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LIMITS ON AGENCY DISCRETION TO CHOOSE BETWEEN RULEMAKING AND ADJUDICATION: RECONSIDERING *PATEL v. INS* AND *FORD MOTOR CO. v. FTC*

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INTRODUCTION

A case can be "underrated" for several reasons. One type of underrated case is the "big" case that the conventional wisdom considers to have been wrongly decided. In constitutional law, for example, some scholars might consider *Lochner v. New York*[1] to be underrated, in that they believe the case to be correct, or at least not as wrong as the conventional wisdom has it. But right or wrong, the case is "big" in that it has come to stand for a fundamental principle of law—even though there is disagreement as to what that fundamental principle is.[2] Under this theory, underratedness is measured by "correctness," with the case's importance taken as a given.

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1. 198 U.S. 45 (1905).
2. *See, e.g.*, David E. Bernstein, Lochner*-Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1 (2003) (setting forth different understandings of *Lochner*).

Professors Weaver and Jellum's contribution to this forum,[3] defending an unquestionably "big" case, *SEC v. Chenery Corp.* (*Chenery II*),[4] reflects this conception of underratedness.

Another way to think about underratedness is to focus on small cases, those that do not explicitly stand for or are generally not thought to stand for grand principles. Such small cases might be underrated if, properly understood, they do in fact stand for something fundamental. Under this theory, underratedness is measured not just (or even primarily) by correctness, but by the case's actual importance. Indeed, if the case confronts a fundamental tension in the law, then it should be thought of as having some intrinsic importance. Even if its resolution of that tension is incorrect, a case still might be useful—and thus potentially underrated—if its error has the effect of pointing towards the correct path.

I offer a pair of candidates for most underrated case: *Patel v. INS*[5] and *Ford Motor Co. v. FTC*.[6] These two Ninth Circuit cases consider the limits of agencies' concededly broad discretion to proceed via adjudication as opposed to rulemaking. These cases are closely related: *Patel* applies a principle, which I call the "anti-circumvention" principle,[7] on which *Ford Motor* then expands. *Patel*'s limits on agency procedural discretion fit neatly with the substantive rule that agencies may not ignore their own regulations. For this reason, *Patel* is correctly decided.

But *Patel* is underrated. Compared with *Ford Motor*, it is far less discussed by commentators[8] and courts,[9] and the principle it announces may suffer by association with *Ford Motor*'s more aggressive—and ultimately incorrect—variant. *Patel* deserves more attention. By stating an exception to the general rule that agencies can choose between rulemaking and adjudication, *Patel* stakes out the limitations of that rule. In

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3. Russell Weaver & Linda Jellum, Chenery II *and the Development of Federal Administrative Law*, 58 ADMIN. L. REV. 815 (2006).

4. 332 U.S. 194 (1947) (*Chenery II*).

5. 638 F.2d 1199 (9th Cir. 1980).

6. 673 F.2d 1008 (9th Cir. 1981).

7. *See* William D. Araiza, *Agency Adjudication, the Importance of Facts, and the Limitations of Labels*, 57 WASH. & LEE L. REV. 351, 397 (2000) (using this terminology).

8. *See, e.g.*, ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 115-17 (1993) (devoting three pages to *Ford Motor* and its progeny, but citing *Patel* only in footnotes); CHARLES H. KOCH, WILLIAM S. JORDAN III & RICHARD W. MURPHY, ADMINISTRATIVE LAW: CASES AND MATERIALS 160-62 (5th ed. 2006) (excerpting *Ford Motor* but not mentioning *Patel*). *But see* Magill, *infra* note 69, at 1408 n.87 (citing *Patel* as a rare example of a court invalidating an agency's reliance on adjudication instead of rulemaking).

9. In the last ten years, only one appellate court has cited it for anything close to the principle which qualifies it, in my view, as underrated. *See* Pfaff v. HUD, 88 F.3d 739, 748 (9th Cir. 1996) (setting forth *Patel* as a situation where the agency's reliance on adjudication amounted to an abuse of discretion).

delineating the extent of agency discretion, *Patel* makes an important contribution to administrative law, and thus qualifies as an underrated case, both for being "correct" and "important."

For its part, *Ford Motor*'s expansion of the anti-circumvention principle is ultimately incorrect; thus, I am not arguing that *Ford Motor* is underrated because it was correctly decided.[10] However, the heavy criticism of *Ford Motor*[11] is unbalanced by a recognition of the case's usefulness. *Ford Motor* takes *Patel*'s anti-circumvention principle to its logical endpoint. In doing so, it reveals the limits of that principle and illustrates important truths about the role of procedure in administrative law. Its attempt to apply basic administrative law principles, while ultimately misfiring, does not warrant one-sided criticism. While incorrect, *Ford Motor* deserves more credit than it gets.

Part I of this Article lays out *Patel* and *Ford Motor*, and the eventual fate of the anti-circumvention principle in the Ninth Circuit. Part II defends *Patel*, and places it within the fabric of other administrative law doctrines. Part III briefly discusses *Ford Motor*. It does not defend *Ford Motor*'s result, but explains the case's importance in illuminating the outer limits of agency discretion to choose its policymaking vehicle. It also argues that, ultimately, *Patel* and *Ford Motor* can be visualized as standing close to each other, but nevertheless on opposite sides of the line separating acceptable and unacceptable uses of agencies' discretion on this issue. If nothing else, the usefulness of these two cases in illuminating that line warrants more attention to these cases and increased consideration at least of *Patel*.

I. ANTI-CIRCUMVENTION IN THE NINTH CIRCUIT

Patel dealt with an agency's discretion to choose between rulemaking and adjudication as its regulatory vehicle. Common wisdom indicates that an agency has wide, though not complete, discretion to make this choice.[12] This Article presumes the reader's familiarity with the basic doctrine and provides here only a brief framework.[13] The Court recognized agencies'

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10. This conclusion reflects a reconsideration of views I had previously expressed. *See* Araiza, *supra* note 7, at 398-99 (defending *Ford Motor*).

