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## The Force of Law After Kisor

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# THE FORCE OF LAW AFTER *KISOR*

Beau J. Baumann\*

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## I. INTRODUCTION

Deference is a bedrock concept in administrative law.<sup>1</sup> *Chevron* deference, at a high level of generality, requires federal courts to defer to agencies’ reasonable constructions of ambiguous statutes.<sup>2</sup> *Auer* deference requires courts to defer to agencies’ reasonable constructions of their own regulations.<sup>3</sup>

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1. See Cass R. Sunstein, *Chevron as Law*, 107 GEO. L.J. 1613, 1615 (2019) (“[*Chevron*] has a strong claim to being the most important case in all of administrative law.”); Jonathan H. Adler, *Restoring Chevron’s Domain*, 81 MO. L. REV. 983, 983 (2016) (“*Chevron* has been among the most important and consequential administrative law decisions of all time.”).

2. See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). The use of the word “constructions,” as opposed to “interpretations,” in this sentence and the sentence that follows flows from a view that I find persuasive—that most *Chevron* cases are about construction and not interpretation. See Lawrence B. Solum & Cass R. Sunstein, *Chevron as Construction*, 105 CORNELL L. REV. 1465, 1469–70 (2020).

3. See *Auer v. Robbins*, 519 U.S. 452, 457–58 (1997).

However, deference has become controversial in the academic literature and in Supreme Court opinions.<sup>4</sup> Critics claim that deference is either unconstitutional, incompatible with the Administrative Procedure Act of 1946 (APA),<sup>5</sup> or antithetical to Anglo-American constitutionalism.<sup>6</sup>

One argument against *Auer* deference turns on a murky concept called the “force of law” (FOL).<sup>7</sup> For now, we can stipulate that when an agency action “binds” regulated parties, it carries the FOL.<sup>8</sup> That uninterrogated notion is reflected in blackletter law.<sup>9</sup> Critics of deference suggest that if an interpretive rule receives *Auer* deference, it has been imbued with the FOL.<sup>10</sup> For “APA originalists,” this poses a conceptual

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4. See generally Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J. L. & PUB. POL’Y 103 (2018) (providing a review of recent arguments for eliminating or narrowing the *Chevron* and *Auer* deference regimes).

5. See Administrative Procedure Act of 1946, 5 U.S.C. §§ 551, 553–559, 701–706 (2012).

6. See, e.g., *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring) (“The proper rules [of deference] for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary.”); Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 977 (2017); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 8 (2014) (“It thus should be evident that, in returning to consolidated extra- and supralegal power, administrative law revives a sort of power that constitutions were emphatically designed to prohibit.”). These rationales are not exhaustive. Some critics of deference believe that either *Chevron* or *Auer* deference should simply be replaced with a less deferential standard. See, e.g., Jack M. Beerman, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why it Can and Should Be Overruled*, 42 CONN. L. REV. 779, 843–50 (2010).

7. See *infra* Part I.

8. See, e.g., Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 471 (2002). For the purposes of the article, I place derivatives of “binding” in quotations when I am merely using the word. Cf. Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1262–63 (2019) (distinguishing between the word “originalism” and *originalism* as a concept). That word is used to refer to several contested and interlocking concepts. When I am referring to one of those disaggregated concepts, derivatives of *binding* will appear in italics.

9. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (equating the FOL with whether rules are “binding”).

10. See, e.g., Aditya Bamzai, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 195–96 (2019) (arguing that § 553 of the APA conflicts with *Auer*

issue.<sup>11</sup> The law distinguishes between “legislative” and “interpretive” rules using the FOL.<sup>12</sup> Legislative rules go through notice-and-comment rulemaking and carry the FOL.<sup>13</sup> Interpretive rules, however, are merely meant to help guide the public and do not carry the FOL.<sup>14</sup> So if *Auer* injects the FOL into interpretive rules, *Auer* may conflict with the APA—specifically, § 553’s distinction between legislative rules and guidance.<sup>15</sup>

This argument was adopted by Justice Gorsuch in his *Kisor* dissent. Gorsuch argued that *Auer* deference “binds” courts so that an interpretive rule carries the FOL.<sup>16</sup> Scholars, even those who do not oppose deference, have accepted this argument with alacrity.<sup>17</sup> Despite this rising tide, Justice Kagan’s plurality opinion in *Kisor* batted down Gorsuch’s dissent with an argument that appears—at first blush—to rely on a straightforward definition. According to Kagan, the FOL merely describes an agency interpretation that can be used in an enforcement action.<sup>18</sup> Interpretive rules do not carry the FOL because they cannot be used in an enforcement action.<sup>19</sup> Kagan’s is an impossible narrow conception of the FOL, especially after

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deference).

11. See generally Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807 (2018) (envisioning and advocating for a mode of analyzing whether modern administrative law doctrines are consistent with the text and structure of the APA).

12. See *Chrysler Corp.*, 441 U.S. at 302 n.31.

13. See *id.*

14. See *id.*

15. See generally Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. 263 (2018) (arguing that § 553 should be read as distinguishing between two classes of agency actions—legislative rules and guidance—and that all forms of guidance should be subjected to the same legal test).

16. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2434 (2019) (Gorsuch, J., concurring).

17. See Steven J. Lindsay, *Timing Judicial Review of Agency Interpretations in Chevron’s Shadow*, 127 YALE L.J. 2448, 2454 (2018) (adopting the view that deference is inconsistent with § 553’s distinction between legislative rules and guidance, but without calling for the Supreme Court to reject deference).

18. See *Kisor*, 139 S. Ct. at 2420 (“An interpretive rule itself never forms ‘the basis for an enforcement action’—because, as just noted, such a rule does not impose any ‘legally binding requirements’ on private parties.”).

19. See *id.* (“An enforcement action must instead rely on a legislative rule, which (to be valid) must go through notice and comment.”).

the judiciary has spent decades expanding the concept.<sup>20</sup> Because the plurality did not flesh out its argument, the FOL argument against *Auer* deference is bound to linger.

The FOL argument in *Kisor* is symptomatic of a larger issue in the administrative law canon. The simplicity of the FOL formulation—an agency action that “binds” the public carries the FOL—masks several doctrinal puzzles that have scarcely been acknowledged, much less solved.<sup>21</sup> The FOL is invoked when courts distinguish between legislative and interpretive rules. It is also a core concept in the justiciability context. Increasingly, the FOL concept is becoming central to the deference case law, as *Kisor* makes clear. There are many FOL concepts, each of which implicates different legal norms in its own domain.<sup>22</sup> This is problematic because courts talk about, and appear to conceive of, the FOL as a unitary concept. The FOL’s Januslike complexion is further complicated by core inter-circuit disputes over what it means to “bind” a regulated party and who or what must be “bound.”<sup>23</sup>

This Article is meant to reexamine the FOL by providing a

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20. See *infra* Parts II–III (illustrating the many differing meanings behind the FOL, all of which have been embraced by different courts at different times); Bamzai, *supra* note 10, at 196 (“And therein lies the conflict with the APA: the plurality’s approach would create a class of agency legal interpretations that supposedly ‘do not have the force of law’ but nevertheless are binding on courts through *Auer*.”).

21. See Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 472–73 n.25 (2013) (noting that the FOL concept overlaps with the APA’s final agency action requirement). See generally Lindsay, *supra* note 17 (a superb student note that fleshes out the connection between finality and the FOL).

22. Cf. Lawrence B. Solum, *Disaggregating Chevron*, 82 OHIO ST. L.J. 249, 253 (2021) (arguing that there are “many *Chevron* doctrines, each of which represents a different legal norm, with its own domain of application and internal structure”).

23. Compare *Texas v. EEOC*, 933 F.3d 433, 443–46 (5th Cir. 2019) (allowing for pre-enforcement review of an agency action even though it was, by statute, binding on no one), with *Am. Tort Reform Ass’n v. OSHA*, 738 F.3d 387, 395–96 (D.C. Cir. 2013) (holding that an interpretive rule was not “final” for judicial review because interpretive rules categorically lack the FOL). This is not to suggest that the circuits have been entirely consistent on their FOL rulings. See *Nat’l Pork Producers Council v. EPA*, 635 F.3d 738, 756 (5th Cir. 2011) (citing *Nat’l Ass’n of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005) (“[I]f the practical effect of the agency action is not a certain change in the legal obligations of a party, the action is non-final for the purpose of judicial review.”)); see also Lindsay, *supra* note 17, at 2466–70 (contrasting the circuits’ different approach to the FOL in the context of final agency action).

conceptual history. It demonstrates that the FOL refers to a “family” of related concepts.<sup>24</sup> This Article is the first to identify and defend the delimitation between these different FOL concepts by reference to the text of the APA. As the FOL has spread, it has come to rest on its compatibility with several different sections of the APA.<sup>25</sup> The “family resemblance” between these branches of the FOL causes confusion in courts and in the literature. After delving into the pre- and post-APA case law, this Article concludes that the plurality was correct in *Kisor*. Whether an interpretive rule receives deference is irrelevant to whether it carries the FOL—at least in the sense implicated by § 553 of the APA.

The most obvious rebuttal to this Article is to conflate *Kisor* with *United States v. Mead Corporation*.<sup>26</sup> There, the Supreme Court narrowed domain of *Chevron* by limiting its reach to agency actions that carry the FOL.<sup>27</sup> One might argue that when an interpretive rule receives *Auer* deference, it carries the FOL and thereby violates § 553.

This counterargument is confused by the “family resemblance” between *Kisor* and *Mead*. Even if the *Mead* FOL limitation on *Chevron* deference applies with equal force to *Auer* deference, any reliance on that limitation in *Kisor* was misplaced. In *Mead*, the Supreme Court’s invocation of the FOL simply meant that *Chevron* deference was limited to “[w]hether Congress has delegated the authority to adopt legally binding rules and regulations[.]”<sup>28</sup> The *Mead* FOL is an interpretive question that is “readily ascertainable from statutory text.”<sup>29</sup> *Mead* and *Chevron* are best conceptualized as standards of review governing the construction of ambiguous statutes.<sup>30</sup>

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24. Cf. Solum, *supra* note 8, at 1264–65 (using the “family resemblance” concept to describe how different theories of “originalism” are related in loose and confusing ways).

25. See 5 U.S.C. §§ 553, 704, 706.

26. See generally *United States v. Mead Corp.*, 553 U.S. 218 (2001).

27. See *id.* at 226–27.

28. Kristin E. Hickman & Aaron L. Nielson, *Narrowing Chevron’s Domain*, 70 DUKE L.J. 931, 937–38 (2021).

29. *Id.* at 938.

30. See Kristin E. Hickman & R. David Hahn, *Categorizing Chevron*, 81 OHIO ST. L.J. 611, 617 (2020); see also Solum, *supra* note 22, at 292 (concluding that “most of the time” *Chevron* is best conceptualized as a standard of review applicable to construction).

They are both part of a body of case law implementing the APA's scope of review provisions like § 706(2)(A).<sup>31</sup> The interests there are with expertise and with indicia supporting *Chevron's* default presumption of delegation.<sup>32</sup> Whether an agency action carries the FOL for the purposes of the § 706—whether it is entitled to *Chevron* deference—has nothing at all to do with whether an interpretive rule's entitlement to *Auer* deference vitiates § 553. When an interpretive rule receives *Auer* deference, it does nothing to formally change a regulated party's obligations. It is not “binding” within the meaning of § 553's FOL. Anticipating that some will reach for *Mead*, I conclude that nothing from that case supports the § 553 argument from *Kisor*.

Part I provides a longer explanation of the FOL dispute in *Kisor*. In my telling, the plurality and the dissenters were essentially talking past each other because the FOL's meaning has been confused over time. To help resolve that conflict, Part II explores the case law from the pre-APA period. This Section shows that the FOL was principally concerned with delegation and whether an agency could craft penalties to enforce either statutes or regulations. Part III demonstrates that this meaning informed the drafting of § 553 of the APA. Part IV discusses the post-APA period by illustrating the spread of the FOL across different parts of the administrative law canon. Part V argues that the *Kisor* plurality was correct. When a court defers to an interpretive rule, it does not “bind” anyone or anything in any sense that is cognizable under § 553. The Conclusion outlines the impact of the approach taken by this Article.

