# INTERPRETIVE AND LEGISLATIVE NORMS IN FRANCE AND IN THE UNITED STATES

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*The distinction between interpretive and substantive (or legislative) norms is a common feature of French and American administrative law. In both legal systems, the distinction, apparently simple, has proved extremely difficult to handle. The article aims at presenting and illustrating the basic functions of the distinction in the two countries, comparing the efforts made to define the contents of the distinction by courts and legal scholarship. After reaching the conclusion that neither French nor American administrative have come up with a reasonably satisfying criteria of distinction, the article makes the case that, if the distinction is still in use, it must be because it serves fundamental purposes of each of these legal systems. It argues that the underlying and central function of the distinction is not the same in the two legal systems. In France, the central function of the distinction is a non-delegation issue. In the USA, its main role is to define and/or limit the scope of the notice and comment procedure, one of the most particular features of American administrative law.*

## INTRODUCTION[**]

In 1962, a renowned French administrative law scholar published an article in which he imagined the comments of a Native American discovering the French administrative law system during a journey to France[1]. By using an old literary device of the French Enlightenment philosophers[2] (pretending to be a candid observer from a remote foreign country discovering France[3]), he tried to give a critical analysis of the French administrative law of his time. But except in the imagination of law professors,

[**] I am very grateful for the suggestions and comments made by Pr. Christopher Elmendorf (University of California, Davis-King Hall School of Law), and by Nicolas Hervieu, Serge Slama and Minming Wu. While these comments have extremely helpful, I am sole responsible for the views expressed in this article or for the errors it may contain.

[1] Jean Rivero, *Le huron au Palais Royal ou réflexions naïves sur le recours pour excès de pouvoir*, D. 1962 Chron. 37

[2] In 1767, the French philosopher Voltaire published the satirical novel *L'ingenu*, in which he pretended to tell the story of a Huron -a member of the Wyandot Nation- transported in France in 1690. Needless to say that the depiction of Native Americans expressed in the novel is deprived of any accuracy. It is rooted in the prejudices of the time and, moreover, was intended as a literary artifact even at the time it was written.

[3] In *Persian Letters* (1721), another French philosopher, Montesquieu, pretended to describe the impressions of two Persian noblemen traveling to France, in order to express its criticism of French society.

the exchanges between French and American[4] administrative law seem to have been limited[5]. For the most part, French and American administrative law are two separate universes, with limited contacts or influences. And yet, the observer may be surprised to discover that French and American administrative law share many concepts and issues.

The presence of the same concept in the two legal systems may, in fact, have very different meanings and consequences. Sometimes, things are relatively simple, because both the contents and the use of the concept are relatively similar. For example, a basic concept of American law such as "standing" has an almost exact equivalent in French law (*l'intérêt à agir*), and can generate rather similar issues, such as the extent of taxpayers' standing to challenge general laws or regulations[6]. The situation is a little more complex when the two concepts share important characteristics, but do not completely overlap in their content and function. For example, the "political question" doctrine and the French theory of the *acte de gouvernement*[7] share many characteristics. Both are judge made doctrines limiting justiciability of agency action on separation of powers concerns. But the two doctrines are not exactly equivalent, since the *acte de gouvernement* doctrine does not explicitly make reference to a political motive or to political consequences, at least not any more[8].

A more puzzling situation may occur when the content of the concept is very close, but its functions are different. The distinction between interpretive and substantive norms (also referred to as legislative norms) falls into this category. In France, this distinction is mainly a product of judge made law. Theorized in the 1950's in the landmark decision of the French Conseil d'Etat[9] on the *Institution Notre Dame du Kreisker*

4 In this paper, the term American administrative law will be used to refer to Federal US administrative law.

5 Not that there have been no exchanges at all. For instance, Bernard Schwartz (1923-1997), professor of law at New York University, authored several books of compared French and American administrative law in the early 1950's. See B. Schwartz, *French Administrative Law and the Common Law World* (1954) ; B. Schwartz, *Le Droit Administratif Americain* (1952).

6 Under French administrative law, a taxpayer has standing to challenge every decision of a local authority (city, county, etc.) involving public expenses, but not decisions or regulations taken on a national level. See the *Casanova* case, CE Mar. 29, 1901, Rec. Lebon 333.

7 Both doctrines define situation of non justiciability of government or agency action, when the courts' action would interfere with core political functions of the other branches, or with foreign policy.

8 The theory of the *mobile politique* ("political motive") was abandoned at the end of the 19th century in the *Prince Napoleon* case, CE Feb. 19, 1875, Rec. Lebon 155.

9 The literal translation of *Conseil d'Etat* would be "Council of state". The Conseil d'Etat is the highest court of the administrative branch of the French justice system. The French court system is divided in two branches: the civil and criminal branch, on the one hand, and the administrative branch, on the other hand.

case[10], the distinction was essentially, but not only, used for standing purposes. It is still a very important one, although its function has been redefined in 2002 by another important decision, the *Duvigneres* case[11]. In the USA, the distinction is rooted the Administrative Procedure Act of 1946, which exempts from the notice and comment procedure interpretive rules and policy statement[12].

In both legal systems, the distinction, apparently simple and straightforward, has proved extremely difficult to handle in practice, and has generated a large amount of case law and doctrinal controversies. But the fact that a concept has generated a lot of case law does not, in itself, tells a lot about its nature and its function. Why is this distinction more problematic that it originally seemed? How come the same distinction can be used differently?

After trying to present and illustrate the basic functions of the distinction (part I), we will compare the efforts made to define the content of this distinction (part II) and try to understand the underlying concerns justifying this distinction (III).

## I. THE BASIC FUNCTIONS OF THE DISTINCTION BETWEEN INTERPRETIVE/SUBSTANTIVE NORMS : TYPOLOGY AND EXAMPLES

The diversity of functions which can be assigned to the distinction between interpretive/substantive norms in the two legal systems is striking, even if these functions rarely overlap (the same function is seldom present in both systems).

### *1) A BROAD ARRAY OF FUNCTIONS* :

In French and American administrative law, the distinction has played a role in three distinct areas: judicial review process (litigation), rule making process (authority to issue rule, rulemaking procedures, rules of publication), and statutory interpretation (deference to agency interpretation).

In the judicial review process (civil procedure in the USA, or procedure before administrative courts–*procedure administrative contentieuse* in France), the distinction can be used for justiciability purposes. In France, this function of the distinction was a central one until the 1990's. As a matter of principle, French administrative courts did not admit

10 CE Ass., Jan. 29, 1954, Rec. Lebon 64
11 CE Sec., Dec. 18, 2002, Rec. Lebon 10
12 Administrative Procedure Act, 5 U.S.C. § 553

standing to challenge interpretive norms. The justification of this line of case law was that allowing purely interpretive rules to be challenged in courts would have been a waste of time and resources, since they were only reaffirming, repeating the content of prior norms. If interpretive rule (a) is only an interpretation of substantive rule (A), the suit must be filed against rule (A), not against interpretive rule (a). There were limited attempts to apply a similar reasoning in American administrative law, not strictly on standing grounds, but on the basis of the finality requirement of the Administrative Procedure Act.[13]

In the rulemaking process, the distinction may also play a significant role.
First, the power to issue the rule may depend on its nature. As we'll see more in depth later, both the American and the French legal system limit or concentrate the ability of the Executive branch members to issue rules. Issuing so-called interpretive rules which, in reality, have a substantive content, is one way to try to circumvent this limitation. When the rule's author has no authority to issue substantive rules, the legal validity of the rule will depend on its substantive or interpretive nature. In the French system, while interpretations require no rulemaking power, substantive rules can only be issued by a limited number of authorities, and most of the time, the demonstration, by the plaintiff, of the substantive nature of the rule, will be a fatal blow to its validity.