11. *See, e.g.*, 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 384 (4th ed. 2002) (placing *Ford Motor* in a category of cases that "announce limits on agency discretion that would produce havoc if they were applied to all agencies," and describing these cases as "wrongly decided"); RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIL, ADMINISTRATIVE LAW AND PROCESS 301 n.142 (4th ed. 2004) (describing *Ford Motor* as "almost certainly . . . an aberration," and noting the ABA's criticism of it).

12. *See* SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947) (explaining that agencies must enjoy significant discretion to choose between rulemaking and adjudication); NLRB v. Bell Aerospace Co., 416 U.S. 267, 295 (1974) (holding that the choice between rulemaking and adjudication lies within the administrative agency's discretion).

13. For a detailed discussion of the cases discussed in this paragraph, see Araiza, *supra*

discretion to choose between rulemaking and adjudication nearly sixty years ago in *Chenery II*.[14] In *Chenery II*, the Court conceded that consistency and notice concerns counseled in favor of agencies taking more advantage of rulemaking, but it also noted the sound practical reasons that might lead an agency to choose instead to proceed via case-by-case adjudication. *Chenery II* recognized that agencies were in a better position to consider those practicalities and, thus, gave the agency broad deference.

Twenty years later, the waters muddied somewhat. First, in *NLRB v. Wyman-Gordon Co.*,[15] the Court held that the NLRB essentially had engaged in a rulemaking when it structured an adjudicatory process to allow broad input from third parties and when the resulting order was broadly applicable and purely prospective. As explained below, *Wyman-Gordon* can be read as attempting to police the procedural and substantive distinctions between rulemaking and adjudication, even while respecting agencies' discretion to choose between the two. Its force was blunted, however, by the unusual combination of votes that produced its holding.[16] Five years later, in *Morton v. Ruiz*,[17] the Court reversed an agency action, using language that could be taken to require agencies to use rulemaking procedures when the action taken has significant impact on vulnerable groups.[18] *Ruiz*'s suggestion is exceptionally vague but, read broadly, it could impose significant limits on agencies' discretion to choose between acting by rulemaking and acting by adjudication.

This period of heightened judicial scrutiny of agency choices of its preferred regulatory vehicle largely came to an end only two months after *Ruiz*. In *NLRB v. Bell Aerospace Co.*,[19] the Court reaffirmed *Chenery II*'s statement that agencies enjoy broad discretion in this area. At the same

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note 7, at 359-68.

14. 332 U.S. at 202-03 (announcing the principle that agencies have broad discretion to choose between rulemaking and adjudication).

15. 394 U.S. 759 (1969).

16. The line-up in *Wyman-Gordon* requires a brief explanation. Justice Fortas, writing for himself and three other justices, concluded that the order the agency relied on for support, issued in an administrative adjudication in a case called *Excelsior Underwear*, was invalid as a de facto rule that was not promulgated pursuant to the Administrative Procedure Act's (APA) rulemaking procedures. *Id.* at 764-65. On this issue, the plurality was joined by Justices Harlan and Douglas. *Id.* at 775-80 (Douglas, J., dissenting); *id.* at 780-83 (Harlan, J., dissenting). But the plurality also concluded that the order in *Wyman-Gordon* itself could stand, as a valid instance of the National Labor Relations Board (NLRB) setting policy by adjudication because, according to the plurality, it would be useless to remand the case to the agency to re-decide a policy issue it had already decided. *Id.* at 766 n.6. The affirmation of the order against Wyman-Gordon also constituted a majority, as Justice Black, writing for himself and Justices Brennan and Marshall, concluded that the *Excelsior* order was valid and thus provided support for the agency's action in *Wyman-Gordon*. *Id.* at 772-73.

17. 415 U.S. 199 (1974).

18. *Id.* at 235-36.

19. 416 U.S. 267, 294 (1974).

time, however, it warned that this discretion might be abused and, thus, left a door open for judicial review of an agency's choice. *Bell Aerospace*'s abuse of discretion standard has become the settled law.

Patel marked the beginning of a jurisprudence in the Ninth Circuit that attempted to apply that abuse of discretion standard by locating the limits of agency discretion. Commentators[20] and courts[21] generally focus on the 1981 *Ford Motor* case when discussing the Ninth Circuit law on this issue. As befitting the topic of underrated cases, academic and judicial commentary on *Ford Motor*, and the principle it enunciated, has been almost uniformly negative.[22] But, *Patel*, which preceded *Ford Motor*, provides the first real glimpse of the Ninth Circuit's developing jurisprudence.

A. The Beginning: Patel[23]

In *Patel*, the court considered an Immigration and Naturalization Service (INS) adjudicatory decision denying an alien's request for a discretionary suspension of deportation. The alien, Patel, based his request on his status as an investor in a U.S. business, as allowed by INS regulations promulgated in 1973. The agency determined, however, that Patel had not satisfied the "investor exemption," reading into it a requirement that the investment "tend to expand job opportunities" in the United States.[24] In so holding, the agency relied on an earlier adjudication—*In re Heitland*[25]—that had established the job creation requirement. The problem was that the *Heitland* decision had interpreted an earlier version of the investor exception regulation and had only stated in dicta that the then-recently promulgated 1973 regulation also included a job creation requirement.[26]

Thus, the situation confronting the court in *Patel* paralleled that in *Wyman-Gordon*. In *Wyman-Gordon*, the agency had first established a legal principle during an adjudicatory proceeding (in a case called *Excelsior Underwear*[27]) and then used that earlier proceeding as authority

20. *See, e.g.*, 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 275 (3d ed. 1994) (focusing on *Ford Motor*).

