A CHANGE OF POLICY: PROMOTING AGENCY POLICYMAKING BY ADJUDICATION

TODD PHILLIPS*

The Administrative Procedure Act and Supreme Court precedents permit federal agencies to articulate new policy through both rules and adjudicative orders. Yet over the past several decades, a once strong culture of policymaking by adjudication within agencies has given way in favor of informal rulemaking, such that former President Trump issued an executive order last year that appears to be intended to, in part, prohibit the practice. At the same time, some in academia seek to limit agencies' abilities to develop policy through adjudicative orders. They argue that courts should deny Chevron deference even to policies announced in formal adjudications and in decisions designated as precedential because they lack the public legitimacy of notice-and-comment rulemakings.

In this Article, I discuss why agencies must again give adjudication its due consideration as a real policymaking option, and why the method remains worthy of Chevron deference. Though it need not be used in every circumstance, developing policy through case-by-case adjudications—akin to courts' development of the common law—can offer significant benefits over informal rulemaking, both to agency policymakers (e.g., speed, case-by-case policy development, ex post policy clarification, increased policymaking opportunities) and to the public (e.g., increased participation by marginalized communities, tailored policies). Adjudication can offer just as much rational reason-giving and accountability as informal rulemaking through practices that broadly permit public participation (e.g., intervention, amicus briefing, oral argument, publishing notice in the Federal Register of opportunities for public input, informing the public of newly articulated policies) as does informal rulemaking. Agencies should consider how to incorporate adjudication into their policymaking activities, and courts should not exclude adjudicatory policymaking from receiving Chevron deference based solely on its form.

---

* Non-Resident Fellow, Duke Global Financial Markets Center and former Counsel for Intergovernmental Affairs, Administrative Conference of the United States. The opinions stated in this Article are the author's own and are not representative of those of the author's employer. The author thanks Jeremy Graboyes, Kent Barnett, Connor Raso, and James Goodwin for their helpful review and comments. The author also thanks Angie Washington, Laura Bonomini, and everyone at the *Administrative Law Review* for their incredible work.

INTRODUCTION

Absent a specific statutory provision to the contrary, the Administrative Procedure Act and Supreme Court precedents permit federal agencies to articulate new policy through both rules and adjudicative orders. Yet over the past half-century, a once strong culture of policymaking by adjudication within agencies has given way in favor of informal rulemaking, such that former President Trump issued an executive order last year that appears to, in part, prohibit the practice.[1] At the same time, some in academia, such as Kristin Hickman and Aaron Nielson in *Narrowing* Chevron*'s Domain*, have sought to limit agencies' abilities to develop policy through adjudicative orders by arguing, for example, that courts should deny *Chevron* deference even to policies announced in formal adjudications.[2]

To avoid confusion over what is meant by "adjudicatory policymaking," it is necessary to contrast it with rulemaking. Rulemakings are prospective acts in which agencies articulate new policies to be followed, while adjudications are retrospective acts in which agencies apply policies to

1. Exec. Order No. 13,924, 85 Fed. Reg. 31,353, 31,355 (May 22, 2020) ("The heads of all agencies shall consider the principles of fairness in administrative enforcement and adjudication listed below . . . . Liability should be imposed only for violations of statutes or duly issued regulations, after notice and an opportunity to respond.").

2. Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron's *Domain*, 70 DUKE L.J. 931, 940 (2021).

actions that have already occurred. Although adjudications are not frequently thought of as policymaking activities, and today are not as commonly used to make policy as rulemakings, they certainly can be.

In the process of applying the law to a given set of circumstances, any judicial or quasi-judicial body may engage in two overlapping activities: interpretation and policymaking. Interpretation requires "figuring out just what the rules mean," while policymaking "is the process of devising and promulgating the rules."[3] Because interpretation "must involve some extra-textual clues . . . as to the 'better' of two or more possible readings," selecting one of several interpretations of a statute that are all "within the range of meanings that the statutory language can support" is policymaking.[4] No law can expressly describe the author's intent in every scenario in which the law will apply, so "[a] certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action."[5]

With this understanding of policymaking in mind, agency policies articulated through adjudication can be as minor as determining whether a singular action is permissible within a statutory framework, or can be as major as developing a whole regulatory framework. An agency tasked with enforcing a "no vehicles in the park" rule could, through adjudication, determine whether a particular object is a vehicle, but it could also articulate a multi-factor test explaining how it will adjudicate this prohibition going forward—much as it could through a notice-and-comment regulation.[6]

---

3. Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 ADMIN. L.J. AM. U. 187, 190 (1992).

4. *Id.* at 190–91; Richard J. Pierce, Jr., *How Agencies Should Give Meaning to the Statutes They Administer: A Response to Mashaw and Strauss*, 59 ADMIN. L. REV. 197, 200 (2007).

5. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475 (2001) (plurality opinion) (quoting Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting)); *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (noting both that "[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule" and that "[i]t is emphatically the province and duty of the judicial department to say what the law is"); Harper v. Virginia Dep't of Tax'n, 509 U.S. 86, 115 (1993) (O'Connor, J., dissenting) (quoting James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 550 (1991)) ("When the Court changes its mind, the law changes with it.").

6. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958). The fact that agencies may articulate policy through either method clearly raises the question of *when* an agency should choose adjudication over rulemaking or vice versa. The scholarship largely concludes that it is a fact-specific decision on the part of agencies, given the plusses and minuses of both methods. *See, e.g.*, Robert L. Glicksman & David L. Markell, *Unraveling the Administrative State: Mechanism Choice, Key Actors, and Regulatory Tools*, 36 VA. ENV'T. L.J. 318, 321–22 (2018). Frequently, these articles fail to consider the speed of adjudication compared to the ossified rulemaking process.

From the beginning of the administrative state in the late 19th and early 20th centuries, "the vast majority of agencies acted primarily through adjudication" rather than rulemaking.[7] This preference began to change in the 1960s, following perceived failings of adjudication to provide the speed, efficacy, and fairness desired of policymaking.[8] Congress required newly created agencies to use rulemakings and gave new rulemaking authorities to older ones. The Supreme Court encouraged agencies to engage in rulemakings by making that process easier and the adjudication process more difficult.

Once agencies began using rulemakings consistently, however, the courts, the White House, and Congress subjected informal rulemaking to a significant transformation, resulting in increased procedural requirements that slowed rulemaking to a crawl.[9] Judicial opinions opened the door to private entities flooding the rulemaking record with biased information while requiring agencies to, in practice, respond in rule preambles to every issue that could possibly be raised in court without first knowing *which* issues would be raised.[10] They also allowed courts to overturn regulations if judges determined that promulgating agencies had "not genuinely engaged in reasoned decision-making" to the judges' satisfaction.[11] Similarly, presidents began requiring agencies to conduct stringent cost–benefit analyses and receive White House approval before finalizing rules, adding months or years of delay to the rulemaking process, and Congress imposed additional analytical requirements on rulemakings above and beyond what the Administrative Procedure Act requires.[12] These changes led to many rulemaking *Federal Register* notices becoming "book-length treatises" that are liable to be overturned for failure to properly explain every decision the agency made.[13]

Informal rulemaking has become so onerous and ossified in the 21st century that agencies must again give adjudication its due consideration as a policymaking option. Though it will not be appropriate in every circumstance, developing

---

7. Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1145 (2001).

8. *See* discussion *infra* Part II. B.

9. *See* discussion *infra* Part III. B.

10. *See* Richard J. Pierce, Jr., *Which Institution Should Determine Whether an Agency's Explanation of A Tax Decision Is Adequate?: A Response to Steve Johnson*, 64 DUKE L.J. ONLINE 1, 10 (2014) ("Every circuit has followed the lead of the D.C. Circuit in holding that an agency rule is arbitrary and capricious unless the agency responds adequately to all well-supported comments that are critical of the rule proposed by the agency, and the Supreme Court's 1983 opinion in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.* has been widely interpreted to approve of the D.C. Circuit approach.") (internal citation omitted).

11. Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970).

12. *See* discussion *infra* Sections III.B.2., B.3.

13. Jerry L. Mashaw, *Administration and "The Democracy": Administrative Law from Jackson to Lincoln, 1829–1861*, 117 YALE L.J. 1568, 1656 (2008).

policy through case-by-case adjudications—akin to courts' development of the common law—can offer significant benefits over informal rulemaking, both to agency policymakers and the public. For example, adjudication can improve policies by requiring agencies to confront the specifics of real cases rather than largely hypothetical situations, and by permitting policymakers to observe regulated actions and retroactively clarify the law in response. Adjudication also allows agencies to develop policy quickly and on a case-by-case basis, allowing officials to observe the effects of one incremental policy change before implementing another, or to quickly reverse course if the effects are not as expected. Finally, addressing policy in individual adjudications may allow for increased public participation by marginalized groups traditionally excluded from the rulemaking process. Adjudicatory policymaking will never be as robust as it once was, but it can be superior to rulemaking in many instances.

Lastly, agency policies articulated through adjudication warrant *Chevron* deference by the courts, allowing them to have the force of law. Deference is granted because Congress delegated policymaking authority to expert agencies over generalist judges, and it is offered only in instances where agencies not only articulate their rationales, but also permit non-agency parties an opportunity to provide information agencies may not have considered.[14] Adjudication can offer just as much rational reason-giving and accountability as informal rulemaking, and may utilize practices that broadly permit public participation, such as allowing third-party intervention, amicus briefing, publishing notices to inform the public of newly articulated policies, and more. Adjudication as a policymaking method is worthy of *Chevron* deference.

This Article proceeds as follows: Part I offers a brief overview of the current law on policymaking by adjudication, with discussions of how the law grants agencies discretion in selecting a method for policymaking and offers protections for litigants in cases where agencies may articulate new policies. Part II details the rise and fall of policymaking by adjudication through history. Part III articulates the benefits of making policy by adjudication in discussing how rulemaking is often much slower than adjudication, how rulemaking has a more onerous process, and how adjudication has other qualities that can make it a more prudent policymaking method than rulemaking. Finally, Part IV reviews the rationales behind the *Chevron* framework and discusses how agencies can ensure adjudicatory policymaking is as robust and maintains as much public legitimacy as informal rulemaking.

Agencies should consider how to incorporate adjudication into their policymaking activities and use it as a tool just as powerful as rulemaking, and courts should not exclude adjudicatory policymaking from receiving *Chevron* deference based solely on its form.

---

14. *See* discussion *infra* Part IV.

I. THE LEGAL AUTHORITY TO MAKE POLICY BY ADJUDICATION

This Part discusses the law governing policymaking by adjudication, including court decisions that allow discretion in policymaking methods and protections for litigants in cases in which agencies create new policies.

A. Discretion in Policymaking Methods

In 1946, Congress enacted the Administrative Procedure Act (APA) to codify government-wide procedures for finalizing agency activities for the first time,[15] and the next year, the Supreme Court spoke for the first time about the APA's effects on agencies' uses of adjudication to create policy. In the seminal case *SEC v. Chenery Corp.* (*Chenery II*),[16] the Court not only found that agencies' uses of adjudication to enact policy is permissible under the APA, but it also provided significant justification for them to do so.[17] At issue was an order by the Securities and Exchange Commission (SEC) declaring illegal the terms of a company's proposed reorganization. The plaintiffs claimed that the SEC "could not determine by an order . . . that [the proposal] was inconsistent with the statutory standards" and that "the Commission would be free only to promulgate a general rule outlawing such [terms] . . . but such a rule would have to be prospective in nature and have no retroactive effect."[18] In its opinion, the Supreme Court ruled in favor of the SEC, holding that the agency could approve or disapprove a reorganization plan "in the form of an order, entered after a due consideration of the particular facts in light of the relevant and proper standards."[19] Even more, it would have been "unjustified" for the SEC to approve a plan it believed to be

15. Administrative Procedure Act, 5 U.S.C. §§ 551–559, 561–570a, 701–706 (2012); *see also* U.S. DEP'T OF JUST., ATT'Y GEN.'S MANUAL ON THE ADMIN. PRO. ACT 5 (1947).

16. 332 U.S. 194 (1947) [hereinafter *Chenery II*].

17. *See id.* at 202–03 (providing that it is well established that an executive agency has the authority to adjudicate to establish policy). Prior to hearing this case, the Supreme Court had previously determined that the Securities and Exchange Commission (SEC) erred by not sufficiently explaining its rationale and remanded the case back to the agency. *See, e.g.*, SEC v. Chenery Corp., 318 U.S. 80, 95 (1943) [hereinafter *Chenery I*] (remanding the case to the SEC because the SEC did not include enough information in the record). In *Chenery II*, the SEC had declared the terms proposed by a company undergoing reorganization for issuing common stock were "detrimental to the public interest or the interest of investors" under the Public Utility Holding Company Act of 1935, concluding that "the proposed transaction is inconsistent with the standards of §§ 7 and 11 of the Act." *Chenery II*, 332 U.S. at 199, 208 (internal citation and quotation marks omitted).

18. *Chenery II*, 332 U.S. at 199, 200.

19. *Id.* at 201.

"inconsistent" with the statute "merely because there was no general rule or regulation covering the matter."[20]

Although the Court noted that the SEC, "unlike a court, does have the ability to make new law prospectively through the exercise of its rule-making powers," it recognized that "any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise."[21] As the Court's majority recognized, "[n]ot every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule," noting that "[s]ome principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations."[22]

The Court also addressed concerns that articulating new policies through adjudicatory orders could result in the policies having retroactive effect, noting "[t]hat such action . . . hav[ing] a retroactive effect [is] not necessarily fatal to its validity. Every case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency."[23] As explained previously, every new interpretation of a statute or regulation shapes the public's understanding of that law's effect, and although a law may not have been written with such specificity as to dictate the exact result in a specific case, those adjudicating a law must apply it. And although the Supreme Court noted that there may be cause for concern when retroactively applying a new policy, "such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles."[24]

The Court concluded, "[t]here is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."[25]

In the decades since *Chenery II*, the Supreme Court has continuously upheld the principle that agencies, unless prohibited by statute, may select

---

20. *Id.*

21. *Id.* at 202.

22. *Id.* at 202–03 ("[P]roblems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective.").

23. *Id.* at 203.

24. *Id.*

25. *Id.*

the method by which they articulate policy. In *Butz v. Glover Livestock Commission*,[26] for example, the Court held it a "fundamental principle . . . that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy the relation of remedy to policy is peculiarly a matter for administrative competence," which may only be overturned if a court finds it to be "unwarranted in law or . . . without justification in fact."[27] In another example, *NLRB v. Bell Aerospace Co.*,[28] the Court held that "adjudication is especially appropriate" when "[i]t is doubtful whether any generalized standard could be framed which would have more than marginal utility," and the agency has reason to "develop[] its standards in a case-by-case manner."[29]

Similarly, in instances that appear to require adjudication, the Supreme Court has recognized an agency's discretion to issue regulations to "resolve certain classes of issues" in its adjudications "that do not require case-by-case consideration."[30] In *American Hospital Association v. NLRB*,[31] although the statute required the National Labor Relations Board (NLRB) to determine the scope of the bargaining unit "in each case," the Court upheld a regulation determining that scope for all cases, holding that "even if a statutory scheme requires individualized determinations, the decisionmaker has the authority to rely on rulemaking [in advance of a case] to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority."[32] In the words of the Court, requiring agencies to "relitigate [particular issues] at each hearing would hinder needlessly an already overburdened agency."[33]

Through this series of cases, the Supreme Court has granted agencies wide latitude to engage in adjudicatory policymaking, and this case law is still good law to this day. Although there are some limitations on the applicability of policies articulated by order, this form of policymaking still provides extensive flexibility to agencies.

B. Protections for Litigants

Although agencies may generally articulate new policies by adjudication, courts have enacted guardrails to guarantee private parties

26. 411 U.S. 182 (1973).

27. *Id.* at 185–86 (citing Am. Power Co. v. SEC, 329 U.S. 90, 112 (1946)) (internal quotation marks omitted).

28. 416 U.S. 267 (1974).

29. *Id.* at 294.

30. Heckler v. Campbell, 461 U.S. 458, 467 (1983).

31. 499 U.S. 606 (1991).

32. *Id.* at 612.