## II. TALKING PAST EACH OTHER: *KISOR* AND THE FOL

James Kisor is a Vietnam War veteran.<sup>33</sup> For decades, he

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31. See Hickman & Hahn, *supra* note 30, at 656; see also Cass R. Sunstein, *Chevron Is Not Inconsistent with the APA*, YALE J. ON REG.: NOTICE & COMMENT (Sept. 16, 2020), <https://www.yalejreg.com/nc/chevron-is-not-inconsistent-with-the-apa-by-cass-r-sunstein/> (advancing the same view of *Chevron's* ontology).

32. See, e.g., *Negusie v. Holder*, 555 U.S. 511, 531 (2009) (Stevens, J., concurring) (“Certain aspects of statutory interpretation . . . are properly understood as delegated by Congress to an expert and accountable administrative body.”); *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (noting that deference flows from agency expertise).

33. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2409 (2019) (plurality opinion).

sought benefits from the Department of Veterans Affairs (VA) for post-traumatic stress disorder.<sup>34</sup> Decades after being denied benefits, Kisor moved to reopen his VA-benefits claim.<sup>35</sup> The VA reversed course and granted Kisor benefits, but only from the date of his motion to reopen.<sup>36</sup> The Board of Veterans' Appeals affirmed that decision after interpreting the relevant agency rule.<sup>37</sup> That regulation provided that the VA could only grant Kisor benefits if it found that there were "relevant official service department records" that the VA had failed to consider in its initial denial.<sup>38</sup> The records Kisor had were not "relevant" because "they did not go to the reason for the denial."<sup>39</sup> Eventually, the Court of Appeals for the Federal Circuit deferred to the Board of Veterans' Appeals' construction of the VA rule.<sup>40</sup> Kisor appealed and the Supreme Court granted certiorari to decide whether it would overrule *Auer*.

Prior to *Kisor*, the two principal decisions addressing what deference courts owe to an agency's construction of its own ambiguous rules were *Bowles v. Seminole Rock & Sand Co.*<sup>41</sup> and *Auer v. Robbins*.<sup>42</sup> The version of deference that these cases established became controversial for reasons that are too numerous and eclectic to explain here.<sup>43</sup> Relevant here, the critics of *Auer* deference adopted two statutory arguments against *Auer* deference, both predicated on the text and structure of the APA.

The first argument is premised on § 706 of the APA.<sup>44</sup> That provision instructs that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."<sup>45</sup> Kisor's first argument was that

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34. *See id.*

35. *See id.*

36. *See id.*

37. *See id.*

38. *Id.* (citing 38 C.F.R. § 3.156(c)(1) (2013)).

39. *Id.*

40. *See id.*

41. *See* 325 U.S. 410 (1945).

42. *See* 519 U.S. 452 (1997).

43. *See generally* Walker, *supra* note 4 (providing a literature review of the cases against *Auer* and *Chevron* deference).

44. *See* Administrative Procedure Act of 1946, 5 U.S.C. § 706 (2012).

45. *Id.*



§ 706 requires a *de novo* standard of review, which is inconsistent with *Auer* deference for agencies' construction of their regulations.<sup>46</sup> In that vein, Aditya Bamzai wrote that when “[r]ead against the history of the APA’s adoption, section 706 is best interpreted as an attempt to revive the traditional [non-deferential] methodology and to instruct courts to review legal questions using independent judgment[.]”<sup>47</sup> That view has been adopted a minority of the Supreme Court’s conservative bloc. Justice Gorsuch argued in his *Kisor* concurrence that § 706 prohibits deference to agencies’ interpretations of their own regulations.<sup>48</sup> However, Justice Kagan’s plurality opinion rejected that argument and ultimately won the day.<sup>49</sup>

*Kisor*’s second statutory argument turned on § 553 of the APA.<sup>50</sup> That provision requires agencies’ rules to go through notice-and-comment rulemaking procedures.<sup>51</sup> Notice-and-comment rulemaking is a multi-step process by which agencies solicit public feedback on proposed rules before they become effective.<sup>52</sup> Section 553 provides an exception for “interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice[.]”<sup>53</sup> From this, and for reasons discussed *infra*, courts have distinguished between “legislative” and “interpretive” rules by holding that the former, and not the latter, carry the FOL.<sup>54</sup>

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46. *See generally* Bamzai, *supra* note 6, at 977.

47. *Id.*

48. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2432 (Gorsuch, J., concurring in the judgment) (“The APA thus requires a reviewing court to resolve for itself any dispute over the proper interpretation of an agency regulation. A court that, in deference to an agency, adopts something other than the best reading of a regulation isn’t ‘decid[ing]’ the relevant ‘questio[n] of law’ or ‘determin[ing]’ the meaning’ of the regulation. Instead, it’s allowing the agency to dictate the answer to that question.” (alteration in original)).

49. *See id.* at 2419 (plurality opinion) (“[W]e have long presumed (subject always to rebuttal) that the Congress delegating regulatory authority to an agency intends as well to give that agency considerable latitude . . . . Because of [this presumption] courts do not violate Section 706 by applying *Auer*. To the contrary, they fulfill their duty to ‘determine the meaning’ of a rule precisely by deferring to the agency’s reasonable reading.”).

50. *See* Administrative Procedure Act of 1946, 5 U.S.C. § 553(b) (2012).

51. *See id.*

52. *See Hickman*, *supra* note 21, at 473–74 (describing the notice-and-comment process).

53. Administrative Procedure Act of 1946, 5 U.S.C. § 553(b)(3)(A).

54. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979); *Hickman*,

Kisor argued that *Auer* deference short-circuits the distinction between legislative and interpretive rules by imbuing interpretive rules with the FOL. Unlike the § 706 argument, the § 553 argument would only apply to agencies' rules that did not go through notice-and-comment rulemaking.<sup>55</sup> The § 553 argument first debuted in *Perez v. Mortgage Bankers Association*.<sup>56</sup> There, one party argued that "interpretive rules have the force of law because an agency's interpretation of its own regulations may be entitled to deference under [*Auer*.]"<sup>57</sup> The Supreme Court held in *Perez* that interpretive rules never carry the FOL, even when they receive heightened deference under *Auer*.<sup>58</sup> However, the Court did not explain this holding with any depth. Undeterred, Justice Gorsuch relied on the same short-circuiting argument in his *Kisor* concurrence. He wrote that "*Auer* effectively nullifies the distinction Congress drew" in § 553.<sup>59</sup> He reasoned that under *Auer*, "courts must treat as 'controlling' not only an agency's duly promulgated rules but also its mere interpretations[.]"<sup>60</sup> Gorsuch thought that by "binding" the courts to an interpretation, agencies could breathe the FOL into an interpretive regulation.<sup>61</sup> Gorsuch's view on the § 553 argument was, nonetheless, briskly shot down by the plurality opinion.<sup>62</sup>

The plurality opinion written by Justice Kagan concluded that *Auer* was irrelevant to § 553 because *Auer* deference has nothing at all to do with whether an interpretive rule carries the FOL.<sup>63</sup> The reasoning, however, has a false definitional appearance. According to Kagan, interpretive rules do not carry

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*supra* note 21, at 467 ("Whether a particular rule is legislative in character, and thus must satisfy the notice-and-comment rulemaking procedures imposed by the APA, depends upon whether the rule carries the force of law.").

55. See *Chrysler Corp.*, 441 U.S. at 302 (explaining that it is not an issue for a rule that went through notice and comment to receive deference under this theory because those rules are "legislative" and are meant to carry the FOL).

56. 575 U.S. 92 (2015).

57. *Id.* at 1208 n.4.

58. See *id.*

59. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2434 (2019) (Gorsuch, J., concurring).

60. *Id.*

61. See *id.*

62. See *id.* at 2420.

63. See *id.*

the FOL because they cannot be used in an enforcement action.<sup>64</sup> Because the FOL is the power to “bind” parties in enforcement actions, interpretive rules lack it.<sup>65</sup> The plurality opinion’s simplified and definitional form of argumentation drew criticism from some observers.<sup>66</sup> But appearances can be deceiving. In *Kisor*, Justice Kagan avoided a fleshed-out explanation of her position. And in the vacuum *Kisor* has created the importance of researching the FOL should be manifest.<sup>67</sup> This Article is meant to fill that gap.

### III. THE FOL CONCEPT BEFORE THE APA

Several notes on methodology are required upfront. The rest of the Article devotes considerable time towards discussing the historical development of the FOL as a phrase referring to a “family” of related concepts.<sup>68</sup> As will be discussed *infra*, the FOL is referenced in the contexts of justiciability, the categorization of agency actions, and in the context of the agency deference regimes. Because the FOL has spread beyond its initial use, it has come to signify or invoke slightly different ideas in each domain. Justice Gorsuch’s argument that § 553 prohibits *Auer* deference turns on (1) whether § 553 prohibits interpretive rules from carrying the FOL; and (2) whether that prohibition is incompatible with *Auer* deference.

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64. *See id.* (“An interpretive rule itself never forms ‘the basis for an enforcement action’—because, as just noted, such a rule does not impose any ‘legally binding requirements’ on private parties.”).

65. *See id.* (“An enforcement action must instead rely on a legislative rule, which (to be valid) must go through notice and comment.”).

66. *See, e.g.,* Bamzai, *supra* note 10, at 196 (“And therein lies the conflict with the APA: the plurality’s approach would create a class of agency legal interpretations that supposedly ‘do not have the force of law’ but nevertheless are binding on courts through *Auer*.”).

67. *See* Hickman, *supra* note 21, at 467 (“Perhaps the single most challenging administrative law question . . . is an old perennial: what does it mean for agency action to carry the ‘force of law’?”). The FOL has been invoked directly in three recent Supreme Court cases and indirectly in at least two others. *See* *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 103-05 (2015); *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff’d by equally divided Court*, 136 S. Ct. 2271 (2016); *CIC Servs., LLC v. IRS*, 925 F.3d 247 (6th Cir. 2019), *rev’d*, 141 S. Ct. 1582 (2021); *Little Sisters of the Poor Saints Peter Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020).

68. *Cf.* *Solum*, *supra* note 8, at 1264–66 (using the “family resemblance” concept to describe how different theories of “originalism” are related in loose and confusing ways).

At times, I reference different FOL concepts that each have their own statutory hooks in the APA. For example, the portion of *Kisor* that I focus on concerns § 553 of the APA. An equally important FOL concept deals with justiciability and is rooted in § 704 of the APA.<sup>69</sup> That provision simply says that “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.”<sup>70</sup> Under the prevailing test, whether an agency action is “final” for review turns on whether “legal consequences will flow” from the decision.<sup>71</sup> That standard is essentially conflated by courts with whether an agency action carries the FOL.<sup>72</sup> A third FOL concept flows from § 706(2)(A) and is associated with *Mead* and *Chevron* deference.<sup>73</sup> Because the text of each of these provisions is open-ended, the pre-APA case law and post-APA understandings of those provisions feature prominently in this Article.

Everyone agrees that the guidance exemption implies a FOL distinction between legislative and interpretive rules, and we can stipulate that § 553 prohibits interpretive rules from obtaining the same status as legislative rules. From there, we get to the heart of the question. For an APA originalist, you might phrase the question as follows: would a hypothetical member of the public, at the time of the APA’s passage and with a middling knowledge of the APA’s legal and political background, understand § 553’s FOL distinction to prohibit courts from deferring under *Auer*?<sup>74</sup> Because the FOL is a phrase referring to many concepts, it matters what precisely § 553 prohibits. That is, we need to know *which* FOL is behind § 553’s distinction between legislative and interpretive rules.

This methodology flows from the recent explosion in the

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69. See Administrative Procedure Act of 1946, 5 U.S.C. § 704.

70. *Id.*

71. *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (citing *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

72. See Levin, *supra* note 15, at 265 n.2.

73. See 5 U.S.C. § 706(2)(A); Hickman & Hahn, *supra* note 30, at 617–18 (arguing that *Chevron* deference is a standard of review that emanates from § 706 of the APA).

