# OUTFOXING ALASKA HUNTERS: HOW ARBITRARY AND CAPRICIOUS REVIEW OF CHANGING REGULATORY INTERPRETATIONS CAN MORE EFFICIENTLY POLICE AGENCY DISCRETION

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The Supreme Court's 2009 decision in FCC v. Fox Television Stations, Inc. undermined the controversial Alaska Hunters doctrine by stating that the Administrative Procedure Act (APA) treats initial and subsequent agency actions in the same way. Applied to rulemaking, Fox would have the APA treat initial regulatory interpretations and subsequent revisions of those interpretations in the same way, in direct conflict with the Alaska Hunters doctrine's requirement of notice and comment for certain revisions.

At the same time that the Supreme Court undermined this restriction on agency discretion, the Court provided a possible replacement: substantive arbitrary and capricious review that can be applied to interpretive rulemaking. Using the arbitrary and capricious review in Fox, which requires (1) an explanation of why the agency changed, (2) a justification of why factors used in the previous interpretation were disregarded, and (3) an analysis on how reliance interests were considered, courts could police agency interpretive discretion by conducting a reasoned analysis of adjustments to regulatory interpretations.

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#### INTRODUCTION

Every so often, an individual can change the course of American history with a speech. Some of history's most revered Americans inspired the country into action through sheer oratory mastery, ushering in historic reforms with mere words. Other times, a speech incites reform a little less directly: "Have you ever tried to get cow s\*\*\* out of a Prada purse? It's not so f\*\*\*ing simple." Nicole Richie's comments at the 2003 Billboard Music Awards started a chain of events ending in the Supreme Court decision in FCC v. Fox Television Stations, Inc.,2 which might finally provide a sufficient framework for analyzing how government agencies can change policy. Sometimes, reform is accidental.

The Administrative Procedure Act<sup>3</sup> (APA) provides the default standards and procedures used by agencies to implement statutes.<sup>4</sup> It

2. 556 U.S. 502 (2009).
3. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

<sup>1.</sup> Billboard Music Awards (FOX television broadcast Dec. 10, 2003).

<sup>4.</sup> See Edward Rubin, It's Time To Make the Administrative Procedure Act Administrative, 89 CORNELL L. REV. 95, 96 n.4 (2003) (providing sources that explain

also establishes judicial review of agency action in order to restrain agency discretion and legitimize an otherwise constitutionally dubious "fourth branch" of government.<sup>5</sup> In reviewing agency action, courts most often use the arbitrary and capricious standard,<sup>6</sup> a standard that courts have interpreted and reinterpreted in often contradictory and confusing ways.<sup>7</sup> This confusion has almost certainly encouraged the litigious nature of the modern administrative state.<sup>8</sup> The confusion has also led to diverging U.S. courts of appeals' interpretations of administrative law doctrines, forcing agencies to choose between uniform administration of statutes and obedience to differing regional judicial doctrines.<sup>9</sup>

Additionally, ossification of rulemaking procedures further obstructs efficient administrative governance. First used by Professor E. Donald Elliott in 1990,<sup>10</sup> "ossification" has become a common topic in the study of administrative law.<sup>11</sup> The theory contends that

the well-known legal evolution toward an administrative state that implements laws through agencies and not the judiciary).

<sup>5.</sup> See Emily Hammond Meazell, Deference and Dialogue in Administrative Law, 111 COLUM. L. REV. 1722, 1727 (2011) (arguing that judicial review keeps the delegation of legislative and executive powers in check).

of legislative and executive powers in check).
6. See 5 U.S.C. § 706 (2006) (setting forth that courts should overturn agency actions meeting this standard).

<sup>7.</sup> See Richard E. Levy & Robert L. Glicksman, Agency-Specific Precedents, 89 Tex. L. Rev. 499, 526–34 (2011) (asserting that there are agency-specific precedents regarding arbitrary and capricious analysis). Compare Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42–43 (1983) (suggesting that arbitrary and capricious review is "evasive," but that the standard requires an articulated and rational decisionmaking process), with Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (holding that arbitrary and capricious review must be "searching" but not a substitute of agency judgment). For example, the Supreme Court has held that it "will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned," Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc., 419 U.S. 281, 286 (1974), but that courts may not provide a reasoned basis for an agency action if the agency did not provide one, SEC v. Chenery Corp., 332 U.S. 194, 196 (1947).

<sup>8.</sup> See Meazell, supra note 5, at 1743–69 (studying "serial cases" that continually cycle from agencies to the courts).

<sup>9.</sup> See Fed. Courts Study Comm., Report of the Federal Courts Study Committee 124–25 (1990) [hereinafter Federal Courts Study], available at http://www.fjc.gov/public/pdf.nsf/lookup/repfcsc.pdf/\$file/repfcsc.pdf (finding that uncertainty in agency treatment of statutes is one of the most "intolerable" consequences of circuit conflicts in general)

consequences of circuit conflicts in general).

10. According to Professor McGarity, Professor Elliot first referred to "ossification" in this context in a 1990 symposium at Duke Law School. See Thomas O. McGarity, Some Thoughts on "Deossifying" the Rulemaking Process, 41 DUKE L.J. 1385, 1385–86 (1992) (citing E. Donald Elliot, Remarks at the Duke University School of Law Symposium: Assessing the Environmental Protection Agency After Twenty Years: Law, Politics, and Economics (Nov. 15, 1990)).

<sup>11.</sup> For a discussion and critique of the trend of ossification, see David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut,* 120 YALE L.J. 276, 284 (2010), which discusses ossification but takes no position on it; McGarity, *supra* note 10, at 1386, which states that rulemaking requires so many

rulemaking has become increasingly burdensome for agencies due to congressionally-imposed and judicially-fabricated procedures.<sup>12</sup> The term analogizes the incremental increase of bureaucracy to the cell-by-cell growth of bone tissue.<sup>13</sup> Ossifying procedures include impact analyses<sup>14</sup> and substantive requirements for agencies to address all contingencies and comments.<sup>15</sup> Though each procedure and requirement has value by itself, most scholars agree that the general trend is leading towards an excessively bureaucratic system.<sup>16</sup> More costly and timely procedures make rulemaking more inefficient and rigid, encouraging agencies to avoid traditional policy-making strategies, like notice-and-comment rulemaking, and to favor less transparent policy-making tools, such as guidance documents or case-by-case adjudication.<sup>17</sup>

procedures, analyses, and reviews that case-by-case adjudication may be superior; and Richard J. Pierce, Jr., Seven Ways To Deossify Agency Rulemaking, 47 ADMIN. L. REV. 59, 60, 71 (1995), which lays out the problem of ossification and suggests remedies. For rebuttals to the critiques of ossification, see William S. Jordan, III, Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability To Achieve Regulatory Goals Through Informal Rulemaking?, 94 Nw. U. L. REV. 393, 397 (2000), which argues that hard-look review, a commonly cited form of ossification, does not significantly impede agencies; and Mark Seidenfeld, Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review, 70 OHIO ST. L.J. 251, 307 (2009), which contends that judicial review, and ossification in general, may be necessary to limit agency discretion.

<sup>12.</sup> *See* Franklin, *supra* note 11, at 283–84 (holding Congress, the President, and the courts responsible for making the rulemaking process "increasingly cumbersome").

<sup>13.</sup> See AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1247 (5th ed. 2011) (defining ossification as "[t]he natural process of bone formation").

<sup>14.</sup> Various statutes require impact analyses. *E.g.*, Regulatory Flexibility Act § 3(a), 5 U.S.C. §§ 603, 605(b) (2006) (requiring agencies to publish a regulatory flexibility analysis, and convene a panel of small business representatives, where a regulation would have a significant economic impact on a substantial number of small entities); National Environmental Policy Act of 1969 § 102(2)(C), 42 U.S.C. § 4332(2)(C) (mandating an environmental impact analysis report for each regulation affecting the environment); Paperwork Reduction Act of 1995 § 2, 44 U.S.C. § 3506(c)(1) (establishing that the Office of Management and Budget must analyze and approve any rule that would impose an information collection burden on ten or more persons).

<sup>15.</sup> See Rodway v. U.S. Dep't of Agric., 514 F.2d 809, 817 (D.C. Cir. 1975) (holding that the intention of a basis and purpose statement is to respond to comments received and not just to address general policy issues); Auto. Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968) ("[T]he 'concise general statement of . . . basis and purpose' mandated by Section 4 will enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.").

<sup>16.</sup> See sources cited supra notes 10–11 (providing scholarship supporting and criticizing the ossification theory).

17. See H.R. REP. No. 106-1009, at 9 (2000) ("[A]gencies have sometimes

<sup>17.</sup> See H.R. REP. No. 106-1009, at 9 (2000) ("[A]gencies have sometimes improperly used guidance documents as a backdoor way to bypass the statutory notice-and-comment requirements for agency rulemaking . . . ."); Todd D. Rakoff, The Choice Between Formal and Informal Modes of Administrative Regulation, 52 ADMIN. L. REV. 159, 166 (2000) (arguing that agencies avoid ossification by issuing guidance

The Alaska Hunters doctrine<sup>18</sup> is one controversial example of an The doctrine, which the federal courts of ossifying procedure. appeals have not universally adopted, 19 establishes that agencies can alter certain interpretations of regulations only through notice-andcomment procedures.<sup>20</sup> According to the doctrine, if interpretation that is initially published without notice and comment becomes definitive and engenders reliance, an agency may only interpretation through notice-and-comment procedures.<sup>21</sup> The doctrine is in conflict with the APA, which expressly exempts all interpretive rules from notice-and-comment requirements.22

This Comment argues that the Supreme Court overruled the Alaska Hunters doctrine sub silentio in Fox, that the Court provided an analysis that is more consistent with the plain language and Supreme Court interpretations of the APA than the Alaska Hunters doctrine, and that the Fox Court's arbitrary and capricious review is a less burdensome model for policing interpretive agency rulemaking. Part I briefly discusses agency rulemaking and the changing distinction between interpretive and legislative rules; Part I also outlines the current state of the Alaska Hunters doctrine and unravels the interwoven opinions in Fox. Part II asserts that the Supreme Court's decision in Fox overruled the infamous Alaska Hunters doctrine sub silentio by holding that the APA does not distinguish between initial and subsequent agency actions. Part III argues that the arbitrary and capricious review in Fox—requiring an agency to explain why it changed policy, why it disregarded contradicting facts or factors, and how it considered reliance interests—should be applied interpretive rulemaking. Part III continues by arguing that the arbitrary and capricious analysis in Fox is a method for restricting agency interpretive rulemaking authority that is more consistent with

documents). But see Connor N. Raso, Note, Strategic or Sincere? Analyzing Agency Use of Guidance Documents, 119 YALE L.J. 782, 820–23 (2010) (providing an empirical study that suggests that agencies do not use guidance documents to avoid notice-andcomment rulemaking).

