9-2016

Preambles as Guidance

Kevin M. Stack

Preambles as Guidance

*Kevin M. Stack**

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.

TABLE OF CONTENTS

---

* Professor of Law, Vanderbilt University Law School. This Article draws in part on a May 2014 report that I prepared as an academic consultant to the Administrative Conference of the United States ("ACUS"), a federal agency. The ACUS adopted Recommendation 2014–3, Guidance in the Rulemaking Process, based on that Report. *See* Administrative Conference Recommendation 2014–3, Guidance in the Rulemaking Process, 79 Fed. Reg. 35,988, 35,992 n.2 (June 6, 2014). I am especially grateful to Michael Snow (Vanderbilt Law 2014) for his outstanding research and work on this project and to Jason Sowards for exceptional research. For comments and discussion, I am grateful to Emily Brenner, Linda Breggin, Lisa Schultz Bressman, Gretchen Jacobs, Fumni Olorunnipa, Chris Serkin, Ganesh Sitaraman, Michael Vandenbergh, and audiences at presentations organized by ACUS and *The George Washington Law Review*.

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.

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%5D%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).

but it did so on sound principles. Under well-established principles of administrative law, the preamble is the public justification for the rules in judicial review; as a result, that justification has an authoritative status for guiding the courts and the public about the rule's application.[18] What is more, as a brief survey of agency rulemaking reveals, agencies provide a tremendous amount of guidance in their preambles—and guidance of widely varying types, from specific application examples to interpretive comments on the interaction of their rules with the common law.[19] Indeed, guidance is such a pervasive feature of regulatory preambles that its neglect in debates over guidance documents is curious. The increased focus on the justificatory and analysis role of the preamble appears to have distracted from evaluation of its guidance function.[20]

In Part II, the Article argues that the guidance agencies provide in preambles (or preamble guidance) has greater authority than other forms of agency guidance. Unlike most other guidance, preambles are issued contemporaneously with agencies' rules, and by the same authority that issues the rule—the agency itself, not individual officers or subordinate entities within the agency.[21] Because the preambles are the primary source of justification for agency rules, they are subject to higher levels of internal vetting, deliberation, and approval within the agency than the vast majority of guidance documents.[22] Moreover, preambles for rules issued by executive agencies are subject to the accountability checks of centralized executive review by the White House, as exercised through the Office of Management and Budget ("OMB") by its Office of Information and Regulatory Affairs ("OIRA").[23] They are also published as part of the rulemaking package in the most accessible, searchable, and highly visible forum for agency documents, the *Federal Register*—where only a subset of agency guidance documents is published. Along these dimensions individually and collectively, preambles—and the guidance in them—

18 *See, e.g.*, SEC v. Chenery Corp., 318 U.S. 80, 87 (1943).

19 *See infra* Section I.B.

20 For a general treatment of the legal regime that applies to preambles, see KEVIN M. STACK, ADMIN. CONFERENCE OF THE U.S., GUIDANCE IN THE RULEMAKING PROCESS: EVALUATING PREAMBLES, REGULATORY TEXT, AND FREESTANDING DOCUMENTS AS VEHICLES FOR REGULATORY GUIDANCE 13–30 (2014) [hereinafter STACK, GUIDANCE IN THE RULEMAKING PROCESS] (arguing that integrating preamble guidance into other guidance may help overcome perceptions that preambles pertain only to legal sufficiency).

21 *See infra* notes 104–06 and accompanying text.

22 *See infra* notes 109–10 and accompanying text.

23 Jennifer Nou, *Regulatory Textualism*, 65 DUKE L.J. 81, 111–12 (2015) (providing account of Office of Information and Regulatory Affairs ("OIRA") vetting process).

have a greater claim to represent the authoritative interpretation of the agency than other forms of guidance.

In Part III, the Article addresses implications of the superiority of preambles for judicial review. It argues that preambles warrant greater weight in judicial review than other forms of guidance documents. The once arcane topic of the standard of judicial review for agencies' interpretations of their own regulations is today one of the most hotly contested and watched issues in administrative law. The Supreme Court is currently debating whether to further limit or abandon the long-established doctrine of *Bowles v. Seminole Rock & Sand Co.*[24] and *Auer v. Robbins*,[25] which requires reviewing courts to accept the agency's interpretation of their own regulations unless plainly erroneous or inconsistent with the regulation.[26] Regardless of how the Court resolves that issue, the Article identifies an underlying principle in the Court's current deference doctrines: the agency's own most considered and deliberate interpretations warrant greatest deference. Under that principle, preamble guidance presents a special case for deference for the very reasons that make it more authoritative than other forms of guidance. Accordingly, for agencies, preambles provide a critical opportunity to obtain deference for their guidance content, an opportunity that will be all the more valuable if the Supreme Court abandons *Seminole Rock/Auer* deference.

The superiority of preamble guidance also imposes constraints on the agency, as addressed in Part IV. First, preamble guidance presumptively supersedes previously-issued guidance documents. Second, the superiority of preamble guidance imposes constraints on the agency's power to revise it. While an agency is not prohibited procedurally from revising its guidance so long as it has a good justification, the superiority of preamble guidance creates an obligation to revise it

---

24 Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).

25 Auer v. Robbins, 519 U.S. 452 (1997). While this doctrine was traditionally associated with *Seminole Rock*, since 1997, the Supreme Court and other courts have frequently attributed it to *Auer*. *See, e.g.*, Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 67 (2011) (Scalia, J., concurring) (noting that the *Seminole Rock* doctrine has recently been attributed to *Auer*). Chief Justice Roberts, the late Justice Scalia, as well as Justices Thomas and Alito expressed an interest in revisiting or overruling *Seminole Rock/Auer*. *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring in the judgment) (calling for the Court to overrule *Auer*); *id.* at 1213, 1224 (Thomas, J., concurring in the judgment) (arguing *Auer* should be overruled); Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1338 (2013) (Roberts, C.J., concurring) (joining with Justice Alito in noting that "[i]t may be appropriate to reconsider" *Seminole Rock/Auer* in another case); *id.* at 1339, 1342 (Scalia, J., concurring in part and dissenting in part) (urging the Court to overturn *Seminole Rock/Auer*).

26 *See Auer*, 519 U.S. at 461; *Seminole Rock*, 325 U.S. at 413–14.

in a document of roughly equivalent formality—that is, in guidance issued at the same level in the agency's hierarchy and published at the same level of visibility—namely, in the *Federal Register*. This obligation, though not judicially enforceable under the APA,[27] should be adopted as part of executive branch internal administrative law, either by individual agencies or by a centralized executive branch policy.

The Article thus has two overriding aims. At a practical level, it seeks to draw attention to preamble guidance as a critical part of the conversation about regulatory guidance, and to provide a framework for how courts, as well as agencies and executive branch regulators, treat this form of guidance. More generally, the Article's effort to identify a hierarchical structure within the vast domain of regulatory soft law seeks to advance the larger goal of articulating a jurisprudence that fits the actual practices of lawmaking and administration of the current state.[28]

I. THE GUIDANCE FUNCTION OF PREAMBLES

This Part provides an overview of the guidance function of preambles—that is, as a source of advice about the meaning, application, and implementation of the regulations they accompany. It first argues that these explanatory documents were conceived as serving a guidance function—and on sound theoretical grounds. It then provides a sampling of the ways in which agencies provide guidance in their preambles today. Finally, it offers an explanation of why this guidance function has faded from view and evaluation.

A. The Dual Roles of Justification and Guidance

The APA provides a simple structure for notice-and-comment rulemaking.[29] Section 553 of the APA sets out three basic elements of notice-and-comment rulemaking.[30] First, § 553 requires publication of

---

27 *See Perez*, 135 S. Ct. at 1209–10.

28 It could be viewed as articulating a normative structure for production of guidance, which has been referred to as being part of current unorthodox rulemaking. *See* Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1803 (2015) (identifying agency guidance as a form of unorthodox rulemaking).

29 *See* STACK, GUIDANCE IN THE RULEMAKING PROCESS, *supra* note 20, at 7–8.

30 *Id.* (citing 5 U.S.C. § 553 (2012)). Section 553 provides a default process for rulemaking except in the rare case that a statute requires rulemaking be conducted through the APA's formal rulemaking procedure, *see* 5 U.S.C. § 553(c) (noting that APA § 556 and § 557 apply when the rules are required by statute "to be made on the record after opportunity for an agency hearing"), or when an agency's statute specifies its own rulemaking procedure.

a "notice of proposed rulemaking" in the *Federal Register*,[31] commonly referred to as an "NPRM." Second, after publication of that required notice, the agency "shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments."[32] Third, after consideration of these comments, "the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose."[33]

Early understandings of the APA suggested that these statements of "basis and purpose," comprising much of what is commonly referred to as a regulation's preamble, were intended to have a dual role. They were conceived as not only identifying the legal and factual basis for the rule, but also providing guidance on its meaning for the public and the courts.[34] This point comes through clearly in the Attorney General's Manual on the Administrative Procedure Act.[35] Of the statement of basis and purpose, the Manual states, "[t]he required statement will be important in that the courts and the public may be expected to use such statements in the interpretation of the agency's rules."[36] The Manual further anticipates that, "the statement is intended to advise the public of the general basis and purpose of the rules."[37] The APA's legislative history also supports this understanding. "The required statement of the basis and purpose of rules is-

31 STACK GUIDANCE IN THE RULEMAKING PROCESS, *supra* note 20, at 7–8 (citing 5 U.S.C. § 553(b)).

32 *Id.* (citing 5 U.S.C. § 553(c)).

33 *Id.* The APA exempts from these notice-and-consideration requirements, among other exceptions, "interpretative rules, general statements of policy, [and] rules of agency organization, procedure, or practice," which are often referred to as "guidance documents." *Id.* (citing § 553(b)(3)(A)); *see* Mendelson, *supra* note 1, at 406 (describing process applicable to guidance documents).

34 STACK, GUIDANCE IN THE RULEMAKING PROCESS, *supra* note 20, at 8 (citing U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 32, 128 (1947)).

35 *See id.* As Lars Noah notes, this Manual has been treated as authoritative guidance on the APA. *See* Lars Noah, *Divining Regulatory Intent: The Place for a "Legislative History" of Agency Rules*, 51 HASTINGS L.J. 255, 309 n.201 (2000) (noting several examples); *see also* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 218 (1988) (Scalia, J., concurring) (referring to "the Government's own most authoritative interpretation of the APA . . . which we have repeatedly given great weight"); Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 546 (1978) (noting that it represents "a contemporaneous interpretation previously given some deference by this Court because of the role played by the Department of Justice in drafting the legislation"). Some have criticized the Manual because it was prepared post-enactment by the Attorney General with some stake in the issues. *See, e.g.*, John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 131–34 (1998). That criticism, however, has little bearing on the particular commentary on rulemaking relied upon here.

