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Agency Adjudication, the Importance of Facts and the Limitations of Labels

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I. Introduction

Administrative law often suffers from its nomenclature. Because agency action can be roughly analogized to adjudication, legislation, and enforcement, the tendency has been to force into agency procedures the features found by the "real" adjudicators, legislators, and prosecutors, namely, courts, legislatures, and prosecutors. But there has always been an aversion to equating agency action completely with the action of its constitutionally-recognized cousin because of crucial differences between the two. Thus, for example, when agencies enact regulations, judges describe the result as "quasi-legislative,"[1] in reaction to the fact that regulations in most respects look like legislation, but would flatly violate the Constitution if courts said so.[2] Similarly, the Administrative Procedure Act labels as "judges" many agency personnel who initially impose agency policy on individual parties[3] even though they lack the institutional independence and tenure and salary protections that have come to be seen as the defining characteristics of federal "judges."[4]

The confusion resulting from this imprecise pigeonholing is nowhere more pronounced than in the area of agency adjudication. Because administrative law labels the two means of agency coercion "rulemaking" and "adjudication,"[5] the natural inclination has been to view agency adjudication as analogous to judicial law-interpreting. This analogy is inaccurate in important

1. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 953 n.16 (1983).

2. *See* U.S. CONST. art. I, § 1 (vesting "all legislative powers herein granted" in Congress).

3. *See* Pub. L. No. 95-251 (1978) (codified at 5 U.S.C. § 3105 (1994)) (changing title of "hearing examiners" to "administrative law judges").

4. *See* U.S. CONST. art. III, § 1 (granting life tenure and salary protections to federal judges).

5. *See, e.g.*, 5 U.S.C. § 551 (1994) (defining "rules" and adjudicative "orders" for purposes of APA); *id.* § 553 (setting forth procedures for administrative "rulemaking"); *id.* § 554 (setting forth procedures for administrative "adjudications").

ways. Most significantly, courts normally purport only to apply existing law, while federal agencies are explicitly understood to have the power to make law in the course of deciding cases. Of course, this distinction can be overstated. Clearly, when a court interprets tort law, or the Clean Air Act, or the Due Process Clause of the Constitution, it does not engage in a mechanical process of plugging a pre-existing meaning into a given set of facts, with no consideration of policy implications. But the judicial process still is constrained by the pre-existing law: prior precedent in the common-law context,[6] the text and other interpretive clues in the statutory context,[7] and a combination of those sources (and other limiting factors) in the constitutional context.[8] By contrast, when agencies adjudicate they enjoy more or less free rein to adopt what they consider to be the best rule (as long, of course, as that rule is consistent with the statute[9]).

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6. *See generally* Nicholas S. Zeppos, *The Legal Profession and the Development of Administrative Law*, 72 CHL-KENT L. REV. 1119 (1997).

7. Indeed, in the last decade judges and commentators have begun debating whether the text of a statute should serve not just as the starting point, but as the stopping point as well, in interpreting statutes. The literature on this school of thought – descriptive and evaluative – is extensive. For a description of textualism, see generally William N. Eskridge, Jr., *Textualism: The Unknown Ideal?*, 96 MICH. L. REV. 1509 (1998). For a representative list of academic critiques of textualism, see *id.* at 1512 n.10; for a list of defenders, see *id.* at 1512 n.13.

8. *See, e.g.*, Poe v. Ullman, 367 U.S. 497, 544 (1961) (Harlan, J., dissenting). Justice Harlan stated:

> Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed. Though we exercise limited and sharply restrained judgment, yet there is no "mechanical yard-stick," no "mechanical answer." The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision must take "its place in relation to what went before and further [cut] a channel for what is to come."

Id. (quoting Irvine v. California, 347 U.S. 128, 147 (1954) (Frankfurter, J., dissenting)).

9. This limitation – that an agency's adjudicatory rule must be consistent with the underlying statute – is a different sort of limitation than that faced by a court seeking to interpret that statute. In most cases, the court seeks to discover the statute's meaning. A court may note the beneficial policy effects of a particular interpretation, but use those arguments only as part of an interpretive search. Thus, for example, a court may assume that the legislature intended a reasonable result, or a result that fully effectuates the statute's purposes, and thus use policy arguments to support its conclusion that it in fact has interpreted the statute correctly. By contrast, a rule emerging from an agency adjudication may well represent the agency's conclusion that the statute does not answer the precise question at hand, and thus implicitly delegates to it the power to make policy. *See generally* Chevron USA v. Natural Resources Defense Council, 467 U.S. 837 (1984) (concluding that vaguely-worded statutes constitute this sort of delegation to agencies authorized to implement them). The agency's rule must still be consistent with whatever guidance the statute does provide, but quite often the statute leaves the agency with an enormous amount of discretion to choose one policy or another. Of course, sometimes courts must also decide cases where the statute is so vague as realistically to leave

The existence of this policy-making power under the rubric of "adjudication" has caused concern among courts. In particular, courts have wondered whether policy-making is an appropriate function for an agency adjudicator, given the traditional conception of adjudication as the application of existing law to a dispute between two parties. Judicial concern increases when courts realize that most agencies also have the power to promulgate rules,[10] which, given their resemblance to legislation, intuitively seem the more appropriate vehicle for policy-making. If it is questionable whether explicit and sole reliance on policy concerns can justify adjudication, and if another agency procedure can effectively set policy, then why allow agencies to base adjudicative results solely on policy concerns?

Nevertheless, fifty years ago in *SEC v. Chenery Corporation*,[11] the Supreme Court refused to scrutinize closely an agency's decision to impose a new policy-based rule[12] through the vehicle of an adjudicatory proceeding.[13] The Court's statement was clear: "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."[14] *Chenery*'s statement remains definitive today.[15] Still, courts periodically have expressed concern with the broad discretion agencies thereby enjoy. Since *Chenery*, the Supreme

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the court at large to consider policy concerns explicitly, rather than just as a part of an attempt to discover some hidden meaning in the statute. The Sherman Act is an example. The fact remains, however, that most statutes that are as broad as the Sherman Act are entrusted to agency administration, with the result that agency adjudication is more likely than its judicial cousin to require explicit recourse to policy concerns as ends in themselves and not merely as interpretive guides.

10. It may even be that agencies that have power to make policy by adjudication should be considered to have the power to do so by rulemaking. *See* National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973); *see also* MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 2-104, Cmt. to ¶ 4 (1981).

11. 332 U.S. 194 (1947).

12. The use of the word "rule" can be confusing because it is commonly understood to refer both to legal requirements emerging from adjudications (as in "the rule that emerges from *Roe v. Wade*"), and more precisely to the requirements that emerge from the administrative *rule*making process. For convenience, this Article adopts the following usage: "rules," "legal requirements," and "mandates" can refer to the product of either adjudications or rulemakings, while "regulations" refer precisely to the products of the rulemaking process.

13. *See generally* SEC v. Chenery Corp., 332 U.S. 194 (1947).

14. *Id.* at 203.

15. *See, e.g.*, 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.8, at 267 (1994) ("Readers interested only in an understanding of the present state of the law need go no further than Justice Murphy's 1947 opinion in *Chenery*."). However, Professor Davis does not reject wholeheartedly judicially-imposed limits on agency freedom to choose between rulemaking and adjudication. *See* KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 1982 SUPPLEMENT § 7.25, at 186 (suggesting five part test for when courts should be able to impose such limits).

Court on at least two occasions has reversed lower court holdings limiting agencies' discretion to set general policy in the course of adjudicating claims against individual parties. The first of these cases, *NLRB v. Wyman-Gordon Co.*,[16] produced a splintered rationale that only served to raise questions as to the scope of the *Chenery* rule.[17] Five years later, the second of these cases, *NLRB v. Bell Aerospace Co.*,[18] produced a unanimous analysis that seemed to reconfirm *Chenery*.[19] But *Bell Aerospace* noted a narrow exception to this broad discretion that the Court did not fully explain because the facts of that case did not implicate it. Since *Bell Aerospace*, several appellate courts, the Ninth Circuit being the most aggressive, have experimented with the *Bell Aerospace* exception, rejecting agency attempts to proceed via case-by-case adjudication.[20]

This Article reconsiders federal agencies' discretion to choose between rulemaking and adjudication, in light of the post-*Bell Aerospace* cases that have sought to limit that discretion. It begins by laying the foundation for the rulemaking/adjudication dichotomy, which in this area is not case law but the Administrative Procedure Act.[21] Part III then sets forth the three major Supreme Court statements on this issue: *Chenery*, *Wyman-Gordon*, and *Bell Aerospace*.[22] These discussions set the stage for the lower court opinions that came after *Bell Aerospace*, the last of the Supreme Court trilogy. Part III discusses these lower court cases, with particular attention to the Ninth Circuit, which has developed the most detailed law on this issue.[23] It uncovers three basic themes that courts use to reject agency decisions to proceed by adjudication: a concern about the "functional" appropriateness of agency adjudication when functionally the matter seems better suited for treatment by rulemaking; a concern about the fairness of using an adjudication to establish a new agency policy when adjudicative results normally are applied retroactively; and a concern about the agency acting inconsistently with its own initial decision to use the rulemaking process.

Part III's discussion sets forth the issues that this Article considers in a more abstract way in Part IV. Part IV focuses on the functional and fairness concerns identified above.[24] Each provides a plausible basis for judicial

16. 394 U.S. 759 (1969).
17. NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969).
18. 416 U.S. 267 (1974).
19. NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).
20. *See infra* Part IV.
21. *See infra* Part II.
22. *See infra* Part III.
23. *See infra* Part IV.
24. *See infra* Part V.

second-guessing of the agency's choice; Part IV examines their importance and the workability of a jurisprudence based on each one.[25] It does so by examining several different contexts in which agencies adjudicate, contexts distinguished by either the generality or fact-specificity of the agency's action and the novelty of the legal rule applied against the defendant. This methodology makes possible an inductive analysis that looks at actual agency actions in order to illuminate the importance of each of these concerns, their interrelationships, and the feasibility of possible solutions. Part V concludes that the fairness concern is the only one justifying intrusive judicial review of the agency's rulemaking/adjudication choice.[26] To the extent agency adjudicative results are usually imposed retroactively, vindication of the fairness concern sometimes will require rejection of an agency's choice to proceed by adjudication. But because functional concerns sometimes militate so strongly in favor of adjudication, vindication of the fairness concern will require allowing the agency to proceed by adjudication but to apply the results prospectively. Part V defends such a practice as fundamentally consistent with our basic understanding of the difference between legislation and adjudication, to the extent that the results in such agency adjudications turn on the facts of the particular party before the agency court.[27]

Part VI applies the lessons indicated by the preceding discussion, adds in the "anti-circumvention" rule developed in the Ninth Circuit, and attempts to distill operational rules guiding judicial review of the agency's choice between rulemaking and adjudication.[28] This application suggests that in fact the Ninth Circuit's often-criticized jurisprudence may contain something valuable even though the Ninth Circuit's rule may mark the outer limits of appropriate judicial review. Part VII ends the Article with a brief discussion of the nature of this general problem and how it illustrates larger issues concerning the role of administrative agencies in our system of separated powers.[29]

II. Rules, Adjudications, and the APA

An agency's decision to proceed by adjudication, as opposed to rulemaking, does not raise constitutional issues.[30] It thus falls to the Adminis-

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25. *See infra* Part V.

26. *See infra* Part V.D.

27. *See infra* Part V.

28. *See infra* Part VI.

29. *See infra* Part VII.

30. However, the opposite situation – i.e., an agency decision to proceed by rulemaking instead of adjudication – might raise such a constitutional issue if the rulemaking process imposes individualized burdens based on the burdened party's particular situation but does not provide an adequate opportunity to be heard. This is saying nothing more than that the Due

trative Procedure Act (APA)[31] to provide the limits on the agency's ability to choose adjudication over rulemaking. The APA does not explicitly limit the agency choice. Instead, any APA-based limits on this choice flow implicitly, from the statute's structure. The basic structure of the APA is to classify all administrative proceedings as either rulemakings or adjudications.[32] The APA does this in at least two ways. First, and most important, it defines the universe of final agency action as either rulemaking or adjudication.[33] Second, it prescribes the procedure for both.[34]

The fact that the APA provides for both adjudication and rulemaking does not directly speak to the agency's authority to choose between them. But the APA does appear to distinguish between regulations and adjudicative "orders" in a way so as to allow courts to tell the difference between one and the other. Specifically, the statute defines a "rule" (i.e., a regulation)[35] in relevant part as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy,"[36] while defining an adjudicatory order solely in contrast to a regulation – namely, as a final agency action that is not a regulation.[37] Thus, this structure essentially takes the universe of final agency actions, carves out a subset that it identifies as "regulations," and labels the remainder as "orders" without ascribing any particular characteristics to that

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Process Clause requires some opportunity to be heard when government imposes a particularized burden on an individual. *See infra* note 182 and accompanying text. Singling out of individuals for particularized burdening may also be a problem if the legislature performs it. *See* Plaut v. Spendthrift Farm, 514 U.S. 211, 240 (1995) (Breyer, J., concurring in judgment) (arguing that statute that commanded reopening of set of cases that had reached final judgment was inappropriate legislative singling out of certain identifiable lawsuits); INS v. Chadha, 462 U.S. 919, 959-67 (1983) (Powell, J., concurring in judgment) (arguing that legislative veto by which Congress vetoed proposed suspension of several named individuals' deportation constituted inappropriate legislative adjudication).

31. 5 U.S.C. §§ 551-596 (1994).

32. *See* U.S. DEPT. OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 126 (1947) (Appendix to Attorney General's Statement); *see also* Jean v. Nelson, 711 F.2d 1455, 1475 (11th Cir. 1983).