74. See Bernick, *supra* note 11, at 843 (“[P]ublic meaning could be operationalized by the construction of a hypothetical ordinary member of the 1946 public who knows something of the subject matter addressed by the APA, as well as some of the legal and political background[.]”).

literature exploring the proper means for interpreting the APA.<sup>75</sup> Due to the sparse language in § 553, courts must judge how best to interpret the policy judgments that inform the APA.<sup>76</sup> Interpreters must balance a tightrope between interpretation and construction.<sup>77</sup> If interpreters apply the text in a “hyperliteralist” fashion, agencies may be able to issue regulations with the FOL without obtaining public consideration and deliberation.<sup>78</sup> If the interpreters imbue the APA with new policy considerations, they risk engaging in lawmaking.<sup>79</sup> This change, in turn, could upset the balance between agencies, Congress, the courts, and the public.<sup>80</sup>

In subsections A-C we begin with background understandings. This includes evidence about the pre-APA antecedents of the FOL. The point to those sections is to establish the FOL as a body of concepts before the drafting of the APA. Subsection D takes this research and sketches out an interpretation of § 553 of the APA. This subsection validates the widely shared reading of that provision. Subsection D also demonstrates how the FOL is applied in various doctrines after the enactment of the APA.

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75. See, e.g., Kathryn E. Kovacs, *Progressive Textualism in Administrative Law*, 118 MICH. L. REV. 134, 137 (2019) (arguing that progressives should use textualism in the context of administrative law).

76. See Bernick, *supra* note 11, at 808 (“[T]he APA does not expressly state the normative principles that animate it[.]”).

77. See generally Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010) (explaining the distinction between construction and interpretation).

78. For an example of why interpreters should avoid hyperliteralism, see Kristin E. Hickman, *Did Little Sisters of the Poor Just Gut the APA Rulemaking Procedures?*, YALE J. ON REGUL.: NOTICE & COMMENT (July 9, 2020), <https://www.yalejreg.com/nc/did-little-sisters-of-the-poor-just-gut-apa-rulemaking-procedures/>. An analysis of Justice Thomas’ opinion in *Little Sisters of the Poor* is beyond the scope of this Article. Nonetheless, Professor Hickman’s criticisms are persuasive.

79. See Bernick, *supra* note 11, at 809 (“Much of our administrative law . . . is governed by judicially-created ‘common law’ doctrines that seem untethered to any text or history.”).

80. See Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1330 (2014) (arguing that when Congress have balanced “a host of incommensurate values” in a statute, “[t]he courts have no constitutional authority to revise that judgment and no epistemic basis for thinking they can make a better one.”); Kovacs, *supra* note 75, at 137 (“The APA is not a typical statute. It arose from a long period of public deliberation and has become deeply entrenched in U.S. law.”).

## A. The Expansion of the Administrative State

Before delving into the FOL, it is important to describe the circumstances that made it an essential concept. Scholarship over the last two decades has demonstrated that the administrative state did not “rise” in the early twentieth century, it merely expanded and changed.<sup>81</sup> From the beginning of the Republic, Congress delegated “lawmaking” or “policymaking” authority to nascent federal agencies.<sup>82</sup> However, judicial review of agency actions looked remarkably different in the absence of federal question jurisdiction.<sup>83</sup> With the advent of broad jurisdiction and evolving forms of regulation, the late-nineteenth century was poised to be consequential.<sup>84</sup>

Starting in the nineteenth century, Congress created new federal agencies that touched daily American life.<sup>85</sup> In 1887, the U.S. government created the Interstate Commerce Commission (ICC), which regulated the rates and practices of railroads.<sup>86</sup> The law that created the ICC, the Interstate Commerce Act, was

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81. See generally JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (Yale University Press, 2012) (demonstrating that administrative governance has been a mainstay since the founding of the country).

82. See Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 332–49 (2021) (demonstrating that the First Congress delegated legislative power to agencies across several contexts).

83. See Bamzai, *supra* note 6, at 948 (“In the absence of general federal-question jurisdiction—and where a claim did not ‘arise under’ one of the specific grants of federal-question jurisdiction that Congress enacted during this period—parties normally had two options: (1) common-law actions in which the interpretation of a statute was an ancillary step in the analysis; and (2) extraordinary writs, such as the writ of mandamus, against the executive branch official charged with enforcing the action.” (citations omitted)).

84. See Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197, 239 (1991) (“The common-law tradition of de novo actions against officers received new support in the Reconstruction era with the passage of the general federal question statute in 1875, and with the passage of the 1871 Civil Rights Act.” (citations omitted)).

85. See JOANNA L. GRISINGER, *THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL 1* (Cambridge University Press, 2012) (“By the end of the 1930s, the bureaucrats were in charge. In expanding the federal government’s field of play in the preceding decades, Congress and the White House had created dozens of agencies, departments, bureaus, and commissions to handle this new and staggering workload.” (footnote omitted)).

86. See Paul Stephen Dempsey, *The Rise and Fall of the Interstate Commerce Commission: The Tortuous Path from Regulation to Deregulation of America’s Infrastructure*, 95 MARQ. L. REV. 1151, 1151–52 (2012).

one of the first statutes to comprehensively regulate any single industry in the United States.<sup>87</sup> Three years after its passage, Congress enacted the Sherman Antitrust Act.<sup>88</sup> Together, “these two pieces of legislation formed ‘the cornerstone of regulation in America,’ and from those two acts of Congress came ‘a proliferation of government regulatory controls.’”<sup>89</sup> From this, new federal agencies were formed such as the Surface Transportation Board, the Federal Maritime Commission, the Federal Energy Regulatory Commission, and the Department of Transportation which regulated “rail, motor, air, and water carriage, as well as pipelines and freight forwarders.”<sup>90</sup> By the end of the New Deal, citizens were accustomed to receiving benefits from federal agencies, while regulated entities wrestled with the scope of agency authority.<sup>91</sup>

The point of this history, for our purposes, is that the twin realities of an expanding administrative state and the appellate review model<sup>92</sup> of agency actions challenged prevailing frameworks for understanding the separation of powers and judicial review.<sup>93</sup> In this state of upheaval, the FOL became a consequential phrase.

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87. See *id.* at 1162 (citing David M. Warner, *To Hell on the Railroads: Why Our Technology and Law Encourage a Degrading Culture*, 26 *TRANSP. L.J.* 361, 382 (1999)).

88. See Charles S. Dameron, *Present at Antitrust’s Creation: Consumer Welfare in the Sherman Act’s State Statutory Forerunners*, 125 *YALE L.J.* 1072, 1089 (2016).

89. Dempsey, *supra* note 86, at 1162.

90. *Id.* at 1152.

91. See GRISINGER, *supra* note 85, at 2 (describing how individuals came to receive benefits from various agencies which became so numerous that “administrative officials . . . had taken on the lion’s share of federal governance” in the Roosevelt Administration).

92. See Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 *COLUM. L. REV.* 939, 942 (2011) (“Insofar as federal courts are concerned, the appellate review model first emerged in full blown form in the context of judicial review of orders of the Interstate Commerce Commission (ICC) around 1910.” (footnote omitted)).

93. See DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940* 108–118 (2016) (recognizing this controversy around agencies and analyzing the intellectual developments that helped ease the transition to administrative governance).

## B. The Rhetoric of Nondelegation and the Categorization of Agency Actions

As agencies grew and developed new regulatory models, they implicated the separation of powers.<sup>94</sup> Courts began asserting the rhetoric of a formalistic nondelegation doctrine in response to expanding delegation of legislative authority. In the decades before the enactment of the APA, Congress enacted “skeleton legislation” that would later be “amplified by executive regulations.”<sup>95</sup> Professor Hickman has recently suggested that lawmaking in this period constituted an eclectic mix of “general,” “specific,” and “hybrid” delegations.<sup>96</sup> These modes of delegation grew “more numerous and more varied” at the same time that the Supreme Court adopted more formalistic rhetoric around nondelegation.<sup>97</sup> The FOL helped ease the gap between congressional delegations and the Supreme Court’s rhetoric and, in the process, helped establish an important drafting convention.<sup>98</sup>

The nondelegation doctrine proceeds from Article I, § 1 of the Constitution, which vests in Congress the legislative powers

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94. Two early cases are sometimes cited as the first involving a nondelegation principle. See Kristin E. Hickman, *Foreword: Nondelegation As Constitutional Symbolism*, 89 GEO. WASH. L. REV. 1079, 1087 (2021) (referencing *The Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 387 (1813); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825)).

95. *Id.* at 1098 (quoting FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 77-8, at 98–99 (1941)).

96. *Id.*

97. *Id.*

98. See Merrill & Watts, *supra* note 8, at 472 (arguing that “Congress followed a drafting convention that signaled to agencies whether particular rulemaking grants conferred authority to make rules with the force of law as opposed to mere housekeeping rules.”). At the time that Merrill and Watts produced their argument about this drafting convention, they suggested that most “modern administrative lawyers are not aware of its existence” and suggested that the failure of appellate judicial opinions to mention the convention caused it to die out. *Id.* at 472. Recently, I have discovered a “missing link” has been found in the form of the “Turney Memo.” See generally Beau J. Baumann, *The Turney Memo*, 97 NOTRE DAME L. REV. REFLECTION 155 (2022) (advising the Senate that the Air Commerce Act of 1926 is constitutional by analyzing the distinction between interpretive and legislative rules). This document shows that the Senate was advised to follow a FOL drafting convention after a careful analysis of the Supreme Court’s case law. It suggests that Congress was aware that the FOL was an important dividing line for the Supreme Court and that it developed a drafting convention around that fact.



“herein granted.”<sup>99</sup> Nondelegation holds that the separation of powers prohibits Congress from delegating its legislative powers to the executive branch.<sup>100</sup> Towards the end of the nineteenth century, the Supreme Court consistently embraced nondelegation, even as it demurred in the face of numerous nondelegation challenges.<sup>101</sup> In *Marshal Field & Co. v. Clark*, for example, the Supreme Court wrote “[t]hat [C]ongress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the [C]onstitution.”<sup>102</sup>

For Congress, it was important to figure out how far they could go in delegating authority to agencies. The first major development was the categorization of different agency actions. Fred T. Field, a former member of the Advisory Tax Board of the Treasury Department, set out in 1920 to develop a theoretical account for distinguishing between “interpretive regulations,” “standards,” and “administrative regulations.”<sup>103</sup> Standards, as opposed to the other two categories, had the power to “bind” regulated parties.<sup>104</sup> Later works kept the reference to “interpretive regulations[,]” but moved towards calling standards “legislative regulations.”<sup>105</sup> In the context of rules, the two main types of rules are “substantive” and “procedural.”<sup>106</sup> “Substantive rules regulate the primary behavior of parties outside the walls of the issuing agency[.]”<sup>107</sup> If a substantive rule carries the FOL, it is a “legislative” rule.<sup>108</sup> If it does not, then

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99. U.S. CONST. art. I, § 1.

100. See Mortenson & Bagley, *supra* note 82, at 282–89 (explaining the rise and fall of the nondelegation doctrine).

101. See Hickman, *supra* note 94, at 7–8 (“Either way, although the Court has routinely upheld statutes against nondelegation claims, it has consistently and repeatedly—for roughly two centuries and in recent decades—embraced the basic premise that Congress cannot delegate the legislative powers vested in it by Article I of the Constitution to other parties.” (citations omitted)).

102. 143 U.S. 649, 692 (1892).

103. Fred T. Field, *The Legal Force and Effect of Treasury Interpretations*, in THE FEDERAL INCOME TAX 91, 99–111 (Robert Murray Haig ed., 1921).

104. See *id.* at 100.

105. See, e.g., Frederic P. Lee, *Legislative and Interpretive Regulations*, 29 GEO. L.J. 1, 2 (1940); James Hart, *The Exercise of Rule Making Power*, in REPORT BY PRESIDENT’S COMMITTEE ON ADMINISTRATIVE MANAGEMENT 309, 317–21 (1937).

