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A Model for Determining the Publication Requirements of Section 552(a)(1) of the Administrative Procedure Act

Michael J. Kump
University of Michigan Law School

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A MODEL FOR DETERMINING THE PUBLICATION REQUIREMENTS OF SECTION 552(a)(1) OF THE ADMINISTRATIVE PROCEDURE ACT

This was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule. The answer was: if everything can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict here.¹

During a typical albeit hectic week, a government agency produces press releases, advisory opinions, adjudicative opinions, orders without opinions, staff manuals containing directives to regional agency members, written memos from the agency head to the staff concerning the interpretation of statutes, similar memos written to only one staff member—the list could go on endlessly.² The Administrative Procedure Act³ (APA) attempts

¹ L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 81e (1945).

² See generally 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 5:11 (2d ed. 1978).

³ 5 U.S.C. §§ 551-559 (1976) [hereinafter cited as APA]. The relevant statutory provisions are the following:

§ 551. Definitions

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency

(5) "rule making" means agency process for formulating, amending, or repealing a rule

§ 552. Public information; agency rules, opinions, orders, records, and proceedings [note: § 552 constitutes the Freedom of Information Act]

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency

Except to the extent that a person has actual and timely notice of the terms

to impose an order upon the multiplicity of agency actions by providing a hierarchical taxonomy for categorizing such actions. The APA's system for rulemaking consists of three separate groupings of agency actions: actions subject to the pre-adoption notice and comment requirements of APA section 553 ("notice and comment" rule);⁴ actions subject to the post-adoption publication requirements of APA section 552(a)(1) ("publication" rule);⁵ and actions subject to the post-adoption public inspection requirement of APA section 552(a)(2) ("availability" rule).⁶

Prior to the adoption of a "rule," an agency must announce the "rulemaking" and formulate such a rule in notice and com-

thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purposes of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. . . . A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

§ 553. *Rule making*

(b) . . .

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

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

⁴ See note 3 *supra*. 5 U.S.C. § 553(c) (1976) provides for receipt, consideration, and publication of public comments.

⁵ See note 3 *supra*.

⁶ *Id.*

ment proceedings.⁷ The APA hierarchy creates an exemption from such proceedings for "interpretive rules" and "general statements of policy." According to the publication rule, an agency must currently publish these interpretations and policy statements in the Federal Register. Finally, some agency results, including "those statements of policy and interpretations which have been adopted by the agency and not published in the Federal Register," need only be made available for public inspection.

This article addresses the question of when the publication rule requires an agency to publish its results in the Federal Register, particularly "interpretations of general applicability" and "statements of general policy." The vast number of recent cases involving violations of the publication rule provide ample impetus for settling this controversy.⁸ Of striking significance is the

⁷ See 5 U.S.C. § 553(b)-(c) (1976).

⁸ See, e.g., *Morton v. Ruiz*, 415 U.S. 199 (1974). *Morton* furnishes a good example of how courts may declare agency actions void for lack of publication in the Federal Register. Unfortunately, the opinion is also indicative of how a court can arrive at such a conclusion through circuitous reasoning.

In *Morton*, two full-blooded Indians who lived off a reservation but in an Indian community near the reservation sought general assistance benefits from the Bureau of Indian Affairs (BIA) under the Snyder Act, 25 U.S.C. § 13 (1976), which authorized the BIA, under the supervision of the Secretary of the Interior, to supervise and expend appropriated funds for the benefit, care, and assistance of Indians throughout the United States for specified purposes. Under a rule found in the BIA staff manual which limited eligibility for such benefits to Indians living "on reservations," the BIA denied the request for benefits. In an unanimous opinion authored by Justice Blackmun, the Supreme Court held that such benefits could not be denied under the circumstances because the "on reservations" limitation in the BIA's manual had not been published in the Federal Register as required by APA § 552(a)(1) and by the Bureau's own policies. 415 U.S. at 236.

Although *Morton* reached a fair conclusion, the Court's reasoning lacked a principled progression from premises to conclusion. See Davis, *Administrative Law Surprises in the Ruiz Case*, 75 COLUM. L. REV. 823, 843-44 (1975). The confusion in the Court's analysis concerns the classification of the hidden BIA rule within the APA taxonomy of agency actions. The Court's discussion clearly indicated that the BIA rule was an "interpretive" rule, 415 U.S. at 237; the Court, however, stopped short of explicitly branding the hidden rule as such. On the contrary, the characterization of the BIA rule as an interpretation would fail to conform to the Court's depiction of the manual as "an internal-operations brochure intended to cover policies that 'do not relate to the public.'" *Id.* at 235. If the manual represented nothing more than such a limited brochure, § 552(a)(2) requires only that the "on reservations" rule be made available to the public.

Unfortunately, the APA provides little guidance for arriving at such conclusions beyond a shapeless taxonomy which only fosters confusion among the courts trying to apply such criteria. Nonetheless, courts are bound to try to follow the statutory provisions of the APA. This article proposes a model which offers the necessary guidance to such courts. See part II *infra*.

For other cases involving violations of the publication rule, see, e.g., *United States v. Mowat*, 582 F.2d 1194 (9th Cir.), *cert. denied*, 439 U.S. 967 (1978) (where defendants had actual notice of instruction barring unauthorized entry onto the island of Kahoolawe, they could be prosecuted even though the instruction had not been published in the

broad spectrum across which these cases stretch: food stamp cases,⁹ prison matters,¹⁰ and immigration disputes.¹¹ The list is as broad as the range of administrative practice.

Part I examines the characteristics found in all policy statements and interpretations without regard to their generality. Thereafter, the focus shifts to "generality," which distinguishes the publication rule from the availability rule. The predominant judicial test in this regard, the significant impact test, is closely scrutinized and rejected. Part II presents a model for determin-

Federal Register); *Appalachian Power Co. v. Train*, 566 F.2d 451 (4th Cir. 1977) (the EPA's regulation governing cooling water intake structures was unenforceable for want of proper publication where the development document had not been published in the Federal Register); *Anderson v. Butz*, 550 F.2d 459 (9th Cir. 1977) (the Secretary of Agriculture's instruction requiring that rent subsidies paid by HUD be included as "income" for food stamp purposes was void for failure to publish the instruction in the Federal Register); *Neighborhood Legal Servs. v. Legal Servs. Corp.*, 466 F. Supp. 1148 (D. Conn. 1979). In *Neighborhood Legal Services*, the legal services agency had not been adversely affected by the lack of publication of material for funding migrant worker programs, so there was no basis under the Freedom of Information Act (FOIA) for a judgment requiring the legal services corporation to consider a new application. The agency was entitled to an injunction, however, requiring the corporation to publish in the Federal Register its statement of general policy concerning the definition of "migrant worker" and the number of migrant workers that had to be within the applicant's service area in order to receive funding; *Human Resources Management, Inc. v. Weaver*, 442 F. Supp. 241 (D.D.C. 1978) (preliminary injunction against the Small Business Administration was precluded because the plaintiffs failed to establish that the defendants' actions were unlawful on the ground that the actions were taken pursuant to procedures not published in the Federal Register); *Aiken v. Obledo*, 442 F. Supp. 628 (E.D. Cal. 1977) (a nonprofit California corporation providing legal services to indigents suffered an "injury in fact" as a result of the Secretary of Agriculture's failure to publish an instruction, and the corporation therefore had standing); *Dean v. Butz*, 428 F. Supp. 477 (D. Hawaii 1977) (a letter promulgated by the defendants which contained a requirement that payments be included as income was of general applicability and, hence, was invalid without publication in the Federal Register); *United States ex rel. Parco v. Morris*, 426 F. Supp. 976 (E.D. Pa. 1977) (an administrative decision to rescind a prior operating instruction of the Immigration and Naturalization Service had to be published under the FOIA; and where it was not published, persons without notice could not be adversely affected); *Lewis v. Weinberger*, 415 F. Supp. 652 (D.N.M. 1976) (the Indian Health Service program had no effect for lack of publication in the Federal Register).

