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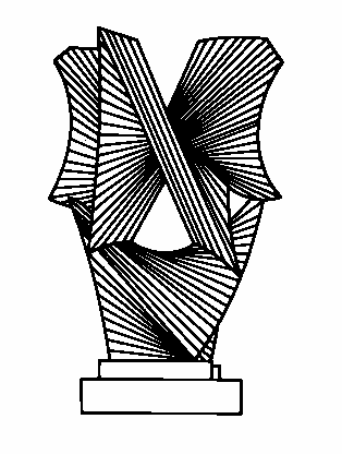

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Legislative Rules Revisited

Jacob E. Gersen†

The distinction between legislative rules and nonlegislative rules is one of the most confusing in administrative law.[1] Yet, it also critical for understanding not just when agencies must use procedural formality to issue policy judgments, but also the subsequent treatment of those judgments by courts.[2] This Essay explores the legislative rule conundrum through the lens of Judge Richard A. Posner's opinion in *Hoctor v United States Department of Agriculture*.[3]

To describe the legislative rule debate is to conjure doctrinal phantoms, circular analytics, and fundamental disagreement even about correct vocabulary. *Hoctor* illustrates many of the fault lines in existing doctrine and suggests a novel if ultimately unsatisfying approach to legislative rules doctrine that turns on characterizing the form, content, and relationship between the new rule and existing law. This Essay suggests instead that much of the legislative rule doctrine might well be jettisoned, avoiding confusion and uncertainty about when agencies must use formal procedures to issue policy.

I. THE CASE

Hoctor involved a challenge to a Department of Agriculture rule issued without notice and comment rulemaking that interpreted a portion of the Animal Welfare Act[4] (Act) as applied to the secure containment of certain animals. The Act was enacted in 1966 and requires the licensing of

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1 For an overview of the doctrinal questions, see generally Stephen G. Breyer, et al, *Administrative Law and Regulatory Policy: Problems, Text, and Cases* ch 4 at 228-346, ch 6 at 478-573 (6th ed 2006).

2 See generally *Chevron USA Inc v NRDC*, 467 US 837 (1984). See also *United States v Mead Corp*, 533 US 218 (2001) (using procedural formality as a defeasible proxy for Congressional intent to delegate law-interpreting authority to agencies).

3 82 F3d 165 (7th Cir 1996).

4 Pub L No 89-544, 80 Stat 350 (1966), codified at 7 USC § 2131 et seq (2000).

animal dealers and exhibitors.[5] The Act also authorizes criminal sanctions for violation of implementing rules promulgated by the Department of Agriculture.[6] The Act provides general rulemaking and adjudication authority and further requires the Department to generate standards "to govern the humane handling, care, treatment, and transportation of animals by dealers,"[7] including establishing minimum requirements "for handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, adequate veterinary care, and separation by species where the Secretary finds necessary for humane handling, care, or treatment of animals."[8]

Pursuant to its statutory obligation, the Department used notice and comment rulemaking procedures (informal rulemaking) to generate what was termed the "structural strength" rule.[9] This rule sets out the requirements for structures containing animals that are covered by the Act:

> The facility must be constructed of such material and of such strength as appropriate for the animals involved. The indoor and outdoor housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals."[10]

The structural strength rule itself was not challenged in *Hoctor*. Rather, the petitioner challenged the Department's interpretation of the rule as articulated in an internal policy memorandum which was subsequently used as the basis for an enforcement action against Patrick D. Hoctor. This "dangerous animals memorandum" specified that, as applied to dangerous animals, the structural strength rule requires that lions, tigers, and leopards be housed inside a perimeter fence at least eight feet high.

The term "dangerous animals" encompasses a class of animals known as "Big Cats" the containment of which was at issue in *Hoctor*.[11] Big Cats, in turn, is a class of animals that includes lions, tigers, cougars, leopards, and ligers—not to be confused with tigons.[12] A liger is a cross between a male lion and a female tiger; a tigon (of course) is a cross between a male tiger and a female lion.[13]

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5 See, for example, 7 USC §§ 2133-4 (providing that "[t]he Secretary [of the Interior] shall issue licenses to dealers and exhibitors" and requiring a valid such license to transport or engage in commerce involving "any animal").

6 7 USC § 2146.

7 7 USC § 2143(a)(1).

8 7 USC § 2143(a)(2)(A).

9 5 USC § 553.

10 9 CFR § 3.125(a) (2006).

11 See *Hoctor*, 82 F3d at 168 (noting petitioner Hoctor's involvement with "Big Cats" and giving a "typical inventory" of Hoctor's menagerie).

12 See id.

13 See id.

As Judge Posner notes, the Animal Welfare Act itself is concerned not so much with the protection of humans from animals as with the protection of animals from humans.[14] One might therefore query why the Act would require fences for Big Cats at all. The government attorneys arguing against Hoctor cleverly noted that if a Big Cat mauls a human being, the Big Cat might itself be at risk of harm from retaliation or punishment. Thus, to protect Big Cats from humans, it is also necessary to protect humans from Big Cats.[15] And to protect humans from Big Cats, a secure a containment fence is necessary. The dangerous animals memorandum took the view that a secure eight-foot fence was also a means of protecting Big Cats from other animal predators, though as Judge Posner usefully notes "one might have supposed the Big Cats able to protect themselves against the native Indiana fauna."[16]

Beginning in 1990, the Department relied on the dangerous animals memorandum to issue Hoctor several citations for violating the structural strength rule. Hoctor, it seems, had only a six-foot perimeter fence surrounding his twenty-five acre wild animal compound containing Big Cats. The Big Cats were not free to roam the compound as they saw fit. Rather, the animals were surrounded in "primary enclosures" or pens that were surrounded by a "containment fence." That is, the Big Cats were kept in pens, the pens were surrounded by a containment fence, and the containment fence was surrounded by a perimeter fence that encompassed the entire twenty-five acre compound. So, even though lions had once escaped from their primary enclosures, Hoctor was able to shoot them while they were still within the containment fence.

