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Revisiting Judicial Review of Interpretive Rules: A Call to Paralyze Auer Deference in the Face of *Perez v. Mortgage Bankers Association*

Kyle M. Asher

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Cover Page Footnote

The author thanks Professors Michael Sant'Ambrogio and Kevin Saunders for their feedback on earlier drafts of this Article. The author also thanks Ryan Hulst for his valuable insights on the topic.

REVISITING JUDICIAL REVIEW OF INTERPRETIVE RULES: A CALL TO PARALYZE *AUER* DEFERENCE IN THE FACE OF *PEREZ V.* *MORTGAGE BANKERS ASSOCIATION*

*Kyle M. Asher**

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I. INTRODUCTION

The year 1946 was a busy one. Congress established the Atomic Energy Act of 1946 leaving the country’s nuclear regulation in the hands of the Atomic Energy Commission.¹ John F. Kennedy’s political career took off, as he was elected to the United States House of Representatives.² On New Year’s Eve, President Harry S. Truman officially declared an end to World War II.³ Amongst all the excitement, the Administrative Procedure Act (“APA”) was signed into law.⁴ Times have certainly changed since then, yet in a recent decision, the Supreme Court reminded the lower federal courts that they may not stray from the text of the 1946 statute.⁵

On March 9, 2015, the Supreme Court took steps to clarify an increasingly confusing area of administrative law. In *Perez v. Mortgage Bankers Association*, the Court overruled the D.C. Circuit’s “*Paralyzed Veterans*” doctrine and held that agencies are not required to use notice-and-comment rulemaking when amending interpretive rules.⁶ Before the Court’s decision, the Fifth Circuit had also adopted the *Paralyzed Veterans* doctrine, while the First, Second, Fourth, Sixth, Seventh, and Ninth Circuits all rejected it.⁷ Administrative law scholars nearly all agree that the Court’s decision in *Perez* is the proper interpretation of the APA.⁸ While textually correct, criticism has emerged that the decision “overturned the functional analysis used in *Paralyzed Veterans* in favor of a highly formalistic analysis that seems to essentially take the agency’s word for it when determining whether a rule is interpretive or not.”⁹

¹ See *History*, U.S.NRC, <http://www.nrc.gov/about-nrc/history.html> (last updated Nov. 4, 2015).

² See *World War II and a Future in Politics*, JOHN F. KENNEDY PRESIDENTIAL LIBRARY & MUSEUM, <http://www.jfklibrary.org/JFK/Life-of-John-F-Kennedy.aspx?p=3> (last visited Mar. 7, 2016).

³ Proclamation No. 2714, 12 Fed. Reg. 1 (Jan. 1, 1947).

⁴ Administrative Procedure Act, Pub. L. No. 79-404, ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–59 (2012)).

⁵ See *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1212 (2015).

⁶ *Id.* at 1203. This doctrine derives from *Paralyzed Veterans of Am. v. D.C. Arena, L.P.*, 117 F.3d 579 (D.C. Cir. 1997).

⁷ *Mortg. Bankers Ass’n v. Harris*, 720 F.3d 966, 969 n.3 (D.C. Cir. 2013).

⁸ See Brian Wolfman & Bradley Girard, *Opinion Analysis: The Court Slays the D.C. Circuit’s Paralyzed Veterans Doctrine, Leaving Bigger Issues for Another Day*, SCOTUSBLOG (Mar. 10, 2015, 9:22 AM), <http://www.scotusblog.com/2015/03/opinion-analysis-the-court-slays-the-d-c-circuits-paralyzed-ve-terans-doctrine-leaving-bigger-issues-for-another-day/>.

⁹ Jonathan Keim, *Perez v. Mortgage Bankers Ass’n: Formalism Trumps Originalism*, NAT’L REV. (Mar. 12, 2015, 12:57 PM), <http://www.nationalreview.com/bench-memos/415306/perez-v-mortgage-bankers-association-formalism-trumps-originalism-jonathan-keim>.

The APA—while ambiguous as to the nuances between the two—distinguishes between “legislative” and “nonlegislative” rules.¹⁰ In theory, this distinction seems clear. In practice, however, commentators have used every antonym of “clear” imaginable to describe it, including “‘tenuous,’ ‘baffling,’ and ‘enshrouded in considerable smog.’”¹¹ While some of the brightest minds in administrative law have proposed credible solutions that would help clarify the distinction, the courts have not yet adopted them.¹²

This distinction is crucial for three reasons: it technically determines whether the rule is binding or nonbinding, it determines the procedural requirements an agency must go through before issuing the rule, and, perhaps most importantly, it determines what level of judicial deference the rule will receive.¹³ Legislative rules have binding effect and are consequently subject to more stringent procedural requirements than their nonlegislative counterparts.¹⁴ Interpretive rules,¹⁵ which are a subset of nonlegislative rules, are supposed to be nonbinding and therefore require practically no process prior to enactment.¹⁶ The problem is that, in an attempt to avoid the increasingly burdensome informal rulemaking process, agencies—under the guise of nonlegislative rules—issue interpretive rules that are binding in practice, and do so without following APA procedures.¹⁷

Today, agencies are left with a choice: when promulgating rules, they can follow the ossified notice-and-comment process, which can take years, and be comforted by the fact that after those years have passed, the rule will be legally binding.¹⁸ Alternatively, with the press of a button, agencies can post a “nonlegislative rule” to their websites that, for all intents and purposes, has legislative effect.¹⁹ Currently, courts review agency interpretations of their own regulations under the framework set forth in *Auer v. Robbins* (referred to as “*Auer* deference”), which directs the courts to uphold the agency’s interpretation unless it is “plainly erroneous or inconsistent with the

¹⁰ See Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretive Rules*, 52 ADMIN. L. REV. 547, 547 (2000) (“When Congress enacted the Administrative Procedure Act (APA) in 1946, it distinguished among agency rules of various types. The most important distinction is between legislative rules and interpretive rules.”).

¹¹ David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 279 (2010).

¹² *Id.* at 276 (“[A]dministrative law scholars have proposed a simple solution to the problem . . . and courts have failed to take them up on it. . . . [R]ather than asking whether a challenged rule was designed to be legally binding in order to determine whether it must undergo notice and comment [these commentators urge], courts should simply turn the question inside-out and ask whether the rule has undergone notice and comment in order to determine whether it can be made legally binding.”).

¹³ See discussion *infra* Part II.

¹⁴ Pierce, Jr., *supra* note 10, at 550 (describing the rulemaking process as “long and costly”).

¹⁵ Over the years, this subset of rules has been classified as both “interpretive” and “interpretive.” For the sake of consistency, this Article will use “interpretive.”

¹⁶ Richard E. Levy & Sidney A. Shapiro, *Administrative Procedure and the Decline of the Trial*, 51 KAN. L. REV. 473, 493 (2003).

¹⁷ See discussion *infra* Sections II.B & III.C.

¹⁸ See discussion *infra* Section II.B.1.

¹⁹ See discussion *infra* Section III.C.

regulation,” regardless of the amount of thought the agency put into the interpretation.²⁰

There are three potential solutions to this problem. The first solution—for the Supreme Court to develop a clear-cut distinction between legislative and nonlegislative rules—would alleviate the entire problem.²¹ As this is also the most unlikely solution, and has been examined by numerous scholars, this Article does not provide a new approach to the distinction. The second solution—for Congress to amend the APA and impose additional procedural requirements on agencies promulgating interpretive rules—is similarly unlikely to occur and has also been discussed in prior scholarship, but would be the most advantageous.²² This Article suggests that the most effective amendment would require agencies to disclose in detail the logic behind their interpretive rule prior to the rule’s issuance. Third, recognizing that scholars and Supreme Court justices have become increasingly critical of *Auer* deference, rather than eliminate *Auer* deference completely as some have suggested, this Article urges courts to examine closely the amount of time and energy spent by an agency in reaching its interpretation, by integrating the framework set forth in *United States v. Mead Corporation*.²³ Under this framework, if the agency acts “with the force of law” when promulgating an interpretive rule, the rule will still receive *Auer* deference, as courts can be assured that the agency has utilized its expertise.²⁴ If the agency does not act with the force of law, the agency’s rule will be reviewed under *Skidmore* deference, and the agency will receive a varying degree of deference depending on “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”²⁵ Courts should give the greatest weight to the first factor—the thoroughness evidence in its consideration. As a result, the more thought the agency puts into the rule and the more the agency utilizes its expertise, the more courts will defer to the agency’s decision.²⁶

Part II of this Article lays the groundwork for the *Perez* decision and provides a brief overview of legislative and nonlegislative rules. Part III discusses the demise of the *Paralyzed Veterans* doctrine, the *Perez* decision,

²⁰ *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). See generally 519 U.S. 452 (1997).

²¹ See *Pierce, Jr.*, *supra* note 10, at 548 (noting that the ability to distinguish between legislative and nonlegislative rules would “reduce significantly the rampant confusion and inconsistency that characterize this important area of law”).

²² See *supra* note 12 and accompanying text; see also discussion *infra* Section III.D.

²³ See generally Michael P. Healy, *The Past, Present and Future of Auer Deference: Mead, Form and Function in Judicial Review of Agency Interpretations of Regulations*, 62 KAN. L. REV. 633 (2014). See *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring); see also 533 U.S. 218, 229 (2001).

²⁴ *Mead*, 533 U.S. at 229; see discussion *infra* Section V.A.

²⁵ 323 U.S. 134, 140 (1944).

²⁶ See discussion *infra* Part V.

and the effects that the *Perez* decision will have on the future of agency rulemaking. Part IV reviews the differing standards of review courts use when analyzing an agency's interpretation of a statute compared to an agency's interpretation of its own regulation. Part V suggests that courts review an agency's interpretation of its own regulation under the same framework as it reviews an agency's interpretation of a statute.

II. THE (NOT SO) FUNDAMENTALS OF ADMINISTRATIVE LAW

Before getting into *Perez*, the *Paralyzed Veterans* doctrine, and the implications that the Court's ruling will have, it is important to attempt to clarify a couple of confusing areas of administrative law. In order to understand why the Court ruled as it did in *Perez*, we must first examine legislative rules, nonlegislative rules, and the distinction between the two that courts have struggled to clarify over the years. "The distinction between legislative and nonlegislative rules is one of the most confusing [issues] in administrative law."²⁷ The distinction has profound effects on agency procedure, on judicial treatment of agency proclamations, and on those impacted by the agency proclamation.²⁸ Whether a rule is classified as legislative or nonlegislative determines first if the agency must comply with APA procedures when promulgating the rule.²⁹ Once a rule is promulgated, its classification also determines what level of deference the agency will receive from the courts.³⁰ The distinction has the additional effect of determining whether the rule has binding legal effect on both the agency and those affected by the proclamation.³¹ As a result of the procedural hurdles and expenses associated with the rulemaking process, however, agencies are frequently circumventing the process by issuing nonlegislative rules with binding effect.³²

A. Legislative Rules under the APA

The APA defines a "rule," in part, as "an agency statement of general or particular applicability and future effect designed to implement, interpret,

²⁷ Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705, 1705 (2007); see Franklin, *supra* note 11, at 278 ("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 Kevin W. Saunders, *Interpretative Rules with Legislative Effect: An Analysis and a Proposal for Public Participation*, 1986 DUKE L.J. 346, 348 (1986) ("While [legislative and interpretive rules] are generally recognized, there is not general accord on how they should be defined.")