The procedure required for adopting the rule may also depend on its nature. In American administrative law, the Administrative Procedure Act exempts from notice and comment requirement "interpretative rules"[14], as well as "general statements of policy, or rules of agency organization, procedure, or practice"[15]. In French law, there is no exact equivalent of notice and comment procedure, except in limited areas of the law (such as expropriation of private property for public use or environmental law) where a procedure law as known as *enquête publique* allows comments by the public on draft rules or orders.

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13 *See, e.g., Air Brake Systems, Inc. v. Mineta*, 357 F.3d 632,640 (6th Cir. 2004) : "To say that a legal interpretation is final because it is not subject to further review within the agency, however, is not to say that it is "final" in the sense that § 10 of the Administrative Procedure Act requires it to be. If the interpretation nonetheless (1) does not "determine rights or obligations" or (2) does not have "legal consequences," it remains non-final for purposes of review under the Administrative Procedure Act". Citing Bennett, 520 U.S. at 178, 117 S.Ct. 1154"

14 5 U.S.C. § 553

15 Id.

But some rules may require special proceedings, such as the consultation of the Conseil d'Etat[16], and, in such a case, the distinction may also play a role.

Publication is also a field in which the distinction used to play a role. In France, for a long time, the obligation to publish rules was limited to substantive rules. But, although the practice of non-publication of interpretive rule is hard to eradicate, the publication of all type of rules, without distinction, became mandatory in 1978. According to article 6 of the Law 78-753 of July 17th, 1978, rules containing an interpretation of the existing law have to be published on a regular basis[17] . Since 2008[18], the rules also have to appear on a special government website[19], without distinction drawn from their interpretive or substantive nature. In the USA, the Administrative Procedure Act makes no distinction either. Pursuant to 5 U.S.C. 552 (a)(1)(D), "substantive rules of general applicability adopted as authorized by law, and statement of general applicability formulated and adopted by the agency" have to be made available to the public by publication in the Federal register.[20]

Last, but not least, the interpretive/substantive distinction may come into play for substantial purposes. In American law, the distinction may command -or least influence - the amount of deference for the statutory interpretation contained in the rule. In *United States v. Mead Corps*[21] , the US Supreme Court held that, for purposes of statutory interpretation, the fact that a rule had gone through the notice and comment process (which normally applies to substantive rules) was a strong factor in favor of *Chevron* deference. Even if the court did not categorically rule out Chevron deference for

16 One of the peculiarities of the French administrative law is that the highest administrative court, the Conseil d'Etat, is also an advisory body, whose advice is required on every government authored bill (*projet de loi*) before its submission to Parliament, but also on the most important administrative rules (*décrets en Conseil d'Etat*).

17 Loi No 78-753 du 17 juillet 1978 portant diverses mesures d'amélioration des relations entre l'administration et le public et diverses dispositions d'ordre administratif, social et fiscal [Law 78-753 of July 17, 1978 adopting various measures improving the relations between agencies and the public and various provisions of administrative law, labor law and tax law], Journal Officiel de la Republique Francaise [j.o] [Official Gazette of France], July 18, 1978, p.2851 ("Font l'objet d'une publication: 1. Les directives, instructions, circulaires, notes et réponses ministérielles qui comportent une interprétation du droit positif ou une description des procédures administratives").

18 Décret 2008-1281 du 8 décembre 2008 relatif aux conditions de publication des instructions et circulaires [Executive Order 2008 of December 8, 2008 on the publication of administrative instructions and rules], Journal Officiel de La République Française [J.O] [Official Gazette of France], Dec. 28, p. 18777 .

19 http://www.circulaires.gouv.fr.

20 5 U.S.C. 552 (a)(1)(D).

21 *United States v. Mead Corp*. 533 U.S. 218 (2001).

rules adopted without notice and comment, it can be said that the interpretive/substantive distinction plays, at least indirectly, a role in statutory interpretation. In French law, agency's statutory interpretations do not get a particular judicial deference. The distinction between interpretive/substantive, nonetheless, used to have some relevance: once a rule was labeled substantive, its conformity to superior norms (statutes, international treaties, constitutional rules) could be examined.

*2) FROM THEORY TO PRACTICE: SOME BASIC EXAMPLES OF THE WAY THE DISTINCTION IS USED BY FRENCH COURTS*

In French administrative law, one of the fields in which agencies have traditionally made an intensive use of interpretive rules –or, at least, purportedly interpretive rules whose nature had to be assessed during judicial review - is immigration law. In French law schools, the teaching of administrative law is largely based on a classical textbook called *LES GRANDS ARRETS DE LA JURISPRUDENCE ADMINISTRATIVE*[22] *("*The landmark cases of administrative law"), first published in 1956, and whose 17th edition was released in 2009. Many of these "landmark cases" originate in suits filed in immigration law, such as the GISTI cases[23]. Many of the GISTI cases involved direct challenges of the validity of *circulaires* (generic French name for supposedly interpretive rule, regardless of their real legal nature) issued by the Ministry of the Interior (whose American equivalent would be the Secretary of Homeland Security). One of these cases, the *GISTI* case, [24] offers a good illustration of the various uses of the way the distinction between substantive/interpretative rules operate in French law. In this case, the GISTI challenged the validity of a rule issued by the Ministry of the Interior and the Ministry of Labor interpreting –or claiming to interpret- an international treaty concluded between France and Algeria in order to regulate the situation of Algerian

22 M. Long, P. Weil, G. Braibant, P. Delvolve, B. Genevois, *Les Grands Arrets de la Jurisprudence Administrative* (16th ed. 2007).

23 GISTI (*Groupe d'Information et de Soutien des Immigres*) is the name of a migrant rights advocacy group –group for the information and support of immigrants - involved in the legal defense of immigrants, which brings challenges against immigration rules on a regular basis. Created in 1972 by lawyers and social workers, the GISTI was one of the first human rights advocacy groups in France to make a systematic use of litigation. See generally L. Kawar, *Legal mobilization on the terrain of the state: creating a field of immigrant rights lawyering in France and in the United States*, 36 Law & Soc. Inquiry 354 (2011).

24 CE Ass. Jun. 29, 1990 Rec. Lebon 171. An English unofficial translation can found at the following address : http://www.utexas.edu/law/academics/centers/transnational/work_new/french/case.php?id=1069 .

immigrants in France. The GISTI claimed that several provisions of the treaty had been misinterpreted in order to limit the rights of Algerian immigrants under the treaty, and that the rule was actually a substantive one, violating the treaty or illegally adding to its content.

The first cause of action regarded the right to work for Algerian immigrants. The GISTI argued that, under the correct interpretation of the treaty, Algerians, unlike foreign workers of other countries, were exempted of the requirement of a working permit or, at least, could obtain such a permit regardless of the situation of the job market. The Conseil d'Etat rejects this part of the claim on a standing ground: after interpreting the relevant stipulation of the treaty, the Conseil d'Etat holds that: 1) the interpretation given by the rule is the correct one; 2) as a result, this part of the rule is purely interpretive, not substantive; 3) since the rule is truly interpretive, the GISTI has no standing to challenge it. This way of reasoning was typical of the use of the substantive/interpretive distinction as a threshold question. At that time, the first inquiry of a court adjudicating a dispute on the validity of a "circulaire" was, paradoxically, a substantial one. The court would start by giving the correct interpretation of the statute and the treaty, and, in a second step, would compare it with the interpretation provided by the rule. If the contents were identical, the court would hold that the rule was purely interpretive, and that the plaintiff had no standing to challenge it.

The second cause of action also involved the right to work, but in a particular hypothesis. The issue was whether Algerians in possession of a student visa needed a work permit in order to occupy a student job, or were exempted from this requirement as long as the job was ancillary. The challenged rule contended that they were not exempted, and the GISTI argued the contrary. The Court finds for the plaintiffs, and declares that, since the interpretation given by the rule is not the correct one, the GISTI has both (1) standing to challenge the rule and (2) a legal ground to have the rule struck down on this point (*recevable et fondé à en demander l'annulation sur ce point*). Although the conclusion is different from the one reached on the first cause of action, the reasoning is the same, and illustrates the entanglement between substantive and standing issues. After reaching the conclusion that the so-called interpretation of the treaty modifies the existing law under color of interpretation, the court decides both the standing and the substantive issue.

