ESSAY

"PRACTICALLY BINDING": GENERAL POLICY STATEMENTS AND NOTICE-AND-COMMENT RULEMAKING

CASS R. SUNSTEIN*

ABSTRACT

Over the last two decades, lower courts have repeatedly held that agencies must use notice-and-comment procedures before they issue purported policy statements that are "practically binding," in the sense that they are fixed and firm. As a matter of policy, this requirement has both desirable and undesirable consequences. It increases the likelihood that agencies will benefit from public comments, but it also creates a strong incentive for agencies to speak vaguely or not to issue policy statements at all. In general, agencies should seek comments before issuing such statements, but strictly as a matter of law, the practically binding test is an unjustified departure from the best reading of the Administrative Procedure Act (APA). The Supreme Court's decision in Vermont Yankee *rules that departure out of bounds. It is true that* Vermont Yankee *suggests an approach that would revolutionize a large number of existing doctrines and that for good reasons, the Court has declined to endorse the full* Vermont Yankee*-ization of administrative law. But the practically binding test is well beyond the pale.*

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* Robert Walmsley University Professor, Harvard Law School. I am grateful to Matthew Stephenson and Adrian Vermeule for valuable comments on a previous draft.

I. THE PROBLEM

In 2014, the Secretary of Homeland Security issued an important memorandum designed to give "deferred action" status to certain immigrants.[1] "Deferred action" means that the United States will not take certain enforcement actions against those immigrants (above all, actions to deport them).[2] Those who have "deferred action" status do not have a strictly legal right to stay in the United States; but they do have a very strong assurance that the government will not proceed against them.[3] For this reason, the memorandum was a central component of the Obama Administration's effort to undertake immigration reform through executive action.[4]

Specifically, the Department of Homeland Security's memorandum stated:

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1. *See* Memorandum, U.S. Dep't of Homeland Sec., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications /14_1120_memo_deferred_action.pdf. As discussed below, the principal actions required by the memorandum were invalidated by the court of appeals, whose decision was affirmed by an equally divided Supreme Court.

2. *Id.* at 2.

3. *Id.*

4. For the central announcement, *see* Press Release, WHITE HOUSE, Fixing the System: President Obama is Taking Action on Immigration, https://www.whitehouse.gov/issues/immigration/immigration-action (last visited Apr. 19, 2016) (emphasizing the importance of immigration to the Obama administration's agenda).

> This memorandum is intended to reflect new policies for the use of deferred action. . . . Due to limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States. As is true of virtually every other law enforcement agency, DHS must exercise prosecutorial discretion in the enforcement of the law. . . .
>
> I hereby direct USCIS [U.S. Citizenship and Immigration Services] to establish a process . . . [involving the exercise of] prosecutorial discretion through the use of deferred action, on a case-by-case basis, to those individuals who:
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> - have, on the date of this memorandum, a son or daughter who is a U.S. citizen or lawful permanent resident;
> - have continuously resided in the United States since before January 1, 2010;
> - are physically present in the United States on the date of this memorandum, and at the time of making a request for consideration of deferred action with USCIS;
> - have no lawful status on the date of this memorandum;
> - are not an enforcement priority as reflected in the November 20, 2014 Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum; and
> - present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate.
>
> Applicants must file the requisite applications for deferred action pursuant to the new criteria described above . . . . [The Department] should begin accepting applications from eligible applicants no later than one hundred and eighty (180) days after the date of this announcement . . . . Immigration officers will be provided with specific eligibility criteria for deferred action, but the ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis.
>
> This memorandum confers no substantive right, immigration status or pathway to citizenship. Only an Act of Congress can confer these rights. It remains within the authority of the Executive Branch, however, to set forth policy for the exercise of prosecutorial discretion and deferred action within the framework of existing law.[5]

The memorandum was not preceded by any kind of notice-and-comment process. Its central goal was to establish a policy that would lack the force of law, but that would nonetheless fundamentally alter the lives of those immigrants who obtain deferred action status.[6] There is no question

5. *See* Memorandum, U.S. Dep't of Homeland Sec., *supra* note 1.
6. *See id.*

that the policy would have significant and immediate consequences, and that it would have law-like effects for immigration officers passing on applications for deferred action status. Those officers would be bound by the memorandum, in the sense that it is an order from a superior, even if they would retain a measure of discretion in passing on particular applications.

We could easily imagine analogous kinds of actions; they are quite common. Some of those actions might seem to be the functional equivalent of legislative rules, in the sense that they do not contemplate anything like case-by-case judgment. For example:

1. The Environmental Protection Agency (EPA) might issue a "guidance document," stating that if companies emit pollution above certain levels into certain streams, it will always and certainly consider them to be in violation of an existing regulation. At the same time, it might say that if companies emit pollution below the specified limits, it will never consider them in violation and will never undertake an enforcement action.
2. The Department of Education might issue a "policy statement," indicating that unless universities establish certain policies to prevent sexual harassment, it will consider them in violation of Title IX and implementing regulations.[7]
3. The Occupational Safety and Health Administration might establish a "policy" to the effect that employers who establish certain "voluntary" programs, or who show a safety record of a specified exemplary kind, will be subject to less frequent, or more relaxed, investigations.[8]
4. Through publicly available questions-and-answers, the Department of Justice (DOJ) might establish a "policy" requiring hotel swimming pools, which are legally required to be wheelchair-accessible, to choose permanent lifts, rather than merely portable ones.[9] The Department might state that it will deem hotels with portable lifts to be in violation of the law—or it might do the opposite, stating that it will deem those with portable lifts to be acting consistently with the

7. *Cf.* Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CAL. L. REV. (forthcoming 2016) (discussing various actions by the Department of Education and other agencies).

8. *See, e.g.*, Cmty. Nutrition Inst. v. Young, 818 F.2d 943 (D.C. Cir. 1987).

9. *Cf.* Press Release, DOJ, Justice Department Issues Further Guidance on Accessibility Requirements for Existing Swimming Pools at Hotels and Other Public Accommodations (May 24, 2012), http://www.justice.gov/opa/pr/justice-department-issues-further-guidance-accessibility-requirements-existing-swimming-pools.

> law, or that it will not take enforcement action against those who use such lifts.[10]

The Administrative Procedure Act plainly exempts "general policy statements" from notice-and-comment rulemaking.[11] Let us stipulate that in all of these cases, the relevant agency has not used notice-and-comment procedures. Let us also stipulate that in all of these cases, the agency does not argue, and cannot argue, that it is issuing an interpretive rule.[12] It states that it is establishing general policy, not interpreting the meaning of any term in a statute or regulation. The question is this: Is the agency required to use notice-and-comment procedures?

