

Preambles as Guidance

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ABSTRACT

Debates over administrative agencies' reliance on guidance documents have largely neglected the most authoritative source of guidance about the meaning of agency regulations: their preambles. This Article examines and defends the guidance function of preambles. Preambles were designed not only to provide the agency's official justification for the regulations they introduce, but also to offer guidance about the regulation's meaning and application. Today, preambles include extensive guidance ranging from interpretive commentary to application examples. Based on the place of preamble guidance as part of the agency's formal explanation of the regulation and the rigorous internal agency vetting which accompanies that formal role, this Article argues that preamble guidance has greater authority than other forms of guidance. That greater authority has important implications. Under current judicial doctrine, preamble guidance warrants greater deference than other forms of guidance. Preamble guidance's superiority also grounds the agency's obligation to act consistently with it—and to revise preamble guidance only in documents issued by the agency, as opposed to lower-level officials, with the same publicity as the original preamble. This obligation should be expressly adopted as a form of internal administrative law either by individual agencies or central executive branch regulators.

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INTRODUCTION

More than a decade of lively debate has focused on how administrative agencies use guidance documents—interpretive rules and general statements of policy exempt from the requirements of notice-and-comment under the Administrative Procedure Act (“APA”).¹ Many credit guidance documents as playing a critical role in regulatory programs.² Even though they lack the force of law,³ guidance documents can promote consistency and uniformity in agency action.⁴ Guidance documents that convey an agency’s view of the law or its enforcement

¹ Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.); *see also* 5 U.S.C. § 553(b)(3)(A) (2012) (exempting “interpretative rules” and “general statements of policy” from notice-and-comment rulemaking); *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1203–04 (2015) (noting this exception). The term “guidance documents” refers to those documents exempt from notice-and-comment rulemaking. *See, e.g.*, Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 398–400 (2007) (providing concise account of “guidance documents” and noting that some commentators refer to these as “nonlegislative rules”); Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331, 334 (2011). A more technical definition of guidance documents is “an agency statement of general applicability . . . that is not intended to have the force and effect of law but that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue.” Regulatory Accountability Act of 2013, S. 1029, 113th Cong. § 2(3) (2013). The Office of Management and Budget’s (“OMB”) definition of “guidance documents” makes only one change to the definition in the Regulatory Accountability Act of 2013: “an agency statement of general applicability and future effect, other than a regulatory action . . . that sets forth a policy on a statutory, regulatory or technical issue or an interpretation of a statutory or regulatory issue.” OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB BULL. NO. 07-02, FINAL BULLETIN FOR AGENCY GOOD GUIDANCE PRACTICES 19 (2007) [hereinafter OMB’s Good Guidance Bulletin], <https://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/fy2007/m07-07.pdf>.

² *See, e.g.*, Paul R. Noe & John D. Graham, *Due Process and Management for Guidance Documents: Good Governance Long Overdue*, 25 YALE J. ON REG. 103, 108 (2008) (noting that guidance documents are “key component[s] of regulatory programs”).

³ *Perez*, 135 S. Ct. at 1204 (noting that nonlegislative rules lack the force of law).

⁴ *See* Seidenfeld, *supra* note 1, at 341 (noting how guidance can enhance consistency). *See generally* Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*,

priorities can also promote values of fair notice; the public and regulated entities generally prefer knowing an agency's positions prior to facing them in an enforcement proceeding.⁵

While acknowledging that guidance documents serve useful functions, policymakers and commentators have sought greater transparency and participation rights in the development of agency guidance.⁶ More pointedly, critics contend that agencies rely on guidance documents in ways that circumvent the notice-and-comment rulemaking process.⁷ Their concern is that agencies are turning increasingly to guidance to establish norms that have significant de facto weight without the participation and accountability virtues of a notice-and-comment process.⁸ Far from remaining solely a matter of insider

119 YALE L.J. 1362, 1466–67 (2010) (noting the connections between internally generated law and consistency).

⁵ See Seidenfeld, *supra* note 1, at 341 (noting that because guidance applies prospectively, regulated entities gain information about the agency's plans and understandings as opposed to having to guess); Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 808 (2001) (noting that citizens are better off if they know how agencies understand and intend to apply the law); cf. Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 579, 601 (2008) (noting that soft law provides information that helps the public adjust its behavior).