<sup>18.</sup> See Jon Connolly, Note, Alaska Hunters and the D.C. Circuit: A Defense of Flexible Interpretive Rulemaking, 101 Colum. L. Rev. 155, 156 (2001) (coining the term "Alaska Hunters doctrine" in reference to the holding in Alaska Prof'l Hunters Ass'n v. FAA, 177 F.3d 1030 (D.C. Cir. 1999), and its progeny).

<sup>19.</sup> See United States v. Magnesium Corp. of Am., 616 F.3d 1129, 1139 (10th Cir. 2010) (recognizing the circuit split); see also FEDERAL COURTS STUDY, supra note 9, at 124–25 (discussing the problems of circuit splits in administrative law). 20. Alaska Hunters, 177 F.3d at 1034.

<sup>21.</sup> Id. at 1034-35; see Ass'n of Am. R.Rs. v. Dep't of Transp., 198 F.3d 944, 950 (D.C. Cir. 1999) (clarifying that reliance interests are necessary to challenge an interpretation using the Alaska Hunters doctrine).

<sup>22. 5</sup> U.S.C. § 553(b) (A) (2006).

Supreme Court case law and the APA, and is more effective at limiting agency discretion than the Alaska Hunters doctrine.

#### I. BACKGROUND

### The APA and Judicial Review of Agency Rules

The APA establishes default standards for judicial review of both the substance and procedure of agency rulemaking.<sup>23</sup> Typically, a court can overturn an agency rule if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or if the process for issuing the rule was invalid.<sup>24</sup> Thus, courts both review the substance of a rule and ensure that the agency used the proper procedure to issue the rule.

Due to the onerous requirements of formal rulemaking, <sup>25</sup> Congress allows most agencies to issue rules through the informal notice-andcomment procedure.<sup>26</sup> Notice-and-comment procedures require agencies to publish notice of a proposed rulemaking in the Federal The public then has a brief opportunity to provide comments either supporting or opposing the proposed rulemaking.<sup>28</sup> Agencies are required to address the comments in the final publication of the rule in the Federal Register.<sup>29</sup>

Section 553(b)(A) explicitly exempts interpretive rules and general statements of policy from notice-and-comment procedures.<sup>30</sup> The language of § 553(b)(A) has led to extensive litigation over what constitutes a legislative or substantive rule—requiring notice and comment—and what constitutes an interpretive rule or general statement of policy—requiring no specified APA procedures at all.<sup>31</sup>

<sup>23.</sup> Id. §§ 551-559.

<sup>24.</sup> Id. § 706; see United States v. Mead Corp., 533 U.S. 218, 227 (2001) (explaining that arbitrary and capricious review and procedural review are the main sources of judicial review outside of the typical jurisdictions of constitutional and

<sup>25.</sup> See 5 U.S.C. §§ 556–557 (requiring hearings comparable to adjudication).
26. See United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 237–38 (1973) (holding that Congress intended formal rulemaking procedures to apply only to rulemakings that are required to be "on the record"); see also Franklin, supra note 11, at 282 (stating that Congress rarely requires rulemakings to be "on the record").

<sup>27. 5</sup> U.S.C. § 553(b).

<sup>28.</sup> Id. § 553(c).

<sup>29.</sup> Id.; see also La. Fed. Land Bank Ass'n v. Farm Credit Admin., 336 F.3d 1075, 1080 (D.C. Cir. 2003) (calling for agencies to respond to comments that, if true, would require a change in the proposed rule).

<sup>30. 5</sup> U.S.C. § 553(b) (A).

See Prof'ls & Patients for Customized Care v. Shalala, 56 F.3d 592, 596-97 (5th Cir. 1995) (arguing that the key inquiry to determining if a rule is legislative is whether it establishes a binding norm); Powderly v. Schweiker, 704 F.2d 1092, 1098 (9th Cir. 1983) (stating that substantive rules affect an existing law or policy while

In theory, a rule is legislative if it creates a new binding norm, and a rule is interpretive if it merely clarifies an already established binding norm in a regulation or statute.<sup>32</sup> In practice, however, agencies can use interpretive rules to change agency policy.<sup>33</sup>

Even when an agency uses proper procedure, a court can still overturn agency rules that the court determines to be arbitrary and capricious.<sup>34</sup> Given the dictionary definitions of "arbitrary"<sup>35</sup> and "capricious," one would suspect that agency rules are rarely overturned. Courts, however, have overruled agency rules and orders of all types using a strict form of arbitrary and capricious review known as the hard-look test.<sup>37</sup> Taking a "hard look," courts can

interpretive rules only clarify existing law or regulations); see also William R. Andersen, Informal Agency Advice—Graphing the Critical Analysis, 54 ADMIN. L. REV. 595, 605-09 (2002) (providing an analysis of the differences between interpretive and legislative rules). Interpretive rules and general statements of policy are typically referred to together as "non legislative rules." *See, e.g.*, Franklin, *supra* note 11, at 286 (explaining that the term aims to distinguish interpretive rules and policy statements from legislative rules).

<sup>32.</sup> See Prof'ls & Patients for Customized Care, 56 F.3d at 596-600 (analyzing whether a rule created a binding norm by looking to the language of the rule and the manner in which it was implemented).

<sup>33.</sup> E.g., 40 YEARS OF EXPERIENCE WITH THE FAIR CREDIT REPORTING ACT: AN FTC STAFF REPORT WITH SUMMARY OF INTERPRETATIONS 8-12 (2011) (acknowledging five "significant" adjustments to previous interpretations of the Fair Credit Reporting Act that could be considered policy changes: the Department of Motor Vehicles is no longer considered a "consumer reporting agency," a report from a consumer reporting agency is now a "consumer report" even if it is used for commercial purposes, the analytical "joint user" concept is no longer endorsed by the FTC, anonymous consumer information that can be linked to consumers are now consumer reports, and consumer reporting agencies may disclose a P.O. box instead of an office address); see also Jacob E. Gersen, Legislative Rules Revisited, 74 U. CHI. L. REV. 1705, 1711–12 & nn.42–45 (2007) (citing to scholarship indicating that some interpretations can be binding insofar as the interpretation is of a binding rule).

<sup>34. 5</sup> U.S.C. § 706(2) (A).
35. See American Heritage Dictionary of the English Language, supra note 13, at 91 ("Determined by chance, whim, or impulse, and not by necessity, reason, or principle.").

<sup>36.</sup> See id. at 277 ("Characterized by, arising from, or subject to caprice; impulsive and unpredictable.")

<sup>37.</sup> See Marsh v. Or. Natural Res. Council, 490 U.S. 360, 374–78 (1989) (applying the hard look test to the Court's arbitrary and capricious review of agency action under the National Environmental Policy Act (NEPA)); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (using a strict form of review, although not using the phrase "hard look"). The Supreme Court never actually used the term "hard look" in *State Farm*, but commentators have suggested that *State Farm* and capacitate of the description. See a preserve S. Lypping A. Charge To Experiment Acquired. endorsed the doctrine. *See, e.g.*, Jeffrey S. Lubbers, A Guide To Federal Agency Rulemaking 481 (5th ed. 2012) (reporting that the Supreme Court has never used the phrase outside of NEPA cases). Before *Marsh* and *State Farm*, "hard look" referred to how hard an agency must look when making policy, not how hard the court looks in determining whether the agency acted arbitrarily or capriciously. See Thomas O. McGarity, The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld, 75 Tex. L. Rev. 525, 527–30 (1997) (providing a historical overview of the judiciary's application of the hard-look test to explain the court's role in migrating the hard-look test from applying to the agency to applying to the court).

reverse agency actions, including rules, if (1) an agency relied on facts that Congress did not intend for the agency to consider, (2) an agency failed to consider important aspects of the issue, (3) evidence raised before the agency contradicts the agency's explanation for its decision, or (4) the explanation is so implausible that it cannot be ascribed to a difference of perspective.<sup>38</sup>

In Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,<sup>39</sup> the Court concluded that a court may not impose procedures on an agency unless specifically required in the APA or other governing statutes.<sup>40</sup> This doctrine has limited judicial review of rulemaking—other than statutory and constitutional review—to substantive arbitrary and capricious review, and review of procedures that the APA mandates, namely, notice and comment.<sup>41</sup>

# B. Binding Legislative Rules, Interpretive Rules, and the Deference Granted to Agencies

Courts have struggled with the distinction between legislative and interpretive rules for decades, but courts and commentators generally agree that a rule is legislative and must be issued through notice and comment if it is "binding" or has independent legal effect. Executly, courts have characterized the distinction between legislative and interpretive rules as whether a rule establishes new law or is properly interpretive. However, this characterization is only a rearticulation of the inquiry of whether a rule is independently binding. A legislative rule is still defined as a rule that establishes "binding" norms and a rule interpreting its underlying regulation

<sup>38.</sup> State Farm, 463 U.S. at 43.

<sup>39. 435</sup> U.S. 519 (1978).

<sup>40.</sup> Id. at 545-48.

<sup>41.</sup> See Mark Seidenfeld, Substituting Substantive for Procedural Review of Guidance Documents, 90 Tex. L. Rev. 331, 344–45 (2011) (stating that the current legal landscape focuses on what constitutes a legislative rule that is subject to notice and comment and arguing that substantive review should be the focus).

comment and arguing that substantive review should be the focus).

42. See Warder v. Shalala, 149 F.3d 73, 82 (1st Cir. 1998) ("[A] rule with the force and effect of law—binding not only the agency and regulated parties, but also the courts—is by definition a substantive rule."); see also sources cited supra note 31 (providing cases and articles that focus on the "binding" nature of a rule in determining whether it is legislative or interpretive).

determining whether it is legislative or interpretive).

43. See Sprint Corp. v. FCC, 315 F.3d 369, 374 (D.C. Cir. 2003) (specifying that a clarification of a definition capturing the original intent of the rule is an interpretive rule); Hoctor v. U.S. Dep't of Agric., 82 F.3d 165, 169–70 (7th Cir. 1996) (holding that a regulatory interpretation that is not sufficiently interpretive, in that it independently establishes new law, is not a valid interpretive rule).

would not be independently binding.44 Thus, the difficulty still lies in determining which rules are independently binding.<sup>45</sup>

The definitional confusion over interpretive and legislative rules has been encouraged by the Supreme Court's lack of guidance in the matter. For example, in Shalala v. Guernsey Memorial Hospital, 46 the Court held that an interpretive rule is invalid if it is inconsistent with the legislative rule it interprets, limiting its guidance on validity of interpretive rules to the most blatant circumstance—where a regulation and its interpretation conflict.<sup>47</sup>

Additionally, in the related context of judicial deference to agency interpretations, the Court recently began linking the deference granted with the procedure used to issue an interpretation. In *United* States v. Mead Corp. 48 and Christensen v. Harris County, 49 the Court ruled that courts should typically grant *Skidmore* deference<sup>50</sup> to rules that are not issued through notice and comment.<sup>51</sup> Skidmore deference requires that courts grant a small amount of deference to agency interpretations, proportionate to the interpretation's power to persuade, because of agency expertise. 52 Compared to the deference established in Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc.,53 which requires deference to reasonable agency interpretations when a statute is ambiguous,<sup>54</sup> Skidmore is a less deferential standard.<sup>55</sup> By establishing that courts only grant Skidmore deference, and not

<sup>44.</sup> See Hoctor, 82 F.3d at 169-70 (stating that an interpretive rule is only binding where the binding element is derived from a process that is "reasonably described as

interpretation"). 45. See Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993) (declaring that an interpretive rule has "legal effect," a synonym for binding effect, if in the absence of the interpretation there would be no basis for enforcing the legislative rule in accordance with that interpretation). 46. 514 U.S. 87 (1995).