II. TWO VIEWS

Broadly speaking, there are two imaginable views. The first is that the exemption to notice-and-comment requirements applies if what agencies have done *lacks the force of law*.[13] Under the force-of-law test, cases of the kind described above are straightforward. Nothing that the agency has done is *legally* binding. The relevant agency actions do not alter the legal status quo or put anyone at risk of (new) legal sanctions. For that reason, the agency has not issued a legislative rule, and it is perfectly entitled to invoke the exception for general policy statements. This view lacks support from the federal courts, at least within recent decades, but it has numerous academic defenders. In fact, the force-of-law test seems to capture the academic consensus,[14] though it is not unbroken.[15]

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10. *Cf. id.*

11. 5 U.S.C. § 553 (2012).

12. Interpretive rules are also exempt from the notice-and-comment requirements, but they raise distinctive questions not explored here. *See id.*

13. *See* Jacob Gersen, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705, 1708–09 (2007); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 929 (2004); E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1491 (1992). A prominent early expression of this view came from Judge Kenneth Starr, who stated that

> The correct measure of a pronouncement's force in subsequent proceedings is a practical one: must the agency merely show that the pronouncement has been violated or must the agency, if its hand is called, show that the pronouncement itself is justified in light of the underlying statute and the facts.

Young, 818 F.2d at 952 (Starr, J., dissenting). Judge Starr wrote, "The abiding characteristic of a legislative rule is that it is law. It defines a standard of conduct that regulated individuals or entities ignore at their peril, in the face of possible enforcement action." *Id.* at 950.

14. *See* Gersen, *supra* note 13, at 1708–09; Manning, *supra* note 13, at 929; Elliott, *supra* note 13, at 1491 (all listing examples of support for the force-of-law test).

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

The second view is that the exemption for general policy statements does not apply if the agency's action is *practically binding*.[16] Under the practically binding test, the central question in these cases is also straightforward: *Are the agency's actions tentative and essentially noncommittal, or are they firm and fixed*? If the latter, we are not speaking of a "general policy statement," even if no one is legally bound.[17] This view has strong support within the most important administrative law court, the United States Court of Appeals for the District of Columbia Circuit,[18] where it clearly represents the law,[19] and it has been adopted elsewhere as well.[20] Though the point remains insufficiently appreciated, the "practically binding" test now seems to dominate the case law; in recent years, no lower court appears to have squarely rejected it. Once highly controversial, the "practically binding" test has become entrenched to the point where Supreme Court intervention would probably be necessary to eliminate it.[21]

In an influential case,[22] for example, the court of appeals found it crucial that a purported policy statement "reads like a ukase. It commands, it requires, it orders, it dictates."[23] In the court's view, a general policy statement does none of these things. By way of elaborating the "practically binding test," the court added:

> If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all

16. *Young*, 818 F.2d at 945–49, 951, 953.

17. *See* Texas v. United States, 809 F.3d 134, 171 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S.Ct. 2271 (2016) ("We evaluate two criteria to distinguish policy statements from substantive rules: whether the rule (1) imposes any rights and obligations and (2) genuinely leaves the agency and its decision-makers free to exercise discretion. There is some overlap in the analysis of those prongs because if a statement denies the decision-maker discretion in the area of its coverage . . . then the statement is binding, and creates rights or obligations."); *see also id.* ("While mindful but suspicious of the agency's own characterization, we . . . focus primarily on whether the rule has binding effect on agency discretion or severely restricts it.").

18. Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020–21 (D.C. Cir. 2000).

19. *See, e.g.*, Nat. Res. Def. Council v. EPA, 643 F.3d 311, 313 (D.C. Cir. 2011); Elec. Privacy Info. Ctr. v. Dep't of Homeland Sec., 653 F.3d 1, 3, 5–6 (D.C. Cir. 2011); Cohen v. United States, 578 F.3d 1, 3 (D.C. Cir. 2009).

20. *See* Iowa League v. EPA, 711 F.3d 844, 877 (8th Cir. 2013); *Texas*, 809 F.3d at 134.

21. *See, e.g.*, *supra* notes 18–20.

22. *Appalachian Power Co.*, 208 F.3d 1015.

23. *Id.* at 1023.

practical purposes "binding."[24]

Some parts of this test are unobjectionable even under the force-of-law test. If an agency treats a purported policy statement "in the same manner as it treats a legislative rule," or if it bases enforcement action on a purported policy statement, then it is at the very least acting unlawfully.[25] A general policy statement is not law. But for those who endorse the force-of-law test, other parts of the court's test are far more questionable. A document might (and often does) offer clear guidance for field offices without having the force of law. A document lacks the force of law even if it leads private parties to believe that it sets out the agency's considered judgment about what counts as compliance with permit requirements. For those who think that the practically binding test is right, here is the key point: *A firm statement with present effects must go through notice-and-comment procedures even if it lacks legal force in the sense that it does not bind either the government or the private sector.* And in fact, a lower court invalidated the Obama Administration's deferred action program in part on just this ground.[26]

To come to terms with the competing views, it is useful to make a distinction between two kinds of cases.[27] The first are those in which the government announces that *it will not take action in certain contexts*.[28] An unambiguous announcement does not impose any strictly legal constraint on the government, at least if the announcement is styled as a policy statement.[29] It has an immediate effect, but it lacks the force of law. Such an announcement might well be counted as an exercise of prosecutorial discretion, made public and stated in general terms.

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24. *Id.* at 1021; *see also Elec. Privacy Info. Ctr.*, 653 F.3d at 3, 5–6; Croplife Am. v. EPA, 329 F.3d 876, 883 (D.C. Cir. 2003); Gen. Elec. Co. v. EPA, 290 F.3d 377, 382 (D.C. Cir. 2002).

25. *Appalachian Power Co.*, 208 F.3d at 1021. The reason for the unlawfulness is not that the agency has failed to use notice-and-comment procedures. An agency may not rely on a policy statement to support an enforcement action—period. It is not necessary or helpful to add that a policy statement must go through notice-and-comment procedures, which is not true.

26. *See* Texas v. United States, 787 F.3d 733 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S.Ct. 2271 (2016).

27. *See generally* Peter Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463 (1992) (providing an excellent discussion of the distinction between the two kinds of cases).

28. *See* Cmty. Nutrition Inst. v. Young, 818 F.2d 943 (D.C. Cir. 1987).

29. Note that if the agency announced that it "will not take action—because the pronouncement either sets minimum criteria for triggering enforcement mechanisms or announces a general deregulatory policy or interpretation—there will usually be no later enforcement action in which the agency's views can be tested." Franklin, *supra* note 15, at 309.