A few additional comments can be made on this example. First, it's important to mention that, even if it was not the case here, the substantive nature did not always mean

the rule was illegal. Sometimes, the rule was substantive because it created new rights or obligations, but was nevertheless legal because (1) the interpreted statute or treaty was silent on this point (2) the author of the rule had received a prior statutory delegation to issue rules on this particular question. Second, it's necessary to explain how the case would be decided today. Under *Duvigneres*, interpretive/standing nature of the rule is no more a standing issue. Standing now stems from the binding or non binding nature of the rule. If the rule is formulated in binding terms, it is enough to satisfy the standing requirement[25]. The interpretive/substantive nature of the rule only plays a role in the ulterior steps of the analysis. If the rule is interpretive, it will generally be deemed legal. If it is substantive, its legality will depend on: 1) the power of the author to issue the rule 2) the conformity of the rule with the interpreted statute or with other superior norms.

## II) DISTINGUISHING INTERPRETIVE NORM FROM SUBSTANTIVE NORM : A LONG AND UNACHIEVED STRUGGLE

The distinction between a rule and an interpretation of the rule –or, in a different terminology, between a substantive and an interpretative rule- may not seem a very complex one. Interpretation is not a purely legal or technical concept, but a familiar term, used in everyday life. To interpret is to "explain or tell the meaning of", to "present in understandable terms"[26]. Interpreting a rule is the action to explain what a rule means. It is supposed to be a process of discovery and explanation of a preexisting content, distinct from the making of new rules. But some have questioned from the beginning the validity of this approach. As soon as 1948, authors have denounced this view as "unreal and unsound"[27] , and warned that: "The plain truth is that statutory interpretation frequently far transcends the discovery of a meaning or a legislative intent"[28]. This prediction has been largely –if not totally- fulfilled. The concept of

25 Provided, of course, that the other prudential standings requirement of French administrative law (such as an injury in fact) are met. But in general, standing requirements for public interest groups are more liberal in French administrative law. For example, a group has an injury in fact when a rule has adverse effect on its corporate goals, and does not have to sue on behalf of a member who has individual standing. Compare the opposite conclusion reached by the US Supreme court in the landmark case, *Sierra Club v. Morton*, 405 U.S. 727 (1972).

26 Merriam-Webster's Collegiate Dictionary 612 (10 ed. 1995).

27 K. C. Davis, *Administrative rules -interpretative, legislative and retroactive* 57 Yale L.J. 919, 950 (1948).

28 *Ibidem.*, 950.

interpretive rule has proved very difficult to implement by the courts, both in France and in the USA (1), so that, in the recent years, many proposals have been made to redefine the very idea of interpretive rule (2).

*-1.INTERPRETING THE CONCEPT OF INTERPRETATION*

Since the middle of the 20th century, both French and American courts have struggled to find a simple and predictable way to distinguish between interpretive and substantive rules work. Both have achieved limited results.

In American law, the notion of interpretive (or interpretative) rule is not defined by the Administrative Procedure Act, but legislative history suggests that the authors of the Act did intend to give it a meaning different from what common sense suggests. The *ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT*[29] (1947), which is generally viewed as a key source for understanding what the framers of the Administrative Procedure Act meant –and, ironically, is also an interpretive document-, defines interpretive rules as "rules or statements issued by the agency to advise the public of the agency's construction of the statutes and rules which it administers"[30]. This apparent simplicity has been of little help for the courts, though. Over the years, they have been unable to agree on the criteria distinguishing substantive from interpretive norms.

Several tests have been used, no consensus has been reached. Many inventories of these tests have already been made[31], and it's all the more difficult to make this inventory that the same test is often called differently by different authors or courts. For the purpose of this study, we will limit ourselves to a few examples. In general, courts have rowed between two reefs. On the one hand, they have tried to use simple definitions, in line with the common, original meaning of the term "interpretive". But these definitions were purely tautological or too vague to help solving difficult or borderline cases. On the other hand, they have tried to construct more elaborate and

[29] U.S. Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act 39 (1947).
[30] *American mining congress v. Mine Safety & Health Administration* 995 F2d 1106 , 1109 (D.C.Cir. 1993).
[31] *See, e.g,* T. J. Fraser, *Interpretive rules: can the amount of deference accorded them offer insight into the procedural inquiry?* 90 B.U.L. Rev., 1303.

innovative tests, but, in so-doing, have been accused of rewriting the Administrative Procedure Act or adding procedural requirements.

On the paraphrasing side of the spectrum, some courts have simply defined interpretive rules as rules which do not impose "new rights or duties"[32]. On the innovative side of the spectrum, the "substantial impact" test deserves a special mention. This test was widely used in the 1970's, before the turning point of the Supreme Court decision in the *Vermont Yankee*[33] case in 1978. According to this test, rules having a substantial impact on the regulated parties were deemed substantive for the application of the Administrative Procedure Act[34], and had to go through notice and comment. This test has been criticized for a series of reasons. From a purely logical point of view, it seemed to confuse the nature of the rule and its effect, the cause with the consequence. As the D.C. Circuit noted in *British Caledonian Airways*[35] "(m)erely because a rule has a wide ranging effect does not mean that it is 'legislative' rather than 'interpretative'"[36]. Moreover, and unsurprisingly, the test has been criticized as judicial reinterpretation of the Administrative Procedure Act, motivated by policy agendas (increasing the public participation, meeting environmental concerns, etc.) more than concern for its original meaning.

Other tests have tried to avoid these two pitfalls, in an attempt to combine precision and fidelity to the original meaning of the Administrative Procedure Act. The *American Mining* test, formulated by the D.C. Circuit, was a particularly elaborated effort of synthesis[37] . Writing for the Court, Judge Williams enunciates four alternative criteria distinguishing a legislative rule from an interpretive one : "(1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule. If the answer to any of these questions is affirmative, we have a legislative, not an interpretive rule"[38]. Interesting as it may have been, this test had

32 *Orengo Caraballo v. Reich*, 11 F.3d 186, 195 (D.C. Circ. 1993).
33 *Vermont Yankee Nuclear Power Corp v. Natural Resources Defense Council Inc.,* 5 U.S. 519 (1978).
34 See *Texaco, Inc. v. Federal Power Commission,* 80 P.U.R.3d 107, 412 F.2d 740 (3d Cir. 1969).
35 *British Caledonian Airways, Ltd. v. C.A.B.,* 584 F.2d 982 (D.C. Cir. 1978).
36 *Ibidem,* 989.
37 *American mining congress v. Mine Safety & Health Administration* 995 F.2d 1106 (D.C. Cir. 1993).
38 *Ibidem*, at 1112.

several flaws. An obvious one was the very different nature of its various prongs, from purely formal and procedural criteria (the publication in the CFR) to elaborate substantial ones (whether in the absence of the rule an enforcement action could be brought).

In the following years, the test underwent several evolutions. The publication criterion was declared by Judge Williams himself to be nothing more than "a snippet of evidence of agency intent"[39]. In ulterior decisions, the DC Circuit seemed to rely essentially on the first prong of the test, and on the question whether "the interpretation itself carries the force and effect of law, … or rather whether it spells out a duty fairly encompassed within the regulation purports to construe"[40]. The central question seemed to be whether, in the absence of the rule under scrutiny, there would be an adequate legislative basis to apply the preexisting text, and, in particular, to bring enforcement actions against regulated parties. In another opinion issued in 2002, the DC circuit added another wrinkle to the problem, by deciding that the relation to prior agency interpretation was also an element to take into account. Precisely, the court held that a change brought by an agency to a prior interpretation had to go through notice and comment[41].