²⁸ Gersen, *supra* note 27, at 1705.

²⁹ *Id.* (noting that the distinction is "critical for understanding . . . when agencies must use procedural formality").

³⁰ Franklin, *supra* note 11, at 280 (arguing that after the Supreme Court's decision in *Mead*, "nonlegislative rules are presumptively disqualified from deferential judicial review under the Chevron doctrine").

³¹ *Id.* at 278 (noting that "legislative rules are designed to have binding legal effect on both the issuing agency and the regulated public," while "[n]onlegislative rules, by contrast, are not meant to have binding legal effect").

³² See Pierce, Jr., *supra* note 10, at 551.

or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency”³³ Legislative rules are those that have binding effect on both the public and the agency issuing the rule.³⁴ As long as the rule does not conflict with a statutory provision guiding the agency, these rules have the “force and effect of law.”³⁵ Due to their binding nature, legislative rules are subject to more stringent procedural requirements than their nonlegislative counterparts.³⁶ The APA distinguishes between legislative rules that are subject to “formal rulemaking”³⁷ and those subject to “informal rulemaking.”³⁸

1. Formal Rulemaking

Given the time and resources required for an agency to engage in formal rulemaking, agencies regularly go out of their way to avoid it, and courts rarely interpret organic statutes to require the formal procedures.³⁹ In fact, in 2011, the American Bar Association’s Section of Administrative Law and Regulatory Practice went so far as to call formal rulemaking “obsolete.”⁴⁰ While rare, formal rulemaking may still be triggered in one of two ways.⁴¹ First, formal rulemaking procedures must be followed when a statute mandates that rules be made “*on the record* after opportunity for an agency hearing”⁴² Because of the time and expenses associated with formal rulemaking, courts have typically required Congress to explicitly use the APA language “on the record” when ordering agencies to partake in formal rulemaking.⁴³ Second, regardless of whether the statute requires formal

³³ 5 U.S.C. § 551(4) (2012).

³⁴ See KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 5.03, at 299 (1958).

³⁵ Maryland Cas. Co. v. United States, 251 U.S. 342, 349 (1920).

³⁶ Pierce, Jr., *supra* note 10, at 550 (describing the rulemaking process as “long and costly”).

³⁷ 5 U.S.C. §§ 556–57 (2012).

³⁸ *Id.* § 553.

³⁹ Levy & Shapiro, *supra* note 16, at 487.

⁴⁰ *Comments on H.R. 3010, The Regulatory Accountability Act of 2011*, 2011 A.B.A. SEC. ADMIN. L. & REG. PRAC. 20.

⁴¹ See *infra* notes 42–44 and accompanying text.

⁴² 5 U.S.C. § 553(c) (2012) (emphasis added).

⁴³ See *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972). In *Allegheny-Ludlum*, the Court examined the Esch Act, which authorized the Interstate Commerce Commission “after hearing, on a complaint or upon its own initiative without complaint, [to] establish reasonable rules” *Id.* at 757 (citing 49 U.S.C. § 1(14)(a)). The Court found that the language in the organic statute did not trigger formal rulemaking, as formal rulemaking “need be applied ‘only where the agency statute, in addition to providing a hearing, prescribes explicitly that it be on the record.’” *Id.* (citations omitted). The Court affirmed this ruling in *United States v. Florida East Coast Railway Company*, when it stated:

In [*Allegheny-Ludlum*], we held that the language of . . . the Interstate Commerce Act authorizing the Commission to act “after hearing” was not the equivalent of a requirement that a rule be made “on the record after opportunity for an agency hearing” Since [the statute at issue in this case] . . . does not by its terms add to the hearing requirement contained in the earlier language, the same result should obtain here

410 U.S. 224, 234–35 (1973).

rulemaking, due process may still require formalized procedures.⁴⁴

When one of the two formal rulemaking triggers are present, the agency must comply with sections 556 and 557 of the APA.⁴⁵ These sections prohibit an agency from engaging in *ex parte* communications and require the agency to hold pre-trial conferences, make proposed findings, and conduct hearings that allow parties to, among other things, “provide testimony, present evidence taken on a record, and cross-examine adverse witnesses.”⁴⁶ Today, a vast majority of commentators believe that formal rulemaking is outdated and unworkable.⁴⁷ Professor Aaron L. Nielson succinctly described the usual complaints with formal rulemaking: “Formal rulemaking (1) does not produce better policy; (2) creates delay; (3) reduces political oversight; (4) makes it difficult to eliminate outdated rules; (5) perverts the regulatory process by encouraging agencies to make policy through means other than rulemaking; and (6) should be within the discretion of the agency.”⁴⁸ Due to these criticisms, and in an effort to expedite the drawn out formal rulemaking process, agencies often opt for informal rulemaking when possible.⁴⁹ Today, however, even informal rulemaking can take years to complete.⁵⁰

B. Informal Rulemaking

1. The Ossification of Informal Rulemaking

The heavy procedural requirements, the expenses, and the time associated with the formal rulemaking process once led agencies to use

⁴⁴ See *Wong Yang Sun v. McGrath*, 339 U.S. 33, 49–51 (1950), *superseded by statute*, Supplemental Appropriation Act, 1951, 64 Stat. 1044, 1048 as recognized in *Ardestani v. INS*, 502 U.S. 129, 133 (1991). In *McGrath*, the Court held that although the organic statute did not require formal proceedings, due process requires a trial-type hearing before deportation. *Id.* at 50–51 (“When the Constitution requires a hearing, it requires a fair one A deportation hearing involves issues basic to human liberty and happiness It might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake.”); see also Craig N. Oren, *Be Careful What You Wish for: Amending the Administrative Procedure Act*, 56 ADMIN. L. REV. 1141, 1151–52 (2004) (noting that in certain instances, such as with ratemaking, courts have required formal rulemaking or similar procedures even when Congress has not expressly mandated it).

⁴⁵ 5 U.S.C. § 553(c) (“When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of [section 553].”).

⁴⁶ 5 U.S.C. §§ 556–57 (2012); Steven Croley, *Making Rules: An Introduction*, 93 MICH. L. REV. 1511, 1514 (1995).

⁴⁷ See Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237, 257 (2014) (noting that “administrative law scholars . . . generally oppose formal rulemaking”). In fact, in 2011, “a group of forty-two professors wrote separately to the House Judiciary Committee to stress ‘the consensus of the administrative law community that the APA formal rulemaking procedure is unworkable and obsolete.’” *Id.* at 258 (quoting Letter of Forty-Two Admin. Law Professors to Lamar Smith, Chairman, Comm. on the Judiciary, and John Conyers, Jr., Ranking Member, Comm. on the Judiciary (Oct. 24, 2011), <http://democrats.judiciary.house.gov/sites/democrats.judiciary.house.gov/files/LawReg1111024.pdf>).

⁴⁸ *Id.* at 259.

⁴⁹ See *infra* note 75 and accompanying text.

⁵⁰ Franklin, *supra* note 11, at 284.

informal rulemaking when possible.⁵¹ Through a plain reading of the APA, informal rulemaking imposes only three requirements on an agency: the agency must (1) publish a general notice of the proposed rule;⁵² (2) allow interested parties the opportunity to comment on the proposed rule;⁵³ and (3) draft a concise statement describing the basis and purpose for the rule.⁵⁴ Despite this seemingly clear language, all three branches of government have contributed to an increasingly complex and formalized “informal” rulemaking process, commonly referred to as the “ossification of rulemaking.”⁵⁵

The Judicial Branch has contributed to the ossification through its interpretation of what the APA requirements mandate and its interpretation of when the APA requirements apply.⁵⁶ For instance, the requirement that agencies allow interested parties to comment on the proposed rule has led to the additional requirement that agencies respond to significant comments made by the public.⁵⁷ Similarly, the requirement that agencies draft a “concise” statement of the basis and purpose of the rule has been interpreted to mean that agencies “must disclose in detail the thinking that has animated the form of a proposed rule and the data upon which that rule is based.”⁵⁸ Further, as seen earlier, lower federal courts have expanded the situations when notice-and-comment procedures are required.⁵⁹

The Supreme Court has taken efforts to reign in the lower courts’ expansion of informal rulemaking. In *Vermont Yankee Nuclear Power Corporation v. Natural Resource Defense Council*, the Court made clear that the three, seemingly reasonable requirements set forth in the APA “established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking

⁵¹ Stuart Shapiro, *Agency Oversight as “Whac-a-Mole”: The Challenge of Restricting Agency Use of Nonlegislative Rules*, 37 HARV. J.L. & PUB. POL’Y 523, 537 (2014) (noting that the “procedural requirements on the formal rulemaking process led agencies to abandon it as a policymaking tool and led them toward informal rulemaking”).

⁵² 5 U.S.C. § 553(b) (2012) (stating the notice must include “a statement of the time, place, and nature of public rule making proceedings,” “reference to the legal authority under which the rule is proposed,” and “either the terms or substance of the proposed rule or a description of the subjects and issues involved”).

⁵³ *Id.* § 553(c) (“After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.”).

⁵⁴ *Id.*

⁵⁵ Franklin, *supra* note 11, at 283 (“In recent decades, . . . Congress, the President, and the courts have all taken steps that have made the notice-and-comment rulemaking process increasingly cumbersome and unwieldy.”); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 60 (1995).

⁵⁶ See *infra* notes 57–58 and accompanying text.

⁵⁷ Home Box Office, Inc. v. FCC, 567 F.2d 9, 35 (D.C. Cir. 1977) (“[T]he opportunity to comment is meaningless unless the agency responds to significant points raised by the public.”).

⁵⁸ *Id.* at 35–36.