To be sure, the beneficiaries of regulatory programs, and others who are unhappy with an announcement of leniency might well have strong objections (legal or otherwise) to public announcements of intended forbearance. Suppose that the Environmental Protection Agency says that it will not take action against people who violate a particulate matter regulation; or that the Department of Justice says that its policy is to ignore certain violations of its swimming pool regulation promulgated under the ADA; or that the Food and Drug Administration (FDA) announces that its policy is to allow certain technical violations of food safety regulations. In such cases, beneficiaries might strenuously object that the agency ought to have listened to the public first.

Part of their complaint might be that when public officials say that they will not take action, it might well be difficult or even impossible for anyone to challenge the unlawful forbearance during an enforcement action in court.[30] By hypothesis, there will not be enforcement actions in which such forbearance might be tested. Beneficiaries and others might want to insist on a public comment period, seeing it as the only opportunity to challenge the substance of the agency's judgments.[31] But even if they do not make that argument, they might contend that practically binding policies have serious effects on important interests, and that the government ought to listen to the public before it imposes such policies. If there is a general policy of forbearance, that listening might be particularly valuable in order to avoid errors.

The second cases are those in which the government states that *it will take action in certain contexts*—for example, that it will refer polluters to the Department of Justice under specified conditions or that it will undertake more costly and time-consuming investigations if members of the regulated class do not agree to take certain steps. In such cases, no one is legally bound. If people refuse to do what the government wants them to do, they are not at legal risk. But they should be, and usually are, fully aware that they will incur significant costs if they do not do as the government suggests. A practically binding edict can be far more burdensome than one that is legally binding, and it is tempting to urge that agencies must use notice-and-comment procedures before they impose significant burdens.[32]

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30. Whether forbearance as such is subject to review is a complex question. *See* Heckler v. Cheney, 470 U.S. 821 (1985); Norton v. S. Utah Wilderness All., 542 U.S. 55 (2004); Massachusetts v. EPA, 549 U.S. 497 (2007).

31. If review is available, of course, the arbitrary or capricious standard remains available.

32. This is a strong theme in Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir.

In such cases, members of the private sector are likely to have an opportunity to challenge the general policy statement on the merits in court. But they might also argue that after-the-fact judicial review, undertaken under relevant deference principles, is not enough. They might insist that before the agency adopts its policy, it ought to hear what they have to say. They might contend that the agency could learn a great deal from public comments. Even if the policy is not legally binding, it will greatly affect private conduct, and the costs of agency error might be very high—and avoidable—if the public comment process is followed.

III. POLICY: EPISTEMIC ADVANTAGES VS. THE RULE OF LAW

Let us suppose that the question is whether agencies *should* be required to use notice-and-comment procedures when they have issued a policy that is fixed and firm. The answer to that question, taken purely as one of policy, might illuminate the legal issue if it is otherwise unclear (and in fact, there is a good argument that the practically binding test is a judicial response to perceived policy imperatives).[33] The answer might also bear on possible statutory changes and agencies' own practices. There are strong arguments on both sides of the question, which raises empirical questions for which we lack clear answers; I now turn to those competing arguments.

A. An Influential False Start

One resolution of the pragmatic problem is suggested in an illuminating essay by E. Donald Elliott.[34] Elliott's concern is that an agency might adopt a policy statement, thus avoiding notice-and-comment, and then invoke it as a basis for an enforcement proceeding.[35] Elliott urges, persuasively enough, that agencies should not be allowed to do that. In his words: "if an agency says initially that a policy statement is not a binding rule and then later treats it as if it were a binding rule by refusing to engage in genuine reconsideration of its contents in a subsequent case, a court should invalidate the agency's action in the individual particular case on the basis that the action lacks sufficient justification in the record."[36]

2000); *see also* Elec. Privacy Info. Ctr. v. Dep't of Homeland Sec., 653 F.3d 1 (D.C. Cir. 2011).

33. *See Elec. Privacy Info. Ctr.*, 653 F.3d 1 (holding that the TSA was required to initiate notice-and-comment rulemaking before announcing its change in screening policy).

34. *See* Elliott, *supra* note 13.

35. *Id.* at 1491.

36. *Id.*

The suggestion is convincing, broadly speaking,[37] and it does answer an important question: *What is the legal status of a general policy statement?* Elliott rightly suggests that agencies cannot rely on a policy statement to bind litigants. But his suggestion does not solve the problem that motivates the use of the practically binding test: agency adoption of fixed and firm policies, having law-like effects, before obtaining public comments. Should those "policies" have to be preceded by notice and comment procedures? Elliott's "pay me now or pay me later" argument cannot resolve that particular question. Litigants argue in favor of "pay me now," in the form of a public comment process in advance; they believe that the process is a crucial safeguard against mistakes and that after-the-fact judicial scrutiny, under existing deference principles, is not sufficient. As we have seen, lower courts have accepted that argument.[38] Are they right?

B. The Competing Effects of the Practically Binding Test

1. Learning

Here is the strongest argument in favor of requiring notice-and-comment procedures in such cases: If agencies use such procedures, they will learn a great deal, and it is especially important for agencies to obtain the relevant information whenever their policies are fixed and firm.

This argument might invoke ideas about democratic legitimacy: Before committing themselves to one course of action or another, public officials should listen to the people they are privileged to serve, above all those whom they would affect. That form of listening is valuable and perhaps indispensable for democratic legitimation. On this view, agencies in general face some kind of democratic deficit, and notice-and-comment reduces the deficit and promotes legitimacy by requiring a period of public discussion. But the argument is less airy, and in my view far more powerful, if it is hard-headedly *epistemic*: Policymakers might find out that their plan is in one or another respect misdirected, and as a result, they might decide to change it in some significant way, or perhaps to abandon it altogether.

In the case of immigration reform, for example, public comments might have shown that the government underweighted certain variables or missed

37. Note, however, that it might be more precise and simpler to say that the general policy statement is not a sufficient basis for the enforcement action.