36 U.S. DEP'T OF JUSTICE, *supra* note 34, at 32.

37 *Id.*

sued," as both the House and Senate Judiciary Committee Reports commented, "should not only relate to the data so presented but with reasonable fullness explain the actual basis and objectives of the rule."[38]

This basic idea that a regulation's statement of basis and purpose is meant to apprise the public of the effect and application of the rule—to serve a guidance function—makes intuitive sense. The agency itself, not a lower-level official, issues the statement, and does so as an explanation of the rule at the time the rule is issued. These features, which make the statement part and parcel of the agency's act of rulemaking, also give the statement an inherent authority. Basic principles of administrative law further augment the statement's authority. Under the longstanding doctrine associated with *SEC v. Chenery Corp.*,[39] a reviewing court will judge the validity of an agency rule only upon the grounds that the agency offered to justify it.[40] This doctrine, called the *Chenery* (or *Chenery I*) doctrine, means that the agency's statement of basis and purpose is authoritative in the sense that courts will uphold an agency rule based on grounds relied upon by the agency in the statement of basis and purpose.[41] Evidence, arguments, or interpretive positions that do not appear in the statement generally will not save the rule on review.[42] Accordingly, when an

---

38 H.R. REP. NO. 79-1980, at 25 (1946); S. REP. NO. 79-752, at 15 (1945). The Senate Report also contains as an appendix the Attorney General's 1945 report on Senate Bill 7. S. REP. NO. 79-752, at 37–38. The Attorney General's report stated the following in regards to the statement of basis and purpose:

> Section 4 (b), in requiring the publication of a concise general statement of the basis and purpose of rules made without formal hearing, is not intended to require an elaborate analysis of rules or of the detailed considerations upon which they are based but is designed to enable the public to obtain a general idea of the purpose of, and a statement of the basic justification for, the rules. The requirement would also serve much the same function as the whereas clauses which are now customarily found in the preambles of Executive orders.

Id. at 39.

39 SEC v. Chenery Corp., 318 U.S. 80 (1943).

40 *See id.* at 87.

41 *See, e.g.*, Michigan v. EPA, 135 S. Ct. 2699, 2710 (2015) (using the agency's statement of basis and purpose to judge the rationales upon which the agency relied for the purposes of review); Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983) (invoking same principle); Richard Murphy, Chenery *Unmasked: Reasonable Limits on the Duty to Give Reasons*, 80 U. CIN. L. REV. 817, 840 (2012) (noting that under *Chenery*, courts began to require an agency's statement of basis and purpose "to respond to all significant objections leveled at the rule during the comment process").

42 Some courts allow an exception when the agency has "articulated and acted on a consistent rationale throughout the course of a lengthy informal [notice-and-comment] rulemaking process, the final rule [will not be] arbitrary and capricious because the rationale was not fully

agency regulation is reviewed under *Chevron*, it is the agency's interpretations in the preamble that form the basis for determining whether the agency's interpretations are permissible.[43] Likewise, when a regulation is reviewed under arbitrary and capricious review, the preamble serves as the agency's explanation of the rationality and factual basis of the rule's validity.[44] For these and other reasons, I have argued in other writing that the agency's account of the purposes of the regulations and its provisions in the preamble should have a privileged place when courts interpret regulations.[45]

A closely related point is critical here: constricting judicial review of a rule's validity to the rule's statement of basis and purpose also augments the statement's guidance role. Though the *Chenery* rule was originally justified on other grounds,[46] a byproduct of the doctrine is making the preamble an authoritative form of guidance. By virtue of the rule in *Chenery*, the preamble becomes the agency's chance to explain its rule to the courts. Closely related, *Chenery* tells the regulated entities and the public that when an agency rule is reviewed, the agency will be limited to the explanations and justifications for the rule provided in the statement of basis and purpose.[47] As a result, the regulated entities and the public also have reason to treat those explanations and justifications as authoritative commentary on the rule.

Not only does the public have reason to treat the preamble as authoritative, but the fact that the preamble includes the agency's reasons for the rule gives the preamble an inherent guidance function. This point follows from an observation Professor Frederick Schauer makes about the practice of reason-giving. As explained by Professor Schauer, publicly expressed reasons have a logical structure of "propositions of greater generality than the conclusions they are reasons for."[48] As a result, when we give reasons for an action, that reason-giving creates "a prima facie commitment to other outcomes falling

---

reiterated" in the statement of basis and purpose. *See* Gatewood v. Outlaw, 560 F.3d 843, 848 (8th Cir. 2009).

43 *See* STACK, GUIDANCE IN THE RULEMAKING PROCESS, *supra* note 20, at 27–30.

44 *See id.* at 10–13.

45 *See* Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 391–96 (2012) (arguing that regulations should be interpreted in light of purposes given to them in their statements of basis and purpose); *cf.* Halo v. Yale Health Plan, 819 F.3d 42, 52 (2d Cir. 2016) (citing *id.* and explaining that regulatory interpretation involves interpretation of the regulation's text in light of its purposes, as stated in the regulation's preamble, as well as the purpose of the regulation's authorizing statute).

46 *See* SEC v. Chenery Corp., 318 U.S. 80, 87–89 (1943).

47 *See id.*

48 Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 638 (1995).

within [the] scope" of the reason.[49] To translate this general idea into the agency rulemaking context, when the agency offers a justification for its course of action and characterization of the objectives of the rule in its preamble, it makes a prima facie commitment to those reasons.[50] "[B]ecause reasons have greater generality than the outcomes they support," the reasons an agency gives in the preamble bear on the application and interpretation of its rules.[51] It is not that those reasons can never be overcome, nor that agencies do not also provide specific guidance in preambles. In Part IV, I address below how agencies can revise these commitments. The point here is only that the justifications agencies provide in their preambles do, at a minimum, create prima facie commitments to reading the rules in light of the reasons given to justify them. Accordingly, the very role of the statement of basis and purpose as the agency's public justification for the rule gives these statements a guidance function. In this legal context, guidance is an unavoidable part of justification—and, more specifically, an ineluctable feature of the regulation's statement of "basis and purpose."

B. Sampling of Guidance in Preambles

Not only does the APA provide statements of basis and purpose a guidance role, but agencies provide extensive guidance content in their preambles. The guidance in preambles goes well beyond the grounds necessary to justify a rule and frequently includes very specific interpretive positions and application advice. Agencies include interpretive positions on general and specific legal questions as well as detailed application examples. Interestingly, much of the guidance provided in preambles could be issued in separate guidance documents. Agencies clearly make choices—implicitly, explicitly, or strategically—to include guidance content in their preambles or in separately-issued guidance documents.

The guidance agencies provide in their preambles can be roughly categorized into three types: (1) that pertaining to purposes or justifications of the rule, (2) interpretive commentary on the meaning of the rule, and (3) application examples. Given the scope of federal rulemaking—not to mention the diversion of readers' attention when

---

49 *Id.* at 648.

50 *See* Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 997 (2007) (quoting Schauer, *supra* note 48, at 638) (elaborating connection between reason-giving and requirement that agency action be upheld only upon grounds stated by the agency).

51 *See id.*

confronted with examples from the *Federal Register*—the aim here is simply to provide a few illustrations of these types of guidance.

1. Purpose Statements

The most straightforward job of a preamble is to provide an explanation of the purpose of its regulation and its provisions in relation to the authorizing statute,[52] and for reasons just discussed, that justificatory material includes guidance. For a garden-variety example, consider the Department of Transportation's ("DOT") 2011 rule restricting use of hand-held mobile phones by drivers of commercial motor vehicles ("CMVs").[53] The DOT has statutory authority to "prescribe regulations on commercial motor vehicle safety . . . [including those setting] minimum safety standards for commercial motor vehicles."[54] Under this authority, the DOT studied driver distractions and concluded that the odds of being in a safety-critical event were six times higher when the driver was hand-dialing a cell phone.[55] "Because of the data on distractions associated with the use of hand-held mobile telephones while driving," the DOT took the position, in the preamble to the 2011 rule, that "it is in the best interest of public safety to restrict a CMV driver's use of such devices."[56] The DOT reasoned that CMV drivers should be limited to voice dialing, where the driver can initiate or receive a call by touching a single button, and "does not require the driver to take his or her eyes off the forward roadway for an extended period—comparable to using vehicle controls or instrument panel functions."[57] The DOT's rule restricted a driver from "dialing a mobile telephone by pressing more than a single button."[58] The standard set forth in the preamble—that the driver's attention should not be diverted more than by using standard vehicle controls—sheds light on the rule's application to other features of smartphones.

---

52 1 C.F.R. § 18.12 (2012) (setting forth requirements for "preambles" to final rules).

53 Drivers of CMVs: Restricting the Use of Cellular Phones, 76 Fed. Reg. 75,470 (Dec. 2, 2011) (to be codified at 49 C.F.R. pts. 383, 384, 390, 391 & 392).

54 *Id.* at 75,472; *see also* 49 U.S.C. § 31136 (2012).

55 Drivers of CMVs: Restricting the Use of Cellular Phones, 76 Fed. Reg. at 75,472.

56 *Id.*

57 *Id.* at 75,475.