The relative indifference of the US Supreme Court to the issue has amplified the problem, leaving the circuit courts to their interrogations and contradictions. The US Supreme Court, which tries a handful of administrative law cases every year, cannot possibly settle the contradictions of lower courts at the same pace as a specialized administrative court, like the French Conseil d'Etat, would do. Having said that, it is difficult to understand how (or why), in more than 60 years of implementation of the Administrative Procedure Act, the US Supreme Court has not been able (or willing) to clarify the notion of interpretive norm. Unwillingness cannot be the only explanation, though. Even the DC Circuit, which is the closest American equivalent to a continental administrative law highest court, has failed to elaborate a stable and workable test.

Even in the more centralized French jurisdictional system, where the administrative highest court, the Conseil d'Etat, decides about 10 000 cases every year[42],

[39] *Health Ins. Ass'n of Am., Inc. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994).
[40] *Paralyzed Veterans of America v. D.C. Arena* L.P., 117 F.3d 579, 588 (D.C. Cir. 1997).
[41] *Air Transp. Ass'n of Am., Inc. v. F.A.A.*, 291 F.3d 49, 56 (D.C. Cir. 2002).
[42] Exactly 9986 in 2009, according to the Conseil d'Etat's official website. *See* : http://www.conseil-etat.fr/cde/fr/quelques-chiffres/.

the search for a unified test has proved difficult[43]. The distinction between interpretive norm and substantive norms has been clearly formulated for the first time in 1954, in the *Institution Notre Dame du Kreisker* case[44]. The Conseil held that the minister of Education, who had issued a rule requesting specific information from private school before they could apply for public funds, had not limited itself to interpreting the existing statute but had issued new rules about the content of the funding application. As a consequence, the plaintiffs had standing to challenge the rule. But the judgment did not provide a general definition of interpretive rule, at least not a very helpful one (saying that an interpretive rule does not create new rules is almost a truism). In particular, it was not clear what type of control, if any, would be exercised on the permissible scope of the interpretation. Would the Conseil d'Etat deem interpretive any permissible or reasonable interpretation? Or would it go further and consider that there was only one way to interpret the existing rule, and that every "interpretation" deviating from that content would be viewed a substantive ?

For many years, the question was not really settled, and –at least- two lines of cases coexisted. On the one hand, some cases seemed to express what an American lawyer would call a "deferential"[45] approach to the agency characterization of its own rule. Without relying totally on the agency label, this line of cases exercised a rather loose control on the interpretive nature of the rule. As long as the author of the rule presented it as a commentary or an opinion, and provided the interpretation seem reasonably in line with the content of the interpreted norm, the rule was classified as interpretive, and there was no standing to challenge it.[46] On the other hand, "Other decisions, less frequent, found in a rule apparently interpretive rules applying to a situation not contemplated or foreseen by the statute, and admitted standing to challenge them"[47]. In this line of cases, the inquiry into the content and correctness of the interpretation was deeper. This idea was to determine the "right" interpretation of the rule, and to check that this content was

43 For a complete history of this evolution, *see* P. Fombeur, *Conclusions sur Mme Duvignères*, Revue Française de Droit Administratif 2003, 280.
44 *Institution Notre Dame du Kreisker*, CE Jan. 29, 1954 Rec. Lebon 64.
45 The concept of deference is not very familiar in French administrative law. In effect, judicial doctrines regarding review of discretion or application-of-law to facts include some deference (the standard of review varies with the type agency decision). But purely factual statements ("exactitude matérielle des faits"), on one side, and questions of law, on the other side ("application du droit") are subject to *de novo* review.
46 See for instance, the *Societe Librairie Aristide Quillet* case, CE Ass., May 5, 1961, Rec. Lebon 297, or the *Varaut et association des avoues de la Seine case*, CE Sect. Mar. 5, 1976, Rec. Lebon 137
47 P. Fombeur, *supra* note 43.

exactly reflected in the interpretation. This approach consisted in a two-step process: (1) determining the exact meaning of the interpreted rule, using all the usual techniques of statutory interpretation, (2) compare it to the interpretation. We could call it a "logical" approach, since it's very close –at least in theory- to what a mathematical or scientific process of comparison of two propositions is supposed to be. Of course, in the real world, things are never so simple, because there is always some uncertainty in the meaning of both terms of the comparison: the interpreted and the interpreting rule.

Over the time, the "logical" approach seemed more and more used[48]. In practice, it meant a greater skepticism towards agency interpretation, and a more frequent use of the tools of statutory interpretation (from the simple ones –legislative history- to the highly sophisticated –preliminary ruling and request of interpretation by the European court of Justice[49], in order to establish the exact meaning of a European Union rule interpreted by a French text).

But many problems remained. At least two deserved to be mentioned.

The first one was the periodical reappearance of another test, based on the binding/not binding distinction[50]. In this approach, the focus was not only on the content of the interpretation, but on the way the agency intended to use it. If the agency viewed the interpretation as binding on itself, the plaintiffs had standing to challenge it. Conversely, the interpretation could not be challenged in court if the agency had not expressed the intent to follow it systematically. In reality, this test was not an attempt to draw a line between interpretive and substantive rule, but a distinction of another nature, based on the effects of the rule rather than on its content. It could be used separately, or in combination with the interpretive/substantive distinction[51].

The second issue was typical of contemporary French administrative law, which is often made of a layer of three or four set of rules, each one superior to the other. Most of the time, this situation stems from the European integration or from the ratification of an international treaty. [52] This kind of situation can occur, for instance, when: (1) an agency issues a rule interpreting a French statute (2) the French statute has not been

48 The *Ordre des avocats à la Cour de Paris* case, CE May 15, 1987, Rec. Lebon 175 ; The *Gisti* case, CE June 29, 1990 Rec. Lebon 171.
49 The *Syndicat des producteurs indépendants* case, CE Feb. 9, 2000, No. 203415 (unpublished)
50 The *IFOP* case, CE Jun. 18, 1993, Rec. Lebon 178.
51 Leading to the following typology : interpretive/binding, interpretive/non-binding, substantive/non-binding, substantive/binding.
52 According to the 1958 French constitution, international treaty law, including European law, trumps French domestic statutory laws. See 1958 Constitution, art. 55.

adopted *sua sponte*, but in order to implement a European law. If the interpretive rule correctly interprets the statute, but that, in the same time, the statute incorrectly construes the European law it is supposed to implement, what is the nature of the rule issued by the agency? Interpretive, insofar as it is faithful to the content of the statute? Substantive, since it reiterates the content of a statute whose content violates a superior norm and, as such, is not "good law"? Does a regulated party have standing to challenge the interpretation? For many years, this question has remained an open one[53], until the Conseil d'Etat decided, in 2002, that a rule reiterating the content of a decree or a statute which was, in turn, in violation of a superior norm (international treaty, regulation, etc.) could be challenged in court[54].

In sum, it is fair to say that, in the French administrative law of the late 1990's and the early 2000's the definition of interpretive rules and the interpretive/substantive rule distinction appeared as an area of uncertainty, and, as a consequence, a source of irritation for practitioners and judges. Meanwhile, the American legal system was –and still is- faced with rather similar problems. What kind of lesson, if any, can be learned from this similarity of issues?

The first one may be that if statutory interpretation is, in itself, a delicate task, it becomes even more difficult when the notion of interpretation itself is not clarified. As we've already mentioned, "interpretation" appears to be one of these familiar notions, speaking for themselves, and not requiring a particular effort of legal definition. Actually, the examples of both French and American law seem to provide strong evidence of the contrary. The framers of the Administrative Procedure Act to the judges who decided *Institution Notre Dame du Kreisker* in 1957 may have viewed this notion as self-explanatory. But things have not been so simple.

The second lesson may be that courts have hesitated between two conceptions of interpretation.

The first conception, rather pragmatic, tends to considers that there are almost always several plausible interpretations of a norm, and that interpretation is essentially a choice. From this perspective, interpretation is not completely different from rule making, and consists at least in part in policy judgment or exercise of discretion. In practice, this conception has often lead to a greater amount of deference to agency interpretation, at least when the agency construes its own rules.