38. *See, e.g.*, *Elec. Privacy Info. Ctr.*, 653 F.3d 11 (holding that the TSA was not justified in avoiding public notice-and-comment).

some unintended adverse consequences. As a result, perhaps the program could have been altered. In the context of accessible swimming pools, the Department of Justice might learn that permanent lifts are more expensive than anticipated or that they would create serious safety hazards for children. If so, the Department of Justice's view might have been changed in a significant way. In the case of food safety, the FDA might learn that its policy would allow certain vulnerable subpopulations to be exposed to unhealthy products, thus causing a revision of that policy. We do not have systematic evidence on the effects of the comment process on ultimate outcomes, but there can be no doubt that agencies frequently learn from what the public has to say—and they are often surprised by what they find out.[39]

This point is a strong reason for agencies to seek public comment even when the law does not require them to do so. Indeed, the Office of Management and Budget has adopted guidance to this effect, calling for public comment on significant guidance documents.[40] In particular, the guidance states:

> Section III(2) requires each agency to have adequate procedures for public comments on significant guidance documents and to address complaints regarding the development and use of significant guidance documents. Not later than 180 days from the publication of this Bulletin, each agency shall establish and clearly advertise on its Web site a means for the public to submit electronically comments on significant guidance documents, and to request electronically that significant guidance documents be issued, reconsidered, modified or rescinded. The public may state their view that specific guidance documents are "significant" or "economically significant" and therefore are subject to the applicable requirements of this Bulletin. At any time, the public also may request that an agency modify or rescind an existing significant guidance document.[41]

The arguments that underlie the guidance might be seen as good reasons for courts to insist, in the face of ambiguity, that agencies must use the notice-and-comment process. In an important discussion, Professor David Franklin contends that without the practically binding test, agencies "would too often sidestep the public input that is necessary to protect the interests of regulatory beneficiaries, to lay the foundation for meaningful hard look

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39. *See id.*

40. The White House's Office of Management and Budget (OMB) issued a Bulletin for Agency Good Guidance Practices in 2007, directing agencies to go through a public comment process before issuing "significant" guidance documents. *See* Guidance Practices Bulletin, 72 Fed. Reg. 3432, 3433 (Jan. 25, 2007).

41. *Id.* at 3437.

review, and, more generally, to ensure a relatively participatory and accountable form of regulatory governance."[42]

2. Disincentivizing the Rule of Law

At the same time, there is an important countervailing consideration: If agencies must use notice-and-comment proceedings before they issue fixed and clear policy statements, they will have a strong incentive to issue fewer fixed and clear policy statements. Instead they will be encouraged to do one of two things: (1) maintain silence and hence fail to disclose relevant information to the public, perhaps by adopting enforcement practices that are never disclosed, or (2) issue a fuzzy policy statement, full of vagueness and qualifications. To the extent that the practically binding test creates this incentive effect (and it does), it is highly undesirable. Members of the public greatly benefit from clear policy statements, because they enable it to know what the agency intends to do.[43]

Ironically, the practically binding test works against the rule of law, by moving agencies away from firm, hard-edged rules in the direction of tentative, open-ended standards, which need not, under the practically binding test, be subject to the notice-and-comment process. It might be thought that this incentive effect is a devastating argument against the view that agencies should be required to use notice-and-comment procedures for practically binding policies.[44] On this view, the practically binding test is a case study in unintended adverse consequences, or a testimony to judicial cluelessness about the systemic effects of one-shot rulings on the administrative process. There can be no question that the practically binding test does impose an incentive to avoid clear rules in favor of open-ended standards.

C. The Relevant Tradeoff

But it is important to be careful before accepting arguments of this kind. We might even deem them a reflection of the first fallacy of the economic

42. *See* Franklin, *supra* note 15, at 324.

43. Cement Kiln Recycling Coal. v. EPA, 493 F.3d 207, 227 (D.C. Cir. 2007) (highlighting provisions in the EPA's guidance document as "recommendations," rather than legally binding requirements).

44. *See* Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE 323 (4th ed. 2002) ("The 'practically binding' test is far too broad. Agencies should apply policy statements as 'controlling in the field.' . . . As long as the agency itself has retained the discretion to depart from a policy statement, it does not establish a 'binding norm' . . . . The courts should apply consistently the legally binding test . . . .").

analysis of law: the identification of an unfortunate incentive effect (no fallacy at all), followed by an immediate declaration of victory (the fallacy, because we do not know the size of the effect or how it compares with the desirable ones). In fact, we might give this fallacy a particular name, the Sign Fallacy, which is committed whenever analysts focus on the direction of an effect but not its magnitude.[45]

Here, as elsewhere, the magnitude of the effect greatly matters, because we need to know what it is in order to have a handle on the value of the total loss that the unfortunate incentive effect produces. Optimists might speculate that as an empirical matter, the loss is small, because the principal consequence of the practically binding test is highly desirable: not to produce vagueness or silence, but to ensure that agencies use notice-and-comment procedures whenever they want their policy statements to be clear and firm. But pessimists might worry that the principal consequence of the test is indeed to incline agencies to be vague or silent and to fail to inform the public about the principles that orient their actions.

For what it is worth, my own experience[46] is that agencies are well aware of the practically binding test and that the test does incline them in the direction of making fuzzy rather than firm policy statements. At the very least, the process of interagency consultation, overseen by the Office of Information and Regulatory Affairs, will flag the possibility that a purported guidance document might be struck down in court if it is fixed and firm—and a plausible response to the perceived "litigation risk" is to make the document more fuzzy. That concern arises frequently, and the response is frequent as well. The conclusion is that those who worry about the incentive effects of the practically binding test are on firm ground.

In pragmatic terms, then, the question is whether the benefits of requiring public comments outweigh the costs of producing fewer firm policy statements. It is tempting to think that (1) the costs of firm, but mistaken, policy statements are extremely high, because such statements have large effects on what agencies or regulated entities do; (2) public comments provide a crucial safeguard against the relevant mistakes; and (3) little is lost if the cost of providing that safeguard is to incline agencies to speak in fuzzier terms. In that view, (1) and (2) outweigh (3). But it is also possible to speculate that (1) the benefits of having public comments on firm policy statements are not especially high and (2) the public loses a great deal

45. *See* Cass R. Sunstein and Adrian Vermeule, *The Unbearable Rightness of Auer*, U. CHI. L. REV. (forthcoming 2016).

46. I served as Administrator of the Office of Information and Regulatory Affairs from 2009 to 2012.

if such comments are required because people will often see, instead, fuzzy policy statements or (worse) no policy statements at all. On that view, (2) outweighs (1).

The problem with these competing views is that they depend on empirical conjectures on which we lack good evidence. My own judgment is that the benefits of public comment are indeed quite high, and those benefits count as a strong reason for having a comment period whenever agency action is fixed and firm (and even when it is not). If the consequence of a comment period is sometimes to move an agency in the direction of more fuzziness, then the price is not too high to pay. The public does not lose a great deal if an agency declines to say that "it will do x" and says instead that it "will exercise case-by-case discretion in deciding whether to do x," so long as the agency's basic plan is not unclear. Indeed, there are advantages to a more qualified announcement. If the agency has not heard public comments, perhaps it has not earned the right to speak in terms of firm rules rather than standards.