58 *Id.* at 75,481. "This exception allows CMV drivers to use their hand-held mobile telephones if necessary to communicate with law enforcement officials or other emergency services." *Id.*

2. *Interpretive Commentary*

In preambles, agencies frequently provide express interpretive commentary on the meaning of their rules and also explain the rule's relationship to other rules and statutes. That interpretive commentary often appears in that agency's designated "section-by-section" analysis of the rule as well as in its explicit responses to commentators. Consider the following examples:

a. In a regulation amending the Consumer Protection Financial Bureau's ("CFPB") Regulation E, which implements the Electronic Fund Transfer Act ("EFTA"),[59] the CFPB provided a section-by-section analysis that is subdivided numerically and by topic with subsections tracking sections in the rule (such as "Section 1005.2 Definitions" and "Section 1005.3 Coverage").[60] This commentary included conclusions about the scope of the rule's application.[61] For instance, the agency offered an interpretation of the term "agent" in the Electronic Funds Transfer Act:

> EFTA section 919 does not use consistent terminology concerning agents of remittance transfer providers . . . . The Bureau does not believe that these statutory wording differences are intended to establish different standards across the rule. Therefore, the rule generally refers to "agents," as defined in § 1005.30(a), to provide consistency across the rule.[62]

The CFPB also advised that because "the concept of agency has historically been defined by common law, it is appropriate for the definition to defer to applicable law regarding agents, including with respect to what creates or constitutes an agency relationship."[63]

b. In a Department of Veterans Affairs ("DVA") rule implementing the DVA's medical foster home program, the preamble reported that a commenter had asked whether the spouse of a married veteran could move into the medical foster home with the veteran or if the rule forced couples to live apart.[64] The DVA answered that

---

59 Electronic Fund Transfers (Regulation E), 77 Fed. Reg. 6194 (Feb. 7, 2012) (to be codified at 12 C.F.R. pt. 1005); *see also* Financial Institutions Regulatory and Interest Rate Control Act of 1978 (Electronic Fund Transfers Act), Pub. L. No. 90-630, 92 Stat. 3641 (codified as amended in scattered sections of 12 & 15 U.S.C.).

60 Electronic Fund Transfers, *supra* note 59, at 6204–05.

61 *Id.* at 6204–71.

62 *Id.* at 6205.

63 *Id.*

64 Medical Foster Homes, 77 Fed. Reg. 5186, 5187 (Feb. 2, 2012) (to be codified at 38 C.F.R. pt. 17).

"[n]othing in the regulation would preclude the spouse of a veteran from living in the same medical foster home as the veteran. Such an arrangement would be a matter of agreement between the spouse of the veteran and the medical foster home caregiver."[65]

c. In a Department of Treasury and U.S. Customs and Border Protection ("CBP") rule defining "members of a family" for purposes of filing a customs family declaration, the agency included a "Definition of Resident" section.[66] There, the agency addressed a commenter's question about whether the definition of "resident" as used by the CBP in this context was the same as "permanent resident" as used in the immigration-law context.[67] The agency's response provides very clear guidance on the meaning of "resident":

> The term "resident" for purposes of this regulation is not the same as "lawful permanent resident" in immigration law. For customs purposes, pursuant to 19 CFR 148.2, persons arriving from foreign countries are divided into two categories: (1) Residents of the United States returning from abroad and (2) all other persons (*i.e.*, visitors).[68]

d. The Equal Employment Opportunity Commission ("EEOC") provided extensive interpretive guidance in response to comments within a section-by-section analysis in a rule implementing Title II of the Genetic Information Nondiscrimination Act.[69] The preamble addressed a commenter's suggestion that medical information obtained from one employee should not be considered family medical history of a family member who also works for the same employer.[70] The EEOC rejected this suggestion, writing, "[w]e do not think Congress could have intended that an employee not be protected from the discriminatory use or the disclosure of his or her genetic information just because the employer obtained it from a family member who was also an employee."[71]

---

65 *Id.*

66 Members of a Family for Purpose of Filing CBP Family Declaration, 78 Fed. Reg. 76,529, 76,530–31 (Dec. 18, 2013) (to be codified at 19 C.F.R. pt. 148).

67 *Id.* at 76,530.

68 *Id.*

69 *See* Regulations Under the Genetic Information Nondiscrimination Act of 2008, 75 Fed. Reg. 68,912, 68,913–31 (Nov. 9, 2010) [hereinafter GINA Regs.] (to be codified at 29 C.F.R. pt. 1635); *see also* Genetic Information Nondiscrimination Act ("GINA") of 2008, Pub. L. No. 110-233, tit. II, 122 Stat. 881 (codified as amended at 42 U.S.C. §§ 2000ff–2000ff-11 (2012)).

70 GINA Regs., *supra* note 69, at 68,915.

71 *Id.* at 68,916. The Small Business Administration ("SBA") and the Social Security Administration ("SSA") also take interpretive positions in their preambles. *See, e.g.*, Small Business Investment Companies—Early Stage SBICs, 77 Fed. Reg. 25,042, 25,044–49 (Apr. 27, 2012)

e. The Railroad Retirement Board ("RRB") used a question-and-answer format conveying clear guidance in the preamble of a rule regarding evaluation of disabilities.[72] The preamble is divided into sections including, "What Programs Will the Final Rule Affect?" and "How Is Disability Defined?"[73] In the section, "How Does This Final Rule Address That Problem?," the RRB responds to commenters by stating:

> The Board has reviewed the comments and the amendments to section 220.178(c)(1) and agrees that the second sentence could be confusing. We have modified that sentence to make it clear that in a continuing disability review, the claimant's current severity will be compared to the standard that was used to make the original, or "comparison point", decision.[74]

These examples suggest the many ways in which agencies take interpretive positions in their preambles—positions that frequently could appear in separately-issued documents.

3. *Detailed Application Examples*

Agencies also provide guidance in preambles through the use of detailed examples. The Department of Education ("DOE") examples, found in a preamble to a rule amending the Direct Loan Program,[75] provided a good illustration. The agency stated that the following example (among others) "illustrate[s] the operation of the final regulations":

(to be codified at 13 C.F.R. pt. 107); Revised Medical Criteria for Evaluating Digestive Disorders, 72 Fed. Reg. 59,398, 59,399–407 (Oct. 19, 2007) (to be codified at 20 C.F.R. pts. 404, 416). Under the heading of *Section 107.50—Definitions*, the SBA responded to a number of commenters that suggested changing the proposed definition of "Early Stage SBIC," writing "SBA . . . believes the commenters' contrasting points of view illustrate the benefits of maintaining the flexibility that the proposed definition provided. SBA expects that some management teams will focus exclusively on early stage companies, while others will opt for a mixed portfolio." Small Business Investment Companies, *supra*, at 25,044–45. For another example, see Revised Medical Criteria, *supra*, at 59,399–407. The SSA also included a "Public Comments" section that is a general response to comments. *Id.* at 59,407–20. Guidance appears throughout these different formats. For instance, in the "Public Comments" section, one commenter suggested that all individuals who require feeding through intravenous or gastrostomy tubes should be considered not able to work under the rule, but the SSA responded that "we do not think it appropriate to presume disability in all individuals who need such treatment; we must evaluate most situations on a case-by-case basis." *See id.* at 59,409.

72 Removal of Listing of Impairments and Related Amendments, 74 Fed. Reg. 63,598, 63,598 (Dec. 4, 2009) (codified at 20 C.F.R. pt. 220).

73 *Id.*

74 *Id.* at 63,599–600.

75 William H. Ford Federal Direct Loan Program, 79 Fed. Reg. 3108, 3108 (Jan. 17, 2014) (codified at 34 C.F.R. pt. 685).

> Example 1: Borrower A and Borrower B are both enrolled half-time and both enrolled in the fall term only. Borrower A receives a Direct Subsidized Loan in the amount of the annual loan limit and Borrower B receives a loan for less than the annual loan limit.[76]

Following this introduction to the example, the DOE included a chart and a few paragraphs explaining how the regulation would impact hypothetical borrowers.[77]

The Centers for Medicare and Medicaid Services ("CMS") also used detailed examples in a preamble to a rule establishing guidelines for Accountable Care Organizations ("ACOs").[78] For instance, commenters expressed confusion over a proposed requirement that the governing bodies of ACOs must be at least 75% controlled by Medicare-enrolled entities.[79] CMS responded with an example: "[I]f a hospital, two physician groups, and a health plan formed an ACO, the hospital and two physician groups must control at least 75 percent of the ACO governing body."[80]

As this short sampling suggests, agencies provide extensive guidance in the preambles to their final rules, whether through the articulation of the purposes and grounds for the rule, direct interpretive commentary, or in detailed application examples,[81] much of which could have been provided in separately-issued guidance documents.

C. *Explaining the Neglect of the Guidance Function*

In light of the variety and extensive guidance agencies provide in their preambles, and the grounding of this practice in history and current law, it is worth pausing to consider why the guidance function of preambles has received so little attention. One plausible explanation is that the guidance function may have lost priority in light of the increasing justificatory and analysis requirements saddled on preambles and the subsequent concern by courts and commentators that agencies

---

76 *Id.* at 3114.

77 *Id.* at 3115.

78 Medicare Program; Medicare Shared Savings Program: Accountable Care Organizations, 76 Fed. Reg. 67,802, 67,802 (Nov. 2, 2011) (codified at 42 C.F.R. pt. 425).

79 *Id.* at 67,819.

80 *Id.* at 67,820.

81 Christopher Walker's recent study of agency rule drafters, *see infra* notes 126–128 and accompanying text, provides further support that rule drafters view the preambles as sources that courts—and presumably others—should rely upon. *See* Christopher J. Walker, *Inside Regulatory Interpretation: A Research Note*, 114 MICH. L. REV. FIRST IMPRESSIONS 61, 65–66 (2015).

have turned to guidance documents as a less costly way of establishing norms outside of notice-and-comment procedures.

The increased justificatory demands on agencies is a familiar theme in the development of administrative law. Beginning in the late 1960s and early 1970s, courts transformed "arbitrary and capricious" review under the APA into "hard look" review, requiring comprehensive justifications for agency rules to appear in their preambles.[82] The Supreme Court's decision in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*[83] still provides a classic statement and illustration of hard look review. In *State Farm*, the Court set a high standard for the agency's level of express justification in its statement of basis and purpose in the preamble.[84] To avoid being arbitrary or capricious under § 706 of the APA, the agency had to "examine the relevant data and articulate a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made.'"[85] *State Farm* explained that an agency rule would be considered arbitrary and capricious if the agency failed to consider an important aspect of the problem, or offered an explanation counter to the evidence before the agency or the rule could not otherwise be viewed as the product of agency expertise.[86]

The Supreme Court used this standard in *State Farm* to reverse the agency's decision to rescind a rule, in part because the agency provided no consideration of one of the viable options within the ambit of the existing rule.[87] Since the *State Farm* decision, both the Supreme Court and the courts of appeals have emphasized that the vesting of wide power in agencies "carries with it the correlative responsibility of the agency to explain the rationale and factual basis for its decision"[88]—a duty that agencies discharge in their statements of basis and purpose. This duty not only includes evaluation of alternatives

---

82 *See, e.g.*, Jerry L. Mashaw, *Explaining Administrative Process: Normative, Positive and Critical Stories of Legal Development*, 6 J.L. ECON. & ORG. 267, 276 (1990) (explaining how judges elaborated the judicial review doctrines to align notice-and-comment rulemaking's extraordinarily rigorous demands with agency reason-giving and rationalization); *see* Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1761–62 (2007) (describing development and persistence of hard look review); Note, *Rationalizing Hard Look Review After the Fact*, 122 HARV. L. REV. 1909, 1912–13 (2009).