21. *See, e.g.*, Stotler v. Commodity Futures Trading Comm'n, 855 F.2d 1288, 1294 (7th Cir. 1988) (citing *Ford Motor* as the basis of petitioner's argument); Colorado Dep't of Soc. Servs. v. Dep't of Health & Human Services, 585 F. Supp. 522, 525 (D. Colo. 1984) (referring to *Ford Motor* as novel and provocative case law); New York Ear and Eye Infirmary v. Heckler, 594 F. Supp. 396, 406 n.18 (S.D.N.Y. 1984) (explaining the criticism of the *Ford Motor* case).

22. *See supra* note 11 and accompanying text (providing examples of legal scholars' criticism of *Ford Motor*).

23. This exposition of Ninth Circuit case law draws heavily on my earlier article, Araiza, *supra* note 7, at 398-99.

24. Patel v. INS, 638 F.2d 1199, 1201 (9th Cir. 1980).

25. 14 I. & N. Dec. 563 (BIA 1974).

26. *Id.* at 564-65.

27. Excelsior Underwear Inc., 156 N.L.R.B. 1236 (1966).

for the adjudicatory order handed down in *Wyman-Gordon*.[28] But, as those familiar with *Wyman-Gordon* will recall, the Court found something inappropriate about the adjudicatory format by which the *Excelsior* rule was established. In particular, the problem was that, in the *Excelsior* litigation, the agency had followed a quasi-rulemaking procedure (most notably, it had invited participation by third parties) and had given the resulting order purely prospective effect (not applying the order against Excelsior itself because it deemed that step unfair, given that the order was laying down a new substantive rule of conduct).[29] Moreover, the rule in *Excelsior*—that an employer had to turn over to a union a list of all the eligible employees' addresses—was not limited to the particular facts of that case, but rather was a generally applicable rule of labor relations law.

Similarly, in *Patel*, the problem was with the status of *Heitland* order as pure dicta "prospectively pronounc[ing] a broad, generally applicable requirement, without then applying that requirement to aliens seeking exemptions under the 1973 regulation."[30] Thus, in *Patel*, just as in *Wyman-Gordon*, the agency was reversed for relying on an adjudicatory precedent that was somehow insufficiently "judicial."

But the *Patel* court did not stop at the parallel to *Wyman-Gordon* by merely refusing to accept the agency's reliance on the *Heitland* dicta. Instead, it went on to question the appropriateness of promulgating *any* job-creation requirement through adjudication. The court first noted that the agency had considered inserting such a requirement into the proposed rule that eventually became the 1973 regulation, but after public comment had eliminated the requirement.[31] It also noted that regulations promulgated subsequent to *Patel*'s application (and thus not applicable to his case) had included a job creation requirement.[32] Because the agency had first tentatively, and later conclusively, utilized the rulemaking process to establish the job creation requirement, the court concluded the issue did not, by its nature, require case-by-case resolution. Thus, the court concluded, the case fell outside of *Bell*'s admonition that certain issues had to be decided by adjudication because of their fact-specific character.[33]

The court then concluded its analysis by noting two issues that would become important in later Ninth Circuit case law. First, it found a notice problem in the agency's inconsistent conduct in the period before Patel's

28. *See* 394 U.S. 759, 761-62 (1969) (setting forth the facts).
29. *Id.* at 765.
30. Patel v. INS, 638 F.2d 1199, 1204 (9th Cir. 1980).
31. *Id.* at 1202.
32. *See id.* at 1205 (noting that the regulation was amended to include the job-creation criterion in 1976).
33. *See id.* ("In contrast [to the situation in *Bell*], the job-creation criterion . . . does not call for a case-by-case determination. It may be stated and applied as a general rule even though the result may vary from case to case.").

application for suspension of his deportation; namely, withdrawing the job-creation criterion from its proposed 1973 regulation but then "obscurely"[34] adding the requirement by means of dictum in the *Heitland* decision. Second, the court noted the severe hardship Patel would face, given the extreme liberty-impairing quality of deportation.[35]

Patel laid the analytical groundwork for subsequent Ninth Circuit jurisprudence. First, the court relied on its conclusion that the agency's use of adjudication to establish the job creation requirement impermissibly "circumvent[ed]"[36] both prior and subsequent rulemaking processes. This approach is different from *Ruiz*'s more aggressive suggestion that certain issues by their very nature required rulemaking. In contrast to *Ruiz*, *Patel*'s approach rested on the agency's own initial and ultimate decisions to use rulemaking. In addition to this procedural flaw, the court found a more fundamental problem in the agency's resolution of this issue by adjudication, since the agency's own conduct suggested that the rule was capable of being stated in a general regulation. Finally, the court noted the burden retroactively imposed on the regulated party, and the party's lack of notice of the rule. All of these concerns ultimately found their way into the developing Ninth Circuit case law.

B. The Development: Ford Motor

In *Ford Motor*,[37] the Ninth Circuit continued to develop its limitations on agency discretion to choose between rulemaking and adjudication. *Ford Motor* considered a challenge to a Federal Trade Commission (FTC) adjudication against the Ford Motor Company and a Ford dealership in Oregon concerning accounting practices they employed to calculate the value of repossessed cars.[38] The agency brought these charges while it was involved in a rulemaking process aimed at regulating closely related practices employed by the same classes of businesses.[39]

The court disallowed the agency's use of adjudication to attack those practices. Relying on *Patel*, the court framed the issue as whether the adjudication "change[d] existing law, and ha[d] widespread application."[40] The court first rejected the agency's argument that the defendants' practices violated Oregon law. It noted that the relevant Oregon statute was part of the Uniform Commercial Code (UCC), but that the agency had not cited a single case from any UCC jurisdiction that interpreted the Code