Hoctor had obviously gone to some trouble to construct a Big Cat compound. How could he have failed to build an eight-foot perimeter fence and thereby meet the seemingly modest requirements of the dangerous animal memorandum? In 1982, when Hoctor entered the exotic animal business, he relied on the advice of a veterinarian employed by the Department of Agriculture, who stated explicitly that a six-foot fence would be adequate to ensure compliance with the structural strength rule. Sadly for Hoctor, the following year, the Department issued the new eight-foot fence dangerous animals memorandum.

The question presented in *Hoctor* was whether the Administrative Procedure Act[17] (APA) required the dangerous animals interpretation to be issued using notice and comment rulemaking. The answer to that question

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14 Id.

15 See id.

16 Id at 169.

17 5 USC § 551 et seq (2000).

turned on whether the rule itself was properly termed a "legislative rule."[18] A legislative rule can only be issued using formal procedures, and the agency's failure to do so would either make the dangerous animals interpretation procedurally invalid (absent good cause) or eliminate the possibility of using the memorandum as the basis for Hoctor's citations without subsequent defense in an enforcement proceeding.

II. RULES LEGISLATIVE AND RULES NOT

As Judge Posner puts the point: "Distinguishing between a 'legislative' rule, to which the notice and comment provisions of the Act apply, and an interpretive rule, to which these provisions do not apply, is often very difficult—and often very important to regulated firms, the public, and the agency."[19] Indeed, it has become the norm in any discussion of legislative rules to recite the various terms the courts have used to convey the degree of confusion that surrounds the topic. Accordingly, the distinction between rules that must be promulgated via notice and comment rulemaking and those that need not has been called "fuzzy,"[20] "tenuous,"[21] "baffling,"[22] "blurred,"[23] and "enshrouded in considerable smog."[24] As one prominent professor has noted, "[t]he subject of nonlegislative rules breeds bewilderment and frustration."[25] Many have joined the chorus seeking clarity of

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18 The query is crisply put by John Manning: "The central inquiry in all nonlegislative rule cases is this: Is the agency document, properly conceived, a legislative rule that is invalid because it did not undergo notice and comment procedures, or a proper interpretive rule or general statement of policy exempt from such procedures?" John F. Manning, *Nonlegislative Rules*, 72 Geo Wash L Rev 893, 917 (2004).

19 *Hoctor*, 82 F3d at 167.

20 *American Hospital Association v Bowen*, 834 F2d 1037, 1046 (DC Cir 1987).

21 *Chisholm v FCC*, 538 F2d 349, 393 (DC Cir 1976) (Wright dissenting). In his dissent in *Chisholm*, Judge Skelly Wright laid out the three factors he thought relevant to the inquiry. First, there must be a "specific grant of legislative rule-making power in this area." Id. Second, what is the impact of the rule in later proceedings? "If a rule is interpretative it does not foreclose challenge in a plenary proceeding before the agency itself, or in court." Id (internal citations omitted). Third, what is the impact of the rule in the instant case? Id at 394. Does it "substantially alter[] the rights" of parties and does it have "a widespread and significant impact"? Id at 393-94.

22 Kenneth Culp Davis, 2 *Administrative Law Treatise* § 7:5 at 32 (K.C. Davis 2d ed 1979).

23 Kevin W. Saunders, *Interpretive Rules with Legislative Effect: An Analysis and a Proposal for Public Participation*, 1986 Duke L J 346, 352.

24 *General Motors Corp v Ruckelshaus*, 742 F2d 1561, 1565 (DC Cir 1984) (en banc) (internal quotation marks omitted); *American Bus Association v ICC*, 627 F2d 525, 529 (DC Cir 1980)) (citation omitted).

25 Robert A. Anthony, *"Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: Lifting the Smog*, 8 Admin L J Am U 1, 6 (1994) (claiming that this confusion arises not because of any inherent complexity but because of "idiosyncratic judicial terminology," the interplay of multiple concepts, and the difficulty in applying those concepts).

terms and concepts, notwithstanding the view, of some, that the distinction is completely "clear."[26]

Some portion of the confusion stems from inconsistent usage and definitions of the relevant terms.[27] The term legislative rules is variously contrasted with interpretive rules, policy statements, nonlegislative rules, spurious rules, and procedurally deficient legislative rules. The term legislative rules is generally (but not always) treated as equivalent to the term substantive rules, which itself is contrasted not only with the above terms, but also with procedural rules.[28] Sometimes legislative rules are defined procedurally to be any rules promulgated by notice and comment rulemaking.[29] More often, a rule is termed legislative if it is legally binding; but others argue that valid interpretive rules (exempt from notice and comment proceedings) are legally binding as well.[30] If all this is less than transparent, then the overview matches the tenor of the field.

There is no explicit distinction between interpretive rules and legislative rules in the APA because the APA nowhere speaks of legislative rules.[31] Rather, when describing the requirements of informal rulemaking in section 553, the APA exempts from those requirements "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."[32] The term substantive rule is used both by the APA and in the Attorney General's Manual on the Administrative Procedure Act.[33] The APA contrasts "substantive rules of general applicability adopted as authorized by law" with "statements of general policy or interpretations of general

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26 Charles H. Koch, Jr., *Public Procedures for the Promulgation of Interpretive Rules and General Statements of Policy*, 64 Georgetown L J 1047, 1049 n 11 (1976) (arguing that the distinction is clear, but that the difficulties arise in applying it).