The appropriate conclusion, then, is that a careful empirical investigation would be necessary to answer the tradeoff question.[47] For obvious reasons, that investigation is also extremely difficult to undertake; we do not have randomized controlled trials here.[48] At the same time, the balance of considerations is plausibly taken to argue in favor of obtaining public comments on general policy statements, at least when they involve important matters and are indeed fixed and firm. The Office of Management and Budget's guidance to that effect is therefore quite reasonable,[49] and a statutory change, generally requiring significant policy statements to be preceded by a period for public comment, would probably be a good idea.

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47. On one view, the tradeoff is one for agencies to make; they are in the best position to decide whether public comments are desirable, and so long as legislative rules are not involved, the decision should be made in their informed discretion. But it is reasonable to think that agencies cannot always be trusted to make that tradeoff properly, especially when the press of time, or political considerations, lead them to undervalue the likely epistemic advantages of receiving public comments.

48. In principle, of course, it would be possible to explore before-and-after pictures, examining the relationship between proposed rules and final rules. A careful exploration would be extremely valuable and there is an important research agenda here—even if it would not be easy to say that comments are always causally responsible for changes from proposed rules to final rules. (Perhaps agencies would have changed from their proposals on their own.) But it would be more difficult to study the incentive effects of requiring agencies to use notice-and-comment procedures for policy statements or guidance documents.

49. *See* OMB, *supra* note 40, at 3437 (requiring agencies to seek public comments on significant guidance documents).

IV. LAW

So much for pragmatic issues. What about the law? It is reasonable to worry that the development of the practically binding test is a form of judge-made common law, in patent violation of *Vermont Yankee*.[50] In the central passage of its opinion in that case, the Court declared that the APA "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures."[51] It added that there was "little doubt that Congress intended that the discretion of agencies and not that of the courts be exercised in determining when extra procedural devices should be employed."[52] Those words could be written with specific reference to the lower courts' adoption of the practically binding test. Indeed, they seem designed for that very purpose.

A. The (Incomplete) Vermont Yankee-ization of Administrative Law

In recent years, many commentators have argued that lower courts, and in particular the DC Circuit, have repeatedly defied *Vermont Yankee*, imposing procedural requirements that go well beyond the mandates of the APA.[53] They have called for a kind of *Vermont Yankee II*, underlining the conclusion that judge-made common law is not a legitimate part of federal administrative law. In *Mortgage Bankers Ass'n*,[54] the Court unanimously delivered that long-awaited *Vermont Yankee II*. At least this is so if we understand the term to refer to an invocation of *Vermont Yankee* to forbid the imposition of a procedural requirement that goes beyond the APA.

In *Mortgage Bankers Ass'n*, the Court invalidated a longstanding (and quite important) doctrine from the DC Circuit, requiring agencies to go through notice-and-comment rulemaking when they alter an interpretive rule.[55] The doctrine has considerable appeal as a matter of policy; people might

50. Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, 435 U.S. 519 (1978).

51. *Id.* at 524.

52. *Id.* at 546.

53. Richard J. Pierce, Jr., *Waiting for* Vermont Yankee III, IV, *and* V*? A Response to Beermann and Lawson*, 75 GEO. WASH. L. REV. 902, 917 (2007); Jack M. Beermann & Gary Lawson, *Reprocessing* Vermont Yankee, 75 GEO. WASH. L. REV. 856, 858 (2007); Richard J. Pierce, Jr., *Waiting for* Vermont Yankee II, 57 ADMIN. L. REV. 669, 683 (2005); Paul R. Verkuil, *Judicial Review of Informal Rulemaking: Waiting for* Vermont Yankee II, 55 TULANE L. REV. 418, 418 (1981).

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

55. *Id.* at 1209–10.

rely on an interpretive rule, even if it lacks the force of law, and a change in such a rule could disappoint reasonable expectations and might well benefit from a comment period. At the same time, the doctrine plainly lacks support in the APA. In a paragraph that borrowed directly from the key passage in *Vermont Yankee*, the Court said that imposing the obligation to go through notice-and-comment "is the responsibility of Congress or the administrative agencies, not the courts."[56]

1. A Simple Enough Conclusion

The doctrine repudiated in *Mortgage Bankers Ass'n* can easily be seen as a member of the same family as the practically binding test. Indeed, it is a fraternal twin insofar as the two require the use of notice-and-comment procedures when the APA does no such thing. Is that not a defining violation of *Vermont Yankee*?

There is a strong argument that it is. As we have seen, general policy statements are expressly exempted from notice-and-comment requirements.[57] To be sure, the APA does not explicitly define "general policy statements." Some help can be found in the influential 1947 Attorney General's Manual on the Administrative Procedure Act, which states that legislative rules are "issued by an agency pursuant to statutory authority and . . . implement the statute," whereas general statements of policy "advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power."[58] The natural reading is that even when what they issue is practically binding, agencies are producing general statements of policy under the stated definition; for example, the immigration policy with which I began clearly advises "the public prospectively of the manner in which the agency proposes to exercise a discretionary power."[59]

It is true that by themselves, the APA and the Attorney General's Manual do not entirely eliminate the ambiguity. Perhaps a purported policy is no such thing if it is practically binding. On one view, the word "policy" is the key, and a "policy" counts as such only if it is tentative; if it is not, it is no mere "policy." This argument might be fortified by the use of the word "general," which can be taken to suggest an unfixed quality. At

56. *Id.* at 1207.

57. 5 U.S.C. § 553 (2012).

58. TOM C. CLARK, DOJ, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947).

59. *See* Memorandum, U.S. Dep't of Homeland Sec., *supra* note 1, at 5.

least in the abstract, it would not be a self-evident textual blunder to contend that a "general policy" cannot qualify as such if it is practically binding, and that if it is, it must be subject to the notice-and-comment process.[60]

But on the text as understood by the Attorney General's Manual, there is a powerful counterargument. In a nutshell, it is that even if a policy is fixed and firm, it falls, as a matter of ordinary meaning, within the category of advice to the public about "the manner in which the agency proposes to exercise a discretionary power."[61] Firm advice about how an agency proposes to exercise a discretionary policy is nonetheless "advice." Importantly, the Attorney General's Manual makes no distinction between vague advice and advice that is fixed and firm. Even if the agency uses words like "will" and "shall," it has nonetheless issued a statement about the agency's proposed exercise of discretionary power.

