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Differentiating Legislative from Nonlegislative Rules: An Empirical and Qualitative Analysis

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NOTES

DIFFERENTIATING LEGISLATIVE FROM NONLEGISLATIVE RULES: AN EMPIRICAL AND QUALITATIVE ANALYSIS

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The elusive distinction between legislative rules and nonlegislative rules has frustrated courts, motivated voluminous scholarly debate, and ushered in a flood of litigation against administrative agencies. In the absence of U.S. Supreme Court guidance on the proper demarcating line, circuit courts have adopted various tests to ascertain a rule's proper classification.

This Note analyzes all 241 cases in which a circuit court has used one or more of the enunciated tests to differentiate legislative from nonlegislative rules. These opinions come from every one of the thirteen circuits and span the period of the early 1950s through 2018. This Note identifies six different tests that courts have employed in this effort and offers a qualitative and empirical analysis of each. The qualitative analysis explains the underlying premise of the tests, articulates their merits and shortcomings, and considers how courts have applied them to particular disputes. The empirical portion of this Note uses regression analysis to ascertain how using or rejecting one or more of the tests affects a court's determination of whether the rule is legislative or nonlegislative.

This Note classifies the different tests into two categories: public-focused tests and agency-focused tests. These two categories are defined by a principle that permeates administrative law jurisprudence: achieving a proper balance between efficient agency rulemaking and maintaining a proper check against unconstrained agency action. These two categories thus defined, this Note proposes a balanced approach that incorporates elements of both categories to identify and refine the proper test.

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INTRODUCTION

Since Congress enacted the Administrative Procedure Act (APA, or the "Act")[1] in 1946, courts, scholars, and litigants have been debating how to differentiate between legislative (e.g., notice-and-comment rules) and nonlegislative rules (e.g., interpretive rules, general statements of policy, and procedural rules).[2] This effort has been described as the most vexing, important, and litigated issue in the rulemaking process today.[3]

Under the APA, administrative agencies must comply with various procedural requirements when issuing legislative rules,[4] known as "notice-and-comment rulemaking."[5] Notice and comment is a form of public participation that allows affected parties and individuals to submit comments, data, and suggestions for alternative solutions with respect to problems that agencies are considering regulating.[6] These procedures, however, are both resource-intensive and time-consuming, lasting an average of more than 460 days per promulgated rule.[7]

But agencies may avoid these hurdles by relying on the APA's exemptions for nonlegislative rules.[8] The APA allows agencies to issue interpretive rules, general statements of policy, and procedural rules without the burden of notice-and-comment rulemaking.[9] Yet, while the Act provides these

1. 5 U.S.C. §§ 551–559 (2012).

2. *See* David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 278 (2010) ("There is perhaps no more vexing conundrum in the field of administrative law than the problem of defining a workable distinction between legislative and nonlegislative rules."); *see also* Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547, 547 (2000) ("For over fifty years, courts and commentators have struggled to identify, and to apply, criteria that are appropriate to distinguish between legislative rules and interpretative rules.").

3. Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. 263, 265 (2018).

4. 5 U.S.C. § 551(4) ("'[R]ule' means the whole or a part of an agency statement of general or particular applicability and future effect."). Under the commonly accepted Department of Justice definition, legislative rules are said to carry "the force and effect of law." U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947).

5. In *United States v. Florida East Coast Railway*, the U.S. Supreme Court narrowed the requirements for formal rulemaking procedures. 410 U.S. 224, 241 (1973). That decision, scholars have noted, marked the "ascendancy of the notice and comment approach for rulemaking." WILLIAM N. ESKRIDGE JR. ET AL., CASES AND MATERIALS ON LEGISLATION AND REGULATION 948 (5th ed. 2014).

6. White v. Shalala, 7 F.3d 296, 303 (2d Cir. 1993).

7. Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 513 (2011).

8. 5 U.S.C. § 553(b)(A).

9. *Id.*

notable exceptions, it perplexingly fails to define them.[10] The Act does not explain the meaning of or the difference between "legislative rules," "interpretive rules," "general statements of policy," and "rules of agency procedure."[11]

The U.S. Supreme Court's most recent foray into the field of APA exemptions is emblematic of the Court's muddled jurisprudence on this issue. In *Perez v. Mortgage Bankers Ass'n*,[12] a trade organization argued that the Department of Labor (DOL) violated the procedural requirements of notice-and-comment rulemaking.[13] Over the course of a decade, the DOL had issued various opinion letters determining whether mortgage loan officers qualify for an exemption from the overtime pay requirement under the Fair Labor Standards Act.[14] In 2010 the DOL abandoned its previous positions and concluded that mortgage loan officers were not subject to the exemption. In response, petitioners argued that the new position constituted a legislative rule and was therefore procedurally deficient and invalid.[15]

During oral arguments, Justice Kagan asked the government to respond to the growing concern that "agencies more and more are using interpretive rules and are using guidance documents to make law and that . . . it is essentially an end run around the notice and comment provisions."[16]

In the Court's majority opinion, Justice Sotomayor did acknowledge the difficult task of differentiating the two types of rules and the long-standing academic debate on the matter.[17] But hopes that the Court would provide a conclusive test were dashed when the majority held that "[w]e need not, and do not, wade into that debate here."[18]

The lack of Supreme Court guidance, coupled with the arduous process of notice-and-comment rulemaking,[19] have raised the specter, as adverted to by Justice Kagan,[20] that agencies have been labeling legislative rules as nonlegislative in an attempt to circumvent the APA.[21] As Professor Robert Anthony remarked:

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10. *See id.* §§ 551–559.

11. RICHARD J. PIERCE, JR. & KRISTIN E. HICKMAN, ADMINISTRATIVE LAW TREATISE § 4.5 (6th ed. 2018).

12. 135 S. Ct. 1199 (2015).

13. *Id.* at 1204–05.

14. *Id.* at 1204.

15. *Id.* at 1204–05.

16. Oral Argument at 11:27, Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199 (2015) (Nos. 13–1041, 13–1052), https://www.oyez.org/cases/2014/13-1041 [https://perma.cc/D6E2-7HLV].

17. *Perez*, 135 S. Ct. at 1204.

18. *Id.*; *see also id.* at 1204–06 (holding that agencies do not have to undergo notice-and-comment procedures when altering a previous interpretive rule).

19. O'Connell, *supra* note 7, at 513.

20. Oral Argument, *supra* note 16, at 11:27.

21. *See* NICHOLAS R. PARRILLO, ADMIN. CONFERENCE OF THE U.S., FEDERAL AGENCY GUIDANCE: AN INSTITUTIONAL PERSPECTIVE 4 (2017) (explaining that "[t]he use of guidance as a binding norm undermines the mandate of the APA that general binding policies should be made only through the exacting procedures of legislative rulemaking").

> If such nonlegislative actions can visit upon the public the same practical effects as legislative actions do, but are far easier to accomplish, agency heads . . . will be enticed into using them. Where an agency can nonlegislatively impose standards and obligations that as a practical matter are mandatory, it eases its work greatly in several undesirable ways.[22]

This Note analyzes the debate over the proper demarcating line between legislative and nonlegislative rules both qualitatively and empirically. The qualitative portion outlines six tests that circuit courts have considered when determining whether a rule is legislative or nonlegislative. It reviews the justifications for and ramifications of each test, and it offers a classification of the tests into two categories of analysis: agency-focused tests and public-focused tests. Constructing these binary categories facilitates useful reflection about competing notions of administrative law jurisprudence.[23]

The empirical portion analyzes 241 cases from across the thirteen circuit courts. In these opinions, courts have relied on one or more of the six tests a total of 588 times.[24] The empirical analysis in particular attempts to offer a new contribution to this rich area of literature by measuring whether a court employing or rejecting a certain test is more or less likely to find that a rule is legislative.

This Note is organized as follows: Part I.A provides a brief history of key developments in this field and highlights the legal and academic debate around articulating and implementing a proper test to distinguish between legislative and nonlegislative rules. Part I.B outlines the six tests circuit courts employ in this effort and considers the tests' merits and shortcomings in turn. Part I.C suggests a division of the tests into binary categories of public-focused and agency-focused tests. Then, Part II.A describes the methodology used in this Note's empirical analysis, and Part II.B presents the results. Finally, Part III suggests a balanced approach consisting of elements from both the public-focused and agency-focused categories and proposes informed refinements for some of the tests identified.

I. LEGISLATIVE OR NONLEGISLATIVE?: THE CHALLENGE OF ARTICULATING A TEST

The APA establishes procedural requirements for agencies to follow when they formulate, amend, or repeal a rule.[25] Compliance with the APA, as established in the Act and in subsequent cases, requires a four-step process.[26] First, the agency must issue a general notice of proposed rulemaking in the

22. 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, 1317 (1992). *But see* Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 ADMIN. L. REV. 65, 90, 127 (2015) (using empirical analysis to demonstrate that agencies avoid rulemaking procedures primarily due to concerns about future litigation).

23. *Infra* Part I.C.

24. Data summarizing the results, as well as individual case coding for the tests relied upon for all 241 cases, are on file with the author.

25. *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1203 (2015).

26. 5 U.S.C. § 553 (2012).

Federal Register.[27] Second, the agency must give interested parties an opportunity to participate "through submission of written data, views, or arguments."[28] Third, as the Second Circuit instructed in *United States v. Nova Scotia Food Products Corp.*,[29] relevant submissions must be given due consideration and may require specific treatment.[30] Lastly, when promulgating a final rule, the agency must include a concise general statement of the rule's basis and purpose.[31]

Agencies may avoid these requirements by relying on the APA's exceptions for interpretive rules, general statements of policy, and rules of agency procedure.[32] These exceptions, as courts have noted, are both key to efficient agency operation and compatible with the purposes of the APA.[33] As the Sixth Circuit explained, the three exceptions "reflect[] the idea that public input will not help an agency make the legal determination of what the law already is."[34] They also facilitate important agency work by providing "a degree of flexibility where 'substantive rights are not at stake.'"[35]

But as *Perez* noted, the terms are "not further defined by the APA, and [their] precise meaning is the source of much scholarly and judicial debate."[36] A 1947 Department of Justice manual (the "Manual") provided an early guide to the APA's definitional void and proved influential with courts.[37] The Manual defines legislative rules as rules "other than organizational or procedural . . . issued by an agency pursuant to statutory authority and which implement the statute" and "have the force and effect of law."[38] The Manual defines interpretive rules as rules "issued . . . to advise the public of the agency's construction of the statutes and rules which it administers."[39] Finally, the Manual defines general statements of policy as "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power."[40]

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27. *Id.* § 553(b) ("The notice should include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.").

28. *Id.* § 553(c).

29. 568 F.2d 240 (2d Cir. 1977).

30. *Id.* at 251 (detailing proper agency consideration of submitted data).

31. 5 U.S.C. § 553(c).

32. *Id.* § 553(b)(A).

33. Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1046 (D.C. Cir. 1987) (explaining that the function of the exemption for general policy statements is to allow agencies to announce their future intentions without binding themselves).

34. Dismas Charities, Inc. v. U.S. Dep't of Justice, 401 F.3d 666, 680 (6th Cir. 2005).

35. Sentara-Hampton Gen. Hosp. v. Sullivan, 980 F.2d 749, 759 (D.C. Cir. 1992) (quoting *Bowen*, 834 F.2d at 1045).

36. Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1204 (2015).

37. U.S. DEP'T OF JUSTICE, *supra* note 4. As Justice Antonin Scalia noted, the Court has "repeatedly given great weight" to the Manual in its decisions on the issue. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 218 (1988) (Scalia, J., concurring).

38. *See* U.S. DEP'T OF JUSTICE, *supra* note 4, at 30 n.3.

39. *Id.*

40. *Id.*

But these definitions, as commentators have noted, are of modest utility,[41] and the challenge of finding a line between legislative and nonlegislative rules persists to this day.[42]

A. The APA: Procedural Requirements and Evolving Doctrine

Congress implemented the APA as a response to growing concerns about administrative overreach during the New Deal.[43] As the Supreme Court noted shortly after the Act's implementation: "The [APA] was framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices."[44] And, as Judge Richard A. Posner noted, in passing the Act, Congress reached a "historic compromise."[45] The APA was, on the one hand, an acceptance of the administrative state as an organ of federal lawmaking and, on the other, a significant check on administrative functions through various procedural constraints.[46]

Chief among these constraints is the notice-and-comment rulemaking structure. By mandating this procedure, Congress pursued several goals: (1) "to reintroduce public participation and fairness to affected parties";[47] (2) to assure "that the agency will have before it the facts and information relevant to a particular administrative problem";[48] and (3) to facilitate a process through which agencies engage in "due deliberation" before implementing regulations with the force and effect of law.[49]

Courts have also maintained that the process is a necessary check on agency power. "The APA notice and comment procedures exist for good reason: to ensure that unelected administrators, who are not directly accountable to the populace, are forced to justify their quasi-legislative rulemaking before an informed and skeptical public."[50]

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41. *See, e.g.*, Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520, 533 (1977).

42. *See generally* Pierce, *supra* note 2.

43. *See* ESKRIDGE ET AL., *supra* note 5, at 937 ("[W]ith the enormous expansion of executive branch and independent agencies during the New Deal, some private sector observers voiced increasing alarm about the bureaucracy's authority and influence over the actions of individuals and entities.").

44. United States v. Morton Salt Co., 338 U.S. 632, 644 (1950).

45. Richard A. Posner, *The Rise and Fall of Administrative Law*, 72 CHI.-KENT L. REV. 953, 954 (1997).

46. *See* Richard A. Epstein, *The Role of Guidances in Modern Administrative Procedure: The Case for* De Novo *Review*, 8 J. LEGAL ANALYSIS 47, 52–53 (2016) (explaining that "[t]he APA is best understood as the consolidation and rationalization of the administrative state, not as its repudiation").

47. Batterton v. Marshall, 648 F.2d 694, 703 (D.C. Cir. 1980).

48. Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1044 (D.C. Cir. 1987) (quoting Guardian Fed. Sav. & Loan Ins. Corp. v. Fed. Sav. & Loan Ins. Corp., 589 F.2d 658, 662 (D.C. Cir. 1978)).

49. Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 741 (1996).

50. New Jersey v. Dep't of Health & Human Servs., 670 F.2d 1262, 1281 (3d Cir. 1981).

A celebrated opinion by Judge Posner articulated these justifications. In *Hoctor v. U.S. Department of Agriculture*,[51] the Seventh Circuit had to determine whether a Department of Agriculture rule—mandating a minimum fence requirement when constructing cages for wild animals—was legislative or interpretive. In holding that the rule was legislative, and that it therefore had to undergo notice-and-comment rulemaking, Judge Posner wrote:

> There are thousands of animal dealers, and some unknown fraction of these face the prospect of having to tear down their existing fences and build new, higher ones at great cost. The concerns of these dealers are legitimate and . . . the agency was obliged to listen to them before settling on a final rule.[52]

The following sections review the common distinction between legislative and nonlegislative rules, the D.C. Circuit's influential decision that shaped the modern debate over the issue, and the Supreme Court's most recent discussion of legislative and nonlegislative rules.

1. The Common Distinction: The Rule's Legal Effect

While the debate continues, scholars and courts seem to have reached a consensus on one fundamental distinction between legislative and nonlegislative rules: the former have a binding effect while the latter do not.[53] As Michael Asimow explains, the prevailing standard for distinguishing legislative from interpretive rules is the "'legal effect' test."[54] If a rule makes new law, instead of interpreting existing law, then that rule is legislative.[55] Similarly, and pre-dating the APA, the Supreme Court announced in *Columbia Broadcasting Systems v. United States*[56] that regulations altering the affected public's behavior "have the force of law."[57]

While that makes some intuitive sense, this distinction is difficult to apply and often produces inconsistent results.[58] As Professor Mark Seidenfeld argues, beyond the consensus that nonlegislative rules lack a binding legal force, ambiguity as to what legal force means and how it can be measured

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51. 82 F.3d 165 (7th Cir. 1996).
52. *Id.* at 171.
53. *See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 295 (1979) ("It has been established . . . that properly promulgated, substantive agency regulations have the 'force and effect of law.'"); Guardian Fed. Sav. & Loan Ass'n v. Fed. Sav. & Loan Ins. Corp., 589 F.2d 658, 664 (D.C. Cir. 1978) (holding that a legislative rule has "the force of law"); *see also* PIERCE & HICKMAN, *supra* note 11, § 4.3.
54. Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 394.
55. *Id.*
56. 316 U.S. 407 (1942).
57. *Id.* at 418.
58. Franklin, *supra* note 2, at 288.

"has confused the courts."[59] Indeed, courts have often admitted that the distinction is "fuzzy," "baffling," and "enshrouded in considerable smog."[60]

2. *American Mining Congress*

In the D.C. Circuit's influential *American Mining Congress v. Mine Safety & Health Administration*[61] decision, the appellate court articulated its task as determining whether a rule has "the force of law."[62] The case concerned a DOL interpretation of a statute mandating that mine operators report certain diagnoses of occupational illnesses.[63] The Department issued several "policy letters" stating that certain x-ray results constitute a diagnosis and therefore must be reported.[64] Replying to the petitioners' challenge, the DOL defended its actions by arguing that the policy letters were interpretive rules exempt from notice-and-comment procedures.[65]

To resolve the challenge, the court introduced three lines of inquiry: (1) What is the agency label? Did the agency note that the rule is nonlegislative, or did it announce the rule in the Code of Federal Regulations (CFR) or go through notice and comment?[66] (2) Has the agency created new rights or duties for the regulated public?[67] Did the challenged rule alter the regulatory landscape such that parties must abide by a new statutory standard?[68] (3) Was the agency clarifying or supplying an ambiguous statute with greater detail?[69] An agency, after all, may provide new definitions to a statute and still remain within the domain of nonlegislative rules.[70]

Though *American Mining Congress* stands as perhaps the most influential articulation of the distinction between legislative and nonlegislative rules,[71] scholars have debated its merits. Professor Richard Pierce argued that *American Mining Congress* is a sound opinion that provides a revealing test.[72] He noted that, if widely adopted, the tests it outlined would

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59. Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331, 335 (2011).

60. Pierce, *supra* note 2, at 547–48 (first quoting Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1046 (D.C. Cir. 1987); then quoting Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 946 (D.C. Cir. 1987); and then quoting Noel v. Chapman, 508 F.2d 1023, 1030 (2d Cir. 1975)).

61. 995 F.2d 1106 (D.C. Cir. 1993).

62. *Id.* at 1109 (quoting Nat'l Latino Media Coal. v. FCC, 816 F.2d 785, 787–88 (D.C. Cir. 1987)).

63. *Id.* at 1107.

64. *Id.*

65. *Id.* at 1108.

66. *Id.* at 1109.

67. *Id.*

68. *Id.* at 1109–10 (explaining that if a new rule is "irreconcilable" with an old legislative rule, the new rule is legislative).

69. *Id.* at 1110 (explaining that if a new rule explains a preexisting duty, the new rule is interpretive).

70. *See infra* Part I.A.3.

71. *See* Pierce, *supra* note 2, at 561 (noting that the *American Mining Congress* opinion is widely praised in casebooks and treatises and "was also followed both within the circuit and by other circuits").

72. *Id.* at 548, 560–61.

significantly help to remediate the "the rampant confusion and inconsistency" that pervades this area of administrative law.[73]

But Professor Richard Manning disagreed and argued that, far from being the ultimate test, *American Mining Congress* makes it "difficult, at best, to draw meaningful distinctions between interpretive and legislative rules."[74] In sum, Manning warned that the D.C. Circuit's approach to identifying legislative rules "may necessitate reliance on little more than an I-know-it-when-I-see-it test."[75]

3. The Current Landscape: *Perez*

Though the Supreme Court has at times referred to the task of differentiating legislative from nonlegislative rules,[76] it has avoided tackling the distinction directly and has instead left the circuit courts in their current disarray. In *Perez*, the Court persisted in its avoidance and announced that it would not wade into the debate over the line between legislative and nonlegislative rules.[77] Still, the majority and concurring opinions provided some insightful commentary on the issue.

The respondents raised three arguments pertaining to the APA and its nonlegislative rules exceptions: (1) text, (2) precedent, and (3) policy considerations.[78] Helpfully, Justice Sotomayor's majority opinion replied to each, shedding important light on the Court's interpretation of the APA.[79] First, the respondents argued that when an agency significantly changes a prior interpretation, it amends that regulation and must undergo notice-and-comment procedures.[80] But the Court disagreed.[81] It distinguished "amending" from "interpreting" and held that agencies may freely engage in acts of interpretation even when that produces new understandings of the underlying statute.[82] The majority reasoned that just as courts do not amend a statute when they interpret its text, so too can agencies interpret a regulation without effectively amending the underlying law.[83] Justice Thomas concurred, stating that "[a]n agency's substantial revision of its interpretation of a regulation does not amount to an 'amendment' of the regulation as that word is used in the [APA]."[84]

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73. *Id.* at 548.
74. John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 922 (2004).
75. *See, e.g.*, *id.* at 927.
76. Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 88 (1995); Chrysler Corp. v. Brown, 441 U.S. 281, 314 (1979).
77. Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1204 (2015).
78. Consolidated Brief of Respondent at 21, 23–25, 28–29, Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199 (2015) (Nos. 13-1041, 13-1052).
79. *Perez*, 135 S. Ct. at 1207.
80. *Id.*
81. *Id.*
82. *Id.* at 1207–08 (comparing *Black's Law Dictionary* definitions of "amend" and "interpret").
83. *Id.* at 1208.
84. *Id.* at 1213 (Thomas, J., concurring).

Perez therefore appears to expand the realm of interpretive rules by allowing agencies to offer a new understanding of a statute, even when that new understanding sets forth new rights or duties.[85] The Court emphasized that the respondents' argument conflicts with the "longstanding recognition" that interpretive rules cannot change the regulation they interpret because interpretive rules do not have the force and effect of law.[86]

Second, the respondents pointed to *Shalala v. Guernsey Memorial Hospital*,[87] in which the Court stated that when agencies adopt new positions inconsistent with existing regulations, they must comply with notice-and-comment procedures.[88] But Justice Sotomayor dismissed that portion of the opinion as "dictum" and cautioned that *Guernsey Memorial Hospital*'s reasoning only applies when the amendment refers to rules originally promulgated as legislative.[89]

Finally, the respondents warned that policy considerations militate against permitting an amendment through an interpretive rule.[90] They contended that overruling *Paralyzed Veterans of America v. D.C. Arena L.P.*[91] would further entrench the practice of issuing nonlegislative rules to skirt the APA and unexpectedly alter important regulations.[92] But the Court rejected that argument and highlighted that the APA contains other constraints on agency procedures, such as the arbitrary and capricious standard of judicial review.[93] Accordingly, the Court held that petitioners cannot rely on newly erected additions to notice-and-comment rulemaking.[94]

In his concurrence, Justice Antonin Scalia took issue with the majority's construction of Congress's intent in framing the exemptions to the APA.[95] "This concession," referring to the APA's exemption of interpretive rules, "was meant to be more modest in its effects than it is today."[96] Lamenting the Court's administrative law jurisprudence, Justice Scalia criticized the Court's approach to the issue and, specifically, its reading of the APA's contemplation of the proper role for the courts. Namely, while the Act holds

85. *Id.* at 1207–08 (majority opinion). But *Perez* could also be read more narrowly given that the case involved an amendment to an interpretive rule. *Id.* at 1205. Unfortunately, the Court was less than careful in its terminology. For example, it held that an agency can interpret a "regulation" without effectively amending the underlying source of law. *Id.* at 1208. It is unclear, however, whether by "regulation" the Court was referring to an interpretive rule, a legislative rule, or both. *See id.*

86. *Id.*

87. 514 U.S. 87 (1995); *see also* Consolidated Brief of Respondent, *supra* note 78, at 26.

88. *See Guernsey Mem'l Hosp.*, 514 U.S. at 100.

89. *Perez*, 135 S. Ct. at 1209.

90. Consolidated Brief of Respondent, *supra* note 78, at 30 (arguing that limitations on amending interpretive rules "prevent fickle agency flip-flopping on established positions").

91. 117 F.3d 579 (D.C. Cir 1997), *abrogated by* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199 (2015).

92. *Perez*, 135 S. Ct. at 1209.

93. *Id.* (explaining that the APA allows courts to find that an agency action is arbitrary and capricious and therefore in violation of the Act).

94. *Id.*

95. *Id.* at 1211 (Scalia, J., concurring).

96. *Id.*

that courts, rather than agencies, will resolve statutory ambiguities, the Supreme Court has allowed agencies to authoritatively resolve ambiguities in statutes.[97]

Consequently, Justice Scalia explained, agencies now use interpretive rules to bind the public in one of two ways. First, as a result of *Auer v. Robbins*,[98] any interpretive rule that meets certain conditions—such as reasonableness—is "every bit as binding as a substantive rule."[99] Second, because agencies are cognizant of the expanding domain of interpretive rules, they "need only write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled later, using interpretive rules unchecked by notice and comment."[100] These developments, the concurrence concluded, shifted the original balance the APA struck with respect to interpretive rules.[101]

B. The Six Tests

From the early "substantial impact" test[102] to the variety of tests articulated in *American Mining Congress*,[103] six different inquiries have defined the judicial approach to differentiating legislative from nonlegislative rules. This section outlines the tests as they appear in case law and highlights the scholarly debate surrounding each.

In short, the six tests are: (1) the "agency label" test, which relies on the agency's own characterization of the rule—as legislative or nonlegislative—as a guide to the rule's proper classification; (2) the "clarification" test, which asks whether a rule merely provides greater clarity to an existing regulation; (3) the "acting pursuant to statutory delegation" test, which assesses whether the agency has the required authority from Congress to implement legislative rules; (4) the "agency binding" test, under which a rule is more likely to be deemed legislative if it has effectively limited an agency administrator's discretion; (5) the "create new rights or duties" test, which assesses whether an agency has shifted the regulatory landscape by creating new rights or duties for the affected public; and (6) the "substantial impact" test, under which a rule with a significant impact on the regulated public will more readily be found to require notice-and-comment procedures.

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97. *Id.*

98. 519 U.S. 452 (1997).

99. *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring); *see also Auer*, 519 U.S. at 461 (holding that an agency's interpretation of its own regulation is controlling unless it is plainly erroneous or inconsistent with the regulation). As this Note is being prepared for publication, the Supreme Court is set to hear oral arguments on the question of whether the Court should overturn *Auer*. *See* Kisor v. Wilkie, No. 18-15 (U.S. cert. granted Dec. 10, 2018).

100. *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring).

101. *Id.*

102. Brown Express, Inc. v. United States, 607 F.2d 695, 703 (5th Cir. 1979).

103. Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1109–12 (D.C. Cir. 1993).

1. Agency Label

The "agency label" test looks to the agency's own classification of the rule in dispute.[104] This, in turn, introduces a rebuttable presumption that a rule is nonlegislative if an agency describes it as such, or if the agency forgoes publication in the CFR or the Federal Register.[105]

This approach is rooted in one of the key tenets of administrative law: courts should afford a "presumption of procedural validity" to an administrator's decisions.[106] As it pertains to ascertaining a rule's true nature, relying on the agency label is an acknowledgement that the agency is the authority best suited to explain why it issued a rule and why it chose to implement it in a specific manner.[107]

Indeed, courts across the circuits often defer to the label an agency casts on its disputed rule and afford it significant weight. The Second Circuit, for example, noted that "[a]n agency's characterization of a rule is the 'starting point' for an analysis of its status as legislative or interpretive."[108] Taking this proposition to its extreme, the Seventh Circuit held: "[Petitioner] starts from a disadvantage, because . . . we give great weight to an agency's expressed intent."[109] And when the Sixth Circuit decided that a Department of Health and Human Services (HHS) letter was a general statement of policy, it noted that the most persuasive factor for its holding was the agency's description of the letter as mere guidance.[110]

Other courts, however, afford little or no weight to the agency's label. Some courts have remarked that an agency's own label is relevant but not dipositive[111] and that it is the court's role to look beyond the agency's characterization.[112] As the Fifth Circuit stated, courts should be "mindful but suspicious of the agency's own characterization" of a promulgated rule.[113]

Perhaps most forcefully, one judge argued that relying on this test is an ill-advised exercise in deference to the agency's views. In *American Hospital*

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104. *See, e.g.*, Disabled Am. Veterans v. Sec'y of Veterans Affairs, 859 F.3d 1072, 1077 (Fed. Cir. 2017) ("There are three relevant factors to whether an agency action constitutes substantive rulemaking under the APA: (1) the Agency's own characterization of the action . . . .").