⁵⁹ See *supra* notes 5–7 and accompanying text.

procedures.”⁶⁰ The Court reasoned that if additional procedures were added, “all the inherent advantages of informal rulemaking would be totally lost.”⁶¹ In March 2015, the Court made clear that *Vermont Yankee* is still binding precedent, stating that “[t]ime and again, we have reiterated that the APA ‘sets forth the full extent of judicial authority to review executive agency action for procedural correctness.’”⁶²

While the Supreme Court has taken steps to deossify the informal rulemaking process, the other two branches of government have not.⁶³ In certain instances, the Legislative Branch requires agencies to submit time- and resource-intensive cost-benefit analyses.⁶⁴ The Executive Branch is also not blameless for the ossification of informal rulemaking.⁶⁵ Dating as far back as the Reagan administration, the Executive Branch has engaged in lengthy reviews of what it deems “significant” rules.⁶⁶ President Clinton, through Executive Order 12,886, implemented increased oversight measures, and President George W. Bush further increased oversight when he directed agencies to receive approval from a “Regulatory Policy Officer” before beginning rulemaking proceedings.⁶⁷

2. Causes of, and Reasons for, Ossification

Given the relatively straightforward text of the APA, one may begin to wonder why, exactly, has the ossification of informal rulemaking occurred? Professor Thomas O. McGarity argues that there are four primary causes of ossification: (1) given informal rulemaking’s initial success, agencies began to use informal rulemaking for increasingly complex and controversial issues, causing a resistance from opposing trade associations and regulators; (2) both the Executive and Legislative Branches are fighting over rulemaking power; (3) for complex scientific and economic issues, agencies often need to seek input from outside experts; and (4) the public at large distrusts the Executive Branch and Executive agencies and wants to limit agency discretion.⁶⁸

⁶⁰ 435 U.S. 519, 524 (1978) (noting that “[a]gencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them”).

⁶¹ *Id.* at 546–47.

⁶² See *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1207 (2015) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009)).

⁶³ See Matthew P. Downer, Note, *Tentative Interpretations: The Abracadabra of Administrative Rulemaking and the End of Alaska Hunters*, 67 VAND. L. REV. 875, 882 (2014) (noting that “Vermont Yankee only spoke to lower courts; it did nothing to prevent the other two branches from imposing additional procedural requirements”).

⁶⁴ Lars Noah, *Doubts About Direct Final Rulemaking*, 51 ADMIN. L. REV. 401, 404 (1999).

⁶⁵ See *infra* notes 66–67 and accompanying text.

⁶⁶ See Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 186 (1994).

⁶⁷ See Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950-1990*, 80 GEO. WASH. L. REV. 1414, 1429 (2012).

⁶⁸ Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1397–98 (1992).

Further, in certain instances, ossification may in fact be advantageous, “provid[ing] important regulatory benefits, such as increased bureaucratic accountability and regulatory rationality.”⁶⁹ Even those scholars opposing the ossification of informal rulemaking acknowledge that a more intensive process leads to “fairness, allocative efficiency, and factual accuracy”⁷⁰

3. The Problems Associated with Ossification

While the ossification process appears to have resulted from rational concerns and may provide certain benefits, the problems associated with it have been well-documented by legal scholars.⁷¹ There are two main concerns with the ossification of the informal rulemaking process.⁷² The first concern is that agencies will be less likely to issue important regulations at all out of fear that they cannot comply with the more stringent requirements.⁷³ Second, there is a concern that the ossification of the rulemaking process often leads to *lesser* procedural requirements, defeating its entire purpose.⁷⁴ Agencies will justifiably engage in informal rulemaking less frequently when it takes longer and requires more agency resources.⁷⁵ As a result, the desire to impose more formality in the informal rulemaking process has led to the increased use of nonlegislative rules, which impose less stringent requirements on agencies.⁷⁶

When agencies *do* in fact engage in informal rulemaking, ossification presents additional problems.⁷⁷ The biggest problem is that ossification defeats the initial purpose of informal rulemaking by decreasing administrative efficiency.⁷⁸ Given the time and expenses the informal rulemaking process demands, once an agency has promulgated a rule, it will be reluctant to go back and revise it.⁷⁹ Because a revision to an existing rule is less likely, agencies will be hesitant to experiment with or test new rules, knowing that the rule may stand for decades.⁸⁰ All of these problems have

⁶⁹ Webb Yackee & Webb Yackee, *supra* note 67, at 1419–20.

⁷⁰ McGarity, *supra* note 68, at 1391–92.

⁷¹ See Pierce, Jr., *supra* note 55, at 60 (noting that the Environmental Protection Agency once “claim[ed] that informal rulemaking procedures take approximately five years to complete”).

⁷² See *infra* notes 73–74 and accompanying text.

⁷³ Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 486–87 (1997).

⁷⁴ See *id.*

⁷⁵ Noah, *supra* note 64, at 405 (noting that due to the ossification of informal rulemaking, many agencies “prefer to avoid the hassles of such a process whenever possible. As a result, federal regulators often choose to utilize even more informal and less participatory vehicles for implementing their enabling statutes and formulating enforcement policies”).

⁷⁶ See *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1204 (2015) (“The absence of a notice-and-comment obligation makes the process of issuing interpretive rules comparatively easier for agencies than issuing legislative rules.”).

⁷⁷ See *infra* notes 78–81 and accompanying text.

⁷⁸ See McGarity, *supra* note 68, at 1391 (“[T]he ossification of the informal rulemaking process deprives it of one of its greatest virtues -- administrative efficiency.”).

⁷⁹ See *id.* at 1390–91.

⁸⁰ *Id.* at 1392.

led to the increased use of nonlegislative rules—including policy statements and interpretive rules—in place of legislative rules.⁸¹

C. *Nonlegislative Rules under the APA*

Just as strict procedural requirements once led to a shift from formal rulemaking to informal rulemaking, the ossification of informal rulemaking has led to a shift from informal rulemaking to nonlegislative rules.⁸² To oversimplify things, a nonlegislative rule—sometimes referred to as a “non-rule rule”—is a rule that is designed to provide guidance to both agencies and members of the public affected by agency regulations.⁸³ While legislative rules derive their authority from congressional delegations, nonlegislative rules receive no such delegation.⁸⁴ As such, nonlegislative rules are not technically binding on the agency or the public.⁸⁵

Because the rules are technically not binding, less process is required.⁸⁶ Under the APA, the only requirement imposed on agencies promulgating nonlegislative rules is that the agency must publish “statements of general policy or interpretations of general applicability formulated and adopted by the agency” as well as any amendments to the statement, in the Federal Register.⁸⁷ The APA explicitly exempts the two most common types of nonlegislative rules—interpretive rules and general statements of policy (“policy statements”)—from the notice-and-comment process.⁸⁸

1. Policy Statements

An agency’s policy statements are one type of nonlegislative rule that is exempted from the notice-and-comment process.⁸⁹ A policy statement “tentatively indicate[s] how agency decisionmakers will exercise a discretionary power.”⁹⁰ For example, a policy statement might discuss how an agency should prioritize its time and money when resources are limited.⁹¹ Policy statements can guide agency members on what data is relevant when making decisions, when to grant a license, and more.⁹² Still, these policy statements must not be binding on agency members when making decisions.

⁸¹ Levy & Shapiro, *supra* note 16, at 484.

⁸² *See id.*

⁸³ Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 383 (1985).

⁸⁴ *Id.* at 381 n.3 (“A ‘nonlegislative rule’ is one adopted by an agency but not pursuant to delegation of legislative power.”).

⁸⁵ *See* John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 893–94 (2004).

⁸⁶ *See infra* note 87 and accompanying text.

⁸⁷ 5 U.S.C. § 552(a)(1)(D)–(E) (2012).

⁸⁸ *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1200–01 (2015); *see also* 5 U.S.C. § 553(b)(3)(A) (2012).

⁸⁹ *Perez*, 135 S. Ct. at 1201.

⁹⁰ Asimow, *supra* note 83, at 386–87.

⁹¹ *Id.* at 386.

⁹² *Id.*

These principles were illustrated in *Professionals and Patients for Customized Care v. Shalala*.⁹³ In *Shalala*, the Food and Drug Administration (“FDA”) issued a self-described “Policy,” without going through notice-and-comment procedures, setting forth “nine factors that the FDA ‘will consider’” when deciding whether to bring an enforcement action against pharmacies who improperly compound drugs.⁹⁴ The Policy provided that the “list of factors is not intended to be exhaustive and other factors may be appropriate for consideration in a particular case.”⁹⁵ Petitioners argued that the Policy was in effect a binding, legislative rule and the FDA was therefore required to go through the notice-and-comment process.⁹⁶ The FDA argued that the Policy was simply a policy statement, and was thus exempt from APA requirements.⁹⁷

To determine whether the Policy was a legislative rule or a general statement of policy, the Fifth Circuit began by giving deference to the FDA’s characterization.⁹⁸ The FDA’s own characterization—a “Policy”—weighed in favor of finding that it was not a legislative rule.⁹⁹ Acknowledging that “the label that the particular agency puts upon its given exercise of administrative power is not . . . conclusive,” however, the court then next looked to whether the Policy was binding.¹⁰⁰ The court stated that when determining whether an agency proclamation is binding:

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, or on the other hand, whether the policy so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule’s criteria. As long as the agency remains free to consider the individual facts in the various cases that arise, then the agency action in question has not established a binding norm.¹⁰¹

After looking at both the FDA’s implementation as well as the plain language of the regulation, the court found that the Policy was, in fact, a policy statement rather than a binding, legislative rule.¹⁰²

⁹³ 56 F.3d 592, 593–94 (5th Cir. 1995).

⁹⁴ *Id.* at 593–94.

⁹⁵ *Id.* at 594.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 596.

⁹⁹ *Id.*

¹⁰⁰ *Id.* (citing *Brown Express, Inc. v. United States*, 607 F.2d 695, 700 (5th Cir. 1979)).

¹⁰¹ *Id.* at 596–97 (quoting *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1377 (11th Cir. 1983)).

¹⁰² *Id.* at 600.

2. Interpretive Rules

A year after the APA was implemented, the United States Attorney General's Manual explained that interpretive rules are rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.¹⁰³ The *Perez* Court stated that "the critical feature of interpretive rules is that they are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'"¹⁰⁴ When drafting legislation, it is impossible for Congress to think of every way in which the statute will be used. Because statutes are often "obscure, ambiguous, or abstract," it is left to the agencies to "fill the gaps" and clarify the statute.¹⁰⁵ If Congress has expressly delegated authority to the agency, the agency may draft a legislative rule that cements its interpretation as law.¹⁰⁶ Often, however, no express delegation exists, and agencies instead issue "nonlegislative interpretive rule[s] of general applicability."¹⁰⁷

Interpretive rules, when used properly, provide great benefits.¹⁰⁸ While not legally binding, these rules give agency employees needed guidance and inform the public of the agency head's interpretation.¹⁰⁹ Often, an agency may not have enough information on a particular subject to create a binding rule, but interpretive rules provide the agency with a "relatively low-cost and flexible way . . . to articulate their positions, at least in tentative terms."¹¹⁰ Moreover, commentators have noted that without the option to issue interpretive rules, in lieu of using more formalized procedures, agencies may be more inclined to not issue rules at all, leaving the public guessing as to how the agency would interpret a particular statute.¹¹¹

These benefits are often outweighed by the costs associated with the improper use of interpretive rules.¹¹² For instance, "agencies often inappropriately issue [interpretive rules] with the intent or effect of imposing a *practical* binding norm upon the regulated or benefited public."¹¹³ Given the ossification of informal rulemaking, agencies frequently use interpretive rules as a way to "circumvent the notice-and-comment process."¹¹⁴ Professor

¹⁰³ ATTORNEY GENERAL'S MANUAL ON THE ADMIN. PROCEDURE ACT 22 (Wm. W. Gaunt & Sons, Inc. 1973) (1947).