53 Two lines of cases were coexisting within the case law of the Conseil d'Etat.
54 The *Villemain* case, CE Ass. Jun. 28, 2002, Rec. Lebon 229.

Actually, deference is not a necessary consequence of this conception. Admitting that there are various possible interpretations does not, by itself, justify a particular deference for the Agency's choice between the potential and competing interpretations[55]. But, for better or for worse, deference to Agency interpretation has been viewed as the best way to solve the conflict of interpretations. The controlling weight given to reasonable agency interpretation of statute when Congress has not spoken clearly on the issue is black letter American administrative law since *Chevron*. In France, deference has never been expressly acknowledged. But, *de facto*, some kind of deference seemed to prevail in early French administrative law when the Conseil d'Etat would deny standing to challenge rules as soon as they were arguably interpretive.

What can explain this deference? In the USA, the justification put forward by the Supreme Court has been, at least originally, based on the idea of *delegation*. Justice Stevens wrote in *Chevron* that "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation[56]", but that "Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit."[57] In France, the justification of this deference has not been explained, for the simple reason the deference itself has not been expressly acknowledge. One possible explanation of this *de facto* deference would be the fact that, in France, Agencies are deeply implicated in the drafting of bills later submitted to Parliament, and, as such have a better understanding of the legislative history[58].

Another consequence of the pluralist view of interpretation, though in the USA only, has been that judges, having viewed interpretation as a choice, were more likely to apply to interpretation the same procedural safeguards that apply to rulemaking. If interpreting implies a large margin of interpretation, it's coherent to apply some of the guarantees of the Administrative Procedure Act, or to modulate these guarantees according to the impact of rule ("the legal impact test") or to its relation to prior interpretations.

Another way of seeing things is to consider interpretation as pure process of discovery and explanation of the existing law. This conception is probably more faithful

[55] I owe this remark to one of the readers of a draft version of this article.
[56] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 843 (footnotes omitted).
[57] Chevron, at 844
[58] In French constitutional law, most bills are drafted by the Government. Moreover, unlike what happens in the USA, votes in Parliament almost always follow party lines, and the control of the Executive on the parliamentary majority is generally very strong.

to the traditional conception of interpretation[59], viewed as "the art or process of discovering and expounding the intended signification of the language used"[60]. In this view, there is little room –if any- for deference to agency interpretation, since courts have both the experience and legitimacy to solve this pure question of law. Moreover, this conception is likely to imply that, for a given statute or rule, there is only one right interpretation[61] (or, at least, that courts shall have the final say on what the best possible interpretation is). Contemporary French administrative law relies largely on this conception, when it operates *de novo* review of agency interpretation, and deems as illegal any interpretation deviating from the judicial interpretation. And, on the American side, this view is probably more in line with the original meaning of the Administrative Procedure Act. It is also reflected in the various and complex hypotheses where there is no deference for agency interpretation.

In any event, both the experience of the French and American administrative law converge in to show that drawing the line between interpretive and substantive rule is, and is likely to remain, a difficult task. It is so much the case that, during the last decade, the focus of the debate has largely shifted, and is now on the function of the distinction rather than on the distinction itself. More specifically, efforts have been made to limit, as far as possible, the use of the distinction, or to redefine it to find "a way out".

*-2. THE SEARCH FOR A WAY OUT*

In France, the difficulty of implementing the distinction has led to a partial renunciation, in the *Duvigneres* case. During the years preceding this turning point, growing criticism had been expressed against the paradoxical use made of the substantive/interpretive function by French administrative case-law. As we've tried to explain, this distinction was used to determine if the plaintiff had standing to challenge the rule. From a practical point of view, the downside of this use was obvious: it meant that a very difficult legal issue was used as a threshold question, and had to be solved before deciding the case on the merits. Although standing doctrines are not always

[59] This view of interpretation as a process of discovery rather than creation is actually very controversial: it has been challenged, in particular, by the realistic theory. See, for a recent presentation of the realistic approach by an American author, see R. A. Posner, *Some realism about judges*, 59 Duke L.J. 1177. See also, for a presentation of the different conceptions of interpretation by a French scholar), E. Millard, *Theorie Generale du droit* 87 (2006).

[60] H. C. Black, *Handbook on the Construction and Interpretation of the Laws* 1 (1896), quoted in Black's Law Dictionary (9th ed. 2009).

[61] Like in this old joke about monotheism, one may ask: "There is only one God… but which one?"

simple, one usually expect threshold question to be simpler that questions of on the merits. From a logical point of view, this doctrine was also peculiar, since the substantive/interpretive distinction is not only a standing question, but has also implications on the merits. Most of the time, the solution on the merits would follow mechanically from the holding on the so-called standing question. If the rule was interpretive, the case was dismissed as inadmissible. If the rule was substantive, it meant two things in the same time: (1) the plaintiff has standing (2) the rule violates the superior norm (decree, statute, treaty, etc.) it pretends to construe, and, as such, is illegal. In other words, deciding the nature of the rule was both the end and the beginning of the case, a standing and a merits issue. Needless to say that such a reasoning was difficult to explain to lay people, and even experienced lawyers unfamiliar with administrative law had trouble to understand it. As the *commissaire du gouvernement*[62] Pascale Fombeur explained in her opinion on the *Duvigneres* case, in such a reasoning, "it is the validity of the rule which reveals its interpretive or substantive nature" ("C'est la légalité de la circulaire qui révèle son caractère interpretative").

In the *Duvigneres* case, the Conseil d'Etat tried to bring this rather nonsensical situation to an end, and to put the law back on its feet. There are essentially two points in the holding. First, the substantive/interpretive inquiry ceases to be a standing question. The test for standing is now based on the binding/non binding nature of the rule. If the wording or the context of the rule shows it is intended to be binding, plaintiff has standing to challenge it[63]. It is only in a second step, when the claim is examined on the merits, that the substantive/interpretive distinction comes into play. If the rule is viewed as a correct interpretation of existing law, the challenge rule is going to be sustained. If, on the contrary, the rule is contradicting, expanding or limiting the meaning of the

62 Despite its archaic and misleading name, the *Commissaire du gouvernement* (litteraly, "Government Commissioner") is a full tenure judge, totally independent from the government or the parties to the case. In the French administrative judicial process - both at the trial and the appellate level-, he is in charge of giving publicly and independently his legal opinion on the solution which should, according to him, be given to the case. His opinion is written in a form very close to a US opinion. Although he is not part of the panel who decides the case, his advice is very influential, and followed in a huge majority of cases. Since judgment before French administrative courts are very brief (they are essentially limited to the holding), the opinion of the *Commissaire du gouvernement* is a way to understand the underlying reasoning of the court, at least when the court followed his advice. In 2009, the archaic name of *Commissaire du gouvernement* was replaced by *Rapporteur public* (literally, "public reporter").

63 Provided, of course, that other standing requirements under French law, such as injury in fact, are met.

interpreted norm, the court will ask the classical questions about the validity of a rule : did the author had authority to issue such a rule ? Does the interpreting rule violates the interpreted rule, or otherwise violates superior rules (constitution, treaty, etc.)?

Let's suppose, for instance, that statute X prohibits rabbit hunting, in very broad terms. If the Minister of Agriculture issues a rule saying that : "According to statute X, all kind of rabbit hunting, including hare hunting, is prohibited." The court is first going assess if the rule is intended to be binding. Here, it is obviously the case, and an individual or organization potential injured by the rule will have standing to challenge it. In a second, the court will, on the merits, determine if the term rabbit in the law can be intended to include hares, in which case the rule is only interpretive. If not, the rule will be deemed substantive, and the following questions are likely to be: does the Minister of Agriculture have statutory authority to extent the list of protected species? Leaving aside the question of authority, are there other substantial rules, in the interpreted statutes or in other applicable texts, prohibiting restrictions on hare hunting?