33. *See* 5 U.S.C. § 551(4) (defining "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect"); *id.* § 551(6) (defining adjudicative "order" as "the whole or a part of a final disposition . . . of an agency in a matter other than rulemaking").

34. *See id.* § 553 (setting forth process for informal rulemaking); *id.* § 554 (setting forth process for formal adjudications); *id.* § 556-57 (setting forth particular requirements applying to both formal rulemaking and formal adjudications). The APA has no explicit provisions for informal adjudication.

35. *See supra* note 12 (noting definitional problems of word "rule").

36. 5 U.S.C. § 551(4).

37. *See supra* note 33 (listing statutory definitions found in APA).

latter class of actions. Intuitively, then, it seems to contemplate a distinction between regulations and orders, as it does not ascribe similar characteristics to both classes such that a particular agency action might be argued to constitute one or the other. At base, the APA's treatment of the regulation/order distinction suggests that there is but one question to ask: Does the agency action satisfy the criteria for a regulation? If it does, then it must be considered a regulation (with all the procedural consequences that follow); if it does not, then it falls into the catch-all category of orders.

In *Bowen v. Georgetown University Hospital*,[38] Justice Scalia interpreted this basic distinction as providing a judicially-enforceable limitation on the means by which agencies can act.[39] In *Georgetown*, the Court rejected an agency's attempt to promulgate a regulation with significant retroactive effect, on the ground that the substantive authorizing statute did not give the agency the authority to issue retroactive regulations. Justice Scalia concurred, adding his view that a retroactive regulation would violate the APA's basic dichotomy between regulations – which under the APA's definition have only prospective effect – and adjudicative "orders" – which he argued must have at least some retroactive effect.[40] According to Justice Scalia, any analysis that would result in the melding of rules and orders was incorrect, as it clashed with "the entire dichotomy [between rules and orders] upon which the most significant portions of the APA are based."[41] For Justice Scalia, then, there has to be less than one-hundred-percent overlap between agency actions that can be seen as regulations and those that can be seen as "orders." If that is so, then it follows that the APA limits an agency's discretion to proceed by its choice of rulemaking or adjudication.

Justice Scalia is in good company in believing that some limits exist on agencies' discretion to choose between rulemaking and adjudication. A number of appellate opinions have struck down agency adjudications on the ground that the agency action was really a rulemaking, while the Supreme Court has recognized the existence of at least theoretical limits on an agency's discretion to proceed by adjudication. This Article now turns to an examination of the cases in which the Supreme Court has considered those limits, to be followed by a discussion of subsequent cases from appellate courts.

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38. 488 U.S. 204 (1988).

39. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 216 (1988) (Scalia, J., concurring).

40. *See id.* at 216-18 (Scalia, J., concurring). Justice Scalia did not suggest that Congress could never authorize an agency to promulgate a retroactive regulation (which thus would blur the APA's distinction between rules and orders). He did, however, suggest that such an authorization would amount to an exemption from the default rules found in the APA. *See id.* at 224-25 (Scalia, J., concurring).

41. *Id.* at 216 (Scalia, J., concurring).

III. The Foundational Supreme Court Statements

The Supreme Court has addressed the rulemaking/adjudication distinction in the trilogy of cases already briefly mentioned: *Chenery*,[42] *Wyman-Gordon*,[43] and *Bell Aerospace*.[44] *Chenery* and *Bell Aerospace* enunciate the current rule of broad deference to agency decisions to choose between rulemaking and adjudication. *Wyman-Gordon*, however, exposes the tension inherent in this rule.

A. Chenery

Chenery arose from an SEC order refusing to approve a utility company's bankruptcy reorganization plan, due to the plan's overly-favorable treatment of management's stock purchases during the reorganization period. The Commission originally had based its disapproval on its understanding of general corporation law principles, but the Supreme Court struck down that decision as a misreading of those principles.[45] On remand, the Commission reaffirmed its disapproval of the reorganization plan, but this time relied on its interpretation of the standards of the Public Utility Holding Company Act of 1935.[46] When the case reached the Supreme Court for the second time, the Court affirmed the agency's order. For our purposes, the important part of the opinion is its discussion of the process by which the SEC established its interpretation of the statute as agency policy. The Court made it clear that the SEC would be allowed to establish such an interpretation by means of a particularized order rather than a general regulation:

> Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.
>
> In other words, problems 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

42. *See supra* notes 11-15 and accompanying text; *infra* Part III.A.

43. *See supra* notes 16-17 and accompanying text; *infra* Part III.B.

44. *See supra* notes 18-19 and accompanying text; *infra* Part III.C.

45. *See generally* SEC v. Chenery Corp., 318 U.S. 80 (1943).

46. 15 U.S.C. § 79 (1994).

> 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. There 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.[47]

Boiled down, Justice Murphy's analysis relies on three general reasons that an agency might not be able to have a regulation in place before it wishes to take action against a private party. First, general principles may not have had a chance to ripen into particular rules that the agency could promulgate because the agency has had insufficient experience with either the statutory mandate and/or the particular regulatory issue. Second, situations arise that the agency simply could not have foreseen but that nevertheless demand rapid agency action. Third, the nature of the issue may simply be incompatible with regulation through a general rule. According to *Chenery*, these possibilities justify the agency's broad discretion to decide when to proceed via adjudication.

Chenery's conclusion that an agency has such broad discretion means that sometimes an agency will impose retroactive liability on a private party. If the principle imposed on the party is not obvious from the underlying statute, but instead represents a policy-based decision within the scope of discretion the statute grants the agency, a party may well be adjudged liable of violating a provision of which it had no prior notice. The *Chenery* Court made it clear that such retroactivity was not necessarily illegal. Instead, *Chenery* required that courts test such retroactivity by means of a balancing test, in which the retroactivity is "balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by the law."[48] The Court easily concluded that the SEC was justified in applying its rule retroactively.[49]

B. Wyman-Gordon

The broad discretion *Chenery* bestowed on the agency to decide between rulemaking and adjudication was thrown into question twenty-five years later in *Wyman-Gordon*. *Wyman-Gordon* arose out of an NLRB adjudicatory order directing that a representation election be held for a particular unit of Wyman-Gordon employees. The provision of the order challenged before the Supreme Court required the firm to turn over to the NLRB an address list of all the

47. SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947).

48. *Id.* at 203.

49. *Id.*

eligible voters in that election, which the NLRB planned to turn over to the competing unions.[50]

As support for this disclosure requirement, the NLRB's opinion cited only a previous NLRB adjudicatory order, *Excelsior Underwear, Inc.*[51] But in *Wyman-Gordon*, the company attacked the validity of the *Excelsior* order itself, arguing that it was invalid as the product of an illegal procedure. Specifically, when the NLRB adjudicated the *Excelsior* case it invited a number of parties to submit amicus briefs on the address list disclosure issue. Then, after ruling in favor of requiring disclosure, the NLRB declined to enforce the requirement in the pending case against Excelsior, but instead made the disclosure rule apply only prospectively. According to Wyman-Gordon, this conduct rendered the *Excelsior* process in reality a rulemaking, which thus was invalid for failure to comply with the APA's rulemaking requirements. In turn, according to the company, the invalidity of the *Excelsior* order left the NLRB's order against Wyman-Gordon devoid of any support.

Wyman-Gordon produced an extremely fractured Court. Justice Fortas, writing for a plurality of four, agreed with the company that the *Excelsior* process constituted a rulemaking, and, as such, was invalid for having failed to comply with the APA's rulemaking provisions.[52] Nevertheless, the plurality concluded that the NLRB's direction to Wyman-Gordon to disclose the address list was valid, as the agency had the authority to impose such a requirement even if it was unsupported by the precedent of the now-discredited *Excelsior* case.[53] This latter conclusion – that the order against Wyman-Gordon was valid – became the holding of the Court, as an opinion by Justice Black, joined by two other Justices, took the position that the NLRB had done nothing wrong in *Excelsior* and thus that the *Excelsior* rule was available as support for the order against Wyman-Gordon.[54] To confuse the matter even further, the plurality's first conclusion – that the NLRB's process in *Excelsior* was an invalid attempt at rulemaking – also commanded a majority of the Court, as the votes of Justices Douglas and Harlan, both of whom would have reversed the order against Wyman-Gordon because of the invalidity of the *Excelsior* order, supplemented the plurality's four votes on this point.[55] Thus, Supreme Court majorities both condemned the *Excelsior* process and upheld the disclosure requirement against Wyman-Gordon, which was not supported by anything except the discredited *Excelsior* rule.

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50. NLRB v. Wyman-Gordon Co., 394 U.S. 759, 761 (1969) (plurality opinion).
51. 156 N.L.R.B. 111 (1966).
52. *See Wyman-Gordon*, 394 U.S. at 764 (plurality opinion).
53. *See id.* at 769 (plurality opinion).
54. *See id.* at 769-75 (Black, J., concurring in result).
55. *See id.* at 775-81 (Douglas, J., dissenting); *id.* at 781-83 (Harlan, J., dissenting).

When put alongside *Chenery*, *Wyman-Gordon* brings into sharp focus the problem of agency adjudication. At least part of the problem a majority of the *Wyman-Gordon* Court had with the *Excelsior* order regarded its purely prospective effect. However, *Chenery* held out the at-least theoretical possibility that an agency order could be struck down as inappropriately retroactive if it failed the balancing test described in that case.[56] The combination of these two conclusions leaves the agency with the possibility that an adjudication could be struck down as either inappropriately retroactive or inappropriately prospective. In fact, if *Wyman-Gordon*'s concern about pure prospectivity takes the form of a per se rule against such a practice, then logically an agency sometimes simply will be unable to proceed by adjudication. To illustrate, consider a situation in which an agency is considering imposing a substantial liability on a party, based either on the agency's new understanding of a statute or new policy concern. If the imposition of such a liability is prohibited because it fails the *Chenery* test, then the agency effectively will be prohibited from using adjudication because purely prospective announcement of the rule also would be of at least questionable legality after *Wyman-Gordon*.

The illogic of the situation after *Wyman-Gordon* reflects a larger problem with agency adjudication. If agency adjudication really is analogous to judicial adjudication, then problems of unfair retroactivity would arise rarely. At least when courts interpret statutory law, the concern underlying the retroactivity bar – lack of notice of the law[57] – does not arise because the law at least formally existed before the judicial interpretation, and thus there is no real retroactivity.[58] And as pointed out by commentators such as Nicholas Zeppos,[59] the most effective common-law decisions suggest that what is happening is incremental change rather than wholesale repudiation of pre-existing rules. Indeed, even constitutional decisions, often considered to be the type of adjudication least cabined by pre-existing law, can be conceived of as fundamentally incremental and bound to prior precedent even when it is being extended beyond that precedent.[60] By contrast, when an agency adjudicates, it need not confine itself to existing law, but instead is able to place upon that law the gloss of

56. *See* SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) (enunciating test balancing "the ill effect of the retroactive application of a standard" against "the mischief of producing a result which is contrary to a statutory design or to legal or equitable principles").

57. *See id.* at 217 (Jackson, J., dissenting).

58. Obviously, this discussion does not deal with *legislative* retroactivity.

59. *See, e.g.*, Zeppos, *supra* note 6, at 1148-49.

60. *See* Poe v. Ullman, 367 U.S. 497, 522-55 (1961) (Harlan, J., dissenting) (describing substantive due process jurisprudence in which process of interpolation and rational extrapolation from enumerated guarantees found in Bill of Rights identifies fundamental rights). *See generally* Lawrence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Right*, 57 U. CHI. L. REV. 1057 (1990) (describing substantive due process jurisprudence in which process of rational harmonization of precedent identifies fundamental rights).

entirely novel policy concerns, in effect explicitly and self-consciously making new law. *Chenery* illustrates that sort of agency lawmaking. Thus, agencies make new law in an explicit manner not done by courts when they apply the common law or interpret statutes or even constitutional provisions.[61]

At the same time that we confront the reality of agency adjudicative lawmaking, however, our intuition – buttressed by the APA[62] – analogizes between agency adjudication and judicial action, and thus arises a concern about agency adjudicative prospectivity. If agency adjudication is just like its judicial cousin, how can agencies be allowed to adjudicate with purely prospective consequences? This question is important to a proper understanding of agency adjudication because judicial retroactivity is not only normal, but is, at least in the federal system, arguably inherent in the idea of adjudication.[63] If the answer is that because agencies make law when they adjudicate, this only raises the question of whether we can attach usefully the term "adjudication" to anything an agency does. This suspicion of agency adjudicative prospectivity only is heightened by the fact that courts are predisposed to accept arguments that an agency has rulemaking authority.[64] So, to amend the previous question: If agency adjudication is just like its judicial cousin, how can agencies be allowed to adjudicate with purely prospective consequences, especially when purely prospective action already can be taken through the rulemaking power? One obvious answer to this question is that adjudication may be a superior format for agency action given the particularized nature of some aspect of the issue. In fact, the particularized nature of the issue confronting the agency was central to the Court's analysis in *Bell Aerospace*, the last of the cases in the Supreme Court's rulemaking-adjudication trilogy.

C. Bell Aerospace

The issue in *Bell Aerospace* was whether certain groups of corporate purchasers for Bell Aerospace could claim the National Labor Relations Act's

61. *But see* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 536-37 (1991) (citing cases in which Supreme Court has applied its decisions prospectively).

62. *See supra* Part II (discussing APA).

63. *See, e.g., James B. Beam*, 501 U.S. at 547 (Blackmun, J., concurring in judgment) (concluding that purely prospective application of new rules that Supreme Court litigation establishes would violate nature of judicial review). I should note, though, that state courts sometimes have authority to act in ways that would constitute separation of powers violations if the federal courts performed them; for example, some state courts have the authority to issue advisory opinions. *See, e.g.*, MAINE CONST. art. VI, § 3 (authorizing Supreme Judicial Court of Maine to issue advisory opinions); State v. Sheward, 715 N.E.2d 1062, 1081-83 (Ohio 1999) (discussing criteria for "public action," obviating standing requirement).