¹⁰⁴ *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015) (quoting *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995)).

¹⁰⁵ Asimow, *supra* note 83, at 385.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ See *infra* notes 109–11 and accompanying text.

¹⁰⁹ See *infra* notes 110–11 and accompanying text; see also Manning, *supra* note 85, at 914.

¹¹⁰ Manning, *supra* note 85, at 914.

¹¹¹ See Saunders, *supra* note 27, at 368–70.

¹¹² See *infra* notes 113–15 and accompanying text.

¹¹³ 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, 1315 (1992).

¹¹⁴ Manning, *supra* note 85, at 915.

Michael Asimow posits that there is no difference in the practical effect of a legislative and nonlegislative rule on members of the public because “[m]ost members of the public assume that all agency rules are valid, correct, and unalterable.”¹¹⁵

III. PARALYZED VETERANS, PEREZ, AND THE FUTURE OF AGENCY RULEMAKING

Out of concern that agencies were issuing interpretive rules simply to “circumvent the notice-and-comment process,” prior to the Supreme Court’s recent opinion in *Perez v. Mortgage Bankers Association*, the D.C. Circuit was enforcing nonlegislative rule implementation in a more practical, albeit textually questionable, manner.¹¹⁶ Under the *Paralyzed Veterans* doctrine, the D.C. Circuit acknowledged the legislative effect that interpretive rules may have and held that agencies must use notice-and-comment procedures prior to amending interpretive rules.¹¹⁷ After *Perez*, however, lower courts were reminded to strictly construe the APA and exempt all interpretive rules, and substantial amendments thereto, from the notice-and-comment process.¹¹⁸ While *Perez* is a correct reading of the APA, it will have immediate effects on agency rulemaking that the Court may not have intended.¹¹⁹

A. *The Paralyzed Veterans Doctrine*

Before 1997, there was a universal understanding that agencies could amend interpretive rules without having to follow notice-and-comment procedures.¹²⁰ In *Paralyzed Veterans of America v. D.C. Arena, L.P.*, however, the D.C. Circuit began the unraveling of this understanding.¹²¹ In *Paralyzed Veterans*, the Paralyzed Veterans Association brought suit under the Americans with Disabilities Act (“ADA”), which provided that new athletic arenas must be “readily accessible to and usable by individuals with disabilities”¹²² Originally, the Architectural and Transportation Barriers Compliance Board interpreted this statute and recommended that wheelchair seating be provided with “lines of sight comparable to those [available to the rest] of the . . . public.”¹²³ In 1991, the Department of Justice (“DOJ”) issued a guidance document that did not discuss whether “lines of sight comparable” to the public meant that wheelchair seating must be provided with sufficient

¹¹⁵ Asimow, *supra* note 83, at 384.

¹¹⁶ Manning, *supra* note 85, at 915; *see also* 135 S. Ct. 1199, 1206 (2015) (“The *Paralyzed Veterans* doctrine is contrary to the clear text of APA’s rulemaking provisions . . .”).

¹¹⁷ 117 F.3d 579, 586 (D.C. Cir. 1997).

¹¹⁸ 135 S. Ct. at 1206.

¹¹⁹ *See infra* notes 248–49 and accompanying text.

¹²⁰ *See* Pierce, Jr., *supra* note 10, at 561 (“Before *Paralyzed Veterans*, agencies routinely changed their interpretations of legislative rules through issuance of interpretative rules.”).

¹²¹ *See generally* 117 F.3d 579.

¹²² 42 U.S.C. § 12183(a)(1) (1994).

¹²³ *Paralyzed Veterans*, 117 F.3d at 581 (quoting 28 C.F.R. pt. 36 app. A. (1996)).

sightlines over standing spectators.¹²⁴ In 1994, however, without using notice-and-comment procedures, the DOJ issued a statement providing that “wheelchair locations must provide *lines of sight[ing] over spectators who stand*.”¹²⁵

Athletic arena owners argued that the original DOJ guidance document “did not require . . . wheelchair seating [to have] sightlines over standing spectators.”¹²⁶ The D.C. Circuit upheld the DOJ’s 1994 interpretation after finding that it was not inconsistent with the prior interpretation.¹²⁷ In dicta, however, the court implied that the result may have been different had the DOJ’s subsequent interpretation differed from the original interpretive rule.¹²⁸ So was born the *Paralyzed Veterans* doctrine, which holds that an agency “must use the APA’s notice-and-comment procedures when it wishes to issue a new interpretation of a regulation that deviates significantly from a previously adopted interpretation.”¹²⁹

From 1997 to 2013, the D.C. Circuit continued to use the *Paralyzed Veterans* doctrine, most notably in the 1999 case of *Alaska Professional Hunters Association, Inc. v. Federal Aviation Administration*.¹³⁰ In 1998, without following notice-and-comment proceedings, the Federal Aviation Administration (“FAA”) published a notice requiring Alaskan hunting and fishing guides who pilot light aircrafts to follow the same FAA regulations that commercial aircrafts must follow.¹³¹ This was a change in stance from a 1963 guidance document advising the hunting and fishing guides that they did not have to comply with FAA regulations governing commercial pilots.¹³² The court, citing *Paralyzed Veterans*, held that “[w]hen an agency has given its regulation a *definitive* interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment.”¹³³

B. *Perez v. Mortgage Bankers Association*

In 2015, the *Paralyzed Veterans* doctrine was officially overturned. In *Perez v. Mortgage Bankers Association*, a dispute arose over whether mortgage-loan officers were covered under the Fair Labor Standards Act of 1938 (“FLSA”).¹³⁴ The FLSA sets baseline requirements for overtime

¹²⁴ *Id.* at 581.

¹²⁵ *Id.* at 582.

¹²⁶ *Id.*

¹²⁷ *Id.* at 588 (“[T]he manual interpretation is not sufficiently distinct or additive to the regulation to require notice and comment.”).

¹²⁸ *See id.* at 586–87.

¹²⁹ *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1201 (2015).

¹³⁰ 177 F.3d 1030, 1033–34 (D.C. Cir. 1999).

¹³¹ *Id.* at 1030.

¹³² *Id.* at 1031.

¹³³ *Id.* at 1034 (emphasis added).

¹³⁴ 135 S. Ct. at 1204.

compensation for certain subsets of employees.¹³⁵ Individuals “employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman” do not receive these protections.¹³⁶ The Secretary of Labor has the authority to “‘define’ and ‘delimit’ the categories of exempt administrative employees.”¹³⁷ In 1999 and 2001, the Department of Labor (“DOL”) issued letters (interpretive rules) finding that mortgage-loan officers were entitled to FLSA protections.¹³⁸ In 2006, the DOL issued a new letter amending its interpretation to find that mortgage-loan officers were among the employees exempted from FLSA protections.¹³⁹ In 2010, the DOL yet again amended its interpretation of the FLSA.¹⁴⁰ It issued an opinion letter stating that, because “mortgage-loan officers ‘have a primary duty of making sales for their employers,’” they do not qualify for the “administrative exemption” and are in fact entitled to FLSA protections.¹⁴¹

As a result of the inconsistent interpretations, the Mortgage Bankers Association (“MBA”) filed a complaint, arguing that the amendments to the interpretation were required to follow notice-and-comment rulemaking under *Paralyzed Veterans* and *Alaska Hunters*.¹⁴² The district court ruled in favor of the DOL on a motion for summary judgment because MBA did not prove that it had relied on the 2006 interpretation.¹⁴³ In 2013, the D.C. Circuit reversed the district court, finding that the *Paralyzed Veterans* doctrine did in fact require the DOL to follow notice-and-comment proceedings before amending its interpretation of the FLSA.¹⁴⁴

On March 9, 2015, the Supreme Court took steps to contract the scope of informal rulemaking back to what was originally envisioned during the APA’s enactment.¹⁴⁵ The Court struck down the *Paralyzed Veterans* doctrine, finding that it “is contrary to the clear text of the APA’s rulemaking provisions, and it improperly imposes on agencies an obligation beyond the [APA’s] ‘maximum procedural requirements’”¹⁴⁶ The Court went on to state that “[this] straightforward reading of the APA . . . harmonizes with longstanding principles of [this Court’s] administrative law jurisprudence[,] [which has consistently held] that the APA ‘sets forth the extent of judicial authority to review executive agency action for procedural correctness.’”¹⁴⁷

¹³⁵ *Id.*

¹³⁶ *Id.* (alterations in original) (quoting 29 U.S.C. § 213(a)(1) (2012)).

¹³⁷ *Id.* (citation omitted).

¹³⁸ *Id.*

¹³⁹ *Id.* at 1205.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *See generally* *Mortg. Bankers Ass’n v. Solis*, 864 F. Supp. 2d 193, 210 (D.D.C. 2012).

¹⁴⁴ *See generally* *Mortg. Bankers Ass’n v. Harris*, 720 F.3d 966, 972 (D.C. Cir. 2013).

¹⁴⁵ *See generally* *Perez*, 135 S. Ct. at 1203.

¹⁴⁶ *Id.* at 1206 (quoting *Vt. Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 524 (1978)).

¹⁴⁷ *Id.* at 1207 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009)).

Given a plain reading of the APA, the Court's logic makes perfect sense. The APA explicitly provides that notice-and-comment procedures "do[] not apply . . . to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice" unless another statute indicates otherwise.¹⁴⁸ Because the DOL's original opinion letter was an interpretive rule, it did not require notice-and-comment.¹⁴⁹ It follows that an amendment to the interpretive rule is still technically an agency's interpretation and, under the APA, does not require notice-and-comment.¹⁵⁰

Justices Alito, Scalia, and Thomas all filed concurring opinions in *Perez*.¹⁵¹ These justices took issue with the degree of judicial deference that interpretive rules receive.¹⁵² Currently, the Court applies *Auer* deference to an agency's interpretation of its own regulations.¹⁵³ The Court has described *Auer* deference by stating: "We must give substantial deference to an agency's interpretation of its own regulations. Our task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation *must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'*"¹⁵⁴ Justice Scalia noted that, while improper for lower courts to impose additional procedures beyond what the text of the APA requires, with the demise of the *Paralyzed Veterans* doctrine and the extreme degree of deference given to agency interpretations, "[a]gencies may now use [interpretive rules] not just to advise the public, but also to bind them. After all, if an interpretive rule gets deference, the people are bound to obey it on pain of sanction Interpretive rules that command deference *do* have the force of law."¹⁵⁵ As a solution, Justice Scalia suggests that courts abandon *Auer*, meaning that "[t]he agency is free to interpret its own regulations with or without notice and comment; but courts will decide—with *no deference to the agency*—whether that interpretation is correct."¹⁵⁶

C. "Regulation by Blog Post": The Inevitable (and Likely Immediate) Effects of *Perez*

The world today is different than it was in 1946 when the APA was

¹⁴⁸ 5 U.S.C. § 553(b)(3)(A) (2012).