33. *Heckler*, 461 U.S. at 468.

in agency adjudications the same rule-of-law protections as are provided in Article III cases, ensuring that agencies do not violate due process rights while engaging in policymaking.[34]

First, agencies cannot create policy by adjudication without there being some existing law to which agencies tether an interpretation, providing the fair notice of the policy as required by the Fifth Amendment's Due Process Clause. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required,"[35] and it "is a cardinal rule of administrative law" that "a party cannot be found to have violated a regulatory provision absent 'fair warning' that the allegedly violative conduct was prohibited."[36] The Supreme Court has noted that "[t]he degree of vagueness that the Constitution [allows] depends in part on the nature of the enactment," with "greater tolerance of enactments with civil rather than criminal penalties."[37]

In *FCC v. Fox Television Stations*,[38] the Court provided something of a test for determining whether fair notice was adequately granted by an agency: a policy's notice must be sufficient such that "regulated parties should know what is required of them so they may act accordingly" and that the policy is declared with such "precision" that courts can ensure "that those enforcing the law do not

34. These guardrails are in addition to those that are also applicable to rulemakings, such as reasoned decisionmaking, that stem from the Administrative Procedure Act (APA). *See, e.g.*, Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 374 (1998); FCC v. Fox Television Stations, 556 U.S. 502, 515–16 (2009).

35. FCC v. Fox Television Stations, 567 U.S. 239, 253 (2012) (internal citation omitted).

36. Rollins Env't Servs. Inc. v. EPA, 937 F.2d 649, 655 (D.C. Cir. 1991) (Edwards, J., concurring in part) (internal citation omitted). It is likely that this requirement forced the National Labor Relations Board's (NLRB's) error in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 (1969). In a prior adjudication, the NLRB had declared that companies must file with the Board a list of employees eligible to vote in future union election cases, but that this requirement would apply "only in those elections that are directed, or consented to, subsequent to 30 days from the date of" that decision. *Id.* at 766 (citing Excelsior Underwear, Inc., 156 N.L.R.B. 1236, 1240 n. 5 (1966)). Before a union election at the company, the NLRB requested that the Wyman-Gordon Co. file with it an Excelsior List. *Id.* at 761. Wyman-Gordon refused, and the NLRB sued to have a court order Wyman-Gordon to provide the list. *Id.* at 761–62. In deciding *Wyman-Gordon*, the Supreme Court held that by articulating a new and prospective directive in *Excelsior* without also applying it to the Excelsior Underwear company, the NLRB had unlawfully enacted a regulation without undertaking the proper rulemaking procedures required by the APA. *Id.* at 764–65. Perhaps the agency did not apply the new *Excelsior* rule to Excelsior Underwear because it believed doing so would violate the prohibition against unfair surprise. Instead, the NLRB applied its new policy only to future elections, resulting in an improperly promulgated rule under the APA.

37. Hoffman Ests. v. Flipside, Hoffman Ests., Inc., 455 U.S. 489, 498–99 (1982).

38. 567 U.S. 239 (2012).

act in an arbitrary or discriminatory way."[39] It also noted that agencies must "provide a person of ordinary intelligence fair notice of what is prohibited."[40]

Lower courts have also looked to whether a regulation gives "the person of ordinary intelligence a reasonable opportunity to know what is prohibited,"[41] or whether the policy would have been "reasonably comprehensible to people of good faith."[42] For instance, in one case, although the D.C. Circuit held that the agency's interpretation of an ambiguous statute was permissible, "the interpretation [was] so far from a reasonable person's understanding of the regulations that they could not have [been] fairly informed . . . of the agency's perspective."[43] Similarly, courts have rejected adjudications in benefits determination contexts "when agencies acted absent any ascertainable limit on eligibility," requiring agencies to articulate limits through rulemakings first.[44]

Courts have also long stated that although agencies can apply interpretations of the law to past actions in adjudications, they cannot penalize persons "for past actions which were taken in good-faith reliance on [agency] pronouncements."[45] Although the Supreme Court noted in *Chenery II* that "[e]very case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency,"[46] courts have noted that "the problem of retroactive application has a somewhat different aspect in cases not of first but of second impression, where an agency alters an established rule defining permissible conduct which has been generally recognized and relied on throughout the industry that it regulates."[47] As such, agencies may not "substitut[e] . . . new law for old law that was reasonably clear" in the course of an adjudication.[48]

---

39. *Id.* at 253 (citing Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972)).

40. *Id.* at 254 (citing United States v. Williams, 553 U.S. 285, 304 (2008)).

41. United States v. Ancient Coin Collectors Guild, 899 F.3d 295, 321 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 1191, 1191 (2019) (citing United States v. Approximately 64,695 Pounds of Shark Fins, 520 F.3d 976, 980 (9th Cir. 2008)) (internal quotation marks omitted).

42. Gen. Elec. Co. v. EPA, 53 F.3d 1324, 1330–31 (D.C. Cir. 1995) (quoting McElroy Elecs. Corps. v. FCC, 990 F.2d 1351, 1358 (D.C. Cir. 1993)).

43. *Id.* at 1330; *accord* Gates & Fox Co. v. Occupational Safety & Health Rev. Comm'n, 790 F.2d 154, 156–57 (D.C. Cir. 1986); Satellite Broad. Co. v. FCC, 824 F.2d 1, 3 (D.C. Cir. 1987).

44. Hobbs *ex rel.* Hobbs v. Zenderman, 579 F.3d 1171, 1185 (10th Cir. 2009) (citing Morton v. Ruiz, 415 U.S. 199 (1974)); Carey v. Quern, 588 F.2d 230, 232 (7th Cir. 1978); White v. Roughton, 530 F.2d 750, 753 n. 8, 754 (7th Cir. 1976) (per curiam); Baker-Chaput v. Cammett, 406 F. Supp. 1134, 1139–40 (D.N.H. 1976)).

45. NLRB v. Bell Aerospace Co., 416 U.S. 267, 295 (1974).

46. *Chenery II*, 332 U.S. 194, 203 (1947).

47. NLRB v. Majestic Weaving Co., 355 F.2d 854, 860 (2d Cir. 1966).

48. Verizon Tel. Cos. v. FCC, 269 F.3d 1098, 1109 (D.C. Cir. 2001) (internal citation

In that vein, agencies cannot penalize litigants for engaging in behaviors that were permissible under a prior settled course of action, even if that course was not a fully articulated policy. The Supreme Court, in *Immigration and Naturalization Service v. Yang*,[49] wrote that an agency's "irrational" departure from "a general policy by which its exercise of discretion will be governed" could be arbitrary and capricious, and that the general policy could be articulated as "by rule or by settled course of adjudication."[50] Although that settled course must be "clearly defined so the [agency's] discretion can be meaningfully reviewed"[51] and "one favorable exercise of discretion does not a settled course make,"[52] courts have found such a course when litigants can show a line of adjudications applying the same policy with a sudden deviation.[53]

Finally, agencies must take into consideration the "adjudicative facts" of the case before them, rather than solely focus on "legislative facts"; that is, agencies may not create policy through adjudications without regard to the facts of litigants' cases.[54] Several circuits have articulated a standard that policies developed through adjudications must be based upon "adjudicative facts specifically relevant to the circumstances of the" litigant, and have

---

and quotation marks omitted). Still, courts note the difference between "reasonably clear" law and "new applications of existing law, clarifications, and additions," the latter of which "carry a presumption of retroactivity that [courts] depart from only when to do otherwise would lead to manifest injustice." Am. Tel. & Tel. Co. v. FCC, 454 F.3d 329, 332 (D.C. Cir. 2006) (quoting *Verizon Tel. Cos.*, 269 F.3d at 1109) (internal quotation omitted); *see also* Epilepsy Found. v. NLRB, 268 F.3d 1095, 1102–03 (D.C. Cir. 2001); Yanez-Popp v. Immigration & Naturalization Serv., 998 F.2d 231, 235–36 (4th Cir. 1993); Pfaff v. U.S. Dep't of Hous. & Urb. Dev., 88 F.3d 739, 747–48 (9th Cir. 1996).

49. 519 U.S. 26 (1996).

50. *Id.* at 32.

51. Menendez-Gonzalez v. Barr, 929 F.3d 1113, 1118 (9th Cir. 2019) (quoting Park v. Att'y Gen. of the U.S., 846 F.3d 645, 653 (3d Cir. 2017)) (internal quotations omitted).

52. Thompson v. Barr, 959 F.3d 476, 487 (1st Cir. 2020) (quoting *Park*, 846 F.3d at 654) (internal quotation marks omitted).

53. *See, e.g.*, *id.* at 489–90 (reviewing a series of cases to find "that the [Board of Immigration Appeals] departed from its settled course of accepting full and unconditional pardons granted by a state's supreme pardoning authority when the pardon is executive, rather than legislative, in nature."); Davila-Bardales v. Immigr. & Naturalization Serv., 27 F.3d 1, 4 (1st Cir. 1994) (reviewing a series of unpublished decisions to find that Board of Immigration Appeals (BIA) "has expressed considerable skepticism about the admissibility of . . . statements made to Border Patrol officers by persons who are both unrepresented and under the age of sixteen.").

54. *See* Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402 (1942) ("When an agency finds facts concerning immediate parties . . . the agency is performing an adjudicative function, and the facts may conveniently be called adjudicative facts. When an agency wrestles with a question of law or policy, it is acting legislatively . . . and the facts which inform its legislative judgment may conveniently be denominated legislative facts.").

stated that a "choice to use adjudication to construct rules of general applicability can amount to an abuse of discretion."[55] In *First Bancorporation v. Board of Governor of the Federal Reserve System*,[56] for example, the Tenth Circuit overturned a Federal Reserve Board order on the grounds that it was "a rule of general applicability . . . and is not, as the Board claims, merely an adjudication of the activity's merits."[57] The agency had "examined no specific facts as to the potential adverse effects of" the behavior it was adjudicating, did not demonstrate that the new policy "ha[d] any particularized relevance to" First Bancorporation, and "made no conclusions at all with respect to" the facts underlying the adjudication.[58]

In sum, although agencies may use adjudications to develop new policy, courts have instituted significant safeguards to ensure that those subject to agency adjudications will have their cases treated fairly.

II. THE RISE AND FALL OF POLICYMAKING BY ADJUDICATION

Until the late 1960s and '70s, adjudication was the primary and default method by which agencies articulated new policies. This Part discusses how agencies used adjudication to articulate policy prior to the 1960s, the rise of informal rulemaking, and why many academics believe that informal rulemaking is the best method for articulating policy—and why it deserves *Chevron* deference.

A. How Agencies Used—And Courts Reviewed—Adjudications Prior to the 1960s

Scholars point to the courts' slow development of judicial review of agency actions as a reason for federal agencies' primary use of adjudication to engage in policy development. It was only in the 1950s and '60s that administrative law scholars started criticizing agency processes by "elevat[ing] the importance of relying upon process as a surrogate for fairness," making it more difficult for agencies to succeed in policymaking through their adjudicatory actions.[59]

---

55. Aqua Prod., Inc. v. Matal, 872 F.3d 1290, 1339 (Fed. Cir. 2017) (Reyna, J., concurring) (internal citations omitted).

56. 728 F.2d 434 (10th Cir. 1984).

57. *Id.* at 437.

58. *Id.* at 438; *see also* Ford Motor Co. v. FTC, 673 F.2d 1008, 1010 (9th Cir. 1981); Curry v. Block, 738 F.2d 1556, 1563–64 (11th Cir. 1984). However, one scholar noted that these cases "are outliers that are difficult to square with Supreme Court instructions." M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1408 (2004).

59. Sam Kalen, *The Death of Administrative Common Law or the Rise of the Administrative Procedure Act*, 68 RUTGERS U. L. REV. 605, 628, 642 (2016).

Prior to the rise of the administrative state—generally dated to the creation of the Interstate Commerce Commission (ICC) in 1887[60]—federal officers' "policymaking" activities can barely be described as making policy. The areas where officials could use deference in undertaking activities were largely related to how a department would undertake its own internal affairs, rather than regulating the public. Cases about this discretion involved issues such as the sale of land[61] and contracting for goods and services.[62]

According to Professor Sam Kalen, in such cases "the judiciary interceded in executive actions only in rare instances when the official acted in a ministerial fashion."[63] Starting with *Marbury v. Madison* in 1803 and continuing through a line of cases through at least the 1890s, courts held that the discretionary acts of an executive branch officer "can never . . . be examinable in a court of justice. [However], where an officer is required by law to perform an act, not of this political or executive character, which affects the private rights of individuals, he is to that extent amenable to the courts."[64] Courts would not adjudicate the activities of the executive branch when acting in a discretionary manner, a category under which policymaking falls.

In 1890, for example, the Supreme Court explained that only in instances where "the language of the statute . . . was clear and precise, and its meaning evident, [and] there was no room for construction," could a case be adjudicated by the courts.[65] In 1891, the Court held that courts could not interfere with executive actions if "its effect is to direct or control the head of an executive department in the discharge of an executive duty involving the exercise of judgment or discretion."[66]

As late as 1912, the Supreme Court was declaring that courts would stay out of cases where agencies had discretion. In *U.S. ex rel. Ness v. Fisher*,[67] the Court was faced with the question of whether the Secretary of the Interior acted in compliance with a particular statute.[68] Noting that the statute was

---

60. LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 9 (abr. student ed. 1965).

61. *See* Gaines v. Thompson, 74 U.S. (7 Wall.) 347, 352–54 (1868) (referencing that officers in whom power has been vested have deference to use judgment and discretion to make decisions within the law).

62. *See* United States *ex rel.* Redfield v. Windom, 137 U.S. 636, 643–47 (1891) (holding that the courts will not interfere by writ of mandamus in the exercise of an executive officer's official duties and thus giving deference to the agents of the Secretary of the Treasury to contract for goods and services).

63. Kalen, *supra* note 59, at 616.

64. *Gaines*, 74 U.S. (7 Wall.) at 349.

65. United States v. Lynch, 137 U.S. 280, 285 (1890).

66. *Windom*, 137 U.S. at 644.

67. 223 U.S. 683 (1912).

68. *Id.* at 691–92.

ambiguous, as demonstrated by lower courts interpreting the statute in different manners,[69] the Court decided the query for it to answer was "not whether the [discretionary] decision of the Secretary was right or wrong," (i.e., not to determine the correct interpretation of an ambiguous statute), but whether a court could even compel the Secretary "to give effect to [an interpretation] not his own and not having his approval."[70] The Court concluded that this "question is not new, but has been often considered by this court and uniformly answered in the negative."[71]

The Supreme Court recognized that courts' differing interpretations of the same statute, "instead of indicating that the Secretary's decision was arbitrary or capricious [by failing to adopt the interpretation of a particular reviewing court], illustrates that there was room for difference of opinion as to the true construction of the section, and [which] necessarily involved the exercise of judgment and discretion."[72] Kalen notes that "[t]he Court's primary function, therefore, was examining whether the statutory language delegated discretion to the executive department."[73] For example, he identified a set of cases later on in the 19th century where "the Court viewed its role as exploring *jurisdictional facts* to determine whether, in fact, the agency was operating legitimately inside discretionary space."[74] With this type of review by the courts, it should come as no surprise that the executive branch would be unlikely to engage in something like rulemaking. If courts grant executive officers (near) unreviewable discretion to act, articulating rules they would be required to follow would only constrain their activities and subject them to litigation risk.

Federal activities began changing significantly with the rise of progressivism and the administrative state, first with the ICC and continuing through to President Franklin Roosevelt's New Deal. The ICC was charged with regulating railroad rates and activities, a policymaking responsibility that quite clearly affects large swaths of private-sector activities, and the New Deal saw the ballooning of social programs to achieve economic and social goals.[75] During this period, "the vast majority of agencies acted primarily through adjudication,"

---

69. *Compare* United States v. Wood, 70 F. 485 (D. Or. 1895), *and* Hoover v. Salling, 102 F. 716 (C.C.W.D. Wis. 1900), *rev'd*, 110 F. 43 (7th Cir. 1901), *with* Hoover v. Salling, 110 F. 43 (7th Cir. 1901), *and* Robnett v. United States, 169 F. 778 (9th Cir. 1909).

70. *Ness*, 223 U.S. at 691–92.

71. *Id.* at 692.

72. *Id.* at 691.

73. Kalen, *supra* note 59, at 617.

74. *Id.* at 622 (citing Noble v. Union River Logging R.R. Co., 147 U.S. 165, 173–75 (1893)).

75. Larry Kramer, *What's a Constitution for Anyway? Of History and Theory, Bruce Ackerman and the New Deal*, 46 CASE W. RSRV. L. REV. 885, 924–25 (1996).

rather than rulemaking.[76] Schiller noted that opponents of this rise in regulatory power "essentially ignored" rulemakings and instead "focused their energies on making agency adjudications more like common law trials."[77] In fact, "one of the most vocal critics of New Deal-era administrative procedure," the American Bar Association's Special Committee on Administrative Law, was the one to propose "the minimalist requirements of section 553" of the APA, showing just how little practitioners and scholars of the day thought about rulemaking in the administrative state.[78] It appears that rulemaking was so rarely used that its potential abuses were not thoroughly contemplated.