⁶ See, e.g., Mendelson, *supra* note 1, at 438–44 (arguing for an amendment to the Administrative Procedure Act (“APA”) to allow stakeholders to petition agencies to amend or repeal guidance).

⁷ See, e.g., John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 660–69 (1996).

⁸ See, e.g., *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000) (“One guidance document may yield another and then another . . . Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.”); 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”); 1 C.F.R. § 305.92-2 (1993) (“The Conference is concerned . . . about situations where agencies issue policy statements which they treat or which are reasonably regarded by the public as binding [But these pronouncements do] not offer the opportunity for public comment”); Transcript of Oral Argument at 13–14, *Perez*, 135 S. Ct. 1199 (No. 13-1041), 2014 WL 6749784, at *13–14 (“[B]ut part of what’s motivating it is a sense that agencies more and more are using interpretive rules and are using guidance documents to make law and that there is—it’s essentially an end run around the notice and comment provisions.” (question of Justice Kagan)); Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2437 (1995) (arguing that the EPA relies on guidance to avoid oversight by courts, Congress, and the OMB); Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 166–67 (2000) (arguing that agencies avoid ossified rulemaking processes by use of nonbinding guidance). As noted below, recent empirical research calls into question the theory of strategic substitution by agencies of guidance documents for rules. See *infra* Section I.C.

Smart Mobile Technologies LLC, Exhibit 2005

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debate, these issues have sparked congressional hearings and bills,⁹ as well as executive orders from Presidents George W. Bush and Barack Obama.¹⁰ The Supreme Court, too, has expressed concerns about guidance documents. In 2001, for instance, the Court decided that notice-and-comment rules, but not guidance documents, presumptively qualify for greater judicial deference.¹¹

This extended debate over agency guidance and its relationship to notice-and-comment rulemaking has largely overlooked what is often the most important form of guidance about the meaning and application of regulations—namely, the guidance content appearing in the preambles to final rules. The preamble is a well-established feature of the regulatory process.¹² In notice-and-comment rulemaking, the APA requires agencies to publish a “concise general statement of their basis and purpose” when it issues a final rule.¹³ That statement, along with some other material, constitutes what is known as the preamble to final rules or the regulatory preamble.¹⁴ These extensive explanatory documents typically run many more pages than the text of the rules themselves.

⁹ See generally Regulatory Accountability Act of 2013, S. 1029, 113th Cong. (2013) (providing a definition of guidance as “other than a rule”); *Non-Codified Documents Is the Department of Labor Regulating the Public Through the Backdoor?: Hearing Before the Subcomm. on Nat’l Econ. Growth, Nat. Res. & Regulatory Affairs of the H. Comm. on Gov’t Reform*, 106th Cong. (2000) (examining agency guidance with regard to the Department of Labor); H.R. REP. NO. 106-1009 (examining agency guidance practices).

¹⁰ In 2007, President Bush issued an executive order, which subjected significant guidance documents to centralized review by the OMB. See Exec. Order No. 13,422, 3 C.F.R. 191, 193 (2008). The OMB subsequently issued general guidelines governing agency guidance practices. See OMB’s Good Guidance Bulletin, *supra* note 1, at 20. In 2010, President Obama revoked President Bush’s executive order. See Exec. Order No. 13,497, 3 C.F.R. 218, 218 (2010), *reprinted as amended in* 5 U.S.C. § 601 app. at 816 (2012). However, the OMB continues to review significant guidance documents, and the OMB’s guidelines on good guidance practices remain in effect. See Memorandum from Peter R. Orszag, Dir., Office of Mgmt. & Budget, to Heads and Acting Heads of Exec. Dep’ts & Agencies (Mar. 4, 2009) [hereinafter Orszag Memorandum], https://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-13.pdf.