¹⁴⁹ *See id.*

¹⁵⁰ *Perez*, 135 S. Ct. at 1206.

¹⁵¹ *Id.* at 1210 (Alito, J., concurring); *id.* at 1211 (Scalia, J., concurring); *id.* at 1213 (Thomas, J., concurring).

¹⁵² *Id.* at 1210 (Alito, J., concurring); *id.* at 1211 (Scalia, J., concurring); *id.* at 1213 (Thomas, J., concurring).

¹⁵³ *Id.* at 1212 (Scalia, J., concurring) (noting that an agency's interpretation of its own regulation is currently given *Auer* deference).

¹⁵⁴ *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (internal citations omitted) (emphasis added).

¹⁵⁵ *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring).

¹⁵⁶ *Id.* at 1213 (emphasis added).

enacted. Today, every federal agency has its own website.¹⁵⁷ Several agencies dedicate specific sections of their websites to support rulemaking initiatives.¹⁵⁸ The Environmental Protection Agency (“EPA”) serves as “managing partner” for the federal government’s “eRulemaking Initiative,” which is designed to “enable the public ease of access to participate in a high quality, efficient, and open rulemaking process.”¹⁵⁹ In the past, in order for members of the public to participate in or observe the notice-and-comment process, they would have to “know the sponsoring agency, when [the regulation] would be published, review it in a reading room, and then [struggle through] the comment process specific to each agency.”¹⁶⁰ Today, with the press of a button, the public has access to every single agency regulation.¹⁶¹ One can even sign up to receive e-mail alerts immediately after an agency has drafted or amended a specific regulation.¹⁶² Agencies are also using social media to interact with the public.¹⁶³ A 2011 study conducted by Professor Cary Coglianese found that 31 agency websites contained a link to an agency blog, 32 agency websites provided a subscription service for immediate e-mail updates, 39 agency websites contained a link to Facebook, and 43 agency websites contained a link to an agency Twitter account.¹⁶⁴ While the study suggests that agencies should provide more information about rulemaking in their social media efforts, the potential to do so is just a click away.¹⁶⁵

The public is taking advantage of these resources. The United Nations conducts a biennial survey that assesses the e-Government development status of the 193 United Nations Member States.¹⁶⁶ In 2014, the United States was one of 25 countries to receive a “very high” e-Government Index score.¹⁶⁷ The Survey notes that since 2012, the United States has “customized its digital agenda to fit the new tendencies and needs of its citizens, such as cloud computing, smart mobile devices, tablets and high speed networks.”¹⁶⁸ As a result, in 2014, United States citizens ranked ninth

¹⁵⁷ Cary Coglianese, *Enhancing Public Access to Online Rulemaking Information*, 2 MICH. J. ENVTL. & ADMIN. L. 1, 12 (2012).

¹⁵⁸ *Id.*

¹⁵⁹ *About Us: The eRulemaking Program*, REGULATIONS.GOV, <http://www.regulations.gov/#!aboutProgram> (last visited Mar. 9, 2016).

¹⁶⁰ *Id.*

¹⁶¹ See *supra* note 159 and accompanying text.

¹⁶² See *supra* note 159 and accompanying text.

¹⁶³ See *infra* note 164 and accompanying text.

¹⁶⁴ Coglianese, *supra* note 157, at 30–31.

¹⁶⁵ See *id.* (“[T]hose agencies that are using social media . . . do not yet use these more interactive, Web 2.0 tools much in connection with their rulemaking.”).

¹⁶⁶ UNITED NATIONS, UNITED NATIONS E-GOVERNMENT SURVEY 2014: E-GOVERNMENT FOR THE FUTURE WE WANT 1 (2014), https://publicadministration.un.org/egovkb/Portals/egovkb/Documents/un/2014-Survey/E-Gov_Complete_Survey-2014.pdf.

¹⁶⁷ *Id.* at 15.

¹⁶⁸ *Id.* at 24.

in the world for “e-Participation.”¹⁶⁹

The recent *Perez* decision, the increasing agency use of electronic media, and the increasing public consumption of that electronic media, all allow for the result that occurred in *Texas Children’s Hospital v. Burwell*,¹⁷⁰ which Professor Josh Blackman has referred to as “regulation by blog post.”¹⁷¹ In this case, Texas Children’s Hospital brought suit against the United States Department of Health and Human Services (“HHS”) and the Center for Medicare and Medicaid Services (“CMS”).¹⁷² The case revolves around CMS’s interpretation of the Medicaid Act.¹⁷³ In an effort to encourage hospitals to provide services to Medicaid-eligible patients, Congress provides hospitals with financial assistance.¹⁷⁴ Those hospitals serving a disproportionate share of Medicaid-eligible patients (called “DSHs”) receive “payment adjustments . . .”¹⁷⁵ In 2003, the Medicaid statute was amended to require each state to provide an annual report and audit of its DSH program.¹⁷⁶ In 2008, CMS issued a Final Rule that defined the types of costs and payments that must be disclosed in the audit reports.¹⁷⁷

In 2011 and 2012, Texas Children’s Hospital—a DSH—found that its federal assistance limit was calculated significantly lower than it expected.¹⁷⁸ Years later, the Hospital discovered the cause—a “frequently asked questions” (“FAQs”) section on CMS’s website.¹⁷⁹ As many agencies now do, in 2010, CMS provided the public with answers to FAQs about the audit requirements on its website.¹⁸⁰ One response to a question stated: “[D]ays, costs, and revenues associated with patients that are eligible for Medicaid and also have private insurance should be included in the calculation of the hospital-specific DSH limit.”¹⁸¹ Notably, the Texas Health and Human Services Commission—the Commission responsible for calculating DSH limits in Texas—believed it was bound by the FAQs portion of the CMS website.¹⁸² Texas, understandably, had taken the advice of CMS

¹⁶⁹ *Id.* at 64–65.

¹⁷⁰ 76 F. Supp. 3d 224, 247 (D.D.C. 2014) (order granting preliminary injunction).

¹⁷¹ Josh Blackman, *Regulation by Blog Post: DDC Enjoins HHS from Implementing Website FAQ*, JOSH BLACKMAN’S BLOG (Dec. 31, 2014), http://joshblackman.com/blog/2014/12/31/regulation-by-blog-post-ddc-enjoins-hhs-from-implementing-website-faq/?utm_source=dlvr.it&utm_medium=twitter (stating that “[o]ne of the hallmarks of Obamacare has been the sudden, ad hoc modifications of the law, outside the notice and comment process, through a series of executive memorandum, blog posts, and even oh-so-helpful FAQs”).

¹⁷² *Tex. Children’s Hosp.*, 76 F. Supp. 3d at 228.

¹⁷³ *Id.* (discussing 42 U.S.C. § 1396 (2012)).

¹⁷⁴ *Id.* (discussing 42 U.S.C. § 1396b(a)(1)).

¹⁷⁵ *Id.* at 230 (discussing 42 U.S.C. § 1396r–4(e)).

¹⁷⁶ 42 U.S.C. § 1396r–4(j) (2012).

¹⁷⁷ See Medicaid Program; Disproportionate Share Hospital Payments, 73 Fed. Reg. 77,904 (Dec. 19, 2008) (to be codified at 42 C.F.R. pts. 447, 455).

¹⁷⁸ *Tex. Children’s Hosp.*, 76 F. Supp. 3d at 232–33.

¹⁷⁹ *Id.* at 232.

¹⁸⁰ *Id.* at 231.

¹⁸¹ *Id.* (emphasis omitted) (citation omitted).

¹⁸² *Id.* at 233.

and effectively incorporated the methodology suggested by the FAQ.¹⁸³

Only one problem existed with Texas following the advice set forth in the FAQ—the advice was arguably incorrect. The 2008 Final Rule made “no mention of payments from private insurance for Medicaid-eligible patients.”¹⁸⁴ The FAQ post, on the other hand, definitively states that private insurance should be included in the calculation of the DSH limit.¹⁸⁵ As previously mentioned, the distinction between a legislative and nonlegislative rule is “one of the most confusing [issues] in administrative law.”¹⁸⁶ Here, the district court construed the FAQ post as a legislative rule, stating:

Because [the FAQ advice] makes a substantive change to the formula for calculating a hospital’s DSH limit, binds state Medicaid agencies, and effectively amends the 2008 Rule, it likely constitutes a final agency action . . . and may only be promulgated in accordance with the notice-and-comment provisions of 5 U.S.C. § 553.¹⁸⁷

Just as easily, however, the court could have found that the FAQ post was an interpretive rule. The Final Rule in 2008 was silent as to whether private insurance should be included in the calculation of the DSH limit, so the FAQ was arguably the result of CMS’s interpretation.

Regardless of the court’s classification, it is not disputed that interpretive rules often have binding effect.¹⁸⁸ After *Perez*, agencies may make substantive changes to interpretive rules that, for all intents and purposes are binding, with only the click of a button. Those affected by the agency’s change in stance have the difficult burden of showing that the “agency’s interpretation . . . ‘is plainly erroneous or inconsistent with the regulation.’”¹⁸⁹ The result, as put by Professor Blackman, could lead to “ad hoc modifications of the law, outside the notice and comment process, through a series of executive memorandum, blog posts, and even oh-so-helpful FAQs.”¹⁹⁰

¹⁸³ *Id.* (citation omitted) (“Texas continued to operate under a state Medicaid plan that it viewed as incorporating FAQ 33’s calculation.”).

¹⁸⁴ *Id.* at 237 (citation omitted).

¹⁸⁵ *Id.* at 231.

¹⁸⁶ Gersen, *supra* note 27, at 1705; *see also* Franklin, *supra* note 11, at 278 (“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.”); Saunders, *supra* note 27, at 348 (“While [legislative and interpretive rules] are generally recognized, there is not general accord on how they should be defined.”).

¹⁸⁷ *Tex. Children’s Hosp.*, 76 F. Supp. 3d at 241.

¹⁸⁸ Gersen, *supra* note 27, at 1711 (“Virtually all agree that policy statements . . . do not bind the agency or the public. But at least one pocket of scholarship suggests that while policy statements are not binding, valid interpretive rules are binding to the extent that they ‘merely interpret’ already existing legal duties.”).

¹⁸⁹ *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

¹⁹⁰ Blackman, *supra* note 171 (criticizing the implementation of Obamacare).