⁹ See, e.g., *Anderson v. Butz*, 550 F.2d 459 (9th Cir. 1977); *Aiken v. Obledo*, 442 F. Supp. 628 (E.D. Cal. 1977); *Dean v. Butz*, 428 F. Supp. 477 (D. Hawaii 1977).

¹⁰ See, e.g., *Cox v. Department of Justice*, 576 F.2d 1302 (8th Cir. 1978) (5 U.S.C. § 552(a)(2) (1976), which lists records that must be made available for public inspection and copying, did not require disclosure of the Drug Enforcement Administration's "violation classification identifier," since disclosure would significantly impair the DEA's law enforcement efforts); *Ramer v. Saxbe*, 522 F.2d 695 (D.C. Cir. 1975) (federal prison inmates brought an action challenging the regulations of the Bureau of Prisons on the ground that the regulations had not been validly published in compliance with the APA; held that the Bureau of Prisons was an "agency" within the definition of the APA).

¹¹ See, e.g., *Mehta v. Immigration & Naturalization Serv.*, 574 F.2d 701 (2d Cir. 1978) (the Board of Immigration Appeals' individual decisions do not have to be published in the Federal Register although they must be made available for public inspection); *United States ex rel. Parco v. Morris*, 426 F. Supp. 976 (E.D. Pa. 1977).

ing when the publication rule requires publication of an agency interpretation or policy statement. The model maintains the APA hierarchical taxonomy but goes beyond the strict meaning of the statutory terms in order to implement the APA policies of agency consistency and avoidance of surprise to the public. A proposed necessary condition for publication is that the agency direct the "general" action towards a class of persons. The core component of the model focuses upon whether the policy or interpretation *diverges* from the agency's corpus of values, beliefs, and positions. This article maintains that if examination uncovers such divergence, publication in the Federal Register should be required. In borderline cases, the agency's experience with prior judicial reactions to its interpretations and statements should be examined. If, in light of this experience, it is likely that a court will defer to the agency policy or interpretation, divergence notwithstanding, this estimation weighs in favor of publication. In sum, the model's elements of generality, divergence, and deference provide the means for effectuating the central APA policies.

I. DEFINITIONS OF APA TAXONOMIC TERMS

In order to prevent courts from voiding agency actions for publication rule violations, agencies must determine whether the APA requires agencies to formulate a policy through notice and comment proceedings or whether they need only publish or make the statement of policy available to the public. The key statutory terms in the APA hierarchy, therefore, require clarification, particularly the two agency actions which the publication rule denominates "statements of general policy" and "interpretations of general applicability."¹²

¹² These two terms demand close scrutiny for several reasons. First, 5 U.S.C. § 552(a)(1)(D) (1976) requires that an agency publish three types of results; these two types of action, which are exempt from notice and comment proceedings, and "substantive rules" which are not exempt from such proceedings. Since the latter undergo pre-adoption notice and comment proceedings, they are less likely to surprise the public. Second, courts spend a considerable amount of time trying to determine the meaning of these terms within the context of the publication rule. *See, e.g., Anderson v. Butz*, 550 F.2d 459, 462 (9th Cir. 1977) ("there is still difficulty determining when publication in the Federal Register is required by the FOIA"). Commentators also find it extremely difficult to understand the requirements and the language of the publication rule. Professor Davis comments as follows:

This question [of what rules, policies, and interpretations must be published in the Federal Register] is (a) highly practical, but (b) probably cannot be answered except in vague terms. . . . for instance, what is the answer to the simple question whether all interpretive rules must be published or whether some need

A. Definitions Without Regard to "Generality"

The following discussion establishes the characteristics found in all policy statements and interpretations.

1. *Policy statements*—The APA exempts "general statements of policy" from notice and comment proceedings.¹³ Agencies must publish "statements of general policy" in the Federal Register.¹⁴ "Statements of policy" need only be made available for public inspection.¹⁵ One mystery surrounding the APA taxonomy is whether general statements of policy represent the same agency actions as statements of general policy.

The better view equates the notice and comment rule's general statements of policy with the publication rule's statements of general policy. Support for this position comes from the fact that the legislative history of the APA never attempts to distinguish between such actions.¹⁶ Furthermore, at least one court has explicitly assumed their substantial equivalence.¹⁷ Finally, the APA hierarchy is sensible only under the equivalence view. Although the notice and comment rule exempts general statements of policy from such proceedings, these statements should be published for the public's protection. Such publication, however, is statutorily required under the publication rule only if general statements of policy are equivalent to statements of general policy.

An argument supporting the *non-equivalence* of these actions concentrates on the placement of the modifier "general." In the

not be? . . . The best answer to [this] question is that probably no judge, no administrator, no practitioner, and no commentator knows the answer. Even though the question of what must be published is so highly practical, the meaning of the FOIA on this question remains about as vague after more than a decade as it was when it was enacted.

1 K. DAVIS, *supra* note 2, § 5:11, at 341. For Professor Davis' view on the type of general approach that should be taken to solve this problem, see note 47 *infra*.

¹³ 5 U.S.C. § 553(b)(A) (1976).

¹⁴ *Id.* § 552(a)(1)(D) (1976).

¹⁵ *Id.* § 552(a)(2)(B) (1976).

¹⁶ See SENATE COMM. ON THE JUDICIARY, 79TH CONG., 2D SESS., ADMINISTRATIVE PROCEDURE ACT 18 (Comm. Print 1946).

¹⁷ In *United States ex rel. Parco v. Morris*, 426 F. Supp. 976, 986 n.18 (E.D. Pa. 1977), the court added this footnote to its discussion:

Whether a "general statement of policy" under § 553 is the same as a "statement of general policy" under § 552 is an intriguing mystery which no case seems to help solve. Nor does Professor Davis seem to discuss the problem. See K. Davis, *Administrative Law of the Seventies* §§ 3A.7, 5.03, at 72-75, 146-61 (1976). We assume that there is no material difference between the two terms, if indeed Congress intended any difference at all.

But see *Lewis v. Weinberger*, 415 F. Supp. 652, 661 (D.N.M. 1976); and note 42 *infra*.

notice and comment rule exemption, this argument is that "general" modifies "statement" whereas in the publication rule "general" modifies "policy." Thus, the different placement of the modifier produces contrasting results. A general statement of policy might concern a very specific policy stated generally while a statement of general policy could never concern a specific policy.

The proponent of the non-equivalence view must confront some curious results. The APA exempts "general statements of policy" from notice and comment proceedings. Under the non-equivalence view, however, these general statements need be neither published nor made available to the public. The non-equivalence view opens a large gap in the APA hierarchy since general statements of policy fall outside of the notice and comment, publication, and availability rules. Such a result clearly undermines the effectiveness of the APA publication scheme. According to the better view, the difference in language does not yield a difference in treatment. These policy statements, therefore, while exempt from notice and comment proceedings, should be subject to mandatory post-adoption publication in the Federal Register.