<sup>47.</sup> Id. at 100.

<sup>48. 533</sup> U.S. 218 (2001).

<sup>49. 529</sup> U.S. 576 (2000).

<sup>50.</sup> See Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

<sup>51.</sup> See Mead, 533 U.S. at 227–29 (ruling that tariff classifications were entitled to Skidmore deference); Christensen, 529 U.S. at 587 (holding that interpretations that do not have the force of law, and that were not issued through formal adjudication or notice and comment, do not warrant Chevron deference).

<sup>52.</sup> Skidmore, 323 U.S. at 140.

<sup>53. 467</sup> U.S. 837 (1984).

<sup>54.</sup> See id. at 842-43 (establishing that a court will look first to the plain language of a statute, and if ambiguous, will then give deference to an agency interpretation).

55. See generally Jim Rossi, Respecting Deference: Conceptualizing Skidmore Within the

Architecture of Chevron, 42 WM. & MARY L. REV. 1105 (2001) (analyzing the "weak" Skidmore deference and the stronger Chevron deference).

Chevron deference, to rules not issued through notice and comment, the Court began a trend of choosing the degree of deference based on the procedure the agency used to pass the rule.<sup>56</sup> The court determines how much deference to grant to a rule by looking to the procedure the agency used to issue the rule, and a court is less deferential to an agency's rule that is issued without notice and comment than to a rule that is issued through notice and comment.<sup>57</sup>

The Supreme Court expounded on this doctrine in Barnhart v. Walton. 58 In Walton, the Court stated that courts should rely heavily on the methods of interpretation that the agency employs and the substance of the question under consideration when determining whether to give *Chevron* deference.<sup>59</sup> The Court essentially stated that Skidmore deference is not granted per se to rules issued without notice and comment, and that *Chevron* deference could be applied to interpretive rules issued without notice and comment where the agency thoroughly analyzed the issue.<sup>60</sup>

Walton could lead one to believe that courts have begun adopting the approach of linking whether a rule is binding, and thus legislative, to procedure.<sup>61</sup> For years, scholars have been proposing this approach, arguing that instead of determining whether a rule is legislative based on whether it is binding, a rule should simply be legislative and binding if it was issued through notice and comment, and interpretive but not binding if issued without notice and comment. 62 The Walton Court's movement towards using procedure

<sup>56.</sup> See Mead, 533 U.S. at 227-29 (conditioning the deference owed in part on the procedure the agency used).

<sup>57.</sup> See id. (looking to whether a rule was issued through notice and comment to determine the appropriate degree of deference, and finding that the customs rule at issue failed to qualify for *Chevron* deference because Congress had not delegated authority to the Agency to make rules carrying the force of law); Christensen v. Harris County, 529 U.S. 576, 587 (2000) (basing the deference determination on the time and effort spent during the rulemaking procedure and concluding that an interpretation contained in an opinion letter warranted Skidmore deference, but not Chevron deference)

<sup>58. 535</sup> U.S. 212 (2002).

<sup>59.</sup> Id. at 222.

<sup>60.</sup> See id. (holding that Chevron deference should be granted to an interpretative rule because of the presence of a statutory gap, the importance of the issue, the expertise of the agency, the complexity of the issue, and the careful consideration that the agency gave the question).

<sup>61.</sup> It is a general consensus among legal scholars that the courts have not adopted this new approach. *E.g.*, Franklin, *supra* note 11, at 279. This Comment contends that the Supreme Court has been taking steps toward adopting the approach, and may already be applying it without fully explaining why. At least one scholar agrees. *See* Gersen, *supra* note 33, at 1720–21 (arguing that *Mead* implicitly embraced this approach).
62. See, e.g., E. Donald Elliott, Re-Inventing Rulemaking, 41 DUKE L.J. 1490, 1490–91

<sup>(1992) (</sup>introducing the concept of linking a rule's binding effect on the court to the

to determine deference bears a striking resemblance to the scholarly proposal of using procedure to determine binding effect.

Professor David Franklin has criticized the approach of tying procedure to binding effect, referring to it as the "short cut." The short cut focuses more on the legal effect of an agency's rule in court than the legal effect of a rule on the public.<sup>64</sup> The obvious pitfall to the short cut is that agencies can label a rule interpretive and circumvent notice and comment, while enforcing the interpretation on the public as if it were binding.<sup>65</sup> The public could always appeal the application of a particular interpretation in court at a later date, but appeals of interpretations are rare and costly.<sup>66</sup> Proponents of the short cut argue that it will require all rules to undergo scrutiny, either during the notice-and-comment process or upon appeal.<sup>67</sup>

In Long Island Care at Home, Ltd. v. Coke,68 the Supreme Court moved towards adopting the short cut. The Court addressed whether a regulation the agency labeled "interpretive" should be considered legally binding in court.<sup>69</sup> The Court concluded that because the "interpretation" affected individual rights and obligations, and because the agency issued it using notice-and-comment procedures, it should be considered binding in court.<sup>70</sup> By concluding that regulations issued through notice and comment are more likely to be binding in court, the Court moved closer to adopting the short cut.

Further confusion arises out of the continued use of the deference established in Auer v. Robbins<sup>71</sup> after Mead.<sup>72</sup> Auer deference—given to

procedure used to issue the rule); Gersen, *supra* note 33, at 1719 (re-exploring the theory that rules should only be binding if issued using notice and comment through the lens of *Hoctor*).

<sup>63.</sup> Franklin, *supra* note 11, at 279. 64. *See* Seidenfeld, *supra* note 41, at 354–56 (calling this approach "ex post

<sup>65.</sup> See Franklin, supra note 11, at 308-12 (espousing the hazards of the short

<sup>66.</sup> See id. at 310 (explaining that "[d]octrines such as standing, finality, ripeness, and nonreviewability of agency inaction combine to make it very difficult to obtain judicial review of . . . agency pronouncements").

<sup>67.</sup> See Elliott, supra note 62, at 1491 (arguing that the traditional and short-cut approaches have roughly equal opportunities for public scrutiny).

<sup>68. 551</sup> U.S. 158 (2007). 69. *Id.* at 171–72.

<sup>70.</sup> Id. at 172-74.

<sup>71. 519</sup> U.S. 452 (1997). In *Auer*, sergeants and a lieutenant in the St. Louis Police Department challenged the application of the Department of Labor's regulation establishing a "salary-basis test," which indicates that an employee is exempt from overtime pay protections in the Fair Labor Standards Act if the employee receives pay on a salary basis. *Id.* at 455. The Secretary of Labor submitted an amicus brief interpreting its "salary-basis test" as applying to the employees in question. Id. at 461-62. The Court followed the interpretation of the Department of Labor's regulation in the Secretary's brief, and in the process granted the

agencies' interpretations of their own rules—is the strongest deference that courts grant to agencies. Auer deference deems an agency's interpretation of its regulations to be "controlling unless plainly erroneous or inconsistent with the regulation." Application of this degree of deference seemingly contradicts Mead, which held that courts typically grant the lesser Skidmore deference to rules that are not issued through notice and comment. The Supreme Court reconciled Mead and Auer in Gonzales v. Oregon, Granting Skidmore deference to the regulatory interpretation in that case. The Court distinguished Auer from Gonzales because the interpreted regulation in Auer "gave specificity to a statutory scheme," while the regulation in Gonzales was nearly identical to the statute. Thus, the Court grants a high degree of deference to interpretations of specific regulations, and less deference to interpretations of vague regulations or regulations that merely repeat the statute.

By making courts' deference dependent on the procedure that agencies utilize in issuing the interpretation, courts have begun to assign legal effect based on procedure. Assigning legal effect based on procedure may overlap with determining whether a rule is legislative because deference level and binding legal force are similar.<sup>80</sup>

interpretation significant deference because it was not "clearly erroneous or inconsistent with the regulation."  $\mathit{Id}$ .

<sup>72.</sup> E.g., Gonzales v. Oregon, 546 U.S. 243, 256 (2006) (recognizing Auer deference after Mead).

<sup>73.</sup> See William N. Eskridge, Jr. & Lauren E. Baer, The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan, 96 GEO. L.J. 1083, 1142 tbl.15 (2008) (presenting a study indicating that courts uphold an interpretation under Auer deference 91% of the time, while only upholding agency action around 70% of the time under all other levels of deference).

<sup>74.</sup> Auer, 519 U.S. at 461 (internal quotation marks omitted). 75. United States v. Mead Corp., 533 U.S. 218, 227–29 (2001).

<sup>76. 546</sup> U.S. 243 (2006).

<sup>77.</sup> See id. at 255–57 (specifying that Auer deference is granted to interpretations of legislative rules promulgated under congressional authority to issue rules "carrying the force of law," while all other interpretations receive Skidmore deference).

the force of law," while all other interpretations receive *Skidmore* deference).

78. *See id.* at 256–57. The statute in question, the Controlled Substances Act, allowed prescription drugs for "currently accepted medical use," requiring a "valid prescription" that is issued for a "legitimate medical purpose." *Id.*; *see* 21 U.S.C. §§ 812(b), 829(c), 830(b)(3)(A)(ii) (2006). The regulatory language being interpreted included similar phrasing: "legitimate medical purpose" and "course of professional practice." 21 C.F.R. § 1306.04(a) (2011).

<sup>79.</sup> Compare Gonzales, 546 U.S. at 256–58 (providing weaker Skidmore deference to the interpretation because the underlying regulation merely restated the terms of the statute itself), with Auer, 519 U.S. at 461 (providing stronger Auer deference to the interpretation because the underlying regulation instituted a "salary-basis test" the Court considered a "creature of the Secretary's own regulations," implementing the underlying Fair Labor Standards Act).