D. Past Solutions to a Current Problem

Given the current system today, agencies are left with a choice: they can follow the highly ossified, time-and-resource-intensive informal rulemaking process that is technically binding on the public; or they can quickly draft a nonlegislative rule, distribute this rule to the public in seconds via the agency's website, and know that the nonlegislative rule is, in practice, binding.¹⁹¹ While more pressing today due to the speed at which agencies can issue nonlegislative rules to a broader audience, prior to the implementation of the *Paralyzed Veterans* doctrine, scholars were faced with the same problem that exists today: agencies bypassing the notice-and-comment process and promulgating interpretive rules with binding effect.¹⁹² As such, commentators, noting this disparity, have examined the potential impacts of both deossifying the notice-and-comment process and of ossifying the nonlegislative rulemaking process.¹⁹³

Professor Robert A. Anthony suggests that even when an exception to the notice-and-comment process applies, agencies should still follow formalized procedures "whenever it is feasible and appropriate to do so."¹⁹⁴ For tentative policy statements, he advises that agencies "should forthrightly declare in their nonlegislative policy documents that the stated policies are tentative," and ensures that agency staff and those affected by agency regulations are made aware that the policies "are tentative and are subject to challenge . . . before they are [finally] applied."¹⁹⁵ Further, he recommends that full notice-and-comment procedures be used when agencies make interpretations that: "1) extend the scope of the jurisdiction the agency in fact exercises; 2) alter the obligations or liabilities of private parties; or 3) modify the terms on which the agency will grant entitlements."¹⁹⁶

The late Charles H. Koch, Jr. went further, arguing "the public should have some opportunity for participating in the formulation and promulgation of interpretative rules and general statements of policy."¹⁹⁷ Koch provided two possible solutions.¹⁹⁸ First, Congress could do away with the portion of the APA that exempts interpretive rules and general statements of policy from the notice-and-comment process, instead providing for "good cause exemptions . . ."¹⁹⁹ Better yet, he recommends "the evolution of procedures specially tailored to the individual forms of exempt rulemaking through

¹⁹¹ See discussion *supra* Part II.

¹⁹² See *infra* notes 193–208 and accompanying text.

¹⁹³ See Pierce, Jr., *supra* note 55, at 60; see also Anthony, *supra* note 113, at 1315; Asimow, *supra* note 83, at 382.

¹⁹⁴ Anthony, *supra* note 113, at 1373.

¹⁹⁵ *Id.* at 1374.

¹⁹⁶ *Id.* at 1377.

¹⁹⁷ Charles H. Koch, Jr., *Public Procedures for the Promulgation of Interpretative Rules and General Statements of Policy*, 64 GEO. L.J. 1047, 1078 (1976) (emphasis added).

¹⁹⁸ See *infra* notes 199–200 and accompanying text.

¹⁹⁹ Koch, Jr., *supra* note 197, at 1078.

notions of fairness”²⁰⁰

Commentators have expressed concern, however, that ossifying the implementation of nonlegislative rules will lead to the same result that occurred after the ossification of informal rulemaking, which is less process.²⁰¹ Professor Asimow, acknowledging the “importance of nonlegislative rules,” also asked whether full notice-and-comment procedures should be required before promulgation.²⁰² He concluded requiring an agency to undergo full notice-and-comment procedures before promulgating a nonlegislative rule “would be a significant disincentive to nonlegislative rulemaking,” and therefore, the risk of less nonlegislative rules was not worth the benefits that additional process would provide.²⁰³ As an alternative, Asimow suggests that agencies should follow the Administrative Conference of the United States’ recommendation that agencies partake in voluntary notice-and-comment procedures for nonlegislative rules that are expected to have a “substantial impact” on the public.²⁰⁴ For all other nonlegislative rules, agencies should allow the public to submit comments *after* the rule is implemented.²⁰⁵

Professor Kevin W. Saunders, focusing narrowly on interpretive rules that have legislative effect, expressed similar concerns to Professor Asimow, yet suggests a different proposal intended to allow for public participation in the notice-and-comment process and prevent agencies from implementing binding rules without following APA requirements.²⁰⁶ Saunders leaves the choice up to the agency, recommending that the agency be required to state whether the rule will have legislative effect before it is issued.²⁰⁷ Rules that the agency desires to have legislative effect must follow the APA requirements, and rules that the agency does not wish to have legislative effect

²⁰⁰ *Id.*

²⁰¹ See *infra* notes 202–05 and accompanying text.

²⁰² Asimow, *supra* note 83, at 409.

²⁰³ *Id.* at 409, 426 (“Mandatory pre-adoption procedure would be a significant disincentive to nonlegislative rulemaking. The public would lose more than it would gain. . . . [Moreover,] [e]ven if a nonlegislative rule lacks substantial impact on the lives or fortunes of those affected by it, the rule would in many cases benefit from the input of interested members of the public. Yet to open all nonlegislative rules to advance public participation would have a devastatingly negative effect on the administrative process.”).

²⁰⁴ *Id.* at 421.

²⁰⁵ *Id.* Asimow suggests that this “post-adoption procedure” has five advantages. *Id.* at 421–22. “First, it would not delay the effective date of a [nonlegislative] rule” that is “trivial or clearly valid” *Id.* at 421. “Second, a requirement of post-adoption procedure would in practice lead agencies to provide pre-adoption procedures for important rules that are expected to provoke substantial comment.” *Id.* at 422. Third, the public would be able to make more informed comments after the rule is implemented than it would be able to in a pre-adoption notice-and-comment process. *Id.* “Fourth, a record consisting of public comments and agency responses would be invaluable to a court engaged in pre-enforcement judicial review of the validity of a nonlegislative rule.” *Id.* Lastly, Asimow suggests that post-adoption procedures would result in greater public participation. *Id.*

²⁰⁶ Saunders, *supra* note 27, at 373.

²⁰⁷ *Id.*

are exempted from notice-and-comment proceedings.²⁰⁸

IV. THE PROBLEMS WITH THE CURRENT DEFERENCE GIVEN TO NONLEGISLATIVE RULES

While circuit courts improperly attempted to take matters into their own hands and require more process from agencies before amending interpretive rules, after *Perez*, agencies can rest easy knowing that as long as the rule is classified as “interpretive” they do not have to follow notice-and-comment procedures.²⁰⁹ This is problematic for two main reasons. First, as previously stated, these “interpretive” rules are often indistinguishable from legislative rules and have binding effect.²¹⁰ Perhaps more important is the high degree of deference that courts currently give agencies when interpreting their own regulations.²¹¹ As noted by Justice Scalia in *Perez*, a primary reason that agencies are able to issue binding rules without following APA procedures is the great deal of judicial deference agency interpretations receive.²¹² Parties affected by agency interpretations of their own regulations have no incentive to bring forth litigation challenging the agency when they know the agency’s interpretation is likely to be upheld.²¹³

A. *Standard of Review Given to Agency Interpretations of Statutes*

Until 2001, an agency’s interpretation of a congressional statute—different from an agency’s interpretation of its own regulation—was often afforded *Chevron* deference (referred to as the “*Chevron* Two-Step test”), a form of deference that a 1998 study found upholds agency interpretations an astounding 89% of the time if the issue reaches the “second step.”²¹⁴ The first part of the *Chevron* Two-Step test requires courts to enforce congressional intent if “Congress has directly spoken to the precise question at issue.”²¹⁵ If Congress has not spoken to the precise question at issue, however, then courts must still defer to the agency’s interpretation of the statute as long as that interpretation is reasonable.²¹⁶

In *United States v. Mead Corp.*, however, the Court introduced a new inquiry (referred to as the “*Chevron* Step Zero”) to determine when agencies

²⁰⁸ *Id.*

²⁰⁹ 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring) (“By deferring to interpretive rules, we have allowed agencies to make binding rules unhampered by notice-and-comment procedures.”).

²¹⁰ *Id.*

²¹¹ See *infra* note 212 and accompanying text.

²¹² 135 S. Ct. at 1211–12 (Scalia, J., concurring).

²¹³ Webb Yackee & Webb Yackee, *supra* note 67, at 1432.

²¹⁴ Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 31 (1998).

²¹⁵ 467 U.S. 837, 842 (1984).

²¹⁶ *Id.* at 843.

are entitled to *Chevron* deference.²¹⁷ In *Mead*, the Court stated that *Chevron* deference applies when “Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law”²¹⁸ When Congress has expressly delegated to the agency informal rulemaking or formal adjudication powers, the Court assumes that Congress expects the agency to speak with the force of law and gives the agency’s interpretation *Chevron* deference.²¹⁹ An agency’s interpretation may still receive *Chevron* deference even if it has not been delegated informal rulemaking or formal adjudication powers, depending on whether the agency’s interpretation was binding and the amount of formality that the agency used when arriving at its interpretation.²²⁰

In *Mead*, the Court held that if an agency’s interpretation of a statute is not entitled to *Chevron* deference, it might still be entitled to *Skidmore* deference.²²¹ *Skidmore* deference, derived from *Skidmore v. Swift & Co.*, gives a varying amount of weight to an agency’s interpretation depending on “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”²²² Whereas under *Chevron* deference, the Court leaves the agency’s interpretation in place so long as it is reasonable, under *Skidmore*, the Court, after giving the agency deference, determines what it thinks is the best interpretation.²²³

One year later, in *Barnhart v. Walton*, the Court again examined whether an agency interpretation was entitled to *Chevron* deference.²²⁴ In *Barnhart*, the Court examined whether the Social Security Administration’s interpretation of the Social Security Act was entitled to *Chevron* deference.²²⁵ Looking to “the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time,” the Court found that the Social Security Administration’s interpretation was entitled to *Chevron* deference.²²⁶ While lower courts have used both the *Mead* and

²¹⁷ 533 U.S. 218, 234 (2001); see also Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006).

²¹⁸ *Mead*, 533 U.S. at 229.

²¹⁹ *Id.* (noting that such a delegation is “a very good indicator of delegation meriting *Chevron* treatment”).

²²⁰ *Id.* at 230–31, 231–34 (“[A]s significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded”).

²²¹ *Id.* at 234–35 (“[T]here is room at least to raise a *Skidmore* claim here, where the regulatory scheme is highly detailed, and [the agency] can bring the benefit of specialized experience to bear on the subtle questions in this case”).

²²² 323 U.S. 134, 140 (1944).

²²³ *Id.*

²²⁴ See generally 535 U.S. 212 (2002).

²²⁵ *Id.* at 217–18.

²²⁶ *Id.* at 222.

Barnhart factors to determine whether an agency's statutory interpretation is entitled to *Chevron* deference, the courts "generally understand that *Chevron* deference applies only if Congress delegates, and the agency exercises, authority to issue interpretations with the force of law."²²⁷

B. Standard of Review Given to Agency Interpretations of Their Own Regulations

Under what is known as *Auer* deference, an agency's interpretation of its own regulation is given "controlling weight unless it is plainly erroneous or inconsistent with the regulation" regardless of the process the agency uses in formulating its interpretation.²²⁸ *Auer* deference is analogous to *Chevron* deference,²²⁹ and its application to an agency's interpretation of its own regulation has the same benefits that providing *Chevron* deference to an agency's interpretation of a statute has.²³⁰ First, agencies are designed to be experts in their assigned field, whereas judges are widely regarded as generalists.²³¹ Therefore, when a matter falls within the agency's expertise, the agency is in a better position to make a decision.²³² Second, while courts are bound by precedent, agencies have more flexibility when making decisions.²³³ This flexibility "promotes efficiency, avoiding the need for

²²⁷ Lisa Schultz Bressman, *How Mead has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1457 (2005).