The legislative history of the APA does not reveal any congressional attempt to define precisely what serves as a policy statement. The 1947 *Attorney General's Manual on the APA* represents the first attempt to provide such a definition.¹⁸ That publication 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."¹⁹ The 1974 *Attorney General's Manual*, which appeared after the most recent APA amendments, defines the availability rule's term "statements of policy" as "statements which articulate a settled course of action which will be pursued in a class of matters entrusted to agency discretion."²⁰ These two definitions highlight features in policy statements of all varieties: such statements describe how an agency will use its *discre-*

¹⁸ U.S. DEP'T OF JUSTICE, *ATTORNEY GENERAL'S MANUAL OF THE ADMINISTRATIVE PROCEDURE ACT* (1947) [hereinafter cited at *ATTORNEY GENERAL'S MANUAL*]. The courts have deferred to the interpretations of the *ATTORNEY GENERAL'S MANUAL* "because of the role played by the Department of Justice in drafting the legislation." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 546 (1978) *cf.* *Power Reactor Dev. Co. v. International Union of Elec. Workers*, 367 U.S. 396, 408 (1961); *United States v. Zucca*, 351 U.S. 91, 96 (1956) (deferring to administrative agencies' construction of statutes relating to the agencies' operation).

¹⁹ *ATTORNEY GENERAL'S MANUAL* 30 n.3 (1947).

²⁰*Id.* at 21.

tionary power in the future.

Several cases enumerate other factors exemplified by policy statements.²¹ First, such statements do not exert a substantial impact upon parties.²² If an agency action imposes rights and obligations on the affected party, this produces a substantial impact upon the regulated population. Second, agencies often direct such statements at their members, informing them of future policy with respect to certain discretionary matters.²³ Third,

²¹ See notes 22-24 *infra*.

²² *Texaco v. Federal Power Comm'n*, 412 F.2d 740 (3d Cir. 1969) is notorious for having established the substantial impact test as the means for determining the scope of § 553 exemptions from notice and comment proceedings. In *Texaco* the FPC had unilaterally promulgated an amendment to a published regulation, requiring for the first time that compound interest be paid on all the FPC-ordered refunds paid by natural gas companies to consumers. Prior to the amendment, the FPC had discretion to order the payment of interest on a case-by-case basis. The Third Circuit held that the FPC order could not be termed a general statement of policy because it had a substantial impact on those regulated and because it "adopts a substantive rule imposing . . . rights and obligations which an [affected person] has the burden of proving should not apply in any waiver or similar proceeding." *Id.* at 744. The court thus held that if an agency statement imposes rights and obligations on the affected party, that action exerts a substantial impact upon the regulated population. Such a statement, then, cannot be one of general policy since statements of general policy have no such substantial impact. See also *Pickus v. United States Bd. of Parole*, 507 F.2d 1107, 1112-13 (D.C. Cir. 1974) stating that an action is not a general statement of policy if "calculated to have a substantial effect on ultimate [discretionary] decision."

For discussions and criticism of *Texaco*, see *Noel v. Chapman*, 508 F.2d 1023 (2d Cir.), *cert. denied*, 423 U.S. 824 (1975); *Aiken v. Obledo*, 442 F. Supp. 628 (E.D. Cal. 1977); *United States ex rel. Parco v. Morris*, 426 F. Supp. 976 (E.D. Pa. 1977); *Lewis v. Weinberger*, 415 F. Supp. 652 (D.N.M. 1976); Note, *A Functional Approach to the Applicability of Section 553 of the Administrative Procedure Act to Agency Statements of Policy*, 43 U. CHI. L. REV. 430 (1976).

²³ In *Noel v. Chapman*, 508 F.2d 1023 (2d Cir.), *cert. denied*, 423 U.S. 824 (1975), unadmitted Western Hemisphere aliens filed a motion for a preliminary injunction to restrain the implementation of a challenged policy of the Immigration and Naturalization Service which would lead to their deportation. The policy in question stated that unadmitted Western Hemisphere aliens, married to American citizens, may extend the time for their voluntary departure until they can obtain visas. The court held that this policy did not deny equal protection to aliens married to resident aliens rather than to citizens. Moreover, the court held the policy was exempt from notice and comment proceedings because it represented a general statement of policy. *Id.* at 1030. Nonetheless, the court admitted that they found the definition of such an agency action "enshrined in considerable smog." *Id.*

In reaching its conclusion that this instruction represented a general statement of policy, the court construed the instruction to be a "statement by the agency of its general policy as a guideline for District Directors." *Id.* The court adopted Judge Friendly's characterization that "one of the values of the [general statement of policy is] the education of agency members in the agency's work." H. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS* 145-46 (1962), *cited in Noel v. Chapman*, 508 F.2d 1023, at 1030 (2d Cir.) *cert. denied*, 423 U.S. 824 (1975) (emphasis deleted). The court also quoted from a commentary which noted that "[i]t may be that 'general statements of policy' are rules directed primarily at the staff of an agency describing how it will conduct agency discretionary functions, while other rules

such policy statements do not establish binding norms and do not finally determine the rights or issues which the statements address.²⁴

2. *Interpretations*—Interpretive rules differ from substantive or legislative rules. While the formulation of the latter must be through notice and comment proceedings, interpretive rules fall within the exemptions to the notice and comment rule and require either publication or public availability.²⁵ Little disagreement exists over the difference between interpretive and substantive rules.²⁶ According to the dominant view, an interpretive rule represents the agency's interpretation of a statute or some prior guiding policy. Substantive rules, on the other hand, fill the gaps in statutes. Congress delegates authority to the agency, which then promulgates these rules pursuant to such power. The difference between interpretive and substantive rules according to the dominant view, then, lies in congressional delegation of authority to the agency to formulate binding substantive rules.²⁷

are directed primarily at the public in an effort to impose obligations on them." Bonfield, *Some Tentative Thoughts on Public Participation in the Making of Interpretive Rules and General Statements of Policy under the APA*, 23 AD. L. REV. 101, 115 (1970), cited in *Noel v. Chapman*, 508 F.2d 1023, at 1030 (2d Cir.), cert. denied 423 U.S. 824 (1975).

²⁴ In *Guardian Federal Sav. & Loan v. Federal Sav. & Loan Ins. Corp.*, 589 F.2d 658 (D.C. Cir. 1978), a federally chartered savings and loan association challenged regulations issued by the defendant agency without prior notice and comment procedures. The Court of Appeals for the District of Columbia Circuit, per Judge Leventhal, held that the challenged regulations encompassing audit specifications and auditor qualifications fell within § 553 exemptions from notice and comment. He noted that a critical test of whether a rule is a general statement of policy, and thus exempt from § 553, is its practical effect in a subsequent administrative proceeding. A general statement of policy, he stated, does not establish a binding norm and is not finally determinative of the issues or rights to which it is addressed. *Id.* at 666. The form of the regulation is not controlling; rather, its substance and effect will determine whether a rule is a general statement of policy. Finally, the court noted that the term "general" includes detailed requirements provided that they are of general, as contrasted with particular, applicability. *Id.* at 667. See part II A *infra*.

²⁵ 5 U.S.C. §§ 552(a)(1)(D), (a)(2)(B), 553(b)(A), (1976) see note 3 *supra*.

²⁶ See, e.g., *Joseph v. United States Civil Serv. Comm.*, 554 F.2d 1140, 1152-54 (D.C. Cir. 1977), especially nn.24-26. In *Joseph*, Judge Tamm carefully spelled out the standard view regarding the distinction between interpretive and substantive rules. In support of the dominant view, see 2 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 7.8 (1978). In opposition to the dominant view, one commentator asserts that "a theoretical distinction between legislative and interpretive rules assumed to be present by Congress when it approved the APA has been effectively erased." Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 521, 563 (1977). Although the dominant view may be under attack, courts continue to draw the distinction, thereby giving that view some measure of vitality. See note 27 *infra*.