Unlike the adjudications of the prior era, the adjudications conducted during this period required agencies to regulate the public rather than just their own internal operations. The SEC was required to determine whether particular activities were "detrimental to the public interest or the interest of investors or consumers,"[79] for example, and the Department of Labor, in adjudicating whether sellers were paying employees "'not less than the . . . prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality,'" was tasked with determining (1) the prevailing minimum wages; (2) the applicable category of work, industry, or group of industries from which to compare; and (3) the scope of the locality.[80] For decades, agencies used adjudications to retroactively interpret and apply statutes to private-sector activities, "view[ing] themselves as akin to special purpose courts," rather than legislative bodies.[81]

---

76. Schiller, *supra* note 7, at 1145. "[NLRB], the Federal Trade Commission [(FTC)], the Federal Power Commission, and the Social Security Administration, for example, only issued rules of practice, related to how adjudicatory cases were to be brought before the agency. Other agencies, such as the Federal Communications Commission [(FCC)], the [SEC], the Civil Aeronautics Administration, and the Interstate Commerce Commission [(ICC)], issued substantive rules, but devoted only a small percentage of agency resources to that activity. For example, a Roosevelt Administration study of the federal administrative apparatus devoted a mere twenty-five pages of a 350-page monograph on the SEC to the Commission's rulemaking activities." *Id.* at 1145–46 (internal citations and parentheticals omitted).

77. *Id.* at 1146–47 (internal citations omitted).

78. *Id.* at 1146.

79. *Chenery I*, 318 U.S. 80, 90 (1943) (internal quotations omitted).

80. Perkins v. Lukens Steel Co., 310 U.S. 113, 116–17 (1940) (internal quotation marks omitted).

81. Richard J. Pierce, Jr., *Rulemaking and the Administrative Procedure Act*, 32 TULSA L.J. 185, 187 (1996).

B. Rise of Informal Rulemaking

Following several decades where agencies acted largely by adjudication, scholars, the agencies, and Congress began giving rulemaking another look in the 1960s, largely due to perceived failings of the adjudication regime. It was during this time that several agencies "undertook the first substantive rulemakings in their history."[82] Similarly, Congress created new agencies that were required by statute to use rulemakings and gave new rulemaking authorities to older ones.[83]

Scholars of the time identified significant issues with policymaking by adjudication, and began promoting rulemaking to be the dominant form of policymaking for agencies. A review of the literature shows that contemporary scholarship on administrative procedure generally detailed improvements that could be made to adjudicatory processes or lauded the benefits of agency rulemaking—largely that adjudication provided agencies significantly more flexibility in the policymaking process to the detriment of those being regulated—and gave little thought to articulating the benefits of policymaking by order over rulemaking. This author could find no article articulating the benefits of adjudication over rulemaking prior to the 1980s. Scholars' arguments for agencies to use rulemakings fell largely into three categories.

Democracy and Rule of Law: First, they argued that rulemaking was better for rule of law purposes and democracy more generally. Judge Henry Friendly of the Second Circuit noted that there is "the basic human claim that the law should provide like treatment under like circumstances," and without set rules upon which the public could rely, agencies could treat similarly-situated individuals differently.[84] Professor David Shapiro noted that agencies were more easily able to deviate from prior policies if they were issued through adjudication than through rulemaking: "when agencies develop policy through adjudication they are generally as devoted to the

82. Schiller, *supra* note 7, at 1147.

83. *Id.* at 1148. The new agencies were the National Highway Traffic and Safety Administration (NHTSA), the Environmental Protection Agency, and the Consumer Product Safety Commission, and the older agencies were the Occupational Safety and Health Administration (OSHA) and the FTC. *Id.*

84. Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards* (pt. 1), 75 HARV. L. REV. 863, 878 (1962) [hereinafter Friendly pt. 1]. Friendly himself did not take these benefits as a reason to move from adjudication to rulemaking, only that standards should be better defined and more unchanging. Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards* (pt. 3), 75 HARV. L. REV. 1263, 1298 n.449 (1962) [hereinafter Friendly pt. 3] ("If an agency can include such a statement in an opinion without rulemaking procedure, why must there be this added formality when it is done separately?").

doctrine of stare decisis as are courts of last resort."[85] He also expressed concern that "an agency [may] depart from its existing rules of decision in a given case without adequate explanation, or even establish directly conflicting lines of authority."[86] Further, Professor Ray Jay Davis wrote that agency adjudications are "where emotions of deciding officers may affect what they do, where political or other favoritism may influence decisions, and where the imperfections of human nature are often reflected in the choices made," whereas "rules make for even handedness."[87]

Additionally, it was noted that a "clear statement of the standards . . . [is] consistent with the democratic process."[88] Not only do the APA's rulemaking provisions require agencies to allow the public to comment on rules as they are being developed, but the public must be able to understand agencies' activities if they are to hold the government accountable. However, adjudication had led to a "failure to develop standards sufficiently definite [to permit decisions to] be fairly predictable and [for] the reasons for [the

---

85. David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 947 (1965) (citing Ray Jay Davis, *The Doctrine of Precedent as Applied to Administrative Decisions*, 59 W. VA. L. REV. 111, 141 (1957)). Although Shapiro's comments demonstrate the risk that agency adjudications will facilitate arbitrary and capricious behavior and show the need for courts to thoroughly police such behavior, it does not appear that this supposed benefit of adjudication was all that useful to agencies. One literature review studying reports of agencies' application of stare decisis noted that "they actually follow precedents as do the courts." Ray Jay Davis, *The Doctrine of Precedent as Applied to Administrative Decisions*, 59 W. VA. L. REV. 111, 124 (1957). Furthermore, courts did ensure agencies acted appropriately. Shapiro identified two cases in particular where courts refused to allow agencies to change policy with "an unexplained departure, perhaps inadvertent or for purposes of a single case . . . ." Shapiro, *supra* at 950 (noting NLRB v. Don Juan, Inc., 178 F.2d 625 (2d Cir. 1949) and Mary Carter Paint Co. v. FTC, 333 F.2d 654 (5th Cir. 1964), *rev'd*, 382 U.S. 46 (1965)). In one of the cases, a concurring judge wrote that "[t]here may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case." Mary Carter Paint Co., 333 F.2d at 660 (Brown, J., concurring specially).

86. Shapiro, *supra* note 85, at 947. Similarly, Judge Friendly gave lectures in the years before Shapiro's paper where he noted a FCC policy change was "slipped into an opinion in such a way that only careful readers would even know what had happened, without articulation of reasons, and with the prior authorities not overruled," so that the agency in the future could rely on either the new rule or old in defending its actions. Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards* (pt. 2), 75 HARV. L. REV. 1055, 1064 (1962).

87. KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY v (1969) (finding that rulemakings are necessary "because rules make for even handedness, because creation of rules is relatively unemotional, and because decisionmakers seldom err in the direction of excessive rigidity when individualization is needed.").

88. Friendly pt. 1, *supra* note 84, at 880.

decisions to] be understood."[89] Furthermore, researchers noted that "[i]ndefinite or conflicting standards of decision are easily maintained so long as situations are dealt with separately," which, of course, adjudication does.[90]

Benefits to Regulated Parties: In the same vein, rulemaking proponents argued that regulated parties benefitted from policymaking through regulation. Knowing agency policies in advance, for example, would "encourag[e] the security of transactions."[91] Judge Friendly noted that having "definiteness" and a "degree of stability" in the law would allow private actors to make economic decisions and plan for the future.[92] Similarly, Warren Baker, writing while working as the Federal Communication Commission's (FCC's) General Counsel, wrote that "[t]o the extent that the agency knows the policy it desires to follow, to that same extent it should inform those coming within its regulation of that policy."[93] Additionally, given rulemaking's solely prospective nature, scholars noted that "it is obviously desirable to avoid, if possible, the harsh effect of retroactive application of agency policy inherent in the case-by-case method."[94] Much as knowing agency policies in advance encourages economic activity, so does knowing that policies will not change after actions have been completed; retroactivity is almost like having no standards at all.

Another benefit of rulemaking to regulated parties that scholars identified was that courts would strike down agency policies more frequently. Professor Shapiro wrote that an "agency that declares and applies a rule in the course of an adjudication often has two strings to its bow on judicial review."[95] When articulating a new policy by adjudication, the thinking went, the agency has the opportunity to articulate a rule *and* apply the rule to the case at hand, and in such cases, a court "may agree with the rule as stated and affirm on that ground," but it could also decide "that the result in the particular case is sound" even if the new policy is not, based on other theories of law applied to the case.[96] In such instances, "the rule survives to fight another day though it might not have survived a more direct attack if issued

89. *Id.* at 867.

90. H.R. REP. NO. 78-678, at 82 (1944).

91. Friendly pt. 1, *supra* note 84, at 878–79.

92. *Id*. at 879.

93. Warren E. Baker, *Policy by Rule or Ad Hoc Approach—Which Should It Be?*, 22 L. & CONTEMP. PROBS. 658, 662 (1957).

94. *Id.* Baker also made the comment that "it certainly goes against elemental notions of fair play when it is considered that the agency, unlike the courts, is not restricted to this one method of dealing with those regulated." *Id.* Baker posits that this retroactivity is more permissible when used by courts than when used by agencies, because agencies have tools courts do not. *Id.*

95. Shapiro, *supra* note 8585, at 944.

96. *Id.* at 944–45.

in the form of a regulation itself subject to judicial review."[97] Without agencies having both a rule and the facts of an adjudication on which to base their cases, regulated entities would be likely to succeed in litigation.

Benefits to Agencies: Still, scholars generally argued that rulemaking provides significant benefits to agency decisionmakers and the decisionmaking process when compared with adjudication. Judge Friendly argued that a "crystallization of standards is . . . necessary to the maintenance of the independence of . . . agencies themselves," as rulemaking allows agencies to "fram[e]" policies and ensure officials are informed as to the consequences of their actions, whereas case-by-case policy development prevents studious examination of the issues and subjects agency officials to potential industry capture that agency officials could otherwise avoid.[98] Furthermore, rulemaking advocates argued that adjudication, "involving a lengthy hearing, examining initial decision, exceptions, oral argument, etc., is more time-consuming than the usual rule-making proceeding of comments filed in response to a notice of proposed rule-making."[99] And Professor Kenneth Culp Davis made the argument, later adopted by the Supreme Court in *American Hospital Association*, that agencies could use regulations to "supplant[] the original discretionary chaos [in adjudications] with some degree of order" by deciding some issues ex ante.[100]

Additionally, scholars noted that promulgating policy by adjudicatory order "seemed glacially slow," whereas informal rulemaking appeared as though it would be significantly faster—and for a time it was.[101] At the time, informal rulemaking was a simple activity with rather lax procedural requirements: agencies could put out four-page notices of proposed rulemakings, four-page final rules several months later, and be done with it.[102] On the contrary, formal adjudication, which agencies frequently used by necessity or by choice, mandated significant procedural requirements—such as requiring agencies to gather evidence, engage in trials with

97. *Id.* at 945.

98. Friendly pt. 1, *supra* note 84, at 880–82. In particular, a "[l]ack of definite standards creates a void into which attempts to influence are bound to rush." *Id.* at 881. Supporters of strong agency action feared captured agencies and encouraged "legislative action to reduce discretion." Aaron L. Nielson, *Visualizing Change in Administrative Law*, 49 GA. L. REV. 757, 777 (2015).

99. Baker, *supra* note 9393, at 664 (internal citation omitted) ("Further, the *ad hoc* method is likely to involve litigation in a multiplicity of cases, whereas the rule-making, except for the occasional hearing required on a waiver request or difficult factual situation, often settles the matter without any need for future litigation.").

100. Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 612 (1991) (quoting KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 6.04 (3d ed. 1972)).

101. Schiller, *supra* note 7, at 1140.

102. *See infra* Part II.B.

cross-examination, and develop full rulings on the merits of individual cases—that made policymaking time–consuming. Furthermore, policymakers found that developing the full body of standards interpreting or applying a statute "could take years," as agencies had to wait for cases with particular facts to arise before articulating a new policy.[103] Before the development of case law around informal rulemaking in the late 1960s and '70s, informal rulemaking seemed like a dream compared to the adjudications that were taking place.

In response to many of these arguments by scholars and advocates, the judiciary soon began curbing agencies' more radical uses of adjudicatory policymaking that judges found too odious to the rule of law. Courts used the Constitution "as a backstop to protect against overly aggressive" agency activities, bringing due process concerns to bear.[104] Frequently, the Supreme Court would ask "whether there was such a want of hearing or such arbitrary or capricious action . . . as to violate the due process clause."[105] Further, courts began taking a highly expansive definition of "jurisdictional facts" so that "distinguishing between legal and factual judgments became highly subjective" and thus courts could have more flexibility in overturning agency actions, particularly if the judges were more amenable to the agency's mission.[106] Over time, a distinction between fact and law developed. Determining the rule of a given statute was granted to the courts and deciding the facts of any given case was granted to agencies; any ambiguities in the law (e.g., whether a worker is an employee for purposes of a statute) was "for the court of ultimate authority," guided by "appropriate manifestations of legislative intention," to determine whether the question was one of law or fact.[107] In other words, it was for the courts to decide how much ambiguity there was in a statute and how much authority to grant to the agency.

In addition to perceived benefits of regulation and restrictions to policymaking by order from the courts, agencies turned to rulemaking as "a

---

103. Schiller, *supra* note 7, at 1140 ("Indeed, the facts of any particular case might not even provide the agency with the information it needed to create the best standard.").

104. Kalen, *supra* note 59, at 628.

105. N.Y. & Queens Gas Co. v. McCall, 245 U.S. 345, 348–49 (1917); *see also* St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 51 (1936) ("But the Constitution fixes limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation.").

106. Kalen, *supra* note 59, at 622, 629. A law review article from 1944 notes that "the orders of the ICC, for example, were treated deferentially, while those of the FTC were more roughly handled." Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 70 (1944).

107. Stern, *supra* note 106106, at 98.

response to ever increasing caseloads."[108] Congress enacted statutes that created new regulatory systems, which brought many more private-sector activities under the purview of agencies than previously. For example, whereas the Food and Drug Administration (FDA) was originally only required to evaluate the safety of drugs, between 1962 and 1976 it was given the mandate to test drugs' efficacies and medical technologies, as well as authority over animal drugs and the registration of medical drug and device manufacturers.[109] The FDA responded to these mandates by issuing regulations.[110] Similarly, the Environmental Protection Agency (EPA) and the Consumer Product Safety Commission, created in 1970 and 1972, respectively, both had expansive mandates that the agencies believed could not be managed through adjudication alone.[111]

Finally, the Supreme Court decided two cases that helped move agencies away from adjudication by opening the path to informal rulemaking. Beginning with the 1972 case *United States v. Allegheny-Ludlum Steel Corp.*[112] and continuing in the 1973 case *United States v. Florida East Coast Railway Co.*,[113] the Court began articulating a presumption in favor of informal rulemaking and against formal rulemaking. In those cases, the statute at issue permitted the ICC, "after hearing," to issue regulations, and petitioners sued in part because the ICC had not engaged in the APA's formal rulemaking procedures in sections 556 and 557.[114] The Court held that such a requirement is insufficient to require the APA's formal rulemaking procedures. Rather, a statute would have to explicitly say that hearings would be "on the record" (or something similarly explicit) to require a formal rulemaking.[115]

These cases, perhaps more than anything else, helped fuel the rise in rulemaking over adjudication. Formal rulemaking procedures, with hearings, cross examinations, and a record on which to respond, were significantly more time-consuming than informal rulemakings—particularly before hard look review developed.[116]

---

108. Schiller, *supra* note 7, at 1148.

109. *See* Drug Amendments of 1962, Pub. L. No. 87-781, 76 Stat. 780; JAMES T. O'REILLY & KATHARINE A. VAN TASSEL, FOOD AND DRUG ADMINISTRATION § 3:7 (4th ed. 2020).

110. Charles C. Ames & Steven C. McCracken, *Framing Regulatory Standards to Avoid Formal Adjudication: The FDA As a Case Study*, 64 CAL. L. REV. 14, 17–20 (1976).

111. Schiller, *supra* note 7, at 1148–49.

112. 406 U.S. 742 (1972).

113. 410 U.S. 224 (1973).

114. *Allegheny-Ludlum Steel Corp.*, 406 U.S. at 756–57 (internal quotation marks omitted); *Florida East Coast Ry. Co.*, 410 U.S. at 227.

115. *Allegheny-Ludlum Steel Corp.*, 406 U.S. at 757; *Florida East Coast Ry. Co.*, 410 U.S. at 241.

116. *See* discussion *infra* notes 168–170 and accompanying text.