64. *See, e.g.*, National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 691 (D.C. Cir. 1973) (noting "the overwhelming judicial support given to expansive agency readings of statutory rule-making authorizations that are not flatly inconsistent with other statutory provisions").

(NLRA) protection for employee unionization. A year before considering the situation of Bell Aerospace's purchasers, the NLRB had decided in another adjudication, *North Arkansas Electric Cooperative, Inc.*,[65] that "managerial employees" could claim the NLRA's protection as long as they satisfied a test focusing on their possible conflicts of interest as unionized managers.[66] According to the *Bell Aerospace* Court, the *North Arkansas* conflict of interest test reflected a reversal of the agency's longstanding position that employees allied with management could never come within the NLRA's protection.[67] In *Bell Aerospace*, the NLRB applied the *North Arkansas* test and decided that the NLRA did in fact protect the purchasers' organizing efforts.

The Court reversed the NLRB's reading of the statute and remanded the case.[68] Because it reversed on the merits, the Court did not consider the procedural propriety of the *North Arkansas* rule. In other words, it did not consider whether, as in *Wyman-Gordon*, the *North Arkansas* rule – representing a significant change from earlier agency practice – should have been enacted by a rulemaking as opposed to an adjudication.[69] However, the Court's decision that the NLRA completely excluded managerial employees meant that on remand the NLRB would have to determine whether the purchasers were in fact "managerial employees." The Court then proceeded to discuss whether the NLRB could make this determination by adjudication, or whether, as the court of appeals had held, this determination demanded rulemaking.

In deciding the rulemaking-adjudication issue, the Court cited *Chenery*'s broad deference to the agency's choice and *Wyman-Gordon*'s recognition that adjudication can serve as the vehicle for the formulation of agency policy. However, the Court did state that in some situations reliance on adjudication "would amount to an abuse of discretion."[70] According to the Court, though, this was not one of those situations. In allowing the agency to proceed by adjudication, the Court noted the variety of factual situations that the employee-or-manager question implicates and concluded that any generalized standard probably would not be very useful. The Court also concluded that industry reliance on prior NLRB decisions did not require a different result. In so concluding, the Court noted several factors:

> It has not been shown that the adverse consequences ensuing from such reliance are so substantial that the Board should be precluded from reconsidering the issue in an adjudicative proceeding. Furthermore, this is not a

65. 185 N.L.R.B. 550 (1970).

66. *See* NLRB v. Bell Aerospace Co., 416 U.S. 267, 270-72 (1974) (describing NLRB's action in *North Arkansas Electric Cooperative, Inc.*, 185 N.L.R.B. 550 (1970)).

67. *See Bell Aerospace*, 416 U.S. at 287-88.

68. *Id.* at 289-90.

69. *Id.* at 291.

70. *Id.* at 294.

> case in which some new liability is sought to be imposed on individuals for past actions which were taken in good-faith reliance on Board pronouncements. Nor are fines or damages involved here.[71]

Thus, the fact-specific nature of the issue in *Bell Aerospace* justified deference to the agency's choice between adjudication and rulemaking. But because the issue did not implicate private party reliance interests, the *Bell Aerospace* Court was able to suggest, consistent with *Chenery*'s retroactivity analysis, that such interests theoretically might limit the agency's discretion to make this choice.

IV. Subsequent Appellate Court Case Law

Federal appellate courts considering challenges to agency adjudications have been left with the task of distilling a rule from *Chenery*, *Wyman-Gordon*, and *Bell Aerospace*. These cases combine rhetoric and holdings indicating broad deference to agency decisions with suggestions that such deference is not unlimited. *Chenery* recognized that an agency adjudication may be unfairly retroactive,[72] *Wyman-Gordon* suggested that the procedure of such an adjudication or its purely prospective application may convert the purported adjudication into a de facto rulemaking,[73] and *Bell Aerospace* identified detrimental reliance as a factor to be considered in determining the appropriateness of the retroactivity that normally results from agency adjudication.[74]

The mixed signals sent by these cases have led lower federal courts to experiment with limitations on agency freedom to choose between rulemaking and adjudication. While the Ninth Circuit has engaged in the most aggressive experimentation with such limitations, other federal courts have tinkered on the margins of the general rule that the rulemaking/adjudication choice remains with the agency. This part of the Article examines appellate courts' post-*Bell Aerospace* jurisprudence. The principles developed in those cases will provide the foundation for this Article's more general discussion of agency discretion to choose between rulemaking and adjudication.

A. The Development of the Law in the Ninth Circuit

The Ninth Circuit, in a series of cases starting in the 1970s, has developed and refined a jurisprudence governing agencies' discretion to choose between rulemaking and adjudication. While some commentators[75] and courts[76] gener-

71. *Id.* at 295.

72. *See supra* Part III.A (discussing *Chenery*).

73. *See supra* Part III.B (discussing *Wyman-Gordon*).

74. *See supra* Part III.C (discussing *Bell Aerospace*).

75. *See, e.g.*, 1 DAVIS & PIERCE, *supra* note 15, § 6.8.

76. *See, e.g.*, Stotler & Co. v. CFTC, 855 F.2d 1288, 1294 (7th Cir. 1988); New York Eye

ally focus on the 1981 case of *Ford Motor Company v. FTC*[77] when discussing the Ninth Circuit law on this issue, in fact an earlier case, *Patel v. INS*,[78] provides the first real glimpse of the court's developing jurisprudence.[79]

1. The Beginning: Patel

In *Patel*, the court considered an INS adjudicatory decision denying an alien's request for discretionary suspension of deportation.[80] The alien, Patel, based his request on his status as an investor in a U.S. business, as allowed by INS regulations enacted in 1973.[81] The agency determined, however, that Patel had not satisfied the "investor exception," reading into it a requirement that the investment "tend to expand job opportunities" in the United States.[82] In so holding, the agency relied on an earlier adjudication, *In re Heitland*,[83] that had established the job creation requirement. The problem in *Patel* arose because *Heitland* had interpreted an earlier version of the investor exception regulation and had stated only in dicta that the then-recently promulgated 1973 regulation also included a job creation requirement.[84]

Thus, the situation confronting the court in *Patel* paralleled that in *Wyman-Gordon*: The agency first had established a legal principle during an adjudicatory proceeding (in *Wyman-Gordon* the disclosure requirement established in *Excelsior*, and in *Patel* the job-creation requirement purportedly established in *Heitland*). In both cases the agency then tried to apply the principle in a later adjudication (against, respectively, the Wyman-Gordon Company or Mr. Patel). But again in both cases, there was something inappropriate about the adjudicatory format by which the agency established the original rule. In *Wyman-Gordon*, the problem arose from *Excelsior*'s quasi-rulemaking procedure and its purely prospective effect, while the problem in *Patel* was that *Heitland* used pure dicta "prospectively [to] pronounc[e] a broad, generally applicable requirement, without then applying that requirement to aliens seeking exemptions under the 1973 regulation."[85] Thus, just as

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& Ear Infirmary v. Heckler, 594 F. Supp. 396, 406 n.18 (S.D.N.Y. 1984); Colorado Dep't of Soc. Servs. v. Dep't of Health & Human Servs., 585 F. Supp. 522, 525 (D. Colo. 1984).

77. 673 F.2d 1008 (9th Cir. 1981).

78. 638 F.2d 1199 (9th Cir. 1980).

79. *See* Ford Motor Co. v. FTC, 673 F.2d 1008 (9th Cir. 1981); Patel v. INS, 638 F.2d 1199 (9th Cir. 1980).

80. *Patel*, 638 F.2d at 1201.

81. *Id.*

82. *Id.* at 1202.

83. 14 I. & N. Dec. 563 (BIA 1974).

84. *Id.* at 566-67.

85. *Patel*, 638 F.2d at 1204.

the Supreme Court had done in *Wyman-Gordon*, the court reversed the agency for relying on an adjudicatory precedent that somehow was insufficiently "judicial."

But the court did not stop at the parallel to *Wyman-Gordon*, 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 the agency had eliminated the requirement.[86] The court also noted that a regulation promulgated subsequent to Patel's application (and thus not applicable to his case) included a job creation requirement.[87] Because the agency had first tentatively, and later conclusively, utilized the rulemaking process to establish the job creation requirement, the court concluded that that issue did not by its nature require case-by-case resolution.[88] Thus, the court concluded, the case fell outside *Bell Aerospace*'s admonition that certain issues must be decided by adjudication because of their fact-specific character.[89] The court then closed its analysis by noting two issues that grew in importance in later Ninth Circuit case law. First, the court found a notice problem in the agency's inconsistent conduct in the period before Patel's application; namely, withdrawing the job-creation criterion from its proposed 1973 regulation but "obscurely"[90] adding the requirement in *Heitland* dicta.[91] Second, the court noted the severe hardship Patel would face, given the extreme liberty-impairing quality of deportation.[92]

Patel laid the analytical groundwork for subsequent Ninth Circuit jurisprudence. First, the court relied primarily on its conclusion that the agency's use of adjudication to establish the job creation requirement impermissibly "circumvent[ed]"[93] both prior and subsequent rulemaking processes. In addition to this procedural flaw, the court found a more fundamental problem in the agency's resolution of this issue by adjudication – the agency's own conduct suggested that the rule could be stated in a general regulation.[94] Finally,

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86. *Id.* at 1202.

87. *Id.* at 1202 n.2.

88. *Id.* at 1205.

89. *See id.* ("In contrast [to the situation in *Bell Aerospace*], 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.").

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 1204.

94. *Id.*

the court noted the burden that retroactivity imposed on the private party target and the target's lack of notice of the rule.[95] All of these concerns ultimately found their way into the developing Ninth Circuit law.

2. *The Development:* Ford Motor

In *Ford Motor*, the Ninth Circuit continued to develop its limitations on agency discretion to choose between rulemaking and adjudication.[96] *Ford Motor* concerned a challenge to an FTC adjudication against an Oregon-based Ford dealership and Ford Motor Company concerning accounting practices they employed to calculate the value of repossessed cars. The agency brought these charges while it was involved in a rulemaking process aimed at regulating closely related practices that the same classes of businesses employed.[97]

The court disallowed the agency's use of adjudications to attack these practices. Relying on *Patel*, the court framed the issue as whether the adjudication "change[d] existing law, and ha[d] widespread application."[98] The court's analysis then considered those two issues. 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 cited no case from any UCC jurisdiction that interpreted the Code to prohibit the challenged practices.[99] The court then highlighted the general applicability of the legal principle emerging from the adjudication. The court noted 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 in order to inform them of the requirements that they would have to meet.[100] The court's conclusion reflected its hesitation to allow 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 § 9-504 and in effect enact the precise rule the FTC has proposed, but not yet promulgated.[101]

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95. *Id.* at 1205.
96. Ford Motor Co. v. FTC, 673 F.2d 1008 (9th Cir. 1981).
97. *Id.* at 1010.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*

3. *The Limiting and Solidifying of* Ford Motor

Subsequent Ninth Circuit opinions have recast the *Ford Motor* test so as to preserve somewhat more 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*,[102] 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.[103] 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.[104] 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."[105] In deciding this issue, the court compared the text of the regulation to the standards announced in the adjudication.[106] 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 [was] consistent with the proceedings in the former."[107]

The two factors considered in *Montgomery Ward* have become the basis of current Ninth Circuit law. In *Cities of Anaheim v. FERC*,[108] the court explicitly identified "[t]wo exceptions qualify[ing] [the] general proposition" that "[a]dministrative agencies are free to announce new principles during adjudication."[109] First, "agencies may not impose undue hardship by suddenly changing direction, to the detriment of those who have relied on past policy."[110] Second, "agencies may not use adjudication to circumvent the Administrative Procedure Act's rulemaking procedures."[111] 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

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102. 691 F.2d 1322 (9th Cir. 1982).
103. Montgomery Ward & Co. v. FTC, 691 F.2d 1322, 1326-27 (9th Cir. 1982).
104. *Id.* at 1329.
105. *Id.*
106. *Id.*
107. *Id.*
108. 723 F.2d 656 (9th Cir. 1984).
109. Cities of Anaheim v. FERC, 723 F.2d 656, 659 (9th Cir. 1984).
110. *Id.*
111. *Id.*

> 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.[112]

Thus, while distinguishing *Ford Motor* on its facts, the *Cities* court appears to have sought to narrow its potentially broad sweep by applying its test more cautiously. The *Cities* analysis has been cited by subsequent courts and appears to have become the generally accepted rule in the circuit.[113] The Ninth Circuit's more circumspect approach to the agency's rulemaking/adjudication decision is also evident in the aftermath 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.[114]

B. Case Law from Outside the Ninth Circuit

For the most part, courts outside the Ninth Circuit have refused to embrace *Ford Motor* and its progeny.[115] However, some courts have refrained from completely deferring to agencies' discretion to choose between rulemaking and adjudication. The opinions generally have relied on slightly different combinations of the factors noted in *Ford Motor*, especially the general or specific nature of the facts at issue in the challenged adjudication and the extent to which retroactive application of the adjudicative result imposed an unfair burden on the defendant.

1. First Bancorporation*:* *The Functional Appropriateness of Adjudication*

Outside of the Ninth Circuit, the Tenth Circuit appears to have adopted the strongest principle limiting agency discretion to choose between rulemaking and adjudication. In *First Bancorporation v. Board of Governors*,[116] that court set aside an adjudicatory order issued by the Federal Reserve, partially on the

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112. *Id.* (footnote omitted).