105. *See* United States v. Alameda Gateway Ltd., 213 F.3d 1161, 1168 (9th Cir. 2000) (finding that a regulation was nonlegislative because it "was not published in either the Code of Federal Regulations or the Federal Register, providing further evidence that the regulation was not intended to be binding").

106. Levin, *supra* note 3, at 290.

107. *Id.*

108. Mejia-Ruiz v. INS, 51 F.3d 358, 365 (2d Cir. 1995) (quoting Metro. Sch. Dist. v. Davila, 969 F.2d 485, 489 (7th Cir. 1992)).

109. First Nat'l Bank of Chi. v. Standard Bank & Tr., 172 F.3d 472, 478 (7th Cir. 1999).

110. Dyer v. Sec'y of Health & Human Servs., 889 F.2d 682, 685 (6th Cir. 1989).

111. *See, e.g.*, Mt. Diablo Hosp. Dist. v. Bowen, 860 F.2d 951, 956 (9th Cir. 1988).

112. *See, e.g.*, Texas v. United States, 809 F.3d 134, 176 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

113. *Id.* at 171.

Ass'n v. Bowen,[114] a majority of a D.C. Circuit panel determined that a rule was nonlegislative after noting that "[t]he real dividing line" between legislative and nonlegislative rules is whether the agency published the rule in the CFR.[115] In dissent, Judge Abner Mikva found this reasoning unpersuasive: "Obviously, an agency that contends its rule is not substantive is unlikely to publish that rule in the CFR. This fact, however, adds nothing to the underlying contention. If the agency's action is in reality a substantive rule, it is no less so for remaining unpublished."[116]

2. Clarification

The "clarification" test offers a seemingly obvious inquiry into whether a rule is legislative or interpretive. Interpretive rules, as the name suggests, seek to clarify statutes and rules[117] and do not "effectuate[ ] [a] change in policy or law."[118] Stated differently, interpretative rules reflect what the agency's administrators think a statute or regulation means.[119]

Scholars have noted that this test is the most prominent test courts use to differentiate interpretive from legislative rules.[120] The case law posits several articulations of this test.[121] These include inquiring whether a rule "reminds" parties of their rights and duties or provides an explanation of the law that is "fairly encompassed" within the regulation that the agency is purporting to elucidate.[122]

But some have raised concerns regarding the clarification test's explanatory power. When a majority of a panel of the Third Circuit applied the clarification test and held that an agency's rule was interpretive,[123] Judge Richard Nygaard forcefully dissented: "The majority seems to imply that, because the two letters clarify and explain the already-existing [statutes], they are interpretive. But this reasoning proves too much. Indeed, it is difficult to conceive of any nonprocedural regulation that does not in some way explain or clarify an existing federal statute."[124]

Nevertheless, the clarification test retains its prominent status in the case law,[125] and courts often expand the realm of "clarifications" to include

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114. 834 F.2d 1037 (D.C. Cir. 1987).
115. *Id.* at 1056.
116. *Id.* at 1060 (Mikva, J., dissenting).
117. Brasch v. United States, 41 F. App'x 574, 576 (3d Cir. 2002); *see also* Guardian Fed. Sav. & Loan Ass'n v. Fed. Sav. & Loan Ins. Corp., 589 F.2d 658, 664–65 (D.C. Cir. 1978) ("[A]n interpretative rule is merely a clarification or explanation of an existing statute or rule.").
118. Allen v. Bergland, 661 F.2d 1001, 1007 (4th Cir. 1981).
119. Gibson Wine Co. v. Snyder, 194 F.2d 329, 331 (D.C. Cir. 1952).
120. *See* JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 73–77 (5th ed. 2012).
121. Levin, *supra* note 3, at 324 (citing Warshauer v. Solis, 577 F.3d 1330, 1337 (11th Cir. 2009); Air Transp. Ass'n of Am. v. FAA, 291 F.3d 49, 55–56 (D.C. Cir. 2002)).
122. *Id.*
123. Elizabeth Blackwell Health Ctr. for Women v. Knoll, 61 F.3d 170, 181 (3d Cir. 1995).
124. *Id.* at 187 (Nygaard, J., dissenting).
125. *See infra* Part II.B.4.

additional policy implications.[126] Most notably, in *American Mining Congress* the D.C. Circuit held that an interpretation of a statute can include a new and more detailed understanding of a regulation because interpretive rules must be able to "suppl[y] crisper and more detailed lines than the authority being interpreted."[127] Holding to the contrary, the court warned, would entail that "no rule could pass as an interpretation of a legislative rule unless it were confined to parroting the rule or replacing the original vagueness with another."[128]

3. Pursuant to Statutory Delegation

Often presented as a threshold test, courts consider whether Congress has delegated agencies the power to issue legislative rules and, if so, whether agencies relied on that delegation.[129] The premise of this test is that an agency that lacks legislative power, or an agency that fails to exercise delegated legislative power to promulgate a specific rule, necessarily issues only interpretive rules.[130]

Nevertheless, as some courts note, this inquiry may often be of limited value.[131] Because agencies have the power to issue interpretive rules, and because many agencies also have delegated legislative rulemaking authority,[132] inquiring whether the agency acted pursuant to statutory delegation often fails to illuminate whether the rule is legislative or nonlegislative.[133]

The Ninth Circuit, for example, noted the test's limited value when deciding whether a Forest Service memo was a legislative rule: "[T]he Forest Service had the authority to promulgate both legislative and interpretative rules concerning surpluses."[134] And because the Service did not indicate on which authority it was relying, the court had to look "for other indications" of the agency's intent.[135]

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126. *See* Homemakers N. Shore, Inc. v. Bowen, 832 F.2d 408, 413 (7th Cir. 1987). Judge Frank Easterbrook explained that though an amendment contained new language, the agency's action helpfully eliminated ambiguity: "Far better to eliminate than to perpetuate confusion." *Id.*; *see also* Alcaraz v. Block, 746 F.2d 593, 613–14 (9th Cir. 1984) (holding that "penalizing the agency for explaining" a regulation "would be like killing the messenger").

127. Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993).

128. *Id.*

129. *See* Children's Hosp. of the King's Daughters, Inc. v. Azar, 896 F.3d 615, 622 (4th Cir. 2018) ("When an agency relies on expressly delegated authority to establish policy . . . courts generally treat the agency action as legislative, rather than interpretive, rulemaking.").

130. W.C. v. Bowen, 807 F.2d 1502, 1504 (9th Cir.), *amended on denial of reh'g en banc*, 819 F.2d 237 (9th Cir. 1987); *see also* Bd. of Educ. v. Harris, 622 F.2d 599, 613 (2d Cir. 1979) ("[A]lways, the question is whether Congress intended to confer upon the agency the power to issue rules having the force and effect of law.").

131. Metro. Sch. Dist. v. Davila, 969 F.2d 485, 490 (7th Cir. 1992).

132. *Id.*

133. *See, e.g.*, *id.* (finding that the pursuant to statutory delegation test "returns us to the starting point . . . what kind of rule does the agency think it has promulgated?").

134. La.-Pac. Corp. v. Block, 694 F.2d 1205, 1209–10 (9th Cir. 1982).

135. *Id.* at 1210.

Still, some courts often use this test as an indication of a legislative rule when the congressional delegation leaves a regulatory gap for an agency to fill.[136] As the Fourth Circuit explained, when Congress leaves a gap in the statutory scheme, it can expressly delegate legislative authority to the agency.[137] Then, the agency's elucidation of that gap through rule promulgation will be a legislative rule.[138] Applying this distinction, the Eighth Circuit found that a rule was interpretive because the agency "was not filling in gaps in a statute which granted the agency broad discretion to carry out policy."[139]

4. Agency Binding

Particularly when determining whether an agency action is a general statement of policy or a legislative rule, courts inquire whether the agency has restricted its own administrators when executing their administrative duties. As the Eleventh Circuit explained, "The key inquiry . . . is the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not to follow that general policy in an individual case."[140]

Under the "agency binding" test, an agency action that allows administrators to exercise flexibility when making individualized determinations is a general statement of policy.[141] But when an agency action limits administrative discretion or establishes a binding norm, it effectively creates a new legislative rule.[142] Such actions are legislative, and they therefore must undergo notice-and-comment procedures.[143] The Eleventh Circuit explained that the agency binding test is useful because it encapsulates the key considerations of notice and comment:

> The significance of this factor is that it reveals whether, if objections to the rule cannot be voiced through notice and comment rulemaking . . . there will be a subsequent opportunity to object to a specific application of the rule. If an agency, or its official, is bound to apply an airtight rule in a given case it is important to allow specific objections prior to promulgation, lest these objections be forfeited.[144]

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136. *See, e.g.*, Coal. for Common Sense in Gov't Procurement v. Sec'y of Veterans Affairs, 464 F.3d 1306, 1317 (Fed. Cir. 2006).

137. Walton v. Greenbrier Ford, Inc., 370 F.3d 446, 452 (4th Cir. 2004) (quoting Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984)).

138. *Id.*

139. McKenzie v. Bowen, 787 F.2d 1216, 1222 (8th Cir. 1986).

140. Ryder Truck Lines, Inc. v. United States, 716 F.2d 1369, 1377 (11th Cir. 1983).

141. Sacora v. Thomas, 628 F.3d 1059, 1069 (9th Cir. 2010).

142. *Id.*

143. *See* W.C. v. Bowen, 807 F.2d 1502, 1505 (9th Cir.) ("Rules which substantially limit an agency's discretion are generally substantive rules."), *amended on denial of reh'g en banc*, 819 F.2d 237 (9th Cir. 1987).

144. Jean v. Nelson, 711 F.2d 1455, 1481–82 (11th Cir. 1983), *aff'd*, 472 U.S. 846 (1985).

But some courts and commentators have expressed concern about the agency binding test.[145] The Federal Circuit, for example, cautioned that an agency limiting its administrators' discretion does not make its actions legislative.[146] Instead, the court must look at whether that limitation adversely affects individual rights and obligations.[147] Administrative law scholars have also remarked that because the APA does not require notice and comment for issuances binding lower-level agency officials, courts should not mandate such a process.[148] Most forcefully, Richard Pierce warned, "With luck, the Supreme Court will have occasion to reject th[is] doctrine unequivocally before it begins to have [a] devastating effect."[149]

5. Create New Rights or Duties

The test for whether a rule creates new rights or duties, in its various formulations, has been the dominant test in this corner of administrative law.[150] Its origin is rooted in the common distinction between nonlegislative and legislative rules, in which the latter, unlike the former, have the force and effect of law.[151] In articulating this test, courts have noted that legislative rules "grant rights, impose obligations, or produce other significant effects on private interests."[152]

This status can often be gleaned from surveying the regulatory landscape before and after the challenged rule. If a rule creates rights or imposes obligations "not already outlined in the law itself," the rule is legislative.[153] As the D.C. Circuit remarked, this formulation is another way of ascertaining "whether the disputed rule really adds content to the governing legal norms."[154]

For example, the Third Circuit deemed a Federal Communications Commission (FCC) rule nonlegislative because it did not "impose new duties upon regulated parties."[155] In contrast, the Second Circuit held that a

145. *See* Warder v. Shalala, 149 F.3d 73, 82–83 (1st Cir. 1998) (holding that a rule may bind agency personnel and still remain nonlegislative for purposes of notice and comment).

146. Animal Legal Def. Fund v. Quigg, 932 F.2d 920, 929 (Fed. Cir. 1991).

147. *Id.*

148. Brief of Administrative Law Scholars as *Amici Curiae* in Support of Petitioners at 16–17, United States v. Texas, 136 S. Ct. 2271 (2016) (No. 15-674) [hereinafter Brief of Administrative Law Scholars].

149. *Id.* at 17 (alterations in original) (quoting 3 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 17.3 (5th ed. 2010)).

150. *See infra* Part II.B.4.

151. *See generally* U.S. DEP'T OF JUSTICE, *supra* note 4.

152. Batterton v. Marshall, 648 F.2d 694, 701–02 (D.C. Cir. 1980); *see also* Gray v. Sec'y of Veterans Affairs, 875 F.3d 1102, 1108 (Fed. Cir. 2017) ("[T]he ultimate focus of the inquiry is whether the agency action partakes of the fundamental characteristic of a regulation, i.e., that it has the force of law." (quoting Molycorp Inc. v. EPA, 197 F.3d 543, 545 (D.C. Cir. 1999)), *cert. granted*, Gray v. Wilkie, 139 S. Ct. 451 (2018).

153. La Casa del Convaleciente v. Sullivan, 965 F.2d 1175, 1177–78 (1st Cir. 1992).

154. Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 96 (D.C. Cir. 1997).

155. SBC Inc. v. FCC, 414 F.3d 486, 501 (3d Cir. 2005).

purported Department of Labor general statement of policy was a legislative rule, in part because it "changed existing rights and obligations."[156]

But other reviewing courts considering this test have argued for a more limited approach. The Ninth Circuit, for example, explained that even though regulations may have altered administrative duties or created hardships, that fact alone does not make them legislative rules.[157] Under this construction of the test, and given the expanding domain of interpretive rules,[158] it is becoming increasingly difficult to ascertain whether an interpretive rule that altered rights and duties crosses the line into the territory of a legislative rule.