27 See generally Anthony, 8 Admin L J Am U 1 (cited in note 25).

28 See *Air Transport Association of America v Department of Transportation*, 900 F2d 369, 382 (DC Cir 1990) ("assum[ing] a spectrum of rules running from the most substantive to the most procedural" based upon the proximity of the conduct they regulate to "primary conduct"), vacated without opinion and remanded for consideration of mootness, 111 S Ct 944 (1991).

29 See William Funk, *A Primer on Nonlegislative Rules*, 53 Admin L Rev 1321, 1322 (2001). See also *Community Nutrition Institute v Young*, 818 F2d 943, 950 (DC Cir 1987) (Starr concurring in part and dissenting in part).

30 See, for example, Manning, 72 Geo Wash L Rev at 893–94 (cited in note 20) (claiming that the D.C. Circuit's case law demonstrates that interpretive rules can be binding); Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L J 1311, 1313–14 (1992) (claiming that interpretive rules are, as a practical matter, binding because agencies can enforce them).

31 But see Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 Mich L Rev 520, 542 (1977) ("Congress . . . enshrined the difference between legislative and interpretive rules in the APA.").

32 5 USC § 553(b)(3)(A). The APA uses the term "interpretative rule." Many courts substitute the term "interpretive rule" and I do so freely as well.

33 5 USC § 553(d); United States Department of Justice, *Attorney General's Manual on the Administrative Procedure Act* 30 n 3 (1947), reprinted in William F. Funk, Jeffrey S. Lubbers, and Charles Pou, Jr., eds, *Federal Administrative Procedure Sourcebook* 33, 62 (ABA 3d ed 2000).

applicability formulated and adopted by the agency."[34] Read together with § 553's exemption of interpretative rules and statements of policy from notice-and comment-requirements, the APA could be said to require notice and comment rulemaking for substantive rules and not otherwise. But it has become commonplace to use the terms legislative rules and substantive rules interchangeably.

The distinction between legislative rules and interpretive rules predates the APA,[35] and the statutory text could be read to implicitly incorporate the preexisting doctrinal distinction.[36] Although the linguistic slippage has caused good deal of confusion, the substantive-legislative conflict is mainly one of semantics. The legislative rule label is attractive in the sense that rules issued via notice and comment rulemaking often make new law or establish new policy that has the binding force of law. Such rules are therefore like legislation. The legal distinction is between rules that must be promulgated using notice and comment rulemaking proceedings and those that may be validly issued without such procedures. Legislative rules are rules that may only be issued using notice and comment rulemaking[37] unless they are excepted therefrom for good cause.[38] Nonlegislative rules are all other rules and include two relevant subsets for current purposes: interpretative (or interpretive) rules and general statements of policy.

If all legislative rules were deemed legally binding and all nonlegislative rules were not, then an agency would face a simple choice: use more formal procedures that will be given legal effect or use less formal procedures that may inform the public and low-level administrators of tentative interpretations, but that must be subsequently defended in enforcement actions.[39] In practice, this view has not quite become the law, nor has it been universally

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34 5 USC § 552(a)(1)(D).

35 See, for example, *Skidmore v Swift and Co*, 323 US 134, 139 (1944) (holding, prior to passage of the APA, that Congress did not grant an Administrator the power to make legislative rules, but rather only to offer nonbinding interpretations).

36 See William Funk, *Legislating for Nonlegislative Rules*, 56 Admin L Rev 1023 (2004); William Funk, *When is a "Rule" a Regulation? Marking a Clear Line between Nonlegislative Rules and Legislative Rules*, 54 Admin L Rev 659 (2002); Asimow, 75 Mich L Rev at 542 (cited in note 31).

37 See Richard J. Pierce, Jr., *Rulemaking and the Administrative Procedure Act*, 32 Tulsa L J 185, 186–87 (1996). See also Davis, 2 *Administrative Law* § 7:8 at 36, § 7:10 at 51–52 (cited in note 24) (insisting that a legislative rule "is the product of an exercise of delegated legislative power to make law through rules. An interpretive rule is any rule an agency issues without exercising delegated legislative power to make law through rules.").

38 5 USC § 553(b)(3)(B).

39 Consider *Community Nutrition Institute v Young*, 818 F2d 943, 950 (DC Cir 1987) (Starr concurring in part and dissenting in part), quoting *Pacific Gas & Electric Co v FPC*, 506 F2d 33, 38 (DC Cir 1974) ("The critical distinction between a substantive rule and a general statement of policy is the different practical effect that these two types of pronouncements have in subsequent administrative proceedings.").

embraced in the commentary.[40] Virtually all agree that policy statements announce a policy or agency intention, but do not bind the agency or the public.[41]But at least one pocket of scholarship suggests that while policy statements are not binding, valid interpretive rules are binding to the extent that they "merely interpret" already existing legal duties.[42]

Rules that should have been issued using notice and comment procedures but were not are known as spurious rules or equivalently, procedurally deficient legislative rules.[43] These rules have the characteristics of legislative rules but were not promulgated using notice and comment. The allegation in *Hoctor* was that the agency's interpretation of the structural strength rule advanced in the policy manual had the characteristics of a legislative rule; therefore, the failure to use notice and comment made the rule procedurally defective.[44] The Department could then only have argued that a fence of less than eight feet at Hoctor's compound was not structurally sound, rather than merely showing that Hoctor's fence was less than eight feet high.[45]

In terms of the evolution of legislative rules doctrine, three distinct strains are discernible. First, until approximately the late 1970's many courts distinguished legislative from nonlegislative rules by asking whether the rule would have a substantial impact on affected parties.[46] The basic intuition was that procedural formality should be a prerequisite for rules

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40 See, for example, Anthony, 8 Admin L J Am U at 7–8, 11–12 (cited in note 25) (claiming that interpretive rules bind the public while policy statements do not). But see Koch, 64 Georgetown L J at 1051–53 (cited in note 26) ("Although attempts have been made to distinguish [interpretive rules from general statements of agency policy], there appears to be no analytical purpose served by such a distinction because the concepts that relate to these and other nonlegislative rules are the same.").