83 Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

84 *Id.* at 30–31.

85 *Id.* at 43.

86 *Id.*

87 *Id.* at 51.

88 Bowen v. Am. Hosp. Ass'n, 476 U.S. 610, 627 (1986); *see also, e.g.*, Detsel *ex rel.* Detsel v. Sullivan, 895 F.2d 58, 63 (2d Cir. 1990).

and explanation of the basis for the regulations adopted, but also a duty to discuss salient comments.[89] The agency's articulation of the grounds of its action and engagement with commentators in its statement of basis and purpose is necessary to the validity of the rule.

As these doctrines of judicial review congealed in the hard look doctrine, the length of regulatory preambles has grown as measured by the average number of pages per final rule published in the *Federal Register*. A Congressional Research Service study reports that the average number of *Federal Register* pages per final rule including the preamble in 1976, 1977, and 1978 was 1.70, 2.07, and 2.21 respectively, whereas the averages in 2009, 2010, and 2011 were 5.93, 6.97, and 6.90 respectively.[90] The conventional and common sense explanation for the lengthening is that the prospect of stringent judicial review, which requires the agency to "show its work," has prompted agencies to devote more energy to writing elaborate statements outlining the legal sufficiency of their regulations in their preambles.[91] Moreover, other regulatory analysis requirements imposed on agencies add to the explanatory obligations agencies must discharge in their preambles, or in the appendices, including the analysis requirements imposed by Executive Order 12,866,[92] other executive orders,[93] the Regulatory Flexibil-

---

89 *See, e.g.*, Am. Mining Cong. v. EPA, 965 F.2d 759, 771 (9th Cir. 1992).

90 *See* CAREY, *supra* note 15, at 17–18 (calculations produced by dividing the number of pages per final rule, including preambles, by the number of final rules, as reported in Table 6).

91 *See, e.g.*, Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1401 (1992) (attributing the "Herculean effort of assembling the record and drafting a preamble" to heightened judicial scrutiny of rulemaking); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 65 (1995) (suggesting that the stringent judicial gloss on the APA has "transformed the simple, efficient notice and comment process into an extraordinarily lengthy, complicated, and expensive process"); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 492–98 (1997) (providing account of ways in which hard look review has increased burdens of explanation and evidence production on agencies). Even if the standards of judicial review have not slowed down rulemaking, they appear to have contributed to the lengthening of the agency's explanatory materials in the preamble.

92 Exec. Order No. 12,866, 3 C.F.R 638, 642–43 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 126–29 (2006 & Supp. V 2011) (requiring agencies to submit detailed proposal with summary of objectives, legal basis, relation of regulation to president's priorities, etc., to executive branch for approval).

93 Exec. Order No. 13,132, 3 C.F.R. 206, 210–11 (1999) (§ 8 requiring certification regarding compliance with federalism requirements of the order); Exec. Order No. 13,175, 3 C.F.R. 304, 307 (2000) (§ 7 requiring certification regarding compliance with tribunal consultation requirements of the order); Exec. Order No. 13,045, 3 C.F.R. 198, 200–01 (1997) (§ 5 requiring analysis and disclosure of risks to children as part of regulatory review); Exec. Order No. 13,211, 3 C.F.R. 767, 767–68 (2001) (§ 2 requiring consideration of actions with significant effects on supply, distribution, or use of energy).

ity Act,[94] the Paperwork Reduction Act of 1995,[95] the National Environmental Policy Act of 1969,[96] and the Unfunded Mandates Reform Act of 1995,[97] among others. Under the weight of these justificatory and analysis requirements, the evaluative focus shifted to how an agency's preamble complied with these demands and away from the preamble's guidance role.

A common suspicion is that the very increased costs associated with notice-and-comment rulemaking have given agencies incentives to look for alternative, less costly ways to establish policy or advise the public of the agency's understanding of the law.[98] In particular, as noted at the outset, commentators and policymakers have worried that the high cost of notice-and-comment rulemaking has caused agencies to pivot toward guidance, relying on separately-issued guidance documents as opposed to re-engaging in a notice-and-comment rulemaking,[99] effectively substituting guidance documents for rulemaking.[100] The focus of debate over guidance has been in assessing whether agencies have been strategically substituting guidance documents instead of engaging in rulemaking. Recent empirical investigations have undermined the view that agencies strategically substitute guidance for rules.[101] But because preambles are not generally

---

94 5 U.S.C. § 604(a)(2) (2012) (requiring agencies to state changes made in rule in response to comments).

95 44 U.S.C. § 3505 (2012) (requiring approval by Director of OMB that rules minimize federal information collection burdens).

96 42 U.S.C. § 4332 (2012) (requiring preparation of environmental impact statement for significantly affecting the quality of the human environment).

97 2 U.S.C. § 1532(a)(5)(A) (2012) (requiring agencies to respond to comments from state and local governments).

98 *See, e.g.*, *supra* notes 6–10 and accompanying text. More generally, as Jacob Gersen and Eric Posner observe, one of the general characteristics of soft law is that it is cheaper for the institution than proceeding through the formalities required to issue binding law. *See* Gersen & Posner, *supra* note 5, at 594–95.

99 *See* 5 U.S.C. § 553(b) (2012) (excepting interpretative rules and general statements of policy from notice-and-comment requirements).

100 *See, e.g.*, Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1316–17 (1992) (arguing that with the increased cost of notice-and-comment rulemaking, agencies are increasingly willing to rely on forms of nonlegislative rules, such as interpretative rules and general statements of policy to implement their statutes); Pierce, *supra* note 91, at 86 (same); *see also supra* notes 6–10.

101 *See* Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1461 (2012) (finding no increase in Department of Interior's issuance of guidance between 1950–1990); Connor N. Raso, Note, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782, 805–07 (2010) (finding that EPA, FDA, FCC, OSHA, and IRS did not increase issuance of guidance strategically, though agencies did issue more guidance

conceived as part of an agency's guidance, this debate over guidance did not address the extent to which the agencies rely upon their preambles as vehicles for guidance.

In sum, the increased legal demands applied to the agency's preamble have been directed toward legal sufficiency or analysis requirements.[102] To the extent those increased justificatory and analysis requirements have had an effect on agency activities in rulemaking—and the lengthening of agency preambles is a good indication of this possible effect—they have augmented the prominence of the justificatory role of the preamble. At the same time, even as policymakers and commentators have devoted more attention to agencies' reliance on guidance, that attention has been almost exclusively directed to separately-issued guidance documents,[103] not the extensive and varied guidance provided in preambles. Despite agencies' robust practices of providing guidance in regulatory preambles, preamble guidance has received little focused attention.

II. THE SUPERIORITY OF PREAMBLE GUIDANCE

Part I of this Article defended the guidance function of preambles both as a matter of design and agency practice. This Part argues that preamble guidance is superior—in authority and political accountability—to other forms of guidance. This argument builds from several commonplace observations about the difference between preambles and other forms of agency guidance.

First, as to source, the agency itself or the agency head issues preambles and thus their guidance content. The APA's requirement that

---

as presidential terms waned); *cf.* Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 936 (2008) (suggesting that volume of agency rulemaking shows it is not ossified). Interestingly, Anne Joseph O'Connell's study reveals that agencies have increased issuance of direct final rules and interim final rules. *See id.* Both direct final rules and interim final rules include statements equivalent to statements of basis and purpose, but they do not undergo a prepublication comment period. *See* NAT'L ARCHIVES & RECORDS ADMIN., *supra* note 12, 10–12 (noting that direct final rules and interim final rules should include preambles explaining the rule's purpose and grounds); O'Connell, *supra* (noting that such forms of regulating bypass the ex ante procedural constraints of traditional rulemaking). Agencies' increased reliance on these forms suggests that at least the "notice-and-comment rulemaking has significant costs that agencies want to avoid." O'Connell, *supra.*

102 *See, e.g.*, Unfunded Mandates Reform Act of 1995 § 202, 2 U.S.C. § 1532(a) (2012) (addressing regulatory procedures); Regulatory Flexibility Act § 3(a), 5 U.S.C. §§ 603–604 (2012) (same); Small Business Regulatory Enforcement Fairness Act of 1996 § 244, 5 U.S.C. § 609 (2012); Congressional Review Act § 251, 5 U.S.C § 801 (2012) (same); Paperwork Reduction Act of 1995 § 2, 44 U.S.C. § 3504(c) (2012) (same).

103 *See, e.g., supra* note 100 and accompanying text.

rules issued through notice-and-comment be accompanied by a statement of their basis and purpose is a requirement that the same entity that issues the rules also issues the statement of basis and purpose.[104] The preamble to a regulation is one of the relatively few types of documents other than the regulations themselves that are issued by the agency (or the agency subdelegate within the agency).[105] Even for regulatory commissions, where commissioners, on occasion, issue dissents from a regulation's preamble,[106] the preamble is still issued on behalf of the agency, just as a majority opinion of a court in the United States is issued on behalf of that court. While some guidance documents are issued by the agency or under the signature of the agency head, much guidance is issued by lower-level officials within the agency.[107] Indeed, it is precisely that fact which prompted the drafters of the OMB's *Good Guidance Bulletin* to require agencies to develop policies for vetting their significant guidance.[108] Thus, the source of the preamble guidance alone renders it more authoritative than all but the small set of guidance documents issued by the highest authority in the agency.

Closely related, authorship by the agency also provides greater assurance of internal vetting.[109] For many agencies, notice-and-comment regulations contain the agency's most important lawmaking and policymaking. Even though many preambles are lengthy, the fact that they are issued by the agency itself provides a strong proxy for internal deliberation and consideration within the highest echelons in the agency. Guidance documents do not generally receive that same level

104 *See* STACK, GUIDANCE IN THE RULEMAKING PROCESS, *supra* note 20, at 8–9.

105 *See* U.S. Telecom Ass'n v. FCC, 359 F.3d 554, 565 (D.C. Cir. 2004) (noting that "subdelegation to a subordinate federal officer or agency is presumptively permissible absent affirmative evidence of a contrary congressional intent").

106 *See, e.g.*, Prohibitions on Market Manipulation, 74 Fed. Reg. 40,686, 40,703–04 (Aug. 12, 2009) (concurring statement of Commissioner J. Thomas Rosch) (agreeing with issuing 16 C.F.R. pt. 317 but expressing misgivings about the FTC's rationale for the rule); Stack, *Interpreting Regulations*, *supra* note 45, at 393–94 (discussing this example).