²⁷ See *Batterton v. Francis*, 432 U.S. 416 (1977). In *Batterton*, the Court noted that Congress expressly delegated to the Secretary of Health, Education and Welfare the power to prescribe standards for determining what constitutes "unemployment" for the purposes of aid to families with dependent children-unemployed fathers eligibility. In

These two types of rules differ most in the standard of review courts employ to measure the rules' validity. On the whole, substantive rules possess the force of law and carry a strong presumption of validity. The courts possess greater power in reviewing interpretive rules.²⁸ The legislative history of the APA suggests viewing interpretive rules as "merely interpretations of statutory provisions [which] are subject to plenary judicial review. . . ."²⁹ When reviewing such actions court may substitute its own judgment on questions of law underlying the interpretive rule. As will be discussed, however, courts often defer to an agency's interpretive rules.³⁰

B. Definitions Keyed to "Generality"

The consensus on what constitutes an interpretation or policy statement is of minimal value when the focus shifts to understanding the requirement of "generality," which distinguishes the publication rule from the availability rule.³¹ Unfortunately, the APA's legislative history and the *Attorney General's Manual* provide little guidance on the problem of the meaning of "generality."³²

exercising that delegated authority the Secretary adopted regulations with legislative effect. *See also* *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). In dealing with guidelines of the Equal Employment Opportunity Commission (EEOC) that differed from the Court's interpretation of a statute, the Court noted that Congress did not confer upon the EEOC the authority to promulgate rules or regulations. Hence, the EEOC rules were accorded less weight because of a lack of delegated authority to make such rulings.

²⁸ *See* note 27 *supra*; *Daughters of Miriam Center for the Aged v. Mathews*, 590 F.2d 1250 (3d Cir. 1978) (a nonprofit organization owning and operating a skilled nursing facility challenged the application to it of medicare depreciation recapture regulations; held that retroactive application of the regulation would be improper).

²⁹ SENATE COMM. ON THE JUDICIARY, *supra* note 16, at 18.

³⁰ *See* part II C *infra*.

³¹ *See, e.g., Tax Analysts & Advocates v. IRS*, 362 F. Supp. 1298 (D.D.C. 1973), *modified on other grounds*, 505 F.2d 350 (D.C. Cir. 1974). The district court compared the publication and availability rules and commented:

Read together these provisions can only mean that interpretations of general applicability are to be published in the Federal Register while all other interpretations adopted by an agency, i.e., those *not* of general applicability, are to be made available to the public, albeit they need not be published. Thus, even those interpretations of very unique applicability must be made available under the Act.

Id. at 1303-04. No one would accuse this passage of being overly illuminating. Yet Professor Davis commented that this case and quotation present "a good judicial treatment of the problem whether § 552 requires publication of interpretive rules. . . ." K. DAVIS, *supra* note 2, § 5:11, at 342.

³² The 1947 and 1974 definitions from the two ATTORNEY GENERAL'S MANUALS fail to distinguish adequately statements of general policy from statements of policy. *See* text accompanying notes 21 & 22 *supra*. In order to know when an agency must publish any

1. *The significant impact test*— The significant impact test, articulated by *Lewis v. Weinberger*,³³ represents the predominant judicial perspective through which the requirement of generality gains meaning.³⁴ *Lewis* established the following test in determining whether a policy or interpretation must be published or merely made available to the public: "A policy statement is not qualified as 'general' nor is an administrative interpretation deemed to be 'of general applicability' if: (1) only a clarification or explanation of existing laws or regulations is expressed; and (2) no significant impact upon any segment of the public results."³⁵ The test directs attention to the "causal" features of the interpretation or policy statement. If an action exerts a significant impact upon some segment of society and goes beyond a mere clarification of existing law, then the publication rule requires publication of that result. Mere interpretations and

policy statement rather than making it available for inspection, the agency must know when such statements announce general policy as opposed to non-general policy. The 1947 and 1974 ATTORNEY GENERAL'S MANUAL's definitions overlap substantially and thus fail to provide any insight for any relevant distinctions. Moreover, neither the APA legislative history nor the ATTORNEY GENERAL'S MANUAL distinguish between specific interpretations and those of general applicability. See SENATE COMM. ON THE JUDICIARY, *supra* note 16; ATTORNEY GENERAL'S MANUAL (1947), (1967), (1974).

³³ 415 F. Supp. 652 (D.N.M. 1976). In *Lewis*, American Indian plaintiffs brought an action attacking the policy and practice of the Indian Health Service (IHS) of denying contract medical care to off-reservation Indians. The court held that the IHS policy found in a memorandum available at IHS offices had no effect for either of two reasons: lack of publication in the Federal Register as required by § 552 (a)(1)(D) and lack of issuance in accordance with § 553 notice and comment proceedings.

In determining that the IHS policy had to be published as a "statement of general policy" within the meaning of § 552(a)(1)(D)," the court established the significant impact test. *Id.* at 659. See text accompanying note 35 *infra*. After deciding the action violated publication rule requirements, the court determined that the action should have been promulgated through notice and comment proceedings. Utilizing the test enunciated in *Texaco v. FPC*, 412 F.2d 740 (3d Cir. 1969), for determining § 553(b)(A) exemptions, the court held that no exemptions applied to the IHS policy since "[t]he policy in question effects a *substantial* change in existing statutes and regulations . . ." 415 F. Supp. at 661 (emphasis added). See note 22 *supra* for a discussion of *Texaco*. Although the court admitted that the IHS policy was a § 552 statement of general policy, it also said that the IHS policy was not a general statement of policy for § 553 purposes; thus, *Lewis* appears to provide support for the non-equivalence position. See part I A 1 *supra*.

³⁴ Although the *Lewis* holding rested upon alternative grounds, subsequent courts have borrowed exclusively that portion of *Lewis* which established the significant impact test for § 552 purposes. Courts in the Ninth Circuit utilize the *Lewis* test more than any other circuit. See, e.g., *United States v. Mowat*, 582 F.2d 1194, 1200 (9th Cir. 1978); *Anderson v. Butz*, 550 F.2d 459, 463 (9th Cir. 1977); *Aiken v. Obledo*, 442 F. Supp. 628, 653 (E.D. Cal. 1977); *Dean v. Butz*, 428 F. Supp. 477, 480 (D. Hawaii 1977) ("This [*Lewis*] test was recently adopted by the Ninth Circuit Court of Appeals in *Anderson v. Butz*. . ."). The *Lewis* test has been used in other circuits as well. See, e.g., *Appalachian Power Co. v. Train*, 566 F.2d 451, 455 (4th Cir. 1977).

³⁵ *Lewis v. Weinberger*, 415 F. Supp. 652, 659 (D.N.M. 1976).

statements of policy,³⁶ which require only public availability, fail to meet the two requirements of *Lewis*. These actions only clarify existing law and fail to exert a significant impact upon some segment of the public.

2. *Criticisms of the significant impact test*— The criteria for evaluating the adequacy of any publication test stand out clearly. An adequate test must fulfill two functions. First, the test should provide direction to agencies so that they can make rational judgments on whether to publish an action or only to keep it available for inspection. Providing this direction, the “agency perspective,” is the test’s primary function. The other function of an adequate publication test, the “judicial perspective,” comes into play only when someone challenges the agency’s action. For this latter function, the test must facilitate a consistent judicial review of publication rule violations. Whether the significant impact test provides an adequate basis for distinguishing among agency actions for the purposes of the publication and availability rules is the key to evaluating its success.

The major difficulty facing the *Lewis* test centers on the inability to articulate adequately what constitutes “significant” impact. The interpretation of the statement ‘action X has significant impact upon Y’ reduces to the identification and understanding of three variables: (a) the *extent* to which there must be impact upon the relevant group (e.g., “some impact” versus “heavy impact”); (b) the *proportion* of the relevant group affected by the impact (e.g., “some number of the group” versus “a large number of the group”);³⁷ and (c) the *frequency* with which the impact affects the relevant group (e.g., “some of the time” versus “all of the time”). Given these variables, there exist eight logically possible interpretations of the statement ‘action X has significant impact upon Y.’³⁸

³⁶ 5 U.S.C. § 552(a)(2)(C) (1976).