²²⁸ *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). *Auer* deference is derived from *Bowles*. 325 U.S. 410. In a more recent case, *Gonzales v. Oregon*, the Court noted a distinction between when *Auer* and *Mead* apply, reaffirming that *Auer* does not apply to an agency's interpretation of statutes. 546 U.S. 243, 255–58 (2006). The Court stated:

[T]he existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute. An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.

Id. at 257.

²²⁹ *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1339 (2013) (Scalia, J., concurring in part and dissenting in part) (citation omitted) ("In practice, *Auer* deference is *Chevron* deference applied to regulations rather than statutes.").

²³⁰ See Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock's Domain*, 79 GEO. WASH. L. REV. 1449, 1459–61 (2011).

²³¹ Chad M. Oldfather, *Judging, Expertise, and the Rule of Law*, 89 WASH. U. L. REV. 847, 848 (2012) ("[T]he iconic American judge remains a generalist. She sits on a court of general jurisdiction and adjudicates whatever disputes happen to come before her."); see also John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 680–81 (1996) (stating that federal courts should provide greater deference to agencies given their expertise and experience).

²³² *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 866 (1984) ("When a challenge . . . really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail."); see also *Pierce, Jr.*, *supra* note 55, at 95 ("It is simply too easy for judges to say they are applying such a standard while they continue instead to evidence the seemingly unlimited hubris that has long been apparent in many judicial decisions reviewing complicated regulatory rules that raise issues beyond the understanding of most judges.").

²³³ See Jonathan Masur, *Judicial Deference and the Credibility of Agency Commitments*, 60 VAND. L. REV. 1021, 1025 (2007) (noting the "Supreme Court's trend . . . towards providing agencies with ever greater temporal flexibility"). For an argument that agency flexibility has been diminished by the recent case of *Alaska Prof'l Hunters Ass'n v. Fed. Aviation Admin.*, see Downer, *supra* note 63, at 891–92.

lengthy litigation to resolve every regulatory ambiguity.”²³⁴ Third, while Supreme Court justices and many other judges across the country have life terms, agency heads are politically accountable to the electorate by way of the Executive Branch.²³⁵ Going further, *Auer* deference arguably provides greater benefits than *Chevron* deference. An agency that drafts a regulation should be in the best position to determine what its own regulation intends.²³⁶ Moreover, “by giving primacy to agencies’ interpretations rather than those of reviewing courts, *Auer* deference tends to promote certainty and predictability in the administration of regulations. This also tends to promote uniformity of application in different judicial circuits.”²³⁷

Despite these benefits, there are also several reasons why three justices in *Perez* and numerous academic commentators have been critical of *Auer* deference as of late.²³⁸ In 2011, Justice Scalia noted that “[i]t seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well.”²³⁹ Further, the fact that *Auer* allows for a high degree of deference to agency interpretations of their own regulations becomes problematic depending on the amount of thought that goes into those original interpretations. Over the years, courts have provided *Auer* deference to highly informal agency interpretations, raising the question of whether the agency’s expertise is actually being utilized.²⁴⁰ For instance, courts have given *Auer* deference to agency interpretations set forth for the first time in amicus briefs.²⁴¹ While amicus briefs “lack the transparency and public participation of rulemaking,” agencies have engaged in “the affirmative use of amicus briefs . . . in strategic and at times aggressive ways . . . to advance the President’s political agenda in the courts.”²⁴² This concern is amplified by the fact that when courts decide *Auer* deference

²³⁴ *Clean Water Act - Auer Deference - Decker v. Northwest Environmental Defense Center*, 127 HARV. L. REV. 328, 333 (2013).

²³⁵ Bradley Lipton, Note, *Accountability, Deference, and the Skidmore Doctrine*, 119 YALE L.J. 2096, 2099 (2010) (“[A]gencies are more politically accountable than courts.”).

²³⁶ DAVIS, *supra* note 34, at 352.

²³⁷ Ben Snowden, *Has Auer’s Hour Arrived?*, 28 NAT. RES. & ENV’T 31, 31 (2014) (first citing *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring); and then citing *Couer Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 296 (2009) (Scalia, J., concurring)).

²³⁸ See Kevin O. Leske, *Between Seminole Rock and a Hard Place: A New Approach to Agency Deference*, 46 CONN. L. REV. 227, 230 (2013); see also Manning, *supra* note 231, at 613–14; Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 371–75 (2012); Derek A. Woodman, *Rethinking Auer Deference: Agency Regulations and Due Process Notice*, 82 GEO. WASH. L. REV. 1721, 1723–25 (2014).

²³⁹ *Talk Am.*, 131 S. Ct. at 2266 (Scalia, J., concurring).

²⁴⁰ See Deborah Thompson Eisenberg, *Regulation by Amicus: The Department of Labor’s Policy Making in the Courts*, 65 FLA. L. REV. 1223, 1226 (2013).

²⁴¹ *Id.* (“Since *Chevron*, deference doctrine has reached far beyond rulemaking to include informal agency interpretations and amicus arguments.”); *Auer v. Robbins*, 519 U.S. 452, 462 (1997) (“[T]hat the Secretary’s interpretation comes to us in the form of a legal brief . . . does not, in the circumstances of this case, make it unworthy of deference.”); *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 196 (2011) (quoting *Auer*, 519 U.S. at 461) (“This Court defers to an agency’s interpretation of its own regulation, advanced in a legal brief, unless that interpretation is ‘plainly erroneous or inconsistent with the regulation.’”).

²⁴² Eisenberg, *supra* note 240, at 1226–27.

applies, they often rule in favor of the agency without engaging in a thorough review of the agency's interpretation.²⁴³ For example, of the twenty cases that district courts applied *Auer* deference to in 2008, the rationality of the agency's interpretation was only discussed eleven times.²⁴⁴ In 2009, of the nineteen cases that applied *Auer* deference, there was "no discussion of the standards or application seven-out-of-nineteen times. In the remaining twelve cases, only eight courts gave more than a superficial review of the standard or application of the facts to the doctrine."²⁴⁵ Given these numbers, regardless of the amount of the time an agency spends developing its interpretation, and despite the lack of formality used in coming to its interpretation, courts will uphold an agency's interpretation of *Auer* deference without meaningful review about 50% of the time.²⁴⁶

V. SOLUTION

In summary, we are left with a mess. Courts and scholars struggle to make a clear distinction between legislative and nonlegislative rules. But when issuing rules after *Perez*, agencies know that so long as the court determines the rule is nonlegislative, the agency is exempt from using notice-and-comment procedures.²⁴⁷ Consequently, agencies are likely to continue using nonlegislative rules improperly and in a manner that has binding effect. Those affected by nonlegislative rules may not realize the agency is acting improperly and have little incentive to bring a challenge. But if a challenge is brought against the agency, it is highly unlikely that an agency's interpretation of its own regulation will be overturned given the extremely lenient standard of review—*Auer* deference—that is applied.²⁴⁸

After *Perez* and *Vermont Yankee*, it is clear that lower courts cannot impose additional procedural requirements on agencies beyond what the APA mandates.²⁴⁹ It is also highly unlikely that Congress will take steps to amend the APA and impose additional requirements on agencies issuing interpretive rules with binding effect, although doing so would be the best possible solution.²⁵⁰ Rather than exempt interpretive rules from the notice-and-

²⁴³ See Claire R. Kelly, *The Brand X Liberation: Doing Away with Chevron's Second Step as Well as Other Doctrines of Deference*, 44 U.C. DAVIS L. REV. 151, 204 (2010).

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 205–06.

²⁴⁶ See *supra* notes 244–45 and accompanying text.

²⁴⁷ See *supra* note 208 and accompanying text.

²⁴⁸ Keim, *supra* note 9.

²⁴⁹ 135 S. Ct. 1199, 1207 (2015) (quoting 435 U.S. 519, 549 (1978)) ("Beyond the APA's minimum requirements, courts lack authority 'to impose upon [an] agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good.'").

²⁵⁰ Rachel Weiner & Ed O'Keefe, *Judging the (Un)productivity of the 113th Congress*, WASH. POST (Aug. 2, 2013), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/08/02/judging-the-unproductivity-of-the-113th-congress/> (describing the 112th Congress as the "most unproductive" Congress ever); see also Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 ADMIN. L. REV. 65, 121–22 (2015) ("Writing a comprehensive and prescriptive statutory definition of when agencies may permissibly avoid a rulemaking procedure requirement is difficult.").

comment process, Congress could impose only one requirement on agencies promulgating interpretive rules: the requirement that agencies “disclose in detail the thinking that has animated the form of a proposed [interpretive] rule and the data upon which that is based,” and still apply *Auer* deference if the agency does so.²⁵¹ This would ensure that agencies—who are in a better position than courts to interpret regulations—are utilizing their expertise. With more detail provided by the agency, it would also make it harder for courts to ignore the rationale given when determining whether the agency’s interpretation is “plainly erroneous or inconsistent with the regulation.”²⁵²

Alternatively, the judicial branch could incentivize agencies to utilize their expertise when promulgating interpretive rules by granting deference based entirely on the process used while making its interpretation. This could be effectuated by applying the *Mead* framework when reviewing an agency’s interpretation of its own regulations. Doing so will still provide the agency with *Auer* deference when it acts “with the force of law”²⁵³ When the agency is not acting with the force of law, however, rather than receiving *Auer* deference, under the *Mead* framework, the agency will be entitled to *Skidmore* deference.²⁵⁴ Under *Skidmore*, the agency will be rewarded with more deference based on the degree to which the agency utilizes its expertise when drafting the regulation.²⁵⁵

A. Providing *Auer* Deference to Agencies Acting with the Force of Law

Applying the *Mead* framework to nonlegislative rules with binding effect draws in part on Professor Saunders’s solution in that it provides the agency with a choice.²⁵⁶ If the agency wishes to ensure a greater likelihood that the regulation will have legislative effect, then the agency can decide to follow notice-and-comment procedures when promulgating the regulation. Under *Mead*, following the notice-and-comment procedure is the equivalent of acting “with the force of law”²⁵⁷ Consequently, when the notice-and-comment process is followed, courts should uphold the agency’s interpretation unless that interpretation is “plainly erroneous or inconsistent with the regulation.”²⁵⁸

²⁵¹ *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35–36 (D.C. Cir. 1977).

²⁵² *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)); see also *supra* note 221 and accompanying text.

²⁵³ *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

²⁵⁴ See *supra* note 221 and accompanying text.

²⁵⁵ See 323 U.S. 134, 140 (1944).

