nothing to eliminate Skidmore's holding that an agency's interpretation may merit some deference whatever its form").

[FN128]. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[FN129]. 463 U.S. 29 (1983).

[FN130]. Id. at 41-44.

[FN131]. Id. at 43.

[FN132]. Cf. Jerry Mashaw, Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development, in Foundations of Administrative Law 77, 80 (Peter H. Schuck ed., 1994) (concluding that it may be possible to interpret every administrative process as furthering the liberal goal of rational decisionmaking or the pluralist goal of ensuring access and accommodation of all political interests). For example, greater transparency and participation in agency rulemaking arguably furthers both the republican goal of deliberative, rational decisionmaking and the pluralist goal of replicating the legislative process at the administrative level so as to ensure decisions that balance competing preferences. Compare Criddle, supra note 75, at 152-54 (characterizing the APA's notice-and-comment rulemaking process as procedural safeguards designed to ensure agencies' compliance with their duties of care and loyalty), with Bressman, supra note 95, at 1771-72 (characterizing the APA's notice-and-comment rulemaking procedures, as interpreted by the courts, as enhancing agency legitimacy on the same principle as legislation-- ensuring that administrative decisionmaking reflects the preferences of all involved).

[FN133]. Bressman, supra note 95, at 1766.

[FN134]. See Gutmann & Thompson, supra note 71, at 14-15; see also Richard H. Fallon, Jr., Should We All Be Welfare Economists?, 101 Mich. L. Rev. 979, 997-1001 (2003) (arguing that an individual's actual choice among competing policies may not reflect the choice the individual "would rationally choose for herself," particularly when individuals lack sufficient information to evaluate competing options and as questions about likely consequences grow more complex); Farina, supra note 67, at 1005 (arguing that government policymakers "need not accede to citizen preferences formed in ignorance of important information").

[FN135]. Cf. Farina, supra note 67, at 1005 ("Obviously, officials can legitimately discount public opinion on technically arcane issues ....").

[FN136]. Id.

[FN137]. Gutmann & Thompson, supra note 71, at 14-15.

[FN138]. See Fallon, supra note 134, at 1017-18 (arguing that policy choices should involve "moral powers of valuation and choice" independent of individuals' well-being and interests); Farina, supra note 67, at 1006-07 (stating that part of the legitimate realm of democratic governance sometimes involves "the deliberate determination by our representatives to defy the will of the people in the interest of the community as a whole, or a vulnerable subsection of the community").

[FN139]. See Fallon, supra note 134, at 1018 (stating that current policy decisions may impact the "interests of unborn generations" by unfairly imposing current popular preferences).

[FN140]. See Farina, supra note 67, at 988, 1006 (arguing that "part of the legitimate realm of democratic governance" is the shaping of values and not simply "passive, mechanistic aggregation of citizen preferences").

[FN141]. See The Federalist No. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961) (acknowledging the danger posed by factions "adverse to the rights of other citizens, or to the permanent and aggregate interests of the community"); Bressman, supra note 61, at 478.

[FN142]. See Bressman, supra note 61, at 498 ("[E]lected officials, responsive to majority will, might enact a law oppressive to individual rights."); Brown, supra note 73, at 570 ("Tyranny was understood as the abuse of power by government--even by representative government acting on the basis of what a majority of its constituents wanted.").

[FN143]. Brown, supra note 73, at 570.

[FN144]. See id. at 570-71 (listing electoral accountability of government officers, separation of powers, federalism, and checks and balances as limiting structures of the governmental design).

[FN145]. See id. at 558-70 (tracing the evolution of political views on popular sovereignty from thirteenth-century England to the enactment of the Constitution).

[FN146]. The Federalist No. 10 (James Madison), supra note 141, at 80.

[FN147]. Id. at 82; see also Brown, supra note 73, at 553 (explaining that the Framers intentionally "buffered majority will, insulated representatives from direct influence of majority factions, and provided checks on majority decisionmaking" (citations omitted)).

[FN148]. See The Federalist No. 53, at 332-33 (James Madison) (Clinton Rossiter ed., 1961); see also The Federalist No. 63, at 384 (probably James Madison) (Clinton Rossiter ed., 1961) (Madison advocated that, as "a defense to the people against their own temporary errors and delusions," senators should serve terms of six years and not be appointed directly by the people. Thus the Senate may serve as a "temperate and respectable body of citizens, in order to check the misguided career and to suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind.").

[FN149]. Brown, supra note 73, at 536.

[FN150]. Richard A. Posner, Bork and Beethoven, 42 Stan. L. Rev. 1365, 1369 (1990).

[FN151]. See generally Bressman, supra note 61, at 493 (observing that constitutional theories have questioned "the idea of majoritarianism as the linchpin of legitimacy").

[FN152]. See Brown, supra note 73, at 536 ("[T]he structural feature of accountability for political actors can be understood, not as a means to maximize the preferences of the majority of the people on matters of routine governance, as it has been widely understood,...but rather as a means primarily to minimize the risk of tyranny in government ....").

[FN153]. Id. at 565.

[FN154]. Tyler's studies examine individuals' perceptions of not only of political authorities but also authorities in legal, industrial, educational, and interpersonal settings. His studies reveal similar effects across these settings. Tyler, supra note 12, at 82.

[FN155]. See id. at 84-106 (analyzing the roles that procedure and past experience assume in shaping individuals' perceptions of the legitimacy of authority and government).

[FN156]. Tom R. Tyler, Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority, 56 DePaul L. Rev. 661, 663 (2007).

[FN157]. Tyler, supra note 12, at 130.