¹¹ See *United States v. Mead Corp.*, 533 U.S. 218, 230–31 (2001) (providing that notice-and-comment rules presumptively qualify for *Chevron* deference so long as they are issued pursuant to a statutory authorization to bind with the force of law).

¹² The preamble to federal rules typically appears under the Supplemental Information heading in the *Federal Register*. See NAT’L ARCHIVES & RECORDS ADMIN., FEDERAL REGISTER DOCUMENT DRAFTING HANDBOOK 12 (1991) (directing that extended discussion of the rule belongs in the Supplementary Information section).

¹³ 5 U.S.C. § 553(c) (2012).

¹⁴ See 1 C.F.R. § 18.12 (2012) (setting forth requirements for “preambles” to final rules). This Article’s references to preambles and regulatory preambles are to those statements for final rules, and not the preambles to notices of proposed rulemaking.

Regulatory preambles have an undeniable importance to law and governance in the United States. We live in an era of regulation in which the number and length of administrative rules issued through notice-and-comment rulemaking far exceed comparable measures for statutes produced by Congress.¹⁵ Under established administrative law, the validity of these agency rules is largely determined by evaluation of the rules' preambles.¹⁶ As a result, regulatory preambles convey the legal justification for large swaths of federal law in the United States. But they do more than that. These statements were conceived as serving—and continue to serve—a guidance function, providing advice about the meaning, application, and implementation of the agency's regulations. Although they are a ubiquitous, authoritative, and important source of guidance, preambles have been largely unmentioned in the debates over agency reliance on guidance.¹⁷

This Article provides an assessment of preambles as guidance and situates this form of guidance within principles of administrative law. Because the guidance function of preambles has fallen so far from view, Part I of the Article is devoted to establishing that preambles have a guidance function. Not only did the APA conceive of the regulation's statement of "basis and purpose" as serving a guidance role,

¹⁵ See CORNELIUS M. KERWIN & SCOTT R. FURLONG, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 13–21 (4th ed. 2011) (documenting, in terms of the number of rules and pages in the Federal Register devoted to federal regulations, a level of production of regulations beginning in the 1970s that far exceeds comparable measures for statutes). Compare MAEVE P. CAREY, CONG. RESEARCH SERV., R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE *Federal Register* 5 (2013) (reporting the number of final rules published annually from 1997 to 2012 ranged from "a low of 2,482 regulations in 2012 to a high of 4,388 regulations in 1998"), with *Legislation of the U.S. Congress: All Legislation Since 1973*, CONGRESS.GOV (reporting 3992 total statutes enacted by Congress from 1997–2016) <https://www.congress.gov/legislation?q=%7B%22congress%22%3A%5B%22112%22%2C%22110%22%2C%22111%22%2C%22109%22%2C%22108%22%2C%22107%22%2C%22106%22%2C%22105%22%2C%22113%22%2C%22114%22%2C%22bill-status%22%3A%22law%22%7D> [<https://perma.cc/GD96-MZDT>] (last visited July 10, 2016).

¹⁶ See *infra* text accompanying notes 39–45.

¹⁷ A few scholars have observed that agencies include statements of basis and purpose to explain their rules and their implementation, and questioned aspects of this practice. See, e.g., JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 337 (5th ed. 2012) ("Agencies often use the statement [of basis and purpose] to advise interested persons how the rule will be applied, to respond to questions raised by comments received during the rulemaking, and as a 'legislative history' that can be referred to in future applications of the rule."); Lazarus, *supra* note 8, at 2437 (noting that the EPA creates "underground environmental law" in the form of extensive guidance documents and lengthy, detailed preambles). See generally Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227, 227–29 (2007) (revealing and criticizing agencies' inclusion of preemption statements in preambles to their rules).

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