<sup>80.</sup> Courts have even articulated degree of deference as whether an interpretation is binding on the court. See Long Island Care at Home, Ltd. v. Coke,

## C. Procedural Ossification Under the Alaska Hunters Doctrine

While the Supreme Court was blurring the line between deference and the binding nature of agency rules, the U.S. Court of Appeals for the District of Columbia Circuit was imposing additional procedural requirements on agency rulemaking. Since Vermont Yankee, procedural ossification of agency rulemaking has taken the form of requiring notice and comment where the APA does not explicitly require it by narrowly defining an exception<sup>81</sup> or imposing additional requirements in the notice-and-comment process. 82 One of the most controversial of these judicial constructions is the Alaska Hunters doctrine.83

In Paralyzed Veterans of America v. D.C. Arena L.P.84 and Alaska Professional Hunters Ass'n v. FAA,85 the D.C. Circuit held that an agency can only adjust certain interpretive rules of regulations after notice and comment.86 Citing dicta in Paralyzed Veterans,87 the court in

<sup>551</sup> U.S. 158, 172-74 (2007) (using the fact that the interpretation was issued through notice and comment as a factor in determining if it was binding in court); Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 238–39 (2004) ("[I]n determining whether Regulation Z's interpretation of TILA's text is binding on the courts, [the Court uses Chevron deference]." (emphasis added)). determinations on whether an interpretation needed to be issued through notice and comment are based on whether the rule is binding on the public; and whether a rule is binding on the public is affected by the level of deference allotted to the interpretation.

<sup>81.</sup> See, e.g., Tunik v. Merit Sys. Prot. Bd., 407 F.3d 1326, 1343–44 (Fed. Cir. 2005) (rejecting the government's argument that the regulation at issue could be exempted from notice and comment under the agency management or personnel exception); Pub. Citizen v. Dep't of State, 276 F.3d 634, 640–41 (D.C. Cir. 2002) (concluding that notice and comment is required where there was a substantive value judgment for a procedural rule); infra notes 85-92 and accompanying text

<sup>(</sup>discussing the Alaska Hunters doctrine).

82. See generally Mark Seidenfeld, A Table of Requirements for Federal Administrative Rulemaking, 27 FLA. ST. U. L. REV. 533, 536–37 (2000) (compiling additional noticeand-comment procedures).

<sup>83.</sup> See Michael Asimow & Robert A. Anthony, A Second Opinion? Inconsistent Interpretive Rules, ADMIN. & REG. L. NEWS, Winter 2000, at 16, 16–17 (arguing that the Alaska Hunters doctrine disrespects the interpretive rule exemption in § 553(b)(A)); William Funk, A Primer on Nonlegislative Rules, 53 ADMIN. L. REV. 1321, 1329–30 (2001) (stating that the Alaska Hunters holding is "difficult to justify"); Richard J. Pierce, Jr., Distinguishing Legislative Rules from Interpretive Rules, 52 ADMIN. L. REV. 547, 566–74 (2000) (asserting that the Alaska Hunters doctrine was a mistake); Peter L. Strauss, Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element, 53 ADMIN. L. REV. 803, 846–47 (2001) (calling the Alaska Hunters doctrine an "unsustainable formality"); Connolly, supra note 18, at 157 (contending that the Alaska Hunters doctrine makes interpretive rulemaking inflexible, thereby deterring agencies from issuing interpretations).

<sup>84. 117</sup> F.3d 579 (D.C. Cir. 1997). 85. 177 F.3d 1030 (D.C. Cir. 1999).

<sup>86.</sup> See id. at 1034 (holding that the Federal Aviation Administration (FAA) could only deviate from the interpretive advice its local officials had given for over thirty years by issuing a rule through notice and comment); Paralyzed Veterans, 117 F.3d at 586 (holding that the Agency's interpretation of its own regulation did not require

Alaska Hunters held that "[w]hen an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment."88

In Alaska Hunters, the D.C. Circuit addressed a case where the Administration (FAA) had Federal Aviation changed interpretation of the applicability of a pilot licensing regulation.<sup>89</sup> Local FAA officials had consistently informed hunting guides in Alaska that they could fly planes into hunting territory without obtaining a pilot license. 90 Years later, after the Alaskan hunting industry had relied on this interpretation, the FAA changed its interpretation without notice and comment, requiring hunting guides to obtain pilot licenses.<sup>91</sup> The D.C. Circuit ruled that the FAA could not change the longstanding and definitive interpretation that hunting guides did not need pilot licenses without issuing a new interpretation through notice and comment, even though the first interpretation was not issued through notice and comment. 92

To substantiate its holding, the D.C. Circuit cited relatively little authority.<sup>93</sup> The court held that changing a definitive interpretation of a regulation is a constructive amendment to the rule itself, which requires notice and comment.<sup>94</sup> The court also focused on the fact that Alaskan hunting operations had relied on local FAA officials' regular advice in deciding to open up businesses in the area, and thus, that advice had become authoritative administrative common law. 95 The court reasoned that its holding was justified by the need to

notice and comment because the interpretation was not sufficiently distinct or additive to the regulation).

<sup>87.</sup> See Paralyzed Veterans, 117 F.3d at 586 ("Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the

regulation itself: through the process of notice and comment rulemaking.").

88. Alaska Hunters, 177 F.3d at 1033–34 (citing Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 94–95 (D.C. Cir. 1997) (quoting *Paralyzed Veterans*, 117 F.3d at 586)).

<sup>89.</sup> *Id.* at 1031–33. 90. *Id.* at 1031–32.

<sup>91.</sup> Id. at 1032.

<sup>92.</sup> Id. at 1034-35. Not only had the first interpretation never been issued through notice and comment, it had never been documented in writing. *Id.* at 1031– 32. The initial interpretation was simply an understanding between local FAA officials and the hunting industry. *Id.* 93. *See id.* at 1033–34 (citing 5 U.S.C. § 551(5) (2006)); *Syncor*, 127 F.3d at 94–95;

Paralyzed Veterans, 117 F.3d at 586.

<sup>94.</sup> Alaska Hunters, 177 F.3d at 1034.

<sup>95.</sup> Id. at 1035.

limit an agency's ability to unfairly change the rules of the game when a company had relied on those rules. $^{96}$ 

The D.C. Circuit has since significantly limited the *Alaska Hunters* doctrine. First, only a party who substantially and justifiably relied upon a previous interpretation can challenge an improperly issued adjustment to a regulatory interpretation.<sup>97</sup> The reliance inquiry looks to whether the agency was bound by the interpretation and whether there was actual reliance.<sup>98</sup> Second, the previous interpretation must be definitive and longstanding.<sup>99</sup> The *Alaska Hunters* doctrine has since been cited with approval in some circuits,<sup>100</sup> while other circuits have rejected<sup>101</sup> or explicitly avoided it.<sup>102</sup>

96. See id. ("Those regulated by an administrative agency are entitled to 'know the rules by which the game will be played." (quoting Oliver Wendell Holmes, Holdsworth's English Law, 25 LAW Q. REV. 412, 414 (1909))).

97. See MetWest Inc. v. Sec'y of Labor, 560 F.3d 506, 511 (D.C. Cir. 2009) (distinguishing the high level of reliance in Alaska Hunters from the low level of reliance in the case at issue); Devon Energy Corp. v. Kempthorne, 551 F.3d 1030, 1040–41 (D.C. Cir. 2008) (holding that reliance on guidance documents was not enough to bind an agency when the guidance documents never had the force of law); Ass'n of Am. R.Rs. v. Dep't of Transp., 198 F.3d 944, 950 (D.C. Cir. 1999) (finding that the plaintiff did not substantially rely on the Agency's initial interpretation and that the Agency had not developed a final policy).

18 meter interpretation and that the Agency had not developed a final policy).

98. See, e.g., Devon Energy, 551 F.3d at 1040–41 (explaining that memoranda issued by low-level officials did not bind the Agency, and thus could not be justifiably relied upon).

99. See Commodity Carriers, Inc. v. Fed. Motor Carrier Safety Admin., 434 F.3d 604, 607 (D.C. Cir. 2006) (stating that an interpretation is not definitive if the agency contradicts the interpretation); Air Transp. Ass'n of Am. v. FAA, 291 F.3d 49, 57–58 (D.C. Cir. 2002) (concluding that a definitive interpretation must be explicit)

(D.C. Cir. 2002) (concluding that a definitive interpretation must be explicit).

100. See SBC Inc. v. FCC, 414 F.3d 486, 498 (3d Cir. 2005) (adopting Paralyzed Veterans outright); Dismas Charities, Inc. v. U.S. Dep't of Justice, 401 F.3d 666, 682 (6th Cir. 2005) (supporting the Alaska Hunters doctrine in dicta only); Shell Offshore Inc. v. Babbitt, 238 F.3d 622, 629–30 (5th Cir. 2001) (invalidating an interpretation of a regulation that contradicted a "long established and consistent practice" without notice and comment).

101. See Miller v. Ćal. Speedway Corp., 536 F.3d 1020, 1033 (9th Cir. 2008) (ruling that agencies always have the authority to change regulatory interpretations if both the initial and subsequent rules constitute interpretive rules); Haas v. Peake, 525 F.3d 1168, 1195–96 (Fed. Cir. 2008) (focusing only on whether a rule was interpretive or substantive and not requiring notice and comment for a change to a longstanding policy); see also Warder v. Shalala, 149 F.3d 73, 81–82 (1st Cir. 1998) (holding, prior to Alaska Hunters, that changes to a regulatory interpretation did not need notice and comment).

102. See United States v. Magnesium Corp. of Am., 616 F.3d 1129, 1140–41 (10th Cir. 2010) (declining to rule on whether to adopt Alaska Hunters because it was inapplicable in a case involving an initial interpretation that was not determinative); Warshauer v. Solis, 577 F.3d 1330, 1338–39 (11th Cir. 2009) (refusing to rule on whether the Alaska Hunters doctrine was valid because the plaintiff's argument did not satisfy the requirements of an Alaska Hunters argument); Paragon Health Network, Inc. v. Thompson, 251 F.3d 1141, 1148 n.4 (7th Cir. 2001) (stating that the court need not address Alaska Hunters because it ruled that the initial and subsequent interpretations were actually consistent).

#### D. FCC v. Fox Television Stations, Inc.

In Fox, the Supreme Court reviewed the Federal Communications Commission's (FCC) decision to forbid the broadcast of fleeting expletives. 103 The Court avoided any constitutional free speech implications<sup>104</sup> and instead reviewed the U.S. Court of Appeals for the Second Circuit's holding that the FCC's policy change was arbitrary and capricious. 105 The FCC had changed its policy from allowing isolated expletives to a policy of considering the frequency of expletives as one factor in determining a broadcast's legality. 106 The Court held, in a 5-4 decision, that the change was not arbitrary and capricious. 107 Though the Fox holding has been described as further limiting judicial intervention in agency policy changes, 108 it is not entirely clear which assertions in Fox carried the support of five Justices.

Justice Scalia wrote the majority opinion; Justices Thomas, Roberts, and Alito joined, while Justice Kennedy joined in part. 109 Justice Scalia wrote that the APA does not distinguish original agency action from later action altering that policy. 110 Justice Scalia provided a summary of his approach to arbitrary and capricious review of policy changes:

[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position . . . . And of course the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the reasons for the new

<sup>103.</sup> FCC v. Fox Television Stations, Inc., 556 U.S. 502, 505 (2009).