[FN158]. Cf. id. (concluding that the findings of his study of Chicago citizens' views of legal authorities suggest that "control models"--behavioral models predicting that individuals care about procedural dimensions that may influence outcomes--do not fully capture individuals' views on procedural justice).

[FN159]. Tyler, supra note 156, at 661.

[FN160]. Id. at 664; Tyler, supra note 12, at 138.

[FN161]. Tyler, supra note 156, at 664, 666; Tyler, supra note 12, at 163-64.

[FN162]. Tyler, supra note 12, at 137.

[FN163]. See id. (listing "the quality of the decisions" as one of "seven distinct aspects of procedure" that citizens take into account when judging procedural justice).

[FN164]. See id. at 151 ("Judgments about 'how hard' the authorities try to be fair emerge as the key overall factor in assessing procedural justice.").

[FN165]. See Tyler, supra note 156, at 664, 667 (discussing "respect for persons" as one of three aspects of the rule of law by which citizens justify deference to agency authorities).

[FN166]. See id. at 664 (explaining that the authority's behavior toward the citizen serves as a "cue[] that communicates information about the intentions and character of the legal authorities with whom they are dealing"); see also Tyler, supra note 12, at 149 (arguing that citizens are more likely to "accept a lack of decision control" when they believe the authority is properly considering their interests, a belief heavily influenced by prior views of the authority).

[FN167]. Tyler, supra note 156, at 664.

[FN168]. See Jerry L. Mashaw, Prodelegation: Why Administrators Should Make Political Decisions, 1 J.L. Econ. & Org. 81, 95 (1985) ("Citizens vote for a president based almost wholly on a perception of the difference that one or another candidate might make to general governmental policies.").

[FN169]. See Mendelson, supra note 13, at 582-83 ("Some commentators go even further, arguing that the political accountability supplied by the President is not simply an adequate substitute for that flowing from Congress, but that the President will be a better conduit for public preferences because she will be better able to counteract narrow regional interests and the demands of small groups of constituents.").

[FN170]. Cf. Kagan, supra note 114, at 2335 (stating that presidents work to expand their base of support among the public due to their desire for re-election or their ambitions for their chosen successor).

[FN171]. See Farina, supra note 67, at 994-95 (noting that various voices of the electorate have proliferated significantly since the nation's founding, with contemporary public discourse reflecting a wide range of groups); see also Seidenfeld, supra note 13, at 1521 ("The number and specificity of individual interests at play in the national political arena make it impossible for members of Congress to assess each constituent's preferences regarding particular legislative choices.").

[FN172]. See Farina, supra note 67, at 999-1000 (explaining the mixed signals citizens often send their elected representatives). Farina explains that the phenomenon of conflicting preferences reflects problems of information, prediction, options, and "a desire to have one's cake and eat it too." Id. at 1000. For example, voters in the 1980s wanted less government but more environmental protection, while voters in the 1990s sought both more-affordable health care and a high degree of individual freedom of choice. Id. at 999.

[FN173]. Cf. id. at 1002-03 (arguing that a president's claim that "by virtue of his national electoral status, [he] uniquely represents the voice of the entire nation particularly ignores the evolutionary quality of the popular will").

[FN174]. Id. at 1002 (citation omitted).

[FN175]. As explained by Farina,

> Whenever the object of the political exercise is adopting a package rather than resolving a single issue--as when citizens must choose among candidates who run on multi-faceted policy platforms--there is a bundling problem. In order to get the policy "sticks" they value most highly, voters have to take whatever other sticks come in the bundle.... The point is not that policy bundling is democratically illegitimate, but rather that it precludes any facile translation of election results into "the people's will" on specific policy issues.

Id. at 998.

[FN176]. See Mendelson, supra note 13, at 570 (noting that, while sometimes effective, congressional tools for oversight are limited); see also Mark Seidenfeld, A Big Picture Approach to Presidential Influence on Agency Policy-Making, 80 Iowa L. Rev. 1, 9-10 (1994) ("[C]ongressional monitoring and after-the-fact restraints provide an important check on agency decision-making.").

[FN177]. See Seidenfeld, supra note 13, at 1551-52 ("Appropriations subcommittees frequently specify which programs are to receive funds. They also engage in non-statutory control over agency programs, for example, by requiring the agency to give the subcommittee advance notice of changes from the mutually understood allocation of appropriated funds.").

[FN178]. See Seidenfeld, supra note 176, at 11 (explaining that congressional committees generally monitor agencies because Congress, as a whole, cannot effectively maintain day-to-day awareness over the regulatory matters it is tasked with overseeing).

[FN179]. Cf. Seidenfeld, supra note 13, at 1522 (observing that Congress delegates certain policymaking decisions to agencies in part because it cannot devote sufficient attention to any one regulatory scheme).

[FN180]. See Mendelson, supra note 13, at 570-71 ("Congressional oversight efforts also tend to be fragmented and reactive to particular agency proposals ...."); see also Seidenfeld, supra note 13, at 1525 (noting that legislators generally do not monitor agency decisions but instead act "as ombudsmen in agency matters concerning constituent interests").

[FN181]. See Kagan, supra note 114, at 2259-60; see also Seidenfeld, supra note 176, at 11-12 ("[T]he committee system biases congressional responses toward acceding to special interest demands and reaffirming agency policy choices. In other words, the interdependence between congressional committees, regulated entities, and regulating agencies undercuts the ability of Con-

gress as an institution to constrain agency policy to comport with generally held values." (internal citation omitted)). For example, congressional agriculture committees generally are comprised of members representing farming districts, while banking committees attract representatives from the urban districts where banks primarily are headquartered. Kagan, supra note 114, at 2259-60.