34. *Id.*
35. *Id.*
36. Patel v. INS, 638 F.2d 1199, 1204 (9th Cir. 1980).
37. Ford Motor Co. v. FTC, 673 F.2d 1008 (9th Cir. 1981).
38. *Id.* at 1008.
39. *Id.*
40. *Id.* at 1010.

to prohibit the challenged practices.[41] The court then noted the general applicability of the legal principle emerging from the adjudication. It observed that the UCC provision on which the agency based its charge existed in forty-nine states and that the agency was preparing to notify car dealerships across the nation of the decision, presumably to inform them of the new requirements to which they would be held.[42] The court's conclusion reflected this concern by using adjudication to achieve industry-wide changes, while at the same time expressing concern over the fact that the agency was involved in a pending rulemaking on related issues:

> To allow the order to stand as presently written would do far more than remedy a discrete violation of a singular Oregon law as the FTC contends; it would create a national interpretation of UCC § 9-503 and in effect enact the precise rule the FTC has proposed, but not yet promulgated.[43]

C. *The Limiting and Solidifying of* Ford Motor

Subsequent Ninth Circuit opinions have read *Ford Motor* as preserving agency discretion to choose between rulemaking and adjudication. Still, the rule that has emerged imposes potentially significant limitations on that discretion. In *Montgomery Ward & Co. v. FTC*,[44] decided one year after *Ford Motor*, the court considered an adjudication-derived legal principle that the agency claimed was based on its interpretation of an existing regulation. The court, however, believed it necessary to consider whether that interpretation was instead a de facto amendment to the rule, in which case, according to the court, the agency would have to resort to the normal agency rulemaking process.[45] In the court's view, "an adjudicatory restatement of the rule becomes an amendment . . . if the restatement so alters the requirements of the rule that the regulated party had inadequate notice of the required conduct."[46] In deciding this issue, the court compared the text of the regulation to the standards announced in the adjudication.[47] The court also examined "the agency's prior use of rule-making and the current adjudication to see if the agency's conduct in the latter is consistent with the proceedings in the former."[48]

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41. *See id.*
42. Ford Motor Co. v. FTC, 673 F.2d 1008, 1010 (9th Cir. 1981).
43. *Id.*
44. 691 F.2d 1322 (9th Cir. 1982).
45. *See id.* at 1329 (stating that an amendment is proper only when adequate notice is provided to affected parties pursuant to appropriate rulemaking procedures).
46. *Id.*
47. *See id.* (explaining that the court looks at the extent the standards applied in the adjudication vary from the plain language of the rule when deciding if the agency decision was an abuse of discretion).
48. *Id.*

The two factors considered in *Montgomery Ward* have become the basis of current Ninth Circuit law. In *Cities of Anaheim v. FERC*,[49] the court explicitly identified "two exceptions qualify[ing] [the] general proposition" that "[a]dministrative agencies are free to announce new principles during adjudication."[50] "First, agencies may not impose undue hardship by suddenly changing direction, to the detriment of those who have relied on past policy."[51] Second, "agencies may not use adjudication to circumvent the Administrative Procedure Act's rulemaking procedures."[52] In rejecting the plaintiffs' claim that the agency should have been required to act by rulemaking, the court seemed to cast doubt on the broader rule enunciated in *Ford Motor*:

> The cities, seizing upon broad language in *Ford Motor Co.* . . . argue that any agency principle of general application that changes existing law must pass through formal rulemaking procedures. Even if this were an accurate statement of the law, FERC's clarification of its suspension policy in [a prior adjudication] was a minor adjustment, a fine tuning of doctrine that does not require rulemaking unless it imposes severe hardship or circumvents existing rules. By contrast, *Ford Motor Co.* involved a new interpretation of the Uniform Commercial Code that would have changed long-standing creditor practices.[53]

Thus, while distinguishing *Ford Motor* on its facts, the *Cities* court appears to have narrowed its potentially broad sweep by applying its test more cautiously. This *Cities* analysis has been cited by subsequent courts and appears to have become the generally accepted rule in the circuit.[54] The Ninth Circuit's more circumspect approach to the agency's rulemaking-adjudication decision also is evident in the results of the cases; since *Ford Motor*, the court has refrained from striking down adjudications on the ground that the agency should have proceeded instead by rulemaking.[55]

II. THREE CHEERS FOR *PATEL*

Despite its obscurity and the criticism leveled at its anti-circumvention rule, *Patel* and the anti-circumvention principle it spawned deserve respect

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49. 723 F.2d 656 (9th Cir. 1984).
50. *Id.* at 659.
51. *Id.*
52. *Id.*
53. *Id.* (internal citations omitted).
54. *See, e.g.*, Union Flights, Inc. v. FAA, 957 F.2d 685, 688-89 (9th Cir. 1992) (citing *Cities* as authority regarding when an agency circumvents the requirements of the APA); Coos-Curry Elec. Coop v. Jura, 821 F.2d 1341, 1346 (9th Cir. 1987) (quoting language from *Cities*); Weight Watchers v. FTC, 830 F. Supp. 539, 542-43 (W.D. Wash. 1993) (applying the rationale of *Cities*).
55. *See supra* text accompanying note 53 (describing the Ninth Circuit's application of *Cities*).

on their merits as an important statement of law and as an illustration of a central tension in administrative law. That is, *Patel*'s analysis is both "correct" and "important," as this Article uses those terms as criteria of underratedness.

The anti-circumvention principle, as applied in *Patel*, is correct. In *Patel*, that principle requires that the agency remain faithful to its own choice of policymaking forum. Nothing in *Patel* dictates or restricts the agency's initial choice between rulemaking and adjudication. Thus, *Patel* does not disturb the settled law dating back to *Chenery II*. However, *Patel* does limit agency discretion in an important way: It requires that an agency, once having made the choice that a given issue is amenable to rulemaking, not abandon that process.