³⁷ This question of proportion is not the same as ‘significant impact upon whom?’ See note 40 *infra*.

³⁸ The eight logically possible interpretations are:

- (i) action X has some impact for some period of time upon some number of group Y;
- (ii) action X has some impact for some period of time upon a large number of group Y;
- (iii) action X has some impact all of the time upon some number of group Y;
- (iv) action X has some impact all of the time upon a large number of group Y;
- (v) action X has a heavy impact for some period of time upon some number of group Y;
- (vi) action X has a heavy impact for some period of time upon a large number of group Y.

The primary difficulty facing a proponent of the significant impact test is determining which of these eight interpretations correspond to significant impact. Different lines will be drawn depending upon which one or combination of these three variables the proponent emphasizes. One might argue for that version which results in the most publications, in view of the philosophy behind the publication rule doing away with "secret law" and conducting agency actions in the public eye.³⁹ Every agency action, however, would seemingly satisfy this least restrictive version of the significant impact test. Such a broad interpretation would expand the Federal Register to incredible proportions and make a mockery of the utility of the publication rule requirements. On the other hand, one could argue for that version which results in the fewest publications, on the theory that agencies need only publish their most important results in the Federal Register. Unfortunately, this stance would indubitably result in agencies not publishing certain policies which ought to be brought to the public's attention for equitable reasons.

Ultimately, the proponent of the *Lewis* test must attempt to justify the adoption of one or more of the versions which lie between the extreme versions. Principled arguments supporting such choices become difficult to produce. Such arguments more likely than not rest at best upon intuitive judgments and at worst upon arbitrary decisions. The various versions of the *Lewis* test, even at the intuitive level, are simply too close in meaning.⁴⁰ The subtle distinctions between the versions virtually

(vii) action X has a heavy impact all of the time upon some number of group Y;

(viii) action X has a heavy impact all of the time upon a large number of group Y.

³⁹ See note 56 *infra*.

⁴⁰ A further problem with the *Lewis* test lies in deciding to whom the test applies. The dilemma is whether the test concerns significant impact upon some segment of the general public or significant impact upon some segment of the regulated public. The *Lewis* formulation focuses upon the former group. See note 33 *supra*. Several cases clearly indicate, however, that courts are looking to the affected regulated public in order to measure significant impact. See, e.g., *Sannon v. United States*, 460 F. Supp. 458, 464 (S.D. Fla. 1978); *Aiken v. Obledo*, 442 F. Supp. 628, 653 (E.D. Cal. 1977); *United States ex rel. Parco v. Morris*, 426 F. Supp. 976, 985 (E.D. Pa. 1977). Suppose, for example, that an agency regulates a handful of oil producers in a particular matter. Under the strict version of *Lewis* one can argue that an agency interpretation with significant impact on these few producers is not of general applicability because the interpretation does not have significant impact upon a segment of the general public. If a rule causes significant impact upon a segment of the general public, it seems to follow that the rule exerts significant impact upon the regulated public. As the above example demonstrates, however, the converse does not necessarily follow.

The problem of to which group the *Lewis* test applies does not present an insurmountable hurdle to the survival of the significant impact test. Such considerations do under-

ensure that agencies and courts will not be able consistently to reach the same conclusions concerning what constitutes significant impact. To expect different actors in different situations to reach consistently similar conclusions about the application of these terms is naive.

Every agency interpretation and statement exerts some impact at some time on some group of people.⁴¹ The *Lewis* test attempts to impose a type of order upon a variety of circumstances which defy categorization in terms of varying "impact."⁴²

score, however, the conceptual confusion which enshrouds the court's handling of this test.

⁴¹ See *Energy Reserves Group, Inc. v. Department of Energy*, 589 F.2d 1082 (Emer. Ct. App. 1978). The court criticized the use of the substantial impact test for determining when to apply § 553 exemptions. See note 22 *supra*. One can apply the court's critical comment to the instant context. The court complained that "[t]he substantial impact test is illogical because every significant interpretive rule choosing between two or more interpretations of a legislative rule or statute has an effect ("substantial impact") on the hopes, desires, expectations or beliefs of some of those regulated by the rule or statute." 589 F.2d at 1094-95.

⁴² One might argue that the *Lewis* test properly attempts to explicate the publication rule generally but fails to account adequately for all the phenomena such a test must cover. Rather than the *Lewis* significant impact test, a better publication test is a "drip-down" theory predicated on the view that § 553 general statements of policy are equivalent to § 552 statements of general policy. The drip-down theory arises from the fact that judicial characterizations of general policy statements indicate that such statements do not have *substantial* impact upon the public although they do have a *significant* impact upon the public. See *Texaco, Inc. v. Federal Power Comm'n*, 412 F.2d 740 (3d Cir. 1969); *Lewis v. Weinberger*, 415 F. Supp. 652 (D.N.M. 1976); and note 24 *supra*. These two conceptions of general policy statements do not necessarily contradict each other. If one assumes that "significant" impact differs from "substantial" impact by representing *less* impact, the result is a drip-down theory relying upon this distinction.

The drip-down theory has two components. The agency first determines if a statement of policy requires promulgation in notice and comment proceedings. If the policy statement or interpretation exerts a *substantial* impact upon the public, then notice and comment proceedings must be undertaken. See, e.g., *Sannon v. United States*, 460 F. Supp. 458, 464 (S.D. Fla. 1978) (using the substantial impact test, the court determined that Immigration and Naturalization Service regulations regarding political asylum were not exempt from notice and comment proceedings.) The drip-down effect occurs when the agency concludes that the policy does *not* exert a substantial impact. The agency then judges whether the statement of policy exerts the lesser *significant* impact upon the public. If so, the agency deems the policy statement "general" and publishes it in compliance with § 552(a)(1)(D). If there is not even a significant impact, the agency only makes the statement available to the public under § 552(a)(2)(B).

The drip-down theory is sensible only if there is a quantifiable difference between a policy causing significant impact and one causing substantial impact. There are strong suggestions from the courts' treatment of § 552 violations as opposed to § 553 requirements that no fine lines are drawn between such varying impacts and apparently no court advocates the theory. Some might argue that the *Lewis* court's use of its own significant impact test and the *Texaco* substantial impact test represents an early version of the drip-down theory. See note 33 *supra*. Such a contention fails, however, for two reasons. First, the drip-down theory depends upon a distinction between substantial impact and the lesser significant impact. The *Lewis* court simply did not draw this distinction between varying impacts. Rather, the *Lewis* court's definition of significant impact,

Moreover, the language and legislative history of the APA do not support such a categorization.⁴³ In judging the *Lewis* significant impact test against the criteria for an adequate publication test, the test clearly fails to provide either the agency or judicial perspective. Ultimately, this test merely provides a shibboleth upon which agencies and courts hang their individual intuitions about right or wrong in a particular case. Such a reduction of jurisprudence to psychology should not prevail until there has been a more thorough attempt to explicate the APA.

II. A MODEL FOR DISTINGUISHING AGENCY ACTIONS FOR THE PURPOSES OF THE PUBLICATION AND AVAILABILITY RULES

Part I A delineated characteristics found in all policy statements and interpretations. The conclusions reached there remain intact even after the analysis in part I B. The rejection in part I B, however, of the significant impact test,⁴⁴ the only

415 F. Supp. at 659, is identical to the *Texaco* court's earlier definition of substantial impact. See note 22 *supra*. Second, the *Lewis* court's reasoning does not "drip-down" but rather "drips-up." The court first made the § 552 determination about publication and then considered the § 553 question of notice and comment. Such a method produces distorted results; every action which requires publication will also require formulation in notice and comment proceedings. Consequently, any attempt to characterize the *Lewis* opinion charitably as an early drip-down theory must fail.