[FN182]. See Kagan, supra note 114, at 2259-60 (noting that the "iron triangle" formed between an agency, a committee, and an organized interest results in administrative policies that are not representative of the interests of the public or their representatives in Congress).

[FN183]. See Thomas W. Merrill, Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation, 104 Colum. L. Rev. 2097, 2145 (2004) (observing that elected officials depend on campaign contributions for their continued existence, and therefore may be more attentive to interest groups than agency officials); see also Nicholas Bagley & Richard L. Revesz, Centralized Oversight of the Regulatory State, 106 Colum. L. Rev. 1260, 1284 (2006) (explaining that capture theory contends that interest groups will "provide support, financial or otherwise, for the [congressional committee] members' reelection" campaigns in an effort to secure "favorable regulations").

[FN184]. See Seidenfeld, supra note 13, at 1551 (detailing the costs and consequences that often prevent legislators from overriding agency decisions); Kagan, supra note 114, at 2259. Even if a majority of Congress supports legislation overriding an agency decision, to become law, the legislation must gain the approval of either the President or two-thirds of both houses. Id.

[FN185]. Cf. Asimow, supra note 10, at 574 (noting that while theoretically the actions of agencies are subject to legislative oversight, in practice most agency rulemaking occurs with little legislative supervision).

[FN186]. Kagan, supra note 114, at 2248.

[FN187]. See Exec. Order No. 12,866, 3 C.F.R. 638 (1994) (requiring agencies to submit to OMB for prepublication review any proposed rule constituting significant agency action); Exec. Order No. 13,422, 72 Fed. Reg. 2763, 2763-65 (Jan. 23, 2007) (amending Exec. Order No. 12,866 to require agencies to submit to OMB for prepublication review significant guidance documents), revoked by Exec. Order No. 13,497, 74 Fed. Reg. 6113 (Jan. 30, 2009).

[FN188]. See Seidenfeld, supra note 13, at 1553, 1573 (suggesting that because the President represents the interests of the popular majority, so will an appointee who shares the President's policy goals and, moreover, that the President will choose agency appointments carefully because the process of appointment "attract[s] media attention"); cf. Kagan, supra note 114, at 2298 (observing that agency officials may accede to a president's preferences "because they feel a sense of personal loyalty and commitment to him; because they desire his assistance in budgetary, legislative, and appointments matters; or in extreme cases because they respect and fear his removal power"); Mendelson, supra note 13, at 581 (noting that the President can "[h]old an executive branch agency accountable through the power to replace top management of an agency").

[FN189]. Presidents have an incentive to remain responsive to electoral views in order to increase their chances of re-election, maintain their party's continued control of the presidency, or enhance their standing among the general public in order to increase their ability to achieve their policy and political agenda. See Kagan, supra note 114, at 2335; Mendelson, supra note 13, at 582-83 (noting that the electorate shows its preferences through its vote for President); see also Kagan, supra note 114, at 2335 ("[B]ecause the President has a national constituency, he is likely to consider, in setting the direction of administrative policy on an ongoing basis, the preferences of the general public, rather than merely parochial interests."); Seidenfeld, supra note 13, at 1552 ("The President answers to the entire electorate and thus has an incentive to oppose policies that hurt the general public more than they help particular interest groups.").

[FN190]. Cf. Mendelson, supra note 13, at 617 ("[T]he electorate at large simply may lack,...well-developed or even informed preferences."); Seidenfeld, supra note 176, at 20, 30 (observing that "[w]hen voting for President, individuals are more likely to consider broad policy themes than to consider particular regulatory policy decisions," and that their influence on presidential

involvement in administrative decisions "[is] not likely to protect the interest of the general public unless voters organize to react to such decisions at the ballot box").

[FN191]. See Seidenfeld, supra note 176, at 19 (discussing the disconnect between electoral incentives and regulatory policymaking).

[FN192]. Kagan, supra note 114, at 2335-36.

[FN193]. While judicial review plays an important check on agencies' ability to adopt policies that are inconsistent with the relevant statutory or regulatory provisions, agencies nevertheless may choose do so when they calculate that the risk of litigation challenging the legal basis for a policy is low.

[FN194]. See Seidenfeld, supra note 176, at 14 (highlighting the limitations of oversight, even where the President prioritizes a matter); see also McGarity, supra note 31, at 1431 (stating that the President and Vice President ordinarily are too busy to play a direct role in regulatory policymaking); Kagan, supra note 114, at 2250 (noting that President Clinton's activity in the regulatory sphere "did not show itself in all, or even all important, regulation" because no president can supervise so "broad a swath of regulatory activity").

[FN195]. While in the past OMB focused on review of legislative rules, it also reviewed significant agency guidance under Executive Order 13,422. Exec. Order No. 13,422, 72 Fed. Reg. 2763, 2763 (Jan. 23, 2007), revoked by Exec. Order No. 13,497, 74 Fed. Reg. 6113 (Jan. 30, 2009).

[FN196]. Cf. Seidenfeld, supra note 13, at 1552 (arguing that OMB may not have the expertise to make ultimate regulatory decisions).

[FN197]. See McGarity, supra note 31, at 1431 ("The accountability argument loses considerable force when it is understood that the President and Vice President ... delegate the oversight function to unelected bureaucrats in OMB ....").

[FN198]. Tyler, supra note 12, at 38, 64.