<sup>104.</sup> Id. at 529. The Supreme Court remanded the First Amendment issue back to the Second Circuit because the lower court had not definitively ruled on the constitutionality of the indecency policy. *Id.* at 530. On remand, the Second Circuit ruled that the indecency policy violated the First Amendment. Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 319 (2d Cir. 2010). However, this ruling was recently vacated and remanded by the Supreme Court, which instead ruled that the indecency standard was void for vagueness. FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2320 (2012), remanded sub nom. to ABC, Inc. v. FCC, 475 F. App'x 796 (2d Cir. 2012).

<sup>105.</sup> Fox, 556 U.S. at 516.

<sup>106.</sup> Id. at 512.

<sup>107.</sup> Id. at 530.108. See Ronald M. Levin, Hard Look Review, Policy Change, and Fox Television, 65 U. MIAMI L. REV. 555, 573 (2011) (arguing that Fox heightened the ability for new administrations to change policy and deemphasized the importance of regulatory

<sup>109.</sup> Fox, 556 U.S. at 504. Justice Kennedy did not join Part III-E of Justice Scalia's decision, which is the section that refutes the dissents. *Id.* at 523–29.

<sup>110.</sup> Id. at 515.

policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates.<sup>111</sup>

However, Justice Scalia also wrote that agencies must provide a reasoned explanation if the change in policy contradicts factual findings used to make the previous policy, or if the prior policy has engendered serious reliance interests.112

Justice Breyer wrote a dissenting opinion and was joined by Justices Stevens, Souter, and Ginsburg. 113 The dissent's approach is similar to the majority's approach, but has been differentiated as requiring a comparison between the old and new policies. 114 However, Justice Breyer's analysis does not always require a comparison. Justice Breyer explains that "change is sometimes (not always) a relevant background feature that sometimes (not always) requires focus (upon prior justifications) and explanation lest the adoption of the new policy (in that circumstance) be 'arbitrary, capricious, an abuse of discretion."115 In fact, Justice Breyer explicitly states that a new justification need not be better than the previous policy. 116 Justice Breyer's analysis parallels Justice Scalia's in stating that agencies should consider the major factors used to adopt the old policy when changing it.<sup>117</sup> However, Justice Breyer argues that agencies cannot base a policy change solely on unchanged facts or factors known at the time the original policy was made. 118 This last point is the principal difference between Justice Scalia's and Justice Breyer's opinions.119

Justice Kennedy's concurrence travels the blurry line between the majority opinion and Justice Brever's dissent. As Justice Brever

<sup>111.</sup> Id.

<sup>112.</sup> *Id.*113. *Id.* at 546–67 (Breyer, J., dissenting).
114. *See* Levin, *supra* note 108, at 568 (stating that Justice Breyer's dissent necessitated a "direct comparison" between policies).

<sup>115.</sup> Fox, 556 U.S. at 551 (Breyer, J., dissenting).

<sup>116.</sup> Id.

<sup>117.</sup> Compare id. at 550 (arguing that an agency should have to explain why it now rejects the considerations that led it to adopt the prior policy), with id. at 515 (majority opinion) (holding that a more reasoned explanation is required when, for example, an agency bases a new policy on factual findings that contradict those on which the prior policy was based).

118. *Id.* at 547 (Breyer, J., dissenting).

<sup>119.</sup> Compare id. ("[The Agency's] explanation instead discussed several factors well known to it the first time around, which by themselves provide no significant justification for a *change* of policy."), with id. at 515 (majority opinion) (stating that the Agency must provide further explanations for policies that conflict with prior findings, but not going so far as saying that an agency cannot ever base a policy change solely on factors considered during the initial policymaking process).

recognized in his dissent, Justice Kennedy's and Justice Breyer's assertions should be precedent where Justice Kennedy deviates from Justice Scalia and sides with Justice Breyer. Justice Kennedy explicitly "agree[d] with the dissenting opinion of Justice Breyer that the agency must explain why 'it now reject[s] the considerations that led it to adopt that initial policy." Justice Kennedy also acknowledged that reliance interests should be considered in the analysis. Like both Justice Breyer and Justice Scalia, Justice Kennedy does not require an agency's new policy to be "better," but instead requires that a policy alteration be rational, neutral, and within the agency's authority. 123

Justices Scalia, Breyer, and Kennedy largely agree on the standard used to determine if an agency's policy change is arbitrary and capricious. Because Justice Kennedy asserts that an agency must explain why it rejected prior considerations, the *Fox* Court does in fact require an agency to explain "why" it changed policy. In explaining why, agencies should address or discount factual findings and other factors used in the original policy, as well as reliance interests created by the prior policy. Additionally, all Justices agree that this analysis is not based on any heightened standard due to the fact that the agency is changing a policy, but is instead a result of the general requirement that agencies cannot ignore facts or factors, whether they are new or were relied upon in prior policies. Thus,

<sup>120.</sup> See id. at 551 (Breyer, J., dissenting) ("The majority's holding could in this respect significantly change judicial review in practice, and not in a healthy direction. But see, ante, at 535–39 (Kennedy, J., concurring in part and concurring in judgment)."). Justice Kennedy's decision is integral to understanding the precedent established in Fox because Justice Scalia's opinion was joined by five Justices including Justice Kennedy, and Justice Breyer's opinion was joined by four Justices, not including Justice Kennedy but carrying his support in certain statements.

<sup>121.</sup> *Id.* at 535 (Kennedy, J., concurring in part and concurring in the judgment) (alteration in original) (quoting *id.* at 550 (Breyer, J., dissenting)).

<sup>122.</sup> Id. at 536.

<sup>123.</sup> Id.

<sup>124.</sup> See Levin, supra note 108, at 564 (identifying that the opinions are the same "up to a point").

<sup>125.</sup> Fox, 556 U.S. at 535 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>126.</sup> *Id.* at 515 (majority opinion).

<sup>127.</sup> See id. at 550 (Breyer, J., dissenting) (agreeing with the majority that the analysis of a policy change does not require a heightened standard (citing id. at 514 (majority opinion))).

<sup>128.</sup> See id. at 515–16 (majority opinion) ("[I]t is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."); id. at 552–53 (Breyer, J., dissenting) (arguing that the FCC acted arbitrarily and capriciously because it failed to consider important aspects of the problem, including some relied upon in the original policy).

though an agency's analysis may have to be more in-depth for policy changes because the facts and factors to be considered would be more extensive, the Court recognized that the APA does not treat initial and subsequent agency actions differently. 129

#### II. FOX OVERRULED ALASKA HUNTERS SUB SILENTIO

Fox overruled Alaska Hunters sub silentio by holding that the APA does not treat initial and subsequent agency actions differently.<sup>130</sup> Though the agency action in question in Fox was an adjudicative order, not a rule, Justices Scalia, Kennedy, and Breyer phrased the entire decision using the broad terms "agency action" and "policy." <sup>131</sup> There is no reason to restrict the Fox holding to adjudications because the Court's language addresses all agency activities, including interpretive rules.<sup>132</sup> Applying the holding in Fox to interpretive rulemaking, the APA should not distinguish initial agency interpretations of regulations from subsequent interpretations undoing or revising old interpretations. 133 The extension of Fox to interpretive rulemaking is consistent with the clear language of the APA, which includes both the issuance and amendment of rules in its definition of "rulemaking." 134

The Alaska Hunters doctrine establishes different procedural standards for initial interpretations of regulations and some subsequent interpretations of regulations. 135 According to the doctrine, initial interpretive rules need not be issued through notice

<sup>129.</sup> See id. at 515 (majority opinion) ("The [APA] makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action."); id. at 550 (Breyer, J., dissenting) (arguing that, rather than imposing a "heightened" standard when changing a policy, the law "requires application of the same standard of review to different circumstances, namely, circumstances characterized by the fact that change is at issue").

<sup>130.</sup> See id. at 515 (majority opinion); see also Levin, supra note 108, at 573 n.90 (suggesting that Fox may have "ripple effect" implications for the Alaska Hunters doctrine). Importantly, the Court never considered Alaska Hunters in Fox.

131. E.g., Fox, 556 U.S. at 515; id. at 536 (Kennedy, J., concurring in part and

concurring in the judgment); *id.* at 548 (Breyer, J., dissenting).

132. *See id.* at 515 (majority opinion); *id.* at 536 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 548 (Breyer, J., dissenting); *cf.* Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992) ("[P]resume that a legislature says in a statute what it means and means in a statute what it says there.").

<sup>133.</sup> See Fox, 556 U.S. at 515–16 (establishing that no further justification is needed for policy changes but that a reasoned analysis might include additional considerations for policy changes).

134. See 5 U.S.C. § 551(5) (2006) ("'[R]ule making' means agency process for

formulating, amending, or repealing a rule.").

135. See Alaska Prof'l Hunters Ass'n v. FAA, 177 F.3d 1030, 1033–34 (D.C. Cir. 1999) (holding that once an agency establishes an interpretation of a regulation, any change to that interpretation must, like a change to the regulation itself, come through a notice-and-comment process).

and comment, while certain subsequent interpretive rules require notice and comment. 136 Because the Alaska Hunters doctrine treats initial and subsequent agency actions differently, it was undermined, if not overruled, in Fox.

Of course, the Court in Fox also asserts that arbitrary and capricious review of agency action can, in practice, differ from review of an initial action because there are inherent substantive differences between initial and subsequent actions.<sup>137</sup> Agencies must analyze all reasonably considerable facts and factors when establishing policy, and the nature of those facts and factors differ depending on whether the action is initial or subsequent. 138 Nonetheless, the Court in Fox held that initial and subsequent actions are reviewed using the same standard—in that case, arbitrary and capricious review. 139 Thus, application of the APA's standards may differ based on the circumstances and context, but the APA's standards for initial and subsequent actions do not differ. 140 Courts applying the Alaska Hunters doctrine interpret the APA as treating initial and subsequent interpretations-with actions—regulatory different procedural standards. The Court rejected that approach in Fox.

Given that the Fox Court rejected the Alaska Hunters approach, some might argue that agencies will be free to change regulatory interpretations at will, undermining regulated parties' abilities to "know the rules by which the game will be played." However, these critics could be appeased by applying the Fox Court's arbitrary and capricious review to shifting interpretations of regulations.

136. *Id.*137. *See Fox*, 556 U.S. at 515–16 (acknowledging that arbitrary and capricious analysis of policy changes should include some analysis unique to changes); id. at 552–53 (Breyer, J., dissenting) (same).

140. See id. at 514-15 (rejecting a per se heightened standard for changing prior rules but articulating the circumstances in which the APA requires a more searching analysis for agency action).

<sup>138.</sup> See id. at 515 (majority opinion).

<sup>139.</sup> Id. at 513.

<sup>141.</sup> Alaska Hunters, 177 F.3d at 1035 (citing Holmes, supra note 96, at 414). For academic support of the Alaska Hunters doctrine, see generally Stephen M. Johnson, Good Guidance, Good Grief!, 72 Mo. L. REV. 695 (2007); Richard W. Murphy, Hunters for Administrative Common Law, 58 ADMIN. L. REV. 917 (2006); and Ryan DeMotte, Note, Interpretive Rulemaking and the Alaska Hunters Doctrine: A Necessary Limitation on Agency Discretion, 66 U. PITT. L. REV. 357 (2004).