106. See Merrill & Watts, *supra* note 8, at 477.

107. *Id.*

108. See *id.*

the rule is “interpretive.”<sup>109</sup>

These categorizations were used as the conceptual framework around delegation and, as a result, statutory construction. Contrary to the scholarship up to this point, which has suggested that the earliest version of the FOL was mysterious and was not memorialized in any surviving texts,<sup>110</sup> recently reproduced sources show that the FOL was critical to the development of the early administrative state. The Office of Legal Counsel for the United States Senate began advising senators on the distinction between legislative and interpretive rules in a 1929 memo.<sup>111</sup> The memo’s author suggested that the nondelegation doctrine was a paper tiger with a single exception rooted in the FOL.<sup>112</sup>

The memo argued that Congress had established, and the Supreme Court had vindicated, delegations of legislative authority in sweeping terms.<sup>113</sup> The only significant limitation, which was itself rooted in the moribund nondelegation doctrine, was that agencies could not always provide for penalties in carrying out a statutory regime.<sup>114</sup> Only regulations that carried the FOL could provide for penalties.<sup>115</sup> The FOL, in that sense, was shorthand for a question of statutory construction: did Congress delegate to agencies the power to promulgate and define civil or criminal penalties?<sup>116</sup> Because the Supreme Court had abdicated its enforcement of the strict nondelegation doctrine, this FOL concept was something like a last stand for the formalist separation of powers during the interwar years. That is, until the nondelegation doctrine’s brief resurgence in

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109. *See id.* (“Interpretive rules’ are nonbinding substantive rules that advise the public about how an agency interprets a particular statute or legislative rule that it administers.” (footnote omitted)).

110. *See id.* at 495 (suggesting that the FOL drafting convention “was never explicitly memorialized in an authoritative text, such as a statute, a legislative drafting guide, or a prominent judicial decision”).

111. *See generally* Baumann, *supra* note 98 (advising the Senate that the Air Commerce Act of 1926 is constitutional by analyzing the distinction between interpretive and legislative rules).

112. *See id.* (suggesting that the broad nondelegation principle laid down by the Supreme Court had been compromised in a series of cases).

113. *See id.*

114. *See id.*

115. *See id.*

116. *See id.*

1935.<sup>117</sup> Regardless, one important bottom-line from this FOL approach was that “interpretive regulations”—that is, “expressions of departmental opinion [had] no binding force on anyone.”<sup>118</sup>

On the ground, delegation and the FOL merged into a simple question of statutory interpretation. “[T]he requisite textual signal was provided by the inclusion of a separate provision in the statute attaching ‘sanctions’ to the violation of rules and regulations promulgated under a particular rulemaking grant.”<sup>119</sup> Practically, an interpreter could tell whether a rule carried the FOL by checking whether the underlying statute “prescribed a sanction” and the “the authority to make ‘rules and regulations[.]’”<sup>120</sup> In the absence of these cues, the rule was interpretive and did not carry the FOL.<sup>121</sup>

From this drafting convention, we get a sense of the FOL in its purest and earliest form. An agency action carries the FOL when it *binds* parties. That is, when parties could face civil or criminal penalties for failing to obey. This concept has several distinct features. First, it tracks the idea of what “law” meant in the early twentieth century: “general commands backed by the threat of sanctions.”<sup>122</sup> This view of what it means to “bind” focuses on regulated parties and hinges on the imposition of

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117. See generally *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating regulations of the poultry industry on nondelegation grounds); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (same with regulations of the petroleum industry). But see Keith Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 380 (2017) (arguing that the nondelegation doctrine was not a major limitation on Congress’s delegation outside of the 1935 resurgence).

118. Baumann, *supra* note 98, at 30.

119. Merrill & Watts, *supra* note 8, at 493.

120. *Id.* at 493. Merrill and Watts cite a litany of statutes from the pre-APA era that follow this convention, including Federal Water Power Act, ch. 285, §§ 25, 41 Stat. 1063, 1076 (1920) (repealed 1935) (attaching criminal penalties to violations of the Federal Power Commission’s rules and regulations).

121. See *id.* at 494 n.125 (“[D]eclaring that the FTC has the power ‘to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act’ but providing for no sanctions for the violation of those rules and regulations”) (quoting Federal Trade Commission Act, ch. 311, § 6(g), 38 Stat. 717, 722 (1914) (codified as amended at 15 U.S.C. § 46(g) (2000))).

122. *Id.* at 494 n. 126 (quoting JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 13–15 (Prometheus ed. 2000) (1832)).

sanctions by the state. It reflects administrative law's preoccupation, then and now, with the imposition of legal sanctions and obligations.<sup>123</sup>

Second, this view of the FOL is essentially a question of congressional intent.<sup>124</sup> The question, squarely put, is whether Congress gave agencies the power to promulgate sanctions. This version of the FOL established a very particular meaning behind what it means to “bind” and whose perspective matters. It functions as a springboard for further and more elaborate meanings discussed *infra*.

### C. The Spread of the FOL

While the FOL helped crystallize a drafting convention and negotiated the distance between the Supreme Court's rhetoric and reality, the need for reformulating the standards for judicial review of agency actions only grew in importance.<sup>125</sup> The FOL, once entrenched, continued to spread to other areas of the administrative law canon. It first spread to the realm of justiciability doctrines.<sup>126</sup> In the beginning, judicial review of agency actions was restrictive and was primarily focused on the enforcement action. This convention meant that judicial review was reserved for agency decisions to enforce a statute or rule against a regulated party *after* a decision was already made. In the words of the 1941 Report of the Attorney General's Committee on Administrative Procedure, judicial review of agency actions was collateral; cases were brought “in actions brought to enforce [agency orders], in injunction suits to prevent their enforcement, in declaratory judgment proceedings, in habeas corpus actions to obtain release from arrests for violation, or in private actions in which the results turned upon

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123. See Cary Coglianese et al., *Unrules*, 73 STAN. L. REV. 885, 938–41 (2021) (documenting this preoccupation's consistency over the last century).

124. See Merrill & Watts, *supra* note 8, at 494.

125. See generally Beau J. Baumann & Greg Mina, *Clowning Around with Final Agency Action*, 28 CORNELL J. L. & PUB. POL'Y 329 (2018) (arguing that prior to the passage of the APA, courts developed doctrines of judicial review that approximated common law theories of adversity and timing).

126. See ARTHUR LENHOFF, COMMENTS, CASES, AND OTHER MATERIALS ON LEGISLATION 723, 759 (1949) (“Since binding regulations must be granted the status of statutes, their reviewability by the courts follows the same principles which control the judicial reviewability of acts of the Legislatures themselves.”).

the effect of regulations.”<sup>127</sup> That form of review mimicked the type of injuries that would have sufficed under the common law model.<sup>128</sup> But changing regulatory models placed pressure on courts to expand their notions of judicial review.

Courts were increasingly preoccupied with whether they had jurisdiction in the absence of an enforcement action. The Supreme Court had, for example, determined early on that federal courts lacked jurisdiction over an agency’s decision to do nothing at all.<sup>129</sup> That ruling reflected the Courts’ desire to maintain a level of adversity that would have been taken for granted in the nineteenth century.<sup>130</sup> In *Proctor & Gamble Co. v. ICC*, the Supreme Court reviewed the ICC’s refusal to act on a shipper’s petition.<sup>131</sup> The petition asserted that the ICC’s regulations were “unjust and oppressive.”<sup>132</sup> When the petition was denied, the ICC sought an injunction in federal court.<sup>133</sup> Importantly, *Proctor & Gamble* was not asserting its arguments from a defensive posture in an enforcement proceeding. Accordingly, the Court held that it lacked jurisdiction over the case because the rules were negative in nature—i.e., it was not enforceable and merely determined a regulated party’s status under the relevant statute.<sup>134</sup> The Court’s “negative order” doctrine expanded and precluded review of certain agency actions.<sup>135</sup>

Ultimately, though, New Dealers on the Court expanded notions of justiciability using the FOL. The new status quo was embodied in the *Rochester* opinion, the holding of which can be summarized as follows:

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127. FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. Doc. No. 77-8 at 1, 115 (1941) [hereinafter *1941 AG Report*].

128. *See id.* (the 1941 Report of the Attorney General’s Committee on Administrative Procedure preferred judicial challenges after an agency action occurred because “[t]he decision w[ould] be the kind courts are accustomed to render[ing].”).

129. *See, e.g., Proctor & Gamble Co. v. United States*, 225 U.S. 282, 297–302 (1912).

130. *See, e.g., Baumann & Mina, supra* note 125, at 334.

131. 225 U.S. 282, at 290–91.

132. *Id.* at 287.

133. *See id.* at 287–89.

134. *See* Charlotte Anschuetz, *The Negative Order Doctrine: Rochester Telephone Corporation v. United States*, 24 WASH. U. L.Q. 591, 592 (1939).

135. *See id.* at 591–92.

Agency actions that can only have the effect of forbidding or compelling actions on the part of a regulated party if some further administrative action is taken *do not carry the FOL and are unreviewable prior to enforcement*;

Agency actions that decline to “relieve the [regulated party] from a statutory command forbidding or compelling conduct on his part” *carry the FOL and will be reviewable under certain circumstances*;

Agency actions that are attacked in court because they do not “forbid or compel conduct by a third person” *will carry the FOL and will be reviewable*.<sup>136</sup>

Note the work that these categories perform; courts ought to evaluate different modes of regulatory behavior on a FOL basis using analogies to enforcement actions.<sup>137</sup> After *Rochester*, an agency’s decision to not intervene and relieve a regulated party of some burden was reviewable. The theoretical justification for this review was an expansion of the FOL to include agency decisions *not* to act.

The focus on pre-enforcement judicial review was central to one other pre-APA decision: *Columbia Broadcasting System v. United States*.<sup>138</sup> That case asked whether federal courts had jurisdiction over CBS’s challenge to a new FCC regulation that would have “affect[ed] adversely [CBS]’s contractual relations with broadcasting stations and impair[ed] its ability to carry on its business in maintaining and operating its nationwide broadcasting network.”<sup>139</sup> The Court’s decision turned on whether the new FCC regulation was a substantive rule.<sup>140</sup> The Court reviewed the regulation’s effect and determined that “in its genesis and on its face, and in its practical operation” the regulation was a rule that affected the rights of the regulated entities.<sup>141</sup> This effect meant, by definition, that the regulation “was adopted by the Commission in the avowed exercise of its rule-making power” and, therefore, carried “the force of law.”<sup>142</sup>

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136. *See Rochester Tel. Corp. v. United States*, 307 U.S. 125, 129–130 (1939).

137. *See id.*

138. *See* 316 U.S. 407 (1942).

139. *Id.* at 408.

140. *See id.* at 416–17.

141. *Id.* at 417.

142. *Id.*

So, in the other consequential pre-enforcement review decision of the pre-APA era, the Court's inquiry boiled down to whether the regulation carried the FOL.<sup>143</sup> And the FOL was the power to "bind" regulated entities and affect their rights.<sup>144</sup> Leading to the passage of the APA, the justiciability case law had its own unique flavor emphasizing flexibility and a pragmatic view of agency actions' effects.<sup>145</sup> As I will discuss *infra*, this era is still having a lasting impact.

The case law prior to the enactment of the APA in 1946 was shaped by the FOL in the contexts of distinguishing categories of rules, negotiating the permissibility of delegations of legislative power, and in determining whether pre-enforcement review was available to regulated parties. The division between different rules focused on coercion, the power to *bind* regulated parties with sanctions. That FOL is concerned with congressional intent and focuses squarely on the perspective of regulated parties. In the justiciability context, the notion of the FOL and what it means to "bind" a regulated party is more flexible and capacious. The *Rochester* framework engages in a pragmatic review of whether an agency action is "binding" from the perspective of regulated parties. If an agency action clearly entails penalties, then the action carries the FOL and is subject to pre-enforcement review, at least for some plaintiffs. But *Rochester* suggests that a failure to act or to levy penalties on a regulated party will sometimes be reviewable if there is a practical effect on regulated parties. Accordingly, the pre-APA era gave us two competing understandings of the FOL and what it means to "bind." Both strains are complicated by competing formalistic and pragmatic traditions.<sup>146</sup>

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143. *See id.*

144. *See id.*

145. *See id.* ("Such regulations which affect or determine rights generally, even though not directed to any particular person or corporation, when lawfully promulgated by the Interstate Commerce Commission, have the force of law[.]").