[FN199]. See Adam M. Samaha, Undue Process, 59 Stan. L. Rev. 601, 603 (2006) (noting that at some point government decisionmaking becomes "too tardy, or too inclusive, or too careful").

[FN200]. Id. at 603-04.

[FN201]. See also Johnson, supra note 7, at 700-02 (explaining that new procedural requirements result in the ossification of the rulemaking process). See generally McGarity, supra note 31 (arguing that democratic pressure on the three constitutional branches of government results in the ossification of the rulemaking process); Richard J. Pierce, Jr., Seven Ways to Deossify Agency Rulemaking, 47 Admin. L. Rev. 59 (1995) (evaluating recent changes in legal doctrine that have the potential to promote deossification in the rulemaking process); Seidenfeld, supra note 36 (arguing that courts should modify the hard look review doctrine); Peter L. Strauss, From Expertise to Politics: The Transformation of American Rulemaking, 31 Wake Forest L. Rev. 745 (1996) (discussing the history and political character of rulemaking in federal law since the enactment of the APA).

[FN202]. Seidenfeld, supra note 36, at 483.

[FN203]. 42 U.S.C. § 4332(2)(C) (2000).

[FN204]. 5 U.S.C. § 603 (2006).

[FN205]. Under Executive Order No. 12,866, a legislative rule is deemed to be a "significant regulatory action" for which an agency must prepare a Regulatory Flexibility Analysis (RIA) if the rule may

(1) [h]ave an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) [c]reate a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) [m]aterially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights or obligations of recipients thereof; or

(4) [r]aise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

Exec. Order No. 12,866, 3 C.F.R. 638, 641-42 (1994).

[FN206]. Id.

[FN207]. See McGarity, supra note 31, at 1405 ("[T]he task of assembling the database and technical expertise necessary to meet statutory analytical requirements can be quite burdensome."); id. at 1406 (estimating that an agency typically must employ numerous consultants and devote one or more person-years of agency staff to the preparation of an RIA); Strauss, supra note 201, at 772 (noting that together with the impact of judicial review, requirements imposed on administrative legislative rulemaking by Congress and the President raise the costs of rulemaking and delay a rule's effective date).

[FN208]. 401 U.S. 402 (1971).

[FN209]. Id. at 416.

[FN210]. McGarity, supra note 31, at 1410.

[FN211]. 463 U.S. 29 (1983).

[FN212]. Richard J. Pierce, Jr., Waiting for Vermont Yankee III, IV, and V? A Response to Beermann and Lawson, 75 Geo. Wash. L. Rev. 902, 908 (2007).

[FN213]. McGarity, supra note 31, at 1412.

[FN214]. Pierce, supra note 212, at 908.

[FN215]. Seidenfeld, supra note 36, at 486-87.

[FN216]. McGarity, supra note 31, at 1412 ("Having gone to the considerable effort of a successful rulemaking, the agencies are understandably reluctant to change their rules to adapt to experience with the rules or changed circumstances."); Pierce, supra note 198, at 61 (stating that although agencies should be reviewing and revising their rules on a regular basis, agencies rarely amend their rules because the amendment process is "daunting").

[FN217]. See McGarity, supra note 31, at 1392 ("[E]xperimentation is riskier in an atmosphere in which any change is likely to be irreversible.").

[FN218]. See id. (contending that inflexibility in the process leads quickly to outdated laws).

[FN219]. See infra note 236 and accompanying text (explaining how public participation assists lawmakers).

[FN220]. Rossi, supra note 102, at 226 (internal quotation, citation, and emphasis omitted).

[FN221]. See id. at 229 ("Sponsors of sunshine acts claim that, when in the open and subject to passive participation by the public, decisionmaking process will enjoy an increase in public confidence, promote greater understanding of agency decisions, and improve outcomes.").

[FN222]. Id. at 233-34.

[FN223]. See supra note 28 and accompanying text (noting that there is no requirement that agencies go through the notice-and-comment process for interpretive rules).

[FN224]. See Mendelson, supra note 7, at 425 (explaining that the Wage and Hours Division of the Department of Labor forgoes outside comment when issuing opinion letters).

[FN225]. See id. at 424-27 (explaining that regulatory beneficiaries generally have less access to agency process for guidance than regulated entities and that agencies often do not solicit input widely on their guidance but instead limit their communications to organizations with whom they already frequently communicate).

[FN226]. See id. at 426 (noting that agencies that have committed to soliciting public comments on their nonlegislative rules generally have not committed to responding to the comments).

[FN227]. See Stephen M. Johnson, The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet, 50 Admin. L. Rev. 277, 303-05 (1998) (speculating that public participation can ensure that people have a voice and agencies are not "captured" by the regulated community).

[FN228]. See id. at 303 (noting that some agencies use public participation in changing existing regulation).

[FN229]. See Pierce, supra note 201, at 59-60 (observing that notice of an agency's intent allows the general public, Congress and the President the opportunity to influence the policies that the agency ultimately adopts).

[FN230]. Johnson, supra note 227, at 278; see Tyler, supra note 12, at 163 (explaining that, when individuals have an opportunity to participate in the decisionmaking process, they feel that procedures are fair and outcomes are more legitimate).

[FN231]. See Anthony, supra note 7, at 1313 (advocating notice-and-comment rulemaking for interpretive rules, with the limited exception of those interpretive rules that interpret statutory language with a "tangible" meaning); cf. Recommendations of the Administrative Conference of the United States, Section 305.76-5 Interpretive Rules of General Applicability and Statements of General Policy (ACUS Recommendation 76-5), 41 Fed. Reg. 56,767, 56,770 (Dec. 30, 1976) (encouraging agencies to voluntarily employ pre-adoption notice-and-comment procedures for interpretive rules and statements of general policy likely to have a substantial impact on the public).