6. Substantial Impact

Under the "substantial impact" test, agency actions that significantly impact the regulated parties are more likely to constitute a legislative rule and should undergo notice-and-comment procedures. This test has proven controversial, with some circuits lauding its value and others forcefully rejecting it.[159]

The Second,[160] Third,[161] Fourth,[162] and Fifth[163] Circuits have considered this test relevant. Most prominently, the Fifth Circuit held that *the* test in determining whether a rule is legislative is the extent to which a rule substantially impacts the regulated parties.[164] If a new agency policy substantially impacts the regulated public, "the new policy is a new substantive rule and the agency is obliged, under the APA, to submit the change for notice and comment."[165] Conversely, where an agency can demonstrate that its actions did not have a considerable impact on regulated parties, that may suggest that the agency properly relied on the notice-and-comment exemptions.[166]

156. Lewis-Mota v. Sec'y of Labor, 469 F.2d 478, 482 (2d Cir. 1972).

157. Chief Probation Officers v. Shalala, 118 F.3d 1327, 1334 (9th Cir. 1997). The court explained that this argument goes into the substantial impact test and is not dispositive. *Id.*

158. *See supra* Part I.A.3.

159. The Eighth, Tenth, Eleventh, and Federal Circuits have not weighed in on the substantial impact test. The First Circuit cautioned that the test is relevant but not dispositive. *See* Caribbean Produce Exch., Inc. v. Sec'y of Health & Human Servs., 893 F.2d 3, 8 (1st Cir. 1989).

160. Time Warner Cable Inc. v. FCC, 729 F.3d 137, 168 (2d Cir. 2013).

161. Chao v. Rothermel, 327 F.3d 223, 227–28 (3d Cir. 2003).

162. Burroughs Wellcome Co. v. Schweiker, 649 F.2d 221, 224 (4th Cir. 1981).

163. Texas v. United States, 809 F.3d 134, 171 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

164. Phillips Petroleum Co. v. Johnson, 22 F.3d 616, 620 (5th Cir. 1994), *modified on denial of reh'g en banc*, No. 93-1377, 1994 WL 484506 (5th Cir. Sept. 7, 1994).

165. Shell Offshore Inc. v. Babbitt, 238 F.3d 622, 630 (5th Cir. 2001).

166. U.S. Dep't of Labor v. Kast Metals Corp., 744 F.2d 1145, 1153–54 (5th Cir. 1984) (finding that the Department of Labor's guidelines were not legislative because they "cast[] not the stone of substantial impact").

The Sixth,[167] Seventh,[168] and Ninth[169] Circuits have expressly rejected the substantial impact test and have enumerated its shortcomings. A Sixth Circuit case illustrates some of these shortfalls. In *Friedrich v. Secretary of Health & Human Services*,[170] a Medicare recipient sued the Secretary of HHS for exempting a critical medical procedure from Medicare coverage.[171] Under Part B of the Medicare Act, the Secretary must deny reimbursement for services not "reasonable and necessary for the diagnosis or treatment" of a claimant's illness or injury.[172] Acting accordingly, HHS issued a manual stating that the required treatment was neither necessary nor reasonable and determined it would no longer be covered under Medicare Part B.[173]

Friedrich alleged that the Secretary's manual was a legislative rule and was procedurally invalid because it had not undergone notice and comment.[174] Though HHS countered that the manual was interpretive, the magistrate judge relied on the substantial impact test and held that HHS failed to comply with the APA procedures for legislative rules.[175]

The circuit court disagreed and explained why it was improper to use the substantial impact test to distinguish between legislative and interpretive rules:

> The plaintiff also contends that the [manual] should be considered legislative or substantive because it has a substantial impact on a large number of Medicare beneficiaries. . . . Any determination by the Secretary . . . will have a substantial impact on a large number of people. The extent of the impact is not an indicative factor in our search for the proper characterization of the [manual].[176]

Because the Secretary interpreted the meaning of "reasonable and necessary" in the Medicare Act, the court reasoned that the substantial impact test would not only fail to shed light on a rule's "true" nature, but it would also point to the wrong conclusion.[177] Accordingly, it reversed the lower court and held that the manual was an interpretive rule, exempt from notice and comment.[178]

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167. Friedrich v. Sec'y of Health & Human Servs., 894 F.2d 829, 836 (6th Cir. 1990) (holding that "the level of impact on interested parties is not a factor in correctly classifying a rule or regulation").

168. Metro. Sch. Dist. v. Davila, 969 F.2d 485, 493 (7th Cir. 1992) (explaining that "[p]revailing authority rejects the proposition that a rule that has substantial impact is necessarily legislative").

169. Rivera v. Becerra, 714 F.2d 887, 891 (9th Cir. 1983).

170. 894 F.2d 829 (6th Cir. 1990).

171. *Id.* at 831–32.

172. *Id.* at 830 (quoting 42 U.S.C. § 1395y(a)(1)).

173. *Id.* at 831–32.

174. *Id.* at 832.

175. *Id.* at 832–33.

176. *Id.* at 836.

177. *Id.*

178. *Id.* at 838.

Finally, the D.C. Circuit stands alone among its sister circuits in rejecting the substantial impact test for interpretive rules[179] but applying it for procedural rules.[180] This distinction produces a somewhat puzzling inconsistency, exacerbated by the harsh critique some panels in the D.C. Circuit have resorted to when describing the test. In *Cabais v. Egger*,[181] the court explained that, after *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,[182] it is clear that courts may not impose procedural requirements on agencies beyond those contemplated by the APA.[183] The court added that "[t]he words 'substantial impact' do not appear in the APA" and that the test is considered a "judicial gloss."[184]

But in the context of procedural rules, panels of the D.C. Circuit have noted the test's explanatory power and have distinguished between procedural and legislative rules based on the substantial impact test.[185] Applying the test to a rule under dispute, one court found that the rule was legislative because it "substantively affect[ed] the public to a degree sufficient to implicate the policy interests animating notice-and-comment rulemaking."[186]

C. Public-Focused and Agency-Focused Tests

The six tests so defined, it is analytically insightful and useful to classify them into two categories: (1) agency-focused tests and (2) public-focused tests.

1. Categorizing the Tests

The agency label, clarification, pursuant to statutory delegation, and agency binding tests are agency-focused. These tests are typified by a legal analysis that focuses on the agency's action or inaction rather than a rule's effect on the public. In contrast, the create new rights or duties test and substantial impact test are public-focused. These tests emphasize the adverse effect on the regulated public and disregard the agency's justification for choosing certain regulatory measures.

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179. Chem. Waste Mgmt., Inc. v. EPA, 869 F.2d 1526, 1537 (D.C. Cir. 1989) ("[T]he impact of a rule has no bearing on whether it is legislative or interpretative; interpretative rules may have a substantial impact on the rights of individuals.").

180. Chamber of Commerce v. U.S. Dep't of Labor, 174 F.3d 206, 211–12 (D.C. Cir. 1999) ("[I]t is apparent that the Directive cannot be considered procedural. The Directive is intended to, and no doubt will, affect the safety practices of thousands of employers.").

181. 690 F.2d 234 (D.C. Cir. 1982).

182. 435 U.S. 519 (1978).

183. *Cabais*, 690 F.2d at 237 (citing *Vt. Yankee*, 435 U.S. at 524).

184. *Id.* at 237 n.3. Still, the court noted that while the test may never constitute an independent basis for a determination, it could be "one of several criteria" in determining whether a rule should be exempt from the APA. *Id.*

185. Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 653 F.3d 1, 5–6 (D.C. Cir. 2011).

186. *Id.* at 6. *But see* Pub. Citizen v. Dep't of State, 276 F.3d 634, 640 (D.C. Cir. 2002) (noting that the D.C. Circuit has gradually shifted away from the substantial impact test).

This binary classification is informed by the underlying premise of each test. In brief, the agency label test[187] analyzes the agency's actions, namely the label it has attached to a rule[188] and where and whether the rule was published.[189] The clarification test,[190] while turning on a textual analysis, assesses whether the agency acted reasonably within the confines of the regulation it is claiming to interpret.[191] The pursuant to statutory delegation test[192] focuses on the agency's mandate from Congress and considers whether the agency acted accordingly.[193] The agency binding test[194] analyzes the agency's own administrators and considers whether they are free to exercise discretion in future cases.[195]

In contrast, the public-focused tests determine whether, and to what extent, the public has been affected by a disputed rule. The create new rights or duties test[196] determines whether individuals bound by the agency's pronouncement must comply with new rules or restrictions.[197] The substantial impact test[198] identifies the relevant affected party and measures the rule's impact on that party.[199] While these tests necessarily consider the agency's action, their primary concern is the regulated public.

The academic literature provides additional support for the binary classification.[200] Some scholars emphasize the adverse effect on the regulated public.[201] Perhaps most famously, Professor Robert Anthony explained that while nonlegislative rules do not purport to bind the public,

187. *See supra* Part I.B.1.

188. *See* First Nat'l Bank of Chi. v. Standard Bank & Tr., 172 F.3d 472, 478 (7th Cir. 1999) ("[W]e give great weight to an agency's expressed intent as to whether a rule clarifies existing law or substantively changes the law.").

189. *See* United States v. Alameda Gateway Ltd., 213 F.3d 1161, 1168 (9th Cir. 2000) ("[T]he [regulation] was not published in either the Code of Federal Regulations or the Federal Register, providing further evidence that the regulation was not intended to be binding.").

190. *See supra* Part I.B.2.

191. *See, e.g.*, United States v. Kriesel, 508 F.3d 941, 946 (9th Cir. 2007).

192. *See supra* Part I.B.3.

193. *See, e.g.*, Ballesteros v. Ashcroft, 452 F.3d 1153, 1159 (10th Cir. 2006).

194. *See supra* Part I.B.4.

195. *See, e.g.*, Sacora v. Thomas, 628 F.3d 1059, 1069 (9th Cir. 2010); Ryder Truck Lines, Inc. v. United States, 716 F.2d 1369, 1377 (11th Cir. 1983).

196. *See supra* Part I.B.5.

197. *Compare* Cathedral Candle Co. v. U.S. Int'l Trade Comm'n, 400 F.3d 1352, 1369 (Fed. Cir. 2005) (holding that a rule was nonlegislative because "the Commission's position did not constitute a substantive rule having the force and effect of law"), *with* Xin-Chang Zhang v. Slattery, 55 F.3d 732, 746 (2d Cir. 1995) (holding that a rule was legislative because it "create[d] a new basis on which" the affected public must rely and "change[d] an existing policy").

198. *See supra* Part I.B.6.

199. *See, e.g.*, Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 653 F.3d 1, 6 (D.C. Cir. 2011).

200. *See* Seidenfeld, *supra* note 59, at 332 (comparing the works of Robert Anthony and Peter L. Strauss); *see also* Anthony, *supra* note 22, at 1372 (concluding that numerous policy documents bind the public and therefore should be issued as legislative rules); Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 807 (2001) (criticizing the D.C. Circuit for unduly restricting agency use of guidance documents).

201. *See* Seidenfeld, *supra* note 59, at 345–52.

"often an agency will make use of such rules with the purpose or effect of imposing a *practical* norm, if not a *legally* binding one, upon the regulated or benefitted public."[202]

These public-focused tests are motivated by a fear of untoward agency actions. "People rightly resent being surprised by new interpretations that the government suddenly pulls out of its nonlegislative hip pocket . . . . We should consider erecting some protections to forestall use of the kinds of interpretations that affect the public most harshly."[203]

But other scholars frame their concerns differently and, perhaps as a result, reach different conclusions. As Professor Seidenfeld notes, scholars fearing the consequences of the public-focused analysis argue that such tests exert an undue burden on agency operation.[204] Responding to Anthony's arguments, Professor Donald Elliott, a former general counsel for the Environmental Protection Agency (EPA), warned: "If the courts were to follow Anthony . . . the modern administrative process would literally grind to a halt."[205] Illustrating this proposition, Professor Thomas McGarity notes that "the fact that the air and waters of the United States are still polluted, workplaces still dangerous, motor vehicles still unsafe, and consumers still being deceived is attributable to the expense and burdensomeness of the informal rulemaking process."[206] In sum, these scholars highlight concerns about inefficient rulemaking procedures and the perils of halting agency action.

This binary classification is, of course, oversimplifying both the case law and academic literature. Some of these tests do not lend themselves to a clear dichotomy. The clarification test, for example, takes many forms, and courts who employ it may explicitly or implicitly refer to the alleged clarification as a benefit to the public.[207] Additionally, while scholars on both sides of the debate highlight different concerns, they do not discredit the contrary position.[208] Instead, they differ in shaping and achieving the proper balance between agency efficiency and public participation.

These shortcomings notwithstanding, this analysis is qualitatively and empirically useful because the tests grouped in the two categories share

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202. Robert A. Anthony, *"Well, You Want the Permit, Don't You?" Agency Efforts to Make Nonlegislative Documents Bind the Public*, 44 ADMIN. L. REV. 31, 32 (1992) (second emphasis added) (arguing that the proper test is inquiring whether agencies intended to, and effectively did, bind the public).

203. *Id.* at 39.

204. *See* Seidenfeld, *supra* note 59, at 352.

205. E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1494 (1992).

206. Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1391 (1992).

207. *See, e.g.*, Homemakers N. Shore, Inc. v. Bowen, 832 F.2d 408, 413 (7th Cir. 1987). While the court focuses on the agency's motivations in issuing an interpretive rule, it also highlights the benefits to the public: "[The previous rule] produced confusion inside and outside the Department, confusion that the [interpretive rule] eliminates. Far better to eliminate than to perpetuate confusion." *Id.*

208. *See, e.g.*, McGarity, *supra* note 206, at 1403 ("[I]t is generally a good idea for agencies to analyze carefully the consequences of proposed rules on the public and on regulatees . . . .").

common themes that permeate the literature and jurisprudence. Empirically, categorizing the tests into binary categories provides insights that these tests, individually considered, could not support.[209]

2. Locating the Dividing Line: A Hypothesis

This Note hypothesizes that courts relying on agency-focused tests will be more likely to find that a rule is nonlegislative and, conversely, that courts relying on public-focused tests will be more likely to hold that a rule is legislative. This hypothesis is rooted in the different considerations that define the scholarship. Scholars such as McGarity and Elliot,[210] for example, focus on considerations of efficient rulemaking procedures, presumptions of procedural validity, and the benefits of nonlegislative rules.[211] These are all encompassed in the agency-focused analysis and thus appear to more readily support a conclusion that the agency acted permissibly.