146. *See, e.g.,* William Funk, *Make My Day! Dirty Harry and Final Agency Action*, 46 ENV'T. L. 313, 330 (2016) (discussing the alternative trends of formalism and pragmatism in the final agency action context); *see also* Baumann & Mina, *supra* note 125, at 331–32.

## D. Interpreting § 553

The drafting process that culminated in the enactment of the APA stretched on for a decade.<sup>147</sup> It was initiated by conservative proponents who feared the intervention of New Dealers in private markets.<sup>148</sup> These political machinations ran concurrently with intellectual developments seeking to make sense of the perceived rise of administrative governance.<sup>149</sup> These roiling circumstances were enlivened by world events, specifically the rise of fascism and dictatorship, which influenced thinking on administrative governance.<sup>150</sup> When the APA did emerge, it represented a litany of “hard-fought compromise[s] that left legislators and interest groups far from completely satisfied.”<sup>151</sup> Both before and after its passage, parties sought to shape a system of administration that controlled the power of government to constrain obligations.<sup>152</sup> The debates around the APA focused, to a considerable extent, on the power of agencies to “bind.” They focused, in no small part, on the FOL.

This Part discusses the text and structure of the APA and examines how § 553 has been interpreted. However, it should be noted at the outset that the importance of § 553 is not apparent on the APA’s face. At the time the APA was enacted, agencies “did not adopt many legally binding regulations.”<sup>153</sup> When they did, they usually used the APA’s formal rulemaking procedure.<sup>154</sup> The Supreme Court obviated formal rulemaking in its *United States v. Florida East Coast Railway Company*

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147. See Coglianese et al., *supra* note 123, at 939.

148. See *id.*

149. See ERNST, *supra* note 93, at 108–18 (recognizing this controversy around agencies and analyzing the intellectual developments that helped ease the transition to administrative governance).

150. See George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1559 (1996). For a barn-burning draft article on the importance of the rise of fascism on the intellectual framework for administrative governance, see generally Noah A. Rosenblum, *The Antifascist Root of Presidential Administration*, COLUM. L. REV. (forthcoming 2022) (arguing that New Dealers accepted constitutionalism and the separation of powers to guard against fascism).

151. Shepherd, *supra* note 150, at 1560.

152. See Coglianese et al., *supra* note 123, at 939.

153. Hickman, *supra* note 78.

154. See *id.*



opinion.<sup>155</sup> As a result, agencies now promulgate rules through the informal method laid out in § 553.<sup>156</sup> So, the centrality of § 553 to this Article is fallout from what scholars call “The Lost World of Administrative Law.”<sup>157</sup> That phrase has become synonymous with the reality that reigning administrative procedures are at odds with the procedures found in, and prescribed by, the APA.<sup>158</sup> Regardless, this transformation was a boon for the FOL.

Once the courts were confronted with large scale informal rulemaking, the text and structure of § 533 became more significant. It provides as follows:

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law.

...

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

To interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice[.]<sup>159</sup>

The core meaning of the provision can be, and has been, obtained through the normal tools of interpretation, without resorting to outright construction.<sup>160</sup> Subsection A provides an exemption from notice-and-comment rulemaking for “interpretive rules” and “general statements of policy” (collectively guidance). From there, most interpreters use negative inferences and the structure of the APA to construe

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155. See 410 U.S. 224 (1973).

156. See *id.*; see also Administrative Procedure Act of 1946, 5 U.S.C. § 553.

157. See generally Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137 (2014) (explaining the increasing disparity between the APA and the realities of modern regulation).

158. See *id.* at 1136–42 (giving the demise of formal rulemaking as an example).

159. Administrative Procedure Act of 1946, 5 U.S.C. § 553(b)(A) (2012).

160. See generally Solum, *supra* note 77 (explaining the difference between interpretation and construction).

§ 553. Interpreters infer that “substantive” or “legislative” rules are the targets of notice-and-comment rulemaking from the fact that guidance documents are exempted.<sup>161</sup> Because a member of the public with a middling understanding of pre-APA administrative law would likely understand the categories of “substantive” and “interpretive” rules that preexisted the APA, this negative inference is permissible.<sup>162</sup> That is also an inference supported by exogenous evidence, such as the fact that an initial draft of the APA stated that “substantive rules” were subject to notice-and-comment.<sup>163</sup> From this, the categorization of rules looks unchanged from the pre-APA period.<sup>164</sup>

The APA does not define what constitutes a “substantive rule.”<sup>165</sup> There was, of course, a specialized meaning behind that phrase in the pre-APA period.<sup>166</sup> From that specialized meaning, we can infer that “substantive” or “legislative” rules are defined by virtue of carrying the FOL. This importation of the pre-APA meaning is complicated by ongoing debates over whether the APA was meant to codify the existing administrative law.<sup>167</sup> Nonetheless, in the absence of some textual or structural cue to the contrary, the best reading of individual and long-tenured terms in the APA is best set against the pre-APA case law. This approach is confirmed by external sources. Because courts have given great weight to the Attorney General’s Manual on the Administrative Procedure Act,<sup>168</sup> that source’s understandings have been used to fill in the categorical definitions for different rules.<sup>169</sup> And the manual defined substantive rules by reference

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161. See, e.g., Levin, *supra* note 15, at 288 n.124.

162. See Bernick, *supra* note 11, at 843 (outlining this approach to interpreting the APA); see also *supra* Section II.A.–B. (demonstrating that the FOL was used to develop the categories of “substantive” and “interpretive” rules before the enactment of the APA).

163. See *supra* Section II.A.–B.

164. But see Robert A. Anthony, “Interpretive” Rules, “Legislative” Rules and “Spurious” Rules: Lifting the Smog, 8 ADMIN. L.J. AM. U. 1, 8–10 (1994) (offering a slightly different interpretation of § 553 whereby guidance that has practically binding effect should be known as a “spurious rule”).

165. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 301–02 (1979).

166. See Solum, *supra* note 77, at 114 (arguing that specialized meanings available to audiences of legal practitioners can be used to determine linguistic meaning).

167. See generally Bernick, *supra* note 11, at 812 n.26 (collecting sources that encapsulate this long-running dispute).

168. See *id.* at 812.

169. See *id.*

to the FOL. It referred to substantive rules as those that “implement” the statute “[s]uch [that the] rules have the force and effect of law.”<sup>170</sup> The manual also suggested that guidance is primarily focused on advising the public as to an agency’s construction of statutes and rules.<sup>171</sup>

The foregoing demonstrates how the FOL survived the hectic period culminating in the passage of the APA. Because notice-and-comment rulemaking hinges on the categorization of rules along the same lines used in the pre-APA period, we might make several inferences about the FOL. First, interpreters of all stripes have determined that the APA structure is meant to make agencies pay the toll of notice-and-comment rulemaking before their rules can carry the FOL.<sup>172</sup> That adds a processual component to the FOL. If an interpreter is trying to determine whether an agency rule “binds” her, she may start with the process that led to the rule’s promulgation. This may cut against the second permissible inference: that the FOL implicated by § 553 is formalistic in the style of the drafting convention discussed above. The processual focus of § 553 contradicts the focus of the FOL drafting convention: congressional intent with respect to penalties. But most interpreters of the APA believe that the earliest form of the FOL—the power to *bind* parties with penalties—is the “raison d’être” of the post-APA administrative state.<sup>173</sup> That understanding “permeates much of the APA.”<sup>174</sup> These issues—how we should construe the FOL distinction between legislative rules and guidance documents—

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170. U.S. DEPT. OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n. 3 (1947).

171. *See id.*

172. *See* Hickman, *supra* note 21, at 473–75.

173. *See* Coglianese et al., *supra* note 123, at 938 (citing STEPHEN BREYER, REGULATION AND ITS REFORM 378 (1982) (describing administrative law’s “original objective” as one of “control[ing] government incursions upon private liberty and property interests”)); Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1202–03 (1982) (“Under the traditional model of administrative law, . . . the system limits the power of government, maintains a well-ordered sphere of private liberty, and preserves the system of market exchange.”); Richard B. Stewart, *Essay, Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 438–39 (2003) (“The traditional core of administrative law has focused on securing the rule of law and protecting liberty . . . Here the function of administrative law is primarily negative: to prevent unlawful or arbitrary administrative exercise of coercive power against private persons.”).

174. Coglianese et al., *supra* note 123, at 938 (footnote omitted).

are hard to address in a vacuum, so the remainder of the Article will explore the difficulties that flow from § 553.

Before proceeding, one point bears mentioning. There is very little from the text or structure of the APA connecting § 553 to the modern deference regimes. There was, however, one remark in § 553's legislative history that could be interpreted as invoking the concept of deference. As noted above, § 553(b)(A) permits agencies to issue "interpretive rules, general statements of policy, [and] rules of agency organization, procedure, or practice" without going through notice-and-comment rulemaking.<sup>175</sup> The 1945 committee print mentioned the following in discussing the § 553 exemptions: "[a]nother reason, which might be added [for including the exemption], is that 'interpretive' rules—as merely interpretations of statutory provisions—are subject to plenary judicial review, whereas 'substantive' rules involve a maximum of administrative discretion."<sup>176</sup> In another context, opponents of the heightened deference regime have cited this remark as evidence that the APA prohibits deference.<sup>177</sup> This portion of the legislative history is something of a mystery.<sup>178</sup> Even if we think the "deference" referenced by the Committee is equitable with either *Chevron* or *Auer* deference, the committee's assertions about plenary review were—in the recent words of Ronald Levin—"poorly reasoned as a rationale for the exemption."<sup>179</sup> The Committee's presumption that legal questions would receive de novo judicial review was a poor understanding of the law even in the 1940s.<sup>180</sup> Just a few years prior, the Attorney General's

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175. 5 U.S.C. § 553(b)(A).

176. S. COMM. ON THE JUDICIARY, 79TH CONG., REP. ON THE ADMINISTRATIVE PROCEDURE ACT (Comm. Print 1945), reprinted in S. COMM. ON THE JUDICIARY, LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, S. DOC. NO. 79-248, at 18 (1946).

177. CALEB NELSON, STATUTORY INTERPRETATION 707 n.26 (2011); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 194 n.406 (1998).

178. See Ronald M. Levin, *The APA and the Assault on Deference*, 106 MINN. L. REV. 125, 157–59 (2021) (discussing this portion of the APA's legislative history, its treatment in the literature, and ultimately discounting the remark's relevance).

179. *Id.* at 158.

180. *Id.* (citing Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514 (describing the remark's assumptions about de novo review as a "quite mistaken presumption")).

Final Report on Administrative Procedure made clear that de novo review “seems not to be compelled” even on questions of law.<sup>181</sup> Indeed, the most recent view of this portion of the APA’s legislative history appears to be one of great skepticism.<sup>182</sup>

Because the remark about deference “reads more like an afterthought” at the very end of a long series of arguments in favor of the exemption, I am inclined towards discounting it in my own analysis.<sup>183</sup> With that in mind, the text, structure, and history provide no clear connection between § 553 and the modern regimes of heightened deference. As things stood in 1946, the FOL was conceptually separate from deference as we understand it today.

#### E. The FOL Under the APA

By the middle of the twentieth century, the FOL concept was used in several distinct areas of the rising field of administrative law.<sup>184</sup> The concept had important implications for the justiciability of agency actions, just like in the common law era.<sup>185</sup> Under the APA, the eligibility of legislative rules for

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181. *See 1941 AG Report, supra* note 127.

182. *See Levin, supra* note 178.

183. *Levin, supra* note 15 at 323.