One might argue that even though courts fail to distinguish between significant and substantial impact, such a distinction can and should be drawn inasmuch as the drip-down theory facilitates decisions about § 552 and § 553 actions. Such a theory fails, however, in the face of overwhelming obstacles such as those which plague the *Lewis* test. See part I B 2 *supra*. The major difficulty facing the drip-down theory is the inability to articulate adequately what constitutes significant as opposed to substantial impact. There exist eight logically possible interpretations of the statements 'action X has significant impact upon Y' and 'action X has substantial impact upon Y.' It has been shown how difficult it is for a proponent of the "drip-down" theory determining which of these eight interpretations characterize which type of impact. See note 38 *supra*.

There is a minimum of three variations of the drip-down theory concerning where to draw the line between significant and substantial impact. These three groups each designate a different variable as being most crucial in distinguishing among impacts. For example, the group which views variable (b) (concerning the proportion of the group) as most crucial claims that interpretations (i),(iii),(v), and (vii) correspond to significant impact while (ii),(iv),(vi), and (viii) align with substantial impact. See note 38 *supra*. All of the arguments against the *Lewis* significant impact test apply equally well to the drip-down theory. See part I B 2 *supra*. All impact tests suffer from the same inherent weaknesses, whether the impact is significant (*Lewis*), substantial (*Texaco*), or split between significant and substantial impact (drip-down).

⁴³ For criticisms of the failure of the substantial impact test to be grounded in the APA, see *Energy Reserves Group, Inc. v. Department of Energy*, 589 F.2d 1082 (Emer. Ct. App. 1978); Asimow, *supra* note 26, at 545-51. These sources are relevant to the significant impact test given the demonstrated similarities between significant and substantial impact. See note 42 *supra*.

⁴⁴ See part I B 1 *supra*.

programmatic attempt to interpret the generality requirement of the publication rule, creates a vacuum. Three options are available. One option is to abandon the distinction in generality between the publication and availability rules. Thereafter, *all* policy statements and interpretations can either be promulgated in notice and comment proceedings, published in the Federal Register, or simply made available for inspection. Another option is to draw a different distinction between these rules. For example, only legislative rules, and announcements identifying those available policy statements and interpretations might be required to be published.⁴⁵ A final option is to maintain the APA distinction of generality between the publication and availability rules. The challenge is to explicate this modifier successfully.

This article integrates the last two options and presents a model for understanding the requirements of the publication and availability rules. The first option's total abandonment of the distinction saddles the agencies and the public with a hopeless system. It is far too costly and time-consuming to require all policy statements and interpretations to go through notice and comment proceedings. The same complaints apply to mass publication in the Federal Register. On the other hand, merely making policy statements and interpretations available for public inspection clearly subverts the APA's commitment to openness.⁴⁶ The second option of redrawing the distinction succeeds only if one who is intent on reforming the APA confronts the fact that some policy statements and interpretations should be fully published for the protection of the public. Ultimately, the APA hierarchical taxonomy provides the best theoretical framework for realizing the objectives behind the APA. To implement APA policies fully while remaining sensitive to agency dynamics, however, requires that an explication of the publication rule must, for the purposes of reform, go beyond the notion of generality. *Lewis* offers one such creative attempt.⁴⁷ This article rejects that

⁴⁵ This is suggested in Koch & Rubin, *A Proposal For A Comprehensive Restructuring of the Public Information System*, 1979 DUKE L.J. 1, 55-56 (1979). A different suggestion is found in Asimow, *supra* note 26, at 573-84. Asimow advocates *post*-adoption notice and comment proceedings for general policy statements and interpretations. His suggestion would take effect only after such results have been published in the Federal Register as required by the publication rule. Hence, this article's model can be utilized by Asimow as a first step in the implementation of his reform. See part II *infra*.

⁴⁶ See note 56 *infra*.

⁴⁷ Professor Davis characterizes the problem with the publication rule and *Lewis's* response to that problem as follows:

Since Congress has done no more than provide a framework which depends mainly on giving meaning to the word "general," and since analysis of such a term is not very promising, perhaps some judicial creativity is appropriate and

attempt but proposes to fill the vacuum with a model.⁴⁸

A. A Threshold Inquiry: Generality

Many analyses of the publication and availability rules assume that the beginning and end of any such analysis must focus upon the modifier "general" in the statutory expressions.⁴⁹ Without doubt, scrutiny of this modifier represents the proper departure point for any analysis of the publication rule. But an analysis of the publication rule bases solely on the dissection of the modifier "general" is overly simplistic.

The detail in which an interpretation or policy statement articulates a particular matter does not determine whether such entities are general.⁵⁰ Rather, the focus should be on whether the agency directs actions and words towards the public or towards a single specific party. If the latter is the agency's target, the policy or interpretation is usually not general.⁵¹ The availability rule exempts from the publication requirements adjudicative opinions⁵² and "instructions to staff that affect a member of the public. . . ."⁵³ The agency presumably directs such actions of non-general applicability against one specific party. These actions, then, contrast with the general policies and interpretations of the publication rule.⁵⁴

The modifier "general" in the publication rule refers to a relatively straightforward agency determination. When an agency directs an action against a particular party, such an action is not general. Whenever an agency frames a policy or interpretation so that the agency action applies to all other similarly situated parties, however, that action reaches the level of generality. This characterization, although accurate, is somewhat misleading. According to the availability rule, a non-general policy statement and interpretation "may be relied on, used, or cited as precedent

even necessary . . . In *Lewis v. Weinberger* . . . the opinion of Judge Bratton is conservatively creative . . . The idea of "impact" cannot be extracted from the word "general" but it can be extracted from what Congress would have intended by "general" if it had expressed itself on the problem before the court. That approach to the problem is constructive and needed.

K. DAVIS, *supra* note 2, § 5:11, at 343-44.

⁴⁸ See parts II A-C *infra*.

⁴⁹ See note 31 *supra*. See also notes 13-15 and accompanying text *supra*.

⁵⁰ See note 24 *supra*.

⁵¹ *But see Tax Analysts & Advocates v. IRS*, 505 F.2d 350 (D.C. Cir. 1974) (ruling that an "interpretation" includes a private ruling by the IRS.).

⁵² 5 U.S.C. § 552(a)(2)(A) (1976).

⁵³ *Id.* § 552(a)(2)(C).

⁵⁴ *Id.* § 552(a)(1)(D).

by an agency against a party other than an agency if- (i) it has been indexed and either made available or published as provided by this paragraph. . . .”⁵⁵ This APA provision greatly diminishes any insight which the term “generality” provides in distinguishing the publication rule from the availability rule. Inasmuch as an agency can use against parties any policy statement or interpretation, without regard to generality, a publication test built solely upon generality fails to have any predictive effectiveness. Nonetheless, generality successfully serves as the starting point for an explication of the publication rule. The model advocated in this article focuses initial inquiry upon whether the agency directs its action towards a class of persons. If the action satisfies the model’s necessary condition of generality, the inquiry proceeds to additional components of the model.

B. The Relationship of Agency Actions to the Agency’s Corpus of Values, Beliefs, and Positions

Consistency of agency action and the avoidance of surprise to the affected public represent the most important policies underlying the publication and availability rules.⁵⁶ Consequently, these considerations must serve as the foundation from which the model arises. The model implements these policies by comparing an agency action to prior agency positions. To minimize potentially harmful surprise to the public, the model dictates

⁵⁵ *Id.* § 552 (a)(2).