113. *See, e.g.*, Union Flights, Inc. v. FAA, 957 F.2d 685, 688-89 (9th Cir. 1992); Coos-Curry Elec. Co-op, Inc. v. Jura, 821 F.2d 1341, 1346 (9th Cir. 1987); *see also* Weight Watchers v. FTC, 830 F. Supp. 539, 542-43 (W.D. Wash. 1993).

114. *See supra* note 113.

115. *See, e.g.*, General Am. Transp. Corp. v. ICC, 883 F.2d 1029, 1031 (D.C. Cir. 1989) (Silberman, J., concurring in denial of rehearing); Stotler & Co. v. CFTC, 855 F.2d 1288, 1294-95 (7th Cir. 1988); New York Eye & Ear Infirmary v. Heckler, 594 F. Supp. 396, 406 n.18 (S.D.N.Y. 1984); Colorado Dep't of Soc. Servs. v. Department of Health & Human Servs., 585 F. Supp. 522, 525 (D. Colo. 1984).

116. 728 F.2d 434 (10th Cir. 1984).

ground that the order constituted an attempt to set legislative policy and thus properly was made only via a rulemaking procedure.[117] The court concluded that the agency had "examined no specific facts about the potential adverse effects" of the private party's proposed action, but "instead made broad conclusions" that important statutory policies would be undermined unless the private party was not restricted from acting as it wished.[118] "Thus," according to the court, "the Board's order contain[ed] no adjudicative facts having any particularized relevance to the petitioner."[119] The Court therefore held that the agency had "abused its discretion by improperly attempting to propose legislative policy by an adjudicative order."[120]

The Tenth Circuit has continued to adhere to that decision. For example, in *Matzke v. Block*,[121] the Tenth Circuit, citing *First Bancorporation*, required the Agriculture Department to promulgate regulations to implement a statutory mandate giving the agency the discretion to defer repayments on farm loans.[122] The court noted the urgency of the problem facing the borrowers and concluded that the need for quick relief required the agency to set up standardized procedural and substantive guidelines governing the decisions to grant or deny that relief.[123]

Other courts also have held agencies to the APA's rulemaking procedures when the agency's action could be described as enunciation of a generally applicable rule. For example, in *American Trucking Association v. United States*,[124] the Eleventh Circuit characterized as a regulation a decision by the Interstate Commerce Commission to revoke all "special permission authorities" (SPAs) to trucking rate bureaus.[125] Essentially, these SPAs were authorizations to the bureaus, granted bureau-by-bureau, to change their rates more

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117. First Bancorporation v. Board of Governors, 728 F.2d 434, 438 (10th Cir. 1984).

118. *Id.*

119. *Id.*

120. *Id.*

121. 732 F.2d 799 (10th Cir. 1984).

122. Matzke v. Block, 732 F.2d 799, 803 (10th Cir. 1984).

123. *See id.* at 802; *see also* Rapp v. Department of Treasury, 52 F.3d 1510, 1521-22 (10th Cir. 1995) (citing *First Bancorporation* but concluding that character of agency's action justified adjudication).

124. 688 F.2d 1337 (11th Cir. 1982).

125. *See* American Trucking Ass'n v. United States, 688 F.2d 1337, 1348 (11th Cir. 1982), *rev'd sub nom.* ICC v. American Trucking Ass'n, 467 U.S. 354 (1984). A rate bureau is an arrangement whereby firms, usually trucking firms or railroads, can meet to discuss pricing information. *See* Fred L. Smith, Jr., *The Case for Reforming the Antitrust Regulations (If Repeal Is Not an Option)*, 23 HARV. J.L. & PUB. POL'Y 23, 27 (1999). Such bureaus enjoy statutory immunity from antitrust regulation. *See* Steven C. Carlson, *A Historical, Economic, and Legal Analysis of Municipal Ownership of the Information Highway*, 25 RUTGERS COMPUTER & TECH. L.J. 1, 37 n.193 (1999).

quickly than normally allowed by law. According to the court, the agency was arguing essentially that its action effectively was a series of adjudications revoking particular SPAs.[126] The court rejected that position, reasoning that the generally applicable nature of the agency's decision rendered it a regulation.[127] Unlike *First Bancorporation, American Trucking* did not discuss the legislative character of the facts crucial to the agency's reasoning. However, the cases are similar in that both courts relied on the general applicability of the agency's action to reject the agency's claim that it really was engaging in adjudication.

2. Denial of Notice

As *Chenery* suggested, agency adjudication may be vulnerable to the charge that it has resulted in the imposition of unfairly retroactive liability. The main concern here is a situation in which the adjudication results in the establishment of a new legal standard that is then applied against the target's past conduct. Before reaching that problem, however, it may be useful to mention a smaller, more easily resolved notice problem.

a. Denial of "Procedural" Notice

In this second version of the notice issue, the agency begins adjudicating a party's liability without having established the legal standard against which it will judge the party's conduct. Thus, the adjudication features argument both on the proper legal standard and on whether that alleged standard was satisfied. Obviously, the uncertainty surrounding the applicable legal standard can severely handicap the party's argument that its conduct was lawful. Thus, in these cases the private party argued that the process made it impossible for it to make an effective presentation regarding its compliance with the law.

An influential case of this sort, relied on by subsequent cases presenting the same problem, is *Hill v. FPC*.[128] *Hill* dealt with a ratemaking proceeding conducted by the Federal Power Commission. In reviewing the proposed rates that natural gas producers submitted, the Commission purported to apply a standard enunciated in an adjudication decided several years

126. *See American Trucking*, 688 F.2d at 1348.

127. *See id.* For similar analyses, see *Jean v. Nelson*, 711 F.2d 1455, 1474-77 (11th Cir. 1983), finding that INS policy not to allow discretionary parole to deportees was a regulation, based on the generality of the rule, and *Brown Express, Inc. v. United States*, 607 F.2d 695, 699-702 (5th Cir. 1979), finding that the agency had engaged in rulemaking when the ICC announced that it would discontinue its long-standing informal practice of giving competing carriers notice before issuing emergency, temporary operating authority. *But see id.* at 699 n.3 (noting that agency did not contest characterization of action as rule, but simply argued that it came within one or more exceptions to APA's notice and comment requirement for rulemaking).

128. 335 F.2d 355 (5th Cir. 1964).

earlier.[129] It rejected the proposed rates, finding that the producers failed to use the appropriate factors in computing their costs.[130] The Commission also refused the producers' request to submit the proof the Commission thus had required.[131] The court reversed the agency, concluding that prior agency statements had not provided a sufficiently clear legal standard to guide the party's evidentiary presentation, and that the agency's refusal to reopen the proceedings to allow the party to present the relevant evidence deprived the producers of a fair hearing.[132]

Notice cases following *Hill* repeated this basic template. Courts applying *Hill* have examined whether the party had actual notice, regardless of its formality. For example, in *Central Arkansas Auction Sale v. Bergland*[133] the agency waited until the day the hearing commenced before giving the private party a copy of the rate computation method the agency was planning to use to judge the party's compliance with the law.[134] The court nevertheless upheld the adjudication because the agency did not object when the party asked for and received a continuance of the hearing in order to study and reply to the computation method it had just received.[135] While the court expressed misgivings about the advisability of this way of proceeding, it nevertheless concluded that the continuance provided adequate notice, which was all that the law required.[136]

The relation of these cases to the *Chenery/Bell Aerospace* problem is clear. Certainly, one solution to the procedural problem of inadequate ad-

129. Hill v. FPC, 335 F.2d 355, 357 (5th Cir. 1964).

130. *Id.* at 358.

131. *Id.* at 357.

132. *Id.* at 361-62.

133. 570 F.2d 724 (8th Cir. 1978).

134. Central Ark. Auction Sale v. Bergland, 570 F.2d 724, 726 (8th Cir. 1978).

135. *See id.* at 730-31.

136. *Id.* at 727-28; *see also* Giles Lowery Stockyards v. Department of Agric., 565 F.2d 321, 325-26 (5th Cir. 1977) (upholding agency procedure by which agency used letter to inform private party of standard by which it would be judged at upcoming adjudication, even when standard was not officially adopted until adjudication itself). Similarly, courts striking down agency action on this basis have focused on whether the challenging party had a realistic opportunity to provide evidence relevant to the legal standard. For example, in *Hatch v. FERC*, 654 F.2d 825 (D.C. Cir. 1981), the court struck down an adjudication in which the agency changed a 40 year-old legal standard in a manner disadvantageous to the private litigant. *Hatch*, 654 F.2d at 837. The court acknowledged that both sides argued the question of the proper legal standard before the ALJ, but noted that the ALJ had reserved his ruling on the legal question and never explicitly suggested that the private party present evidence relevant to the new standard. *Id.* In the court's view, the ALJ's actions made it impossible to construe the private party's action as a waiver of its right to present evidence relevant to the standard that the ALJ ultimately adopted. *Id.* at 836; *see also* Port Terminal R.R. Ass'n v. United States, 551 F.2d 1336, 1345-46 (5th Cir. 1977) (striking down agency adjudication because of lack of notice to private party of legal standard agency ultimately used).

vance notice of the legal standard is for the agency to promulgate the standard by means of a rule. By promulgating such a rule, the private party would be put on notice of the type of evidence it should present during the adjudication. Indeed, the private parties in some of these cases argued that the agency should be required to proceed by rulemaking.[137] Such a requirement would, of course, flatly contradict at least the spirit of *Chenery* and, arguably, would not find support in *Bell Aerospace*'s narrow exception, which speaks more to substantive reliance interests than procedural fairness. Unsurprisingly, then, the courts in these cases – even those that reversed the agency's actions – recognized the agency's freedom to proceed by adjudication.[138]

Ultimately, prohibiting the agency from using adjudication is unnecessary, given that a much simpler – and legally uncontroversial – expedient exists: the bifurcation of the hearing. Under this solution to the problem, the agency would conduct a hearing that aimed at determining the correct legal standard, and then would adjourn the proceedings in order to give the private party the opportunity to collect and present evidence relevant to the newly-enunciated standard. The courts striking down the agency's adjudication all suggested this approach,[139] and the proceeding in *Central Arkansas* – where the hearing was continued to give the private party a chance to prepare his case in light of the newly-disclosed standard – appears actually to have followed this model.[140]

b. Denial of "Substantive" Notice

A more serious notice problem arises when an agency applies a newly-established legal rule to past private party conduct, thus giving rise to a claim of unfair retroactivity. Recall that, to deal with these claims, *Chenery* announced a balancing test that weighed the burden that the retroactive application imposed against the "mischief" of producing a result "contrary to statutory design or to legal or equitable principles."[141] Thirty years later, the *Bell Aerospace* Court, without explicitly referring to the *Chenery* retroactivity test, relied on the lack of retroactive penalties in allowing an agency to act via an adjudication.[142] To complicate matters slightly, two years before *Bell Aerospace*, the D.C. Circuit, in *Retail, Wholesale & Department Store Union v.*

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137. *See, e.g., Central Ark.*, 570 F.2d at 726-27; *Giles Lowery*, 565 F.2d at 325.

138. *See* Hill v. FPC, 335 F.2d 355, 363 (5th Cir. 1964) ("We would not for a moment suggest that the Commission should, or could for that matter, lay down once and for all the standards to be applied in natural gas producer cases."); *see also Central Arkansas*, 570 F.2d at 1346 n.5 (acknowledging general lack of any requirement that agency proceed by rule as opposed to adjudication); *Giles Lowery*, 565 F.2d at 325 (same); *Port Terminal*, 551 F.2d at 1341 (same).

139. *See Hatch*, 654 F.2d at 835; *Port Terminal*, 551 F.2d at 1345; *Hill*, 335 F.2d at 364.

140. *See* Central Ark. Auction Sale v. Bergland, 570 F.2d 724, 727 (8th Cir. 1978).

141. SEC v. Chenery Corp., 332 U.S. 194, 203 (1947).

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

NLRB[143] enunciated a test to judge the appropriateness of retroactive agency action when the rulemaking-versus-adjudication issue is not present.[144] Appellate courts[145] confronted with that precise question largely have adopted this test.[146]

Several decisions have relied on the *Chenery/Bell Aerospace* doctrine to reverse agency adjudication results on the ground that they impermissibly impaired private parties' reliance interests on a prior legal regime. For example, in *United Gas Pipe Line Company v. FERC*,[147] the Fifth Circuit considered agency use of adjudication to impose a new rule regarding gas pipeline companies' authority to recover from their customers funds that they had advanced to gas production companies for exploration and production.[148] The first version of this rule disallowed recoverability for advances unless the producer spent the advance within a "reasonable time." The next year, the agency denied a pipeline company's recovery request on the ground that the producers had

143. 466 F.2d 380 (D.C. Cir. 1972).

144. *See* Retail, Wholesale & Dep't Store Union v. NLRB, 466 F.2d 380, 390-91 (D.C. Cir. 1972) (enunciating five factor test to judge claims of unfair agency retroactivity, considering: (1) whether case was one of first impression; (2) whether new rule represented abrupt departure from prior law; (3) degree to which affected party relied on any former rule; (4) degree of burden imposed by retroactive application of new rule; and (5) statutory interest in applying new rule despite any private party reliance on preexisting standard). Essentially, the *Retail, Wholesale* test echoes *Chenery*: Not only does it repeat, in more detail, the factors going into the balancing test, but it also asks whether the case was one of first impression, echoing *Chenery*'s observation that every case of first impression has a retroactive effect, but that such retroactivity by itself cannot make the action illegitimate. *Compare id. with Chenery*, 332 U.S. at 203.

145. *See* Abner S. Greene, *Adjudicative Retroactivity in Administrative Law*, 1991 SUP. CT. REV. 261, 273 n.44 (listing cases adopting *Retail, Wholesale* test).