184. *See, e.g., Home Shipping Co., S.A. v. United States*, 239 F. Supp. 226, 231–32 (D. Del. 1965) (finding in a suit against the government, provision in the Aids to Navigation Manual of the U.S. Coast Guard lacked the FOL and therefore could not be the basis for liability); *Hester v. Melidosian*, 261 F. Supp. 659, 661 (E.D. Pa. 1966) (outlining that a regulation acquired the FOL overtime and protected agency officials’ discretion); *United States v. Sawyer Fuels, Inc.*, 199 F. Supp. 876, 878 (D.N.D. 1961) (dodging claim that regulation carried the FOL and was an unconstitutional delegation of Article I power); *United States v. St. Paul Mercury Indem. Co.*, 133 F. Supp. 726, 735 (D. Neb. 1955) (refusing to adopt the agency’s interpretation of the statute it enforced because its interpretations did not carry the FOL).

185. *See, e.g., Kalur v. Resor*, 335 F. Supp. 1, 8 (D.D.C. 1971) (holding that pre-enforcement judicial review was permissible because the relevant agency action carried the FOL and the parties were sufficiently adverse) (citing *Columbia Broad. Sys. v. United States*, 316 U.S. 407 (1942)). The FOL continues to play an important role in the justiciability context through the “final agency action” requirement. *See also* Administrative Procedure Act of 1946, 5 U.S.C. § 704 (“Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.”). Some courts interpret the FOL as a requirement for finality. *See Pharm. Rsch. & Mfrs. of Am. v. U.S. H.H.S.*, 138 F. Supp. 3d 31, 41 (D.D.C. 2015) (“Admittedly, interpretive rules, guidance policies, and other general agency statements that lack the force of law ‘generally do not

pre-enforcement review is beyond peradventure.<sup>186</sup> Pre-enforcement review for rules that did not go through notice and comment often turns on whether the underlying rule is a disguised legislative rule.<sup>187</sup> If the rule is not legislative in character, the availability of pre-enforcement judicial review is more complicated. At the beginning of the APA era, agency practices depended on guidance and interpretive rules much less than they do now.<sup>188</sup> The availability of pre-enforcement judicial review for nonlegislative rules would not become a major issue in the field for several decades.

In the last few decades, courts have been under increasing pressure to ferret out disguised legislative rules. In 1992, Robert Anthony published an ACUS study on guidance that moved the case law in a new direction.<sup>189</sup> Anthony argued that a nonlegislative regulation could coerce private parties without going through § 553's procedures.<sup>190</sup> This result, according to Anthony, would subvert the policy tradeoff at the heart of § 553—the FOL for notice and public scrutiny.<sup>191</sup> Anthony's work launched a move towards recognizing that regulations could have “practical binding effect.”<sup>192</sup> To restate Anthony's thesis, guidance documents could carry the FOL by virtue of their coercive effect on regulated parties.<sup>193</sup>

Whether guidance carries coercive effects became an important test in some circuits.<sup>194</sup> In the *Texas v. United States*

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qualify' as a final agency action.”).

186. See Lindsay, *supra* note 17, at 2451 (“Legislative rules, then, are uncontroversially ‘final agency action’ that may be judicially reviewed before ever being enforced against a regulated party.” (footnote omitted)).

187. See, e.g., *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 250–51 (D.C. Cir. 2014) (framing the entire finality analysis around whether guidance was really “legislative” in character).

188. See Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REG. 165, 168 (2019) (quoting an interview with a former senior FDA official who said that he “cannot imagine a world without guidance”).

189. See Anthony, *supra* note 164.

190. See *id.* at 6–12.

191. See *id.* at 13–14.

192. See *id.* at 12–15.

193. See Levin, *supra* note 15, at 275 (“By giving a policy statement practical binding effect, an agency can illicitly have the best of both worlds; it can impose policies of its choosing in a document that has never been subjected to the discipline of APA rulemaking.”).

194. See, e.g., *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C.

litigation around President Obama’s Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program, the court asked whether the DAPA rule “(1) ‘impose[d] any rights and obligations’ and (2) ‘genuinely leaves the agency and its decision-makers free to exercise discretion.’”<sup>195</sup> In its inquiry, the Fifth Circuit emphasized the pragmatic portion of the FOL tradition.<sup>196</sup> Cases like *Texas v. United States* have had a cascading effect on the FOL across the board. In the justiciability context, courts have emphasized a pragmatism that gauges the effects of agency action on regulated parties.<sup>197</sup> That mode of analysis “may well be the single most frequently litigated and important issue of rulemaking procedure before the federal courts today.”<sup>198</sup>

Note that the “practical binding effect” test stands in some tension with the text of § 553, which does not explicitly provide for judicial review as a way of reinforcing the distinction between legislative rules and guidance.<sup>199</sup> Nonetheless, courts have adopted that standard and asked whether the “document in question expresses or implements a policy judgment in a binding fashion.”<sup>200</sup> Ultimately, the test turns on whether the agency considers the position definitive.<sup>201</sup> The agency cannot, for

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Cir. 2000); *Texas v. United States*, 809 F.3d 134, 173–76 (5th Cir. 2015), *aff’d by equally divided Court*, 136 S. Ct. 2271 (2016); *Texas v. EEOC*, 933 F.3d 433, 443–46 (5th Cir. 2019).

195. 809 F.3d at 171.

196. *See id.* at 173 (“The DACA and DAPA Memos purport to grant discretion, but a rule can be binding if it is ‘applied by the agency in a way that indicates it is binding,’ and there was evidence from DACA’s implementation that DAPA’s discretionary language was pretextual.”).

197. *See Texas v. EEOC*, 933 F.3d at 441–46 (the Fifth Circuit held that an agency’s guidance was final agency action even though the guidance could not bind regulated parties without another agency’s decision to enforce). This case was the first to adopt an approach to finality advanced by the author in another piece of scholarship. *See Baumann & Mina, supra* note 125, at 359–62 (suggesting that an agency action may still be “final” for the purposes of APA review even if it could not directly “bind” the relevant regulated party).

198. Levin, *supra* note 15, at 263.

199. *See id.* at 289 (“On their face, the notice-and-comment provisions of § 553 set forth preconditions for the promulgation of legislative rules—or substantive rules . . . . Under a literal reading of the statute, those provisions do not seem to impose any restrictions at all on the issuance or use of guidance documents.”).

200. *Id.* at 291.

201. *See id.*

example, rely on a policy statement as if it were law.<sup>202</sup> One formulation of the binding effect test focuses on whether the guidance in question “impose[s] any rights and obligation” and whether it “genuinely leaves the agency and its decision-makers free to exercise discretion.”<sup>203</sup> This formulation includes the traditional meaning of the FOL that focuses on *binding* regulated parties with respect to penalties. It goes further to suggest that agencies may “bind” themselves with guidance and thereby vitiate § 553’s distinction between legislative rules and guidance. This focus on the agency flows naturally from the processual implications of § 553. But it is worth noting that the binding effect test deviates from the FOLs we have discussed so far, which included focuses on congressional intent (the drafting convention) and the practical effects of an agency action on regulated parties (justiciability).

Recently, a debate has opened as to whether this application of the FOL can be squared with the APA and *Vermont Yankee*.<sup>204</sup> Professor Cass Sunstein has suggested that the binding effect test violates *Vermont Yankee*’s prohibition on court-crafted procedural obligations.<sup>205</sup> In other words, Sunstein has argued that § 553 does not place any procedural limitation on guidance documents. So the binding effect test can be read as a roadblock to guidance promulgation with no textual hook in the APA.<sup>206</sup> This argument has come under fire, most notably from Professor Levin.<sup>207</sup> As Levin points out, the reason courts have not sided with Sunstein is because the binding effect test is itself framed as an interpretation of the APA.<sup>208</sup> Further, the test has a prophylactic quality. It has been justified on the basis that in its absence agencies could simply treat guidance as binding as a practical matter and thereby “bind” regulated parties with the

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202. See *Pac. Gas & Elec. Co. v. Fed. Power Comm’n*, 506 F.2d 33, 38 (D.C. Cir. 1974).

203. See *American Bus Ass’n v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980).

204. See generally 435 U.S. 519 (1978).

205. See Cass R. Sunstein, “Practically Binding”: *General Policy Statements and Notice-and-Comment Rulemaking*, 68 ADMIN. L. REV. 491, 505–12 (2016).

206. See *id.*

207. See Levin, *supra* note 15, at 313–15.

208. See *id.*



threat of looming enforcement actions.<sup>209</sup>

While this Article is not meant to vindicate either side in the debate described above, it is useful in two ways. First, it outlines the kind of evidentiary burden one might have to make out to justify a prophylactic rule like the binding effect test. That standard was only pioneered after considerable debate among the administrative law community, after empirical analysis of the risks posed by guidance, and after a significant showing that, in the absence of the binding effect test, § 553's guidance exemption could be undermined.<sup>210</sup> To the extent that Justice Gorsuch's approach in *Kisor* can be viewed as a prophylactic gloss on the guidance exemption, a similar standard of proof should be met for Gorsuch's approach to be adopted. Second, the Sunstein-Levin debate demonstrates the pitfalls when interpreting § 553. The provision is bare but attempts to flesh it out may run headlong into a kind of procedural common law that is antithetical to APA review.

The remainder of the Article will stipulate that the binding effect test is consistent with the structure of the APA and is within the permissible glosses on the FOL outlined above. Notably, the FOL was central to this important test. The FOL was meant to gauge whether a regulation or its underlying statute controlled in an enforcement proceeding. Its value as a heuristic to both courts and regulated parties would be obviated if agencies could "bind" parties without going through notice-and-comment rulemaking. The approach outlined by Professor Anthony may have been necessary to smoke out agencies' ultra vires action. Further, it does little to alter the original compromise behind § 553.

#### F. Taking Stock

Before proceeding, this subsection is meant to review the FOL as it stood before the year 2000. Above, we have outlined the "family" of concepts that are referred to by the FOL. By the

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209. *See id.* at 315 ("From this vantage point, the doctrine can be seen as simply an example of the courts' longstanding propensity to construe the APA creatively in order to keep up with the developing needs of the rulemaking system.").

210. *See id.* at 273–86 (describing the development of the binding effect test).

end of the 1990s, the FOL had come to play a major role in the administrative law landscape. As discussed above, the FOL is the touchstone for determining whether a guidance document really should have gone through notice-and-comment rulemaking.<sup>211</sup> In that context, the FOL analysis can be processual or it can focus on penalties that directly affect regulated parties.<sup>212</sup> This analysis can also turn on whether the agency itself was “bound” by an agency action.<sup>213</sup> “Binding” here takes on a new focus (an agency instead of regulated parties) and a new meaning (limiting discretion instead of the imposition of legal penalties).<sup>214</sup>

In the justiciability context, the FOL has a pragmatic bent that focuses on the effects of an agency action on regulated parties. One major vehicle for the FOL in this context is the APA’s final agency action requirement.<sup>215</sup> Most courts import the FOL and ask whether the challenged agency action “binds” regulated parties.<sup>216</sup> “Binding” here refers to agency actions that affect legal rights; the actual imposition of civil or criminal penalties is not required. While the lower courts have occasionally been formalistic in their applications of the FOL in the final agency action context,<sup>217</sup> the Supreme Court has consistently kicked them back into line.<sup>218</sup>

These examples merely scratch the surface.<sup>219</sup> The point is

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211. *See, e.g.*, Nicholas Bagley, *No Harm, No Foul in Texas v. United States*, YALE J. ON REG.: NOTICE & COMMENT (Jan. 19, 2016) (“Is the Obama administration’s deferred action program for the parents of citizens and legal permanent residents (DAPA) a legislative rule? The Fifth Circuit says [] it probably is, the administration swears it isn’t[]. The fight matters because, if DAPA is a legislative rule, it should have gone through notice and comment.”).

212. *See Texas v. EEOC*, 933 F.3d 433, 443–46 (5th Cir. 2019) (allowing for pre-enforcement review of an agency action even though it was, by statute, binding on no one because of the practical effects on the regulated entity).

213. *See, e.g.*, *Texas v. United States*, 809 F.3d 134, 172–73 (5th Cir. 2015) (teeing up the binding effect test in the context of the DAPA program).

214. *See id.*

215. *See generally* *Bennett v. Spear*, 520 U.S. 154 (1997) (interpreting 5 U.S.C. § 704 and establishing a new final agency action standard).