⁵⁶ See COMM. ON THE JUDICIARY, *supra* note 16, at 193-94, 198. The Senate Judiciary Committee noted:

The bill is designed to afford parties affected by administrative powers a means of knowing what their rights are and how they may be protected.

. . . .
The first of these is basic [referring to the substance of the public information section of the APA], because it requires agencies to take the initiative in informing the public.

. . . .
The public information provisions of section 3 are of the broadest application because, while some functions and some operations may not lend themselves to formal procedure, all administrative operations should as a matter of policy be disclosed to the public except as secrecy may obviously be required or only internal agency “housekeeping” arrangements may be involved . . . The public information requirements of section 3 are in many ways among the most important, far-reaching, and useful provisions of the bill. For the information and protection of the public wherever located, these provisions require agencies to take the mystery out of administrative procedure by stating it. The section has been drawn upon the theory that administrative operations and procedures are public property which the general public, rather than a few specialists or lobbyists, is entitled to know or to have the ready means of knowing with definiteness and assurance.

publication when the agency interpretation or policy statement *diverges* from the agency's corpus of values, beliefs, and positions.⁵⁷

Typically, an agency interpretation or policy statement directly relates only to some subset of the agency's corpus of values, beliefs, and positions. Consider an agency interpretation 'X' and the subset of agency values, beliefs, and positions $\{Y_1, Y_2, \dots, Y_n\}$ which generally concern the same agency matters as 'X'. The following definitions can be given:⁵⁸

Def. 1. Agency action *X* *diverges* from
 $\left. \begin{array}{l} \{Y_1, Y_2, \dots, Y_n \text{ if and only if} \\ \{Y_1, Y_2, \dots, Y_n \text{ entails } \textit{not-X}. \} \end{array} \right\}$

Def. 2. Agency action *X* *converges* with
 $\left. \begin{array}{l} \{Y_1, Y_2, \dots, Y_n \text{ if and only if} \\ \{Y_1, Y_2, \dots, Y_n \text{ entails } X. \} \end{array} \right\}$

A hypothetical example will help elaborate upon these definitions.⁵⁹ Aid for Families with Dependent Children (AFDC) programs provide monthly payments to low income families with children. The relevant statute dictates that in order for a family to be eligible for AFDC aid, either death or desertion must deprive the children of a parent.⁶⁰ Agencies interpret this federal statute in accordance with the "substitute father" rule. In the

⁵⁷ This model does not pretend to aid directly in the determination of whether an action falls within the § 553 exemptions. The model presupposes the ability of the agency and the courts to distinguish between substantive rules subject to notice and comment proceedings and interpretations or statements of policy that § 553(b)(A) exempts from such proceedings. See part I A *supra*. Furthermore, the model's purpose is not to distinguish interpretations from policy statements. The discussion in part I A, *supra*, indicates, however, a consensus on how to draw such a distinction. The model comes into play, as does the *Lewis* test, when an agency must decide if its interpretation or policy statement requires publication under § 552(a)(1)(D) or whether it need only be made available to the public under § 552(a)(2)(B).

⁵⁸ This account presupposes the following definition of "entailment": a group of statements 'X' entails a given statement 'A', if and only if, A must necessarily be true when every member of X is true.

⁵⁹ This example does not precisely describe an actual sequence of events. However, the example does depict some of the events taking place in the administration of Aid for Families with Dependent Children (AFDC) programs.

⁶⁰ 42 U.S.C. § 606(a) (1976) defines the term "dependent child," and 42 U.S.C. § 606(b) (1976) defines the term "aid to families with dependent children." For the comprehensive regulations for AFDC programs, see 42 U.S.C. §§ 601-644 (1976).

example, an agency issues, over a five month period, the following five interpretations of the statute:

- (a) if a substitute father resides in a home, that family is ineligible for AFDC aid.
- (b) if an unrelated male resides in the house, that male is presumed to be a substitute father.
- (c) if a male uses a house as his mailing address, he is presumed to be a substitute father in that home.
- (d) if the mother's name and the male's name are on the house's deed as co-mortgagors, he is presumed to be a substitute father.
- (e) in order for any member of the household to receive AFDC aid, every member of the household must be eligible to receive AFDC aid.

Subsequent to the issuing of interpretations (a) through (e), the same agency adopts the following interpretation of the statute in question:

- (f) any adult person living in the household is deemed to be contributing money to the children of the household.

At an even later time the agency issues a further interpretation of the statute.⁶¹

- (g) an unrelated adult member of the household is not a part of the family for AFDC eligibility purposes unless that person has a legal duty to support the children.

The question is which agency interpretations, if any, diverge from prior positions and require publication under the publication rule.

Surprise to the public, which possibly results in harm, will arise at two points. The first point is when an agency offers its initial interpretation of a statute or its initial statement of how it will use its discretion in a new area. Thereafter, surprise arises when the agencies produce interpretations or policy statements which express sentiments different from their initial posture. In the hypothetical, interpretation (a) is the agency's first interpre-

⁶¹ See *King v. Smith*, 392 U.S. 309 (1968), which concerns the Alabama Department of Pension and Security's issuance of the substitute father rule. The Supreme Court held the Alabama regulation invalid by defining the term "father" to include a person who does not owe to the child a state-imposed legal duty of support.

tation of the statute. Certainly, (a) is a general interpretation, so the threshold hurdle is met.⁶² There exist three possible findings when measuring initial interpretation (a) against the divergence component. First, interpretation (a) diverges from the agency's corpus of values, beliefs, and positions, thus calling for publication in the Federal Register.⁶³ Second, interpretation (a) does not diverge from the agency's corpus of positions and the availability rule requires public availability of (a).⁶⁴ Finally, it might not be clear whether (a) diverges or converges with the agency's other positions. The likelihood of the last finding is great when dealing with the agency's initial policy statement or interpretation such as (a).

The model erects a presumption in favor of publishing the initial general policy statement or interpretation. This presumption can be overcome only by a strong showing that the agency action converges with a prior set of agency positions. This presumption is met for (a), for example, if the agency utilizes the substitute father rule in interpreting all other eligibility statutes under their authority. The motive behind this presumption arises out of the strong APA policies favoring agency consistency and the avoidance of surprise.⁶⁵ More likely than not, an initial general policy statement or interpretation will surprise the public. Moreover, given the action's newness, such a result will not obviously converge or diverge from other agency positions. Hence, in this hypothetical the model compels publication of interpretation (a) in the Federal Register.

Surprise to the public also arises after the initial policy or interpretation when the agency "changes its mind." Consider the two subsequent agency interpretations (f) and (g) in the example. Clearly, the conjunction of all agency positions $\{(a)\&(b)\&(c)\&(d)\&(e)\}$ entails interpretation (f). In other words, (f) cannot be true if the previous interpretations (a) through (e) taken together are false. As such, interpretation (f) *converges* with the previous interpretations (a) through (e). Therefore, the model does not require publication of (f). Just as clearly, interpretation (g) *diverges* from the conjunction of all agency positions $\{(a)\&(b)\&(c)\&(d)\&(e)\&(f)\}$. In other words, this conjunction entails the *negation* of interpretation (g). The conjunction of all the agency positions entails that "an unrelated adult mem-

⁶² See part II A *supra*.

⁶³ 5 U.S.C. § 552(a)(1)(D) (1976).

⁶⁴ *Id.* § 552(a)(2)(B).

⁶⁵ See note 56 *supra*.

ber of the household is a part of the family unit for AFDC eligibility purposes even if that person has no legal duty to support the children." Interpretation (g), however, makes the opposite claim. Hence, interpretation (g) *diverges* from the previous agency interpretations (a) through (f). Therefore, the model requires publication of (g) in the Federal Register.