In contrast, the public-focused approach, most notably promoted by Professor Anthony, brings to the forefront the concerns and frustrations of a regulated public that has been afflicted with new obligations via an unchallengeable and private proceeding.[212] The create new rights or duties test and substantial impact test are particularly apt to capture such considerations. Stated differently, the hypothesis is that courts emphasizing the burdens on different parties—agencies or the public—will reach different results.

Before turning to the empirical analysis, it is important to highlight one analytical drawback that this hypothesis introduces. Namely, because there is no uniform test, courts may choose to employ a certain test to support their predetermined conclusion and avoid tests that would point in the opposite direction. Testing the hypothesis therefore may not reveal the explanatory power of the two approaches, but instead may merely demonstrate that courts reference the tests most suitable to their conclusion.

The concern that courts will cherry-pick factor tests that best fit their predetermined conclusion was notably articulated by Justice Scalia.[213] He argued that judges will chose a test that will produce an outcome "favored by the[ir] personal (and necessarily shifting) philosophical dispositions."[214] In the matter of differentiating legislative from nonlegislative rules, the concern is even greater given the lack of a standard test between the circuits and even within a single circuit.[215]

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209. Some of the tests appear less frequently in the case law and therefore do not provide meaningful inferences from a statistical-analysis standpoint.

210. *See* Elliott, *supra* note 205, at 1491–94; McGarity, *supra* note 206, at 1397–99.

211. Elliott, *supra* note 205, at 1491–96.

212. *See generally* Anthony, *supra* note 22.

213. *See* John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 754 (2017).

214. Rutan v. Republican Party of Ill., 497 U.S. 62, 96 (1990) (Scalia, J., dissenting); *see also* McDonald v. City of Chicago, 561 U.S. 742, 795 (2010) (Scalia, J., concurring) (arguing that a multifactor test is more confusing than revealing).

215. *See supra* Part I.B.6.

Accordingly, the meaningful difference between the public-focused and agency-focused tests can be explained not by the tests' power to shed light on the dispute, but instead by the courts' predilection to adopt the analysis that best suits the panel's preconceived notions. Nevertheless, this analysis can provide meaningful insights and allows for a simple distinction between the tests.

II. EMPIRICAL ANALYSIS

The focus of this empirical analysis is measuring the effect of using each of the six tests when a court is determining whether a rule is legislative or nonlegislative. Specifically, this Note seeks to ascertain whether, by employing any of the six tests, a court is more or less likely to find that a rule is legislative. Finally, this Part presents its findings by separating the tests into the two identifiable categories of agency-focused tests and public-focused tests discussed in Part I.C.

The empirical study covers 241 cases from across the thirteen circuits. The earliest case is from 1952 and the latest is from 2018. The vast majority of the cases were decided after the Court's seminal decision in *Vermont Yankee*.[216] Each of the tests appeared in nearly every circuit. In 205 cases, a court used more than one test. Overall, the tests appeared a total of 588 times across all 241 opinions.

This analysis is organized as follows: Part II.A outlines the empirical study's methodology. It details how each test is classified and how the database is structured. Part II.B presents the results from the study of the 241 cases, Parts II.B.1 through II.B.3 detail patterns in the case law across circuits and over time, and Part II.B.4 provides a detailed analysis of the use or rejection of each test. Finally, Part II.B.5 revisits this Note's hypothesis that using public-focused tests increases the likelihood of a finding that a rule is legislative.

A. Methodology

The following explains which cases comprise the dataset and how they were chosen, and then details how the tests were identified and coded.

1. Finding Cases

The 241 cases in the dataset were mostly located by the following Boolean searches on Westlaw: "'legislative rule' OR 'substantive rule' & APA OR 'Administrative Procedure Act'"; "'interpretive rule' OR 'interpretative rule' & APA OR 'Administrative Procedure Act'"; "'general statement of policy' OR 'policy statement' & APA OR 'Administrative Procedure Act'"; "'procedural rule' OR 'rule of agency procedure' & APA OR 'Administrative Procedure Act'".

216. 435 U.S. 519, 524 (1978) (holding that courts may not add additional procedural requirements not already outlined in the APA).

A minority of the cases did not appear in these searches. Instead, they were discovered in one of three ways: first, by referring to cases cited in court opinions that were found using the Westlaw searches; second, by using the Westlaw headnotes feature to find cases citing other opinions; and third, by referring to cases cited in scholarly articles.

In the vast majority of the cases in the database, a petitioner is challenging an agency for circumventing the notice-and-comment procedures by improperly relying on the APA's exemptions.[217] In a few cases, petitioners actually tried to remove themselves from a rule's coverage by claiming that a rule is nonlegislative.[218] This difference is meaningful given the presumptions about how agencies and plaintiffs frame their arguments. Nevertheless, because a court's analysis is effectively the same in both types of cases, they are both considered.

Finally, cases in the database meet two conditions. First, these cases were decided on the merits. Challenges resolved on issues such as standing or mootness were not coded. Second, the court's opinion included some, even minimal, analysis of the reasons for determining whether a rule is legislative or nonlegislative. Decisions that affirm or deny a lower court's determination without an explanation were not coded into the study.

2. Reciting Precedent or Applying a Test?

The empirical analysis determines the impact of a court using a particular test to find whether or not a rule is legislative. This invites the question of what constitutes "using" a test. This Note only examines cases that *expressly* rely on one of the six tests.[219] Such reliance is manifested by courts' application of one or more of the tests to the facts of a particular dispute rather than a mere recitation of a precedent or administrative law principle.[220]

3. Identifying the Tests

Determining when a court uses a test is fairly simple in three instances. First, opinions often refer to the tests by the terminology this Note employs.

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217. *See, e.g.*, Warshauer v. Solis, 577 F.3d 1330, 1334 (11th Cir. 2009) ("[Plaintiff] filed the present action under the [APA] seeking to enjoin the Secretary of Labor . . . from enforcing [a regulation] without the Secretary first engaging in notice and comment rulemaking."); Oregon v. Ashcroft, 368 F.3d 1118, 1133 (9th Cir. 2004) ("[Petitioners] argue that the Ashcroft Directive is not a valid agency rule—and thus is not entitled to deference—[because] the Attorney General did not promulgate the Ashcroft Directive pursuant to the Administrative Procedure Act's notice-and-comment rulemaking procedures . . . ."), *aff'd sub nom.* Gonzales v. Oregon, 546 U.S. 243 (2006).

218. *See, e.g.*, United States v. Lott, 750 F.3d 214, 217 (2d Cir. 2014). Lott, a convicted sex offender, argued that the sentencing guidelines used in his trial were interpretive rules. Accordingly, he alleged that the Attorney General improperly relied upon the guidelines as a rule with the force and effect of law. *Id.*

219. *See* James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 5 (2005) (identifying the usage of canons of construction by assessing courts' express reliance on them).

220. *See, e.g.*, Dia Navigation Co. v. Pomeroy, 34 F.3d 1255, 1264 (3d Cir. 1994) (holding that "the INS policies at issue in this case constitute rules for purposes of the APA").

Examples include: "[the change had] a substantial impact on the motor carrier industry";[221] the Secretary "did not create rights or change existing law";[222] and "we find that the agency did not intend to exercise its delegated law-making power."[223]

Second, some opinions employ a synonym or an equivalent term for the tests. For example, when the Fourth Circuit referred to the "pursuant to statutory delegation" test, it noted: "the Bureau of Prisons has exercised the discretion given to it by Congress."[224] Similarly, when the Tenth Circuit used an equivalent of the create new rights or duties test, it noted that the "interpretation did not create or alter a legal obligation."[225]

The third instance includes opinions with language that is not an equivalent of this Note's terminology but refers to substantially the same underlying principle. For example, while the Second Circuit did not explicitly use the terminology "agency label" in *Xin-Chang Zhang v. Slattery*,[226] it observed that "[t]he January 1990 interim rule is self-described as interpretive."[227]

Each instance of these three categories was coded as using the defined test. The more challenging task in this analysis, however, is classifying opinions that use more obscure language. The guiding principle of the methodology can be summarized as one of erring on the side of caution. Therefore, opinions that seem to suggest that the court is relying on a particular test, but are too vague to draw a clear conclusion, were not included in the dataset. Context also guides the analysis. If a circuit has previously endorsed or rejected a certain test, these past decisions informed the determination.

For example, in *Malone v. Bureau of Indian Affairs*,[228] the Ninth Circuit held that a memo characterized by the agency as an interpretive rule was instead a legislative rule.[229] The court noted that the memo "conclusively affect[s] the rights" of individuals like the petitioner.[230] A plausible reading of this language would indicate that the court is relying on the substantial impact test. However, the court does not mention the test, and the word "conclusively" could encompass meanings other than substantial and its synonyms. Additionally, the Ninth Circuit has elsewhere rejected the substantial impact test in the context of interpretive rules.[231] Therefore, the analysis does not code *Malone* as relying on the substantial impact test.

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221. Brown Express, Inc. v. United States, 607 F.2d 695, 702 (5th Cir. 1979) (applying the substantial impact test).

222. McKenzie v. Bowen, 787 F.2d 1216, 1222 (8th Cir. 1986) (applying the create new rights or duties test).

223. La Casa del Convaleciente v. Sullivan, 965 F.2d 1175, 1179 (1st Cir. 1992) (applying the pursuant to statutory delegation test).

224. Pelissero v. Thompson, 170 F.3d 442, 447 (4th Cir. 1999).

225. Ballesteros v. Ashcroft, 452 F.3d 1153, 1159 (10th Cir. 2006).

226. 55 F.3d 732 (2d Cir. 1995).

227. *Id.* at 745–46.

228. 38 F.3d 433 (9th Cir. 1994).

229. *Id.* at 438–39.

230. *Id.* at 438 (quoting Linoz v. Heckler, 800 F.2d 871, 877 (9th Cir. 1986)).

231. Rivera v. Becerra, 714 F.2d 887, 891 (9th Cir. 1983).

B. Results and Discussion

The study includes 241 cases from the thirteen circuit courts. The earliest case is from 1952[232] and the latest is from July 23, 2018.[233] In 205 cases, courts used more than one test in their analysis. Overall, courts mentioned one of the six tests 588 times.

In total, circuit courts found that a rule is legislative in 66 out of 241 cases in the database, or in 27.4 percent of challenges to agency rules. In the remaining 175 cases, courts held that the rules were either interpretive rules, general statements of policy, or rules of agency procedure.

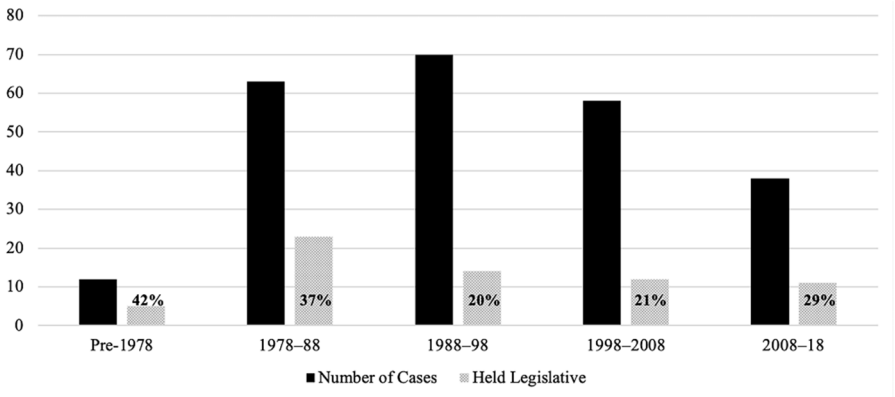
Table 1: Total Holdings: Legislative or Nonlegislative (N = 241)

	Cases	**Percentage (%)**
Nonlegislative	175	72.6
Legislative	66	27.4

1. Challenges to Nonlegislative Rules over Time

Two patterns appear when charting the total number of cases over five distinct time periods and the total number of cases in which a rule was held legislative.

Chart 1: Number of Cases over Time and Percentage of Cases in Which Courts Determined a Rule Is Legislative (N = 241)[234]



232. Gibson Wine Co. v. Snyder, 194 F.2d 329 (D.C. Cir. 1952).

233. Children's Hosp. of the King's Daughters, Inc. v. Azar, 896 F.3d 615 (4th Cir. 2018).

234. The dark bars represent the total number of cases in the time period. The lighter bars represent the number of cases in which a court held that a rule was legislative. The percentages represent the ratio of the number of findings that a rule was legislative to the number of cases within the time period. Thus, for example, in the decade between 1978 and 1988, there are sixty-three cases in the study. Courts found that a rule was legislative in twenty-three of the cases, or 37 percent.

First, the total number of cases on this issue peaked between 1988 and 1998 and has declined gradually in the two decades since. Second, the percentage of courts holding that a rule is legislative peaked before 1988, declined in the period from 1998 to 2008, but has been trending upward in the past decade.

Several factors may help explain these patterns. First, success on the merits may have invited more legal challenges. Given that over a third of the challenges to nonlegislative rules were successful before 1988, observant litigants were likely more eager to challenge an agency's failure to engage in notice and comment. Conversely, the diminished success of these challenges in the subsequent decade might have dissuaded similarly situated litigants.

Second, developments in administrative rulemaking and the perception of agency work may have affected overall patterns. From the significant expansion of agency actions during the 1970s,[235] a more exacting standard of judicial review under the APA of agency decision-making emerged in the late 1970s and 1980s.[236] This trend could have encouraged litigants to challenge agencies in front of more discerning panels.