Even if the substantive/imperative distinction has not disappeared from the landscape, the fact it's not a standing question any longer can be viewed as great progress towards simplification (which is not to say that the binding/non-binding distinction is completely flawless[64]).

In the USA, the statutory origin of the distinction makes a similar move of simplification unlikely, for it would imply a modification of the Administrative Procedure Act. Nevertheless, other ways to simplify the problem have been suggested. Many scholars, in particular, have come to the conclusion that, since there is "perhaps no more vexing conundrum in the field of administrative law than the problem of defining a workable distinction between legislative and non legislative rules"[65], the notion should be reinterpreted along a purely formal line. According to this view, characterized by an author as the "short cut"[66], "rules that have been through notice and comment would be accorded the force of law in later enforcement actions; rules that have not been through notice and comment would be denied such force. No longer would a rule's substantive

64 In general, Agencies tend to abide by the rules they have issued. Otherwise, what would be the point in issuing these rules? In my view, the binding test should almost always be met.
65 D. L. Franklin, *Legislative rules, nonlegislative rules, and the perils of the shortcut*, 120 Yale L.J 276,278 (2010).
66 D. L. Franklin, *Legislative rules, nonlegislative rules, and the perils of the shortcut*, *supra* note 65, 279.

nature dictate its procedural provenance; instead, its procedural provenance would determine its substantive effect."

Concretely, the agencies would have the following choice. In the first option, the Agency decides to go through the process of notice and comment. As a consequence, the rule is categorized as substantive. In compensation for the time and cost spent in the process, the Agency is entitled to this highest degree of deference under *Chevron* and *Meade*. The Agency may also use its rule to bring an enforcement action. In the second option, the Agency declines to use the notice and comment procedure. The rule falls – automatically- in the category of interpretive rules. But the Agency cannot claim particular deference for its interpretation, and cannot rely on its interpretation in case of enforcement action.

This suggestion of a kind of Copernican revolution (which reverts the traditional views on the problem) has gathered a lot of support[67]. At first surprising, this theory may, after some thought, appear relatively appealing. It is simple to put in practice, and puts an end to the never ending controversies on the nature of the rule. In that measure, it can be justified by considerations of judicial economy, since it "economizes on decision costs by eliminating the need to identify the class of rules that should have been promulgated using notice and comment"[68]. In terms of control and review of agency action, it can also be presented as a balanced approach. Agency's choice to opt out of notice and comment is discouraged by the negative consequences of this choice (no deference).

This is probably too good to be true. In his study on *Legislative rules, nonlegislative rules, and the perils of the shortcut*, Davis L. Franklin tried to list the drawbacks of this approach. He mentioned, among other things, that : (1)- the short cut "inadequately protects the interests of those persons (…) whose interests are affected by deregulatory or permissive agency pronouncements", such as the "regulatory beneficiaries"[69] –(2) it "ignores important differences between public scrutiny at the promulgation stage and heightened scrutiny at the enforcement stage"[70]. It would excess the scope of the present

[67] See E. D. Elliot, *Re-Inventing Rulemaking*, 41 Duke L.J. 1490 (1992), W. Funk, *When is a rule a "regulation"? Marking a clear line between non legislative rules and legislative rules*, 54 Admin. L. Rev. 659 (2002), John F. Manning, *Non legislative rules*, 72 Geo. Wash. L. Rev. 893 (2004), J. E. Gersen, *Legislative rules revisited*, 74 U. Chi. L. Rev. 1705 (2007).
[68] J. E. Gersen, *Legislative rules revisited*, *supra* note 67.
[69] D. L. Franklin David L. Franklin, *Legislative rules, nonlegislative rules, and the perils of the shortcut*, *supra* note 65, 276.
[70] D. L. Franklin David L. Franklin, *Legislative rules, nonlegislative rules, and the perils of the shortcut*, *supra* note 65, 276.

study to assess the pro and cons of the "short cut" proposal. But, at least as a matter of first impression, the objections made appear serious. In terms of policy, the risk of having the rule struck down for lack of notice and comment disappears, the incentive for Agency to skip this long and complex phase, and to exchange the public debate with a purely internal and bureaucratic process of rule-making is very strong. It is difficult to know how the agency will compare this benefit with the costs of a smaller deference in case of litigation. Under *Meade*, the agencies already know that they have to follow notice and comment if they want to benefit from *Chevron* deference of statutory interpretation. It would be interesting to study empirically how they have reacted to that signal, and to which extent they have increased their use of notice and comment.

Both the American debate on the "short cut" and the evolutions of French case law illustrate how vexing the distinction between interpretative and substantive norm may be. It is one thing to say that an interpretation should be a content neutral explanation of a norm (almost everyone would agree on that), but it is another thing to come up with a test or a methodology to sort out the rules meeting this definition. In sum, the result of this quest for a perfect test to distinguish substantive and interpretive norm is rather disappointing.

But if it is so difficult to draw a line between substantive and interpretive norm, how to explain the persistent use of this distinction in the two legal systems we are studying? It must be that this distinction serves very important goals, if it is still widely used despite its limits. An image may help to understand the problem. Like legal concepts, objects of everyday life cannot be indefinitely improved: despite technological progress, a car remains a car. It will always need some amount of energy to be moved, and a better model will never prevent you from being stuck in traffic at commute hours. The question then becomes: why are people driving? In other words, and coming back to our problem, what is the central function of this distinction, which makes it so necessary?

## III) THE USE OF THE DISTINCTION AND WHAT IT REVEALS OR ILLUSTRATES OF THE STRUCTURE OF FRENCH AND US ADMINISTRATIVE LAW

In the first part of this study, we have mentioned the primary functions of the distinction between interpretive and substantive norms in the French and American legal system. But if a simple enumeration of the basic uses of the distinction is a necessary step to understand how the system works, it is not enough to grasp the central function of the

distinction, what makes it particularly useful or even necessary. What we would now try to understand is the underlying and deeper concerns that justify the use of the substantive/interpretive distinction.

*-1. THE CENTRAL FUNCTION OF THE DISTINCTION IN FRENCH LAW: A NON-DELEGATION ISSUE*

If you had asked to a French lawyer or judge twenty years ago what the essential function of the distinction was, they would probably have answered you immediately: "standing!" At that time, conventional wisdom was that the distinction was essentially a device to regulate litigation, and to prevent the potential plaintiffs to challenge every kind of document issued by an Agency. With the *Duvigneres* case, this justification has ceased to be true: the substantive/interpretive distinction has been dropped as a standing criteria, and substituted by the binding/non binding distinction. Moreover, the standing rules in French administrative law have always been so liberal[71], at least with respect to challenges against rules (as opposed to challenges of individual orders and decisions), that this function was not necessary coherent with the general structure and philosophy of the system.

If the distinction is not so useful to regulate access to Court, what is left? We submit that it is related to two important and complementary features of French administrative law.

The first of these features is the desire to avoid the dilution of the rule making power expressly recognized to the Executive. In order to introduce this point, some background information is necessary. In France, under articles 21, 34 and 37 of the 1958 Constitution, the Executive is expressly entrusted with a rule making power (*pouvoir réglementaire*), under the condition that the rules it issues do not contradict statutory laws adopted by the Parliament (the equivalent of Congress in the USA) or other superior norms (Constitutional rules and principles, and, increasingly, European and international law). This is, at least in theory, a strong contrast with the American legal system, where the rule making function is supposed to be the exclusive province of the Legislative

71 In a famous case, the Conseil d'Etat held that a camper can challenge any camping regulation in any of the 36,000 cities of the country, even if he has never set a foot there (the *Abisset* case, CE Feb. 14, 1958 Rec. Lebon 98) or that owning a hotel in a touristic zone gives you standing to challenge the rule deciding the date of school holidays (the *Damasio* case, CE Sect. May 28, 1971 Rec. Lebon 391). Moreover, legal persons or associations do not have to show that one of their members has suffered a personal injury to have standing.

branch, and where the President does not have rule a making power of its own (as President Truman famously learned at its own expenses in the "steel seizure case", when he tried to seize steel mills to avoid a major labor conflict during the Korean war) [72]. In a nutshell, the French legal system is based on the idea that concentration of the rulemaking power in the hands of Parliament has proved to be completely unmanageable during the Third (1870-1940) and Fourth Republic (1946-1958), and that it's better to recognize that Parliament cannot do everything, and that some rules have to be –and, in practice, always are- issued by the Executive. As a result, the French constitution defines two kinds of rules: *la loi* (statutory laws adopted by the Legislative branch, in the fields defined by the Constitution) and *le règlement* (rules issued by the Executive, in the fields not reserved to statutory law, or in order to enforce and precise statutory laws)[73]. Moreover, under the previous Constitutions, an inherent rulemaking powers had also been recognized to the Head of the Executive[74], for at least two purposes: making police laws on a national scale (*pouvoir de police générale*), and taking the measures necessary to the execution of statutory laws (*exécution des lois*).