216. *See, e.g.*, *Ass’n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 716 (D.C. Cir. 2015).

217. *See Baumann & Mina, supra* note 125, at 333.

218. *See U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 578 U.S. 590 (2016).

219. *See, e.g.*, *McAlpine v. United States*, 112 F.3d 1429, 1434 (10th Cir. 1997) (using FOL concepts to determine whether there was “law to apply”

merely to rehash the family of concepts that the FOL refers to. So far, the FOL will variously focus on (1) congressional intent; (2) process; (3) *binding* an agency by limiting discretion; (4) *binding* a regulated party with civil and criminal sanctions; and (5) *binding* a regulated party by affecting its legal rights. Across the different FOL domains, “binding” is used with slightly different meanings. Laid across this diversity is a spectrum of pragmatism and formalism that can divide outcomes between and within the lower courts.

#### IV. FOL AS A TOUCHSTONE FOR DEFERENCE: THE *MEAD* REVOLUTION

In 2001, the FOL concept—which by then had already achieved a pride of place in the administrative law field—received a boost from the *Mead* revolution.<sup>220</sup> *Mead* purports to clarify the deference regime established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>221</sup> Under *Chevron*, courts defer to agencies’ interpretations of the statutes they implement if Congress has not “directly spoken to the precise question at issue” (if the relevant provision is ambiguous) and the agency’s interpretation is reasonable.<sup>222</sup> Depending on your priors, *Chevron* deference is either a pillar of the public law or an unconstitutional blight on the separation of powers.<sup>223</sup>

*Mead* asked whether “a tariff classification ruling by the United States Customs Service deserves judicial deference.”<sup>224</sup> Tariff classifications only bound the recipient and were not the product of either notice-and-comment rulemaking or formal adjudications.<sup>225</sup> In finding that the tariff classification was not

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under *Heckler* review); see also *Ctr. for Auto Safety v. Dole*, 828 F.2d 799, 803 (D.C. Cir. 1987).

220. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

221. See 467 U.S. 837 (1984).

222. *Id.* at 842–43.

223. Compare Sunstein, *supra* note 1, at 1615–18 (arguing in support of *Chevron* deference), with Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1188–92 (2016) (questioning the constitutionality of *Chevron* deference).

224. *Mead Corp.*, 533 U.S. at 221.

225. See *id.* at 231. Further, the Court emphasized two other features of the relevant regulatory process: (1) that no entity was solely responsible for issuing the letters; and (2) that the agency could change course without any kind of publicly accountable process.

eligible for *Chevron* deference, the Court emphasized that heightened deference was reserved for agency actions that were the byproducts of FOL delegations from Congress.<sup>226</sup> Here, the FOL was meant to delineate the law-like agency interpretations (like the regulatory regime at issue in *Chevron*) from the scatter-shot ruling letters of *Mead*.<sup>227</sup>

*Mead*, along with post-APA enactment changes to agency practice, has placed increased pressure on the traditional FOL distinction between legislative and nonlegislative rules.<sup>228</sup> As a result of *Mead*, the Sixth Circuit has pioneered a controversial shortcut for assessing whether agency actions are final for judicial review. Because “final agency actions” are ones that carry the FOL, and because rules that would receive heightened deference carry the FOL after *Mead*, the Sixth Circuit has been willing to merely apply the *Chevron* two-step analysis instead of the unwieldy finality case law to determine whether an agency

226. *See id.* at 221.

227. *See, e.g.*, Kristin E. Hickman & Aaron L. Nielson, *Narrowing Chevron’s Domain*, 70 DUKE L.J. 931, 957 (2021) (“In other words, the facts in *Mead* differed greatly from those in *Chevron*. Whereas *Chevron* involved hierarchical, notice-and-comment rulemaking by the EPA, *Mead* confronted a scheme in which dozens of entities may interpret language through hearing-free adjudications.”).

228. The effects of *Mead* were recently put succinctly by Professors Hickman and Nielson:

Courts, [after *Mead*] therefore, generally use the *Chevron* standard in evaluating interpretations of ambiguous statutes offered by agencies in notice-and-comment rulemakings and in formal adjudications. By contrast, courts typically apply the less deferential *Skidmore v. Swift & Co.* standard to interpretations advanced through informal mediums, like interpretive rules and policy statements.

*Id.* at 936–37. This perhaps puts the situation with respect to informal adjudications and nonlegislative rulemaking a little too neatly. The Court in *Mead* went to great lengths to emphasize that it was not finding that informal adjudications and nonlegislative rulemaking per se lacked the FOL. *See Mead Corp.*, 533 U.S. at 230 (“It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force . . . . That said, and as 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[.]”).

action is final for judicial review.<sup>229</sup> Under this approach, interpretive rules (nonlegislative rules) could be subject to pre-enforcement review.<sup>230</sup> Adding to the confusion, the Sixth Circuit's approach stands in stark contrast to the more formalistic approach of the D.C. Circuit, which has held in several cases that interpretive rules can never carry FOL by definition—relying, of course, on the traditional understanding of the APA.<sup>231</sup>

Many have argued that the post-enactment reality of agency deference ought to be considered when determining whether an agency action should be subject to pre-enforcement review.<sup>232</sup> As a result of the post-enactment shift towards deference, the argument goes, the FOL concept should be expanded to take account of heightened deference.<sup>233</sup> Further, it is well documented that nonlegislative rulemaking is now the bread-and-butter of agency practice.<sup>234</sup> As this trend continues, agencies will be subject to less judicial review unless the FOL concept is expanded.

A case prior to *Kisor*, *Perez v. Mortgage Bankers Association*, teed up the FOL divide for the Court.<sup>235</sup> The case asked whether the D.C. Circuit's *Paralyzed Veterans* doctrine, which required federal agencies to engage in notice-and-comment rulemaking when they substantially altered an interpretive rule, is permissible under the APA.<sup>236</sup> The Court unanimously held that the D.C. Circuit's doctrine ran afoul of the APA and that the

229. See, e.g., *Franklin Fed. Sav. Bank v. Dir., Off. of Thrift Supervisor*, 927 F.2d 1332, 1336 (6th Cir. 1991); see also *Air Brake Sys., Inc. v. Mineta*, 357 F.3d 632, 642 (6th Cir. 2004).

230. See *Air Brake Sys., Inc.*, 357 F.3d at 642.

231. See, e.g., *Am. Tort Reform Ass'n v. OSHA*, 738 F.3d 387, 393 (D.C. Cir. 2013) (holding that an interpretive rule was not final because it lacked the FOL).

232. See *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring); *Air Brake Sys., Inc.*, 357 F.3d at 642; Lindsay, *supra* note 17, at 2455.

233. See Lindsay, *supra* note 17, at 2455 (opining that “[f]or better or worse, *Chevron* deference for interpretative rules is contrary to the practice of judicial deference that existed when the APA was enacted” and arguing in favor of an approach that expands the FOL to include agency deference).

234. See Parrillo, *supra* note 188, at 168 (quoting a veteran EPA lawyer who also said that he “cannot imagine a world without guidance”).

235. See *Perez*, 135 S. Ct. 1199.

236. See *id.* at 1203 (citing *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 589 (D.C. Cir. 1997)).

*Vermont Yankee* rule that federal courts cannot add to the procedural requirements specified in that statute.<sup>237</sup> Along the way, Justice Sotomayor, writing for the Court, relied on what the Court appears to have believed was an axiom— “[i]nterpretive rules ‘do not have the force and effect of law and are not accorded that weight in the adjudicatory process.’”<sup>238</sup> That move was a way of deflating the defense of the *Paralyzed Veteran* doctrine, which asserted that it merely made agencies pay a procedural price for “amending” an underlying interpretive rule.<sup>239</sup> Justice Sotomayor argued that agencies do not literally “amend” regulations by issuing interpretive rules because agency interpretive rules do not carry the FOL.<sup>240</sup> But that portion of the opinion is dicta because the *Paralyzed Veteran* doctrine was vitiated by the Court under the rule from *Vermont Yankee*.<sup>241</sup> Nonetheless, that dicta played a starring role in the *Kisor* opinions.<sup>242</sup>

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237. *See id.* at 1206 (“The *Paralyzed Veterans* doctrine is contrary to the clear text of the APA’s rulemaking provisions, and it improperly imposes on agencies an obligation beyond the ‘maximum procedural requirements’ specified in the APA . . . .” (quoting *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978))).

238. *Id.* at 1204 (citing *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 99 (1995)).

239. *See id.* at 1208.

240. *See id.* (“MBA does not explain *how*, precisely, an interpretive rule changes the regulation it interprets, and its assertion is impossible to reconcile with the longstanding recognition that interpretive rules do not have the force and effect of law.” (citation omitted)).

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

242. *See id.* at 1210. This portion of the opinion prompted several Justices to write concurrences that touch on the FOL question. *See id.* at 1210 (Alito, J., concurring) (clarifying that the Court should not “dismiss” the concern that interpretive rules—by virtue of the deference regimes—essentially carry the FOL in contravention of the APA’s structure). *See also id.* at 1211 (Scalia, J., concurring). Justice Scalia agreed that the Court’s decision “produces a balance between power and procedure quite different from the one Congress chose when it enacted the APA.” He argued that the FOL was not supposed to extend to interpretive rules under the statute, *see id.* (“An agency may use interpretive rules to *advise* the public by explaining its interpretation of the law. But an agency may not use interpretive rules to *bind* the public by making law, because it remains the responsibility of the court to decide whether the law means what the agency says it means[]”), but that the APA’s original safeguards have effectively been undone by the “headless” deference regimes. *Id.* Justice Scalia then provides the first thorough case for expanding the FOL concept to include an agency action’s eligibility for heightened deference: “[a]fter all, if an interpretive rule gets deference, the people are bound to obey

## V. KISOR AND THE FOL DIVIDE

The FOL argument in *Kisor* was premised on the idea that *Auer* deference erodes the APA's structural safeguards when it is granted to interpretive rules.<sup>243</sup> That was essentially the same argument that prompted the bright-line rule in *Perez*.<sup>244</sup> According to *Kisor*, the APA's key compromise was enshrined in 5 U.S.C. § 553.<sup>245</sup> The APA requires legislative rules to go through notice-and-comment procedures.<sup>246</sup> But the APA "allows agencies to issue 'interpretive' rules without notice and comment."<sup>247</sup> The supporting logic is that legislative rules, as opposed to interpretive rules, are legally "binding" and the agencies should pay a heavier toll for promulgating them.<sup>248</sup> The problem, according to *Kisor*'s argument, is that by granting *Auer* deference to interpretive rules, those interpretive rules then carry the FOL without having gone through notice and comment.<sup>249</sup>

Here, it is worth contemplating what *Kisor* and Gorsuch mean when they argued that an interpretive rule that receives *Auer* deference is "binding." Gorsuch suggested that "[u]nder *Auer*, courts must treat as 'controlling' not only an agency's duly promulgated rules but also its mere interpretations."<sup>250</sup> If the underlying regulation carries the FOL, then the "controlling"

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it on pain of sanction, no less surely than they are bound to obey substantive rules, which are accorded similar deference. Interpretive rules that command deference *do* have the force of law." *Id.* at 1212. This flexible approach to the FOL question dovetails with the "flexible" approach the Court has taken in parallel areas. *See* U.S. Army Corps of Eng'rs v. Hawkes Co., Inc., 136 S. Ct. 1807, 1815 (2016) (describing the Court's "pragmatic" approach to finality).

243. *See* Brief for Petitioner at 26, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (No. 18-15).

244. *See Perez*, 135 S. Ct. at 1208.

245. *See* Brief for Petitioner, *supra* note 243, at 28.

246. *See Perez*, 135 S. Ct. at 1203 (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 302–03 (1979)).

247. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2420 (2019) (citing 5 U.S.C. § 553(b)(A)).

248. *See* Brief for Petitioner, *supra* note 243, at 31 ("The APA authorizes agencies to issue rules using procedures other than notice-and-comment rulemaking . . . . 'But that convenience comes at a price: Interpretive rules do not have the force and effect of law and are not accorded that weigh in the adjudicatory process.'" (quoting *Perez*, 135 S. Ct. at 1204) (internal quotation omitted)).