Third, the Court's decisions in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[237] and *United States v. Mead Corp*.[238] may have also contributed to the continued decline of challenges in the past two decades.[239] As Professor Anne Joseph O'Connell explained,[240] one possible outcome of *Mead* is that agencies may now prefer the more laborious notice-and-comment rulemaking process to issuing informal guidance.[241] Because rules promulgated through notice-and-comment procedures will likely receive *Chevron* deference, agencies may be more willing to employ such procedures.[242]

Finally, the higher ratio of success in the past decade may also be influenced by the concern that some politicians[243] and commentators[244] have expressed regarding the "administrative state." This renewed attention to and concern about unbridled agency action could have motivated a more skeptical judicial review of agency action. Based on past trends, the next

235. ESKRIDGE ET AL., *supra* note 5, at 896 (explaining that "United States agencies in the 1970s showed unprecedented interest in rulemaking rather than adjudication").

236. *Id.* at 897–98.

237. 467 U.S. 837 (1984).

238. 533 U.S. 218 (2001).

239. Note, however, that the sample size is limited and does not account for challenges that ended at the district court level. Accordingly, conclusions from the data should be carefully drawn.

240. O'Connell, *supra* note 7, at 522.

241. *Id.*

242. *Id.*

243. Susan E. Dudley, *Trump Wants to Deconstruct the Administrative State. Can He?*, NBC NEWS (Oct. 16, 2017), https://www.nbcnews.com/think/opinion/trump-wants-deconstruct-administrative-state-can-he-ncna810576 [https://perma.cc/9KZL-HVGV].

244. Chuck DeVore, *The Administrative State Is Under Assault and That's a Good Thing*, FORBES (Nov. 27, 2017, 1:53 PM), http://www.forbes.com/sites/chuckdevore/2017/11/27/the-administrative-state-is-under-assault-and-thats-a-good-thing/ [https://perma.cc/8PBS-PKBF].

decade could see a similar increase in the number of challenges to agencies invoking nonlegislative exemptions.

2. Circuit Court Holdings

Table 2: Rules Held to Be Legislative by Circuit (N = 241)

Circuit	Total Number of Cases	Held Legislative (%)
First	6	2 (33.3)
Second	16	5 (31.3)
Third	16	4 (25.0)
Fourth	17	5 (29.4)
Fifth	13	6 (46.2)
Sixth	15	3 (20.0)
Seventh	9	1 (11.1)
Eighth	6	2 (33.3)
Ninth	44	10 (22.7)
Tenth	9	0 (0.00)
Eleventh	6	1 (16.7)
D.C.	68	23 (33.8)
Federal	16	4 (25.0)

Because circuits other than the Ninth and the D.C. Circuit have decided relatively few cases, it is difficult to draw meaningful conclusions or patterns from circuit court holdings. Indeed, a regression analysis indicates that only the Tenth Circuit offers statistically significant data.

Table 3: Regression Analysis: Differentiating Rules by Circuit (N = 241)[245]

Circuit	Held Legislative
First	-.09 (.18)
Second	-.06 (.12)
Third	-.11 (.12)
Fourth	-.05 (.12)
Fifth	.01 (.13)
Sixth	-.14 (.12)
Seventh	-.09 (.15)
Eighth	-.01 (.18)
Ninth	-.13 (.08)
Tenth**	-.35 (.15)
Eleventh	-.13 (.18)
D.C.*	.18 (.09)
Federal	-.10 (.12)

As Table 3 demonstrates, few meaningful inferences can be drawn by testing a specific circuit's likelihood of finding that a rule is legislative. On the one hand, this lack of significance is perhaps attributable to courts' inability to fashion a cohesive test and the field's changing consensus on the proper tests to be employed. On the other hand, and perhaps more encouragingly, this could also indicate that courts are indeed conducting a neutral case-by-case analysis, and therefore their rulings are unrelated to the court's predisposition to side with or against an agency.

A notable exception, however, is the Tenth Circuit, which the analysis indicates is 35 percent more likely to side with an agency and hold that a rule is nonlegislative. Although this result is statistically significant, the Tenth Circuit only heard nine cases on the issue and therefore had fewer opportunities to reach a different result.

3. Number of Tests Considered

In the 241 cases, the tests were invoked 588 times. In Table 4, the leftmost column represents the number of tests an opinion expressly relied upon. Thus, in 34 cases, the court relied on only 1 test; in 109 cases, the court relied on 2 tests; and so on. The "Held Legislative" column represents the number

245. $*p < 0.1$; $**p < 0.05$; $***p < 0.01$. Robust standard errors appear in parentheses next to coefficients. The base category for comparison is no effect, (-1) represents a finding that a rule is nonlegislative, and (+1) represents that a rule is legislative. This Note follows the traditional social-science approach to regression results, where a p value of .05 or less indicates a statistically significant result. *See* RAND WILCOX, MODERN STATISTICS FOR THE SOCIAL AND BEHAVIORAL SCIENCES 147 (2d ed. 2017).

of times a court held that a rule was legislative rather than nonlegislative. Therefore, from the 34 cases in which the court relied on one test, it found the rule was legislative in eight of the cases.

Table 4: Number of Tests Relied Upon (N = 588)

Number of Tests Used	Cases	Held Legislative (%)
1	34	8 (23.5)
2	109	28 (25.9)
3	60	18 (30)
4	30	12 (40)
5	7	0 (0)
6	1	0 (0)

Increasing the number of tests considered in a given case does not have a statistically significant effect on the likelihood of finding that a rule is legislative.

Table 5: Statistical Significance of Number of Tests Relied Upon (N = 588)

	Held Legislative
Number of tests considered	.01 (.03)

The regression in Table 5 measures the impact of increasing the number of tests considered—from one to six—on a court's likelihood of finding that a rule is legislative. Increasing the number of tests considered in a given case does not have a statistically significant effect on the likelihood of finding that a rule is legislative. This is perhaps rooted in three reasons. First, courts may dismiss "weaker" challenges where the panel decides a rule is nonlegislative, and therefore the panel does not need to engage in a lengthy discussion that differentiates legislative from nonlegislative rules.[246] Conversely, courts perhaps provide a more detailed analysis, including multiple tests, to better justify why an agency action is permissible under the APA in challenges that appear more meritorious. Finally, it is also possible that considering more tests increases the suspicion that an agency acted impermissibly. As it relates to the public-focused and agency-focused analysis, perhaps courts considering tests from both approaches are able to better scrutinize an

246. For example, the Sixth Circuit held that a rule is interpretive in a brief paragraph:

> An interpretive rule is one "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." We agree with the district court that [the rule] "advises the public of the DOI's construction of [the statute]" . . . and hence that notice and comment were not required.

United States v. Century Offshore Mgmt. Corp. (*In re* Century Offshore Mgmt. Corp.), 111 F.3d 443, 453 (6th Cir. 1997) (first quoting Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 99 (1995)).

agency's action. In sum, however, increasing the number of tests considered has no bearing on the likely success of a challenge to an agency rule.

4. The Six Tests

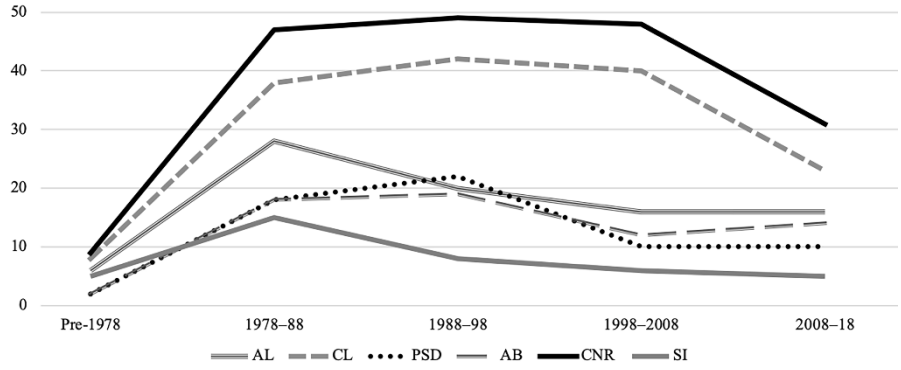
This Note seeks to determine whether using any one of the six tests affects the likelihood that a court will find that a rule is legislative. The following discussion details the patterns the study found about the six tests.

Table 6: Overall Frequency for Each Test in the Database (N = 241)

Test	Cases	% Used
Agency Label	86	35.68
Clarification	151	62.66
Pursuant to Statutory Delegation	62	25.73
Agency Binding	65	26.97
Create New Rights or Duties	184	76.35
Substantial Impact	40	16.60

From 1952 until 2018, the most prominent test in the case law has been the create new rights or duties test, which appears in 184 out of 241 cases. Also appearing in over half of the cases is the clarification test. Charting and plotting test usage throughout the years demonstrates some of the trends in the analysis.

Graph 1: Test Appearance over Time[247]



Graph 1 demonstrates developments and trends in the case law over time. First, the create new rights or duties test and clarification test are persistently the most prominent tests. Second, the pursuant to statutory authority test

247. AL = Agency Label; CL = Clarification; PSD = Pursuant to Statutory Delegation; AB = Agency Binding; CNR = Create New Rights or Duties; SI = Substantial Impact.

increased in appearance in the decade between 1988 and 1998. This is perhaps explained by the Supreme Court's 1984 holding in *Chevron*, which focused on congressional delegation to an agency as the first step of its analysis.[248] Third, the substantial impact test has been steadily decreasing in appearance since the early 1980s.

Tables 7 and 8 below represent the key findings of this Note: the effects of using one of the six tests in a court's determination of whether a rule is legislative or nonlegislative.

These tables represent the results of the following regression analysis. The independent variable is the test considered. The base category for comparison is no effect. Table 7 is a simple regression model with the test considered as an independent variable, and whether the rule was held as legislative (+1) or nonlegislative (-1) as the dependent variable.[249] Thus, for example, a court using the agency label test is 10 percent less likely to find that a rule is legislative or, conversely, 10 percent more likely to find that a rule is nonlegislative. Table 8 introduces two additional control variables to the regression: circuit court and time period.[250]

Table 7: Simple Model: Tests Considered and Finding that an Agency Rule is Legislative (N = 241)

Test	Simple Model
Agency Label*	-.10 (.06)
Clarification***	-.19 (.06)
Pursuant to Statutory Delegation	.03 (.12)
Agency Binding	.05 (.06)
Create New Rights or Duties***	.27 (.06)
Substantial Impact**	.16 (.07)

Table 8: Control Model: Tests Considered and Finding that an Agency Rule is Legislative (N = 241)

Test	Control Model
Agency Label**	-.13 (.06)
Clarification***	-.18 (.06)
Pursuant to Statutory Delegation	.04 (.07)
Agency Binding	.02 (.07)
Create New Rights or Duties***	.27 (.09)
Substantial Impact	.11 (.08)

248. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

249. The dependent variable is binary, with (-1) representing a finding that a rule is nonlegislative and (+1) representing a finding that a rule is legislative.

250. The circuit court variable includes the thirteen circuits. The time periods are defined as pre-1978, 1978–1988, 1988–1998, 1998–2008, 2008–2018.

Part II.B.4.a through Part II.B.4.f below analyze the study's results for each of the tests.

a. Agency Label

The agency label test is statistically significant when introducing the circuit court and time period control variables and falls slightly short of the statistically significant threshold in the simple regression model.

Relying on Table 8, a court using the agency label test will be 13 percent more likely to find that a rule is nonlegislative and that the agency action is permissible. This result is perhaps explained by the premise that some courts have outlined when relying on this test: there is a presumption of procedural validity when the court reviews an agency action.[251] Thus construed, the agency label test appears to encapsulate a limited role for the court in checking agency action. This presumption, which has been increasingly reiterated by the Supreme Court, perhaps also explains why controlling for time periods in Table 8 increases the significance of the agency label test.

Connor Raso's analysis of the court's role in administrative law is insightful here.[252] Technically, three entities may punish agencies for procedurally defective process: the president, Congress, and the courts.[253] As Raso notes, however, the first two entities rarely take up that mantle,[254] and courts are left as the sole barrier between the agency's will and the affected public.

Given that role, judges who explicitly acknowledge that an agency has labeled a rule nonlegislative and then proceed to hold that a rule is legislative, find themselves in the position of having to tell an agency: "you are lying." Meaning, if the court holds that a rule is legislative even though the agency labeled it as nonlegislative, the court is in fact holding that the agency has misled the president and Congress and has attempted, unsuccessfully, to mislead the court.

Indeed, any determination that the agency failed to follow notice-and-comment procedures carries such implications. But when judges recite in detail the agency's actions, such as an administrator's pronouncement that a rule is nonlegislative, they make their disagreements more pronounced and place the court in a seemingly more activist position.

In sum, the results in Tables 7 and 8 indicate that considering the agency label increases the likelihood that the court will agree with the agency and hold that the rule did not violate the notice-and-comment provisions of the APA. This is explained both by the presumption of procedural validity that

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251. *See, e.g.*, United States v. Alameda Gateway Ltd., 213 F.3d 1161, 1168 (9th Cir. 2000).

252. Raso, *supra* note 22, at 90.

253. *Id.* at 80.

254. Recently, however, the Trump administration appears to be challenging that proposition. *See* Memorandum from Jefferson Sessions, Att'y Gen., on Prohibition on Improper Guidance Documents 1 (Nov. 16, 2017).

courts confer on agencies and by courts' unwillingness to check an agency and hold that it has attempted to deceive the courts.

b. Clarification

In both regression models, the clarification test is statistically significant and increases the likelihood of a finding that a rule is legislative by 19 percent and 18 percent, according to Table 7 and Table 8 respectively.