That said, there are several agencies that still conduct the vast majority of their policymaking through adjudications, often more through accidents of history and agency culture than through affirmative decisions on the part of agency leadership. The NLRB, for example, almost solely makes policy by adjudication, despite the legal authority to issue rules and pleas from the Academy to do so.[117] Similarly, the Federal Trade Commission (FTC) largely acts through adjudications and enforcement actions. Congress in 1975 required the agency to use time-consuming, formal-like rulemaking procedures when enacting regulations governing unfair and deceptive acts and practices (UDAP),[118] and the agency began disfavoring rulemakings altogether, although informal rulemaking is still available for non-UDAP rules.[119]

III. THE BENEFITS OF ADJUDICATION FOR MAKING POLICY

Although informal rulemaking rose to become the dominant method for policymaking following perceived abuses by agencies in the New Deal and post-war eras, the pendulum has swung too far against adjudication. The courts, the White House, and Congress perceived abuses by agencies in the flexibilities inherent in informal rulemaking and imposed extreme procedural requirements that cancel out many of rulemaking's benefits—primarily, the relative speed with which agencies could issue policies.

This Part discusses the benefits of adjudicatory policymaking over rulemaking in today's rulemaking environment, which can include addressing actual facts rather than hypotheticals; the ability to engage in ex post clarification and case-by-case policymaking; additional opportunities for public participation; and perhaps most importantly, speed.

It is worth noting, however, that although policymaking by order has some benefits over rulemaking in many situations, it would not be prudent to dictate every policy through adjudication. There are some complex

---

117. *See, e.g.*, Jeffrey S. Lubbers, *The Potential of Rulemaking by the NLRB*, 5 FIU L. REV. 411, 412, 433 (2010) (noting the lack of major NLRB rulemakings in the prior twenty years and encouraging the NLRB to use rulemakings to develop policy); Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2015 (2009); Claire Tuck, *Policy Formulation at the NLRB: A Viable Alternative to Notice and Comment Rulemaking*, 27 CARDOZO L. REV. 1117 (2005).

118. Magnuson–Moss Warranty Act, Pub. L. 93–637, 88 Stat. 2183, 2193 (1975) (codified at 15 U.S.C. § 57a(a)(2)).

119. *See* Rohit Chopra & Lina Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357, 367–68 (2020) (arguing that the FTC would benefit from rulemaking in non-unfair deceptive acts and practices (UDAP) instances in three ways: 1) by providing sufficient notice to participant as to what the law is, 2) by relieving cost and trial lengths, and 3) by establishing rules through a transparent and participatory process, making those rules more legitimate).

regulatory schemes that, while it may be permissible to effectuate through adjudication, would be better articulated through the language of the *Code of Federal Regulations* than through the prose required of agency orders.[120] For others, not only would it be unwise to articulate policies through orders, doing so could be illegal.[121]

A. Adjudication's Many Benefits

The backlash to perceived abuses of informal rulemaking has led scholars to begin articulating more fully the benefits of policymaking by order. Although the necessary protections courts have imposed on agencies to ensure that litigants are protected[122] and the better policing of the APA's distinction between rulemaking and adjudication[123] means that adjudicatory policymaking will never be as robust as it once was, it can still be superior to rulemaking in many instances.

Adjudicative Facts: Adjudication "grounds the agency's decision-making in empirical reality"[124] by requiring agencies to confront the facts of a case, which Professor Kenneth Culp Davis coined as "adjudicative facts," rather than largely hypothetical situations or cherry-picked examples provided by commenters.[125] The Supreme Court in *Chenery II* noted that an "agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule," while addressing the issue in an adjudication gives them that experience.[126] It is

120. For example, though it might be possible to develop a system for the federal government to reimburse private expenditures through orders, doing so would be unwise and could subject the government to litigation over discriminatory payments.

121. Under the standard articulated in *FCC v. Fox Television Stations*, 567 U.S. 239, 253 (2012), notice must be given of a new policy sufficient such that "regulated parties should know what is required of them so they may act accordingly." It is doubtful courts would permit, for example, the SEC to articulate through adjudication a requirement that all public companies complete a specific form every quarter; the first company sued would not have advanced warning that it needed to complete the form.

122. *See supra* Part I.B.

123. *See*, *e.g.*, NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969) (refusing to impose a requirement created in a previous NLRB adjudication because the rule was only to apply to future union elections and had not gone through the rulemaking process required by the APA).

124. Philip J. Weiser, *The Future of Internet Regulation*, 43 U.C. DAVIS L. REV. 529, 589 (2009).

125. KENNETH CULP DAVIS, 2 ADMINISTRATIVE LAW TREATISE § 12:3, 413 (2d ed. 1979) ("Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are the general facts which help the tribunal decide questions of law and policy and discretion.").

126. *Chenery II*, 332 U.S. 194, 202 (1947).

also well noted that "in some cases testimonial proof and cross-examination can serve a more valuable function in testing forecasts and generalized conclusions underlying future policy planning than in making findings concerning specific past events."[127]

Further, with adjudication, agencies can see in concrete detail the benefits or harms that private-sector behaviors are causing. In such instances, agency officials may have "[e]motional reactions [that are] useful cues to good decisionmaking," or may be moved by the historical context of an adjudication, such as cumulative harms or historical discrimination to communities affected by a particular adjudication.[128] Absent actual examples of how a policy will affect real-world behaviors, agencies in rulemakings may rely heavily on a quantified cost–benefit analysis that fails to take into consideration unquantifiable issues of morality that arise in individualized circumstances and have a tendency to average out or erase crucial context.

Ex Post Clarification and Prospective Flexibility: As the Supreme Court noted in *Chenery II*, "problems may arise in a case which the administrative agency could not reasonably foresee."[129] As stated before, it is impossible to tailor a regulation to account for every possible scenario. If agencies are only permitted to articulate policy through rulemakings, they are likely to face situations where socially-positive actions are prohibited or harmful actions are permitted, yet agencies are unable to intervene despite the "spirit" of the regulation or what a "reasonable person" would predict the policy to be.[130] If agencies were limited to ex ante clarifications of policy (i.e., rulemakings), that restriction "may inadvertently facilitate 'evasion of the basic statutory objectives'" by inhibiting agencies from combatting novel or bespoke methods for circumventing the law that they could not have predicted.[131] It would be easier for Congress's intent to be violated if agencies were required to create a list of prohibited actions by regulation, for example, before they could begin enforcing their interpretations of the statute. Without this "prospective flexibility" that adjudication offers,[132] agencies

127. Glen O. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 522 (1970).

128. Jeffrey J. Rachlinski, *Rulemaking Versus Adjudication: A Psychological Perspective*, 32 FLA. ST. U. L. REV. 529, 546 (2005). "[S]ympathies might well develop sensible rather than foolish rules. A rulemaking process that hides the emotional aspects of a social decision might be missing an important cue." *Id.* at 550.

129. *Chenery II*, 332 U.S. at 202.

130. *See* discussion *supra* Part I.B; *see also Chenery II*, 332 U.S. at 202 (noting that these situations "must be solved despite the absence of a relevant general rule").

131. Glicksman & Markell, *supra* note 6, at 342 (quoting Shapiro, *supra* note 85, at 928).

132. *Id.* at 344.

and the public would be reliant on courts to undertake these policymaking activities, albeit without the agencies' expertise.

Furthermore, adjudication allows regulators prospective flexibility—that is, they have the flexibility to use their time and other resources on the most pressing of needs, rather than making a formal announcement of policy that may or may not be immediately necessary. Additionally, the flexibility of being able to select interpretations of statutes during the course of an adjudication means that agencies can leave open questions unanswered so that regulated entities may act more cautiously (e.g., abiding by the strictest interpretation of a statute in case that interpretation is the one the agency will end up selecting).[133]

Finally, although opponents of adjudicatory policymaking may describe it pejoratively (for example, describing that "an agency retains greater freedom [through adjudication] to apply a new policy to prior conduct if it wishes to do so"),[134] there is a difference "between a retroactive clarification of unsettled law and a retroactive change in settled law."[135] As previously described, agency adjudications—much like Article III adjudications—are only permitted to address the former.[136]

Case-by-Case Development: With that prospective flexibility in mind, adjudication offers agencies the opportunity to develop policy slowly and with "the accumulation of experience in individual cases."[137] There might be instances where "a rule cannot be drawn which will clearly delineate or predict the agency's action on a given problem involving a complex factual situation," or where an "agency may not know enough about the particular problem to warrant issuance of rule-making" as a result of "the newness of the agency or the problem before it."[138] In such instances, agencies may find it better to develop policy "realistically with actual problems," rather than to articulate standards based on "hypothetical cases that may never arise."[139] Further, as the Supreme Court noted in *Chenery II*, case-by-case policy development allows agencies to easily address issues "so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule."[140] Agencies can

133. Shapiro noted one instance in which the FTC declined to give unofficial approval to proposed advertisements in a request for an advisory opinion. It was later learned that the Commission "was not contemplating legal action against any group," but the agency had the privilege of not officially articulating a policy until it wanted to. Shapiro, *supra* note 85, at 928–29 (noting 5 Trade Reg. Rep. ¶ 50183 (1963)).

134. *Id.* at 952.

135. *Id*. (internal citation omitted).

136. *See supra* Part I.B.

137. Shapiro, *supra* note 85, at 927.

138. Baker, *supra* note 93, at 661.

139. Shapiro, *supra* note 85, at 927–28.

140. *Chenery II*, 332 U.S. 194, 203 (1947).

be responsive to those specialized problems, rather than attempting to develop a sole rule to cover every situation that may be ineffective.

Frequent Policymaking Opportunities: Much as how adjudication permits case-by-case policy development, it also provides more opportunities to develop policy compared to rulemaking. Rulemakings are frequently complex endeavors that can take months or years and require many staff-hours to finalize, and so agency officials are reticent to undertake rulemakings on a particular topic more than once during their tenure, if they are even given the chance. Adjudication, on the other hand, provides agencies an opportunity to make policy every time a case arises.

Further, the frequency of adjudicatory policymaking opportunities provides agencies the "[a]bility to experiment with limited adverse consequences," and change policy swiftly if the repercussions are not as predicted.[141] An agency can make a policy decision in one case based on the information it has available (i.e., conforming with rational decisionmaking requirements) and can adjudicate the next case based on what it learned from watching the consequences of the first (while still ensuring that the non-agency party in the second adjudication does not face unfair surprise). Similarly, frequent policymaking opportunities allow agencies to incrementally develop a regulatory regime without developing it entirely in one go. Rather, agencies "see an issue repeatedly, and in different contexts," with the potential "to identify sensible categories from the adjudicatory record" and learn facts that can help develop and refine the policy as necessary.[142]

Public Participation: Finally, although the notice-and-comment process allows for broad public participation, there may be significant groups that are excluded from that process that would participate in adjudications, either because they are the subjects of adjudications or may indirectly be benefited or harmed by an agency's order. Community members affected by a plant spewing toxic fumes, for example, may be more likely to participate in a single hearing about penalizing that particular plant than in nationwide rulemakings about particular chemicals used in that plant and others.[143]

Marginalized groups that were the intended beneficiaries of legislation "lack the influence that many regulated private entities have in

141. Glicksman & Markell, *supra* note 6, at 344.

142. *Id.* at 344–45 (noting Rachlinski, *supra* note 128, at 546).

143. Of course, it may be the case that there are times when rulemaking benefits those groups, who may "lack[] the resources to participate in multiple adjudicatory policymaking processes." Glicksman & Markell, *supra* note 6, at 341 n.126 (noting Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 406, 432 (1981)).

rulemaking."[144] They frequently are unable to provide the "right" kind of information in their letters that agencies find useful.[145] And although some public interest groups advocate on behalf of these communities and do understand what types of comments will be considered by agencies, they "lack the clout and resources of regulated industries," and "have more on their plate than they can handle" to adequately comment on every rulemaking that may, but just as easily may not, affect their clients.[146] Realistically, notice-and-comment rulemaking has become a technocratic and data-centric exercise. The only comments seriously considered are those that provide technical information to make the policies operate more smoothly and those that offer statistics when it offers a financial incentive; many times, commenters that lack the significant resources necessary to collect data to support their arguments of the harms policies will produce will simply be ignored.[147] Only in the minority of rulemakings will agencies learn of information that drastically changes their perspectives.

In adjudications, however, a policy issue is no longer theoretical. Agency officials can see quite clearly the effects of their policies or lack of policies, and communities may be more likely to participate in the regulatory process if they can see themselves concretely as beneficiaries.[148] Thus, the

144. Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992, 2019 (2012) (internal citations omitted).

145. *See* Michael Herz, Cardozo Sch. of L., Symposium at American University Washington College of Law: Mass and Fake Comments in Agency Rulemakings, 126 (Oct. 5, 2018). https://www.acus.gov/sites/default/files/documents/10-5-18%20Mass%20and%20Fake%20Comments%20in%20Agency%20Rulemaking%20Transcript.pdf ("There is no hint that the FCC was moved one way or the other by these millions of comments. They were irrelevant to the process, to the outcome.").

146. Sant'Ambrogio & Zimmerman, *supra* note 144144, at 2020.

147. *See* Todd Phillips & Sam Berger, *Reckoning With Conservatives' Bad Faith Cost-Benefit Analysis*, CTR. FOR AM. PROGRESS 1 (Aug. 14, 2020), https://www.americanprogress.org/issues/democracy/reports/2020/08/14/489336/reckoning-conservatives-bad-faith-cost-benefit-analysis/ ("The process . . . makes it far easier for sophisticated parties with significant resources to generate data showing large costs than it is for agencies to accurately capture more diffuse and, at times, unquantifiable benefits to society as a whole.").

148. *See* Glicksman & Markell, *supra* note 6, at 344–46 (describing how a "one-time agency response to an issue may forego learning opportunities provided by sequential adjudications"); Rachlinski, *supra* note 128, at 546 (arguing that "the lack of 'emotional content' in rulemaking may deprive agencies of 'useful cues to good decision-making.'"); Robert L. Glicksman et. al., *Technological Innovation, Data Analytics, and Environmental Enforcement*, 44 ECOLOGY L.Q. 41, 80–83 (2017) (discussing the role of citizens in monitoring environmental impacts). *See generally* Renée A. Irvin & John Stansbury, *Citizen Participation in Decision Making: Is It Worth the Effort?*, 64 PUB. ADMIN. REV. 55 (2004) (discussing what makes public participation more or less likely).

retrospective aspect of adjudication can help bring into focus those who are usually not truly considered in the rulemaking process.

B. Rulemaking's Problem: Layers Upon Layers of Time-Consuming Process

One of the key reasons that informal rulemaking overtook adjudicatory policymaking was that it allowed agencies to enact policies relatively quickly compared with adjudication. However, that advantage has been called into question by the significant transformations rulemaking has undergone with increases in procedural requirements stemming from judicial interpretations, legislation, and executive orders.[149] This transformation has been described as the "ossification" of the rulemaking process,[150] and the result is that "the marvelously simple and speedy rulemaking procedures of 1946, when the APA was adopted, bear about as much resemblance to the rulemaking procedures of [today] as an acorn does to a mighty seventy-year-old oak."[151]

Although Professor Kenneth Culp Davis declared that "administrative rulemaking is one of the greatest inventions of modern government,"[152] "[t]his enthusiasm, it turned out, stemmed from novelty. . . . [H]opes and expectations for what was essentially a bureaucratic innovation."[153] The APA only requires that agencies publish with rules "a concise general statement of their basis and purpose,"[154] yet the preambles to regulations that are published in the *Federal Register* have "metastasize[d] into . . . book-length treatises" that require more agency resources today than ever before.[155] In 1975, for example, the Department of Labor's *Federal Register* notice to finalize the rule "Definition of the Term 'Fiduciary'" under the Employee Retirement Income Security Act was only three pages long.[156] When the

149. THE FEDERAL RULEMAKING PROCESS, PUB. CITIZEN, https://www.citizen.org/wp-content/uploads/regulations-flowchart.pdf (charting the process and requirements of federal rulemaking).

150. *See, e.g.*, Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493, 1493 (2012).

151. Sidney A. Shapiro & Richard W. Murphy, *Arbitrariness Review Made Reasonable: Structural and Conceptual Reform of the "Hard Look,"* 92 NOTRE DAME L. REV. 331, 332–33 (2016).

152. KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 448 (2d ed. 1978) (internal quotes omitted).

153. Schiller, *supra* note 7, at 1140.

154. 5 U.S.C. § 553(c).