# III. ARBITRARY AND CAPRICIOUS REVIEW, AS REFINED IN FOX, IS A MORE EFFECTIVE AND EFFICIENT WAY TO POLICE CHANGES TO REGULATORY **INTERPRETATIONS**

Traditionally, the exemption for interpretive rules in the APA, <sup>142</sup> and the principle that interpretive rules have no binding effect, gave agencies discretion to change interpretations of regulations at will. 143 Courts used arbitrary and capricious analysis to limit this discretion. 144 The D.C. Circuit deviated from this approach with the Alaska Hunters doctrine, which limits the discretion of agencies by requiring notice and comment for changes of certain interpretations of regulations. 145 In Fox, the Court not only implicitly overruled the Alaska Hunters doctrine, it also provided a framework that could facilitate a return to the traditional approach—using arbitrary and capricious review to limit agency discretion in interpretive rulemaking.

The Alaska Hunters doctrine provides the courts with a shield for defending against what Professor Robert Anthony has termed "spurious rules." Spurious rules are interpretive rules, not issued through notice and comment, that interpret a vaguely written regulation with little underlying meaning.<sup>147</sup> Spurious rules, Professor Anthony argues, should be considered independently binding because they provide the specific requirements needed to give effect to an otherwise vague legislative rule, thereby providing the appearance of legal force.<sup>148</sup> These rules pose a real risk, as many agencies have developed a practice of issuing intentionally vague regulations, or regulations identical to a statute, leaving the real "binding" element up to later agency interpretations. <sup>149</sup> By doing

<sup>142. 5</sup> U.S.C. § 553(b) (A) (2006).

<sup>143.</sup> See Mark Seidenfeld, Rulemaking, in DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE 1998–1999, at 105, 112 (Jeffrey S. Lubbers ed., 2000) (recognizing this traditional principle).

<sup>144.</sup> *Id*.

<sup>145.</sup> Alaska Hunters, 177 F.3d at 1033–34; supra Part I.C.
146. Robert A. Anthony, "Interpretive" Rules, "Legislative" Rules and "Spurious" Rules:
Lifting the Smog, 8 ADMIN. L.J. Am. U. 1, 10 (1994).

<sup>147.</sup> Id. at 10–11. Professor Anthony also recognizes policy statements that are not based on any regulation or legislation as "spurious." <sup>1</sup>Id. However troubling this development may be, it is not relevant to this Comment.

<sup>149.</sup> See Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020 (D.C. Cir. 2000) ("The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance memoranda, explaining, interpreting, defining and often expanding the commands in the regulations . . . . Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations."). The court in *Appalachian Power* believed that it found a spurious rule. The Environmental Protection Agency (EPA)

this, agencies maintain the flexibility to change a rule, but circumvent the public's ability to participate in the rulemaking process. 150

The arbitrary and capricious review in Fox can replace the Alaska Hunters doctrine's limitation on agency discretion to change regulatory interpretations by allowing review of each interpretive adjustment during litigation. Under Fox, a court would require (1) an adequate explanation of why the agency changed interpretations, (2) a justification for contradicting or disregarding facts or factors considered in the previous interpretation, and (3) an indication that the agency considered reliance interests. 151 To withstand judicial review, agencies would publish limited explanations of changes to regulatory interpretations, addressing the above three considerations. These safeguards are more consistent with the APA and Supreme Court case law than the *Alaska Hunters* doctrine. Additionally, the safeguards are more efficient at limiting the typical abuses of interpretive rulemaking than a notice-and-comment requirement.

#### A. Fox Is More Consistent with the APA than the Alaska Hunters Doctrine

Unlike the Alaska Hunters doctrine, applying the arbitrary and capricious review in Fox to agency changes to regulatory interpretations is consistent with the plain language of the APA. Section 553(b)(A) exempts interpretive rules from notice-andcomment procedures. 152 This exemption should include changes to interpretive rules because the APA includes amendments to rules in its "rule making" definition. 153 Thus, amendments should be subject to the same procedures as initial rules, and all interpretive rules, including amendments, are exempt from notice and comment.

issued a rule through notice and comment that directed state permitting agencies to condition permits for regulated entities on "periodic monitoring." Id. at 1018. The EPA later issued an interpretation of that regulation, asserting that the periodic monitoring regulation required enough monitoring to ensure compliance with pollution standards. *Id.* at 1025. The court set aside the guidance document because it expanded the monitoring requirement beyond the meaning of the regulation. *Id.* at 1028 (citing *Alaska Hunters*, 177 F.3d at 1034).

<sup>150.</sup> See Batterton v. Marshall, 648 F.2d 694, 704 (D.C. Cir. 1980) (stating that the main purpose of notice and comment is to ensure public participation after policy

making authority is delegated to unrepresentative agencies).

151. See supra notes 125–26 and accompanying text (explaining the basis of these three factors).

<sup>152. 5</sup> U.S.C. § 553(b) (A) (2006). 153. *Id.* § 551(5); *see* Pierce, *supra* note 83, at 567 (arguing that the D.C. Circuit looked only to § 551(5) and failed to consider the interpretive rule exemption in § 553(b)(A)).

The D.C. Circuit seems to read the APA differently. It considers a long-standing interpretation to be a part of the regulation itself. 154 Thus, amending the interpretation is akin to amending the legislative rule itself, an act that requires notice and comment under § 553. 155

Interpreting the APA to equate an amendment of an interpretive rule with amending the underlying legislative rule undermines the distinction between interpretive and legislative rules. By holding that a regulatory interpretation has become a part of the legislative rule, a court essentially accepts the interpretation as binding. 156 fundamentally undermines the distinction between interpretations legislative regulations because it acknowledges interpretations of regulations can be as binding as legislative regulations.157

Relative to the shaky statutory foundation of the Alaska Hunters doctrine, applying the arbitrary and capricious analysis used in Fox to regulatory interpretations would be statutorily sound. The section of the APA referring to judicial review, § 706, states that "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."158 Congress intended courts to use arbitrary and capricious analysis to restrict "abuse[s] of discretion." Because interpretive rules are exempt from notice and comment, interpretations are left to agency discretion.<sup>160</sup> Under § 706, abuse of agency discretion can be held unlawful if arbitrary and capricious. 161

The Fox Court reiterated that when changing policies, agencies should engage in certain reasoning that would not otherwise be

<sup>154.</sup> See Alaska Hunters, 177 F.3d at 1034 ("When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule . . . "); Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 586 (D.C. Cir. 1997) (stating that the adoption of a new interpretation of a regulation is akin to amending the regulation); Richard W. Murphy, Hunters for Administrative Common Law, 58 ADMIN. L. REV. 917, 923 (2006) (recognizing the D.C. Circuit's interpretation of the Alaska Hunters doctrine as linking a long-standing interpretation to the legislative rule).

<sup>155. 5</sup> U.S.C. § 553.
156. See Robert A. Anthony, The Supreme Court and the APA: Sometimes They Just Don't Get It, 10 ADMIN. L.J. AM. U. 1, 3–11 (1996) (arguing that courts should perform independent review of agency interpretations because any level of deference has the effect of making interpretations binding).

<sup>157.</sup> See Connolly, supra note 18, at 172–74 (asserting that the Alaska Hunters doctrine erodes the difference between legislative and interpretive rules).

<sup>158. 5</sup> U.S.C. § 706. 159. *Id*.

<sup>160.</sup> *Id.* § 553(b)(A).

<sup>161.</sup> *Id.* § 706(2)(A).

necessary for initial policy decisions.<sup>162</sup> Applying *Fox* to changes in regulatory interpretations means review of any change will look to reliance interests, a description of why the agency changed, and contradictions with any facts or factors considered in the previous policy.<sup>163</sup> The APA does not preclude consideration of these issues; in fact, § 706 states that courts should "determine the meaning or applicability of the terms of an agency action."<sup>164</sup> This broad language, on its face, grants courts wide authority to interpret agency actions, including regulatory interpretations of the agency regulations.<sup>165</sup> Therefore, though the plain language of the APA conflicts with the *Alaska Hunters* doctrine, it does not preclude arbitrary and capricious review of amendments to interpretations of regulations.

# B. Fox Is More Consistent with Supreme Court Case Law than Alaska Hunters

The Alaska Hunters doctrine has never been litigated before the Supreme Court, and Fox carries more authority because it is a Supreme Court decision. Applying the Fox analysis to interpretive rulemaking is also more consistent with prior Supreme Court case law, an indication that the Supreme Court might overrule the Alaska Hunters doctrine explicitly if given the chance.

The *Alaska Hunters* doctrine conflicts with the Supreme Court's decision in *Vermont Yankee*. In *Vermont Yankee*, the Court famously held that the APA provides the maximum level of procedural requirements that a court can impose on agencies. <sup>166</sup> The Court held that the judiciary cannot overturn a rule because an agency's procedures did not "ventilate" the issues; to invalidate a rule based on procedure, a court must find that the agency did not comply with a

165. See Anthony, supra note 156, at 9 (arguing that courts should not abdicate their authority to interpret agency regulations by deferring to agency interpretations). Despite the Supreme Court's history of strong deference to agency decisionmaking, e.g., Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984), even it has acknowledged that courts should usually grant agencies less deference where, like in interpretive rulemaking, the agency opinion is issued without notice and comment, e.g., United States v. Mead Corp., 533 U.S. 218, 230–31 (2001).

<sup>162.</sup> E.g., FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) (establishing that agencies must at least acknowledge the policy change).

<sup>163.</sup> See supra notes 125–26 and accompanying text (deriving these requirements from the Fox decisions).

<sup>164. 5</sup> U.S.C. § 706.

<sup>166.</sup> See Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 523, 544–45 (1978) (holding that a court may only invalidate a rule due to procedural inadequacies if an agency failed to comport with statutorily established procedures).

statutory procedure established in either the APA or a governing statute.<sup>167</sup> Accordingly, a court cannot impose notice-and-comment procedures when the APA would not require those procedures. 168 Hunters doctrine requires notice-and-comment procedures for some interpretive rules—a requirement not found in the APA.

Arbitrary and capricious review of changing regulatory interpretations would also establish procedures that the APA does not explicitly require. The APA does not explicitly require agencies to include any basis of reasoning or purpose when publishing interpretive rules. 169 If a court applied the arbitrary and capricious review in Fox to agency interpretations, agencies would have to provide such a statement of reasoning and purpose alongside the interpretation to facilitate that review. 170 This could be considered an additional procedure because an agency would be required to publish more than just the interpretation itself.