This result appears to support the concern that Judge Nygaard expressed[255] when rejecting his colleagues' use of the clarification test—nearly all regulations in some way explain or clarify an existing rule.[256] Accordingly, and under an expansive definition of the clarification test,[257] agencies may always successfully contend that a rule is interpretive and does not violate the APA.[258] This definition also finds support in *American Mining Congress*, which emphasized that a rule may be interpretive even if it "supplies crisper and more detailed lines" than an existing rule.[259]

A recent decision that relies on *Perez v. Mortgage Bankers Ass'n* illustrates the implications of broadly construing the clarification test. In *Ass'n of Flight Attendants v. Huerta*,[260] a flight attendants' union sued the Federal Aviation Administration (FAA) for violating the APA. For decades, the FAA had recommended that passengers be allowed to use electronic devices during the main portion of the flight[261] but not during takeoff and landing.[262] In 2013, however, the FAA issued a notice informing its safety inspectors that the agency need not approve an airline's finding that passengers may use personal electronic devices during all parts of the flight.[263] Soon after, the flight attendants' union sued the agency for improperly promulgating a legislative rule.[264] At the core of the union's argument was that the 2013 notice amended a prior regulation and therefore should not be considered an interpretive rule.[265]

The D.C. Circuit disagreed.[266] The court explained that agencies may freely issue interpretations that do not amend the underlying regulations they interpret.[267] As applied to the union's challenge, the guidance documents

255. *See supra* note 124 and accompanying text.
256. Elizabeth Blackwell Health Ctr. for Women v. Knoll, 61 F.3d 170, 187 (3d Cir. 1995) (Nygaard, J., dissenting).
257. *See supra* Part I.A.3.
258. *See supra* notes 80–86 and accompanying text.
259. Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993).
260. 785 F.3d 710 (D.C. Cir. 2015).
261. *Id.* at 714. This was the FAA's interpretation of 14 C.F.R. § 121.306(b)(5), which recommended that airlines permit use of any device so long as the device does not interfere with aircraft systems. *Id.* at 713–14.
262. *Id.* at 714.
263. *Id.* at 715.
264. *Id.*
265. *See id.*
266. *Id.* at 717–19.
267. *Id.* at 713.

may have created new recommendations that aviation safety inspectors could follow, but they did not create new law that amended a previous regulation.[268] The court relied on the arguments set forth in *Perez*, which explained the difference between amending and interpreting a rule.[269] Under this framework, it is likely that a new interpretation of a regulation, which produces different effects on the regulated public, would be sustained as an interpretive rule and therefore exempt from notice and comment.

In sum, the expansive definition of an interpretive rule, which *American Mining Congress* established[270] and *Perez* overwhelmingly endorsed,[271] allows agencies to successfully argue that a new interpretation clarifies a regulation and is therefore permissible. If the two decisions are taken to their logical extremes, it is, as Judge Nygaard warned, difficult to conceive of any interpretation that would not be sustained under the clarification test.[272] Further, if interpretive rules are construed as beneficial agency actions that serve the regulated public, courts may be more willing to accept an agency rule that modifies an existing regulation so long as the agency couches it as an interpretive rule and finds shelter under the umbrella of the APA's exemptions.

c. Pursuant to Statutory Delegation

In both regression models, the pursuant to statutory delegation test is not statistically significant. This result supports the Seventh Circuit's characterization of the test as lacking in explanatory power: "[this test] returns us to the starting point . . . what kind of rule does the agency think it has promulgated?"[273] Stated differently, because most agencies have the delegated power to issue both legislative and nonlegislative rules, the test reveals little about the true nature of an agency's challenged action.[274] Given the test's seeming tendency to confirm a decision rather than aid in its formulation, the cases below demonstrate how courts have referred to the test and have arrived at different conclusions.

On the one hand, some courts find specific legislative authority to support an inference that an agency issued legislative rules. In *Sweet v. Sheahan*,[275] for example, the Second Circuit held that an EPA rule regulating lead paint was legislative, in part because it was "promulgated pursuant to the explicit statutory authority of the Lead-Based Paint Act."[276] Likewise, the D.C. Circuit explained that the DOL "enjoys delegated authority to prescribe rules

268. *Id.* at 718.
269. *Id.* at 713 (quoting Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1208 (2015)).
270. Am. Mining Cong. v. Health & Safety Admin., 995 F.2d 1106, 1109–12 (D.C. Cir. 1993).
271. Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1206–09 (2015).
272. Elizabeth Blackwell Health Ctr. for Women v. Knoll, 61 F.3d 170, 187 (3d Cir. 1995) (Nygaard, J., dissenting).
273. Metro. Sch. Dist. v. Davila, 969 F.2d 485, 490 (7th Cir. 1992).
274. *See, e.g.*, La.-Pac. Corp. v. Block, 694 F.2d 1205, 1209–10 (9th Cir. 1982).
275. 235 F.3d 80 (2d Cir. 2000).
276. *Id.* at 92.

with the force of law"[277] and, regarding the specific issue in the case, that it was "authorized to promulgate legislative rules governing unemployment statistics."[278] Accordingly, the court held that the DOL's action "cannot be merely an interpretative rule."[279]

On the other hand, courts have relied on an agency's lack of authority to regulate specific matters to hold that a rule is nonlegislative. The Eleventh Circuit held that a DOL rule was interpretive because the congressional delegation only allowed the DOL to issue interpretive rules.[280] In another challenge to the DOL, the First Circuit held that the agency action constituted an interpretive rule in part because it was within the Secretary's authority to formulate rules in administering the statute.[281] Thus, the pursuant to statutory delegation test does not appear to influence a court's finding in either direction. Instead, it seems to serve as an added justification for a decision reached on other merits.

d. Agency Binding

The agency binding test is not statistically significant under either regression model, and the empirical analysis does not point to any determinative impact that follows from considering this test. This is surprising given that commentators have cautioned that using the agency binding test will have several deleterious effects.[282]

This result is perhaps explained by the limited number of occasions in which courts have considered this test,[283] nearly always in the context of general statements of policy. But perhaps the reason is more fundamental. Weighing this test typically entails questioning whether the agency bound itself to reach a particular result in adjudication or enforcement actions: an elusive distinction to draw.

For example, in *National Ass'n of Broadcasters v. F.C.C.*,[284] the D.C. Circuit held that an FCC directive was not a legislative rule because it did not force the Commission to reach a particular result in any case.[285] But the same circuit rejected a similar argument a few years earlier. In *General Electric Co. v. EPA*,[286] the court held that a guidance document was a legislative rule even though the EPA had maintained that the document did not force the agency to reach a particular result in any case.[287] Instead, the

277. Batterton v. Marshall, 648 F.2d 694, 705 (D.C. Cir. 1980).
278. *Id.* at 706.
279. *Id.*
280. Warshauer v. Solis, 577 F.3d 1330, 1338 (11th Cir. 2009).
281. Nason v. Kennebec Cty. CETA, 646 F.2d 10, 18 (1st Cir. 1981).
282. Brief of Administrative Law Scholars, *supra* note 149, at 16–17.
283. *See supra* Part II.B.3.
284. 569 F.3d 416 (D.C. Cir. 2009).
285. *Id.* at 426.
286. 290 F.3d 377 (D.C. Cir. 2002).
287. *Id.* at 384–85.

court determined that the agency "will not be open to considering approaches other than those prescribed in the Document."[288]

As the two cases demonstrate, whether a certain document is binding on an agency is a difficult line to draw and appears to support an "I-call-it-when-I-see-it" type of reasoning. That, in addition to the theoretical shortfalls that litigants[289] and the First Circuit and Federal Circuit articulated,[290] lend support to the criticism of this test.

e. Create New Rights or Duties

In both regression models, the create new rights or duties test is statistically significant; using the test increases the likelihood of finding that a rule is legislative by 27 percent. This impact, combined with the frequency with which the test appears in opinions, renders it the most critical test in the legislative versus nonlegislative rules debate.

The dominance of the create new rights or duties test is perhaps explained by its ability to "catch" different instances in which the agency, by mistake or design, binds members of the public and alters the regulatory landscape. A rigid construction of this distinction, as in the case of *Xin-Chang Zhang v. Slattery* below, results in a more forceful limitation on an agency's power to issue nonlegislative rules.[291]

In *Xin-Chang Zhang*, the Second Circuit determined that a self-proclaimed interpretive rule by the Immigration and Naturalization Service (INS) was legislative and failed to comply with the APA.[292] Until 1990, the INS had held that China's "one couple, one child" rule was not, alone, a sufficient basis for granting asylum.[293] But that year the agency issued an interim rule—described as interpretive—stating that refugee status may be conferred on the sole basis of an applicant's objection to China's "one child" policy.[294] That change, the Second Circuit held, "create[d] a new basis on which aliens may be granted refugee status; it change[d] an existing policy."[295] Accordingly, the court concluded that the interim rule was legislative.[296] This holding flowed from the court's description of the proper way to distinguish legislative from nonlegislative rules: "In distinguishing between the two types of rules, the central question is essentially whether an agency . . . create[d] new law, rights, or duties."[297]

This result is particularly striking considering that the Fourth Circuit, analyzing the same rule but using a different test, reached a different

288. *Id.* at 384.
289. *See supra* note 148.
290. Warder v. Shalala, 149 F.3d 73, 82–83 (1st Cir. 1998); Animal Legal Def. Fund v. Quigg, 932 F.2d 920, 929 (Fed. Cir. 1991).
291. 55 F.3d 732, 745–47 (2d Cir. 1995).
292. *Id.* at 747.
293. *Id.* at 739.
294. *Id.* at 745–46.
295. *Id.* at 746.
296. *Id.* at 747.
297. *Id.* at 745.

conclusion. In *Chen Zhou Chai v. Carroll*,[298] the petitioner argued that in considering his asylum request, the INS failed to follow the interim rule and therefore improperly denied his request.[299] Unlike in *Xin-Chang Zhang*, however, the *Chen Zhou Chai* court considered whether the rule was a general statement of policy.[300] This, in turn, prompted the court to analyze the interim rule under the agency binding test rather than the create new rights or duties test.[301] Thus, instead of asking, as the Second Circuit did, whether the interim rule bound the public, the Fourth Circuit asked whether the rule bound the agency.[302]

The court explained that "[a] rule is a general statement of policy if it does not establish a binding norm and leaves agency officials free to exercise their discretion."[303] It held that because the agency could still reach different results, the interim rule did not bind the agency and was exempt from the APA's notice-and-comment procedures.[304] As the conflicting results and the statistical analysis indicate, reliance on the create new rights or duties test can meaningfully affect a court's inquiry.

But the test's influence should not be overstated. Less than an overly strict application of the test[305] often leads to a finding that an agency acted properly even when it shifted the regulatory landscape.[306] Moreover, it is doubtful whether, in light of *Perez*, the Second Circuit would have reached a similar result today. Accordingly, the create new rights or duties test's continued dominance is somewhat in doubt.

f. Substantial Impact

The substantial impact test is statistically significant in the simple model but not in the control model, which includes control variables for time periods and circuit courts. The lack of significance in the control model is perhaps explained by the test's dominance in the Fifth Circuit, and its greater regard prior to the Supreme Court's *Vermont Yankee* decision in 1978, which established that courts may not add procedural restrictions not contemplated by Congress in the APA.[307] While circuits gradually rejected the test

298. 48 F.3d 1331 (4th Cir. 1995).
299. *Id.* at 1335.
300. *Id.* at 1341.
301. *Id.*
302. *Id.*
303. *Id.*
304. *Id.*
305. *See, e.g.*, A.D. Transp. Express, Inc. v. United States, 290 F.3d 761, 768 (6th Cir. 2002).
306. *See, e.g.*, Dismas Charities, Inc. v. U.S. Dep't of Justice, 401 F.3d 666, 680 (6th Cir. 2005).
307. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524 (1978).

entirely[308] or in part,[309] the Fifth Circuit continued to apply it.[310] And because that circuit has a higher rate of finding that a rule is legislative overall, it is likely that controlling for the circuit reduces the significance of the test's explanatory power.

Still, Table 7 indicates that a court employing the substantial impact test increases the likelihood of it finding that a rule is legislative by 16 percent. This result supports the notion, or concern, that weighing whether an agency action has a substantial impact on the regulated public would more often than not demonstrate that an action has a substantial impact.

But it is noteworthy that despite these explanatory pitfalls, the substantial impact test is less determinative of a court's resolution of a notice-and-comment exemption challenge than the create new rights or duties test.[311] This is surprising given the considerable number of scholars[312] and courts[313] who maintain that the substantial impact test would produce outcomes overly burdensome to agencies.

5. Public-Focused Tests vs. Agency-Focused Tests

Lastly, the empirical analysis tests the hypothesis that relying on public-focused tests increases the likelihood of a court finding that a rule is legislative. To review, the agency-focused tests include: agency label, clarification, pursuant to statutory delegation, and agency binding. The public-focused tests are the create new rights or duties and substantial impact tests. In both regression models, the two categories are statistically significant.

Table 9: Agency-Focused vs. Public-Focused Analysis (N = 241)

Tests	**Held Legislative Under Simple Model**	**Held Legislative Under Control Model**
Agency-Focused	-.23*** (.09)	-.24*** (.06)
Public-Focused	.27*** (.07)	.27*** (.07)

Under the control model, using agency-focused tests reduces the likelihood of finding that a rule is legislative by 24 percent, while public-focused tests increase that likelihood by 27 percent. These results support the initial hypothesis and are also compatible with the findings of the create new rights or duties and clarification tests in particular.

308. *See supra* notes 167–78.

309. *See* Caribbean Produce Exch., Inc. v. Sec'y of Health & Human Servs., 893 F.2d 3, 8 (1st Cir. 1989) (quoting Levesque v. Block, 723 F.2d 175, 182 (1st Cir. 1983)).

310. *See supra* notes 164–66 and accompanying text; *see also* Shell Offshore Inc. v. Babbitt, 238 F.3d 622, 630 (5th Cir. 2001); Phillips Petroleum Co. v. Johnson, 22 F.3d 616, 620 (5th Cir. 1994), *modified on denial of reh'g en banc*, No. 93-1377, 1994 WL 484506 (5th Cir. Sept. 7, 1994).

311. *See supra* Part II.B.2.

312. Levin, *supra* note 3, at 289–90.

313. *See supra* notes 167–78.

The difference between the two modes of analysis, focusing on the agency or focusing on the public, captures a fundamental debate in administrative law: What is the proper balance between burdening agencies with procedural rules on the one hand, and usurping public participation from the process on the other?[314] Another way to frame this question is to ask how much burden the public should endure in exchange for efficient and effective agency work? The results in Table 9 appear to suggest that the answers to these questions are reflected in judges' determinations of whether a rule is legislative or nonlegislative.