It is obvious that the Attorney General's Manual is not the APA itself, and in the face of conflict, the latter must prevail. But in the face of arguable textual ambiguity, the Attorney General's Manual should be given weight. In any case, the leading decision by the Supreme Court, widely ignored in the lower courts, has fully embraced the Attorney General's Manual on this point and repudiates the practically binding test. It is difficult to take *Lincoln v. Vigil*[62] as anything other than an endorsement of the force-of-law test instead.

In that case, the Court said that "§ 553(b)(A) also exempts 'general statements of policy,' which we have previously described as 'statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.'"[63] In *Lincoln* itself, the Indian Health Service had announced that it was discontinuing direct clinical services under the Indian Children's Program in order to establish a nationwide treatment program.[64] That announcement was fixed and firm; it was practically binding. Nonetheless, the Court held that the announcement was exempt from the notice-and-comment requirements of the APA: "Whatever else may be considered a 'general statemen[t] of policy,' the term surely includes an announcement like the one before us,

60. *See* Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 952 (D.C. Cir. 1987) (Starr, J., dissenting) (arguing that a general statement of policy is a lower form of pronouncement and thus not a legislative rule).

61. *See* CLARK, *supra* note 58.

62. 508 U.S. 182 (1993).

63. *Id.* at 197.

64. *Id.* at 184.

that an agency will discontinue a discretionary allocation of unrestricted funds from a lump-sum appropriation."[65] For present purposes, the key point is that *there was nothing tentative and vague about the announcement*. Though it was practically binding, the Court ruled that it was not subject to the notice-and-comment requirements of the APA.

To be sure, distinctions are imaginable. Perhaps an agency's announcement about its own appropriations should be treated as policy statements; perhaps such an announcement is sui generis, and not the same as the kinds of practically binding documents for which courts have required notice-and-comment rulemaking. But on reflection, that distinction does seem fragile, a conclusion rather than an argument, a kind of lawyer's trick; why is a practically binding statement about an appropriation sui generis? In terms of its effects, it is hardly less important, and hardly less conclusive, than other practically binding documents. In any case, the best understanding of the APA, taken in its context and in light of the Attorney General's Manual, is that a general policy statement can be either tentative or fixed; its defining feature is that it lacks the force of law.

The most reasonable conclusion is that under the APA, the defining characteristic of a general policy statement is that it does not have that kind of force.[66] What this means is that those who violate it will not face sanctions.[67] A legislative rule, by contrast, *subjects violators to some kind of legal consequence*, which might be imposed in an enforcement proceeding.[68] If an agency has issued a statement that does not have the force of law, but that is fixed and firm merely as a practical matter, the APA simply does not require it to use notice-and-comment. That interpretation is clean and straightforward. It sharply separates a mere policy statement from a legislative rule.

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65. *Id.* at 197.

66. *See* Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 952 (D.C. Cir. 1987) (Starr, J., dissenting) (noting that policy statements lack force of law, and therefore are lower forms of law).

67. *Cf.* Thomas Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 472–74 (2002). The complexities explored by Merrill and Watts are important, but they do not bear on the general conclusion here, which is that the practically binding test is an unjustified interpretation of the APA.

68. *Id.* at 471.

2. *Vermont Yankee and its Discontents*

a. *Doctrinal puzzles*

It is true, of course, that *Vermont Yankee* has fallen short of its revolutionary potential, and for legitimate reasons. A significant number of administrative law doctrines lack obvious or full support in the APA. Consider four examples:

1. Modern standing doctrine, with its emphasis on the "arguably within the zone of interests" test, has been largely disconnected from the APA's "legal wrong" test.[69]
2. Contemporary "hard look" review, with its demand for comprehensive and highly specific justifications for agency decisions, is not exactly simple to find in either the APA's requirement of a "concise general statement of basis and purpose"[70] or the "arbitrary and capricious" standard, which seems to require no such justifications.[71]
3. Current doctrine requires agencies to allow for meaningful comments on the technical data or studies on which they rely in formulating proposed rules.[72] The doctrine is longstanding, but Judge Kavanaugh has rightly emphasized that it rests on a "shaky legal foundation (even though it may make sense as a policy matter in some cases)."[73] The problem is that it is hard to connect the doctrine with the requirements of the APA.
4. Courts require final rules to be a "logical outgrowth" of proposed

69. 5 U.S.C. § 702 (2012); *cf.* Ass'n of Data Processing Serv. Org. v. Camp, 397 U.S. 150, 153 (1970) (loosening the standing doctrine from 5 U.S.C. § 702). Note, however, the important discussion in *Lexmark Int'l Inc. v. Static Control*, 134 U.S. 1377 (2014), in which the Court took steps toward correcting the error in *Data Processing*, and restoring a connection with the APA.

70. 5 U.S.C. § 553.

71. *Id.* § 706; *see also* Motor Vehicles Mfrs. Ass'n v. State Farm, 463 U.S. 29, 58 (1983) (exemplifying hard look review). *See generally* Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, (Harvard Pub. Law, Working Paper No. 15-15), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2639644, MICH L. REV. (forthcoming 2016) (discussing whether State Farm is genuinely illustrative).

72. *See* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 392–93 (D.C. Cir. 1973) (discussing the EPA's testing standards and disclosures); *see also* Chamber of Comm. v. SEC, 443 F.3d 890, 899 (D.C. Cir. 2006) (noting that technical studies must be available to the public for evaluation); Conn. Light & Power Co. v. Nuclear Reg. Comm'n, 673 F.2d 525, 530–31 & n.6 (D.C. Cir. 1982) (discussing the proposed comment period).

73. Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 246 (2008) (Kavanaugh, J., concurring in part and dissenting in part).

> rules, a requirement that has no clear connection with the APA, which does not use those words.[74]

Read for all that it is worth, *Vermont Yankee* raises serious questions about every one of these doctrines. At the same time, there is a fair argument that all or most of them are now so entrenched that it is too late in the day to eliminate them. In any case, and perhaps more fundamentally, there is at least a colorable association between each of them and the APA itself.[75]

b. Fundamentals

It is also important to acknowledge that when *Vermont Yankee* was decided, it encountered serious resistance from knowledgeable observers. Most sharply, and with his eye on the development of administrative law in the decades since enactment of the APA, Professor Kenneth Culp Davis, the informal dean of administrative law scholars, described the decision as one of the few occasions on which "a unanimous Supreme Court speaks with little or no authority."[76] In an influential essay, Professor Richard Stewart characterized the decision as myopic and formalistic, and wildly inconsistent with the longstanding path of the law, which had treated the APA (in his view wisely and appropriately) as a foundation for "evolving judge-made law."[77]

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74. *See* Long Island Care at Home v. Coke, 551 U.S. 158, 174 (2007) (discussing logical outgrowth).