107 *See* Seidenfeld, *supra* note 1, at 367 (noting guidance issued at multiple levels in the hierarchy).

108 *See* OMB's Good Guidance Bulletin, *supra* note 1, at 3, 20. Not all agencies have yet developed those written procedures. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-368, REGULATORY GUIDANCE PROCESSES: SELECTED DEPARTMENTS COULD STRENGTHEN INTERNAL CONTROL AND DISSEMINATION PRACTICES 20 (2015) [hereinafter REGULATORY GUIDANCE PROCESSES] (reporting that two of four agencies studied did not have written procedures or wide knowledge of those procedures as required by the OMB's Good Guidance Bulletin).

109 For a rich description of the internal review process for rules at the EPA, see Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, 54 LAW & CONTEMP. PROBS. 57, 89 (1991) (describing working group, steering committee, and "Red Border Review" prior to submission of draft rules and preambles to the Administrator).

of review, nor is there the same level of institutional incentives for it. The OMB's *Good Guidance Bulletin* requires agencies to develop written procedures for the approval of significant guidance to ensure that it is approved by senior agency officials.[110] That provides some check that significant guidance documents—those leading to an annual effect on the economy of more than $100 million or as otherwise defined by the OMB's *Good Guidance Bulletin*—receive high-level review within the agency.[111] But only a small sliver of agency guidance qualifies as significant guidance such that it triggers this OMB requirement for clearance by senior agency officials.[112] For the rest, there is no cross-cutting requirement of internal vetting (or a requirement that the guidance be issued by a rulemaking within the agency). Moreover, this OMB requirement for clearing significant guidance does not apply to independent agencies.[113] Given the sheer volume of most agencies' guidance,[114] it also would be unrealistic to presume that guidance generally receives the same level of internal agency vetting as preambles.

The preamble's authorship by the highest-level officials within the agency makes clear who is ultimately responsible for its contents,[115] augmenting political accountability and accountability to the stakeholder community for action. Moreover, for executive agencies, as Professor Jennifer Nou emphasizes, draft regulatory preambles for significant regulatory actions are also part of the rulemaking package reviewed by OIRA.[116] OIRA review not only involves the desk of-

110 OMB's Good Guidance Bulletin, *supra* note 1, at 20.

111 Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1853 (2013) (noting that administrations will not want important guidance documents to be issued without vetting by senior administrative officials).

112 *See* REGULATORY GUIDANCE PROCESSES, *supra* note 108, at 17 (departments studied considered few of their guidance documents as "significant" under the OMB Bulletin and none as "economically significant").

113 OMB's Good Guidance Bulletin, *supra* note 1, at 19.

114 *See* Mendelson, *supra* note 1, at 398–99 (noting that guidance documents far exceed rules in number); Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1468–69 (1992) (noting the same based on informal sampling).

115 *See* David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 238 (arguing that *Chevron* should be limited to actions taken by statutory delegates whose actions are more politically accountable, disciplined, and easily identifiable than other actors); Nou, *supra* note 23, at 112 n.145 (noting political accountability benefits of agency head claiming authorship).

116 *See* Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1779 (2013) (noting that regulatory submissions to OIRA include preambles and regulatory texts among other matters); Donald R. Arbuckle, *OIRA and Presidential Regulatory Review: A View from Inside the Administrative State*, EXPRESSO 39 n.98 (May 3, 2008) (unpublished paper), http://works.bepress.com/donald_arbuckle/1/ (noting that draft preambles, regulatory

ficers at OIRA but also officers within the Executive Office of the President, and, depending on the subject matter, the views of other departments and agencies,[117] thus providing a formal check of vetting by various executive branch officials. In these internal consultations and conversations, the draft final preamble and the draft regulatory text are both the subject of review;[118] review comments may be directed towards the alternatives the agencies considered or should have considered, issues typically disclosed in the preamble, not the text of the draft rule.[119] The dialogue between the agency and OIRA can involve detailed negotiations about not only the text of the proposed rule but also the text of the preamble.[120] While a small selection of significant freestanding guidance documents may obtain the same level of executive review as preambles to significant regulations,[121] that review is institutionalized and routine only for regulatory preambles.[122] As rulemaking documents are typically more important for policy and the public than stand-alone guidance documents, the level of internal review within the agency and external review by OIRA is more intensive.[123] In short, regulatory preambles are typically the products of more extensive political, expert, and intra-agency vetting than other guidance documents.[124]

---

text, regulatory impact analysis as well as other materials are part of the agency submission to OIRA).

117 *See* Sunstein, *supra* note 111, at 1854–56 (describing OIRA's role as facilitator of interagency dialogue as part of review).

118 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-929, RULEMAKING: OMB'S ROLE IN REVIEWS OF AGENCIES' DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS 73 (2003) [hereinafter OMB'S ROLE] (noting rules "in which the most significant changes attributed to OIRA's or OMB's suggestions resulted in the addition or deletion of material in the explanatory preamble section of the rule").

119 *See* Sunstein, *supra* note 111, at 1857 (noting interagency debate about the alternatives considered as an example of OIRA facilitated review).

120 OMB'S ROLE, *supra* note 118, at 111 ("Our review indicated that some changes made to the preambles of the agencies' rules (e.g., suggestions that agencies solicit comments on particular issues) could affect their application, and therefore appeared to us to be 'substantive.'"); *see also id.* at 10 (noting that in thirty-four of the sixty rules that OIRA did not significantly change, "the changes that OIRA suggested primarily involved revisions to the language in the preambles of the draft rules (e.g., expanding or clarifying agencies explanations of certain issues) or suggestions that the agencies request public comments on particular issues."). For a collection of changes to regulatory preambles in OIRA review, see *id.* app. II, at 132–87 (providing detailed account of numerous changes to preambles).

121 *See* Orszag Memorandum, *supra* note 10 (noting that OMB reviews significant guidance documents).

122 OMB'S ROLE, *supra* note 118, at 9.

123 *See* STACK, GUIDANCE IN THE RULEMAKING PROCESS, *supra* note 20, at 30–31, 46–47.

124 Moreover, as Jennifer Nou points out, the Congressional Review Act ("CRA") imposes report-and-wait requirements on both executive and independent agencies that require submis-

Just as important, under long-established principles of administrative law, as noted above,[125] preambles are an agency's primary venue to justify their rules. No stand-alone guidance document plays that role. This doctrine further heightens an agency's incentives to devote significant resources to carefully vetting every aspect of its preamble in order to ensure the preamble can withstand legal challenge to its accompanying rules. Indeed, it is difficult to imagine agencies having any stronger incentives for careful deliberation given that the validity of their most important lawmaking depends upon the preamble's content. Nor is there any reason to think that same consideration does not extend to the guidance content of the preambles. How a regulation applies is critical to judging both its permissibility under statute as well as its rationality. Indeed, recent empirical research provides some support for the claim that agencies conceive of regulatory preambles as their most deliberate discussion of the rule.[126] In Professor Christopher Walker's recent study of federal rule drafters, he asked the drafters whether courts should use a rule's statements of basis and purpose when interpreting their rules.[127] All but one of his respondents said they should.[128] Professor Walker's purpose was not to compare statements of basis and purpose to other guidance documents, but the overwhelming consensus that courts should use preambles when interpreting the corresponding rules provides support for the idea that agency actors regard these statements as reflecting the agencies' deliberate articulation of their positions.

Finally, regulatory preambles are published in the *Federal Register*, the most highly visible, accessible, and searchable compilation of federal regulatory actions. All told, even if a small portion of separately-issued guidance documents do receive substantial vetting by the

---

sion of every "major" rule to each house of Congress as well as the Government Accountability Office. *See* 5 U.S.C. § 801(a)(1)(A)–(B) (2012); Nou, *supra* note 23, at 114. This means that the draft text of major rules and their preambles are presented to Congress so that it has a chance to pass a joint resolution of disapproval. Freestanding guidance documents do not have a similar requirement of congressional reporting. At least in principle, this provides an additional assurance of the political accountability of regulatory preambles, though in practice Congress has rarely passed a joint resolution of disapproval. *See* Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2169 (2009) (noting that under the CRA Congress only repealed one major rule between 1996 and 2008).

125 *See supra* text accompanying notes 39–46.

126 Walker, *supra* note 81, at 66.

127 *Id.*

128 *Id.* at 64–66. Additionally, 29% agreed strongly that "agencies should draft the statement of basis and purpose . . . in part to guide courts," 40% agreed, and 24% somewhat agreed. *Id.* at 64. More of the results of the study are reported in Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999 (2015).

agency and by central executive branch actors, that review is the norm and is institutionalized only for regulatory preambles. Moreover, regulatory preambles have a legal feature that even significant freestanding guidance documents issued at the same time as rules do not have—they provide the authoritative justification for the rules they introduce.[129] As a result, not only do they typically receive more extensive internal and external vetting, they also have an authoritative legal status that separately-issued guidance does not. This superiority has implications for judicial review and agency practice.

III. JUDICIAL DEFERENCE TO PREAMBLE GUIDANCE

This Part argues that the guidance agencies provide in preambles to final rules warrants greater judicial deference than other forms of guidance. It first provides an account of the standard of judicial review for agencies' interpretations of their own regulations. This complex area of law is founded on a basic principle that an agency's most considered and deliberate interpretations are the strongest candidates for controlling deference or substantial weight. That principle provides the major premise for the argument that preamble guidance warrants greater deference than other forms of guidance. The arguments of Part II as to the superiority of preamble guidance provide the minor premise—that preambles best represent the agency's considered and deliberate views of the regulation. The conclusion that preamble guidance warrants greater deference follows from these two premises.

A. The Court's Standard of Deference for Guidance

In the Supreme Court's increasingly reticulated doctrines regarding the standard of review of agency action, an underlying principle is emerging (or reemerging): the agency is entitled to deference only for interpretations—whether pertaining to statutes the agency administers or its own regulations—which (1) reflect the agency's own views, not those of lower-level officers, and (2) represent the agency's most considered position, not positions taken strategically or without deliberate vetting within the agency. This amounts to a reassertion of a version of the "pay me now or pay me later"[130] principle in adminis-

129 STACK, GUIDANCE IN THE RULEMAKING PROCESS, *supra* note 20, at 7–9.

130 This principle has primarily been invoked with regard to the agency's choice to issue legislative rules or to proceed without them. *See* E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1491 (1992) (invoking this principle regarding the agency's choice to proceed through rulemaking to avoid burdens of case-by-case justification in enforcement); Matthew C.

trative law: the agency must pay with careful deliberation and vetting to qualify for deference, and without that, the agency must pay later with greater judicial scrutiny of its actions. Under this principle, the deliberate and publically justified actions of the statutory delegate would presumptively qualify for greater deference.