41 See, for example, Manning, 72 Geo Wash L Rev at 894 (cited in note 18).

42 See id at 893–94 ("[T]he court's cases tend to ask the intertwined questions whether a nonlegislative rule has a 'binding' effect and, if so, whether that effect can be ascribed to 'interpretation.' . . . If a nonlegislative rule does have a binding effect, it will be upheld only if it can be justified as a mere interpretation of an antecedent statute or legislative rule as opposed to an act of independent policymaking."). Roughly speaking, an interpretive rule provides an interpretation of existing law, be it statutory or regulatory. Thus, the interpretive rule's force derives from the existing legal duty inherent in the existing legislative rule or statute. See, for example, *General Motors*, 742 F2d at 1565 ("[I]f by its action the agency intends to create new law, rights or duties, the rule is properly considered to be a legislative rule.").

43 See Anthony, 8 Admin L J Am U at 10 (cited in note 25).

44 There is some dispute about whether a spurious rule is invalid or simply cannot serve the binding effect that an agency wants to give to it. In *Hoctor*, Judge Posner posed the issue in the former way. The court could have treated the eight-foot fence rule as a statement of the agency's intent to interpret. Although the agency would have to defend the interpretation in a subsequent enforcement proceeding as a lawful interpretation of the structural strength rule, the interpretive rule or policy statement would remain valid, just not as a binding legislative rule.

45 Funk, 54 Admin L Rev at 664–65 (cited in note 36) (arguing that the fact that the rule was adopted without notice and comment does not make it "an invalid legislative rule; it means that the [rule] simply cannot provide the legal basis for assessing a violation of the secure containment regulation"). See also *General Motors*, 742 F2d at 1565.

46 Funk, 53 Admin L Rev at 1325–26 (cited in note 29).

with big impacts.[47] Over time, a general, if not altogether clear, trend has emerged towards various versions of a legally binding test, in which a rule is deemed legislative if and only if it is legally binding.[48] Some courts emphasize the intent of the agency to make the rule legally binding[49] while others focus on the legally binding effect of the rule on regulated parties.[50] Other courts have experimented with variants, for example, the "practically binding" test.[51] Because an agency might pursue only enforcement actions alleging a violation of the given policy, private parties might rationally treat legally nonbinding documents as though they were binding.[52] A third alternative define the difference procedurally,[53] simply defining legislative rules as those that result from notice and comment, rather than those that require notice and comment. Indeed, after considering Posner's proposal, this Essay suggests the procedural approach is more attractive than it has been historically because of recent developments in administrative law.

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47 Id.

48 See id at 1326. Consider *American Mining Congress v Mine Safety & Health Administration*:

> [The nature of the rule can be] ascertained by asking (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule. If the answer to any of these questions is affirmative, we have a legislative, not an interpretive rule.

995 F2d 1106, 1112 (DC Cir 1993). Judge Williams later revised his view of these criteria modestly, suggesting that that publication in the CFR is only a "snippet" of evidence. See *Health Insurance Association of America, Inc v Shalala*, 23 F3d 412, 423 (DC Cir 1994).

49 See, for example, *Troy Corp v Browner*, 120 F3d 277, 287 (DC Cir 1997) ("We will also consider an agency's characterization of its own actions, although that characterization is not dispositive."); *American Portland Cement Alliance v EPA*, 101 F3d 772, 776 (DC Cir 1996) ("An agency's characterization of an administrative action, though not dispositive of reviewability, may provide guidance as to whether a pronouncement is a regulation."); *Pacific Gas and Electric Co v FPC*, 506 F2d 33, 39 (DC Cir 1974) ("Often the agency's own characterization of a particular order provides some indication of the nature of the announcement.").

50 Consider *Pacific Gas and Electric Co*, 506 F2d at 38 ("The critical distinction between a substantive rule and a general statement of policy is the different practical effect that these two types of pronouncements have in subsequent administrative proceedings. . . . A general statement of policy . . . does not establish a binding norm.") (quotation marks omitted).

51 See, for example, *Appalachian Power Co v EPA*, 208 F3d 1015, 1021 (DC Cir 2000) ("If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes 'binding.'").

52 See id. See also Anthony, 41 Duke L J at 1328–29 (cited in note 30). As Pierce points out, however, the practically binding effects test would apply quite broadly. See Richard J. Pierce, Jr., 1 *Administrative Law Treatise* § 6.3 at 323 (Aspen 4th ed 2002). Agencies regularly treat internal documents as more or less binding rules of thumb regarding enforcement. Id. The practically binding test would require virtually all of these documents to go through notice and comment proceedings.

53 See Funk, 54 Admin L Rev at 664 (cited in note 36).

III. PURPOSIVISM, PRAGMATISM, AND ADMINISTRATIVE LAW

Hoctor relies on a classic Posnerian blend of purposivism and pragmatism. It should come as no surprise that Judge Posner's starting place is a purposivist reading of the statute: "[O]ur task in this case is not to plumb the mysteries of legal theory; it is merely to give effect to a distinction that the Administrative Procedure Act makes, and we can do this by referring to the purpose of the distinction."[54] As noted above, the distinction between legislative rules and interpretive rules predates the APA,[55] and was not explicitly incorporated into APA.[56] But a charitable reading of the opinion is that Posner, like many other judges, assumes that the pre-APA distinction between legislative rules and interpretive rules should be taken to inform the APA's distinction between substantive rules and interpretative rules or general statements of policy.