The Supreme Court considered this very issue in Pension Benefit Guaranty Corp. v. LTV Corp. 171 In LTV Corp., the Court was forced to reconcile Vermont Yankee with Citizens to Preserve Overton Park, Inc. v. Volpe, 172 which imposed a procedural arbitrary and capricious requirement that agencies provide an explanation of agency policy positions before arguing the positions in the courtroom.<sup>173</sup> Court recognized that requiring an agency to explain its actions at the proper time in order to facilitate judicial review was an exception to Vermont Yankee. 174

Again, the Fox standard requires an adequate explanation of why an agency changed policy, a justification for contradicting or disregarding facts or factors considered in the previous policy, and consideration of reliance interests. 175 Applying these requirements to changes in regulatory interpretations, an agency would have to

<sup>167.</sup> *Id.* at 540–45. 168. *Id.*; see supra Part III.A (discussing how the Alaska Hunters doctrine is not explicitly established in the APA).

<sup>169.</sup> Alternatively, legislative rulemaking requires a "general statement of . . . basis and purpose." 5 U.S.C. § 553(c).

170. See supra notes 125–26 and accompanying text (establishing that Fox requires

these considerations and explanations).

<sup>171. 496</sup> U.S. 633 (1990). 172. 401 U.S. 402 (1971).

<sup>173.</sup> See id. at 419 (prohibiting post hoc courtroom rationalizations and providing

that certain additional explanations can be required to facilitate judicial review). 174. See LTV Corp., 496 U.S. at 655 ("[U]nlike in Overton Park, the Court of Appeals did not suggest that the administrative record was inadequate to enable the court to fulfill its duties under § 706 [arbitrary and capricious review].").

<sup>175.</sup> See supra notes 125–26 and accompanying text (analyzing the Fox opinions).

include these explanations and analyses with any altered interpretive rule, <sup>176</sup> and thus would require procedures not explicitly included in the APA. <sup>177</sup> However, like *LTV Corp.*, *Vermont Yankee* would not bar a court from requiring these explanations because they are intended to facilitate judicial arbitrary and capricious review. <sup>178</sup>

# C. Arbitrary and Capricious Review Is More Consistent with the New Approaches for Distinguishing Between Legislative and Interpretive Rules

Arbitrary and capricious review, as opposed to the *Alaska Hunters* doctrine, is more likely to survive the Supreme Court's changing perspective on the distinction between legislative and interpretive rules. The arbitrary and capricious analysis espoused in *Fox* fits with the evolving perspectives on the distinction between interpretive and legislative rules. Though the degree of deference owed to regulatory interpretations is unclear, it is apparent that the Court is now focusing more on the issue of deference than whether an interpretation is binding on the public, and thus procedurally invalid.<sup>179</sup> By focusing on substantive arbitrary and capricious review, a court could look to an agency's *Fox* explanations, with whatever deference is required, to limit an agency's discretion when changing regulatory interpretations.<sup>180</sup>

By bolstering the substantive review of interpretive rules, courts can avoid the nebulous analysis of what is and is not a legislative rule; courts could simply establish that rules issued through notice and comment enjoy the deference granted to legislative rules, and that rules issued without notice and comment are granted the lesser

<sup>176.</sup> *See supra* Part II (asserting that applying these requirements to interpretive rulemaking is reasonable because the *Fox* Court referred to "agency action" and the arbitrary and capricious standard applies to all agency actions, including interpretive rulemaking).

<sup>177.</sup> See 5 U.S.C. § 553 (2006) (including no procedural requirements for interpretive rules).

<sup>178.</sup> See LTV Corp., 496 U.S. at 654–55 (concluding that the arbitrary and capricious standard imposes a procedural requirement that agencies take whatever steps necessary to enable a court to evaluate the agency's rationale)

steps necessary to enable a court to evaluate the agency's rationale).

179. See United States v. Mead Corp., 533 U.S. 218, 230–31 (2001) (analyzing an interpretive rule using a deference analysis instead of analyzing whether it was binding on the public). Again, legislative rules that are binding on the public must go through notice and comment, and inversely, interpretive rules that do not go through notice and comment are not binding. See supra notes 42–45 and accompanying text.

<sup>180.</sup> See supra notes 125–26 (establishing that Fox arbitrary and capricious review requires an agency to explain why it changed interpretations, justify contradicting facts or factors considered in the previous interpretation, and consider reliance interests).

deference given to interpretive rules.<sup>181</sup> In essence, the process that an agency uses to issue a rule is less important as long as the decision is made after considering all of the issues and coming to a reasonable decision. Professor Mark Seidenfeld recently argued for this approach, advocating for a "reasoned decisionmaking" review.<sup>182</sup> The *Fox* analysis can provide a version of reasoned decisionmaking review by requiring explanations of agency changes after review of all of the issues.

The *Alaska Hunters* doctrine has no place in this new regime, which defines a rule by its procedure, not by its effect. In the new regime, amending a regulatory interpretation without notice and comment would place the action within the exemption in § 553; the interpretation could not be considered a part of the regulation because the lack of notice and comment would make it an interpretive rule. Additionally, defining an interpretive rule by its non-binding effect creates challenges because many regulatory interpretations are granted the higher *Auer* deference, establishing the highest level of deference and therefore increasing the likelihood that the interpretation will be upheld. 184

# D. The Benefits of Using Substantive Review To Manage Agency Use of Guidance Documents in General

Professor Seidenfeld argues for the use of a reasoned analysis review at the time a guidance document is issued. This approach would circumvent any doctrinal confusion over what is binding or which level of deference is appropriate, and would ideally replace many procedural restrictions. By focusing solely on the substance of guidance documents, courts can properly restrict an agency's abuse of these documents, without decreasing efficiency via a protracted process. The Fox decision provides a framework for

<sup>181.</sup> See Seidenfeld, supra note 41, at 373–75 (arguing that substantive analysis can replace procedural review while providing a proper balance between the necessity of guidance documents and the necessity of restraining agency autonomy in issuing guidance documents).

<sup>182.</sup> Id. at 374.

<sup>183.</sup> See supra notes 56-67 and accompanying text (describing the short-cut approach).

<sup>184.</sup> Auer v. Robbins, 519 U.S. 452, 461 (1997); see Eskridge & Baer, supra note 73, at 1142 tbl.15 (finding that courts uphold an agency interpretation under Auer deference 91% of the time).

<sup>185.</sup> Seidenfeld, supra note 41, at 373.

<sup>186.</sup> Id.

<sup>187.</sup> Id. at 373-75.

substantive review that can be used to implement Professor Seidenfeld's suggestions. 188

The doctrines of finality and ripeness, however, obstruct the full implementation of this approach because they could impede the immediate review of guidance documents. Some courts have concluded that a regulatory interpretation is not final and thus cannot be reviewed. Other courts have held that a regulatory interpretation's lack of independent binding force exempts the interpretation from the general assumption of pre-enforcement ripeness. Neither of these obstacles should exist in a legal landscape that ties the appropriate level of deference to the binding nature of a rule.

The appropriate level of deference could be determined at the time a rule is issued because the degree of deference is determined by an analysis of factors or events that occur before enforcement. <sup>192</sup> The probability that a rule will be upheld in court should be proportional to the degree of deference it is afforded. <sup>193</sup> Because a

<sup>188.</sup> *See supra* notes 125–26 and accompanying text (analyzing the distinct factors considered in the various *Fox* opinions).

<sup>189.</sup> See Seidenfeld, supra note 41, at 375–85 (acknowledging that some courts have refused to review agency interpretations before an enforcement action due to ripeness and finality, but providing examples where courts reviewed interpretations pre-enforcement). The doctrine of finality generally requires agency action to be at its final stage before a court may review it. See Bennett v. Spear, 520 U.S. 154, 177–78 (1997) (stating that agency action is only judicially reviewable if it is a consummation of the agency's process, and if legal consequences will follow the agency determination). Furthermore, claims challenging agency action must be ripe. See Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 733 (1998) (holding that an interpretive rule was not ripe because it did not impose immediate legal effects on the litigant due to the non-binding nature of legislative rules).

the litigant due to the non-binding nature of legislative rules).

190. See, e.g., Air Brake Sys., Inc. v. Mineta, 357 F.3d 632, 639 (6th Cir. 2004) (describing a tentative agency letter as not final); Taylor-Callahan-Coleman Cntys. Dist. Adult Prob. Dep't v. Dole, 948 F.2d 953, 957 (5th Cir. 1991) (finding that an advisory interpretation was not final because it was subject to change). But see Natural Res. Def. Council v. EPA, 643 F.3d 311, 320 (D.C. Cir. 2011) (holding that a guidance document was final because it changed binding norms); Venetian Casino Resort, L.L.C. v. EEOC, 530 F.3d 925, 931 (D.C. Cir. 2008) (concluding that a guidance document amounted to final action).

<sup>191.</sup> See, e.g., Abbott Labs. v. Gardner, 387 U.S. 136, 149–50 (1967) (adopting a pragmatic approach that assumes pre-enforcement ripeness). But see Seidenfeld, supra note 41, at 381 n.267 (providing cases that imply no pre-enforcement ripeness of guidance documents).

<sup>192.</sup> See Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 171–73 (2007) (effect on rights and notice and comment); Gonzales v. Oregon, 546 U.S. 243, 257 (2006) (specificity of the interpretation); Barnhart v. Walton, 535 U.S. 212, 222 (2002) (adequacy of the interpretive method).

<sup>193.</sup> In theory, the probability that a rule will be upheld in court should be tied to the deference it is afforded. Studies indicate, however, that deference has little effect on whether a rule will be upheld, unless it is afforded *Auer* deference, which is associated with the highest probability that a rule will be upheld. Eskridge & Baer, *supra* note 73, at 1142 tbl.15 (reporting that agency action is upheld 70% of the time

challenged rule is only truly binding on the public when a court is bound to apply the rule to the public, the level of deference a court gives an agency's guidance document is directly related to the document's binding effect on the public. 194 In other words, when a court grants deference to a guidance document, it gives the document a level of binding force—undermining the justification for avoiding pre-enforcement review of guidance documents due to ripeness. 195 Additionally, to hold that a guidance document cannot be challenged because it may not be applied to regulated parties is illogical; the very existence of a guidance document implies that an agency is at least planning to follow it. Of course, agencies have prosecutorial discretion to apply an interpretation to a specific party, but considering that agencies have that same discretion when it comes to all interpretive rules, legislative rules, and even statutes, this is no basis for establishing differing finality or ripeness standards for guidance documents.

Ripeness and finality issues aside, the *Fox* standard for arbitrary and capricious review can provide a reasoned analysis that can replace procedural objections to guidance documents. The Supreme Court in *Fox* established a viable framework for substantive review by requiring an agency to explain why it changed interpretation, refute conflicting facts and factors used in the initial interpretation, and address reliance interests implicated by the change. <sup>196</sup> In focusing on these three factors, the *Fox* standard requires an agency to sufficiently build the record to verify that it conducted a reasoned analysis. <sup>197</sup>

# E. The Problems with Compulsory Notice and Comment Under Alaska Hunters

There is some limited evidence suggesting that compulsory notice and comment does not affect the resulting policy in a rule. Assuming

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under all but Auer deference, and that agency action is upheld 90% of the time under Auer deference). Thus, if a regulatory interpretation is granted Skidmore deference, it will have the same probability of being upheld as a legislative rule, and if a regulatory interpretation is granted Auer deference, it will actually have a higher probability of being upheld.