146. It is a difficult question whether the *Chenery/Bell Aerospace* doctrine responds to precisely the same concern as the *Retail, Wholesale* test. Superficially it does not: *Chenery* speaks to the question whether an agency should be required to proceed by rulemaking as opposed to adjudication, while *Retail, Wholesale* asks when an agency should be prohibited from applying a new rule retroactively. Of course, if prospectivity corresponds with rulemaking, and retroactivity with adjudication, then the two tests do in fact speak to the same question. But if, for example, an agency can be allowed to adjudicate with purely prospective effect, then the analogy is broken, as a decision prohibiting agency retroactivity in a particular case does not necessarily mean that it is also prohibited from acting through adjudication. Thus, a judicial decision prohibiting agency retroactivity may affect the agency differently than a decision prohibiting an agency from adjudicating. It follows then that, even though the two tests are quite similar, *see supra* note 144, courts may apply them differently, if a court takes into account the effect any limitation it imposes may have on the flexibility remaining to the agency. Indeed, taking this factor into account seems almost mandated by the requirement – present in both tests – that the court consider the impact a prohibition on retroactivity would have on the effectuation of the regulatory policy. For this reason this Article, and, specifically, this part of the Article, focuses mainly on courts that explicitly relied on *Chenery* or *Bell Aerospace*, and places only secondary emphasis on courts applying *Retail, Wholesale*.

147. 597 F.2d 581 (5th Cir. 1979).

148. *See generally* United Gas Pipe Line Co. v. FERC, 597 F.2d 581 (5th Cir. 1979).

held some of the advances for more than thirty days after the pipeline company had included the amounts in its rate base: The agency believed that it would be unreasonable to pass on these costs when the advances had been held by the producers so long.[149]

The court considered the new order as announcing a presumption that costs held over thirty days were unreasonable and struck down its application against the defendant, concluding that the agency's use of adjudication to impose this new requirement fell within the *Bell Aerospace* exception.[150] The court concluded that retroactive imposition of the ratemaking order would make it impossible for the operator to recover "substantial . . . costs" incurred "in reliance on past Commission decisions."[151] Significantly, the court added, with almost no analysis, that "[w]e cannot help but think that the resulting enormous yearly losses would hinder the Commission's very purpose for instituting the [cost recovery] program."[152] Thus, even though the court did not explicitly cite the *Chenery* balancing test for retroactive adjudication, it essentially applied it, balancing the private costs of retroactivity against the damage to the regulatory program that would flow from disallowing the retroactivity. In *Natural Gas Pipeline Company of America v. FERC*,[153] the Seventh Circuit struck down a similar order, again based on *Bell Aerospace*'s exception.[154] But that court examined only the injury suffered by the private party's reliance and not the policy damage that denial of the order's retroactive effect would cause.[155] Another court, in a different factual context, purported to apply the *Chenery* balancing test but again only examined the harm done to the private party.[156]

V. Analyzing Agency Adjudication

Boiled down, the appellate court opinions discussed above reflect three distinct concerns about the propriety of agency decisions to choose between rulemaking and adjudication. The first, found in the Ninth Circuit rule as it ultimately developed, relates to inconsistencies in the agency's own conduct;

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149. *Id.* at 584.

150. In support of its view that the agency had established a general presumption and applied it retroactively, the court noted that the agency had established thirty days as the standard of reasonableness in every proceeding it decided after a particular date. *Id.* at 587 n.30.

151. *Id.* at 588.

152. *Id.* The court did note in a footnote, however, the Commission's own statement of the purpose of the cost recovery program and an earlier court's understanding of the statute's overall intention. *Id.* at 588 n.34.

153. 590 F.2d 664 (7th Cir. 1979).

154. *See generally* Natural Gas Pipe Line Co. of Am. v. FERC, 590 F.2d 664 (7th Cir. 1979).

155. *Id.* at 669-70.

156. *See* Drug Package, Inc. v. NLRB, 570 F.2d 1340, 1347 (8th Cir. 1978) (reversing retroactive application of NLRB's order).

namely, recourse to adjudication after the agency already has concluded that rulemaking is the more appropriate method for deciding a particular issue. The Ninth Circuit expressed this phenomenon as "circumvention" of the rulemaking process.[157] The second concern, most forcefully expounded by the Tenth Circuit in *First Bancorporation*, focuses on the functional appropriateness of one procedural vehicle over another.[158] In *First Bancorporation*, the court examined the nature of the issue to be decided – namely, whether it was fact-dependent or a more abstract issue of law or policy – and required the agency to proceed by rulemaking when the issue seemed more like the latter.[159]

Finally, courts have considered the unfair retroactivity that can potentially result from new legal standards being established and applied in the course of adjudications. Courts have faced two variants of this problem. First, agencies have sometimes established a legal standard during the course of an adjudication and attempted to apply that standard to the defendant in that adjudication. Such retroactive application of a new legal standard makes it difficult, if not impossible, for the defendant to argue effectively that it was in compliance with a standard whose status as a legal rule was in question until after the adjudication was over. Second, agencies have simply applied a new rule retroactively. In this second situation the issue is not such "process unfairness," but instead the unfairness that arises from retroactive imposition of a new rule.

The previous part of this Article considered each of these concerns in isolation. This part brings them together, by considering the types of agency conduct that implicate both the functional and the retroactivity concerns.[160] The subsequent part then brings in the anti-circumvention idea as part of an overall evaluation of the jurisprudence and a prescription for change.

A. The Types of Agency Action

The fact that two sets of criteria are operating here – law-changing versus law-applying and generalized versus particularistic types of issues – means that agency action can be split into four relevant categories:

	law-changing	law-applying
generalized	3	2
particularistic	4	1

157. *See, e.g.*, Konishi v. INS, 661 F.2d 818, 819 (9th Cir. 1981).

158. *See supra* Part IV.B.1; *infra* Part V.B.2.

159. *See supra* Part IV.B.1; *infra* Part V.B.2.

160. Because bifurcation of the adjudicative proceeding so easily remedies the "process unfairness" concern, *see supra* notes 139-40 and accompanying text, the rest of this Article will focus instead on situations in which bifurcation cannot cure the unfairness of the retroactivity, i.e., situations in which it is clear that the defendant has violated the new rule.

Each combination of these characteristics – the nature of the agency action as law-changing or law-applying (the two columns), and its generalized or fact-specific focus (the two rows) – carries with it different consequences for the rulemaking/adjudication decision. This part of the Article considers the four combinations of these criteria, represented in the above grid as Boxes 1 through 4, and draws some general conclusions about the importance of each of them to the question of judicial review of the agency's rulemaking/adjudication decision.

Box 1 can be immediately dismissed as a concern, as it presents a clear case for allowing an agency to proceed by adjudication. As in *Bell Aerospace*, the agency must make judgments about particular fact patterns that are not easily generalized, and does so – by hypothesis – by applying settled legal criteria.[161] This latter fact should mitigate concern about unfair impairment of reliance interests. Similarly, the fact-dependent nature of the agency's analysis indicates that the agency is acting appropriately in refraining from announcing a general rule. Once again an analogy to courts exists, if at a more abstract level; in this situation the agency adjudicator, like a court, is dispensing individual justice by applying settled law to the individual's unique facts. Such action – as opposed to setting forth broad policy applicable to an entire class of individuals – is quintessentially judicial.[162]

B. Justifications for an Agency's Choice to Proceed by Adjudication: Reconsidering Functional Analysis and Retroactivity Concerns

By contrast, Box 3, which presents the exact opposite situation as Box 1, is troubling. In Box 3, the agency is applying a novel legal principle and its application does not turn on facts particular to the subject of the adjudication. Analysis of this situation requires consideration of any agency justifications for choosing to adjudicate in this situation. In light of these justifications, this subpart continues by re-examining the functional and retroactivity concerns introduced earlier.

1. Justifications

Box 3 reflects the situation in *Excelsior Underwear, Inc.*,[163] the agency adjudication that the NLRB purported to use as the basis for the employee

161. *See* FTC v. Magui Publishers, 9 F.3d 1551 (unpublished table decision), 1993 WL 430102, at *2 (9th Cir. 1993) (rejecting claim that agency should have proceeded by rulemaking instead of adjudication when it prosecuted art dealers for misrepresenting authenticity of prints, on ground that "the present adjudication does not 'change[] existing law' or 'ha[ve] widespread application'" and that *Ford Motor* was inapplicable because "the practices the FTC seeks to forbid . . . are plainly illegal").

162. *Cf.* U.S. CONST. art. I, § 10, cl.1 (prohibiting states from enacting bills of attainder).

163. 156 N.L.R.B. 1236 (1966).

address-disclosure rule at issue in *Wyman-Gordon*.[164] The NLRB's conduct in *Excelsior* indicated a lack of concern with the functional factors *Chenery* identified as justifying an agency preference for adjudication – the fact-specificity of the regulatory issue, the agency's need to develop regulatory expertise before concretizing a principle into a rule, and the unforeseeability of a situation requiring a rapid agency response.[165] First, its decision-making process and analysis indicated a lack of concern with the nominal defendant's particular facts. The process included NLRB solicitations of amicus briefs from employer and union interest groups.[166] In its written opinion announcing the address disclosure principle, the NLRB discussed the requirement in general terms of the burdens it placed on employers, the benefits it would give to unions in general, and the logic of requiring the rule given the typical employer's superior data base of employee residence information.[167] By contrast, the NLRB's discussion included no statements about Excelsior Underwear's particular situation regarding employee information. Second, the general and purely prospective application of the address disclosure principle strongly suggests that the agency was not attempting to develop its regulatory power incrementally by imposing a requirement on a particular party and then observing how it actually worked in practice. Finally, the process suggests that the agency was not responding to an unforeseen situation that required an agency response. On the contrary, the agency's conduct reflects a measured, calculated initiative careful to take into account the interests and perspectives of all interested parties, whose result did not even apply to past conduct.

But even without these justifications, an agency may still attempt to justify its preference for adjudication on the ground that it needs to apply the new principle retroactively, given that it is at best unclear whether agencies have inherent authority to impose regulations retroactively.[168] Of course, this justification was not available to the agency in *Excelsior* because the agency applied the result only prospectively. But assume that, unlike in *Excelsior*, an agency justifies its preference for adjudication on the need to apply the result retroactively. If, as *Chenery* teaches,[169] the justification for retroactive action

164. *See supra* Part III.B (discussing *Wyman-Gordon*).

165. *See* text accompanying *supra* note 47 (quoting *Chenery*).

166. *See Excelsior*, 156 N.L.R.B. at 1237.

167. *See id.* at 1240-47.

168. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 216 (1988) (Scalia, J., concurring). For samples of the academic literature on this question, see generally William V. Luneburg, *Retroactivity and Administrative Rulemaking*, 1991 DUKE L.J. 106, and Richard J. Wolf, Note, *Judicial Review of Retroactive Rulemaking: Has* Georgetown *Neglected the Plastic Remedies?*, 68 WASH. U. L.Q. 157 (1990).

169. *See* SEC v. Chenery Corp., 322 U.S. 194, 203 (1947) (ruling that courts must balance burden of retroactive law-changing against "mischief" agency sought to remedy by such law-changing in determining constitutionality of retroactive agency action).

is the "mischief" that would occur absent retroactive application, but the case lacks *Chenery*'s justifications for resorting to adjudication, it should be harder for the agency to defend piecemeal imposition of the new rule. In other words, if functionally the regulatory situation does not require adjudication, the "mischief-abatement" ground for retroactivity might seem less compelling because such piecemeal conduct by its nature may not be particularly effective in abating the mischief.[170]

It should not be enough for an agency to respond to this argument by saying that retroactive piecemeal adjudication is the best it can do given a lack of statutory authorization to promulgate retroactive regulations. The lack of statutory authorization is not an unchangeable feature of the legal landscape; instead, Congress can authorize agencies to promulgate retroactive regulations.[171] Like Sherlock Holmes's dog that did not bark, the Congress that does not authorize retroactive agency regulations, especially after *Bowen v. Georgetown University Hospital* required that such authority be granted explicitly,[172] should be acknowledged in its silence.[173] To allow agencies to impose piecemeal retroactive burdens on the theory that piecemeal retroactivity is better than none at all, thus short-circuiting *Chenery*'s balancing test, would deny Congress's role in ultimately setting the limits of agency conduct.

It may be even more inappropriate for the agency to answer the concern about piecemeal imposition of retroactive burdens by imposing the adjudicative result generally, either informally or through an aggressive enforcement program. In *Ford Motor*, the Ninth Circuit was concerned about precisely this possibility: In that case, the FTC was preparing to notify auto dealers throughout the nation of the result of the adjudication, presumably to induce general compliance with the principle emerging from it. To allow the agency to surmount the *Chenery* retroactivity balancing test by asserting that the

170. It is true that sometimes an agency adjudication may be quicker than a rulemaking. *See, e.g.*, STEPHEN G. BREYER & RICHARD B. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 607 (1992) (noting EPA estimate that initial preparation to promulgation of major rule takes average of three and one half years). On the other hand, an adjudication does not cause every party in the affected industry to comply automatically; instead, there may be a significant delay while the agency publicizes the adjudicative result and sets forth its position regarding the binding nature of the adjudication on the rest of the industry. Thus, adjudication may at least sometimes be the longer, less expeditious route of effectuating industry compliance with a given standard.

171. *See Georgetown*, 488 U.S. at 208.

172. *See id.* at 208 (requiring express statement before courts may construe statutes to authorize agency to promulgate retroactive regulations).