155. Mashaw, *supra* note 13, at 1656.

156. Definition of the Term "Fiduciary," 40 Fed. Reg. 50,842 (Oct. 31, 1975); *see also* Richard W. Parker, *The Empirical Roots of the "Regulatory Reform" Movement: A Critical Appraisal*, 58 ADMIN. L. REV. 359, 395 (2006) (discussing how rulemaking notices may contain only "five or six pages of rule, preceded by fifty or more *Federal Register* pages setting forth detailed agency

Obama Administration finalized a new regulation (after eight years of effort) overhauling the 1975 rule, its *Federal Register* notice was 57 pages and was accompanied by "[p]rohibited [t]ransaction [e]xemption[s]" that helped shape the rule, running a total of 275 pages.[157]

The following increased procedural requirements for agency rulemakings may have benefits, but they have cumulatively increased the time it takes for agencies to promulgate new regulations by making sure agencies have crossed every T and dotted every I for fear of having their rules thrown out in court on procedural grounds.[158]

1. Judicial Requirements

It is no coincidence that extensive rule preambles—the language preceding regulatory text in *Federal Register* notices drafted to explain the rules—have expanded as courts have permitted regulated parties new and successful avenues for challenging regulations on procedural grounds. As Professors Shapiro and Murphy have noted, these preambles are not "designed for anyone actually to read in order to understand the basic approach and concerns of a rule," but instead "are massive lines of defense that agencies construct to protect their rules from judicial challenges—often from well-heeled corporate interests."[159] Yet these lines of defense can fail. In one case over a rulemaking, the court even noted that the record was "a sump in which the parties have deposited a sundry mass of materials that have neither passed through the filter of rules of evidence nor undergone the refining fire of adversarial presentation."[160] Still, judicial precedents have provided incentives for regulated industries to fill rulemaking records with as much information as possible just to see what can be used later on to challenge any given regulation.[161]

---

explanations and/or responses to the most technical and arcane comments").

157. *See* Definition of the Term "Fiduciary"; Conflict of Interest Rule-Retirement Investment Advice, 81 Fed. Reg. 20,945 (Apr. 8, 2016).

158. For example, a Government Accountability Office report found that "between 1981 and 2010, the time it took OSHA to develop and issue safety and health standards ranged from 15 months to 19 years and averaged more than 7 years"—nearly two presidential terms! U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-602T, WORKPLACE SAFETY AND HEALTH: MULTIPLE CHALLENGES LENGTHEN OSHA'S STANDARD SETTING 2 (2012).

159. Shapiro & Murphy, *supra* note 151, at 351.

160. Nat. Res. Def. Council, Inc. v. SEC, 606 F.2d 1031, 1052 (D.C. Cir. 1979).

161. *See, e.g.*, Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321 (2010) (discussing the incentives produced to overwhelm the administrative system).

Pre-1960s Rulemaking Review

From the APA's enactment through the 1960s, the standard for determining whether an agency's regulation was arbitrary and capricious was "extremely deferential."[162] There were two primary rationales for such permissive review: First, "most regulation had been . . . implemented through the case-by-case process of adjudication rather than through quasi-legislative rulemaking procedures,"[163] and second, pre-enforcement review of regulations was rare (if available at all). That is to say, only after a regulated entity was penalized by an agency—through an order or administrative hearing—could the entity challenge the regulation in federal court.

When an agency brings an enforcement case, it can provide to the court the record of the defendant's particular bad activities, with the "enforcement action itself provid[ing] additional information and context for determining the rule's legality and rationality."[164] In such instances, courts would generally uphold the agency's policy so long as "*any* state of facts reasonably can be conceived that would sustain it" and would scrutinize the instant application of the policy more closely.[165] For example, the D.C. Circuit in one instance found that the plaintiff's allegation that the regulatory policy was "inconsistent with the statutory purposes [was] too general to sustain plaintiff's burden," but that a court could entertain allegations of a "discriminatory" application of the policy.[166] Similarly, the Ninth Circuit declared in another case that it would not review the "factual premise upon which" an agency enacted a regulation; "[i]f the factual premise itself were open to review, then it would be necessary for all general rule-making to include a trial-like hearing."[167]

One 1964 opinion of the Second Circuit is quite unbelievable to 21st century administrative lawyers. In *New York Foreign Freight Forwarders & Brokers Ass'n v. Federal Maritime Commission*,[168] the court considered whether six regulations were properly promulgated. One of the plaintiff's claims was that "the rules [did] not contain 'a concise general statement of their basis and purpose' in compliance with" the APA's rulemaking requirements.[169] The court held that the commissioners met this obligation by stating in their notice promulgating the rules that they "implement the 1961 Law 'and have

162. Shapiro & Murphy, *supra* note 151151, at 337 (noting Pac. States Box & Basket Co. v. White, 296 U.S. 176, 185 (1935)).

163. *Id.* at 338 (internal citation omitted).

164. *Id.* at 339.

165. Borden's Farm Prods. Co. v. Baldwin, 293 U.S. 194, 209 (1934) (emphasis added).

166. Cont'l Distilling Corp. v. Humphrey, 220 F.2d 367, 371–72 (D.C. Cir. 1954).

167. Superior Oil Co. v. Fed. Power Comm'n, 322 F.2d 601, 619 (9th Cir. 1963).

168. 337 F.2d 289, 292, 296 (2d Cir. 1964).

169. *Id.* at 296.

for their purpose the establishment of standards and criteria to be observed and maintained by licensed independent ocean freight forwarders, ocean freight brokers and oceangoing common carriers in the conduct of their business affairs.'"[170] With one sentence, an agency complied with a mandate that would only be upheld through pages (or dozens of pages) of text today.

Abbott Laboratories *and Pre-Enforcement Review*

As stated previously, the Supreme Court encouraged informal rulemaking beginning in the 1960s. Simultaneously, "it also sought to ensure that the judiciary controlled it."[171] In *Abbott Laboratories v. Gardner*,[172] the Court encouraged pre-enforcement review and, incidentally, helped pave the way for more strenuous and searching reviews of agency rulemakings.[173] At issue in *Abbott Laboratories* was the legality of regulations issued by the FDA.[174] Drug manufacturers sued to enjoin enforcement of the regulations before the FDA could bring a case.[175] The district court enjoined the regulation, which the Third Circuit reversed, holding in part that the "threat of enforcement must be real, and not merely implied by the existence of the law and regulations," before a court could issue a declaratory judgment.[176]

Overturning the Third Circuit, the Supreme Court articulated a broad new standard that allowed for pre-enforcement review of regulations under nearly all statutes: "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review," including pre-enforcement judicial review, especially in instances "where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance."[177]

This holding—allowing affected interests to challenge regulations before they can be enforced—fundamentally changed the way that courts review regulatory cases by changing the records upon which those cases are challenged. Prior to *Abbott Laboratories*, courts often refused to hear pre-enforcement cases "because of ripeness concerns."[178] In the Third Circuit *Abbott Laboratories* decision, the court wrote that the case was not justiciable because "[n]o specific case was presented, no immediate

170. *Id.*

171. Schiller, *supra* note 7, at 1152.

172. 387 U.S. 136 (1967).

173. *Id.* at 139–44.

174. *Id.* at 139–40.

175. *Id.* at 138–39.

176. Abbott Lab'ys v. Celebrezze, 352 F.2d 286, 290 (3d Cir. 1965), *rev'd sub nom* Abbott Lab'ys v. Gardner, 387 U.S. 136 (1967).

177. *Abbott Lab'ys*, 387 U.S. at 141, 153 (quoting Rusk v. Cort, 369 U.S. 367, 379–80 (1962)).

178. Schiller, *supra* note 7, at 1152 (internal citation omitted).

prosecution threatened. The administrative intention was expressed but had not yet come to fruition."[179]

In one pre-*Abbott Laboratories* case, the D.C. Circuit held it lacked jurisdiction to hear an appeal of a Federal Power Commission regulation because "an appellate court has no intelligible basis for decision unless a subordinate tribunal has made a record fully encompassing the issues."[180] The record for post-enforcement cases would be the rulemaking record *and* the record of the activities affected by the policy. In that case, the D.C. Circuit recognized that it must adjudicate "the effect of [the rule] on certain contracts of [the] petitioner," yet the case before it lacked "such contracts" and "the aid of testimony, affidavits, etc."[181] With *Abbott Laboratories*, pre-enforcement cases without the agency enforcement record "placed great pressure on courts, especially circuit courts, to find a substitute basis for their decisions."[182] Without the enforcement record, the record for a pre-enforcement challenge became noticeably narrower—and much lighter.

Lower courts responded in a rather predictable manner: by requiring agencies to flesh out what was left of the record, using a statute that was not intended for such a purpose.[183] Professors Shapiro and Murphy describe courts as using the notice-and-comment requirement to get each agency to "provide an adequate foundation for a serious adversarial critique of an agency's information, analysis, methods, and plans."[184] Perhaps it is a judicial bias in favor of ensuring cases are complex and more interesting to adjudicate, rather than being largely one-sided in favor of the agencies.

The year after the Supreme Court decided *Abbott Laboratories*, the D.C. Circuit in a pre-enforcement case offered a "remind[er]" to the executive branch "of the ever present possibility of judicial review."[185] Specifically, although the APA only requires "'a concise general statement'" to explain the purpose of a regulation, the court in *Automotive Parts & Accessories Ass'n v. Boyd*[186] "caution[ed] against an overly literal reading of the statutory terms 'concise' and 'general.'"[187]

---

179. *Celebrezze*, 352 F.2d at 290.

180. United Gas Pipe Line Co. v. Fed. Power Comm'n, 181 F.2d 796, 799 (D.C. Cir. 1950).

181. *Id.*

182. Shapiro & Murphy, *supra* note 151, at 339.

183. *See generally id.* at 340 (internal citations omitted) (explaining that "courts have 'interpreted' the APA aggressively to require that a notice of proposed rulemaking reveal all the scientific and technical data and methodologies underlying the proposal.")

184. *Id.* at 340.

185. Auto. Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968).

186. 407 F.2d 330, 333 (D.C. Cir. 1968).

187. *Id.* at 338; Administrative Procedure Act, 5 U.S.C. § 553 (2018).

These adjectives must be accommodated to the realities of judicial scrutiny, which do not contemplate that the court itself will, by a laborious examination of the record, formulate in the first instance the significant issues faced by the agency and articulate the rationale of their resolution. We do not expect the agency to discuss every item of fact or opinion included in the submissions made to it in informal rule making. We do expect that, if the judicial review which Congress has thought it important to provide is to be meaningful, the "concise general statement of . . . basis and purpose" mandated by [the APA] will enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.[188]

If the APA was interpreted literally—to, in fact, require regulation preambles to be "concise" and "general"—agencies would have legal bases for fending off attacks that they did not consider particular facets of issues regulations were designed to address, instead providing in court documentary evidence or affidavits that they did. However, *Automotive Parts*' declaration that preambles can be as long as courts require so as to fully flesh out the innumerable issues that may or may not be raised in litigation sets the precedent that there are no limits on how long a preamble can be or how much time and effort an agency can put into its development.[189]

Contemporaneous Rationalizations and a Closed Record

In 1971, the Supreme Court further challenged agencies' ability to succeed in pre-enforcement suits in *Citizens to Preserve Overton Park v. Volpe*.[190] The Court examined the scope of the record before the lower courts. In *Overton Park*, the Secretary of Transportation had approved a project's funding without providing any findings demonstrating that he had considered statutory factors necessary to the project's approval.[191] The two lower courts ruled that formal findings were unnecessary to fully adjudicate the issue; instead, they could rely on litigation affidavits.[192] The Supreme

188. *Boyd*, 407 F.2d at 338.

189. *See, e.g.*, Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 881 n.19 (1st Cir. 1978) (internal citations omitted) (noting that the "use of the extra-record evidence" can "constitute fatal error."). *See also* Wagner, *supra* note 161, at 1356–57 (internal citations omitted) ("There appear to be no cases in which a court has rejected a rule because an agency's lengthy and highly technical preamble was not concise or comprehensible enough. By contrast, and although the agency need not discuss every minor facet of its proposal, the courts will remand rules for insufficiency when major issues are left unaddressed.").

190. 401 U.S. 402 (1971).

191. The statutes provided that "the Secretary shall not approve any program or project" requiring public parkland "unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park . . . ." 49 U.S.C. § 1653(f) (Supp. V 1964); 23 U.S.C. § 138 (Supp. V 1964).

192. *Overton Park*, 401 U.S. at 409.

Court ruled that affidavits alone were insufficient for judicial review, based on two rationales that have proven to be significant restrictions on the ability of agencies to defend the appropriateness of their actions in court.[193]

First, the Court held that courts are to look at the contemporaneous rationales of agencies when reviewing their actions, rather than any "'post hoc' rationalizations" that agencies may conjure in litigation to support their positions, essentially requiring agencies to thoroughly document their rationales at the time a decision is made to be successful in future litigation.[194] Second, a court's "review is to be based on the full administrative record that was before the [agency] at the time" a decision is made.[195]

Overton Park's principles clearly apply to adjudications as well as rulemakings; the case concerned an agency adjudication, after all. However, its restrictions are not nearly as onerous in adjudications as they are when applied to agency rulemakings. *Overton Park*'s two requirements—and their increasingly aggressive application by circuit courts—together with the APA's rulemaking requirement that agencies act only "[a]fter consideration of the relevant matter presented" have presented ample opportunity for agencies to fail during litigation. [196] Professor Richard Pierce has noted that regulated firms soon learned they could have rules overturned on pre-enforcement review by filing "lengthy and detailed comments that criticized" proposed rules they disliked, "often accompanied by consultants' reports that purported to make findings that undermined" the rules' bases.[197] If agencies fail to respond in preambles to even the most tangentially-related information, rules can be thrown out by courts—with the adequacy of responses being determined by courts after rules are finalized and with no opportunity for agencies to cure deficiencies and demonstrate that they *actually did* review and consider all comments.[198]

Hard Look Review

Finally, courts imposed what has become known as "hard look review" on agency rulemakings, ensuring that the agencies have taken a "hard look" at the issue being decided and have acted appropriately—just about the exact

193. *Id.* at 409–10.

194. *Id.* at 419 (citing Burlington Truck Lines v. United States, 371 U.S. 156, 168–69 (1962)).

195. *Id*. at 420.

196. 5 U.S.C. § 553(c).

197. Pierce, *supra* note 10, at 9.

198. *See generally* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973) (holding that the court can review agency decisions to find whether the agency had exercised reasonable care); *see also* Wagner, *supra* note 161, at 1359 (internal citation omitted) ("The agency's only responsible course of action when faced with these doctrinal demands is to engage in defensive overkill when developing rules.").

opposite of the pre-*Abbott Laboratories* standard of upholding a rulemaking if "any state of facts reasonably can be conceived that would sustain it."[199] Scholars point to the 1970 case *Greater Boston Television Corp. v. FCC*[200] as the beginning of this shift.[201]

The D.C. Circuit in *Greater Boston Television* offered an extensive description of how courts would adjudicate agencies' compliance with the APA.[202] Judge Leventhal explained that courts maintain a "supervisory function in review of agency decision" with agencies and courts working as "collaborative instrumentalities of justice" in "a partnership in furtherance of the public interest."[203] Courts are to overturn agency actions when they determine "that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making."[204] The court came to this conclusion because "[r]easoned decision promotes results in the public interest by requiring the agency to focus on the values served by its decision, and hence releasing the clutch of unconscious preference and irrelevant prejudice."[205]

Though it involved an adjudication, *Greater Boston Television* opened the door to courts imposing new procedural requirements in rulemakings to ensure judges may fully interrogate agencies' rationales. A decade later, Judge Wald of the D.C. Circuit penned a footnote describing how the shift in agency policymaking from being primarily adjudication-based to being primarily informal rulemaking-based necessitated this new standard for review.[206]

---

199. Pac. States Box & Basket Co. v. White, 296 U.S. 176, 185 (1935).

200. 444 F.2d 841 (D.C. Cir. 1970).

201. *Id.* at 851–52.

202. *See generally id.* at 850–53 (providing an explanation in the section titled "General Conformance of Agency Disposition to Salient Principles of Rule of Law").

203. *Id.* at 850–52 (internal citations and quotation marks omitted).

204. *Id.* at 851 (quoting WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969)).

205. *Id.* at 852.

206. *See* Nat'l Lime Ass'n v. EPA, 627 F.2d 416, 451–52 n.126 (D.C. Cir. 1980). Judge Wald wrote that "[t]he cumbersomeness of rulemaking 'on the record' and its attendant delays prompted increased provision for the more flexible and expedient 'notice and comment' rules in areas in urgent need of regulation," but also that "[t]he sheer massiveness of impact of the urgent regulations . . . and the diffidence of judges in the face of highly technical regulatory schemes prompted the courts to require the agencies to develop a more complete record and a more clearly articulated rationale to facilitate review for arbitrariness and caprice." *Id.* (internal citations omitted). She also noted that although the phrase "hard look" originally "described the agency's responsibility and not the court's," the requirement "evolved to connote the rigorous standard of judicial review." *Id.* This "hard look" review standard shifted from being about the agencies' analysis of the issue at hand to being about the courts' analysis of the agency's analysis. *Id.* at 452.