Another characteristic of the French legal system is that the rule-making power granted to the Executive is in turn centralized in the two heads of the Executive branch (the President and the Prime Minister). Except for internal organization purposes, or on the basis of an express statutory delegation, Agencies and ministers (the equivalent of secretary of states) do not have the authority to issue rules[75]. Once again, this principle is probably a product of history. The Third and Fourth Republic were Parliamentary regimes, where the Executive was very weak, and where Cabinets were always a fragile coalition of numerous political parties. Allowing every member of Cabinet, representing different parties, to make rules of its own, would have been the final straw that breaks the camel's back, and led to complete anarchy.

Even if the term "Unitary Executive", sometimes used in the USA[76], would not be perfectly appropriate to describe a system in which the President and the Prime Minister actually share the rule making power, the concern is the same: concentration and

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72 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863 (1952).
73 By the way, that is one of the reason that the term "legislative rule" is not a synonym of "substantive rule" in French law : "legislative" refers only to rules adopted by the Parliament (statutes).
74 The *Labonne* case CE Aug. 8, 1919, Rec. Lebon 737.
75 The *Jamart* case, CE Feb. 7, 1936, Rec. Lebon 172 .
76 *See e.g. Morrison v. Olson*, 487 U.S. 654, 733 (Scalia J., dissenting).

centralization of the power within the Executive, in order to ensure subordination of all Agencies and Ministers/Secretary to the Head(s) of the Executive Branch.

In this context, the main functions of judicial review of interpretive norms are : (1) to prevent infringement of the rule-making power of the Executive on the rule-making power of the Parliament, or the violation of Constitutional or international norms under color of interpretation (2) to prevent Agencies to exercise a rule-making power they are not vested in. If Ministers or Agencies were permitted to issue purportedly "interpretive" rules which, in reality, contain substantive provisions, they would either infringe on the domain of statutory law, which belongs to Parliament, or undermine the centralization of the Executive branch. Agencies are subordinate body, not supposed to make important policy determination of their own. They have to be kept under the subordination of the Parliament, on one side, and the President and the Prime minister, on the other side. In American terms, we could say it's both a "separation of powers" issue and a "non-delegation" issue.

This "non-delegation" function of the distinction between substantive/legislative rules has to be related to the fact that, in French administrative law, there is no deference for Agency interpretation of statutory law, or for Agency interpretation of superior rules in general. In some way, it can be surprising, because the involvement of the Executive and of the Agencies in the process of statutory law making is higher in France (where an Agency prepared bill -a *projet de loi*- can go through the legislative process with limited changes) than in the USA (where a strict conception of separation of powers and divided government strongly limits the ability of the Executive branch to impose its views to Congress). Whereas the Framers of the 1958 French constitution have granted a huge rulemaking power to the Executive, they have not gone so far as allowing him, in addition, to construe the rules made by the Legislative branch. This is, by contrast, the task of the Courts, especially the Administrative Courts, which always review de novo the questions of laws, with no particular deference to Agency interpretation.

While some aspects of the description which has just been made could also fit the American system, where concerns of separation of power are strong, one striking difference emerges from this comparison: so far, we haven't made any mention of "notice and comment" involvement of the public and the regulated parties in the rule making) concerns. This simply because there is no equivalent of this process in French law, except in limited fields of environmental law, urban planning law and eminent

domain law[77]. Neither substantive nor interpretive rule are submitted to public input and discussion. This appears, on the contrary, to be a central feature of the American legal system.

*-2. THE CENTRAL FUNCTION OF THE DISTINCTION IN US LAW: A NOTICE-AND-COMMENT ISSUE*

It is so obvious that it may seem tautological: in the American legal system, the main function of the substantive/interpretive distinction is to determine the scope of the notice-and-comment procedure, according the Administrative Procedure Act[78]. The main concern is one of process, ensuring that the most important rules are elaborated in a way allowing the public –general public, industry, public interest groups, etc.- to discuss the content of the norm. As we've just mentioned, there is no general equivalent of this process in French administrative law. Since Napoleon, the role of improving the content of the projects elaborated by the Agency before they become rules has been vested in a body of experts, not in the public. This is the function of the Conseil d'Etat which, in a peculiar but characteristic feature of French law, is both the highest administrative court of the country and an advisory body for the Government[79]. In other words, the process of rule-making is essentially an internal and bureaucratic one. In the French tradition, still very alive on this point, *l'Etat* (the central State)[80] is largely in charge of the *intérêt général* (this expression, difficult to translate, refers to the interest of the public in general, distinct from the aggregation or sum of the different private interests and conflicting individual points of views).

On the contrary, in the modern American administrative law as it has emerged from the Administrative Procedure Act and the subsequent case law, the rule making

77 Where a procedure called *enquête publique* is applied, and allows the public to participate and make observations.
78 5 U.S.C. § 553.
79 For a general presentation of the role of the Conseil d'Etat, see its annual public report (English version), http://www.conseil-etat.fr/cde/media/document/annual_report_ce2009_gb.pdf. Over the years, and under the influence of the fair trial provisions of the European convention of human rights, the trying and advising functions have been separated within the Conseil d'Etat (for example, a judge who issued an advice on a rule will not try the case if the rule is challenged), but the Conseil d'Etat as whole still hold the two functions.
80 For a general description by an outsider of the French system of administrative law, see for instance the recent address of a member of the Italian Constitutional Court, Pr Sabino Cassese, in a symposium on the "Future of the French model of public law in Europe" : http://www.conseil-etat.fr/cde/fr/discours-et-interventions/l-avenir-du-modele-francais-sous-un-regard-europeen.html (in French).

process is largely open to public comments and sometimes becomes close to a cooperative one, particularly when strong interests groups, like the industry, are involved. Even if internal processes of review of projected norms have also been created, such as the review by the Office of Management and Budget, the role of allowed to the public is without equivalent. As a consequence, the distinction between substantive/interpretive rule is essentially conceived as a tool to guarantee that every important rules goes through this process of public debate, and to draw the borders of the notice and comment procedure.

This function is so prominent that, under its pressure, the notion of interpretive norm has sometimes moved away from its initial and apparent meaning.