173. Distinguish the controversial practice of inferring meaning from legislative silence. *See* Peter Tiersma, *The Language of Silence*, 48 RUTGERS L. REV. 1, 92 (1995) (noting disagreement among commentators and courts on meaning properly accorded legislative silence). *See generally* David L. Rotenberg, *Congressional Silence in the Supreme Court*, 47 U. MIAMI L. REV. 375 (1992). In this situation, the default presumption is that silence confers no authority to promulgate retroactive regulations.

retroactive effect of the adjudication was not limited to the litigation target but was generally applicable would allow the agency to accomplish by indirection what Congress is presumed to have not approved of – promulgating a generally applicable retroactive regulation. Such conduct would constitute circumvention, not of the rulemaking process per se, but of Congress's limitations on the scope of administrative regulations.

Thus, approaching the matter from a strictly policy perspective, there appear to be few justifications for agency use of adjudication in this situation. The rationales noted by *Chenery* do not apply, and the need for retroactivity should be considered lessened to the extent that Congress has not given the agency the authority to issue retroactive regulations, even after *Georgetown* established explicit legislative authorization as a requirement. Nevertheless, the fact that the agency has a weak case for preferring adjudication in this situation does not necessarily justify courts in striking down the agency's choice. Even if there is no rationale affirmatively justifying the agency's choice, the agency still may be able to argue that its choice was not so irrational as to constitute an abuse of discretion. The analysis of whether the agency's choice does in fact constitute an abuse of discretion should address the two issues to which this discussion now turns. First, is there a workable rule for determining when adjudication is not only not a good idea, but affirmatively a bad one? Second, what harm does an agency's inappropriate choice cause? The next subpart of this Article considers these questions in the context of the Tenth Circuit's functional analysis in *First Bancorporation*,[174] while the subsequent subpart considers them against the backdrop of the fair notice-retroactivity concern.[175]

2. First Bancorporation *Reconsidered*

The search for a workable rule should begin with *First Bancorporation*. As noted earlier, the *First Bancorporation* approach asks whether the agency's analysis in the adjudication turned on facts specific to the defendant or whether instead it relied on generally applicable policy concerns.[176] Concluding that the agency had not considered such particularized facts, the court held the agency's action to constitute an abuse of discretion. Thus, if we assume away any reliance concerns that might implicate retroactivity analysis, we can analyze *First Bancorporation* as presenting the situation in Box 2, law applying in a non-fact specific context. So understood, *First Bancorporation* squarely raises the question whether this sort of functional analysis, divorced from any concerns about retroactivity, can provide a tool for judicial control of an agency's choice between adjudication and rulemaking.

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174. *See infra* Part V.B.2.

175. *See infra* Part V.B.3.

176. *See supra* Part IV.B.1.

Although heavily criticized,[177] *First Bancorporation* employs an analysis used in the important procedural due process cases from the early twentieth century. Those foundational cases, *Londoner v. Denver*[178] and *BiMetallic Investment Co. v. State Board of Equalization*,[179] together established the law for when the due process right to a hearing applied.[180] In *BiMetallic*, the Supreme Court, speaking through Justice Holmes, rejected a due process claim brought by a landowner who wished to contest a state agency decision to revalue, for property tax purposes, every parcel of taxable land in a county.[181] In rejecting the claim that the Constitution gave the landowner the right to a hearing, the Court distinguished *Londoner*, in which the Court stated that due process required a hearing when a bill for city improvements was assessed against landowners presumed to have benefitted from the improvements. The *BiMetallic* Court distinguished *Londoner* as follows:

> In *Londoner* . . . [a] relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds, and it was held that they had a right to a hearing. But that decision is far from reaching a general determination dealing only with the principle upon which all the assessments in a county had been laid.[182]

Thus, in order to determine whether a party had a due process hearing right, the *BiMetallic* Court examined the sort of facts at issue (i.e., were the parties "affected . . . upon individual grounds").[183] Commentators seeking to explain and justify the *Londoner/BiMetallic* distinction have noted and expanded upon this functional analysis,[184] and modern courts have looked explicitly to the "adjudicative" or "policy" character of the issue when confronted with claims that an agency should have proceeded by adjudication instead of rulemaking.[185]

An obvious distinction between the *Londoner/BiMetallic* analysis and the analysis in *First Bancorporation* lies in the right at issue: *Londoner* and *BiMetallic* decided claims of constitutional right, while *First Bancorporation* simply decided a sub-constitutional issue of administrative procedure. While

177. *See* Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 63 (1985); Russell L. Weaver, *Challenging Regulatory Interpretations*, 23 ARIZ. ST. L.J. 109, 146-47 (1991).

178. 210 U.S. 373 (1908).

179. 239 U.S. 441 (1915).

180. *See generally* BiMetallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915); Londoner v. Denver, 210 U.S. 373 (1908).

181. *See BiMetallic*, 239 U.S. at 445-46.

182. *Id.*

183. *Id.* at 446.

184. *See* 2 DAVIS & PIERCE, *supra* note 15, § 9.2; *see also* William D. Araiza, *The Trouble with* Robertson*: Equal Protection, the Separation of Powers, and the Line Between Statutory Amendment and Statutory Interpretation*, 48 CATH. U. L. REV. 1055 (1999).

185. *See infra* note 204.

due process *requires* an adjudicatory hearing if an agency acts in a targeted way against a particular party, the due process guarantee does not speak to the situation in *First Bancorporation*, where the claim was that the agency should have proceeded by some means *other* than an adjudicatory hearing. The different source of those rights may well justify greater judicial deference to agency discretion than if the rights emanated from the Constitution. The government may not impair constitutional rights, as fundamental limits on governmental action, simply by labeling its action in a way so as ostensibly to avoid the constitutional problem. For example, a legislature cannot pronounce an individual guilty of a crime and deny the individual a trial on the ground that the action was legislative instead of adjudicative,[186] nor can it effectively take private property simply by decreeing that it is not private property at all.[187] Thus, the *BiMetallic* Court did not stop at the government's own characterization of such action, but instead compared the characteristics of that action with those in *Londoner*. By contrast, the right to participate in an administrative rulemaking does not exist independently of the government action – that is, the right does not attach until an agency is in fact conducting a rulemaking. Unless there is something intrinsically important about that right – i.e., unless there is something about it so important that it should drive courts to conclude that the agency is in fact conducting a rulemaking – the existence of the rulemaking participation rights should not be used as a bootstrap for a judicial conclusion that the right applies in a given case.

Rulemaking participation rights certainly are not trivial. Agency use of adjudication to establish a rule may well deprive subsequent defendants of any meaningful participation right for at least two reasons. First, while agency adjudications are subject to procedural requirements imposed by the Due Process Clause, this right may not mean much if the statutory scheme authorizes the agency to collect substantial fines or damages from individuals who violate the rule.[188] For example, in *Ford Motor* the Ninth Circuit noted that

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186. *See* U.S. CONST. art. I, § 10, cl. 1 (prohibiting states from enacting bills of attainder); INS v. Chadha, 462 U.S. 919, 960 (1983) (Powell, J., concurring in judgment) (concluding that legislative veto overturning agency's suspension of particular named individuals' deportations constituted unconstitutional attempt by Congress to exercise judicial powers).

187. *See* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 163-64 (1980) (holding that state took private property when it deemed private funds deposited in court-supervised account to be "public money," concluding that "a State, by *ipse dixit*, may not transform private property into public property without compensation"). Still, the Takings Clause presents a difficult application of this principle because the state initially defines property. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1034-35 (1992) (Kennedy, J., concurring in judgment) (discussing concept of property as expectation interests, which are in turn inevitably created by governments). A similar problem arises in the area of procedural due process, when the inquiry turns to whether the government action has impaired a property interest. *See generally* Board of Regents v. Roth, 408 U.S. 564 (1972).

188. Imposition of such fines would not implicate reliance-retroactivity concerns because

the agency was in the process of preparing a letter to every other car dealer in the country, notifying them of the result of the agency adjudication.[189] If the statute had authorized the agency to assess penalties for statutory violations, such a "notification" might serve as a not-so-subtle signal to the industry to conform with the result of that adjudication, lest the agency pursue them and seek fines for ongoing non-compliance.[190] While such fines might rise to the level of a due process violation if they effectively precluded an opportunity to challenge the agency's interpretation of the law,[191] the contours of that guarantee are not certain[192] and leave open the real possibility that parties effectively will be precluded from a chance to challenge the policy wisdom of the rule that the agency seeks to apply.

Second, even if a party thus is not precluded from challenging the rule when it has its turn before the agency, the presumption in favor of the rule enshrined in the precedent means that there will be less opportunity to convince the agency that its rule constitutes unwise policy. Under current law, an agency cannot depart from principles announced in prior adjudication unless it explains why it changed its mind.[193] The institutional and possibly political cost that an agency faces when considering a change of position, combined with the requirement that such a change survive an extra, sometimes unpredictable, and possibly quite rigorous[194] layer of judicial review, likely

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these subsequent defendants would most likely be held to have been on notice of the existence of the rule from the prior adjudication. Indeed, as noted, the agency might even notify other members of the industry of the result of the first litigation as well as the rule thereby established. *See infra* note 189 and accompanying text.

189. *See* Ford Motor Co. v. FTC, 673 F.2d 1008, 1010 (9th Cir. 1981).

190. For a more general discussion of such informal agency pressure, see generally Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 WIS. L. REV. 873.

191. *See Ex parte* Young, 209 U.S. 123, 147 (1908) (holding that statutory scheme violates due process "when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate [the private party] from resorting to the courts to test the validity of the legislation").

192. *See, e.g.*, Solid State Circuits, Inc. v. EPA, 812 F.2d 383 (8th Cir. 1987) (discussing scope of *Ex parte* Young); Wagner Seed Co. v. Daggett, 800 F.2d 310 (2d Cir. 1986) (same); Aminoil, Inc. v. EPA, 599 F. Supp. 69 (C.D. Cal. 1984) (same); *see also* J. Wylie Donald, *Defending Against Daily Fines and Punitive Damages Under CERCLA: The Meaning of "Without Sufficient Cause,"* 19 COLUM. J. ENVTL. L. 185, 196-206 (1994) (analyzing scope of *Ex parte* Young).

193. *See infra* notes 194 & 233.

194. *Cf.* Motor Vehicles Mfrs. Ass'n v. State Farm Auto Ins. Co., 463 U.S. 29, 41-42 (1983) (invalidating National Highway Transportation Safety Board's reversal of its previous requirement that automakers install airbags or passive safety devices as arbitrary and capricious). The Court stated that:

> Revocation [of a regulation] constitutes a reversal of the agency's former views as to the proper course. A "settled course of behavior embodies the agency's informed

places at least a finger on the side of the scale favoring adherence to past precedent. By contrast, the notice and comment rulemaking process allows any and all interested parties to participate in the shaping of regulatory policy before the agency has committed itself.

Despite these problems with agency adjudication, *First Bancorporation*'s limit on agency discretion to choose adjudication presents problems of its own. Notwithstanding the *Londoner/BiMetallic* distinction, the line between actions that "look like adjudicating" and those that "look like legislating" is sufficiently vague as to make it impossible to conclude that an agency abused its discretion in doing one but calling it another. For example, courts very often decide abstract issues of law that have little to do with the facts of particular parties before them. Constitutional or statutory interpretation is often of this sort. To take an obvious example, the particular situation of the plaintiff in *Roe v. Wade*[195] probably had little effect on the Supreme Court's analysis of the constitutional right to an abortion.[196] In fairness, federal courts nevertheless require that their power not be invoked except at the behest of particular parties who have been injured and who require judicial assistance in vindicating a right.[197] But even though agency courts are not subject to the same Article III standing requirements, agency adjudication effectively satisfies a standing-like requirement when the agency, on behalf of the government, alleges that a particular party has violated federal law.[198] Even if the agency adjudication solely establishes a rule of conduct that then will apply generally to all parties, the concrete adversarial nature of the agency's enforcement action makes the agency adjudication just as inherently judicial as a test case litigated in a court.[199]

> judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to."

Id. (citations omitted).

195. 410 U.S. 113 (1973).

196. *See* Roe v. Wade, 410 U.S. 113 (1973). One should note, though, that the particular party's situation might have much to do with whether the court will feel obligated to reach a given legal issue. It is for this reason that advocates seeking to advance an agenda broader than their particular clients' immediate interests often pick their cases carefully. But once a court decides that a particular plaintiff's claims require a decision on a broader statutory or constitutional issue, the plaintiff's particular facts tend to become less important.

197. *See, e.g.*, Valley Forge College v. Americans United for Separation of Church & State, 454 U.S. 464, 472 (1982) (discussing this concern in standing doctrine).

198. A more interesting Article III-type question is whether purely prospective adjudicative relief makes an agency adjudication akin to an advisory opinion. *See infra* Part V.C.