In 1983, the Supreme Court adopted the hard look review standard as law of the land, albeit without using the phrase "hard look."[207] At issue in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*[208] was whether the rationale given by the National Highway Traffic Safety Administration (NHTSA) for rescinding certain standards was arbitrary and capricious.[209] The Carter Administration mandated automobiles include one of two "passive restraint" systems: either airbags or automatic seatbelts, which the Reagan Administration quickly moved to repeal.[210] When insurance companies predictably sued, the Court held that NHTSA violated the APA in its repeal of the prior rule by identifying significant gaps in NHTSA's logic: the agency failed to consider "a technologic[al] alternative within the ambit of the existing [s]tandard" (i.e., non-detachable seatbelts)[211] and failed to support its conclusion that there was so much uncertainty in the evidence such that it could be discounted.[212]

In *State Farm*, the Court formally approved the practices of the D.C. Circuit: courts were to thoroughly investigate the rationales for agency decisions,[213] marking a significant departure from the pre-APA holding that courts were to uphold an agency's discretionary action so long as "any state of facts reasonably can be conceived that would sustain it."[214] The majority expanded upon the Court's previous jurisprudence to explain that courts will overturn notice-and-comment rulemakings on arbitrary and capricious grounds:

---

207. Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983).

208. 463 U.S. 29 (1983).

209. *Id.* at 34.

210. *Id.* at 38–39. Upon taking office in 1981, the Reagan Administration repealed the regulation on the premise that changes made by manufacturers meant the rule would no longer produce safety benefits; since manufacturers planned to install automatic seatbelts in 99% of new cars rather than airbags, and "the overwhelming majority" of those belts would be detachable, there would be no benefit from the rule. *Id.* at 38–39.

211. *Id.* at 51, 46, 55 ("NHTSA apparently gave no consideration whatever to modifying the Standard to require that airbag technology [alone] be utilized," and that it "failed to articulate a basis for not requiring nondetachable belts.").

212. *Id.* at 43. NHTSA offered "no direct evidence in support of the agency's finding that detachable automatic belts cannot be predicted to yield a substantial increase in usage," and claimed "substantial uncertainty" in the data without explaining what information the data did provide. *Id.* at 52–53 (internal quotation marks omitted).

213. *See id.* at 42–43.

214. Borden's Farm Prods. Co. v. Baldwin, 293 U.S. 194, 209 (1934).

> [I]f the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[215]

Further, it reiterated, quoting *Chenery II*, that a "reviewing court should not attempt itself to make up for such deficiencies[:] we may not supply a reasoned basis for the agency's action that the agency itself has not given."[216]

The one ground that has significantly opened the door to judicial activism is that an agency may have "entirely failed to consider an important aspect of the problem."[217] Unless Congress explicitly provides a list of considerations in a statute for agencies to consider, most problems do not have a list of "important aspects." The lack of such lists allows a reviewing court to overturn a regulation if the agency fails to articulate in its *Federal Register* notice that it has considered a facet of the problem that the court deems important, and courts have leapt at the opportunity to do so.[218]

---

215. *State Farm*, 463 U.S. at 43. Most of these grounds for overturning an agency action were originally found in precedent, though they were largely "throwaway" lines in dicta. For example, in *Burlington Truck Lines v. United States*, the Court held that the agency failed to "articulate any rational connection between the facts found and the choice made" as one of many failures of the agency. 371 U.S. 156, 168 (1962). And in *Citizens to Pres. Overton Park v. Volpe*, the Court had held that agency decisions must be "based on a consideration of the relevant factors and whether there has been a clear error of judgment" based on a book that largely argued how judges *should* adjudicate agency actions. 401 U.S. 402, 416 (1971) (internal citations omitted). Also, like *Overton Park*, *State Farm*'s holdings apply to adjudications as well as rulemakings, though arguably affect rulemakings more significantly. It is likely that the important aspects of a question are easier to determine in an adjudication when, for example, there is only one aspect to consider.

216. *State Farm*, 463 U.S. at 43 (citing *Chenery II*, 332 U.S. 194, 203 (1947)).

217. *Id.* It is clear that courts, before the 1970s, encouraged agencies to engage in informal rulemaking while simultaneously discouraging adjudication, and following the 1970s, have made informal rulemaking that much more difficult. It has been argued that judges undertake these types of activities based on their own political beliefs, rather than as their proper role as judges. *See, e.g.*, Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the* State Farm *and* Grove City *Cases*, 6 J.L. ECON. & ORG. 263, 265 (1990) (noting that *State Farm* and a second case "can be understood as the Court reacting strategically to changes in the relevant political constraints reflecting changes in both Congress and the Presidency, and not necessarily to legal precedent or to Congressional intent. Also, even though these two decisions can be seen as favoring different political tendencies, they are both consistent with a self-interested but politically moderate Supreme Court."). Congress may consider engaging in a rebalancing of sorts, or whether the rulemaking process as it currently exists, rather than as written in the APA, functions as intended.

218. *See, e.g.*, Chamber of Com. v. SEC, 412 F.3d 133, 144–45 (D.C. Cir. 2005) (overturning an agency regulation for failing to consider whether an entirely different

With each of the major cases identified—*Abbott Laboratories*, *Overton Park*, *Automotive Parts*, *Greater Boston Television*, and *State Farm*—courts made the rulemaking process more difficult and more time consuming for agencies. The holdings appear to have been enacted to allow courts to fully review agencies' decisionmaking processes but were structured in ways that save judges time at the expense of agencies. In each case, courts effectively mandated that agencies significantly expand their preambles by detailing every possible consideration that goes into their rules' development to allow courts to more easily review the agencies' rationales. However, while courts may find this effort useful for the few rulemakings they review, agencies must create expansive preambles for every rule they promulgate in case one is challenged.

It did not have to be this way. Courts could have permitted agencies to provide, once litigation has begun, documentary evidence or affidavits demonstrating that the agencies considered concerns raised by plaintiffs. Especially with agencies universally using e-mail, providing evidence that at least one agency policy analyst considered a facet of an issue is much easier than drafting extensive preambles in the hopes of addressing every possible source of litigation risk.

2. Executive Order Requirements

Of course, judicially created requirements are not the only procedural mandates that have made rulemaking slower and more difficult. Presidents have also enacted various executive orders that require agencies to consider particular aspects of each new rule. For example, Executive Order 12,630 requires agencies to consider the impact of regulations on property rights; Executive Order 13,211, on energy supplies; and Executive Order 13,132, on state and local budgets.[219]

Of the orders that establish review requirements, Executive Order 12,866 has had the most significant impact.[220] Order 12,866 was signed to "reform and make more efficient the regulatory process," with the philosophy that agencies are to "promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need," which includes addressing market failures and protecting public health and safety, the environment, or "the well-being of the American people."[221] Order 12,866 does this by subjecting many agency rulemakings

---

regulatory regime—disclosure—would be a prudent alternative to the one adopted).

219. Exec. Order No. 12,630, 53 Fed. Reg. 8,859, 8,859 (Mar. 15, 1988) (property rights); Exec. Order No. 13,211, 66 Fed. Reg. 28,355, 28,355 (May 18, 2001) (energy supplies); Exec. Order No. 13,132, 64 Fed. Reg. 43,255, 43,255–56 (Aug. 4, 1999) (state and local budgets).

220. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

221. *Id.* at 51,735.

to stringent cost–benefit analysis requirements and requiring them to receive White House approval before they are finalized, which can add months or years to the rulemaking process.[222]

At the proposal stage of all significant rulemakings,[223] executive agencies (independent agencies are excluded) are to complete regulatory impact analyses (RIAs) that assess and, to the extent possible, quantify the costs and benefits anticipated.[224] Then, agencies are to submit proposed rules and the RIAs to the Office of Information and Regulatory Affairs (OIRA) for its review. Next, OIRA is to offer "meaningful guidance and oversight" on the proposed rules.[225] Finally, once agencies receive OIRA's approval, their rule proposals can be published in the *Federal Register*.[226] The same process repeats for finalizing these rules.

Given OIRA's placement inside the Executive Office of the President and its physical proximity to the White House (across a section of Pennsylvania Avenue on which cars are prohibited from driving), OIRA's veto authority over regulations gives the White House significant control over the regulatory process, and frequently results in less-strenuous regulations than those regulatory agencies would prefer.[227] Some may view this oversight as a benefit, but these processes come with significant costs.

Complying with Order 12,866 is a time-consuming and workforce-intensive process that depletes resources that agencies could use for other tasks, and it is unlikely agencies would otherwise be undertaking these analyses; the methodology OIRA requires agencies to use in developing

---

222. *Id.* at 51,735–37. *See* PUBLIC CITIZEN, THE PERILS OF OIRA REGULATORY REVIEW 5 (June 12, 2013), https://www.citizen.org/wp-content/uploads/oira-delays-regulatory-reform-report.pdf (noting "examples abound of "[The Office of Information and Regulatory Affairs] OIRA reviews extending months if not years").

223. Significant rules are defined as those that may: (1) "[h]ave an annual effect on the economy of $100 million or more or adversely affect" the economy, the environment, public health and safety, or State and local governments; (2) "[c]reate a serious inconsistency or otherwise interfere with an action taken or planned by another agency;" (3) "[m]aterially alter the budgetary impact of" Federal programs; or (4) "[r]aise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in" 12,866 itself. Exec. Order No. 12,866, at 51,738.

224. *Id*. at 51,741.

225. *Id.* at 51,742.

226. *Id.* at 51,741.

227. *See* Simon F. Haeder & Susan Webb Yackee, *Presidentially Directed Policy Change: The Office of Information and Regulatory Affairs as Partisan or Moderator?*, 28 J. PUB. ADMIN. RSCH. & THEORY 475, 475 (2018); *see also* Scot J. Paltrow, *How a Small White House Agency Stalls Life-Saving Regulations*, REUTERS (Oct. 29, 2015), https://www.reuters.com/investigates/special-report/usa-regulations-oira/.

RIAs is more demanding than that which courts require under hard look review.[228] Additionally, OIRA's review of rules can be drawn out. Order 12,866 grants OIRA ninety days to review a regulation, which can be extended once at the request of the OIRA Administrator for thirty days, or for any duration by the head of the agency writing the rule.[229] Yet OIRA frequently misses this ninety-day window and requires agencies to request extensions.[230] "More than 20% of rules [OIRA] reviewed in calendar year 2019 (99 of 475) were delayed by more than 120 days, and the longest was delayed by 420 days."[231] Such delays can have dramatic impacts: OIRA's more than two-year delay in approving a proposed rule to prevent silicosis is predicted to have resulted in an estimated 1,600 lives unnecessarily lost.[232]

3. Legislative Requirements

In addition to judicial and legislative requirements, three statutory provisions have made rulemaking more time consuming for agencies without placing similar requirements on adjudications.

The first provision is the Regulatory Flexibility Act (RFA), which, among other things, requires agencies to analyze the impacts of their regulations on small businesses when publishing the vast majority of their rules and allows courts to overturn rulemakings if those analyses are not completed to the judges' satisfaction.[233] Congress enacted the RFA after having perceived agency regulations as restricting small businesses unnecessarily, and with the

228. *See* discussion *supra* Part III.

229. Exec. Order No. 12,866, 58 Fed. Reg. at 51,742, ("OIRA shall waive review or notify the agency in writing of the results of its review . . . [for most] regulatory actions[] within 90 calendar days after the date of submission of the information . . . . The review process may be extended (1) once by no more than 30 calendar days upon the written approval of the Director and (2) at the request of the agency head.").

230. *See* Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENVT'L. L. REV. 325, 359 (2014) ("[T]he way that agency heads come to request extended review, in my experience, is that OIRA calls an official at the agency and asks the agency to ask for an extension. It is clear, in such a phone call, that the agency is not to decline to ask for such an extension. Thus, not only is there no deadline for OIRA review, but OIRA itself controls the agency's 'requests' for extensions. In this way, it comes to pass that rules can remain at OIRA for years.").

231. Todd Phillips, *Three Steps President Biden Can Take to Create a Progressive Regulatory. Process*, AMERICAN CONST. SOC'Y BLOG: EXPERT FORUM (Jan. 19, 2021), https://www.acslaw.org/expertforum/three-steps-president-biden-can-take-to-create-a-progressive-regulatory-process/.

232. Occupational Exposure to Respirable Crystalline Silica, 81 Fed. Reg. 16,285 (Mar. 25, 2016) (providing that the rule would prevent an expected 642 cases of silica-related mortality annually, or 1,605 cases over 2.5 years).

233. 5 U.S.C. §§ 601–12

intention to "establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation."[234]

The requirements on agencies to comply with the RFA are not complex, but they are time consuming and are yet another burden on agency rulemakings. The statute requires each agency to undertake two "regulatory flexibility analyses" when issuing regulations through the notice-and-comment process, first when issuing a notice of proposed rulemaking, and second when issuing a final rule.[235] These analyses must, among other things, estimate the number of small businesses to which the rule would apply and estimate compliance requirements on small businesses.[236] Initial analyses must also offer alternatives to the proposed rule that would "accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities,"[237] while final analyses must respond to comments received about the initial analyses and describe "the factual, policy, and legal reasons for selecting the alternative adopted" and why it rejected various alternatives.[238]

The RFA also permits small businesses affected by a regulation to sue an agency for failing to comply with the law, with possible relief in the form of "remanding the rule to the agency[] and [] deferring the enforcement of the rule against small entities."[239] Additionally, the judicial review provisions of the APA allow a court to hold a rule unlawful for failure to follow the RFA.[240] Agencies have not been subject to many RFA lawsuits—Westlaw reports only 103 cases cite the judicial review provision of the RFA—but it is yet one more "hook" with which agency policies may be challenged.[241] In several cases, the agencies have succeeded in APA challenges to their rulemakings only to have their rules remanded for the purpose of rectifying RFA analyses.[242]

Following the 1994 elections and as part of the Republican's "Contract with America," Congress enacted the other two relevant provisions. The first was the Small Business Regulatory Enforcement Fairness Act

234. *Id.* § 601.
235. *Id.* §§ 601, 603–04.
236. *Id.* §§ 603–04.
237. *Id*. § 603.
238. *Id*. § 604.
239. *Id*. § 611.
240. *Id*. § 706.
241. *Id.*
242. *See* Aeronautical Repair Station Ass'n, Inc. v. FAA, 494 F.3d 161, 163 (D.C. Cir. 2007); Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 417 F.3d 1272, 1277 (D.C. Cir. 2005).

(SBREFA), which built upon the RFA. SBREFA requires agencies to issue "small entity compliance guides" to accompany any final rule issued subject to the RFA so as to "assist small entities in complying with the rule,"[243] and to impose additional meeting requirements on three particular agencies when they issue regulations:[244] whenever the EPA, Consumer Financial Protection Bureau,[245] and Occupational Safety and Health Administration issues a proposed rule, they must convene review panels—staffed by employees from the agency, OIRA, Office of Management and Budget, and the Office of Advocacy within the Small Business Administration—to meet with and review materials offered by individuals representative of small entities affected by the rule[246] and to issue reports on the panels' findings with recommendations for modifying the proposed rules, if appropriate.

Additionally, and also as a part of the "Contract with America," Congress enacted the Congressional Review Act (CRA).[247] The CRA allows Congress to overturn any regulation through a simple majority vote in both chambers plus the President's signature within sixty days of a rule's enactment.[248] It also delays the effective date of "major rules"—those which are found by OIRA to have a predicted annual effect on the national economy of at least $100 million, major increase in costs or prices, or significant adverse effect on "competition, employment, investment, productivity, innovation, or on the ability of" U.S. companies to compete internationally—for sixty days, so as to not make significant changes to law only to have to change them back upon repeal.[249]

The importance of the CRA in slowing down the rulemaking process is twofold. First, although Congress and the President can overturn agency actions, including adjudications, using their lawmaking authorities, the CRA prohibits repeal resolutions from being filibustered in the Senate, making

---

243. Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, § 212, 110 Stat. 847 (internal quotation marks omitted). Fortunately, Congress decided to explicitly exempt the publication of these compliance guides from judicial review; however, this still in an additional requirement when agencies engage in rulemakings.

244. 5 U.S.C. § 609(b).

245. The inclusion of the Bureau was later added by the Dodd–Frank Act. Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1100G, 124 Stat. 1376, 2112 (2010).

246. These individuals may only nominally be representative of small entities. One study found that trade associations (which represent companies large and small) make up the plurality of the OIRA meeting attendees. *See* Rachel Augustine Potter, *Regulatory Lobbying has Increased Under the Trump Administration, but the Groups Doing the Lobbying May Surprise You*, BROOKINGS (July 11, 2018), https://www.brookings.edu/research/regulatory-lobbying-has-increased-under-the-trump-administration-but-the-groups-doing-the-lobbying-may-surprise-you/.