Many courts suggest that legislative rules make new law, while nonlegislative rules interpret existing law. *Hoctor*, however, does not:

> [U]nless a statute or regulation is of crystalline transparency, the agency enforcing it cannot avoid interpreting it, and the agency would be stymied in its enforcement duties if every time it brought a case on a new theory it had to pause for a bout, possibly lasting several years, of notice and comment rulemaking.[57]

Much agency interpretation is done via enforcement proceedings, and the APA does not require notice and comment proceedings each time an agency interprets a statute. This is clearly correct, but Posner offers an intriguing view of why. When the administrative agency proceeds with interpretation in enforcement proceedings, it brings expertise, which substitutes for more formal fact gathering or information collection.[58] Notice and comment ostensibly allows an agency to receive public input from interested parties, thereby developing expertise. Notice and comment rulemaking both generates information and produces policy resulting from the participation of interested parties; that is, notice and comment rulemaking serves both technocratic and democratic aims. Indeed, rulemaking is taken by some to replicate a variant of the deliberative exchange to which Congress might as-

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54 *Hoctor*, 82 F3d at 170.

55 See note 35 and accompanying text.

56 Davis, 2 *Administrative Law* § 7:9 at 47–48 (cited in note 22) (explaining that the APA has been interpreted to distinguish between legislative and interpretative rules). See also Pierce, 1 *Administrative Law* § 6.4 at 325 (cited in note 52) ("§ 553 [of the APA] requires notice and comment procedures for all rules except those specifically exempt, e.g., interpretative rules and rules of procedure. Based on pre-APA practice and the legislative history of the APA, however, courts universally understand this language to draw a distinction between legislative rules and interpretative rules.").

57 *Hoctor*, 82 F3d at 170.

58 Id.

pire.[59] Agency expertise might then substitute for formal fact gathering, satisfying the information gathering feature of notice and comment. But it does not obviously satisfy the public participation goal. For democratic ends, Posner emphasizes the number of people that will be affected by a rule as an indicator of whether notice and comment is required. "The greater the public interest in a rule, the greater reason to allow the public to participate in its formation."[60]

Posner is correct that Interpretation of statutes and regulations is done in both formal and informal settings, in both rulemakings and adjudications. Attempting to distinguish rules that are "law making" from those that are "law interpreting"[61] because one simply "reminds affected parties of existing duties"[62] is unlikely to cut much ice Some mechanism is needed to distinguish interpretation appropriate for informal settings from interpretation only appropriate for formal settings.

Posner's novel approach is to distinguish between "normal or routine" interpretation and "arbitrary" interpretation. Arbitrary interpretation is the province of legislative rules; normal interpretation may properly be accomplished in either legislative or nonlegislative rules. Arbitrary interpretation involves a choice among alternatives, all of which are equally consistent with the existing statute or regulation rather than being uniquely derivable from the statute.[63]

As applied to *Hoctor*, the requirement that a fence be eight feet tall is "arbitrary" in the Posnerian sense, and therefore inappropriate for a nonlegislative rule. The choice of an eight-foot fence is consistent with the structural strength rule, but so too is a requirement of a seven-foot fence or a twelve-foot fence. No matter how long one stares at the structural strength

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59 See Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 Harv L Rev 1512, 1559–60 (1992) (arguing that informal rulemaking, through "comment procedures, provide[s] relatively easy access to the discourse among interest groups and the dialogue between those groups and decisionmakers").

60 *Hoctor*, 82 F3d at 171.

61 See, for example, *Orengo Caraballo v Reich*, 11 F3d 186, 195 (DC Cir 1993) ("Ultimately, an interpretive statement simply indicates an agency's reading of a statute or a rule."); *Gibson Wine Co, Inc v Snyder*, 194 F2d 329, 331 (DC Cir 1952) ("Generally speaking, . . . 'regulations', 'substantive rules' or 'legislative rules' are those which create law, usually implementary to an existing law; whereas interpretive rules are statements as to what the administrative officer thinks the statute or regulation means."). See also Manning, 72 Geo Wash L Rev at 920 & n 138 (cited in note 18) (collecting cases and stating that "the D.C. Circuit asks whether a nominal 'interpretative rule,' in fact, merely interprets a statute or legislative regulation rather than makes new law").

62 *General Motors Corp v Ruckelshaus*, 742 F2d 1561, 1565 (DC Cir 1984) (internal quotation marks omitted), quoting *Citizens to Save Spencer County v EPA*, 600 F2d 844, 876 n 153 (DC Cir 1979).

63 *Hoctor*, 82 F3d at 170 ("[R]easonable but arbitrary (not in the 'arbitrary or capricious' sense) rules . . . are consistent with the statute or regulation under which the rules are promulgated but not derived from it, because they represent an arbitrary choice among methods of implementation.").

rule, it is impossible to *uniquely* derive the eight-foot requirement.[64] "When agencies base rules on arbitrary choices they are legislating, and so these rules are legislative or substantive and require notice and comment rulemaking, a procedure that is analogous to the procedure employed by legislatures in making statutes."[65]

To flesh out the distinction between arbitrary and ordinary interpretation, Posner further links specificity to arbitrary interpretation in legislative rules, and generality to ordinary interpretation in nonlegislative rules. Specificity, in turn, is closely associated with numerical standards. When an agency uses numbers in interpretation, it is a good, though not perfect indicator of arbitrary interpretation. Some rules establishing numerical standards can be legislative rules; "[t]here is merely an empirical relation between interpretation and generality on the one hand, and legislation and specificity on the other."[66]

To take a well known example, the interpretation at issue in *American Mining Congress v Mine Safety & Health Administration*[67] involved an agency judgment articulated in a policy letter indicating that an x-ray reading rating of 1/0 or higher on the International Labor Office classification system would be considered a "diagnosis" of illness for purposes of the Federal Mine Safety and Health Act.[68] The agency view was held nonlegislative for purposes of the APA, notwithstanding the use of numerical standards.[69] Nonetheless, the Posnerian view seems to be that when an agency offers numbers to give content to existing rules, the probability that notice and comment procedures will be judicially required increases.[70]

If there is an oddity in this theoretical link between interpretation and specificity, it is that the empirical relationship seems precisely opposite.