This modest limitation on agency discretion protects the integrity of the Administrative Procedure Act's (APA) rulemaking processes. As implied by *Wyman-Gordon*, rulemaking procedures matter; once a court determines that the product of the procedure is in fact a rule, an agency cannot use any procedure it wishes to promulgate it. It follows that an agency cannot avoid those procedures simply by claiming that it is not really producing a rule. In *Wyman-Gordon* itself, for example, the Court decided that the *Excelsior* decision upon which the agency was relying was in fact a rule, despite the agency's argument that it was simply a policy-setting adjudication. This insight necessarily means that courts must have a conception of what a rule is. Thus, in *Wyman-Gordon*, the Court invalidated the agency's reliance on *Excelsior* because, in the Court's view, the *Excelsior* order had taken the form of a rule (because it was generally applicable and purely prospective), but the agency did not use the mandated rulemaking procedures.

Wyman-Gordon's attempt to distinguish rules from orders, while seemingly compelled if the goal is to protect the rulemaking process, nevertheless presents a paradox. Adjudicative and rulemaking procedures often feature similar characteristics, and orders and regulations often have similar effects. Agencies often invite (or at least allow) third parties to submit their views on an issue in an adjudication. They also often issue adjudicative orders that impose generally applicable rules—indeed, this almost follows the black-letter principle that agencies can "set policy" through adjudication. Thus, the only difference between these everyday adjudications and the *Excelsior* adjudication invalidated in *Wyman-Gordon* was that, in the *Excelsior* proceeding, the agency attempted to protect the regulated party from the unfairness of imposing on it a new rule.[56] But

56. *See, e.g.*, Patel v. INS, 638 F.2d 1199, 1203 (9th Cir. 1980) ("The plurality [in *Wyman-Gordon*] did not prohibit agencies from announcing principles by adjudication which may later govern agency actions as precedent. . . . Rather, the Court forbad agencies

protecting a regulated party from unfair surprise hardly seems a good reason to invalidate the otherwise unremarkable process that took place in *Excelsior*, especially when the surprise may not be apparent to the agency when it commenced the adjudication.[57]

For our purposes, however, we do not need to go as far as *Wyman-Gordon* did when it attempted to determine whether an agency action was really a "rule." If we assume that the agency already has embarked on a rulemaking process, then a court does not need to determine for itself the nature of the agency's action. Rather, the agency itself has made that determination by commencing a rulemaking. Moreover, with the agency having decided to act by rulemaking, even more danger to the integrity of the rulemaking process exists when the agency attempts to switch its policymaking vehicle. Thus, in such cases, there is much more reason to hold the agency to its choice of that process.

This more limited protection for the integrity of the rulemaking process, in which judicial protection is triggered only after the agency itself has made a commitment to rulemaking, is what the court provided in *Patel*. *Patel* could have rested its holding on the ground that the job-creation requirement was a de facto amendment to the INS regulation.[58] But, instead, as explained above, the court analogized its situation to the one in *Wyman-Gordon*, with the *Heitland* dicta playing in *Patel* the role the invalid *Excelsior* order played in *Wyman-Gordon*. In particular, *Patel* focused on the broadly applicable and purely prospective nature of the *Heitland* dicta upon which the challenged order in *Patel* rested. As with the *Excelsior* order, the *Heitland* dicta was invalidated as procedurally flawed.

The crucial difference between *Wyman-Gordon* and *Patel* is that the *Excelsior* order painted on an essentially blank regulatory canvas, while the *Heitland* order was issued against the backdrop of an existing regulation. Thus, the *Wyman-Gordon* Court had to take the more extreme step of labeling *Excelsior* a rule, even in the face of the agency's argument that *Excelsior* was simply another in its long line of policymaking adjudicative

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from promulgating a 'rule,' which the APA defines as 'an agency statement of general or particular applicability and future effect . . . ,' in an adjudicative proceeding. It was the prospective pronouncement of a broad, generally applicable requirement, without application of the requirement to the parties before the NLRB in *Excelsior*, which the Court deemed improper in *Wyman-Gordon*.") (internal citations omitted).

57. To deepen the paradox, severe surprise may be grounds for refusing to allow an agency to impose an adjudicative result on the target of the enforcement action. *See* Araiza, *supra* note 7, at 372-76, 387-91 (describing the author's views on denial of "procedural" notice, denial of "substantive" notice, and the retroactivity problem).

58. Indeed, a previous Ninth Circuit case had so concluded; however, that earlier case ultimately rested its holding on the unfair surprise *Heitland* had imposed on the individual. *See* Ruangswang v. INS, 591 F.2d 39, 45 (9th Cir. 1978) (stating that *Heitland* did not provide the necessary notice to Ruangswang).

orders.[59] By contrast, *Patel* simply could point out that a regulation already existed and that the agency ultimately amended that regulation through the notice and comment process. Thus, *Patel* could take the more moderate position that once the agency went down the rulemaking path, it could not abandon it without another rulemaking.[60]

On reflection, it becomes clear that *Patel*'s principle is nothing more than the procedural reflection of the substantive rule that an agency regulation binds the agency as well as outside parties, unless and until the agency revises that regulation.[61] These substantive and procedural requirements are tightly linked; indeed, it may not be an overstatement to characterize them as mirror images. The character of agency regulations as binding not just on private parties but on the agency itself[62] would not mean much if the agency could alter a regulation whenever the target of an enforcement action alleged that the agency was violating it. Conversely, the procedural requirements for rulemaking would be easily evaded—indeed, "circumvented"—if the agency could change an agency regulation through a means short of another rulemaking—for example, issuing a purported interpretive regulation (which does not require the notice and comment process) or changing it in an adjudication. Of course, agency regulations cannot be expected to answer every regulatory issue that might arise—hence the need for interpretative regulations and adjudications, even when an agency has promulgated a legislative regulation. But properly understood, an interpretive regulation does not imply an alteration of the substance of the regulation.[63] *Patel* suggests the same for adjudications construing a regulation.