First, consider the Supreme Court's treatment of guidance that interprets statutory terms. Under the Supreme Court's 2001 decision in *United States v. Mead*,[131] guidance documents taking positions on statutory issues generally do not warrant the controlling deference of *Chevron*. *Mead* reserved *Chevron* deference for instances when the agency both has been delegated authority to bind with the force of law, and exercised that authority.[132] The Court elaborated this requirement by noting that notice-and-comment rulemaking and formal adjudication presumptively qualify for *Chevron* deference but still allowing for the possibility that less formal agency action may also qualify.[133] The *Mead* Court offered as an example of this latter category a decision in which the statutory delegate (the Comptroller) had interpreted a statute in the course of granting a bank a license to sell annuities.[134] The Court has also, subsequently, granted deference to guidance on statutory interpretation where the guidance was the agency's own position, reflecting the agency's considered and consistent interpretation of an interstitial issue.[135] Thus, with regard to guidance interpreting statutory terms, *Mead* created a safe harbor for the agency's most formal exercise of authority—rulemaking and formal adjudication—but also granted *Chevron* deference to the agency's most considered expression of its views, such as a deliberate, formal position taken by a statutory delegate.

Mead created an awkward disjuncture between deference granted to agency statutory interpretations and the Court's treatment of an

---

Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449, 1464 (2011) (discussing this principle with regard to the choice to issue legislative rules). The formulation above is more general; under it, the agency may "pay me now" not only through legislative rulemaking but also in other actions by the statutory delegate which indicate careful deliberation.

131 United States v. Mead Corp., 533 U.S. 218 (2001).

132 *Id.* at 226–27.

133 *Id.* at 230–31.

134 *Id.* at 231 n.13 (citing NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256–57 (1995) (granting deference to position of Comptroller of Currency who is charged with enforcement of banking laws)).

135 *See* Barnhart v. Walton, 535 U.S. 212, 219–20 (2002) (granting *Chevron* deference to Social Security Administration's own longstanding interpretation issued without notice-and-comment).

agency's interpretation of its own regulations. As noted above, under the established standard for the latter type of review, identified with *Bowles v. Seminole Rock & Sand Co.* and *Auer v. Robbins*,[136] a court must accept an agency's interpretation of its own regulations unless the interpretation is "plainly erroneous or inconsistent with the regulation."[137] Most agency interpretations of their own regulations appear in informal formats (for obvious reasons, agencies will not generally engage in a notice-and-comment rulemaking to interpret a prior regulation, when they could just reinterpret it informally). As a result, after the Supreme Court's decision in *Mead*, guidance documents can fall under two different deference regimes. Because guidance documents are, by definition, not exercises of lawmaking authority, under the basic test in *Mead*, a guidance document construing an agency's authorizing statute would presumptively not qualify for controlling weight under *Chevron* deference. But if the document interpreted the agency's own regulation, it would be entitled the controlling deference of *Seminole Rock/Auer*. To address this inconsistency, commentators have advocated restricting the scope of *Seminole Rock/Auer*'s application to bring it in line with *Chevron* by confining it to more formal interpretations.[138]

While the Court has not directly embraced this critique, in recent years, the Court has limited *Seminole Rock/Auer*'s application in ways consistent with this criticism. In *Christopher v. SmithKline Beecham Corp.*,[139] the Supreme Court made clear that, although *Auer* deference was the general rule, it did not apply in all cases;[140] and the Court reiterated this limitation in its 2015 decision in *Perez v. Mortgage Bankers Association*.[141] Thus far, the Court has identified three limitations on *Auer*'s application. First, by its own terms, *Auer* deference does not apply when the agency's interpretation "is plainly erroneous

136 *See supra* note 25.

137 *Auer*, 519 U.S. at 461 (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989) (quoting *Seminole Rock*, 325 U.S. at 414)). Several justices have expressed an interested in reconsidering the doctrine. *See supra* note 25.

138 Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 900 (2001) ("*Seminole Rock* deference should at a minimum be subject to the same limitations that apply to the scope of *Chevron* deference."); Stephenson & Pogoriler, *supra* note 130, at 1484–86, 1496 (arguing that *Mead*'s logic for constraining *Chevron*'s scope of application extends to *Seminole Rock*).

139 Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156 (2012).

140 *Id.* at 2166.

141 Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1208 n.4 (2015) (noting that *Auer* deference is not an "inexorable command" and is not appropriate in some cases).

or inconsistent with the regulation,"[142] just as *Chevron* deference does not apply when the statute clearly precludes the agency's view. Second, and most relevant for our purposes, *Auer* deference does not apply when the agency's interpretation "does not reflect the agency's fair and considered judgment on the matter in question."[143] As examples of an agency's position not reflecting its fair and considered view, the Court mentioned interpretations that conflict with prior interpretations, and those that are merely a convenient litigating position or a post hoc rationalization "advanced by an agency seeking to defend past agency action against attack."[144] Third, the Court has previously denied *Auer*'s application to agency interpretation of regulations when those regulations substantially "parrot" the statutory language.[145] The Court's emphasis, that only agency interpretations of their regulations that represent the agency's "fair and considered view" warrant deference under *Auer*, brings *Auer*'s application closer in scope to *Chevron*'s application.

The underlying premise in these doctrines is that the agency's entitlement to deference depends upon overt indications that the agency's interpretation—whether of its authorizing statute or its own regulations—reflects the agency's most considered, deliberate view. Not only do rulemaking and formal adjudication satisfy this standard, but also positions that the agency itself has taken[146] that reflect a deliberate view, as evidenced by the position being long-held and well-reasoned, as opposed to strategic positions taken post hoc[147] and positions that are not coordinated within the agency.[148]

In light of the critique of the *Auer* doctrine embraced by members of the Supreme Court,[149] it is worth noting that the same considerations are relevant to the weight given to an agency's interpretation if it does not qualify for controlling deference under *Chevron* (for statutory interpretations) or under *Auer* (for regulatory interpretations). When neither *Chevron* nor *Auer* is warranted, the Court defaults to

---

142 *SmithKline*, 132 S. Ct. at 2166 (quoting *Robertson*, 490 U.S. at 359).

143 *Id.* (quoting *Auer*, 519 U.S. at 462).

144 *Id.* (quoting *Auer*, 519 U.S. at 462).

145 Gonzales v. Oregon, 546 U.S. 243, 257 (2006) (denying *Auer* deference on the ground that the regulation interpreted merely parrots the statutory language).

146 *See* Barnhart v. Walton, 535 U.S. 212, 219 (2002); NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256–57 (1995).

147 *See SmithKline*, 132 S. Ct. at 2166.

148 *See* United States v. Mead Corp., 533 U.S. 218, 233 (2001) (noting that agency rulings issued at a rate of more than 10,000 a year by forty-six scattered offices do not have a lawmaking pretense).

149 *See supra* note 25.

the standard of review articulated in *Skidmore v. Swift & Co.*[150] In *Skidmore*, the agency's interpretation was not "controlling,"[151] but was still entitled to weight. In Justice Jackson's memorable phrasing, the weight of the agency's position on matters within its area of expertise will vary depending on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[152] Thus the very factors that support the applicability of *Chevron* and *Auer*—the deliberate, considered quality of the interpretation, and its embrace by the agency itself—would also strengthen the weight given to the agency in review under *Skidmore*. So under each of the Court's deference doctrines, the agency's most deliberate positions warrant greatest deference.

B. Deference to Preamble Guidance

In light of this principle of deference, the argument that preamble guidance merits greater deference than other guidance just needs a minor premise: that preamble guidance reflects the kind of deliberate, considered view that would entitle it to the greatest level of deference, regardless of the specific doctrinal framework applied. The argument for that premise is straightforward and has largely already been made in discussing the superiority of preamble guidance. In short, preambles are authored by the agency itself, issued contemporaneously to provide the exclusive justification of the regulations in the event they are challenged, and as a result, generally receive the higher level of vetting internally within the agency and by the executive branch than any other guidance. The very ways in which the guidance in preambles makes it superior and distinct from other guidance are also reasons why, under the Supreme Court's standard of deference, it should be granted the greatest weight.

This deference could come in two forms. First, preamble guidance is a special case for *Auer* deference. The Supreme Court's 2012 decision in *Christopher v. SmithKline Beecham Corp.* provides a doc-

150 Skidmore v. Swift & Co., 323 U.S. 134 (1944). *See SmithKline*, 132 S. Ct. at 2168–69 (applying *Skidmore* to review an agency's interpretation of its own regulation that did not qualify for review under *Auer*); *Mead*, 533 U.S. at 220 (agencies' interpretations that do not qualify for *Chevron* still merit some deference under *Skidmore* given the "specialized experience and broader investigations and information available to the agency"); Manning, *supra* note 7, at 686–90 (arguing for adoption of the *Skidmore* standard).

151 *Skidmore*, 323 U.S. at 140.

152 *Id.*

trinal foothold for treating agency's statements in regulatory preambles differently than other (and, in particular, post hoc) guidance. In *SmithKline*, the Court declined to accord *Seminole Rock/Auer* deference to a Department of Labor ("DOL") interpretation of its own regulations that contradicted earlier DOL positions and was in tension with statements in the regulation's preamble.[153] The specific question before the Court was whether pharmaceutical sales representatives qualified as "outside salesmen," under the Fair Labor Standards Act ("FLSA").[154] For many years, the DOL had considered pharmaceutical sales representatives to be "outside salesmen" under the regulations.[155] Those regulations defined the statutory term "outside salesman" as "any employee . . . [w]hose primary duty is . . . making sales within the meaning of" the FLSA.[156] In the preamble to the regulations, the DOL had stressed its interpretation that the "outside salesman" exception applies whenever an employee "in some sense make[s] a sale,"[157] and "'should not depend' on technicalities, such as 'whether . . . the sales employee . . . types the order into a computer system and hits the return button.'"[158]

But before the litigation at issue in *SmithKline*, the DOL had changed course; in a sequence of amicus briefs in pending cases that preceded the litigation at issue in *SmithKline*, it took the position that pharmaceutical sales representatives were not outside salesmen.[159] On fair notice grounds, the Court rejected the argument that it must defer to the DOL's new position: "To defer to the agency's interpretation in this circumstance would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'"[160] The Court went on to note that to defer in this case would "result in precisely the kind of 'unfair surprise' against which our cases have long warned."[161] Indeed, in explaining how deference here would create unfair surprise, the Court

153 *SmithKline*, 132 S. Ct. at 2165–68; *see also* Halo v. Yale Health Plan, 819 F.3d 42, 52 (2d Cir. 2016) (interpreting a regulation in light of its purposes, as stated in the regulation's preamble).