III. REFINING THE IMPERFECT TEST

Administrative law scholars have articulated several proposals for the proper test.[315] In the 1990s, some scholars tended to endorse one of the six tests used by courts or to offer a refinement to one of those tests.[316] Other scholars, however, have ventured to suggest more novel approaches, such as dismissing this inquiry entirely and allowing an agency to promulgate nonlegislative rules when it labels them as such.[317]

This Note prefers a more conservative approach: using a combined public-focused and agency-focused test. Specifically, using the clarification test and create new rights or duties test together will help elucidate the agency's intent, the rule's impact, and consequently its proper classification. These recommendations are informed by this Note's qualitative and empirical analyses. As the qualitative portion demonstrated, the clarification test and create new rights or duties test each offer a powerful analytical framework.[318]

Further, the empirical analysis demonstrates not only that these tests are the most widely used tools but also that they meaningfully increase or decrease a court's likelihood of finding that a rule is legislative or nonlegislative.[319] A balanced approach, then, could help to arrive at the most neutral test.

Accordingly, this Note endorses the use of both the clarification and create new rights or duties tests by courts. To resolve further ambiguity, this Note also calls for a narrow substantial impact test. Finally, this Note suggests that the agency label test be removed from the analysis entirely.

A. Balancing Agency-Focused and Public-Focused Tests

As Part II.B.5 indicates, adopting either the agency-focused or public-focused approach contributes to the result the court reaches in differentiating

314. *See* Asimow, *supra* note 41, at 533–34.

315. *See* Franklin, *supra* note 2, at 286–86 (analyzing some of the proposed tests or modifications to existing approaches).

316. *See, e.g.*, Pierce, *supra* note 2, at 559–61.

317. *See, e.g.*, Elliott, *supra* note 205, at 1490. Elliott frames his suggestion as rooted in "a fundamental tenet of administrative law, crucial to maintaining the proper balance between courts and agencies, that an agency's action is what it says it is." *Id.*

318. *See supra* Parts II.B.4.b, II.B.4.e.

319. *Supra* Part II.B.4.

legislative from nonlegislative rules.[320] The case law and literature highlighted throughout this Note provide several reasons for this result.[321] But in short, and on an abstract level, an agency-focused analysis highlights the challenges of administrative rulemaking procedures,[322] and a public-focused analysis places great weight on the adverse impact a regulation has on the public.[323] From these different approaches, courts seem to draw different conclusions.

But to reach a result that best captures the principles of the APA,[324] courts should adopt elements of both. As one circuit aptly noted: "Inevitably, in determining whether the APA requires notice and comment rulemaking, the interests of agency efficiency and public input are in tension."[325] Accordingly, an analysis that overly emphasizes one of these interests would more readily arrive at the conclusion that best supports one of these considerations.

Adopting an analysis that includes elements of both public-focused and agency-focused tests would not immunize a court from scrutiny around injecting certain biases about the proper role and function of agencies into its analysis of a particular dispute. But it would push, or at least lightly nudge, the reviewing court to grapple with justifications from both categories and employ a more equitable analysis. Though some scholars prefer to look outside of the established realm of case law to fashion a proper test,[326] it is possible to improve the current approach within the established tests. The following sections suggest which modifications should be introduced.

B. Balancing the Create New Rights or Duties and Clarification Tests

The create new rights or duties test and clarification test complement and inform each other. An agency action may clarify a regulation, create new rights or duties, or accomplish both. Employing these tests assists courts by demonstrating both the agency's intended effect and the actual impact an action has on the public. This, in turn, provides the court with a greater understanding of the rule's proper classification under the APA. A Sixth

320. *Supra* Part II.B.4.

321. *Supra* Parts I.B, II.B.3.

322. *See, e.g.*, Friedrich v. Sec'y of Health & Human Servs., 894 F.2d 829, 836 (6th Cir. 1990) ("The Secretary's role is . . . to apply the statutory standard to an enormous number of modern medical practices.").

323. *Compare* Alcaraz v. Block, 746 F.2d 593, 613–14 (9th Cir. 1984) ("[P]enalizing the agency for explaining what was for the plaintiffs the bad news . . . would be like killing the messenger."), *with* Hoctor v. U.S. Dep't of Agric., 82 F.3d 165, 171 (7th Cir. 1996) ("There are thousands of animal dealers, and some unknown fraction of these face the prospect of having to tear down their existing fences . . . . The concerns of these dealers are legitimate . . . .").

324. *See* United States v. Morton Salt Co., 338 U.S. 632, 644 (1950); *see also* Posner, *supra* note 45, at 953–54 (describing the APA as a compromise between competing views on the function of administrative agencies).

325. U.S. Dep't of Labor v. Kast Metals Corp., 744 F.2d 1145, 1153 (5th Cir. 1984).

326. *See, e.g.*, Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705, 1720–21 (2007); Manning, *supra* note 74, at 929.

Circuit case, *Dismas Charities, Inc. v. U.S. Department of Justice*,[327] illustrates some of the merits of this proposition.

In *Dismas Charities*, an operator of private detention centers challenged a DOJ amendment to its previous regulations as a legislative rule.[328] Specifically, the case concerned the Imprisonment of a Convicted Person Act.[329] The provision giving rise to the dispute stated that the DOJ could place prisoners in any facility that met the DOJ's "minimum standards."[330] In 1992, the DOJ determined that private facilities met these standards and, accordingly, allowed certain classes of prisoners to be placed in them.[331] But a decade later, the DOJ issued a memorandum that rendered imprisonment of certain classes of prisoners in private facilities unlawful.[332] This change, the court agreed, had a severe impact on corporations such as the plaintiffs in the case.[333]

Nevertheless, the Sixth Circuit held that the memorandum is a paradigmatic example of an interpretive rule.[334] It reasoned that the memorandum interpreted the statute and, based on that interpretation, concluded that the DOJ's previous position was unlawful.[335] The memo's impact notwithstanding, the court held that the DOJ acted properly and that this action was exempt from notice and comment.[336]

While the court's certainty that the rule was interpretive is perhaps overstated, the holding is justified. It was within the DOJ's power to determine what it could lawfully do under the statute, and the court's conclusion that the agency did not need to undergo notice-and-comment rulemaking was therefore reasonable. Public input, the court reasoned, is neither necessary nor helpful to determine "what the law already is."[337] The court was able to reach this conclusion by considering both the rule's impact on the public and the agency's capacity to interpret a statute.

Compare this sensible reasoning to a district court that analyzed the same memorandum but came to the opposite conclusion.[338] The district court held that the DOJ violated the APA because it did not afford affected parties an opportunity to participate in the process.[339] The court's decision is curious because it leaves agencies powerless to engage in proper and useful interpretive actions. Instead, it significantly narrows an agency's ability to

327. 401 F.3d 666 (6th Cir. 2005).
328. *Id.* at 675.
329. *Id.* at 670.
330. *Id.* (describing how, under 18 U.S.C. § 3621(b), the Bureau of Prisons may place prisoners in "any available penal or correctional facility that meets minimum standards of health and habitability").
331. *Id.*
332. *Id.*
333. *Id.* at 681.
334. *Id.* at 680.
335. *Id.*
336. *See id.* at 681–82.
337. *Id.* at 680.
338. Monahan v. Winn, 276 F. Supp. 2d 196, 215 (D. Mass. 2003).
339. *Id.*

issue the type of interpretive rules that the APA exempts from notice-and-comment procedures.

These two cases illustrate why considering both factors can be illuminating. Since agency actions often both clarify a regulation and establish new rights or duties, adopting both tests enables courts to strike the balance between proper and efficient agency action on the one hand, and impermissible actions that bind the public on the other.

C. Disposing of the Agency Label Test

The agency label test has some appeal, especially in its capacity to afford a presumption of validity to agency operation.[340] Nevertheless, this test's significant shortcomings necessitate its removal from a proper analysis. Most worryingly, the logic of the agency label test is circular. Courts considering it an indication of the disputed rule's proper classification effectively adopt the following position: The agency's rule is nonlegislative because the agency labeled it as nonlegislative. And the agency labeled it as nonlegislative because the rule is nonlegislative.[341]

It is true that most courts analyze other tests and do not justify their conclusions on this test alone.[342] However, even those courts arguing that the inquiry is a "starting point" introduce an ill-advised consideration into the inquiry.[343] Not only does it produce circular reasoning, it also places undue emphasis on an element that is already embedded in the analysis. The agency's classification of the rule is well-known: the petitioner is challenging it.

Finally, one key argument for the test is that it captures certain presumptions of valid agency actions that permeate administrative law.[344] Agencies, after all, have been delegated authority because of their expertise, and it is therefore justified, if not necessary, to afford them this presumption. But this rationale is best suited for instances in which courts are asked to inquire whether an agency action is substantively reasonable. In the context of the APA, and specifically in applying the exemptions from the notice-and-comment procedures, these presumptions are misguided.

First, courts, unlike agencies, are neutral arbiters in determining whether an agency's procedure was valid. Second, the APA—as manifested in its text and legislative history—is undoubtedly concerned with procedural

340. *See supra* notes 105–07 and accompanying text.

341. *See, e.g.*, United States v. Alameda Gateway Ltd., 213 F.3d 1161, 1168 (9th Cir. 2000) (finding that a rule was nonlegislative because it "was not published in either the Code of Federal Regulations or the Federal Register, providing further evidence that the regulation was not intended to be binding").

342. *Supra* Part II.B.2.

343. *See* Mejia-Ruiz v. INS, 51 F.3d 358, 365 (2d Cir. 1995) (quoting Metro. Sch. Dist. v. Davila, 969 F.2d 485, 489 (7th Cir. 1992)).

344. Levin, *supra* note 3, at 290 (noting that the agency label test is rooted is an "outgrowth of the presumption of procedural validity that courts ordinarily accord to administrative action").

validity.[345] Accordingly, when courts assess procedural validity they are firmly within their expertise and congressional mandate. They do not wade into the substantive territory that agencies dominate. The agency label test is therefore better left to nonprocedural inquiries and should not inform the analysis when distinguishing legislative from nonlegislative rules.

D. Narrowing the Substantial Impact Test

Courts who venture into the substantial impact analysis flirt with the temptation to establish additional procedural requirements on agencies beyond the scope of the APA.[346] The Supreme Court has, on several occasions, warned about such practices,[347] and accordingly, courts have gradually shifted away from the test.[348] But this inquiry can be informative and still remain within the confines of the APA.

A Second Circuit case, *Time Warner Cable Inc. v. FCC*,[349] illustrates some of the justifications of the substantial impact inquiry. Commensurate with the rise in popularity of cable television, Congress and the FCC were concerned that telecom companies were engaging in anticompetitive practices.[350] Specifically, regulators worried that cable operators, such as Time Warner Cable, were taking "unfair advantage" of their market dominance when negotiating with programming networks, such as CNN or ESPN.[351] As part of the effort to combat this practice, the FCC established a regulatory regime under which programming networks could challenge anticompetitive behavior by cable operators.[352]

In 2011, without notice and comment procedures, the FCC published a "standstill rule," which required that, in the case of a dispute between programming networks and cable operators, the latter must continue to broadcast content from the former until the FCC settles the dispute.[353] Time Warner sued, arguing that the rule is legislative, and the Second Circuit agreed. The court explained that "all procedural rules affect substantive rights to some extent."[354] Accordingly, the proper distinction between those rules that are legislative and those that are exempt from notice and comment is "one of degree depending upon whether the substantive effect is sufficiently grave so that notice and comment are needed to safeguard the

345. *See* United States v. Morton Salt Co., 338 U.S. 632, 644 (1950).

346. *See* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524 (1978) (holding that courts may not add additional procedural requirements not already outlined in the APA); *see also* La.-Pac. Corp. v. Block, 694 F.2d 1205, 1210 (9th Cir. 1982) (noting that using the substantial impact analysis possibly violates the Court's holding in *Vermont Yankee*).

347. Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1207 (2015).

348. *See* PARRILLO, *supra* note 21, at 11–12 (explaining that courts replaced the substantial impact test with the binding effect test or the create new rights or duties test).

349. 729 F.3d 137 (2d Cir. 2013).

350. *Id.* at 143–45.

351. *Id.* at 146.

352. *Id.* at 143–48.

353. *Id.* at 150–51.

354. *Id.* at 168.

policies underlying the APA."[355] Applying this rationale to the facts, the court found that the rule was legislative because it "significantly affect[ed] substantive rights."[356] This significant impact, the court concluded, is precisely the effect which the APA sought to curb by allowing public participation.[357]

As this case demonstrates, often an agency and petitioner both raise concerns and justifications that are reasonable and can be aptly supported by the existing tests. What the substantial impact test allows, then, is to determine whether an agency action created the types of burdens the framers of the APA sought to curb. The substantial impact test, used when other tests fail to point to the proper classification, can thus be illuminating for courts.

CONCLUSION

A way forward in the pursuit of a proper demarcating line between legislative and nonlegislative rules is to consider both the clarification and create new rights or duties tests. This balanced public-focused and agency-focused approach provides a test that is able to capture the procedural concerns giving rise to the APA while also embracing agency reliance on nonlegislative rules, even when these impact the public. In cases where this distinction produces ambiguous results, the substantial impact test could provide an informative analysis.

Scholars who propose that we do away with any of the six tests offer persuasive reasoning. They rightly contend that the tests, in their various formulations, do not answer the question of what rule's "true" nature is. The approach this Note offers does not resolve every question, and the test is bound to remain imperfect. But a cohesive, balanced framework could, without disregarding decades of precedent and experience, make this inquiry more uniform, perceptive, and actionable for both courts and agencies.

355. *Id.* (quoting Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 653 F.3d 1, 5–6 (D.C. Cir. 2011)).

356. *Id.*

357. *Id.* at 169 (quoting *Elec. Privacy Info. Ctr.*, 653 F.3d at 5).