75. To take the points in sequence, and very briefly: (1) *See* Lexmark Int'l v. Static Control Components, 134 S. Ct. 1377, 1388–90 (2014) (domesticating the "zone" test by connecting it with the legal wrong test of the APA, and explaining the plausibility of the connection). (2) The logical outgrowth test can reasonably be connected with the APA's requirement that people be given notice of "the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553. While the "terms or substance" or "subjects and issues" test is not the same as the "logical outgrowth" test, the latter can be understood as a specification of the former. *Id.* (3) It is also possible to say that courts cannot tell if agency decisions are "arbitrary" or "capricious" without seeing a detailed explanation, at least on the most significant issues. The latter claim is a bit of a stretch, but it can be seen as an accommodation of the APA framework in light of the unanticipated rise of notice-and-comment rulemaking as the principal vehicle for agency policymaking. (4) For reasons outlined by Judge Kavanaugh, the requirement that agencies allow public comment on the data on which they relied is hardest of all to justify under *Vermont Yankee*, but perhaps it can be connected with the "opportunity to comment" language of 5 U.S.C. § 553 (a stretch again, to be sure). *See generally* Vermont Yankee Power Corp. v. Nat. Res. Def. Council, 435 U.S. 519 (1978).

76. Kenneth Culp Davis, *Administrative Common Law and the* Vermont Yankee *Opinion*, 1980 UTAH L. REV. 3, 17 (1980).

77. Richard Stewart, Vermont Yankee *and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805, 1815 (1978).

More strikingly, then-Professor Antonin Scalia lamented the decision, insisting that changed circumstances, including the unanticipated rise of notice-and-comment rulemaking as the principal vehicle for agency decisionmaking, meant that the *Vermont Yankee* Court was undermining, rather than enforcing, the original legislative compromise in the APA. In his most telling words, Scalia wrote, "the opening passage of the opinion ('In 1946, Congress enacted the Administrative Procedure Act'), redolent of the opening passage of the Gospel of St. John ('In the beginning was the Word'), characterizes an approach that attributes to the APA a fundamentality which, it seems to me, the statute can no longer bear."[78] More particularly, he explained that "When the legislative mandate leaves to the agencies . . . broad freedom to alter the underlying realities of administrative practice, then strict adherence to the statute will permit a distortion, rather than enforce an observance, of the original legislative compromise."[79]

Put in its most positive light, the Davis–Stewart–Scalia view[80] is that both administrative behavior and judicial developments have ensured that major policymaking can and does occur through notice-and-comment rulemaking, rather than through formal adjudication, as the APA drafters expected.[81] In these circumstances, the judicial developments traced above, including the demand for detailed explanations and the logical outgrowth test, may be taken (in Professor Scalia's words) to reflect an "irreverent approach to the text of the APA" that nonetheless "served to render the nature of agency resolution of particular issues, and the nature of judicial review, closer to what was the expectation in 1946."[82] Whether or not this argument is convincing,[83] it helps to explain a number of contemporary administrative law doctrines, some of which can claim to be based on a far

78. Antonin Scalia, Vermont Yankee*: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUPREME CT. REV. 345, 375 (1978).

79. *Id.* at 382.

80. There are, of course, important differences among the three. *See id.* at 375–82 (not embracing the idea that federal administrative law is largely common law and trying to tether his criticism of *Vermont Yankee* to the goals of the APA); *cf.* Davis *supra* note 76 (endorsing a common law approach); Stewart, *supra* note 77 (vigorously defending the idea that federal administrative law is largely common law). What I mean to emphasize is their shared repudiation of *Vermont Yankee*.

81. *See* Scalia, *supra* note 78.

82. *Id.* at 381.

83. It appears to rest on a controversial form of purposivism, to which committed textualists have their own responses: purposes are made rather than found, and the best way to proceed it to rely on words, not claims about what lies behind words. For that reason, it is not at all clear that Justice Scalia would agree with the views of Professor Scalia.

less "irreverent"[84] approach than those rejected in *Vermont Yankee* and *Mortgage Bankers Ass'n*.

c. Bracketing the Largest Controversies.

It is nonetheless true that taken seriously, *Vermont Yankee* raises continuing challenges for a range of administrative law doctrines, putting the competing positions sketched by Davis, Stewart, Scalia, and the *Vermont Yankee* Court in intriguingly continuing debate. For present purposes, the central point is that as compared with those doctrines, the practically binding test stands on exceptionally weak ground. Its elimination would hardly wreak havoc with the fabric of administrative law, and the Supreme Court has never said a positive word about it, let alone endorsed it. On the contrary, *Lincoln v. Vigil* stands against it. And its connection with the text of the APA is far more fragile than that of other doctrines that the Court has not yet been willing to question. In this respect, it belongs in very much the same category as the principle rejected in *Mortgage Bankers Ass'n*.

3. Cases

Return in this light to the two kinds of cases with which I began. If an agency states that it will *not* initiate proceedings in certain situations, and thus has adopted a policy in favor of leniency, it has not imposed a risk of legal consequences on anyone. It has simply stated its general policy. If, by contrast, an agency states that it *will* undertake action in certain situations, the issue is slightly more complicated—but only slightly. In such cases, the agency has imposed costs and risks on people who know that if they do not act as the agency wishes, something bad might happen to them. But however unwelcome, a risk or threat of that kind does not transform a policy statement into a legislative rule. A policy statement that genuinely announces a policy lacks the force of law; it remains a policy statement even if it contains a highly unpleasant threat.

The most plausible response to this argument would be that the defining characteristic of "general policy statements" is that they are tentative and vague, and in that particular sense "general"—and that once a purported policy statement becomes fixed, it is no longer a policy statement at all. In an instructive discussion,[85] David Franklin captures the set of concerns that seem to underlie the reasoning of the lower courts:

84. *See* Scalia, *supra* note 78, at 381.
85. *See* Franklin, *supra* note 15, at 305.

> The use of nonlegislative rules comes at a serious cost from the standpoint of participation, because it enables agencies to make major policy decisions without observing the formal processes that Congress crafted to facilitate meaningful public input, commentary, and objection. Often these policy decisions in effect command compliance from regulated industries and thus have substantial practical effects on the public, regardless of whether they are framed as mere guidances, interpretations, or tentative policy statements. It would seem inconsistent with both legislative intent and democratic theory to allow agencies to make such decisions without public input whenever they wish.[86]

As a matter of policy, Franklin's argument is hardly unreasonable. But as stated, it is far too broad. Any guidance document can have "substantial practical effects on the public" even if it is not fixed and firm—but it does not, for that reason, have to go through the notice-and-comment processes. A failure to use such processes may or may not be inconsistent with "democratic theory," but agencies are not obliged to act in accordance with any particular understanding of what democratic theory entails.