[FN232]. See OMB Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3437 (Jan. 25, 2007). The OMB Bulletin defines the term significant guidance document to generally mean a guidance document that reasonably may be anticipated to lead to an annual effect on the economy of $100 million or more or adversely affect in a material way the economy or a sector of the economy. Id. at 3439. However, the OMB Bulletin does not create any substantive or procedural legal rights enforceable against an agency. Id. at 3440.

[FN233]. Unlike the proposed guidance published at the beginning of the pre-adoption notice-and-comment process, under the post-adoption process the initial guidance published by the agency would take effect immediately. See Asimow, supra note 7, at 422-24 (explaining the post-adoption process and discussing its advantages and disadvantages).

[FN234]. See Michael Asimow, Guidance Documents in the States: Toward a Safe Harbor, 54 Admin. L. Rev. 631, 656-57 (2002) (detailing the steps agencies would take in post-adoption procedures); cf. ACUS Recommendation 76-5, 41 Fed. Reg. at 56,770 (recommending that in the absence of pre-adoption notice and comment, agencies voluntarily invite comments following publication of their interpretive rules and statements of general policy).

[FN235]. See Asimow, supra note 234, at 657; cf. ACUS Recommendation 76-5, 41 Fed. Reg. at 56,770 (suggesting that the agency respond to significant comments "as may be appropriate"). Similar to a post-adoption notice-and-comment process, at least one commentator has argued that individuals should have a right to petition an agency to revise or repeal its guidance. See Mendelson, supra note 7, at 438-44; cf. William V. Luneberg, Petitioning Federal Agencies for Rulemaking: An Overview of Administrative and Judicial Practice and Some Recommendations for Improvement, 1988 Wis. L. Rev. 1, 13-14 (arguing that § 553(e) of the APA grants a right to petition an agency to reconsider a nonlegislative rule, thereby requiring agencies to "receive, consider, and respond to the views and information of interested persons who may suggest the need for reconsideration"). As with post-adoption notice and comment, an agency would be required to respond in a reasoned manner to petitioners' significant facts and relevant arguments within a specified period. See Mendelson, supra note 7, at 439-40 ("As with other such petitions, the agency's response, or its failure to respond by a statutory deadline, would be subject to judicial review.").

[FN236]. See Asimow, supra note 10, at 574 (noting that agencies are "not omniscient and do not have all relevant economic and social data"); see also Farina, supra note 11, at 226 (opining that discussions with affected individuals can provide helpful insight into relevant facts and applications of policies); Rossi, supra note 102, at 185-86 ("[A]s information makes its way inside the bureaucratic process to the actual decisionmakers, it contributes to the rationality of the final decision by improving the information base utilized in setting agendas, developing alternatives, and making final policy decisions.").

[FN237]. See Asimow, supra note 10, at 574 (discussing the effect that public participation can have in shaping rules); Farina, supra note 11, at 226 (pointing out that public participation would allow affected parties to provide information to shape the regulation).

[FN238]. See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (defining the scope of review under the arbitrary and capricious standard).

[FN239]. See Mendelson, supra note 7, at 419 (discussing the neopluralist model of the administrative state).

[FN240]. See Rossi, supra note 102, at 213 (describing how broad public participation will minimize the monopoly of interest groups over agencies).

[FN241]. Asimow, supra note 10, at 529, 574.

[FN242]. See supra note 35 and accompanying text.

[FN243]. See Asimow, supra note 10, at 529 (stating that interpretive material alerts the public as to an agency's position on substantive matters); cf. Mendelson, supra note 7, at 413 (discussing how a regulated entity uses interpretive guidance documents to make decisions regarding compliance).

[FN244]. See Mashaw, supra note 91, at 901-02 ("'Kafkaesque' procedures take away the participant's ability to engage in rational planning about their situation," whereas reason-giving "provide[s] guidance for the individual's future planning").

[FN245]. Cf. Asimow, supra note 10, at 526 (noting that IRS nonlegislative rules "reduce the number of inquiries from taxpayers to which the IRS must respond.... [and] conserve scarce IRS resources by deterring the very kinds of transactions that would most likely be audited and that would probably lead to litigation").

[FN246]. See Asimow, supra note 7, at 402-09 (stating that the cost to the agency of requesting public comments can be substantial and that the notice-and-comment process can interfere with the regulatory processes of the agency); Asimow, supra note 10, at 524-30 (noting that the Federal Trade Commission staff tended to draft interpretive rules that were intentionally vague); Strauss, supra note 7, at 1480-87 (noting that cost may discourage agencies from offering guidance documents on regulations); Mendelson, supra note 7, at 437 ("[R]ulemaking's cost and loss of administrative flexibility might lead an agency to publicly state its policies less often or in less detail.").

[FN247]. See Asimow, supra note 7, at 405-06 (describing the choices an agency might make in using its scarce resources); Strauss, supra note 7, at 1480-81 ("[C]ostly procedural requirements may encourage or even force the agency to act without rules.").

[FN248]. See Asimow, supra note 7, at 406 (explaining that agency staff repeatedly noted that agencies were concerned with the "bureaucratic costs" of adopting nonlegislative rules).

[FN249]. See id. at 407-08 (describing the response of some California agencies to a California Supreme Court case requiring that a notice-and-comment period precede the adoption of nonlegislative rules); Asimow, supra note 234, at 636 ("[S]ome agencies, respectful of the law but mindful of their own resource constraints, provide no guidance documents at all or fail to revise outdated material, thus depriving regulated parties and the staff of any guidance.").