154 *SmithKline*, 132 S. Ct. at 2161.

155 *Id.* at 2163, 2167–68.

156 *Id.* at 2162 (alterations in original) (quoting 29 C.F.R. § 541.500(a)(1)(i) (2004)).

157 *Id.* at 2163 (quoting 69 Fed. Reg. 22,122, 22,162 (Apr. 23, 2004) (to be codified at 29 C.F.R. § 541)).

158 *Id.* (quoting 69 Fed. Reg. at 22,163).

159 *Id.* at 2165.

160 *Id.* at 2167 (alteration in original) (quoting Gates & Fox Co. v. Occupational Safety & Health Review Comm'n, 790 F.2d 154, 156 (D.C. Cir. 1986)).

161 *Id.* (citing Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 170–71 (2007)).

wrote that the "statute and regulations certainly do not provide clear notice" of the possibility of a changed interpretation with regard to pharmaceutical representatives qualifying as outside salesmen.[162] To explain the point, the Court noted that "nothing in the statutory or regulatory text or the DOL's prior guidance plainly requires a contrary reading"[163]—and the Court pointedly cited the regulation's preamble as an example of that prior guidance.[164] Moreover, the Court's other reasoning further suggests that it viewed the distinction between guidance provided ex ante and that provided post hoc as meaningful:

> It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.[165]

SmithKline could be read narrowly as denying deference only when the agency's position is post hoc, is announced in a brief in the context of an enforcement proceeding, and changes a longstanding interpretation. But the Court's underlying rationale for denying deference was broader and provides some support for granting preambles greater deference than other forms of guidance. The Court fundamentally objected to the DOL's departure from the interpretation in the preamble long-held by the DOL.[166] This suggests that preambles fall on the deliberate and considered side of the line, such that, under *Auer*, they should be given controlling weight unless they contradict the regulation or statutes. When viewed through the lens of *Auer*, preamble guidance has the strongest claim to controlling deference.[167]

But even if, for one reason or another, *Auer* deference were not available, preamble guidance should receive greater weight under

---

162 *Id.*

163 *Id.*

164 *Id.* (quoting 69 Fed. Reg. 22,122, 22,162 (Apr. 23, 2004) (to be codified at 29 C.F.R. § 541)) ("See Preamble 22162 (explaining that an employee must 'in some sense' make a sale). . . .").

165 *Id.* at 2168.

166 *Id.* (noting that, for decades, the DOL "never initiated any enforcement actions" on this topic).

167 This position is the corollary of the point that regulations should be interpreted in light of their preambles. Treating the preamble as a privileged source for interpretation of regulations could also be viewed as giving the preamble a form of controlling deference. Whether framed as a privileged source for interpretation or as meriting special judicial deference, the conclusion is the same: the preamble has a special claim on how the regulation is read.

Skidmore review. As a class, preambles provide the agency's most detailed explanation and reasoning in the exercise of its expertise and political judgment. So the very reasons that preambles are the strongest candidates for *Auer* deference justify granting them the greatest weight in *Skidmore* review. Either way, as the agency's most carefully considered and vetted statements, preamble guidance is entitled to greater deference or weight than other forms of guidance.

C. *Objections*

It is worth addressing three objections. One objection is that greater deference to guidance in preambles could be seen as giving agencies incentives to load their preambles with guidance content in order to obtain heightened deference to that content. There are several lines of response. At a basic level, it is not clear why the provision of more guidance earlier (such as in the preamble) is a problem so long as agencies do not include legislative rules in their preambles, which they are not permitted to do.[168] Indeed, more guidance provided earlier in the regulatory process is generally a benefit. Further, a significant constraint on including guidance in a preamble is that such guidance provides a constraint on later-issued guidance.[169] By virtue of the operation of arbitrariness review and its requirements of reasoned decisionmaking, agency guidance that contradicts the guidance in a preamble needs justification.[170] *SmithKline* stands clearly for that point.[171] If preamble guidance reduces the agency's later flexibility to change position, there is a built-in incentive for the agency, at least within the same presidential administration, not to overload preambles with guidance. Moreover, if agencies heed the arguments below the special constraint on revising preamble guidance,[172] the constraint will be still greater.

A second line of objection raises the practical issue of whether guidance provided in a preamble is as easy for the public and the regulated to access and read as topical guidance documents. Why give greater deference and authority to guidance that can be more costly to locate and difficult to understand? As many preambles are currently

168 *See* STACK, GUIDANCE IN THE RULEMAKING PROCESS, *supra* note 20, at 23 (discussing this prohibition).

169 *See infra* Part IV.

170 *See* John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 935–36 (2004) (arguing that an agency would not have less obligation to justify its departure from a nonlegislative rule than its departure from an agency precedent).

171 *See supra* notes 153–166 and accompanying text.

172 *See infra* Part IV.

organized and presented, locating their guidance content is often not as easy as locating topically organized guidance documents. In addition, as a recent study illustrates, preambles are frequently written at a high reading level.[173] The most basic response is that even if agencies have room for improvement in making their preamble guidance as accessible as their other guidance documents, this objection does not undermine the underlying reasons for granting greater deference to guidance in preambles. The grounds for deference have to do with the authority of preamble guidance, not merely its accessibility.

Moreover, recent reforms hold promise for improving the accessibility of preambles. A 2014 Recommendation of the Administrative Conference of the United States ("ACUS") addresses how agencies draft preambles, including urging use of section-by-section analysis and resisting incorporation or reliance upon discussions in prior notices.[174] In addition, that Recommendation advised agencies to integrate their preambles into their compilations of guidance and into accessible sources presenting their guidance.[175] The pragmatic task of integrating the presentation of preamble guidance may prompt more substantive deliberation within the agencies about the levels of authority of their guidance and varieties of their guidance and internal law.[176] Responding to these ACUS Recommendations, as well as suggestions by advocates for improved readability of rulemaking documents,[177] would augment the guidance function of preambles.

A third line of objection to granting greater deference to guidance in preambles raises a deeper issue. Professor Nina Mendelson exposes a systemic problem with the issuance of stand-alone guidance documents: indirect regulatory beneficiaries have far fewer ways of holding the agency accountable for positions taken in freestanding guidance documents—whether through participation or access to judicial review—than they have for notice-and-comment regulations.[178]

---

173 *See* Cynthia R. Farina et al., *The Problem with Words: Plain Language and Public Participation in Rulemaking*, 83 GEO. WASH. L. REV. 1358, 1395–96 (2015) (finding that executive summaries exceed college reading levels for all agencies studied). This study also provides a careful account of the efforts to improve the accessibility and readability of rulemaking documents. *See id.* at 1367–79.

174 Administrative Conference Recommendation 2014–3, Guidance in the Rulemaking Process, 79 Fed. Reg. 35,988, 35,992–93 (June 25, 2014) (recommendations 2 & 3).

175 *Id.* (recommendation 5).

176 STACK, GUIDANCE IN THE RULEMAKING PROCESS, *supra* note 20, at 51 (arguing that integrating preamble guidance into other guidance may help overcome perceptions that preambles pertain only to legal sufficiency).

177 *See* Farina et al., *supra* note 173, at 1362.

178 *See* Mendelson, *supra* note 1, at 420–33.

So why grant (heightened) deference to statements in preambles? While not a complete response to the concerns Professor Mendelson raises, it is worth emphasizing some of the advantages guidance in preambles has over separately-issued guidance with regard to accountability. Preamble guidance is endorsed by the head(s) of the agency or commission, so there is a political accountability check that many other guidance documents do not have. In addition, while there is not a separate process right to comment on the content of a preamble, courts look with disfavor on statements in agency preambles that were not ventilated by the agency in its prior notice of proposed rulemaking. For instance, in *Wyeth v. Levine*,[179] the Supreme Court declined to accord the FDA's position on preemption stated in its final preamble any weight in part because its notice of proposed rulemaking disclaimed preemption in the regulations, and neither the public nor the states were offered any opportunity to comment on the new position taken in the final preamble.[180] Thus, even though regulatory beneficiaries still face greater obstacles than regulated entities in obtaining judicial review of guidance, as Professor Mendelson argues,[181] guidance in preambles still has accountability advantages over many other guidance documents. Those accountability advantages, as well as the integral role of preambles in the rulemaking process, ground the argument for granting greater deference to preamble guidance than other forms of guidance.

While agencies could do more to make their preamble guidance as accessible as their other guidance, preambles remain an agency's most deliberate and well-considered expressions of its view of its own regulations. This creates opportunities for greater judicial deference—opportunities to which many agencies are attuned but some may squander. One of the respondents in Professor Walker's study commented, "I think agencies routinely blow this opportunity."[182] This Article's argument that preambles are entitled to greater deference highlights the cost to agencies for missing this opportunity.

---

179 Wyeth v. Levine, 555 U.S. 555 (2009).

180 *Id.* at 575–77.

181 Mendelson, *supra* note 1, at 422, 425.

182 The comment was made in response to Professor Walker's survey asking about whether agencies should draft preambles to guide courts in their interpretation of regulations. *See* Walker, *supra* note 81, at 66.

IV. PREAMBLE GUIDANCE AND AGENCY PRACTICE

The superiority of preamble guidance is a double-edged sword for agencies. While preambles merit greater judicial deference, their superiority also imposes constraints. In particular, this Part argues that preambles not only supersede previously-issued inconsistent guidance, but also impose special obligations when the agency seeks to revise or amend its preamble guidance—or is required to do so by a court order.

The argument above that preamble guidance is superior to other forms of guidance implies that preamble guidance should generally be treated as superseding and displacing prior inconsistent guidance. Indeed, given that preamble guidance pertains to the meaning of regulations being issued, it is difficult to imagine a circumstance where prior guidance would be more authoritative than that contained in a preamble. Perhaps if the preamble to a regulation included a gloss on a different previously-issued regulation, the priority of the later-issued preamble guidance would be less clear. But in the main, the preamble's status as part of the new moment of lawmaking gives it greater authority than previous guidance.