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64 Id. Posner analogizes the choice of arbitrary height requirements for containment fences with the arbitrary choice of a number of years of limitations. Id. Nothing inherent in the idea of a tort suggests a specific number of years, nor does anything inherent in the idea of structural strength suggest eight feet as opposed to six feet.

65 Id at 170–71. For example, Posner analogizes the notice of proposed rulemaking to a bill and the reception of written comments to the hearing on the bill. Id at 171.

66 Id at 171.

67 995 F2d 1106 (DC Cir 1993).

68 Id at 1108.

69 Id at 1113 (holding that the agency "offer[ed] no interpretation that repudiates or is irreconcilable with an existing legislative rule" and was therefore a nonlegislative rule). Why these numerical standards were properly nonlegislative and the numerical standards in the dangerous animals interpretation legislative (spurious) is somewhat mysterious. Surely the x-ray reading rating was no more uniquely derivable from the statute than the eight-foot fence requirement.

70 *Hoctor*, 82 F3d at 171. This idea has been echoed elsewhere in Posner's writings. See, for example, Richard A. Posner, *The Rise and Fall of Administrative Law*, 72 Chi Kent L Rev 953, 962 (1997) ("When the fixing of a rule requires either the kind of scientific or technical data obtainable only in a rulemaking proceeding, or simply an arbitrary judgment, the adjudicative process is unusable. Notice and comment rulemaking must be employed, and the required rule is therefore a legislative rather than an interpretive rule.").

Rules that lay out general legal obligations are legislative rules; rules that fill in gaps, giving more precise content and definition are typically interpretive rules. Legislation and generality go hand in hand; so too interpretation and specificity.

Perhaps then Posner means not general versus specific, but rather rigid versus flexible—in his terms, "flat" versus "hilly."[71] Interpretation that is flat (arbitrary or specific) is solely the providence of legislative rules. Interpretation that is hilly (ordinary or general) is appropriate for nonlegislative rules. A rule requiring an eight-foot fence is flat and therefore legislative (requiring notice and comment). A rule requiring either an eight-foot fence, or a moat, or an electric fence is hilly and need not be promulgated via notice and comment.[72] Hilly rules are apparently less arbitrary and freestanding, and more tied to the underlying standard of secure containment.[73]

This view is essentially a topographical theory of legislative rules, perhaps connoting the rules-standards debate; flat rules must be generated by formal procedures, but hilly standards need not be. But, it cannot be the case that all legislative rules are flat and all nonlegislative rules hilly, for that would mean that notice and comment proceedings could not adopt standards, a claim that is demonstrably false. Conceivably, all flat rules must be legislative rules, even if not all legislative rules are flat, but this seems a poor fit with existing case law. Nor is it at all clear that rules (in the rules versus standards sense) and procedural formality must go hand in hand. Nonlegislative rules issued in policy statements or guidance documents can be flat or rule-like rather than hilly or standard-like.[74]

If the flat-hilly distinction is not about rules and standards, perhaps it is about rigidity. Rigid (arbitrary, numerical, specific) rules that cannot be rebutted are legislative; flexible (ordinary, non-numerical, general) rules that can be rebutted are nonlegislative. A proper nonlegislative rule could state that a fence less than eight feet high would presumptively be deemed to violate the structural strength rule, subject to rebuttal evidence demonstrating that a lower fence was secure. This rule is not unbending, is tied to the animating standard of secure containment, and Posner suggests it would not need to be promulgated using notice and comment.[75]

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71 Id ("To switch metaphors, the 'flatter' a rule is, the harder it is to conceive of it as merely spelling out what is in some sense latent in a statute or regulation, and the eight-foot rule in its present form is as flat as they come.").

72 See id (noting that government lawyers attempted to "loosen up the rule . . . to make it more palatable to the reviewing court" by implying that Hoctor might not have run afoul of the Department had he built a moat or an electrified six-foot fence).

73 See id (contrasting more a more flexible approach that "t[ies] the rule to the animating standard" with the agency's rigid rule that "stand[s] free of the standard, self-contained, unbending, arbitrary").

74 See *Hoctor*, 82 F3d at 171.

75 Id.

Perhaps, then, Posner's view of legislative rules is as follows: The mark of a legislative rule is part content (arbitrary interpretation) and part form (topography). Arbitrary interpretations (often, but not always, numerical interpretations) must be generated using notice and comment, unless they are flexible (hilly)—presumptions that can be rebutted with actual evidence. Normal interpretations can be promulgated using nonlegislative rules, but must be uniquely derivable from the existing rule or statute.

Posner's underlying project is laudable: tailor procedural requirements to the nature of the policy decision. Cast in this light, the opinion is part of a longer historical trend in administrative law.[76] Where the agency has requisite expertise or has already received democratic inputs, notice and comment procedures should not be required. Where the procedures would provide relevant information or views that the agency lacks, and that would be critical to the rule, notice and comment procedures should not be required. Arbitrary interpretation entails value judgments and therefore benefits from the airing of democratic views.[77] When the task is ordinary interpretation, agency expertise suffices. In part, this is because expertise was already developed in prior rulemaking proceedings that generated the existing rule to be interpreted—here the structural strength rule. "Notice and comment is the procedure by which the persons affected by legislative rules are enabled to communicate their concerns in a comprehensive and systematic fashion to the legislating agency."[78]