[FN250]. See Asimow, supra note 234, at 636 ("Agencies employ case-by-case adjudication instead of rulemaking; adjudication operates retroactively rather than prospectively and does little to spread the word to parties byond those involved in the adjudication.").

[FN251]. See id. (explaining that some California agencies fail to provide guidance or revise outdated materials); Asimow, supra note 7, at 407-08.

[FN252]. See Johnson, supra note 7, at 728 (noting that some commentators believe that agencies have incentives to produce guidance documents notwithstanding costs to the agency); see also Mendelson, supra note 7, at 435-37 (suggesting that agencies may be motivated by "good-government concerns" as well as a desire to maintain relations with regulated entities).

[FN253]. See Mendelson, supra note 7, at 435 ("[A]n agency's failure to disclose its policy positions or interpretations would likely undermine its relations with regulated entities, which strongly prefer to operate in an atmosphere of certainty.").

[FN254]. Id.

[FN255]. See id. (describing the motivations of agencies in issuing guidance).

[FN256]. See Rubin, supra note 87, at 1165 n.511 (explaining that in not issuing guidance, the government "denies itself an instrument for altering individual behavior to achieve a social policy objective" and may impair the individual's ability to take advantage of entitlements). For example, in the absence of guidance an individual may fill out a form incorrectly or fail to modify his or her behavior so as to become eligible for benefits. See also Asimow, supra note 10, at 529 ("Agencies cannot perform effectively unless they clarify the law through interpretive rules and ... policy statements.").

[FN257]. See KPMG, LLP v. SEC, 289 F.3d 109, 116 (D.C. Cir. 2002) (setting aside an order of the SEC finding that an accounting firm had provided audit services based on an improper contingent fee arrangement when the order was based on a "novel" interpretation of a rule prohibiting contingent fee arrangements and when the accounting firm did not have fair notice); see also Mendelson, supra note 7, at 436 (stating that a number of circuit courts have barred agencies from enforcing their regulations in the absence of "clear notice of the conduct required").

[FN258]. Cf. Mendelson, supra note 7, at 435 ("[F]ailing to disclose policy positions in advance may alienate members of Congress concerned with compliance assistance.").

[FN259]. See Mendelson, supra note 7, at 437 (noting that rulemaking can be a costly process); Johnson, supra note 7, at 728 (suggesting that, despite incentives to issue guidance documents, agencies are likely to reduce their use of guidance documents).

[FN260]. Cf. McGarity, supra note 31, at 1443 (stating that preparing a reasoned explanation that responds to all significant comments is very resource-intensive and time-consuming).

[FN261]. See Asimow, supra note 7, at 404 ("During the rulemaking period, regulated entities remain uncertain about the ultimate course of regulation and thus are inhibited from making plans.").

[FN262]. Asimow, supra note 10, at 576; see also Mendelson, supra note 7, at 437 (noting that the high cost of notice-and-comment rulemaking could lead to less guidance from the agency about its policies).

[FN263]. See Mendelson, supra note 7, at 437-48 (arguing that an agency "cannot and probably should not attempt to fully specify its policies" and that, "[f]or the unforeseen or unforeseeable case, it may be desirable for an agency to retain flexibility to design just results").

[FN264]. The OMB Bulletin requires agencies to permit the public to submit post-adoption comments on significant guidance documents but does not require agencies to provide a formal response to public comments unless economically significant. OMB Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3437 (Jan. 25, 2007). Nevertheless, over time, agencies' compliance with the OMB Bulletin may provide useful data for researchers seeking to evaluate the costs and benefits of notice-and-comment procedures for agency guidance.

[FN265]. See supra notes 238-41 and accompanying text.

[FN266]. See Asimow, supra note 7, at 423 (suggesting that an agency may be less open to alternatives--and will have adopted a rigid position--after the rule has been published); cf. Mendelson, supra note 7, at 442 (acknowledging that a potential concern with a process that allows citizens the right to petition an agency for review of its final guidance is that "by the time a petition is filed, the agency decision-making process would already have concluded" and "an agency might not be truly open-minded and willing to revisit its earlier decision").

[FN267]. See Asimow, supra note 7, at 423 (noting that, because comments made after a rule is adopted may be less effective in influencing the rulemaking process, "members of the public may be less willing to take the trouble to prepare comments").

[FN268]. See id. at 422 (concluding that post-adoption comments "can be quite effective," as they often will "identify shortcomings in the rule that can be swiftly repaired"); Asimow, supra note 10, at 579 (arguing that post-adoption comments may lead an agency to amend or repeal its guidance, or at least to defend its guidance in replying to comments).

[FN269]. Mendelson, supra note 7, at 442.

[FN270]. See Asimow, supra note 10, at 577 ("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.").

[FN271]. But see id. at 581 (stating that the increase in agency costs under a post-adoption notice-and-comment process would be far less costly than pre-adoption notice and comment). Asimow does not explain the reasoning underlying his conclusion.

[FN272]. My proposal would not restrict a limited notice-and-comment process to agency guidance deemed "significant." Critics may contend that the burdens of a limited notice-and-comment process outweigh its benefits when agencies issue trivial or noncontroversial guidance. However, these guidance materials are unlikely to generate much public interest, with agencies receiving few if any comments supported by meaningful and relevant facts or arguments. See id. at 579-80 ("If the rule is trivial or noncontroversial, nobody will comment on it."). In the absence of any significant public comments, the agency could finalize its guidance quickly with little expenditure in agency resources.