<sup>194.</sup> Furthermore, some courts have begun discussing interpretive rules as binding on the court. *Supra* note 80.

<sup>195.</sup> Anthony, *supra* note 156, at 3–11 (arguing that courts should grant independent review of agency interpretations because deference creates a binding effect).

<sup>196.</sup> See supra notes 125–26 and accompanying text (discussing the factors analyzed in Fox review).

<sup>197.</sup> See Seidenfeld, supra note 41, at 385 (arguing that arbitrary and capricious analysis should build the record for reasoned analysis).

this is true, the government burden of compulsory notice and comment could outweigh its benefits.

At least one empirical study suggests that notice and comment is either minimally effective at limiting an agency's discretion or redundant, 198 making the Alaska Hunters doctrine either ineffective or unnecessary. In a two-month study of federal regulations issued through notice and comment, Professor Stuart Shapiro found that 72% of rules issued through notice and comment were substantively unchanged by the process.<sup>199</sup> This means that of all federal agency actions carried out with notice-and-comment procedures, agencies only substantially changed the final rule after receiving comments 28% of the time, implying that notice and comment rarely leads to a change in policy.<sup>200</sup> A more pertinent study to the *Alaska Hunters* doctrine would focus on whether agencies change final rules after receiving comments when the notice-and-comment procedure was court ordered. Presumably, when an agency voluntarily opts to send a rule through notice and comment when it is not required by the APA, 201 the agency would be more open to adopting public When an agency sends a rule through notice and comments. comment after having already attempted to avoid the procedure, it is probable that the agency would be less open to adopting comments, decreasing the chance that the procedure will further change policy.<sup>202</sup>

Of course, limiting an agency's discretion is not the only purpose of notice and comment. Notice and comment provides notice to the public of proposed rules and creates a record for subsequent judicial challenge.<sup>203</sup> It also ensures that the public has a chance to participate in the rulemaking process.<sup>204</sup>

<sup>198.</sup> Stuart Shapiro,  $\mathit{Two}$  Months in the Life of the Regulatory State, ADMIN. & Reg. L. News, Spring 2005, at 12, 14 & tbl.4.

<sup>200.</sup> *Id.*201. *E.g.*, 73 Fed. Reg. 35,102, 35,107 (proposed June 20, 2008) (to be codified at 20 C.F.R. pt. 501) (acknowledging that the Department of Labor voluntarily provided the notice-and-comment opportunity despite the fact that the proposed changes were exempt from the APA). This notice is one of many examples where an agency voluntarily posted a notice for comment to obtain information from the

<sup>202.</sup> A comparable empirical study suggests that when a rule is remanded, it does not typically stop the agency from eventually achieving its regulatory goals. Jordan, supra note 11, at 413, 414 & tbl.2.

<sup>203.</sup> See Hoctor v. U.S. Dep't of Agric., 82 F.3d 165, 167 (7th Cir. 1996) (establishing that notice and comment is intended to allow the marshalling of opposition to a rule and provide a long record for judicial review).

204. See Johnson, supra note 141, at 735 (arguing for more public involvement in

agency guidance).

Arbitrary and capricious review under *Fox* can also provide these valuable benefits. The requirements and explanations necessary to comply with the *Fox* standard would develop the administrative record. Additionally, the public can participate in litigation where courts use the arbitrary and capricious standard to review altered interpretations.<sup>205</sup> As for notifying the public of proposed policy changes, the thirty-day notice provided by notice and comment is probably not worth the increased government burden of undergoing the procedure.<sup>206</sup>

Compulsory notice and comment is also ineffective because an agency can adopt an invalidated interpretation during adjudicatory proceedings.<sup>207</sup> If a court invalidates an interpretative rule because it was not issued through notice and comment, the agency can adopt that interpretation during adjudication.<sup>208</sup> To give substantive effect to the procedural violation, a court would then have to invalidate the regulatory interpretation independent of the interpretive rule.<sup>209</sup>

The deference granted to an interpretation of a regulation provided by an agency during litigation should be similar to that granted to a regulatory interpretation issued without notice and comment. If the *Skidmore* deference granted to interpretive rules is truly limited to the rule's power to persuade,<sup>210</sup> then it is not much different than the deference the court grants to any attorney; if a court is persuaded by an attorney, it will rule in that attorney's favor. Just as courts will not defer to an agency's "unsupported" position in

<sup>205.</sup> Public participation through litigation is enhanced by the general assumption that litigants have pre-enforcement standing. *See* Abbott Labs. v. Gardner, 387 U.S. 136, 148–50 (1967) (providing a two-fold analysis for standing that favors pre-enforcement by looking to fitness of the issue for judicial decision and hardship to parties).

<sup>206.</sup> See 5 U.S.C. § 553(d) (2006) (requiring agencies to issue final rules thirty days before the effective date).

<sup>207.</sup> See Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 90 (1995) (concluding that an interpretive rule that might have otherwise been procedurally invalid was valid because the guidance document espoused an interpretation that the court would have independently upheld); NLRB v. Wyman-Gordon Co., 394 U.S. 759, 774–75 (1969) (Black, J., concurring) (contending that the procedural invalidity of a rule did not bar application of the interpretation to the defendants in litigation); Seidenfeld, supra note 41, at 361–63 & n.160 (arguing that the preceding two cases establish that agencies can freely pursue interpretations through rulemaking or adjudication).

<sup>208.</sup> See Guernsey Mem'l Hosp., 514 U.S. at 90; Wyman-Gordon, 394 U.S. at 774-75 (Black, J., concurring).

<sup>209.</sup> Guernsey Mem'l Hosp., 514 U.S. at 101–02 (upholding the litigation position after invalidating the identical interpretive rule); Wyman-Gordon, 394 U.S. at 774–75 (Black, J., concurring) (same).
210. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). Regulatory

<sup>210.</sup> Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). Regulatory interpretations are given the greater *Auer* deference when the interpretation is less spurious. Gonzales v. Oregon, 546 U.S. 243, 256–57 (2006).

litigation,<sup>211</sup> neither should courts grant significant deference to an agency's interpretive rule.<sup>212</sup> Empirical evidence suggests that courts in fact do not provide differing levels of deference to cases warranting *Skidmore* deference and cases that the courts review de novo.<sup>213</sup> Therefore, there is little doctrinal difference between the review of an interpretive rule and an interpretation advanced as a position in litigation.

Though a court may preclude the retroactive application of a position in litigation that contradicts prior regulatory interpretations,<sup>214</sup> this preclusion will not deter agencies from pursuing new positions in litigation. Even if a court rules that an agency's position in litigation cannot retroactively apply to the defendant, the position can be applied to subsequent defendants as precedent.<sup>215</sup> Therefore, an agency would have little incentive to repromulgate an invalidated interpretive rule through notice and comment because successful litigation of that interpretation could accomplish the same goal by establishing precedent.<sup>216</sup>

Given that notice and comment is relatively ineffective at restricting an agency's discretion when changing regulatory interpretations, the *Alaska Hunters* doctrine's net effect is regulatory delay. The benefits of efficient governance outweigh the benefits of the *Alaska Hunters* doctrine.<sup>217</sup> Using arbitrary and capricious review

<sup>211.</sup> See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988) (holding that the courts should not apply *Chevron* deference to an agency position in litigation that is unsupported by interpretations or regulations). Bowen leaves open the possibility of applying the lower *Skidmore* deference to agency positions in litigation. Also, a substantively valid position may receive deference under the Bowen framework because it would be supported by the underlying regulation.

because it would be supported by the underlying regulation. *Id.* 212. *See* United States v. Mead Corp., 533 U.S. 218, 230–31 (2001) (establishing that the lower *Skidmore* deference, which requires an agency's interpretation to be persuasive is granted to interpretive rules)

persuasive, is granted to interpretive rules).

213. See Eskridge & Baer, supra note 73, at 1142 tbl.15 (concluding that courts uphold agency action around 70% of the time no matter whether the court applied Chevron, Skidmore, State Farm, or de novo deference). This study supports the assertion that deference given to interpretive rules and interpretations asserted during litigation is the same.

<sup>214.</sup> See, e.g., NLRB v. Bell Aerospace Co., 416 U.S. 267, 294–95 (1974) (holding that an agency could change a long-standing interpretation through adjudication, but that a new interpretation could not be retroactively applied to impose a substantial penalty); see also Verizon Tel. Cos. v. FCC, 269 F.3d 1098, 1109 (D.C. Cir. 2001) (applying a new interpretation issued during adjudication retroactively because the new interpretation is a new application of existing law, not a change in the law).

<sup>215.</sup> See NLRB v. Wyman-Gordon Co., 394 U.S. 759, 774–75 (1969) (Black, J., concurring) (applying a litigation position to a defendant as precedent that, due to retroactivity, was not applied when the precedent was set).

<sup>217.</sup> See DeMotte, supra note 141, at 361–62 (arguing that the benefit of the Alaska Hunters doctrine is its ability to restrain discretion).

to limit an agency's discretion to change its interpretations of regulations imposes a substantive limitation on agency discretion without delaying agency action.

#### CONCLUSION

The Supreme Court's jurisprudence on agency rulemaking is a confusing maze of contradicting definitions, levels of deference, and standards of review. Unfortunately, the *Alaska Hunters* doctrine added to this confusion by making the procedure for changing regulatory interpretations unclear to both agencies and regulated parties. Differing circuit doctrines on how regulatory interpretations can be issued further clog an administrative system that implements regulations on a national level. Thankfully, the Supreme Court cleared up some of the confusion by overruling the *Alaska Hunters* doctrine *sub silentio* in *Fox*, bringing the nation closer to establishing a consistent and straight-forward procedure for issuing and amending interpretations of regulations.

Applying the arbitrary and capricious review in *Fox* to interpretive rulemaking is more consistent with the APA, more consistent with the Supreme Court's nebulous case law, and more efficient than the Alaska Hunters doctrine. The Supreme Court took the first of many necessary steps toward alleviating ossification of agency rulemaking by overruling Alaska Hunters sub silentio. The next step should be to simplify its own precedent on the binding effect of, and deference granted to, interpretive and legislative rules. A simple regime of heightened deference (or binding effect) for rules issued through notice and comment, and the arbitrary and capricious review prescribed in Fox, would provide a much more manageable legal landscape. Where an agency deviates from a past interpretation without notice and comment, arbitrary and capricious review could be facilitated by requiring an agency to issue the new interpretation with explanations on why it changed interpretations, why contradicting facts or factors were disregarded, and how reliance interests were considered. The benefits of a less ossified rulemaking landscape using the Fox analysis would outweigh the minimal benefits of compulsory notice and comment under the Alaska Hunters doctrine.