The real question is what the APA requires. Congress did craft "formal processes" to promote "meaningful public input," but it also crafted an exemption for general policy statements.[87] A policy statement does not become a rule merely because it is fixed and firm. The word "general" does not mean tentative, standard-like, and multi-factored; it means general. A fixed and firm policy statement remains a policy statement.

V. WHAT'S PRACTICALLY BINDING, ANYWAY?

Under the practically binding test as it now stands, many cases are straightforward. If an agency uses words like "shall" and "will," it is at serious risk. If it lists a set of factors, or accompanies its document with well-placed and well-worded disclaimers, it is probably free from the notice-and-comment requirements.[88] At the same time, hard intermediate cases are easy to imagine.

The Obama Administration's immigration reform policy is a prominent

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86. *Id.*

87. *Id.* at 306.

88. Sacora v. Thomas, 628 F.3d 1059, 1069–70 (9th Cir. 2010) (holding that the Bureau of Prisons was not required to use APA notice-and-comment procedure); Catawba Cty. v. EPA, 571 F.3d 20, 33–34 (D.C. Cir. 2009) (denying—with one exception—petition for review of the EPA's designations under the Clean Air Act); Prof'ls & Patients for Customized Care v. Shalala, 56 F.3d 592, 596-601 (5th Cir. 1995) (discussing factors considered by the FDA and the FDA's use of discretion regarding enforcement actions).

example.[89] The memorandum repeatedly uses the words "case-by-case" and explicitly states that it is the foundation for the exercise of discretion on the part of relevant officers. Are those formulations sufficient to avoid the strictures of the practically binding test? On one view, they are not. As the lower court ruled in the case on precisely this question, it is not conclusive if a policy purports "to grant discretion," because "a rule can be binding if it is 'applied by the agency in a way that indicates it is binding.'"[90]

Or suppose that a policy statement is phrased in a way that generally looks fixed and firm—"it commands, it requires, it orders, it dictates"[91]—but that it begins and ends with an unambiguous disclaimer. It might say, for example, that "this document is a mere policy statement, designed to orient the exercise of discretion, and should not be taken as practically binding or fixed and firm," or that "this document is meant as mere guidance, to be used on a discretionary basis by field officers." Do such disclaimers mean that the relevant documents are not practically binding?

Courts have struggled mightily with such questions,[92] and as a matter of doctrine, the answer is not clear. In the context of the Obama Administration's deferred action plan, the court of appeals emphasized the nature of the agency's own practice.[93] It found that applicants who met the specified criteria were given deferred action status in well over 90% of cases, and that when they were not, it was because they made some technical error in their applications.[94] In the court's view, the practice established that the policy was fixed and firm.[95] Perhaps a consistent practice can show that a purported policy statement is no such thing.

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89. *See* Texas v. United States, 809 F.3d 134 (5th Cir. 2015) (demonstrating division within the court), *aff'd by an equally divided court*, 136 S.Ct. 2271 (2016).

90. *Id.* at 173.

91. Appalachian Power Co. v. EPA, 208 F.3d 1015, 1023 (D.C. Cir. 2000).

92. *See, e.g.*, *Texas v. United States*, 809 F.3d at 173; U.S. Tel. Ass'n v. FCC, 28 F.3d 1232 (D.C. Cir. 1994) (holding that the penalty schedule was not a policy statement and should have been available for public comment); STEPHEN BREYER, ADMINISTRATIVE LAW & REGULATORY POLICY (5th ed. 2011) (collecting cases).

93. *Texas v. United States*, 809 F.3d at 171–76 (noting that DAPA would not allow the agency to truly exercise discretion).

94. *Id.* at 172 ("The DACA Memo instructed agencies to review applications on a case-by-case basis and exercise discretion, but the district court found that those statements were 'merely pretext' because only about 5% of the 723,000 applications accepted for evaluation had been denied . . . ."); *see also id.* (adding that the government "could not produce any applications that satisfied all of the criteria but were refused deferred action by an exercise of discretion.").

95. *Id.* at 176–78 (discussing the process of substantive review and value).

But why is that so clear?[96] It is certainly possible that a policy statement remains exactly that even if those who operate under it always, or almost always, choose to exercise their discretion in a specific direction. Suppose, for example, that the EPA issues a policy statement to the effect that permit applications will be assessed on a case-by-case basis, under specified criteria. Suppose that all or almost all applications are approved. The reason might be a selection effect: those who apply meet the criteria, and those who do not meet the criteria do not apply. The fact that 90%, or 99%, of applications are approved does not mean that a case-by-case inquiry is not involved (after all, nearly every law professor has had the experience of grading a large set of examinations, every one of which receives a passing grade under a case-by-case assessment).

At the same time, there is a legitimate argument that if the practically binding test is to be accepted, an agency cannot avoid it merely by slapping on some kind of disclaimer. If a policy statement would otherwise count as a legislative rule, an agency is not allowed to transform it into a policy statement simply by announcing, "this is a policy statement." So long as the practically binding test is the law—and I have argued that it should not be—the question is whether the agency's action is fixed and firm, which requires courts to examine what, in fact, the agency is purporting to do. That question requires investigation of its text, not of practice under its text. For that reason, agencies would be well advised to avoid words like "shall" and "will" in favor of words like "should" and "case-by-case." In my view, the Obama Administration's memorandum on deferred action status does not run afoul of the practically binding test, because it is indeed sufficiently qualified, but there remains room for reasonable disagreement so long as that test continues to govern.

CONCLUSION

I have had two goals in this Essay. The first is to ask whether, as a matter of policy, agencies should be required to seek public comment before issuing documents that are practically binding. The second is to explore whether the practically binding test is a legitimate interpretation of the APA.

In terms of policy, the answer is not clear, because a final judgment

96. *See* Pierce, *supra* note 44, at 323 ("The 'practically binding' test is also extremely difficult to apply. It certainly should not be satisfied by mere proof that agency field personnel always apply the statement or that the agency usually applies the statement. All policy statements should have those effects.").

would require answers to empirical questions on which sufficient information is lacking. While the test increases the likelihood that agencies will benefit from the dispersed information of the public, it also creates an incentive for agencies to speak vaguely or not to issue policy statements at all. There is a reasonable—and in my view convincing—argument that the balance of considerations usually argues in favor of allowing a period for notice-and-comment, certainly for significant guidance documents. But as a matter of law, things are much more straightforward. The practically binding test is an unacceptable departure from any plausible reading of the APA. *Vermont Yankee* rules it out of bounds.