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59. Recall that until recently the NLRB was well known for making policy almost exclusively through adjudications. *See generally* Robinson, *infra* note 71, at 512 (noting the NLRB's reliance on making policy through adjudications).

60. For example, a rulemaking that rescinded the prior rule and announced that subsequent policy would be made by adjudication.

61. *See, e.g.*, United States v. Storer Broad. Co., 351 U.S. 192, 199-200 (1956) (finding that the Federal Communications Commission regulations under consideration bound the broadcaster and would continue to bind respondent until modified); Am. Fed'n of Gov't Employees v. FLRA, 777 F.2d 751, 760 (D.C. Cir. 1985) (Scalia, J., concurring) ("[W]hile an adjudication can overrule an earlier adjudication, the Administrative Procedure Act clearly provides that a rule can only be repealed by rulemaking."). Some commentators have explicitly linked the process rule stated in *Patel* and the substantive rule that an agency is bound by its own regulations. *See, e.g.*, L. Harold Levinson, *The Legitimate Expectation that Public Officials Will Act Consistently*, 46 AM. J. COMP. L. 549, 564 (Supp. 1998) ("The adoption or the repeal of a rule is defined as rulemaking; therefore, an agency must use the rulemaking process in order to adopt or repeal rules. Thus an agency is bound by its own rules unless the agency repeals them or a higher authority intervenes.") (internal citations omitted); *see also* Russell L. Weaver, *Challenging Regulatory Interpretations*, 23 ARIZ. ST. L.J. 109, 121 n.48 (1991) (collecting cases suggesting this connection).

62. *See supra* note 61 and accompanying text (explaining that regulations bind the agency as well as outside parties).

63. *Id.*

Under *Patel* it is the agency's original decision to promulgate a regulation that triggers the requirement that it stick with that path—for example, that it not announce subsequent changes in an adjudication. So understood, *Patel*'s rule parallels how some courts have gone about determining whether a regulation is legislative or interpretive. The rulemaking-adjudication and legislative-interpretive rule issues pose a common challenge to courts: They both require courts to make difficult determinations that carry significant procedural consequences for agencies. When distinguishing between legislative and interpretive rules, courts have often relied heavily on the agency's own characterization of the challenged action.[64] Reliance on the agency's own labeling makes sense, as both labels carry costs and benefits for the agency. Legislative rules are difficult to promulgate, but they become binding law. Conversely, interpretive rules are easier to promulgate. However, because they are not legally binding, an agency's decision to characterize its action as a mere interpretation carries costs for the agency, as it will be forced to litigate the appropriateness of that policy every time it initiates an adjudication. As I have argued elsewhere, "[b]ecause description of a statement as something less than a substantive rule thus has real costs for the agency, there is at least some reason for a court to defer to an agency-imposed label."[65]

A similar rationale applies when a court requires an agency that has chosen rulemaking to continue down that path rather than to deviate to adjudication. Agencies enjoy many benefits when they choose to proceed by rulemaking. A rule applies to all affected parties, and has the force of law without the agency having to litigate its wisdom in case after case. Moreover, after *United States v. Mead Corp.*,[66] the product of a notice and comment rulemaking enjoys a greater chance of earning *Chevron* deference than does a statutory interpretation reached in the course of an informal adjudication.[67] At the same time, using rulemaking to address a regulatory problem carries costs for the agency. Most notably, the process itself may be onerous, and the agency will be cabined in its ability to deviate from the regulation that is ultimately promulgated—it can, of course, deviate, but only by promulgating an amendment or rescission.[68]

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64. *See* Araiza, *supra* note 7, at 399 n.256 (citing to cases that stand for the proposition that an agency's characterization is a factor).

65. *Id.* at 399.

66. 533 U.S. 218 (2001).

67. Indeed, the consequences of an agency interpretation not being accorded *Chevron* deference include not only the presumably lesser level of deference suggested by the default *Skidmore* standard, but also the greater unpredictability inherent in that standard. *See id.* at 240, 250 (Scalia, J., dissenting) (discussing the unpredictability of *Skidmore* deference).

68. *See supra* note 61 and accompanying text (confirming the principle announced in *Patel* that the agency's decision to promulgate a rule binds both the agency and the outside community).

Thus, both of these limits on the agency's discretion to abandon notice and comment rulemaking respect the agency's discretion to make the initial choice to embrace that process. There is good reason for this similarity. In the legislative rule-interpretive rule issue, aside from a small set of easy cases, there is a paucity of judicially manageable criteria by which courts can determine whether the alleged interpretive rule really does just interpret existing law or whether it establishes a new standard of conduct. Similarly, in most cases, courts are less able than agencies to determine whether a given regulatory problem is more susceptible to rulemaking as opposed to adjudication. At the same time, in both situations the agency faces both benefits and drawbacks in choosing either option. Thus, in both cases it makes sense for the agency to possess the discretion to make the initial choice, as long as the agency is then held to the procedural consequences of that choice.

In the context of the anti-circumvention principle, the choice that carries consequences is the choice to attack a particular regulatory problem by promulgating a regulation. Once the agency goes down the rulemaking path, it should be viewed as having committed itself to the procedural requirements of rulemaking. Thus, the consequence of choosing the rulemaking path is that the agency should not be able to alter the substance of that rule through a process less elaborate than a rulemaking.