247. *See* 5 U.S.C. §§ 801–08.

248. *Id.* § 802.

249. *Id.* §§ 802, 804(2).

them easier to enact and, therefore, making regulations more likely to be overturned than policies articulated in adjudications. Second, OIRA has used its authority to designate rules as major as a hook with which to require independent agencies to conduct RIAs like those Executive Order 12,866 requires of executive agencies.[250] Although the CRA does not by itself add new procedural requirements to agency rulemakings, OIRA has used it in a way that does, at least for independent agencies.

IV. ADJUDICATION AND THE *CHEVRON* FRAMEWORK

Agencies' policies created through adjudication are toothless if those policies are not binding on the public. Unless courts find these policies to be legally binding, the privilege to articulate policy by order, promised by the APA and the Supreme Court, will be nothing more than a paper tiger. This Part describes the philosophical basis for *Chevron* deference and explains how agency adjudication can be structured to be as legitimate a venue for policymaking as informal rulemaking.

A brief discussion about the dichotomy between formal and informal adjudication, and why it does not matter for this Article's purposes, is necessary. Under the APA, the term "formal adjudication" refers to those adjudications that are subject to the Act's formal hearing procedures,[251] whereas "informal adjudication" refers to those that are not. However, it has been noted that some APA informal adjudications have more procedures and procedural safeguards for litigants than APA formal adjudications.[252] These additional safeguards may stem from agencies' organic statutes or from their rules of procedure. As such, the consideration of how adjudications can be made to better comport with the rationales of *Chevron* should rely on the quality of the procedural safeguards offered during an adjudication, rather than relying on the APA's insufficiently specific dichotomy.

A. When Should Courts Defer to Agency Interpretations?

The Supreme Court has offered several rationales for deferring to reasonable agency interpretations when judges find statutes ambiguous. In

250. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, M-19-14, GUIDANCE ON COMPLIANCE WITH THE CONGRESSIONAL REVIEW ACT (2019).

251. 5 U.S.C. §§ 554, 556–57.

252. *See* MICHAEL ASIMOW, EVIDENTIARY HEARINGS OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 3 (Nov. 10, 2016) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/sites/default/files/documents/adjudication-outside-the-administrative-procedure-act-final-report_0.pdf.

Skidmore v. Swift,[253] the Court identified that agencies may have "more specialized experience and broader investigations and information than is likely to come to a judge in a particular case."[254] In *Chevron v. Natural Resources Defense Council, Inc.*,[255] the Supreme Court declared that agencies likely have the technical expertise that courts lack, and that the executive branch has a stronger claim to creating policy than do the courts.[256] The Supreme Court has also recognized various levels of deference to agency interpretations, ranging from those interpretations which have the force and effect of law and to which judges *must* defer (i.e., *Chevron* deference), to those interpretations with the mere "power to persuade" judges that the agency's view of the statute is correct (i.e., *Skidmore* deference).[257]

In *Chevron*, the Supreme Court explained that when a "statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[258] Yet, the Court soon confronted situations in which this simple test was inadequate and it began to narrow "*Chevron*'s domain."[259] In a series of cases, the Supreme Court declined to grant full *Chevron* deference to agency interpretations that were not the product of "the rigors of the Administrative Procedure Act"[260] or, particularly, "a formal adjudication or notice-and-comment rulemaking."[261]

In *United States v. Mead Corp.*,[262] the Supreme Court further clarified the *Chevron* standard. The Court cited precedent to declare that "courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position" to determine whether an interpretation is worthy of deference,[263] and deemed that courts would only grant *Chevron* deference to those interpretations with "legal force."[264] It quoted *Skidmore* to say that "the thoroughness evident in [an agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade" help.[265] Further, the Court provided that courts are not to grant

253. 323 U.S. 134 (1944).
254. *Id.* at 139.
255. 467 U.S. 837 (1984).
256. *Id.* at 864–66.
257. *Id.* at 866; *see also Skidmore*, 323 U.S. at 140.
258. *Chevron*, 467 U.S. at 843.
259. *See supra* text accompanying note 2.
260. Reno v. Koray, 515 U.S. 50, 61 (1995) (internal quotation marks omitted).
261. Christensen v. Harris County, 529 U.S. 576, 587 (2000).
262. 533 U.S. 218 (2001).
263. *Id.* at 228 (internal citations omitted).
264. *Id.* at 233.
265. *Id.* at 228 (quoting Skidmore v. Swift, 323 U.S. 134, 140 (1944)).

Chevron deference "where it is in doubt that Congress actually intended to delegate particular interpretive authority to an agency."[266]

Despite the Court's narrowing on *Chevron*, and although cases where *Chevron* deference is granted to adjudications are few and far between (likely because agencies today infrequently use adjudications to enact new policies), several cases make clear that the Supreme Court fully intends to grant deference to policies articulated through adjudication when deserved. In *INS v. Aguirre-Aguirre*,[267] for example, the Supreme Court granted *Chevron* deference to a Board of Immigration Appeals (BIA) interpretation of what constitutes a "serious nonpolitical crime."[268] The Court looked to the statute being interpreted and to the nature of the political and regulatory system in which the adjudication was being conducted, and it concluded that *Chevron* deference was warranted because the "judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions."[269] Additionally, in *Christensen v. Harris County*,[270] the Court declined to grant deference to "an interpretation contained in an opinion letter," as the policy was not "arrived at after, for example, *a formal adjudication* or notice-and-comment rulemaking."[271] And in *Mead*, the Court "recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the rulemaking *or adjudication* that produces regulations or rulings for which deference is claimed."[272]

There are legitimate questions as to the propriety of *Mead*'s narrowing of *Chevron*, though this debate is for another paper.[273] Given *Mead*'s status as law of the land, scholars have worked to provide the theoretical underpinnings for this reframing of *Chevron* deference and, more recently, scholarship has attempted to make policymaking by adjudication more difficult for agencies by positioning it as unworthy of deference by courts. In particular, Professors Kristin Hickman and Aaron Nielson have a new piece titled *Narrowing* Chevron*'s Domain* in which they argue against even formal

266. *Id.* at 230 (quoting *Harris County*, 529 U.S. at 596–97 (Breyer, J., dissenting)).

267. 526 U.S. 415 (1999).

268. *Id.* at 424.

269. *Id*. at 425 ("A decision by the Attorney General to deem certain violent offenses committed in another country as political in nature, and to allow the perpetrators to remain in the United States, may affect our relations with that country or its neighbors.").

270. 529 U.S. 576 (2000).

271. *Id.* at 587 (emphasis added).

272. United States v. Mead Corp., 533 U.S. 218, 229 (2001) (emphasis added).

273. *See*, *e.g.*, *id*. at 241 (Scalia, J., dissenting) ("The Court has largely replaced *Chevron*, in other words, with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th'ol' 'totality of the circumstances' test.").

adjudications receiving *Chevron* deference.[274]

With *Mead's* narrowing of *Chevron*, the doctrine is no longer solely about the executive branch's stronger claim to being a democratically legitimate policymaker than the courts. Hickman and Nielson summarize the doctrine as now being about three things—"delegation, expertise, and accountability"—and an agency pronouncement without any one of these considerations should not be automatically granted *Chevron* deference.[275] Taking them one at a time, it is clear that agency adjudications can meet that threshold.

***Delegation*:** As articulated in *Mead*, a court is not to give deference to an agency when Congress has not intended for the agency to fill in gaps.[276] When Congress enacts a statute, either the courts or the agencies can interpret it, and it may prefer one or the other. It makes sense, therefore, that a court would only defer to an agency interpretation of a statute if Congress intended for it to be that way.

In *Chevron*, the Supreme Court declared "that delegation of legislative power is ubiquitous," leading scholars to presume that "the Court appeared to renounce any effort to police attempts by Congress to shirk its constitutional responsibilities."[277] Since then, however, the Court has provided further color in how it will determine which instances it will find policymaking authority has been delegated to an agency. In *Barnhart v. Walton*,[278] the Court wrote that it would look at, among other things, "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time" to determine whether the issue is one Congress intended to delegate.[279]

As the issue of delegation is one of whether Congress intended for courts to defer to agency interpretations, the method by which an agency articulates a policy should not affect congressional intent. However, Hickman and Nielson argue that there is less of a rationale for courts to presume Congress intended agency adjudications to receive deference than for rulemakings.[280] With rulemakings, "Congress tends to be quite clear in granting agencies the

274. Hickman & Nielson, *supra* note 2.

275. *See id.* at 938 (discussing that without any or all of these three attributes, agency interpretations should instead be given *Skidmore* deference, or deference only to the extent the agency's opinion has the "power to persuade."); *see also* Skidmore v. Swift, 323 U.S. 134, 140 (1944).

276. *See Mead*, 533 U.S. at 231–32 (2001).

277. Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 866 (2001).

278. 535 U.S. 212 (2002).

279. *Id.* at 222.

280. Hickman & Nielson, *supra* note 2, at 972.

authority to adopt legally binding regulations," and the APA requires agencies to "follow notice-and-comment rulemaking procedures" when engaging in informal rulemaking.[281] This combination means Congress intends for the products of informal rulemakings to be granted deference.[282] "Adjudication is different," argue Hickman and Nielson, as "Congress rarely expressly requires the formal adjudication procedures imposed by the APA."[283] And since courts largely defer to agencies' interpretations that statutes permit informal adjudication, granting deference in those instances provides an "ability for an agency to choose its own deference standard [with] opportunities for strategic behavior."[284]

However, Congress frequently does not expressly grant rulemaking authority in statute, yet agencies promulgate rules anyway and courts defer to them.[285] Further, for many regulatory statutes, it is likely that Congress intended (if members of Congress thought of it at all) to permit agencies to make policy through adjudications because adjudication was the default method for agency policymaking for much of American history.[286] When Congress imbued the first administrative agencies with the authority to adjudicate claims, it clearly intended for them to interpret their organic statutes—otherwise the agencies would have been required to sue in Federal court. The ICC, the first modern administrative agency, was granted ratemaking authority, and the FTC was created explicitly to "combine non-adjudicative with adjudicative functions" as a way to avoid the courts that had previously refused to interpret the antitrust laws in the way Congress intended.[287] Adjudication, not rulemaking, was the expected method for agency policymaking.

To that end, the determination of whether Congress intended for a particular statute to delegate interpretation rights to agencies instead of courts should not turn on whether the interpretation is arrived at through a rulemaking or adjudication.

***Expertise*:** As the Court explained in *Chevron*, judges may defer on matters of regulatory statutes when they "are not experts in the field," but

281. *Id.* at 968.

282. *Id.* at 971.

283. *Id.* at 968.

284. *Id.* at 971.

285. *See, e.g.*, Texas Rural Legal Aid, Inc. v. Legal Servs. Corp., 940 F.2d 685, 689 (D.C. Cir. 1991) (finding that the Legal Services Corporation's responsibility to "administer" an act granted it rulemaking authority and deferring to its rule).

286. *See supra* Part II.A. (discussing how agencies acted primarily through adjudication during the New Deal period).

287. Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 79 (2003).

agencies are.[288] In that case, the Court found that Congress intended for the statute's interpretation to "reconcil[e] conflicting policies" within a "technical and complex" regulatory scheme, and it noted that "[p]erhaps that body consciously desired the [agency] to strike the balance . . . thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position" to make that decision than itself.[289]

However, that logic only applies if agencies actually do have particularized expertise,[290] and they may need to demonstrate that they are the "authoritative interpreter[s]" of a particular statute, rather than judges, for courts to grant them deference.[291] Given today's case law and the hard look review standard, agencies will likely only demonstrate their expertise by explaining their analyses of the facts and rationales for the decisions they make.[292]

Courts look to preambular text in notice-and-comment rulemakings for agencies' demonstrations of their expertise in interpreting a given statute.[293] But adjudicatory opinions should also be sufficient vehicles if the expertise is similarly demonstrated. Society supports the decisions of judges and trusts that they uphold the rule of law because they thoroughly articulate their rationales in their opinions, and the knowledge that a failure to provide proper rationales for judgments will result in decisions being overturned on appeal strengthens this trust. Similarly, agencies can demonstrate their particularized expertise through their opinions, explaining their

---

288. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 865–66 (1984).

289. *Id*. at 865.

290. *See, e.g.*, Collins v. Nat'l Transp. Safety Bd., 351 F.3d 1246, 1252–53 (D.C. Cir. 2003) ("Where a statute is generic, two bases for the Chevron presumption of implied delegation are lacking: specialized agency expertise and the greater likelihood of achieving a unified view through the agency than through review in multiple courts.").

291. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 983 (2005). As the Supreme Court said in *Mead*, "courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." United States v. Mead Corp., 533 U.S. 218, 228 (2001) (internal citations omitted).

292. Another benefit of requiring agencies to explain their analyses is that it provides for what scholars have deemed "fire-alarm oversight." Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1791 (2007). Deferring only to those policies that are backed by explanations sufficient to understand the agencies' rationales can allow Congress, the president, and the public to see errors of logic or political judgment. Only when this information is known can the public work for changes in policy.

293. *See e.g.*, Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (looking to an agency's *Federal Register* notice to determine whether "the agency has . . . offered an explanation for its decision that . . . could not be ascribed to . . . the product of agency expertise").

interpretations of statutes and the application of those interpretations to the facts at hand. And agencies' failures to properly demonstrate their expertise will, like judges, result in their decisions being overturned on appeal.

***Accountability / Outside Input*:** What Hickman and Nielson name *accountability* may also be described as allowing for agencies to receive information from non-agency parties.[294] In *Christensen* and *Mead*, the Supreme Court explained that judges should avoid determining policy if the elected branches could do so instead, but only to the extent that agency interpretations are found in formal adjudications, notice-and-comment rulemakings, or other agency actions that have "legal force."[295] One unifying aspect of agency actions with legal force is that they all require agencies to articulate their rationales, allowing the public to observe the agencies' thought processes. But they also allow for non-agency parties to offer information that may be counter to the agencies' thinking, either through writing comment letters, participating in on-the-record hearings, or other mechanisms.

Such processes to provide some sort of public input can expand the information available to agencies for consideration. As Hickman and Nielson noted, "agency officials do not have a monopoly on knowledge," and agency officials can be well-served by having agency outsiders provide additional information or data that can help shape their thinking.[296] Much like how Congress has hearings to learn what it needs to know before legislating, agencies act similarly to ensure they have full information before policymaking.[297]

Processes that allow for outside parties to offer input may also deem a policy "more legitimate" in the eyes of the public[298] and "can help us view the agency

---

294. *See* Hickman & Nielson, *supra* note 2, at 938–39.

295. Christensen v. Harris County, 529 U.S. 576, 587 (2000); *Mead*, 533 U.S. at 233.

296. Hickman & Nielson, *supra* note 2, at 966 ("An idea that sounds good in an agency's conference room may not make sense in the real world, for some reason that the agency had not considered. Or an agency's data may be flawed, for some reason that the agency does not know. When agencies act with less knowledge—including 'unknown unknowns,' that is, things that the agency does not know it does not know—they may go astray.")

297. These processes may "serve[] as a rough substitute for the deliberation and accountability that attend [congressional] lawmaking." Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 372 (2019).

298. Hickman & Nielson, *supra* note 2, at 967 (citing Jeremy Kessler, *The Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718, 718–22 (2016)). However, Nicholas Bagley has articulated the position that procedure and legitimacy do not actually go hand in hand. Bagley, *supra* note 297, at 369. Rather, those who argue for their linking believe that "any procedure that slows, checks, and constrains agencies will be constitutionally virtuous precisely because it hobbles them. And no matter how many more procedures you add, they will never, ever be enough. It's a sucker's game, and we should stop playing it." *Id.* at 370, 378.

decision as democratic and thus essentially self-legitimating."[299] Even if the agencies go in a different direction than what any individual member of the public may have suggested, the fact that there was an opportunity to provide input may make the policy more politically valid. Furthermore, comment opportunities, even if no comments were received, may help convince judges that agencies have more of a right to dictate policy than do courts.

Notice-and-comment rulemaking clearly supports the ideas of political accountability and non-agency parties providing information, as it requires agencies to solicit and review the public's input on any and all facets of proposed regulations, respond on the record to material comments they receive, and thoroughly explain their rationales. However, adjudications can, with on-the-record hearings and permitting amicus briefs, enable the public's participation in adjudicatory policymaking.