[FN273]. See supra notes 236, 238-39 and accompanying text.

[FN274]. See supra note 237 and accompanying text.

[FN275]. See Mendelson, supra note 7, at 448 (concluding that proposals such as the FDA's Good Guidance Practices and the OMB Bulletin for Good Guidance Practices "do not ensure that the agency will meaningfully engage the comments it receives" because agencies are not required to respond to comments). Agencies also may forgo careful review of comments in light of existing barriers to obtaining pre-enforcement judicial review of agency guidance. McGarity, supra note 31, at 1442. If in practice this concern proves valid, with agencies regularly avoiding meaningful review of comments, Congress could remedy the problem by creating a right to judicial review for agency guidance subject to a limited notice-and-comment process. A loosening of legal doctrines governing standing, ripeness, and final agency action also might allow for pre-enforcement challenge of agency guidance. Cf. William Funk, Legislating for Nonlegislative Rules, 56 Admin. L. Rev. 1023, 1033-34, 1038-40 (2004) (advocating that the APA be amended so as to allow for judicial review of interpretive rules and general statements of policy by defining "final agency action" as including interpretive rules and general statements of policy and providing that interpretive rules and general statements of policy can be ripe for judicial review despite their not having binding legal effect).

[FN276]. Cf. Asimow, supra note 7, at 422 ("When members of the public know that their input must be read, considered, and commented upon, they will be more likely to take the trouble to make comments.").

[FN277]. Cf. Asimow, supra note 10, at 574 (reporting that interviews with agency personnel "indicated the practical value that agency personnel attach to public commentary, including that obtained in the course of adopting interpretive rules and policy statements").

[FN278]. For example, the Centers for Medicare and Medicaid Services (CMS) often posts on its website and invites public comment on significant draft guidance. See, e.g., Quality Standards for Suppliers of Durable Medical Equipment, Prosthetics, Orthotics, Supplies (DMEPOS) and Other Items and Services: Draft of Proposed Recommendations (Sept. 26, 2005), http://www.cms.hhs.gov/CompetitiveAcqforDMEPOS/downloads/dmepos_qualitystandards.pdf (inviting public comments on document during a sixty-day public comment period); Memorandum to All Part D Plans re: Medicare Prescription Drug Benefit Manual--Draft of Chapter 5, from Cynthia Tudor, Director, Medicare Drug Benefit Group (Sept. 5, 2006), available at http://www.cms.hhs.gov/PrescriptionDrugCovContra/Downloads/PartDManualChapter5.pdf (announcing the posting on CMS's website the draft of Chapter 5 of CMS's Medicare Prescription Drug Benefit Manual and inviting public comments by September 18, 2006). Other agencies similarly have invited public comment on their draft guidance. See, e.g., U.S. Dep't of Labor, Request for Comments on Draft Hazard Communication Guidance Documents, http://www.osha.gov/dsg/hazcom/hazcomcommentnotice.html (last visited Apr. 15, 2009) (inviting public comments by June 16, 2004); U.S. Dep't of Trans., Hazardous Materials: Reducing the Risk of Hazardous Materials Incidents During Loading and Unloading Operations, http://primis.phmsa.dot.gov/meetings/MtgHome.mtg? mtg=45 (last visited Apr. 15, 2009) (inviting written comments on draft operating procedures for review before public workshop).

[FN279]. See Cary Coglianese, The Internet and Citizen Participation in Rulemaking, 1 I/S: J.L. & Pol'y for Info. Soc'y 33, 55 (Winter 2004-2005) (stating that the use of e-rulemaking and its greater transparency "might lead political appointees and career public servants to make decisions that better serve the broad public interest over special private interests," as "public officials who know that the general public can easily see and hear everything they do will almost certainly act differently than

they do now").

[FN280]. See McGarity, supra note 31, at 1444 ("The requirement that an agency explain itself ... can be an effective and relatively inexpensive curb on arbitrariness and reliance upon extra-legal considerations."); Seidenfeld, supra note 13, at 1537-38 (arguing that requiring agencies to provide an explanation for their decisions will "sometimes prevent decisionmakers from crediting raw political power[, as s]ome political deals simply cannot be justified persuasively in principled terms"); cf. Scanlon, supra note 88, at 96 (arguing that requiring public authorities to justify their actions by adducing reasons of the appropriate sort and defending these against critical attack provides some assurance against nonarbitrariness).

[FN281]. See Frank I. Michelman, Formal and Associational Aims in Procedural Due Process, in Due Process: Nomos XVIII 126, 126 (J. Roland Pennock & John W. Chapman eds., 1977).

[FN282]. See McGarity, supra note 31, at 1444 ("[A] reasoned explanation ensures that the range of agency action is bound by those options that are supportable by facts in the record, reasonable assumptions, and sound policy considerations ...."); cf. Rubin, supra note 87, at 1165 (stating that a requirement that the government give reasons for the denial of benefits "mean [s] that the administrators must be able to articulate in advance some respectable explanation for that action"); Henry J. Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267, 1292 (1975) (observing that the requirement that the agency provide a statement of reasons "is a powerful preventive of wrong decisions" and is "almost essential if there is to be judicial review").