There are some obvious objections to this central component of divergence. One might argue that it cannot adequately be determined when an agency interpretation or policy statement diverges from or converges with the agency's other values, beliefs, and positions. Such an objection can be overcome, however, through repeated application and refinements of the model. For example, an agency interpretation or policy statement which merely clarifies a previous agency position will quite likely converge with that position. To the extent that it converges, the model indicates that the agency need not publish the new result.

Others will argue that the model is unacceptable because it goes beyond the strict meanings of the APA taxonomy. Such an argument, however, actually points to the model's greatest virtue — the implementation of the APA policies favoring agency consistency and the avoidance of surprise to the public.⁶⁶ A strict reliance on the infertile APA legislative history and the face of the APA's language results in the submersion of these important policy considerations. Accordingly, any useful explication of the publication rule must forge new ground by building upon the APA policies.⁶⁷

C. *Judicial Deference to Agency Decisions*

When a person runs afoul of an agency interpretation or policy statement and requests that a court review the case's merits, a judicial decision to void the agency action mitigates to a great extent the harm to the challenging party. Over time and through interaction with the judicial system, agencies begin to expect certain types of judicial reactions. These agency expectations can help serve as a further basis for decisions about the publication rule requirements. The APA concern over surprise injuries to the public relates to these considerations since greater harm befalls the party when the reviewing court upholds the agency's action, in contrast to striking it down. If, in light of the agency's experience, a general policy statement or interpretation is the

⁶⁶ *Id.*

⁶⁷ See note 47 *supra*.

type of agency action to which a court is likely to defer, *then this estimation weighs in favor of publishing the result in the Federal Register*. This aspect of the model does not concern the actual divergence or convergence of an agency policy since this might or might not influence a court's specific deference decision.⁶⁸ Rather, the model inquires whether this type of result falls into an area of agency actions which receive judicial deference, divergence notwithstanding.

The "deference" component of the model does not occupy the central position held by divergence. As such, the component of judicial deference only cuts in favor of and never against publication. For example, if a general policy diverges but is not a likely candidate for judicial deference, the model nonetheless compels publication. Similarly, if a general policy *clearly* converges but is a probable candidate for judicial deference, the model does not compel publication. The role of deference in the model is similar to that of a "tiebreaker"—the likelihood of judicial deference compels publication in borderline and murky divergence cases.⁶⁹

⁶⁸ See *Morton v. Ruiz*, 415 U.S. 199, 237 (1974), where the Court noted that consistency in the agency's interpretation of the statute will weigh in favor of the Court's deference.

⁶⁹ In assessing the potential for judicial deference to agency decisions, the agency must examine the courts' standards of review with regard to both interpretive rules and discretionary matters. Courts have the right to substitute their own judgment for the agency's on questions of law in interpretive rules. See part I A 2 *supra*. Courts will often defer, however, to the agency's position. Agency expertise is the factor most frequently relevant to the decision of deference. See, e.g., *Esquire, Inc. v. Ringer*, 591 F.2d 796, 801 (D.C. Cir. 1978); *Giles Lowery Stockyards v. Department of Agriculture*, 565 F.2d 321, 326 (5th Cir. 1977); L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 576-85 (1965); W. GELLHORN, C. BYSE & P. STRAUSS, *ADMINISTRATIVE LAW* 311-18 (1979). Courts often defer to the agency when they recognize the agency action as growing out of a particular kind of agency expertise. See, e.g., *Smithkline Corp. v. Food and Drug Administration*, 587 F.2d 1107, 1118 (D.C. Cir. 1978) (the court noted that courts will ordinarily exercise considerable deference to an agency's technical expertise and experience, particularly with respect to questions involving engineering and scientific considerations). An agency might view every decision it renders as an outgrowth of its expertise. As a result of even a limited interaction with the judicial system, however, the agency must learn that courts will reject such an extreme perspective. See, e.g., *U.S. Lines v. Federal Maritime Comm'n*, 584 F.2d 519, 535 (D.C. Cir. 1978) (the court noted that agency expertise does not afford the agency absolute power; the existence of judicial review, although under a presumption favoring the agency's decision making, negates any notion that the deference to be afforded the agency's expertise in any particular field is absolute or its discretion unreviewable). Agencies must therefore be sensitive to the types of expertise to which the courts will defer. Otherwise this model component will be of less help to the agency. Apart from respect for an agency's expertise, a certain judicial attitude also creates a climate favorable to deference. The reviewing court need not find that the agency's interpretation is the only possible one or even that it represents the one the court would adopt in the first instance. See *Belco Petroleum Corp. v. Federal Energy Reg. Comm'n*, 589 F.2d 680, 685-86 (D.C. Cir. 1978). The combination of these elements

CONCLUSION

This article's model arises directly out of the fundamental APA concerns favoring agency consistency and the avoidance of surprise to the public.⁷⁰ The agency or subsequent reviewing court should undertake their inquiry of the publication rule in accordance with the model's components. According to this article's proposal, a policy statement or interpretation must be published in the Federal Register if and only if:

- (i) the agency directs its action towards a *class* of persons; and
- (ii) the agency action *diverges* from the agency's corpus of values, beliefs, and positions;

also counting in favor of publication is a further element:

- (iii) in light of the agency's past experience, the agency action is of a type to which a reviewing court will likely defer.

The model weighs these three components according to their respective degrees of importance in implementing APA policies. The generality requirement of (i) presents the starting point for publication rule analysis and acts only as a necessary condition for publication. The divergence component in (ii), representing the core of the entire model, serves as a necessary and sufficient condition for publication. Furthermore, if the policy statement

leads to judicial deference to agency interpretations in many situations.

Since policy statements give direction to the future exercise of agency discretion, the model component concerning judicial deference to policy statements must also take notice of the standard of review for discretionary acts. The relevant statutory provisions state that the review provisions of the APA apply "except to the extent that . . . agency action is committed to agency discretion." 5 U.S.C. § 701(a) (1976). Another section, however, allows a court to "hold unlawful and set aside agency actions, findings, and conclusions found to be . . . arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A). The Supreme Court resolved any conflict between these two provisions by construing § 701(a) narrowly in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). The Court established that there is preclusion of the review of discretionary action only in those rare instances when there is no law to apply. The Court delineated the procedure for review of agency action for abuse of discretion. First, the reviewing court must determine whether the administrator's act falls within the scope of his authority. Second, the court must decide whether to characterize the agency action as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." This standard of review is a *narrow* standard and the court must find a clear error of judgment for there to be an "abuse of discretion." The court cannot substitute its own judgment for that of the agency.

⁷⁰ See note 56 *supra*.

or interpretation is the agency's initial effort in a particular area, the model erects a strong presumption favoring publication in the Federal Register. The deference element in (iii) serves as neither a necessary nor sufficient condition for publication. Rather, the model includes the deference element to help push difficult cases towards publication of the agency result.

This model admittedly does not provide simplistic formulas which facilitate the blind application of "black letter" law. The model components, however, incorporate the general concerns of consistency and avoidance of surprise underlying the APA publication rule. Some might complain that this model provides no advantages over earlier efforts such as the *Lewis* test. Such a complaint fails to grasp the inherent limits of any theory. Any publication test will ultimately rest upon the intuitive judgments of agency members and judges. The model in this article presents not only additional, but better guidelines for publication rule judgments. In an area of such great complexity as the APA, a model can only channel the parties' vision in the appropriate direction. If the parties stubbornly turn their heads after the model points them in the proper direction, the criticism must shift from the model methodology to the actors themselves.

—*Michael J. Kump*