IV. A MODEST PROPOSAL

Legislative rule doctrine has faltered, in part, because judges are not well situated to evaluate how binding is too binding or how substantial an impact is too substantial an impact. Most existing doctrine focuses on the effect of the agency statement on parties: does the rule "have the force and effect of law"[79] or did the agency "intend to bind."[80] These factors seem

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[76] For example, a major dispute in the 1970s centered on an attempt by some judges in the D.C. Circuit to calibrate procedural requirements to nature and magnitude of an agency's decisions. See, for example, *National Resources Defense Council v Nuclear Regulatory Commission*, 547 F2d 633, 653 (DC Cir 1976), revd as *Vermont Yankee Nuclear Power Corp v Natural Resources Defense Council, Inc*, 435 US 519 (1978). The impulse to calibrate agency procedures and the intensity of judicial review to the nature of the underlying agency decision is still evident in much of modern administrative law. Consider the possibility of a "major questions" exception to *Chevron* deference. See Cass R. Sunstein, Chevron *Step Zero*, 92 Va L Rev 187, 231, 243 (2006) (considering the view that "*Chevron* deference is not owed for agency decisions of great 'economic and political significance'").

[77] See Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 Wake Forest L Rev 745, 755–56 (1996) (discussing why rulemaking is more democratic than adjudication).

[78] *Hoctor*, 82 F3d at 171.

[79] United States Department of Justice, *Attorney General's Manual* at 30 n 3 (cited in note 33). See also *National Latino Media Coalition v FCC*, 816 F2d 785, 787–88 (DC Cir 1987) (holding that

largely beside the point for Posner.[81] Rather than focus on whether the rule is truly binding on regulated parties or the agency, Posner emphasizes the form of the rule (topography) and the rule's relationship to preexisting law (arbitrary interpretation).

The proposal is attractive in that it requires more procedures for the class of agency actions most likely to benefit from notice and comment. The proposal is unattractive for the same reasons that current doctrine has faltered. Using a mixture of form and content to identify rules that may only be issued using notice and comment procedures requires just the sort of line-drawing that judges have historically struggled with in legislative rules cases.[82] How arbitrary is too arbitrary? How flat is not hilly enough?

However, the problem with *Hoctor* is deeper than banal observations about comparative institutional competence and the difficult of drawing lines in the law. Ascertaining whether an allegedly interpretive rule is tied closely enough to a preexisting regulation is unnecessarily difficult no matter which political institution is given the unenviable task. The problem is not that judges are imperfect or that line drawing is challenging, but that the very existence of the line is unstable. Virtually all agency statements interpret preexisting law and policy; virtually all agency statements alter the behavior of regulated parties. Otherwise, there would be little justification for the agency action in the first place.

Rather than fight about the arbitrariness or hilliness of an alleged interpretive rule, legislative rule doctrine should avoid these inquiries entirely. Both judges and commentators have periodically suggested inverting the legislative rule inquiry.[83] Rather than asking whether a rule is legislative to answer whether notice and comment procedures should have been used, courts should simply ask whether notice and comment procedures were used. If they were, the rule should be deemed legislative and binding if otherwise lawful. If they were not, the rule is nonlegislative. If the rule is

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statements by the FCC "do not amount to adoption of a 'legislative rule,' which is a rule that is intended to have and does have the force of law").

80 *Vietnam Veterans of America v Secretary of the Navy*, 843 F2d 528, 537 (DC Cir 1988) ("it makes sense to say that statements whose language, context and application suggest an intent to bind agency discretion and private party conduct-the sort of statements requiring compliance with § 553-will have that effect if valid; interpretive rules or policy statements will not, *regardless* of their validity") (emphasis in original).

81 Whether a rule has the force of law might be said to turn, in part, on whether Congress has given an agency requisite authority and whether the agency has exercised it. *American Postal Workers Union, AFL-CIO v United States Postal Service*, 707 F2d 548, 558 (DC Cir 1983); *Skidmore*, 323 US at 137.

82 See Manning, 72 Geo Wash L Rev at 894–95 (cited in note 18) (claiming that such a distinction is only a matter of degree of policymaking discretion, and that at the margins the line becomes too fine for courts to police in a principled way).

83 See *Community Nutrition Institute v Young*, 818 F2d at 950 (Starr concurring in part and dissenting in part); E. Donald Elliott, *Reinventing Rulemaking*, 41 Duke LJ 1490, 1491 (1992); Funk, 54 Admin L Rev at 664 (cited in note 36).

nonlegislative, a party may challenge the validity of the rule in any subsequent enforcement proceeding; if the rule is legislative, the agency may rely on the rule in a subsequent enforcement proceeding without defending it.

Reconsider *Hoctor* in this light. Because the agency did not issue the eight-foot-fence rule via notice and comment, the agency should have had to demonstrate that the failure to have a fence eight feet high constituted failure to have a structurally sound containment fence. If the agency had issued the eight-foot-fence rule via notice and comment, the agency would merely have had to show that Hoctor's fence was less than eight feet high in order to issue a valid citation.

The long-since identified benefit of defining legislative rules procedurally in this way is that dubious inquiries into the essential character of a rule are avoided. The procedural definition economizes on decision costs by eliminating the need to identify the class of rules that should have been promulgated using notice and comment. In the process, the procedural approach avoids the considerably uncertainty associated with judicial judgments on this matter, which courts themselves readily acknowledge.