[FN283]. Requiring an agency to articulate the reasons for its nonlegislative rules does not guarantee that the true basis for the agency's actions will reflect some sufficiently public purpose, and not a nonpublic purpose. For example, when two or more explanations exist for a nonlegislative rule, one legitimate and one impermissible, "it will be difficult for anyone, including the actor, to be clear about what 'really' generated it, and it is simple human nature to want to believe that the more laudable purpose played a (the) significant role." Ely, supra note 55, at 128. Similarly, the prospect of public scrutiny does not ensure that the agency will fairly consider the concerns of all affected parties. Cf. Evelyn R. Sinaiko, Due Process Rights of Participation in Administrative Rulemaking, 63 Cal. L. Rev. 886, 916 (1975) (noting that the submission of written comments to an agency on its proposed rule does not ensure that the agency will consider all viewpoints of those potentially affected by the rule). Nevertheless, requiring agencies to issue their final guidance and explanatory statement provides some protection for process values. At a minimum, the requirement ensures that agencies can articulate a legitimate explanation for their actions. See supra note 280. In addition, an explanatory statement promotes better decisionmaking by agencies, as transparency in the agency's decisionmaking process allows interested parties to identify any mistaken assumptions or concerns inadvertently neglected by the agency in developing its guidance.

[FN284]. See supra note 270 (arguing that the vast majority of interpretations and policy statements would elicit no public interest at all).

[FN285]. See McGarity, supra note 31, at 1443 ("[P]reparing a reasoned explanation can be very resource-intensive and time-consuming, and the prospect of having to respond to blunderbuss attacks by regulatees can be a significant disincentive to agency action."); see also supra Part III (discussing the hard look doctrine).

[FN286]. Cf. Asimow, supra note 7, at 405 (arguing that increasing the costs of producing nonlegislative rules likely will diminish their supply). The fact that several agencies voluntarily employ a limited notice-and-comment process for important guidance suggests that the costs are not unduly burdensome; agencies soliciting comments on guidance, however, rarely respond to specific comments. But see Analysis of and Responses to Public Comments: Quality Standards (Aug. 14, 2006), http://www.cms.hhs.gov/CompetitiveAcqforDMEPOS/Downloads/Final_public_ Responses82506.pdf (responding to public comments on draft quality standards for Medicare suppliers of durable medical equipment, prosthetics, orthotics, and supplies). See generally Mendelson, supra note 7, at 426 (noting that among the agencies who have expressed a commitment to receive public comments on draft guidance, "none of the agencies thus far have committed to respond to public comments").

The amount of resources involved in limited notice and comment obviously is an empirical question for which at present there exists little data. Over time agency compliance with the recent OMB Bulletin should provide researchers with useful data

on this issue. The OMB Bulletin requires agencies to permit the public to submit comments on significant guidance, but does not require agencies to provide a formal response to public comments unless the guidance is "economically significant." OMB Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3437 (Jan. 25, 2007). Although the OMB Bulletin does not require agencies to solicit comments on significant guidance (other than economically significant guidance) prior to their adoption, it encourages agencies to do so when practical. Id. at 3438.

[FN287]. For example, CMS issued its 2009 Call Letter--a 267-page document providing guidance to sponsors of Medicare Advantage and prescription drug plans on existing and new policies under the Medicare Advantage and prescription drug programs for 2009--only two months after soliciting comments on the Draft 2009 Call Letter. Manatt Health Solutions, Key Elements of DRAFT 2009 Medicare Advantage (MA), Medicare Advantage-Prescription Drug (MA-PD), Cost-Based Plan, and Prescription Drug Plan (PDP) Sponsors Call Letter (Part D Section) (Jan. 17, 2008), http:// www.manatthealthsolutions.com/publications/articles/Summary%20of%CC20Draft%CC202009%CC20Call%C etter.pdf; 2009 Call Letter (Mar. 17, 2009), http:// www.cms.hhs.gov/PrescriptionDrugCovContra/Downloads/CallLetter.pdf.

[FN288]. Section 553(b)(3)(B) of the APA provides that a legislative rule may be published as a final rule without prior publication of a proposed rule with opportunity for public comments for "good cause." Good cause exists if notice and comment would be impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. § 553(b)(3)(B) (2006).

[FN289]. Cf. OMB Bulletin, supra note 47, at 3438, 3440 (permitting agencies to forgo the required prior notice and comment for economically significant guidance documents when "not feasible or appropriate," such as in response to a statutory requirement or court order or when there exists a threat to public health or safety or an emergency).

[FN290]. Cf. id. at 3438 (concluding that notice and solicitation of comments is most helpful for significant guidance documents that are "particularly complex, novel, consequential, or controversial").

[FN291]. 5 U.S.C. § 553(c) (2006).

[FN292]. Pierce, supra note 212, at 908; see also Jerry L. Mashaw, Richard A. Merrill & Peter M. Shane, Administrative Law 511 (5th ed. 2003) (explaining that an agency's final regulation typically was accompanied by a brief explanation of the agency's rationale and general assurances that the agency had considered public comments).

[FN293]. See Seidenfeld, supra note 36, at 498-99 (noting that the hard look doctrine has imparted the message "that agencies must collect data and provide analyses to support their rejection of every reasonable alternative to the approach they took and to respond to every plausible argument against their approach").

[FN294]. McGarity, supra note 31, at 1400.

[FN295]. Cf. id. at 1443 (advocating that Congress amend the APA to make clear that its requirement that agencies support their legislative rules with a "concise general statement of basis and purpose" does not require agencies to "respond to every comment and criticism that accompanies a blunderbuss attack on the technical underpinnings for their rules").

[FN296]. Cf. id. at 1443-44 (stating that amending the APA to permit a concise statement of basis and reason in support of agencies' legislative rules would allow agencies to focus their scarce resources on gathering data and responding to comments deemed especially relevant).

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