199. Indeed, to take the analogy further, sometimes legislation looks suspiciously like adjudication. The Supreme Court attempted to demarcate a line between "legislation" and adjudication of individual cases in the famously opaque case of *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872). The line *Klein* draws has proven anything but clear. *See* Araiza, *supra*

Of course, courts have other, more pragmatic, reasons for limiting judicial action to concrete, live disputes. Such adversarial conflicts sharpen presentations of the issues, enhance a court's understanding of the effects its decisions will have on private parties, and generally increase the quality of judicial decision-making.[200] But once again these rationales also apply to agency adjudication. If the agency has the authority to use either rulemaking or adjudication but concludes that its decision-making will be enhanced by a sharply adversarial presentation of the legal issues and the presence of parties that the agency's action will immediately affect, it makes sense to allow the agency to choose adjudication. For example, *Chenery* itself stated that it was appropriate for an agency to rely on adjudication when it needed to develop more experience with a statute before promulgating generally applicable binding regulations.[201] In the same vein, in a Tenth Circuit case that distinguished *First Bancorporation*, the court authorized an agency to deviate in a particular case from general penalty guidelines the agency had developed, based on the agency's statement that the guidelines should be expected to evolve as the agency gained expertise in administering the statute.[202]

Thus, an agency's use of adjudication to enunciate a generally applicable rule without reference to the litigant's particular facts – the situation in *First Bancorporation* – mirrors in substantial degree activities undertaken by courts. This conclusion suggests that it is difficult to condemn the agency's conduct in such situations on a purely functional basis. At base, the line between adjudication and legislation is simply too porous to rely on such functional terminology as the basis for holding that an agency's use of adjudication was inappropriate. The fact that courts review the agency's adjudication/rulemaking choice only for abuse of discretion buttresses this conclusion.[203] The APA drafters' choice of this relatively lenient standard suggests that rulemaking participation rights are not so important relative to the alterna-

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note 184, at 1073-79 (discussing how courts and commentators have attempted to understand *Klein*). In *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992), the Court upheld, against a *Klein* challenge, an appropriations rider that directed courts to find that certain government actions satisfied statutes alleged to have been violated in cases identified in the rider. As a result of *Klein*, Congress can go a long way toward micro-legislating without crossing the line into the adjudication of cases. For a more detailed discussion of *Klein*, *Robertson*, and the problem of legislative interference with the judicial function, see generally Araiza, *supra* note 184.

200. *See Valley Forge*, 454 U.S. at 486 (discussing rationale for standing requirement); State *ex rel.* Ohio Academy of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1080-81 (Ohio 1999) (same).

201. SEC v. Chenery Corp., 332 U.S. 194, 203 (1947).

202. *See* Rapp v. Department of Treasury, 52 F.3d 1510, 1521-22 (10th Cir. 1995).

203. *See* 5 U.S.C. § 706 (1994) (setting forth APA's standards of review); *see also Chenery*, 332 U.S. at 202-03 (identifying abuse of discretion as appropriate standard of review prior to drafting of APA).

tive that parties have rights to participate in their own adjudications so as to justify stringent judicial policing of the hazy distinction between adjudication and legislation, at least when constitutional rights are not at stake.[204]

This conclusion does not mean that an agency is thereby free to use adjudication whenever it chooses. Since the APA distinguishes between rules and adjudicative orders, it should be read as imposing some limits on the agency's ability to choose. But rather than approaching the issue from the point of the view of the character of the decision – i.e., the functional approach in *First Bancorporation* – it may make more sense to approach the question from the point of view of the private party rights that the agency's choice implicates. Indeed, the above discussion suggests that the nature of the right involved may distinguish *First Bancorporation* from *BiMetallic*.

The most important private party right that the agency's choice of adjudication implicates is the right to fair notice of the law. An agency's retroactive application of a new rule implicates that right. Because most agency retroactivity results from adjudication, this Article now considers the problem posed by retroactive application of a new rule via agency adjudication.

3. Reconsidering the Retroactivity Problem

Compared to *First Bancorporation*'s functional analysis, the retroactivity concern presents both a stronger reason to be concerned about an agency's choice to proceed by adjudication and more hope for judicial limits to protect private interests.

First, the retroactivity concern protects private party rights that always have been considered quite weighty. In contrast to the functional concern, which only protects a version of the participation rights that the APA guarantees, the retroactivity issue implicates rights of constitutional magnitude. The Supreme Court has identified several important principles implicated by legislative retroactivity, including protection of reliance interests,[205] interests in

204. Indeed, cases in which the private party alleges the opposite – that an agency engaged in rulemaking when it should have adjudicated – do appear to feature less deferential review, even if the results still tend to favor the agency's choice. *See, e.g.*, Hercules Inc. v. EPA, 598 F.2d 91, 118 (D.C. Cir. 1978) (rejecting such claim in context of Clean Water Act, based on court's conclusion that issues decided in rulemaking "require[d] EPA to consider issues of general policy with respect to a pollutant, i.e., the significance of its toxicity, degradability, persistence, and effects on affected organisms, rather than issues of fact concerning any particular entity's discharges"); South Terminal Corp. v. EPA, 504 F.2d 646, 660-61 (1st Cir. 1974) (distinguishing between adjudicative facts and legislative facts); Anaconda Co. v. Ruckelshaus, 482 F.2d 1301, 1306-07 (10th Cir. 1973) (approving agency's use of public hearing). Significantly, this less deferential review arises exactly when the claim made – that an agency should have adjudicated instead of doing rulemaking – has constitutional overtones.

205. *See, e.g.*, Eastern Enters. v. Apfel, 524 U.S. 498, 547-49 (1998) (Kennedy, J., concurring in judgment and dissenting in part); General Motors Corp. v. Romein, 503 U.S. 181, 191 (1992); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16-17 (1976).

"finality and repose,"[206] and concern about the inappropriate singling out that is possible when legislation burdens a discrete class of individuals that can be identified with precision.[207] Concern with retroactivity also fits comfortably within the broad outlines of constitutional limitations on government. The concern for reliance animates constitutional jurisprudence ranging from procedural due process[208] to the Takings[209] and Contracts[210] Clauses. The singling out concern finds expression in a variety of constitutional guarantees, including the Ex Post Facto,[211] Bill of Attainder,[212] and Equal Protection[213] Clauses.[214]

Second, there is a history of judicial experimentation with and application of principles designed to detect inappropriate retroactivity. The appellate courts developing and applying the *Retail, Wholesale* test[215] have created a nuanced test that expands upon the basic *Chenery* balancing test for judging agency retroactivity. Periodic Supreme Court cases analyzing the test by which courts analyze legislative retroactivity have complimented this effort.[216] Together, these cases reflect a workable judicial standard for measuring the appropriateness of agency retroactivity.

This is not to suggest that analysis of the retroactivity concern is simple or mechanical. Indeed, the few cases to have analyzed the adjudication/rule-

206. United States v. Carlton, 512 U.S. 26, 37-38 (1994) (O'Connor, J., concurring in judgment).

207. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 266-67 (1994) (discussing presumption against finding statute to have retroactive effect); *see also* Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 693 (1960) (stating that retroactive laws "may be passed with an exact knowledge of who will benefit from [them]"). Justices Breyer and Powell have located concern about such singling out in the Constitution's general structure of separated power. *See* Plaut v. Spendthrift Farm, 514 U.S. 211, 240 (1995) (Breyer, J., concurring in judgment); INS v. Chadha, 462 U.S. 919, 960 (1983) (Powell, J., concurring in judgment). For a deeper examination of these Breyer and Powell opinions, see Araiza, *supra* note 184, at 1092-95 & 1099-1101.

208. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564 (1972) (discussing reliance basis underlying legal understandings of concept of property).

209. *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (finding that property interest does not exist, and thus no taking occurs, when legal principles extant in jurisdiction at time owner acquires property would have supported limitation on use whose later denial allegedly constitutes taking); Penn Cent. Transp. Corp. v. City of New York, 438 U.S. 104, 124 (1978) (identifying degree of interference with investment-backed expectation interests as factor in determining whether taking has occurred).

210. *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 245 (1978) (highlighting unusually severe impact on reliance interests of statute impacting pension funding obligations).

211. U.S. CONST. art. I, § 10, cl. 1.

212. U.S. CONST. art. I, § 9, cl. 3 & art. I, § 10, cl. 1.

213. U.S. CONST. amend. XIV.

214. *See generally* Araiza, *supra* note 184.

215. Retail, Wholesale & Dep't Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972).

216. *See supra* notes 205-07.

making issue in terms of *Chenery*'s balancing test indicate the problems that can occur. Recall, for example, the pipeline rate base cases in which the Fifth and Seventh Circuits relied on *Bell Aerospace* to reverse the agency's choice to proceed by adjudication.[217] In *Natural Gas Pipeline*, the Seventh Circuit struck down the agency's use of retroactive adjudication based simply on the size of the retroactive monetary liability.[218] Moreover, the court's conclusion as to the size of that liability appeared to be ad hoc, without any reference either to the scale of defendant's operations or some other relevant comparative factor.[219]

The problem is that many, perhaps most, agency adjudications will impose liability on the private party. If that alone is enough to make retroactively imposed liability suspect, then the *Bell Aerospace* exception becomes much wider than courts – and even *Bell Aerospace* itself – appear to have supposed. Such analysis is flatly inconsistent with *Chenery*, which required that the courts balance the burden on the private party against the mischief the agency sought to remedy with retroactive application of the new rule. The logical conclusion of such a bizarre jurisprudence is reflected in a Fourth Circuit case where a dissenting judge argued that the Federal Mine Safety and Health Review Commission should not be allowed to announce and to apply a new rule in an adjudication because imposition of that new rule had resulted in the private party being fined a total of two dollars.[220]

Even when these courts considered the substantive rationality of the agency retroactivity decision, they sometimes have failed to give that issue sufficiently careful analysis. Consider the other pipeline case discussed earlier, the Fifth Circuit's opinion in *United Gas*.[221] In that case the court condemned the agency's thirty-day presumption because it failed to promote the statutory objective of encouraging domestic gas production.[222] Thus, in

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217. *See supra* Part IV.B.2.b.

218. *See supra* notes 153-55 and accompanying text (discussing *Natural Gas Pipeline*).

219. *Compare supra* Part IV.B.2.b *with* United States v. Carlton, 512 U.S. 26, 32-33 (1994) (considering constitutionality of statute's retroactive effects, and framing relevant issue as scope, not size, of statute's retroactive effect), Laborer's Int'l Union of N. Am. v. Foster Wheeler Corp., 26 F.3d 375, 393 (3d Cir. 1994) (comparing amount of retroactive liability to estimated litigation expenses of challenging it), *and* J.L. Foti Const. Co. v. OSHA, 687 F.2d 853, 858-59 (6th Cir. 1982) (considering magnitude increase in penalty due to retroactive application of new standard). *See* Eastern Enters. v. Apfel, 524 U.S. 498, 548-49 (1998) (Kennedy, J., concurring in judgment and dissenting in part) (finding *Carlton* factor satisfied based on challenged statute's creation of "liability for events which occurred 35 years ago").

220. *See* Sewell Coal Co. v. Federal Mine Safety & Health Review Comm'n, 686 F.2d 1066, 1072 (4th Cir. 1982) (Widener, J., dissenting).

221. United Gas Pipe Line Co. v. FERC, 597 F.2d 581 (5th Cir. 1979).

222. *See* text accompanying *supra* notes 147-52 (discussing facts and court's analysis in *United Gas*).

Chenery's terms, the court simply decided that retroactive application of the thirty-day presumption did not promote the goals of the regulatory program, but actually impeded them. So understood, *United Gas* and cases like it[223] implicitly conclude that there is nothing to balance: retroactivity both produced harm to the private party and impeded attainment of the statutory objective. But if this were really the court's conclusion, one would have expected a more in-depth discussion of the policy repercussions of the agency retroactivity. Instead, the analysis is breathtakingly quick. For example, the *United Gas* court's entire textual discussion of the agency's policy consisted of the conclusion that "[w]e cannot help but think that the resulting enormous yearly losses would hinder the Commission's very purpose for instituting the [cost recovery] program."[224] Fundamental tenets of judicial deference to administrative expertise and judgment require careful review of the agency's rationale – rather than the cursory analysis seen in these cases – before the agency action can be struck down as irrational.[225]

Nevertheless, this sort of misanalysis is not the result of a fundamentally unmanageable rule. As noted above, both the appellate courts and the Su-

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223. *See, e.g.*, Drug Package, Inc. v. NLRB, 570 F.2d 1340 (8th Cir. 1977). In *Drug Package*, the Eighth Circuit struck down retroactive application of a rule announced by the NLRB after labor and management in the *Drug Package* case had performed all the relevant actions. *Id.* at 1346. The court based its refusal to impose retroactive liability on two grounds. First, it found that the company had relied on the prior NLRB rule. *Id.* at 1347. Second, it found, without analyzing the issue, that retroactive application of the new rule to Drug Package would "accomplish[ ] none of the benefits contemplated in" the adjudication in which the agency changed the rule. *Id.* For a similar, though better reasoned, example of a court concluding that retroactive application of a new principle frustrated regulatory policy and thus left nothing to balance, see McDonald v. Watt, 653 F.2d 1035, 1046 (5th Cir. 1981) (applying *Retail, Wholesale* test).

224. *United Gas*, 597 F.2d at 588. The court did note in a footnote, however, the Commission's own statement of the purpose of the cost recovery program, as well as an earlier court's understanding of the statute's overall intention. *See id.* at 588 n.34. For a similarly cursory analysis, see *supra* note 223 (discussing *Drug Package*).

225. *Cf.* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29 (1983) (finding agency action arbitrary and capricious after considering whether agency had considered relevant statutory standards or committed clear error of judgment). It should be noted that courts applying the similar *Retail, Wholesale* test have decided to apply the test on a de novo basis, with no deference to the agency. *See, e.g.*, Oil, Chemical & Atomic Workers Int'l Union, Local 1-547 v. NLRB, 842 F.2d 1141, 1144 n.2 (9th Cir. 1988); Retail, Wholesale & Dep't Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972). While there is an argument for less deference to an agency when what is at stake is a constitutional right such as the due process right to be free of arbitrary retroactivity, that position must be balanced against the inescapable fact that the agency will best understand how to effectuate regulatory policies. Thus, while there may be a good argument for de novo application of other parts of the *Retail, Wholesale* test, there is a weaker argument for such review of the agency's determination that retroactivity is necessary in order to implement a given regulatory policy.

preme Court have provided a great deal of guidance in the enunciation and sensitive application of a test to measure administrative retroactivity. Problems such as those in the pipeline cases can be viewed as simple misapplications of a rule, an easily correctable situation. For example, some courts applying the *Retail, Wholesale* test have managed to consider retroactivity in a much more nuanced way.[226] Thus, the retroactivity concern provides both a reason to be concerned about agency adjudication and a method to police inappropriate agency uses of adjudication. But the anti-retroactivity principle threatens to collide with one of the main reasons to allow agencies to adjudicate, a reason that all agree is legitimate: a case where the proper outcome depends on the facts of the particular litigant. This Article now turns to that situation.