A first example of this phenomenon was given by a line of case of the D.C. circuit, under which new interpretations had to be submitted to notice and comment as well[81]. Under this theory, which came to be known as *the Paralyzed Veterans* doctrine[82], the D.C. Circuit held that "[w]hen an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, which requires notice and comment"[83]. From a strictly logical and textual point of view, this position did not seem to make sense. Innovative as they may be, "new" interpretations of existing rules are still interpretations. Furthermore, the Administrative Procedure Act does not distinguish between "new" and "old" interpretations. This is why, perhaps, this reasoning could be best understood by reference to the general philosophy or to the goals of the interpretative/substantive distinction in the Administrative Procedure Act. The underlying principle seemed to be that the public had a right to notice and comment on every potentially disruptive rule: this is certainly the case, in practice, of a new interpretation, especially is the change is "fundamental"[84]. However, in *Perez v. Mortgage Bankers Association (2015)*[85], the Supreme Court put an end to the *Paralyzed Veteran* doctrine. The Court held logically that: "Because an agency is not required to use notice-and-comment procedures to issue an

[81] *See e.g. Paralyzed Veterans of America v. D.C. Arena* L.P. 117 F.3d 579, 586 (D.C. Cir. 1997)*Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030,1034 (D.C.Cir.1999) ; *Air Transp. Ass'n of Am., Inc. v. F.A.A.,* 291 F.3d 49, 56 (D.C. Cir. 2002).
[82] *Paralyzed Veterans of America v. D.C. Arena L.P.* 117 F.3d 579 (D.C. Cir. 1997).
[83] *Alaska Prof'l Hunters Ass'n v. FAA,* 177 F.3d at 1034.
[84] *Paralyzed Veterans of America v. D.C. Arena* L.P. 117 F.3d 579, 586 (D.C. Cir. 1997).
[85] *Perez v. Mortgage Bankers Association*, 575 U.S ___ (2015) (slip opinion).

initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule."[86]

Another illustration of the porosity of the interpretive/substantive distinction when public participation is at stake is given by *Mead*[87]. Under the Mead doctrine, "administrative implementation of a particular statutory provision qualifies for Chevron deference when it appears that Congress delegated authority to the agency generally to make rules carry the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[88] A "very good indicator of delegation meriting Chevron treatment" is recognized in "express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations".[89] Accordingly, notice-and-comment -or formal adjudication- are "significant" in pointing to Chevron authority, even if the Court did not rule out the possibility of Chevron deference when such formalities are not required.[90] *A contrario*, interpretive rule, which are not supposed to go through notice-and-comment, are very unlikely to be granted Chevron deference.

Familiar as it may now be to an American administrative law specialists, this holding is paradoxical and confusing for the non-initiates -and the foreign observer-, for a least two reasons.

The first *Mead* paradox is that interpretive rules get little interpretive deference, if any at all. Interpretations contained in policy statements, agency manuals and enforcement guidelines are "beyond the *Chevron* pale"[91]. Even if the refusal to grant Chevron deference is balanced, in theory, by the possibility to invoke a more limited kind of deference, the so-called *Skidmore* deference, the practical impact of this limited deference is unclear. It is easier to image a continuum of various degrees of deference than to apply such a scale and, a fortiori, to understand in advance how it will be applied. Equally unclear is the scope of the exception mentioned by the Court when it recalled that the Chevron deference had "sometimes" been found without notice-and-comment and formal adjudication[92].

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86 *Id*. at 9.
87 *US v. Mead Corp*. 533 US 218 (2001).
88 *Id*. at 226-227.
89 Id. at 229.
90 Id. at 230-231.
91 Id. at 234.
92 Id. at 231.

The second paradox of *Meade* is that, in order to get deference, the best way to interpret a statute is not issue an interpretive rule, but a substantive one (or, more precisely, issued pursuant to the rules applicable to the adoption of substantive rules). This paradox has been emphasized in Judge Scalia's dissent, in which he points at the risk of an "artificially induced increase in informal rulemaking"[93] , and a situation where notice-and-comment becomes "a virtual necessity"[94]. To agency wishing to enjoy the protection of Chevron deference in case of litigation, Meade gives a strong incentive to employ notice-and-comment rulemaking as a tool of statutory interpretation. In other words, agencies are likely to submit to notice-and-comment rules that they clearly view as interpretive, but that they whose interpretive content they want to protect from Court challenge.

Confronted to interpretive rules with limited interpretive weight, and substantive rules used as tools of interpretation, the observer is somewhat puzzled… But, precisely, this result makes sense if the essential purpose of these doctrines is reflected in their practical result: preventing agencies from issuing highly consequential rules without going through notice-and-comment. In practice, agencies are likely to use notice and comment every time a potentially disruptive rule is issued, and use this procedure more frequently than a strict lecture of the Administrative Procedure Act would suggest. The central role of notice-and-comment rulemaking is reaffirmed, confirming that public participation in rule making is a core value and a distinctive feature of the American administrative law system.

## CONCLUSION

At the end of this short journey through French and American administrative law, the words that could best summarize the traveller's impression on the interpretive/substantive distinction are: necessary evil. As we tried to show, the distinction is very difficult to deal with, and neither the French nor the American law system have found a perfect way to draw the line, and there is no miraculous test or concept that could be imported from one system to solve the difficulties of the other. In that sense, the distinction is an "evil", an irritating problem we cannot really get rid of. The persistent use of this distinction, though, illustrates its importance for both legal

[93] Id. at 246.
[94] Id.

systems. Defining the scope of substantive rules is a way of ensuring that Agency are not going to escape the constraints put on their rulemaking activity, and that interpretation will not be the pretext and the camouflage of a parallel system of rulemaking. As a French judge of the Conseil d'Etat once wrote[95] , *La circulaire est un pavillon qui peut recouvrir toutes sortes de marchandises* (Interpretive rule is a flag under which many kinds of cargos are shipped).

Of course, the checks put on the rulemaking power of Agencies are of a different nature. In the French system, the implication of the public in the rule making process is limited, whereas it appears to be a central question in the American system. And yet, the ultimate goal is not so different. For, one of the lessons of a comparative study of French and American administrative law is that they have a central issue in common: balancing efficiency and legitimacy concerns. On the one hand, Agencies are necessary, because all experiences of strict centralization of the rule making power in the Legislative branch have been a failure. The breadth and complexity of the tasks faces by a modern State are such that the burden of rule-making has to be shared at one point. But this grant or delegation of rulemaking power must, in turn, go along with safeguards, checks and balances that will limit the power of Agencies, and prevent them from abusing their power, violate the constitutional, statutory or international limits put on their action.

[95] *Conclusions* of the *Commissaire du gouvernement* Bernard Tricot on the *Institution Notre Dame du Kreisker* case, *quoted in* M. Long, P. Weil, G. Braibant, P. Delvolve, B. Genevois, *Les Grands Arrets de la Jurisprudence Administrative 891* (16th ed.2007).

## ANNEX 1

*An explanation of the role of the Government commissioner by the European court of Human Rights (ECHR, Case of Kress v. France, June 7th 2001, num. 39594/98, paragraph 41)*

"The institution of Government Commissioner dates from an ordinance of 12 March 1831. Originally, as its name indicates, it was designed to represent the government's point of view, but that function very rapidly disappeared (at the latest in 1852). The title has remained but is now a misnomer. Since then the institution has become, to the outside observer, one of the most distinctive features of French administrative justice, in particular because Government Commissioners rapidly established themselves as judicial officers totally independent of the parties.

The Government Commissioner plays a traditionally very important role in the creation of administrative case-law and most of the major judicial innovations have come about as a result of celebrated submissions by the Government Commissioner. Furthermore, given that the judgments of the *Conseil d'Etat* are always drafted very elliptically, it is often only by reading the submissions of the Government Commissioner, where published, that one can discern the *ratio decidendi* of the judgments."

## ANNEX 2

*The role of the Conseil d'Etat seen by himself (presentation of the Conseil d'Etat on his official website) :*

"Protecting freedom and fundamental rights, defending the interest
of the people, promoting high standards of public governance :

"The Conseil d'État advises the Government on the preparation of bills, ordinances and certain decrees. It also answers the Government's queries on legal affairs and conducts studies upon the request of the Government or through its own initiative regarding administrative or public policy issues.

The Conseil d'État is the highest administrative jurisdiction - it is the final arbiter of cases relating to executive power, local authorities, independent public authorities, public administration agencies or any other agency invested with public authority.

In discharging the dual functions of judging as well as advising the Government, the Conseil d'État ensures that the French administration operates in compliance with the law. It is therefore one of the principal guarantees of the rule of law in the country.

The Conseil d'État is also responsible for the day-to-day management of the administrative tribunals and courts of appeal.

Every year, 130 bills, 800 decrees and 300 non-statutory texts are examined by the Conseil d'État."