The more important and difficult question is the constraint preamble guidance imposes on an agency's later action. In particular, how may an agency revise its preamble guidance? A host of considerations bear on this issue, some substantive and some procedural. On the substantive side, an agency may not, in later guidance documents, contradict the conclusions or interpretations of the preamble that were necessary to the validity of the rule. Put another way, an agency is obliged not to sever or revise matters in the preamble that are necessary to the reasoned justification of the rule;[183] to do so would render the rule arbitrary and capricious. But within that substantive limit, the superiority of preamble guidance also recommends some procedural requirements for revision. For instance, given the superiority of preamble guidance, it does not make sense to allow a lower-level official within the agency to revise positions taken in the preamble. The following process requirements strike a good balance between agency flexibility and the superiority of preamble guidance: when an agency seeks to revise interpretations given in its preamble,

183 *Cf.* Charles W. Tyler & E. Donald Elliott, *Administrative Severability Clauses*, 124 YALE L.J. 2286, 2341 (2015) (noting that if severing a portion of a rule would render the rule arbitrary and capricious a court should remand to the agency). This raises the question of how a court should approach an administrative severability clause that pertains to the rule's preamble as well as sections of the rule.

or is forced to do so by a court ruling,[184] (1) the author of the revision must be the same (or higher) hierarchical level in the agency as the author of the original preamble, (2) the revision must be published in the *Federal Register*, and (3) must be expressly justified.

Each of these procedural requirements matters. First, given that preambles are issued by the agency in its lawmaking capacity, requiring that the same author issue the revision provides an assurance of internal consideration within the agency; we presume that documents issued by the agency itself have been extensively vetted within the agency. This authorship requirement ensures that those politically accountable within the agency have approved the revision and remain responsible for it—and, just as important, that individual agency officials do not have the power to revise commitments made in a preamble. This would implement the principle that revision of preamble guidance should match the deliberation and accountability of the preamble itself. Second, publication in the *Federal Register* makes the announcement at the same level of publicity and accessibility as the original preamble. And, finally, the requirement of justification is unavoidable; reasoned justification for a change in position is a basic requirement for surviving arbitrariness review.[185]

These obligations can be usefully understood as akin to those for departing from an adjudicative precedent. Professor Peter Strauss has insightfully argued that published agency guidance should be thought of as imposing the same level of constraint on agencies as agency precedent—namely, that the agency may act inconsistently with its published guidance documents only with special justification.[186] Adapting this idea of precedential reasoning, it matters whether the guidance is issued by a line attorney or the agency itself, just as it matters whether the decision is from a lower or higher court. Preamble guidance issues from the highest level of authority within the agency, and so should not be contradicted by lower-level officials, just as lower-level courts cannot contravene their superiors. Precedent also captures the re-

184 *See* Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015).

185 *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42–43, 46–51 (1983) (requiring reasoned justification for change of position); Manning, *supra* note 170, at 935 n.208 (making this point); *cf.* Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112, 135–59 (2011) (developing a theory of justification requirements under arbitrariness review); Anita S. Krishnakumar, *Longstanding Agency Interpretations*, 83 FORDHAM L. REV. 1823, 1863, 1877–79 (2015) (examining constraints longstanding interpretations impose on agencies and defending agency flexibility so long as agencies provide fair warning such as through a notice-and-comment process).

186 *See* Strauss, *supra* note 5, at 823–24; *see also* Manning, *supra* note 170, at 934–35 (arguing nonlegislative rules enjoy precedential force).

quirement of justification. An agency action that deviates from guidance in a regulatory preamble requires a reasoned justification, just as departure from a precedent does for a court.[187]

But a critical difference is that the requirements that a preamble be revised only from a body positioned at the same level or higher in the agency hierarchy (a "hierarchy" requirement) and published in the *Federal Register* are not judicially enforceable. To see this, first consider a more stringent procedural requirement that revisions to a preamble be made only through a notice-and-comment proceeding. That requirement would be clearly invalid under *Perez v. Mortgage Bankers Association*.[188] At issue in *Perez* was a D.C. Circuit doctrine—most often associated with *Alaska Professional Hunters v. FAA*[189] and *Paralyzed Veterans of America v. D.C. Arena, L.P.*[190]—that an agency must proceed through notice-and-comment rulemaking to issue a new interpretation of a regulation that deviates materially from a prior interpretation.[191] The *Perez* Court roundly rejected this doctrine on the ground that it imposes a procedural obligation beyond those specified in the APA.[192] Thus, *Perez* would also foreclose judicial enforcement of the requirement that only certain entities in the agency revise preamble guidance or publish those revisions in a particular way. As the Court reiterated in *Perez*, "the APA 'sets forth the full extent of judicial authority to review executive agency action for procedural correctness.'"[193] The APA imposes no requirement regarding who may revise an agency's guidance or preambles or where such a revision is to be published. Accordingly, a court could not demand agencies to comply with these requirements under the APA.

The bar on judicial enforcement does not, however, prevent agencies from adopting these requirements as a matter of their own internal law or central executive branch actors from imposing this obligation on agencies. If adopted in executive branch policy, these requirements would amount to a generalization of the obligations currently imposed by the OMB's *Final Bulletin for Agency Good Guidance Practices*. The *Bulletin* states that "[a]gency employees should

187 *See* Manning, *supra* note 170, at 934–35; Strauss, *supra* note 5, at 824–25.

188 *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1205–06 (2015).

189 Alaska Prof'l Hunters Ass'n v. FAA, 177 F.3d 1030 (D.C. Cir. 1999), *abrogated by Perez*, 135 S. Ct. 1199.

190 Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579 (D.C. Cir. 1997), *abrogated by Perez*, 135 S. Ct. 1199.

191 *Perez*, 135 S. Ct. at 1205.

192 *Id.* at 1206.

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

not depart from significant guidance documents without appropriate justification and supervisory concurrence."[194] The requirement for revision urged here is one step more demanding; it would demand that revisions of preamble guidance be issued at the same or greater level within the agency hierarchy as the original preamble, accompanied by a justification published in the *Federal Register*. But given the superior status of preamble guidance, these demands are justified. That reform could be adopted in a revision to the *Good Guidance Bulletin* or by individual agencies as part of their policy on guidance.

The Environmental Protection Agency's ("EPA") response to the Supreme Court's recent decision in *Michigan v. EPA*[195] provides a nice example of an agency's revision of its preamble in accordance with these principles. In *Michigan v. EPA*, the Supreme Court invalidated an interpretation of the Clean Air Act that the EPA had taken in the preamble to a related regulation.[196] In 2000, the EPA, after a study, had concluded that regulation of coal- and oil-fired power plants was "appropriate and necessary" under the Clean Air Act, and the agency reaffirmed that conclusion in 2012.[197] In making this determination, the EPA interpreted the term "appropriate" to not require consideration of costs as to the initial decision of whether to regulate.[198] As the Court noted, in the preamble to the regulation, the agency specified, "[w]e further interpret the term 'appropriate' to not allow for the consideration of costs."[199] The Court rejected this position, interpreting the phrase "appropriate and necessary" as requiring consideration of costs.[200] Effectively the Court's *Michigan v. EPA* decision reversed a position that the EPA took in a regulation's preamble. After *Michigan v. EPA*, the EPA was clearly presented with the question of how it could revise an interpretive position taken in its preamble.

The EPA responded to the Court's ruling by issuing for public comment a consideration of costs for the initial decision to regulate coal- and oil-fired electric utility generating units.[201] This was pub-

194 OMB's Good Guidance Bulletin, *supra* note 1, at 20.

195 Michigan v. EPA, 135 S. Ct. 2699 (2015).

196 *Id.* at 2705–07 (citing 77 Fed. Reg. 9304, 9363 (Feb. 16, 2012) (to be codified at 40 C.F.R. pts. 60 & 63)).

197 *Id.* at 2705.

198 *Id.* at 2706.

199 *Id.* (quoting 76 Fed. Reg. 24,976, 24,988 (May 3, 2011) (to be codified at 40 C.F.R. pts. 60 & 63)); *see also id.* (quoting 77 Fed. Reg. at 9327) ("Cost does not have to be read into the definition of 'appropriate.'").

200 *Id.* at 2707–10, 2712.

201 *See* Supplemental Finding that It Is Appropriate and Necessary to Regulate Hazardous

lished in the *Federal Register*, under the signature of the Administrator of the EPA.[202] In this proposed supplemental finding, the EPA concluded that consideration of costs did not alter its previous decision that regulation was appropriate.[203] The EPA's action following *Michigan v. EPA* met (indeed, exceeded) the executive branch requirements for preamble revisions defended above: the agency formally revised the preamble in a statement by an official at the same or higher level in the agency as the initial author of the rule and preamble, and in addition (beyond the requirement suggested above), it offered the public an opportunity to comment on those revisions through a notice in the *Federal Register*. While *Perez* would prohibit a court from requiring these elements, they represent best agency practices for revision of a preamble.

CONCLUSION

The internal law of the administrative state—what much administrative law might characterize as guidance or soft law—plays a critical role in the systemic legality of regulatory governance.[204] But to understand these internal legal constraints requires evaluating different forms of internal law and their distinctive features. This Article attends to a species of document that justifies a vast swath of federal law—the preambles to final rules. It shows that these documents were designed to have a guidance function as well as to serve a justificatory role—and agencies continue to include significant guidance in their preambles. As this Article argues, the guidance agencies include in their preambles is superior in authority to other forms of agency guidance because preambles are issued by the agency in its rulemaking as part of the agency's authoritative justification for a rule, and they accordingly obtain the highest level of vetting and careful consideration by agency and executive officials. Under current standards of judicial review, the superiority of preamble guidance has an important implication: that preamble guidance is a special case for judicial deference regardless of whether the *Auer* or *Skidmore* standards apply. Accordingly, preambles provide agencies with their best opportunity for judi-

---

Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units, 80 Fed. Reg. 75,025, 75,025 (Dec. 1, 2015) (to be codified at 40 C.F.R. pt. 63).

202 *Id.* at 75,042.

203 *Id.* at 75,026.

204 *See* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 223 (2012) ("A robust internal law of administration is always necessary to systemic legality and is often the most constant protector of private rights.").

cial deference to their interpretive view of a rule's meaning and application. But the very superiority of preamble guidance also has a constraining implication for agencies. An element of the internal law of agency action is that preamble guidance should only be revised if done so with a level of deliberation, political accountability, and accessibility that mirrors that of the underlying preamble. That policy on revision or departure from preamble guidance could be adopted by OIRA or by individual agencies.