249. *See Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring).

250. *Kisor*, 139 S. Ct. at 2434 (Gorsuch, J., concurring).

interpretations will be given a “binding” effect.<sup>251</sup> The argument then changes the focus of the FOL from Congress, regulated parties, and agencies themselves to the federal courts. This argument dovetails with Justice Scalia’s critique of *Auer* in *Perez*, insofar as Gorsuch is suggesting that the public is ultimately bound by interpretive rules.<sup>252</sup> This FOL critique became one focus for the plurality. Justice Kagan waived it away with a definitional argument:

In *Mortgage Bankers*, we held that interpretive rules, even when given *Auer* deference, do *not* have the force of law. An interpretive rule itself never forms “the basis for an enforcement action”—because, as just noted, such a rule does not impose any “legally binding requirements” on private parties.<sup>253</sup>

This line of reasoning puzzled some observers.<sup>254</sup> But Justice Kagan merely omitted a detailed explanation of her deeper understanding of the FOL. Her point was that deference does not turn an interpretive rule into a legislative one because the FOL does not encompass the purported “binding” of federal courts through heightened deference.

As discussed in Part II, the pre-APA administrative law framework divided legislative rules and other regulations along FOL lines.<sup>255</sup> This distinction led to a drafting and interpretive convention that focused on whether Congress delegated the power to impose sanctions on a regulated party. That version of the force of law focuses on *binding* regulated parties with the power of coercion.<sup>256</sup> Prior to the APA, the FOL was also used in the justiciability context to refer to agency actions that affected

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251. *See id.*

252. *Perez*, 145 S. Ct. at 1211–22 (Scalia, J., concurring) (arguing that *Auer* lets agencies “use [interpretive] rules not just to advise the public, but also to bind them”).

253. *Kisor*, 139 S. Ct. at 2420 (citations omitted).

254. *See Bamzai*, *supra* note 10, at 196 (“And therein lies the conflict with the APA: the plurality’s approach would create a class of agency legal interpretations that supposedly ‘do not have the force of law’ but nevertheless are binding on courts through *Auer*.”).

255. *See supra* Part II.B.

256. *See supra* note 105 and above-line text.



parties' rights—even in the absence of sanctions.<sup>257</sup> And, after the passage of the APA, tests were adopted to smoke out when guidance practically limits the discretion of agencies and thereby vitiates § 553's guidance exemption.<sup>258</sup> Finally, *Mead* limited *Chevron* deference by holding that it is limited to agency actions that carry the FOL.<sup>259</sup>

With this background in mind, it becomes clear that the FOL argument in *Kisor* has no footing in § 553 or the FOL case law. To explain why, I must first unpack what “deference” means in administrative law. Whether *Auer* or *Chevron* “binds” anyone at all likely turns on the ontology of deference.<sup>260</sup> Recently, two excellent articles have tried to “categorize” *Chevron*.<sup>261</sup> Commentators have “variously describe[d] *Chevron* as a standard of review, a canon or method of statutory interpretation, and a rule of decision.”<sup>262</sup> And although *Chevron* is not applied consistently by either the Supreme Court or the lower federal courts, there is a developing consensus that *Chevron* deference is a standard of review flowing from § 706(2)(A).<sup>263</sup> Although there are cases that apply *Chevron* as a rule of interpretation, *Chevron* was itself about construction and that is the doctrine's proper application.<sup>264</sup>

The scholarship described above is—to put the point

257. See *supra* Part II.C.

258. See *supra* Part II.E.

259. See *supra* Part III.

260. See Michael Dorf, *The Ontology of Sovereign Immunity*, DORF ON LAW (May 31, 2018), <http://www.dorfonlaw.org/2018/05/> (“‘Ontology’ is a fancy word for the nature of a thing.”) (internal quotes omitted).

261. See generally Hickman & Hahn, *supra* note 30, (asking whether *Chevron* is a rule of decision, a standard of review, or a canon of construction); Solum, *supra* note 22 (same but with a strong emphasis on the interpretation-construction distinction).

262. Hickman & Nielson, *supra* note 28, at 992 (collecting citations).

263. See Hickman & Hahn, *supra* note 30, at 617–18 (“And we argue that *Chevron* is an evolving judicial construction of . . . § 706(2)(A) arbitrary and capricious standard, which is unquestionably a standard of review.”); Solum, *supra* note 22, at 296 (“Deference to an agency implementing rules in the construction zone is entirely consistent with a textualist reading of the ‘shall . . . interpret statutory provisions’ language of Section 706.”).

264. See Solum, *supra* note 22, at 270 (“Much of the writing about *Chevron* seems to assume that the *Chevron* doctrine is about interpretation . . . [T]here are cases of that kind, but the actual *Chevron* decision in the original case is best understood as involving judicial deference to an agency's implementing rules in the construction zone.”).

bluntly—excellent. It accurately describes agency deference at a conceptual level and how it is applied most of the time by the federal judiciary. The foregoing analysis turns on a stipulation that agency deference is properly construed as a tool of construction flowing from § 706. This includes the *Auer* deference at issue in *Kisor*.<sup>265</sup>

With this background in mind, it becomes clear that the FOL argument in *Kisor* has no footing in § 553 or the FOL case law. Remember that Justice Gorsuch’s argument is premised on the idea that *Auer* deference “binds” judges. But that term is a misnomer. *Auer* and *Chevron*, properly understood, are not “binding” rules of interpretation.<sup>266</sup> Instead, they are rules of “construction.”<sup>267</sup> The interpretation-construction distinction is of great importance here. The deference regimes flow from the realization that the relevant statutory or regulatory text has essentially run out, so that the language will permit a zone of “reasonable” interpretations. The focus on the “binding” of judges here has no parallels in the case law. It does not focus on the “binding” of regulated parties or agencies. Gorsuch’s theory is not rooted in congressional intent or the ability of agencies to levy penalties on regulated parties.

Of course, the deference regimes are standards for review that flow from statutory text that are “binding” law. But these doctrines, when they apply, do not “bind” anyone in a way that is distinct from how any other standard of review with a statutory hook is “binding.” For example, “hard look” review flows from § 706, the same as *Chevron*.<sup>268</sup> Both doctrines are part of evolving case law construing § 706’s requirements. But we would not describe a court’s decision that an agency action survives hard look review as “binding” in the sense implicated by § 553 of the APA. The court’s holding is certainly “binding” in the *Marbury* sense of that word (i.e., binding as an outcome

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265. See *Perez v. Wolf*, 943 F.3d 853, 864–65 (9th Cir. 2019) (requiring a district court to decide “the standard of review to apply on remand, including whether *Chevron* or *Auer* deference is appropriate”).

266. See Sunstein, *supra* note 1, at 1647, 1675–78.

267. See *id.*

268. Hickman & Nielson, *supra* note 28, at 954. Hard look review was pioneered by the D.C. Circuit as a way of policing the expansion agency rulemaking. The Supreme Court ultimately accepted hard look review as a way of implementing the arbitrary and capricious standard of § 706 of the APA. See *id.*

on the parties before the court), but that decision—by itself—only preserves the pre-suit status quo and does not itself levy new obligations on regulated parties. In no sense does a decision to apply *Chevron* or *Auer* deference imbue an agency action with the FOL.

Under the theory of *Auer*, the agency's interpretation is just a permissible gloss on the regulation.<sup>269</sup> In other words, the zone of permissible constructions established by the statute is still operable if the relevant regulation is an interpretive one.<sup>270</sup> That courts might defer to an agency's construction of an interpretive rule does not change the rule's character or its relationship to an underlying statute or regulation. While judges and scholars may disagree with the default rule of construction that *Auer* establishes, nothing about that rule "binds" judges, regulated parties, or agencies. This is illustrated by *Kisor* itself, which provides criteria for the application of *Auer* deference.<sup>271</sup> These criteria are meant to keep agencies from operating with lawmaking power in the interstices of guidance. They turn on traditional tools of interpretation and require a court to scrutinize the regulation and the underlying statutory regime.

The only rationale that makes sense of Justice Gorsuch's position comes from *Mead*.<sup>272</sup> That case's emphasis on the FOL could be used to reverse engineer a rule holding that heightened deference imbues an agency action with the FOL.<sup>273</sup> But that option flows from a misguided understanding of what *Mead* meant when it invoked the FOL. There, the Court was referencing the oldest meaning of the FOL, whether an agency has been delegated the FOL.<sup>274</sup> That question is one of statutory interpretation which undermines the necessity of adopting

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269. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2411 (2019) ("In each case, interpreting the regulation involves a choice between (or among) more than one reasonable reading. To apply the rule to some unanticipated or unresolved situation, the court must make a judgment call.").

270. See *id.*

271. See *id.* at 2406.

272. See *supra* Section III.

273. See *supra* notes 215–17 and above-line text.

274. See Hickman & Nielson, *supra* note 28, at 938 ("Again, the [Supreme] Court has held that *Chevron* first and foremost requires a delegation from Congress to an agency of the power to act with the force of law. Whether Congress has delegated the authority to adopt legally binding rules and regulations is readily ascertainable from statutory text.").

Justice Gorsuch's argument.<sup>275</sup> To make sure an interpretive rule does not carry the FOL in the sense implicated by *Mead*, a court need only analyze the underlying statutory regime to see whether Congress has delegated the power to sanction parties.<sup>276</sup> Notably, this analysis has nothing at all to do with whether that same interpretive rule is owed *Auer* deference.

Conceding that the text of § 553 is capacious, the case for Justice Gorsuch's conception of the FOL—if one views it as a prophylactic rule—is much weaker than Professor Anthony's case for the binding effect test.<sup>277</sup> As noted above, existing doctrine is sufficient to police the Gorsuch's alleged dangers. No comparable evidence has been proffered to demonstrate that *Auer* poses a threat to the guidance exemption.<sup>278</sup> Looming over this discussion, of course, is the reality that adopting Justice Gorsuch's approach would further complicate the FOL, which is already the cause of confusion across the administrative law landscape.

One might object that the lesson of *Mead* is that the FOL is a precondition to *Chevron* deference. While that argument has some intuitive appeal, the *Mead-Kisor* comparison flows from the family resemblance between loosely related conceptions of the FOL. In *Mead*, the Supreme Court's invocation of the FOL simply meant that *Chevron* deference was limited to “[w]hether Congress has delegated the authority to adopt legally binding rules and regulations[.]”<sup>279</sup> This is an interpretive question that is “readily ascertainable from statutory text.”<sup>280</sup> *Mead* is really a throwback to the pre-APA FOL that dealt with delegations and the interpretation convention. But whether Congress delegated *binding* authority to an agency in some statute is different from whether an interpretive rule is “binding” in the sense implicated by § 553. That is, it has nothing to do with whether an interpretive rule is merely advising the public or is levying new legal obligations.

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275. *See id.*

276. *See id.*; *supra* Section II.B.

277. *See supra* Section II.E.

278. *See generally* Daniel E. Walters, *The Self-Delegation False Alarm: Analyzing Auer Deference's Effect on Agency Rules*, 119 COLUM. L. REV. 85, 93 (2019) (demonstrating that the threat of “self-delegation” posed by *Auer* is illusory).

279. Hickman & Nielson, *supra* note 28 at 938.

280. *Id.*

## VI. CONCLUSION

It is difficult to comprehend the complexity of the FOL concept in administrative law. It is so pervasive that the phrase has become a heuristic for a “family” of interrelated concepts. What it means to “bind” and who must be “bound” are deeply contested issues. The outcomes in any given case will depend on context. But this eclectic basket of concepts does not support Justice Gorsuch’s FOL argument in *Kisor*. Whether an otherwise legitimate interpretive rule receives the FOL is of no consequence under any recognized conception of what it means to “bind.” The textual hook for Gorsuch’s argument, § 553’s guidance exemption, may be capacious, but the opponents of *Auer* deference have not met their burden of demonstrating that the best way of construing that provision is by eliminating deference. In sum, the FOL argument in *Kisor* has no basis in the administrative law canon and is unjustifiable from the perspectives of historical practice and commonsense.