Patel therefore can be seen as the procedural reflection of the substantive rule that an agency is bound by its own regulations. Further, because the agency already had promulgated a rule, *Patel* is less aggressive than *Wyman-Gordon*, which attempted to identify the abstract nature of a rule. In contrast to *Wyman-Gordon*, *Patel* respects agency discretion as long as the agency lives with the consequences of its choice of regulatory vehicle.[69] For these reasons *Patel* seems correct[70] and fits snugly against other administrative law principles.

It may seem that *Patel* is obvious and, for that reason, trivial. If all it stands for is the procedural flip-side of an uncontroversial substantive rule, then what is its significance? But *Patel* reveals an important linkage between procedural and substantive requirements on agencies. It illuminates the substantive law link to the requirement that the agency respect the rulemaking process, while at the same time according agencies

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69. Of course, since courts review whether agencies followed the appropriate procedures for the chosen regulatory vehicle, they can always attempt to influence the agency's choice by varying the strictness of the judicial review to correspond with the court's sense of whether the agency made an appropriate choice. *See, e.g.*, M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1431-34 (2004) (describing Magill's views on how the courts can shape the administrative process).

70. *See, e.g.*, *id.* at 1412 (explaining as a basic understanding of *Chenery II* the concept that "agencies may select their form [of proceeding], but they may not design it").

appropriate deference to make the initial choice between rulemaking and adjudication. Its analysis is more satisfying than *Wyman-Gordon*'s, which attempted to identify the Platonic form of a rule as a predicate to requiring the agency to follow the APA's rulemaking process. Of course, a court may find it easier to deal with a case in which the agency already has acted through rulemaking, as in *Patel*, than one in which the agency has not yet committed itself to rulemaking, as in *Wyman-Gordon*.[71] But even if the court in *Patel* had an easier task than the Court in *Wyman-Gordon*, the fact remains that its analysis marks an intersection between two fundamental principles: agency procedural discretion and the binding nature of agency procedural rules. This makes the case important. The lack of attention paid to it—and, even more importantly, the criticism *Patel* may have suffered by association with the case that extended it a step too far—*Ford Motor*—justifies calling *Patel* a truly underrated case.

III. ONE CHEER FOR *FORD MOTOR*

The more difficult question is posed by *Ford Motor*. In *Ford Motor* the circumvention of the rulemaking process occurred not after the rulemaking was complete, as in *Patel*, but rather during the pendency of the rulemaking process. Because there was no extant regulation from which the agency adjudication deviated, *Ford Motor* cannot be seen as the procedural flip-side of the substantive rule that regulations bind the promulgating agency until the agency changes them: In *Ford Motor* there was no regulation binding the agency.

At the same time, *Ford Motor* does reflect *Patel*'s purely procedural concerns about an agency abandoning its earlier choice to proceed by rulemaking. *Ford Motor*'s facts are troubling in that the agency was attempting to impose via adjudication a generally applicable and seemingly new rule that was the subject of a concurrent rulemaking process. One can intuitively understand why the court was concerned about the agency's attempt to proceed down two tracks at the same time. It is difficult to justify deferring to the agency's choice of policymaking forum when the agency seems not to have made a choice. Further, a participant in the pending rulemaking justifiably might wonder if the agency's adjudicatory

71. Indeed, the facts in *Wyman-Gordon* were even more egregious, in that the agency (the NLRB) was well known for having always eschewed rulemaking in favor of setting policy by adjudication. For this reason the Court in *Wyman-Gordon* may have felt especially strongly about labeling *Excelsior* a rule and rebuking the agency's argument that *Excelsior* was a run-of-the-mill adjudication. *See, e.g.*, Glen O. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 512 (1970).

choice and planned notification of all car dealers across the nation had prejudged its position in the rulemaking even more than an agency necessarily does when it announces a proposed rule.[72]

The problem with *Ford Motor*'s more aggressive use of the anti-circumvention principle is that it clashes with *Chenery II*'s recognition of the real world problems faced by agencies, and the deference properly accorded agencies to respond to those problems. Read aggressively, *Ford Motor* could be understood as prohibiting agencies from using adjudications to take interim actions during the pendency of a rulemaking on that subject. Such a result might be troublesome. Given how long rulemaking takes, a prohibition on interim agency actions on that same topic—even a narrower prohibition on an agency announcing a *new* legal principle in the course of an adjudication conducted during a rulemaking—could arguably cripple an agency's ability to deal with a new and urgent problem. The risk that the pendency of a rulemaking would stop the agency from proceeding in the interim through adjudication might well convince the agency to completely avoid the rulemaking. This additional restriction on rulemaking would add to the phenomenon of procedural requirements making rulemaking less desirable to agencies. Doctrinally, if *Ford Motor*'s prohibition on adjudication-based policymaking during the pendency of a rulemaking were understood as a procedural restriction on the rulemaking process itself, it might violate the spirit of *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*.[73]

Leaving the *Vermont Yankee* concern aside, it may be overstating the problem to fear that *Ford Motor*'s anti-circumvention rule cripples an agency's ability to respond quickly to a problem while simultaneously promulgating a regulation as a long-term solution.[74] Today, if an agency is concerned that the pendency of a rulemaking might preclude an interim response, it can invoke the good cause exception to the notice and comment procedures, promulgate an interim rule immediately, and then engage in a post hoc rulemaking. This type of rulemaking, which Michael Asimow calls "interim-final" rulemaking,[75] resolves the dilemma posed in the preceding paragraph. One might object that concern about crippling the

72. *See, e.g.*, Ass'n of Nat'l Advertisers v. FTC, 627 F.2d 1151, 1154, 1173-74 (D.C. Cir. 1979) (finding no unconstitutional prejudgment when an agency head expresses general views about the merits of an issue in advance of issuing a notice of proposed rulemaking on that issue), *cert. denied*, 447 U.S. 921 (1980).

73. *See* 435 U.S. 519, 523-25 (1978) (cautioning lower courts not to impose on agencies rulemaking procedures not contained in the APA or the agency's organic statute).