B. How Adjudication Could Fit into the Chevron Framework

Many adjudications, including formal APA adjudications, qualify for *Chevron* deference under the framework narrowed by *Mead*. Yet Hickman and Nielson still counsel against providing deference to adjudications because, "[t]o the extent that the Court has justified *Chevron* on pragmatic grounds, the pragmatic argument for it is stronger in the rulemaking context . . . ."[300] It is true that informal rulemaking currently provides opportunities for public participation and notice of new policies far better than adjudication, but there are several processes that agencies could enact to ensure adjudications provide the same demonstration of expertise, opportunities for public input, and fair notice of new interpretations as informal rulemakings.[301]

Offering the following suggestions is not meant to imply that courts should require agencies adopt any or all of them to be granted *Chevron* deference. The procedural requirements for rulemakings are not the same as for adjudications—sections 553 and 554 of the APA are different provisions, after all—and there are certainly other methods for ensuring the "pragmatic" benefits of rulemaking can be offered through adjudication as well.

Public Participation: One significant premise for the supremacy of rulemaking over adjudication is that only through rulemaking can the

299. Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1343 (2011).

300. Hickman & Nielson, *supra* note 2, at 968.

301. Research has shown that agency adjudications can support rule of law values above and beyond those identified by Hickman and Nielson. *See, e.g.*, Katie R. Eyer, *Administrative Adjudication and the Rule of Law*, 60 ADMIN. L. REV. 647 (2008) (discussing the ways through which federal agencies promote consistency and predictability in adjudicative lawmaking).

public have a say in agency policy.[302] Hickman and Nielson posit that, "[a]lthough agencies sometimes may gain enough information to make optimal policy through the adjudicatory process . . . there is reason to fear that sometimes they do not."[303] They note that agencies can gain this information "if the adjudication is widely publicized and the agency allows nonparties to submit relevant information," but "[a]djudications typically involve only a narrow group of parties."[304]

However, agencies can—and do—solicit amicus briefs, offering the public an opportunity to weigh in on policies that may be set in an adjudication. A recent report published by the Administrative Conference of the United States notes the variety of methods agencies use to solicit briefs, including directly soliciting amicus briefs, asking other affected agencies or agencies with expertise to weigh in, or permitting parties to solicit amicus briefs on their own behalf.[305] Although these amicus procedures largely do not provide the comment opportunities that informal rulemaking does, that is not to say that agencies cannot make them so. Agencies could—and should—change their rules of practice to accept amicus briefs from anyone who wishes to submit comments on adjudications that may result in a policy change, or for every adjudication.[306]

Agencies could also permit intervenors or other forms of limited participation. The Federal Rules of Civil Procedure permit intervention to allow third parties who would be affected by a case's outcome to be heard, and the logic may apply to agency adjudications as well.[307] Although amicus

---

302. *See* Hickman & Nielson, *supra* note 2, at 967 ("A process that requires an agency to interact with broad segments of society and explain why it has acted in view of concerns raised by the general public, all else being equal, typically should yield more legitimate outcomes.").

303. *Id.*

304. *Id*.

305. CHRISTOPHER J. WALKER & MATTHEW LEE WIENER, AGENCY APPELLATE SYSTEMS 35 (2020) ("Some appellate bodies, like the NLRB, sometimes actually solicit amicus briefs in significant cases. At the [Merit Systems Protection Board] . . . the Office of Personnel Management and the Office of Special Counsel can be asked to weigh in . . . . In immigration adjudication, whether to allow amicus briefs is at the sole discretion of the BIA. At the [U.S. Citizenship and Immigration Services (USCIS)], amicus briefs are only allowed if they are solicited by the party or the USCIS."); *see also* CHRISTOPHER J. WALKER & MATTHEW LEE WIENER, AGENCY APPELLATE SYSTEM: APPENDICES C–N 11 (2020) (giving examples of how various federal agencies solicit public input on adjudicative lawmaking).

306. *See* Public Participation in Administrative Hearings (Recommendation No. 71–6), 38 Fed. Reg. 19,789 (July 23, 1973) (encouraging agencies to grant public intervenors more rights in administrative hearings).

307. Fed. R. Civ. P. 24; *see also* Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 359 (1972) (discussing when intervention may be prudent in administrative adjudications).

briefs are likely to be sufficient in many instances, there may be times when intervention would be preferable, and as such, agencies could change their rules of practice to permit intervention when suitable.

Notice of Comment Opportunities: Another identified benefit of rulemaking over adjudication is that the APA requires that notices of proposed rulemakings be published in the *Federal Register* to alert interested individuals that policy changes may be occurring.[308] There is no such requirement for adjudications. However, agencies could begin doing so in advance of policy-changing adjudications. If an agency believes it may decide a case in a way that is precedent-setting or policy-changing, it could place a notice in the *Federal Register* that describes the issues in the case (or simply link to the case's docket or filings) and solicits amicus briefs. An agency could even receive briefs through regulations.gov, as many do for rulemakings. Or, at minimum, agencies could improve or begin using docketing systems so that the public can easily view and submit amicus briefs for adjudications.[309]

This combination is not unusual—providing notice of pending policy-changing adjudications and the opportunity to comment is essentially the system used by federal appeals courts, and court systems world-wide[310]—and would make commenting on adjudications just as easy as commenting on a rulemaking.

Notice and Explanation of New Policies: Additional benefits of rulemaking include the explanation of agencies' rationales for enacting new policies and responses to public comments, as well as notice of new policies' enactments through publishing final rulemakings in the *Federal Register*. In contrast, policies authored through adjudications may not address arguments made in amicus briefs and are usually found only in agency opinions. Both are easy to address.

To ensure agencies are held as accountable for their adjudications as for their rulemakings, they would have to respond on the record to amici comments. This should not be difficult. Agencies already have experience responding to comments in the rulemaking context, and they should be able to apply the same standards of replying to material comments to adjudications as well. Courts could quite easily see if material arguments were offered in amicus briefs that agencies did not address.

Furthermore, that agency adjudications are not published in the *Federal Register*, as are rulemakings, does not intrinsically raise due process or unfair

---

308. 5 U.S.C. § 553(b).

309. *See generally* Adoption of Recommendations, 83 Fed. Reg. 30,683, 30,686 (June 29, 2018) (offering recommendations for developing electronic case management systems).

310. It is likely even better than what the Supreme Court uses for its shadow docket. *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 NYU J.L. & LIBERTY 1 (2015) (using the term "shadow docket" to describe federal court decisions issued without following court procedures).

surprise concerns—judge-made law is also found only in opinions. However, it is true that they can be more difficult for the public to learn about or to locate. Agencies could publicize their decisions, with extra effort given to publicize those that are designated as precedential. The BIA, for example, publishes all precedential decisions on its website with summaries of each precedential decision's holdings and allows anyone to sign up to the receive notifications of newly published decisions.[311] Agencies could also issue press releases or guidance describing the new holdings, and compile their adjudication holdings in compendiums, akin to rulemakings and the *Code of Federal Regulations*.

No Unfair Surprise: Opponents of adjudicatory policymaking also raise the objection that policies articulated are retrospective, rather than prospective. As courts have routinely described, one fundamental principle of the rule of law is that those subject to the law must know what the law is before acting. If laws can be applied retroactively, not only would that put a chilling effect on legal activities that may be made illegal in the future, but it also "is fundamentally unfair and unjust."[312] The Supreme Court has long understood "that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly;"[313] has articulated a "principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires;'"[314] and has consistently warned against agencies engaging in actions that could cause "unfair surprise."[315]

Despite these rulings, apprehension of unfair surprise remains. Then-President Trump in 2019 signed an executive order that expressed concern that "some agency practices with respect to enforcement actions and adjudications undermine the APA's goals of promoting accountability and

---

311. *See*, *e.g.*, Matter of H-Y-Z-, 28 I&N DEC. 156 (BIA 2020) (stating that "[a]bsent a showing of prejudice on account of ineffective assistance of counsel, or a showing that clearly undermines the validity and finality of the finding, it is inappropriate for the Board to favorably exercise our discretion to reopen a case and vacate an Immigration Judge's frivolousness finding.").

312. Robert S. Summers, *The Principles of the Rule of Law*, 74 NOTRE DAME L. REV. 1691, 1704 (1999).

313. Grayned v. City of Rockford, 408 U.S. 104, 108 (1971).

314. Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 156 (2012) (quoting Gates & Fox Co. v. Occupational Safety & Health Review Comm'n, 790 F.2d 154, 156 (D.C. Cir. 1986)).

315. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2406 (2019) (internal citation and quotation marks omitted); *Christopher*, 567 U.S. at 156; FCC v. Fox Television Stations, Inc., 567 U.S. 239 (2011); Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 170–71 (2007); Martin v. Occupational Safety & Health Rev. Comm'n., 499 U.S. 144 (1991); NLRB v. Bell Aerospace Co., 416 U.S. 267 (1973). These cases define and clarify "unfair surprise" as an agency taking a new policy position in an adjudicative proceeding, thereby holding wronged parties to legal standards the parties could not have been aware of at the time of the act in question.

ensuring fairness" and cause unfair surprise.[316] Hickman and Nielson argue that "agency adjudications impose present legal consequences for past actions, making deference in such instances retroactive in its orientation and undermining reliance interests," and, therefore, courts should not grant deference to pronouncements made through adjudication.[317]

This concern is misplaced for several reasons. First, the sheer number of cases from the Supreme Court and Courts of Appeals addressing unfair surprise should assuage fears of agencies applying policy retroactively.[318] Agencies are on notice that they cannot cause unfair surprise, and even if one attempts to, courts will refuse to allow it.

The concern about unfair surprise is misplaced also because agencies still can—and should—engage in retrospective adjudicatory policymaking that does not result in unfair surprise. As noted earlier, the interpretation of laws and their application to new sets of facts can be a form of policymaking, yet this action is at the very essence of adjudication, which courts do on a daily basis.[319]

As an example of how this type of action plays out in practice, take a recent BIA case (that has now been vacated due to a pending rulemaking). The Immigration and Nationality Act authorizes the Attorney General, in his discretion, to grant asylum to individuals if they show that they have a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[320] Under existing BIA precedent, to qualify for membership in a particular social group, the group must be "(1) composed of members who share a common immutable characteristic; (2) defined with particularity; and (3) socially distinct within the society in question."[321] In his decision in *Matter of L-E-A*, the Attorney General declared that "most nuclear families are not inherently socially distinct and therefore do not qualify as 'particular social groups'" for purposes of the test.[322] By making this decision, the Attorney General did not introduce any

316. Exec. Order No. 13,892, 84 Fed. Reg. 55,239, 55,239 (Oct. 15, 2019).

317. Hickman & Nielson, *supra* note 2, at 971.

318. *See* cases cited *supra* note 315315 (listing court cases that have decried unfair surprise); *see also supra* Part I.B (explaining that policy changes in adjudicative proceedings cannot apply to actions taken in reliance on policy positions that were valid at the time of the act in question).

319. *See* Harper v. Virginia Dep't of Tax'n, 509 U.S. 86, 106 (1993) (Scalia, J., concurring) ("[P]rospective decisionmaking is quite incompatible with the judicial power[] and . . . courts have no authority to engage in the practice."); Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting) ("Judicial decisions have had retrospective operation for near a thousand years.").

320. 8 U.S.C. § 1101(a)(42)(A); *id.* §§ 1158(b)(1)(A)–(B)(i).

321. Matter of L-E-A, 27 I&N DEC. 581, 581 (A.G. 2019).

322. *Id.* The Attorney General vacated this decision in 2021, citing the Department of Justice's "pending rulemaking specifically addressing the meaning of 'particular social

unfair surprise into the adjudication—this particular issue had not been decided before, and whether a nuclear family is a "particular social group" for purposes of the test is rather ambiguous—but he was still setting a new policy.[323] Further, during the period before the opinion was vacated, it was published precedent, and it would be straightforward for courts to grant the BIA deference to this new policy.

But, for argument's sake, presume that previous BIA precedent *had* held that a nuclear family could be a particular social group, and the Attorney General desired to change it. It is certainly possible a court would find that changing the policy constituted unfair surprise, in which case the new precedent should not apply to this immigrant in this adjudication. However, courts should still apply this new policy going forward, as notice would now be given that this interpretation is law.[324]

Administrability: Finally, concern has been expressed that the law around applying *Chevron* to adjudications "is a mess," and that administrability concerns warrant a "bright-line rule" that prohibits policies articulated in adjudications from receiving deference.[325] Hickman and Nielson posit that courts could restrict "*Chevron* to formal adjudications, while excluding informal adjudications," which they say would be an improvement, but note that some informal adjudications have more processes than APA formal adjudications.[326] Limiting deference to formal adjudications and informal adjudications with evidentiary hearings "could easily slip into asking which highly formalized informal adjudications are formal enough, and then we are right back where we started with *Mead*."[327]

As the above solutions to Hickman's and Nielson's concerns should demonstrate, there are ways to easily administer deference to agency adjudications, and such administration would only get easier the more agencies utilize adjudicatory policymaking. As it stands, advertising a policymaking, providing a comment opportunity, responding to material

---

group.'" Matter of L-E-A, 28 I. & N. Dec. 304, 305 (A.G. 2021).

323. Matter of L-E-A, 27 I&N DEC. 581, 581 (A.G. 2019).

324. Similarly, a new policy could apply to other cases while the initial case is still being litigated, so long as the grounds for continued litigation are not the illegality of the policy.

325. Hickman & Nielson, *supra* note 2, at 977–79 (internal citations omitted).

326. *Id.* at 980.

327. *Id*. Specifically, Hickman and Nielson posit restricting *Chevron* deference to those adjudications which are Type A or Type B in Professor Asimow's classification system. In Asimow's classification, Type A adjudications are those that are "governed by the adjudication sections of the [APA]"—sections 554, 556–57—whereas Type B adjudications are those "administered by federal agencies through evidentiary hearings required by statute, regulation, or executive orders, that are not governed by the adjudication provisions of the [APA]." Asimow, *supra* note 252, at 2. Type C adjudications are all others. *Id.*

comments, and publishing and publicizing a new policy are generally the requirements for informal rulemaking. If agencies know they can get deference to their adjudications only by doing these four things, they will do them. It will also be easier for courts and the public to recognize when a new policy, derived from interpreting a statute, will receive deference.

The following table compares the current informal rulemaking process to options for aligning adjudications:

When Should Courts Defer to Agency Interpretations?		
	Rulemakings	**Adjudications**
Public Notice of Comment Opportunity	*Federal Register* publication	Public docketing system or *Federal Register* publication
Public Comment Opportunity	Comment submissions under § 553	Amicus briefs
Respond to Material Comments	Respond to material comments in the final rule's preamble	Respond to material comments (from party filings and amicus briefs) in the adjudication's opinion
Publication of Final Policy	*Federal Register* and *C.F.R.* publication	Identify cases as precedential, guidance document, press release, website publication, *Federal Register* publication
No Unfair Surprise	Prospective application only	Retrospective interpretation with no unfair surprise – or – Prospective application if unfair surprise is found

Hickman and Nielson write that if deference is restricted to rulemakings, "the result will be outcomes that are more consistent with *Chevron's* delegation, expertise, and accountability."[328] This statement is not necessarily true. Where Congress has delegated policymaking authority to agencies, they can enact policies through adjudication that are just as high-quality and legitimate as rulemakings.

328. Hickman & Nielson, *supra* note 2, at 965.

CONCLUSION

In many circumstances, adjudication is just as effective a policymaking tool as—if not better than—informal rulemaking. The design of adjudications, with a record on which agency policymakers can observe the concrete policy implications of a course of action, can lead to better policymaking by agency decisionmakers than through rulemakings. Further, the lack of excessive judicial, executive, and legislative requirements on adjudications currently mandated for rulemaking means that agencies can use the former to create policy more expeditiously than through the latter, while maintaining similarly high levels of public participation and accountability. Finally, legal safeguards are in place to ensure that those with cases being adjudicated are treated fairly and justly, with protections against unfair surprise and mandates that agency decisions be based in adjudicative facts so as to prevent agencies from using a case solely as a vehicle to articulate a new policy.

With that in mind, agencies should consider how to incorporate adjudication into their policymaking activities. Rather than defaulting to extensive, time consuming rulemakings, agencies should examine which policies can be effectuated by adjudications. Additionally, when policies must be enacted through regulation, agencies should hasten the rulemaking process by leaving more gaps for adjudication, allowing the law to develop gradually and as necessary. By no means should agencies adopt adjudication as their sole method for developing policy, but agencies should not rule the option out.

Finally, courts should not exclude adjudicatory policymaking from receiving *Chevron* deference based solely on its form. As the Supreme Court has made clear throughout the nation's history—during the country's earliest years, immediately following the enactment of the APA, and in 21st century cases—it is permissible for judges to defer to policies articulated by order. If *Chevron* really is about delegation, expertise, and public engagement, adjudications can be made to fit all three: if agencies are delegated authority to make policy, it should not matter what method they use; if agencies must demonstrate their expertise, they can do that equally as well in adjudicatory opinions as in regulations' preambles; and if agencies must permit some form of public participation, they can ensure the public has just as many opportunities for comment in adjudications as in rulemakings.