²⁵⁶ See *supra* notes 205–07 and accompanying text.

²⁵⁷ *Mead*, 533 U.S. at 229. Even without an explicit congressional grant to the agency to use notice-and-comment, under the *Mead* framework, courts should surely reward the agency’s regulation with legislative effect due to the binding nature and formality inherent in the notice-and-comment process.

²⁵⁸ See *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)) (describing *Auer* deference). While this differs slightly from *Mead*, which provides *Chevron* rather than *Auer* deference to agencies acting with the force of law, as Justice Scalia has noted, “[i]n practice, *Auer* deference is *Chevron* deference applied to regulations rather

When the notice-and-comment process is followed, courts can be comforted by the fact that the agency's expertise has been utilized.²⁵⁹ All of the benefits associated with informal rulemaking are present, including "bureaucratic accountability, . . . regulatory rationality,"²⁶⁰ "fairness, allocative efficiency, and factual accuracy"²⁶¹ But when there is no indication that the agency has used its expertise, there is no benefit to providing the agency with deference. Therefore, in cases such as *Perez* and *Texas Children's Hospital*, when the agency does not follow notice-and-comment procedures, it will not receive *Auer* deference. Following the *Mead* framework and recognizing that requiring agencies to follow notice-and-comment procedures in all cases has its drawbacks, when the agency does not follow notice-and-comment procedures, the agency will still receive *Skidmore* deference.²⁶²

B. Providing *Skidmore* Deference to Agencies Acting Without the Force of Law

If an agency opts to use less formal procedures when promulgating interpretive rules, under *Skidmore* deference, courts should give varying degrees of deference to the agency depending on how the agency came to its interpretation.²⁶³ The factors that the court will look to are "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."²⁶⁴ In order to reward and incentivize those agencies demonstrating that they have utilized their expertise, courts should give the most weight to thoroughness evident in agency's consideration.

1. Thoroughness

Under the first factor—the thoroughness evident in the agency's consideration—courts should give weight to "the agency's explanation of its interpretation."²⁶⁵ In *Perez*, the DOL provided some reasoning for its

than statutes." See *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1339–40 (2013) (Scalia, J., concurring in part and dissenting in part); see also *Mead*, 533 U.S. at 229.

²⁵⁹ See *supra* notes 231–37 and accompanying text.

²⁶⁰ See *Webb Yackee & Webb Yackee*, *supra* note 67, at 1419–20.

²⁶¹ *McGarity*, *supra* note 68, at 1392.

²⁶² See 533 U.S. at 220 ("[T]here is room at least to raise a *Skidmore* claim here, where the regulatory scheme is highly detailed, and [the agency] can bring the benefit of specialized experience to bear on this case's questions."). Professor Michael P. Healy argues that courts should completely do away with *Auer* deference, instead reviewing agency interpretations under a two-step framework, applying *Skidmore* deference at step two. Healy, *supra* note 23, at 677.

²⁶³ Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1281 (2007).

²⁶⁴ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

²⁶⁵ *Hickman & Krueger*, *supra* note 263, at 1281.

changing interpretations.²⁶⁶ For instance, in 2010, the DOL stated that because “mortgage-loan officers ‘have a primary duty of making sales for their employers, . . . [they] therefore do not qualify’ for the administrative exemption.”²⁶⁷ The DOL further stated that its 2006 interpretation relied on “misleading assumption[s] and selective and narrow analysis” of the original rule.²⁶⁸ Providing an explanation for its interpretation is an indication that the agency used its expertise to some degree in forming its conclusion. As noted by Professors Kristin E. Hickman and Matthew D. Krueger, courts also look to the formality of an agency’s proceedings under this factor.²⁶⁹ For instance, the Second Circuit Court of Appeals has stated that “[t]horoughness is impossible for an agency staff member to demonstrate when the staff member does not report to the Secretary, bears no lawmaking authority, and is unconstrained by political accountability. Thorough consideration requires a macro perspective that a staff member, acting alone, lacks.”²⁷⁰ This factor may also encourage agency heads to issue regulations rather than to delegate authority.²⁷¹ If an agency knows that it will be rewarded for its explanation with more deference, it will be less likely to post an interpretive rule with no explanation on a blog or website, and Professor Blackman’s concern of “regulation by blog post” should be less pronounced.²⁷²

2. Validity of the Agency’s Reasoning

When evaluating the second factor—the validity of the agency’s reasoning—courts must be sure to continue to take the other three factors into consideration.²⁷³ A 2007 study found that in 15% of cases applying *Skidmore*, courts relied too heavily on this factor and did not consider the other three factors.²⁷⁴ Under this factor, “most courts consider the substantive merits of the agency’s interpretation in determining whether to defer to it”²⁷⁵ But relying too heavily on this factor becomes problematic, as often times, courts are in a worse position to determine the validity of the reasoning than the agencies.²⁷⁶ In *Perez*, while the DOL provided an explanation for its changing

²⁶⁶ See *infra* note 267 and accompanying text.

²⁶⁷ *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1205 (2015) (citation omitted).

²⁶⁸ *Id.*

²⁶⁹ Hickman & Krueger, *supra* note 263, at 1281–82.

²⁷⁰ *Id.* at 1282 (quoting *De La Mota v. U.S. Dep’t of Educ.*, 412 F.3d 71, 80 (2d Cir. 2005)).

²⁷¹ See *United States v. Mead Corp.*, 533 U.S. 218, 219–20 (2001). In *Mead*, the Court found the fact that the agency was issuing opinion letters “at a rate of 10,000 a year at 46 offices” to show that the agency was not expecting to create binding law. *Id.*

²⁷² See *supra* note 170 and accompanying text.

²⁷³ See *infra* notes 274–78 and accompanying text.

²⁷⁴ Hickman & Krueger, *supra* note 263, at 1273 (“To the extent that a court accepts an agency’s interpretation solely because it is ‘valid,’ the court potentially extends deference beyond what *Mead* envisioned.”).

²⁷⁵ *Id.* at 1285.

²⁷⁶ Pierce, Jr., *supra* note 55, at 95 (“It is simply too easy for judges to say they are applying such a standard while they continue instead to evidence the seemingly unlimited hubris that has long been apparent in many judicial decisions reviewing complicated regulatory rules that raise issues beyond the understanding of most judges.”).

interpretation, the validity of the reasoning appears suspect. In 2010, the DOL stated that mortgage-loan officers do not qualify for the administrative exemption because they “have a primary duty of making sales for their employers”²⁷⁷ The DOL failed to state what changed, however.²⁷⁸ A strong argument could be made if, for example, the role of a mortgage-loan officer has evolved from ministerial to sales-based, but given that the DOL makes no such argument, this factor weighs against providing a great deal of deference.

3. Consistency

While Professors Hickman and Krueger state that this factor is “less dispositive than other *Skidmore* factors[,] . . . [g]enerally, courts value consistency because it protects parties’ reliance interests, promotes the rule of law by ensuring similarly situated parties are treated similarly, and guards against capricious or ill-intentioned agency action.”²⁷⁹ In 2005, the Tenth Circuit Court of Appeals afforded an agency’s interpretation “little deference principally because [it] had changed its interpretation of the statute three times in thirty years, upsetting settled expectations of rights holders at each turn.”²⁸⁰ In *Perez*, the fact that the DOL has changed its interpretation three times since 1999 certainly weighs against providing deference. Mortgage banking companies that relied on prior interpretations holding that mortgage-loan officers were not entitled to FLSA protections are now on the hook for unanticipated costs.

4. Other Factors with the Power to Persuade

Under *Skidmore* review, courts often take into account the agency’s expertise.²⁸¹ In *Perez*, the DOL is likely in a better position than the courts to determine what a mortgage-loan officer’s primary job functions are. Still, after fact-finding at the trial court level, this does not appear to be an issue of such complexity that the judiciary requires the agency’s expertise. If the DOL could affirmatively show that it exercised its expertise when formulating its interpretation, this factor would weigh in favor of giving the DOL a greater degree of deference.²⁸²

VI. CONCLUSION

For decades, agencies have been circumventing the notice-and-comment rulemaking process and issuing rules with binding effect under the

²⁷⁷ *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1205 (2015) (citation omitted).

²⁷⁸ *Id.*

²⁷⁹ Hickman & Krueger, *supra* note 263, at 1286–87.

²⁸⁰ *Id.* at 1287.

²⁸¹ *Id.* at 1288–90.

²⁸² *See id.* at 1289.

guise of nonlegislative rules.²⁸³ This improper use of nonlegislative rules caused circuit courts to take matters into their own hands.²⁸⁴ Under the *Paralyzed Veterans* doctrine, the D.C. Circuit Court of Appeals held that an agency “must use the APA’s notice-and-comment procedures when it wishes to issue a new interpretation of a regulation that deviates significantly from a previously adopted interpretation.”²⁸⁵ These judge-made rules once discouraged agencies from using nonlegislative rules improperly.²⁸⁶

On March 9, 2015, the Supreme Court struck down the *Paralyzed Veterans* doctrine.²⁸⁷ While the Court’s ruling was a correct reading of the APA, under the current framework, agencies are left with a choice: when promulgating rules, they can follow the ossified notice-and-comment process, which can take years, and be comforted by the fact that after those years have passed the rule will be legally binding. Alternatively, with the press of a button, agencies can post a “nonlegislative rule” to their websites that, for all intents and purposes, has legislative effect, and will receive a great deal of deference. As a solution, this Article argues that deference to agencies is highly beneficial when agencies utilize their expertise and seek the best methods to encourage agencies do so. This can be done in two ways. First, Congress could amend the APA to require agencies to “disclose in detail the thinking that has animated the form of a proposed [interpretive] rule and the data upon which that is based” prior to issuing interpretive rules, and still apply *Auer* deference if the agency does so.²⁸⁸ Second, under the *Mead* framework, courts can continue to apply *Auer* deference if the agency acts “with the force of law” and utilizes the notice-and-comment process.²⁸⁹ When the agency is not following the notice-and-comment process, courts should apply *Skidmore* deference, which will incentivize agencies to be thorough in their interpretations by providing more deference depending on the time spent and energy utilized.²⁹⁰

²⁸³ See discussion *supra* Section II.D.

²⁸⁴ See *infra* note 285 and accompanying text.

²⁸⁵ *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1200 (2015).

²⁸⁶ See Ryan DeMotte, Note and Comment, *Interpretive Rulemaking and the Alaska Hunters Doctrine: A Necessary Limitation on Agency Discretion*, 66 U. PITT. L. REV. 357, 361 (2004) (arguing that the *Paralyzed Veterans* doctrine “preserves public participation in important policy decisions and protects the legitimate reliance interests of regulated parties”).

²⁸⁷ *Perez*, 135 S. Ct. at 1201.

²⁸⁸ *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35–36 (D.C. Cir. 1977).

²⁸⁹ 533 U.S. 218, 229 (2001).

²⁹⁰ *Home Box Office*, 567 F.3d at 35.