74. *See infra* note 77.

75. *See* Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 704 (1999) (defining interim-final rules as "rules adopted by federal agencies that become effective without prior notice and public comment and that invite post-effective public comment") (emphasis omitted).

agency's power to act during a rulemaking does not properly count as good cause for avoiding pre-promulgation notice and comment. However, in *Ford Motor*, the FTC tried to act to the same effect—with an interim announcement (via adjudication) of a general rule while notice and comment proceeded—and the conventional wisdom is that it should have been allowed to do so. The only difference is that in *Ford Motor* the agency opted for policymaking by adjudication rather than promulgation of an "interim-final" rule. Why the latter expedient should be considered a misuse of a procedural tool while the agency's procedural course in *Ford Motor* should be considered legitimate (if still undesirable) is unclear.

Ultimately, this analysis tracks a long circle back to *Chenery II*. As suggested above, methods exist for agencies to modify both rulemaking and adjudication to deal with particular regulatory situations. Thus, assuming no unfair surprise to the regulated party, judicial review of the agency's choice of one vehicle or the other reduces to examination of the functional appropriateness of the chosen vehicle.[76] But if *Chenery II*'s deference rule means anything, it must mean that those decisions are for the agency to make, not the reviewing court. Under *Chenery II*, the only restrictions a court can legitimately impose on the agency's choice of vehicle are those that are compelled by due process (when retroactive application of an adjudicative result would be fundamentally unfair). Review for functional appropriateness is inappropriate.

However, *Chenery II* leaves room for judicial review when the agency takes steps inconsistent with the policymaking vehicle the agency has itself already chosen. In such a case, respect for the process the agency itself has chosen requires judicial scrutiny of the agency's procedural conduct. *Patel* falls within this latter justification for judicial review, in that the INS's action in that case was inconsistent with its initial choice of rulemaking. In contrast, *Ford Motor* goes beyond it.

The difference between *Patel* and *Ford Motor* reveals the justification for a judicial rule requiring the agency to use rulemaking. *Patel*'s requirement that an agency use rulemaking to amend an existing order dovetails with the rule that regulations are binding on the agency itself. However, when, as in *Ford Motor*, there is no extant regulation, the substantive law prop for the anti-circumvention rule disappears.[77] At that

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76. *See, e.g.*, First Bancorporation v. Bd. of Governors, 728 F.2d 434, 438 (10th Cir. 1984) (relying on the functional appropriateness of rulemaking to a given regulatory problem to compel the agency to act by rulemaking); *see also* Araiza, *supra* note 7, at 370-72, 381-87 (discussing courts' reliance on this approach).

77. In this latter case—where there is solely a procedural reason for an anti-circumvention rule—the *Vermont Yankee* concern becomes most prevalent. *See Vermont Yankee*, 435 U.S. at 524 (noting that agencies have discretion in granting additional procedural rights, which generally reviewing courts cannot impose). By contrast, when a procedural requirement is necessary to satisfy a substantive rule of administrative law,

point there is less reason to prohibit the agency from toggling back and forth between policymaking by rulemaking and policymaking by adjudication. Such toggling may be bad practice, but unless there is a separate problem with it, such as unfair surprise, it should remain within the agency's discretion to respond to regulatory problems as it sees fit. Under this reasoning, *Ford Motor* applies an overly aggressive version of the anti-circumvention principle.

Still, *Ford Motor* (and, for separate reasons not discussed here, *Wyman-Gordon*[78]) illustrates the potential for agency misuse of this discretion. There must be some impact on the credibility of the rulemaking process when, during the pendency of a rulemaking, the agency tips its hand—and arguably pre-commits itself—by announcing a particular policy in an adjudication. While courts are understandably loathe to find unfair prejudgment when an agency embarks on a rulemaking,[79] one can understand how a party would wonder about the meaningfulness of a rulemaking when the agency had quite possibly already made up its mind—even as an interim measure.[80] These concerns, if not judicially cognizable, are real. *Ford Motor* illustrates those concerns, and thus highlights a problem in administrative law. Moreover, by pushing the anti-circumvention principle farther than it could properly go, *Ford Motor*, especially when considered in conjunction with *Patel*, serves a useful purpose in delineating the proper boundaries of *Patel*'s principle. Thus, *Ford Motor*, while ultimately a misfire, both reveals important legal and policy issues and sharpens our understanding of *Patel*. For that reason it deserves at least some credit, even if it must ultimately be rejected.

Vermont Yankee becomes less relevant as precedent. *Cf. Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 653-54 (1990) (stating that *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), suggested that the judicial review provisions of the APA imposed a "general procedural requirement" that the agency take the necessary steps to provide an explanation upon which a court could base its judicial review, and distinguishing *Vermont Yankee* on that basis) (internal quotation omitted). In our situation, the substantive rule is the binding nature of a regulation even on the agency itself—a rule that would be violated if the agency were free effectively to change that rule through means short of a subsequent rulemaking. This rule is relevant to the situation in *Patel*, where there is an extant regulation, but not to the situation in *Ford Motor*, where there is no such regulation.

78. *See* Robinson, *supra* note 71, at 512 (noting and critiquing the NLRB's failure to use rulemaking).

79. *See supra* note 72.

80. While private party concern about prejudgment is, of course, impossible to quantify, it seems reasonable to hypothesize that there might be less concern about prejudgment when an agency issues an interim regulation. If nothing else, the explicitly interim nature of the regulation gives the agency an easy way to backtrack gracefully should it conclude, after notice and comment, that the interim policy was a mistake. Because adjudications do not carry with them that explicitly interim character, a private party might conceivably believe the agency to be more committed to that policy, especially when, as in *Ford Motor*, the agency was preparing to notify all regulated parties of the result of that adjudication-derived policy.