The procedural test was not embraced historically because of a fear that it would allow agencies to produce substantively important policy without facing public input ex ante or serious judicial scrutiny ex post. Agencies might seek to shield their regulations from the scrutiny of notice and comment, choosing instead to cast would-be regulations as interpretative rules or policy statements. Regulated parties might then adjust their behavior to comply rather than risk sanctions. If regulated parties did not comply, the agency's interpretation would, of course, be subject to judicial scrutiny in a subsequent enforcement proceeding. However, the agency's interpretation of its own regulation would generally receive deference from judges as an interpretations of a statute or regulation.[84] Therefore, the agency could avoid scrutiny on the front end by issuing policy as an interpretive rule and avoid scrutiny on the back end because of deference doctrine.[85]

This concern is real, but its import has been significantly lessened by developments in other areas of administrative law. Specifically, *United States v Mead Corp*[86] and its progeny suggest the degree of deference courts owe to an agency's statutory interpretation is a partial function of the pro-

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84 See *Auer v Robbins*, 519 US 452, 461 (agency's view of its own regulation upheld unless plainly erroneous or inconsistent with the regulation); *Bowles v Seminole Rock & Sand Co*, 325 US 410, 414 (1945) (same).

85 See also *American Mining Congress*, 995 F2d at 111.

86 533 US 218 (2001).

cedures used to generate an agency decision.[87] In the immediate aftermath of *Chevron*, it appeared courts would apply a broad presumption of deference to agency interpretations. *Mead* emphasizes that judicial deference is appropriate "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[88] Although recent statements suggest procedural formality is neither a necessary nor a sufficient condition for deference, judicial deference is much more likely when agency views are articulated using formal procedures like notice and comment.[89] In the post-*Mead* world, an agency may still use nonlegislative rules to issue policy. But the probability of receiving judicial deference to views articulated in those rules falls substantially.

Moreover, when an agency adopts a controversial or less textually plausible interpretation, the agency has incentives to use formal procedures to obtain judicial deference.[90] Informal procedures will likely be associated with less controversial agency interpretations—those that would be upheld even without judicial deference. If so, then *Mead* may have inadvertently helped solve the legislative rule riddle.

> The main objection to defining legislative rules procedurally has been that too much important policy could be made without either sufficient public input or adequate judicial scrutiny. *Mead* mitigates if it does eliminate this problem by making it much more likely that the agency will either "pay now" by using notice and comment, or "pay later" by facing more serious judicial scrutiny in litigation. But for *Mead*, agencies might well make critical interpretive choices using nonlegislative rules. But after *Mead*, this approach to policy is implausible, or at least less attractive. So long as *Mead* provides sufficient incentives for formal procedures to be used for substantively important interpretations, the procedural model of legislative rules avoids interminable disputes about whether an agency is making law or interpreting law, and makes legisla-

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87 See generally Cass R. Sunstein, Chevron *Step Zero*, 92 Va L Rev 187, 191 (2006); Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 Vand L Rev 1443, 1486 (2005); Adrian Vermeule, Mead *in the Trenches*, 74 Geo Wash L Rev 347 (2003).

88 *Mead*, 533 US at 226–27.

89 *Mead*'s language initially appeared to make Step Zero turn entirely on procedural formality. Unfortunately, the precise relationship between the delegation of force-of-law authority and procedural formality remained elusive. The Court clearly stated that a lack of procedural formality does not preclude *Chevron* deference. Mead, 533 US at 231 ("The fact that the tariff classification here was not a product of such formal process does not alone, therefore, bar the application of *Chevron*."). And at least Justice Breyer thinks procedural formality is not a sufficient condition for *Chevron* deference either. See *National Cable & Telecommunications Assn v Brand X Internet Servs*, 545 US 967, 1003–05 (2005) (Breyer concurring).

90 Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 Harv L Rev 528 (2006).

tive rule doctrine consistent with dominant themes of agency choice and flexibility in administrative law.[91]

V. CONCLUSION

A main premise of the administrative state is that Congress enacts broad general statutes and agencies fill in the details by interpreting statutes. This process of gap-filling is interpretation, but in the post-realist post-*Chevron* world it is also policymaking.[92] The arc of administrative law in the past thirty years has been to resist judicial meddling in the choice of agency procedures. Courts usually do not require that policy be made via rulemaking instead of adjudication.[93] Courts only rarely force agencies to rely on formal rulemaking rather than informal rulemaking.[94] Courts may not impose additional procedural requirements on agencies that are not mandated either by statute or the Constitution.[95] Notice and comment proceedings are a statutory rather than common law mandate, but a probing judicial inquiry into the content and form of an agency's pronouncements is in at least modest tension with the spirit of agency flexibility.

Making procedural requirements hinge on the binding intent or effect of a rule has generated nothing but confusion in legislative rules doctrine. A turn to topology and arbitrariness is intriguing, but unlikely to be a panacea. Historically, there were good reasons to resist the procedural gloss on legislative rules, but given recent developments in administrative law, these concerns have much of their force. Today, agencies has a relatively clear choice. They may utilized formal procedures that make use of public input for promulgate interpretations and receive subsequent judicial deference to those views. Alternatively, agencies may use informal mechanisms that do not incorporate systematic public input and receive greater judicial scrutiny after the fact. As a result, an old proposal to define legislative rules procedurally may have new vitality. These ideas are tentative; yet, they suggest that the time may be right for another round of discussion on legislative rules in administrative law.

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91 See generally M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U Chi L Rev 1383 (2004) (exploring why agencies choose to use different types of policymaking and arguing that courts review this choice indirectly through different standards of review for each type of policymaking available to agencies).

92 See *Chevron USA Inc v NRDC*, 467 US 837, 843 (1984) ("The power of an administrative agency . . . necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.") (internal marks omitted), quoting *Morton v Ruiz*, 415 US 199, 232 (1974).

93 *SEC v Chenery Corp*, 332 US 194, 202 (1947) ("In performing its important functions . . . , an administrative agency must be equipped to act either by general rule or by individual order.").

94 *United States v Florida East Coast Railway*, 410 US 224 (1973).

95 *Vermont Yankee Nuclear Power Corp v NRDC*, 435 US 519, 544 (1978) (discussing the "very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure").

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