C. Prospective Agency Adjudication and the Importance of Facts

Box 4 represents the situation where a novel principle is being established, but – unlike in *Excelsior* and *Ford Motor* – the subject matter at issue is not susceptible to generalized treatment. *Bell Aerospace* presents this situation.[227] In *Bell Aerospace*, the agency considered a unionization request made by a group of corporate purchasers. The agency concluded that they were eligible for federal unionization protection, applying a two-year old reinterpretation of the NLRA to the effect that even some managerial employees could be represented by a union.[228] The Supreme Court reversed the agency's statutory interpretation and read the statute so as to exclude "managerial employees" from its union organizing rights. The Court then remanded the case to the agency for it to determine whether the purchasers were in fact "managerial employees." It also made it clear that the agency could proceed by adjudication if it chose. According to the Court, the diversity of fact patterns facing the agency meant that the agency justified a case-by-case approach because those differing fact patterns were crucial to the agency's analysis.[229]

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226. *See supra* note 219 (citing cases considering *Retail, Wholesale* test); *see also McDonald*, 653 F.2d at 1043-46.

227. For a more detailed statement of *Bell Aerospace*'s facts, see *supra* Part III.C.

228. The term "managerial employee" is not mentioned in the statute, but became significant only after the NLRB itself developed a jurisprudence in which unionization rights turned on that term, which the agency coined based on its interpretation of the statute. *See* NLRB v. Bell Aerospace, 416 U.S. 267, 275-77 (1974).

229. *See Bell Aerospace*, 416 U.S. at 294. The Court stated:

> As the Court of Appeals noted, "[t]here must be tens of thousands of manufacturing, wholesale and retail units which employ buyers, and hundreds of thousands of the latter." 475 F.2d at 496. Moreover, duties of buyers vary widely depending on the company or industry. It is doubtful whether any generalized standard could be framed which would have more than marginal utility. The Board thus has reason to

While a case such as *Bell Aerospace* thus presents a strong functional argument for adjudication, the use of adjudication nevertheless potentially conflicts with the retroactivity concern. This problem did not arise in *Bell Aerospace*, as the Court concluded that the reliance interests were not "so substantial that the Board should be precluded from reconsidering the issue in an adjudicative proceeding."[230] But what if that reliance had in fact been substantial? If the balance between those reliance interests and the mischief that retroactive application of the new rule mitigated had favored non-retroactivity, what course would have been left to the agency?

Assuming both the necessity of proceeding by adjudication and the strong reliance interests, the obvious solution to the problem is for the agency to use adjudication but to apply the result only prospectively. But this suggestion immediately encounters the objection that pure prospectivity converts adjudication into de facto rulemaking.[231] Because any solution must be consistent with the APA's basic distinction between adjudication and rulemaking, adjudicative prospectivity is vulnerable to the extent that retroactivity and prospectivity define the distinction between adjudication and rulemaking. This Article suggests that a deeper understanding of adjudication – when combined with the unique features of agency action – justifies allowing an agency to apply an adjudicative result prospectively, but only when the adjudicative result turns on the particular facts of the party before the agency court. In those instances, the fact-intensive nature of the issue mitigates the legislative character of purely prospective agency adjudication. At the same time, limiting agency adjudicative prospectivity to fact-intensive contexts allows the agency to choose adjudication in the situations *Chenery* identifies as justifying that procedure without allowing the agency's discretion to spill over into situations in which the adjudication would become de facto rulemaking.

First, fact-intensiveness makes a decision less abstract and thus more like classic adjudication. Indeed, a fact-intensive adjudicatory decision, prospectively applied, starts to look like an injunction because it judges the legality of the party's prior conduct and directly controls its future conduct. To the extent that the rule established is fact specific, it mitigates the objection that pure prospectivity refocuses the agency action away from the specific target of the litigation and toward the class of similarly situated parties. Arguing for

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proceed with caution, developing its standards in a case-by-case manner with attention to the specific character of the buyers' authority and duties in each company.

Id.

230. *Id.* at 295.

231. *See, e.g.*, Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 216 (1988) (Scalia, J., concurring) (arguing that APA clearly distinguishes administrative regulations from agency adjudicative orders in that regulations have only prospective effect while adjudicative orders have "future as well as past legal consequences").

adjudicative prospectivity, another commentator makes an analogous point, noting that the defendant in the litigation that produced the prospectively applied rule would most likely remain affected by that decision as a member of the class whose future conduct the rule impacted.[232] The limitation on adjudicative prospectivity suggested here merely goes one step further, requiring that the rule's direct impact be limited to that particular party.

Second, this type of adjudicatory prospectivity allows for participation rights that distinguish those adjudications from regulations. Again, the key lies in the fact-intensiveness of the adjudication. Just like a common-law decision, a fact-dependent agency adjudication can always be distinguished in the next case on the ground that the new facts are sufficiently different to justify a different result. This feature thus limits adjudicatory prospectivity to situations in which subsequent targets have a meaningful participation right, i.e., the right to distinguish their facts from those of the precedent case.

By contrast, purely prospective application of a more general principle, such as the address disclosure rule in *Excelsior*, resembles legislation precisely because it does not depend on the defendant's unique facts and thus does not afford a realistic participation right to subsequent defendants. Of course, a defendant in an enforcement action brought after *Excelsior* would still have a right to a hearing, but since the relevant rule does not turn on the particular defendant's own facts, the only argument available to such a defendant is that the rule is simply bad policy. That argument, however, is not made against a blank slate, for agency adjudications are presumptively binding unless the agency explains why it has decided to deviate from its previous policy.[233] A subsequent defendant also faces the hurdle of arguing against a rule that the agency already has considered and decided to adopt, with all the attendant institutional biases against reversing a publicly-announced course. A subsequent defendant confronted with these significant hurdles must also factor in the possibility of fines or penalties accruing during the litigation period.[234] Thus, when the agency prospectively applies a generally applicable rule such as the *Excelsior* rule, the result is very much akin to the result when an agency promulgates a regulation: in both cases, members of the affected class face significant pressure to comply.

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232. *See* Greene, *supra* note 145, at 298.

233. Indeed, in such a situation the agency would have the burden of justifying a deviation from its prior rule. *See, e.g., Georgetown*, 488 U.S. at 216-17 (Scalia, J., concurring) (citing Local 32, Am. Fed'n of Gov't Employees v. FLRA, 774 F.2d 498, 502 (D.C. Cir. 1985); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (1970)). Although this might also be the case with a fact-specific adjudicatory rule, the task of distinguishing would be significantly easier the more fact-specific the original rule was.

234. *See supra* notes 190-92 and accompanying text (explaining how agency-imposed fines pressure litigants).

This does not suggest that allowing limited adjudicative prospectivity magically solves the problem of guarding private party participation rights. Under this proposal, agencies would continue to have the power to enunciate general rules via adjudication, with all the attendant concern for the participation rights of subsequent litigants, as long as the agency applied those rules retroactively (consistent with the *Chenery* balancing test). The point of allowing limited prospective adjudication is not to solve that difficult problem, at least not conclusively.[235] Instead, the point is to show how such limited prospective adjudication solves the problem of unfair retroactivity while still keeping adjudication analytically distinct from rulemaking. The retroactivity problem is solved, of course, by allowing prospectivity. Adjudication remains distinct from rulemaking because it retains a core attribute of traditional adjudication – a focus on case-by-case consideration of individual parties' particular facts.

Finally, this approach to prospective adjudication – that it is appropriate when applied to a fact-specific context – also justifies prospectivity when the agency's rationale for choosing adjudication is that it needs experience applying the statute before it feels comfortable solidifying the requirement into a general regulation. As *Chenery* noted, such a situation clearly justifies agency use of adjudication.[236] But when the *Chenery* balance would not allow retroactivity based on such a "learning curve" rationale, the adjudicative results can be applied prospectively on the theory that such adjudication is, in its own way, fact-intensive. Specifically, imposition of a mandate via an adjudication allows the agency to observe how the rule operates in practice, that is, how it operates in the context of the defendant's specific facts. Particularized facts once again become important, not necessarily as inputs into the decision to impose the rule, but instead as prospective indicators of the rule's effectiveness and wisdom.[237]

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235. In a way, though, limited adjudicatory prospectivity does in fact solve the problem. If satisfaction of the *Chenery* test implies a conclusion that the public need outweighs private parties' reliance interests, public need may also outweigh private parties' rights to a meaningful hearing when the agency applies the rule against them. Obviously, the formal right to a hearing would always remain, but it is assumed that such a hearing is less meaningful when (1) the rule is based on general policy concerns, (2) there is a presumption against the agency changing its mind on the general policy wisdom of the rule, *see supra* note 233, and (3) the agency could threaten to assess non-compliance fines during the litigation period, *see supra* notes 190-92. But at least the right to a hearing would remain, and that right might be enough to conclude that there is no "participation right" problem when the *Chenery* test allows retroactivity.

236. *See* SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947).

237. As an operational rule, this principle would require courts to inquire whether the agency is planning on imposing the same rule throughout the industry before examining the effect of the rule on a limited number of parties. For the agency to engage in such selective testing of its rule would cause obvious unfairness problems of the agency imposing different

So understood, allowing prospective adjudication when the outcome is fact-dependent provides room for the agency to choose adjudication in all the situations *Chenery* identified as justifying adjudication[238] while it simultaneously honors legitimate reliance interests. The first *Chenery* justification – the fact specificity of the regulatory issue – is satisfied by definition. The "learning curve" rationale also is satisfied, once that rationale is understood as speaking to the agency's need to observe the interplay of its tentative regulatory approach and the facts of a given party's business operations. Finally, the agency's need to respond to unforeseen circumstances presumably means that, absent extraordinarily strong reliance interests, the private burden-public mischief balance for agency retroactivity will favor retroactive application of the rule, thus obviating the need to worry about prospective adjudication. Moreover, limited prospectivity honors the fundamental difference between adjudication and legislation and the participation rights that attend each of those.[239] It therefore manages to address both the retroactivity and functional concerns discussed above.

The rule also is judicially manageable. Unlike *First Bancorporation*'s approach, it manages to avoid most instances of courts having to second guess the functional appropriateness of fact-based specificity or policy-based generality because it applies only when retroactive application would cause constitutional concerns. There would still be some need for judicial consider-

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burdens on similarly situated parties. However, the only way to mitigate this concern would be for the agency to apply the rule to all similarly situated industry members. If that is what it does, however, then the agency is not really acting tentatively by testing a rule before turning it into a regulation. Instead, its conduct looks much more like simple circumvention of the rulemaking process of the sort *Ford Motor* criticized. *See* Ford Motor Co. v. FTC, 673 F.2d 1008, 1010 (9th Cir. 1981).

238. *See Chenery*, 332 U.S. at 202-03.

239. Another approach to the question of prospective application of agency adjudications argues that the appropriateness of such prospectivity should turn on the novelty of the legal principle established. For example, Professor Greene suggested that courts allow agencies to apply adjudicatory results purely prospectively if the rule established in the adjudication would be tested under the second prong of the two-part test announced in *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984), for evaluating agency constructions of their authorizing statutes. *See* Greene, *supra* note 145, at 278. Under *Chevron*, courts first ask whether the statute clearly answers the interpretive question; if not, then courts must defer to any reasonable agency construction. *See Chevron*, 467 U.S. at 842-45. Thus, Professor Greene would allow the agency to apply an adjudication purely prospectively if the rule the adjudication established was not clearly discernable from the statute; in other words, if the agency was effectively engaging in lawmaking. *See* Greene, *supra* note 145, at 276. This Article's analysis is not inconsistent with Professor Greene's. However, by focusing less on the novelty of the agency's rule and more on the character of the process that produced it, this Article's analysis moves beyond the concern with unfair retroactivity to address a broader concern about the functional appropriateness of an agency choosing adjudication over rulemaking in a particular situation.

ation of the fact-specific nature of an agency adjudication if an agency attempted to give only prospective effect to what really was a general rule.[240] But the judicial scrutiny here would be of lesser scope. Courts would not directly second-guess the agency's choice between rulemaking and adjudication. Instead, at most they would decide that an agency could not use adjudication to apply purely prospectively a rule so unprecedented[241] and so burdensome that its retroactive application would deny due process. Furthermore, the only ground for such a judicial decision would be that the agency was using adjudication even though the rule did not turn on facts specific to the defendant and even though the agency was not using adjudication in order to test out a new policy before applying it generally. In other words, the only situation in which a court should reverse the agency action would be when the agency was using adjudication to announce a (1) new, (2) purely prospective, (3) non fact-dependent rule that (4) would be immediately applicable to all members of the relevant industry and (5) whose retroactive application would violate due process. If there is to be any judicial role in policing the rulemaking/adjudication distinction, it must include striking down that kind of an adjudication.

D. Conclusion

This investigation suggests that although the non-fact specificity of the rule is relevant to the wisdom of an agency decision to act via adjudication or rulemaking, courts should not use a lack of specificity as the sole criterion for reviewing the legality of an agency's action. As noted in the discussion of *First Bancorporation*, use of adjudication when the litigant's own facts are not relevant does not violate anyone's constitutional rights aside from the retroactivity issue.[242] Moreover, courts themselves use adjudications as vehicles for deciding larger issues without special reference to the litigant's particular facts. Finally, the agency may well improve its decisions on larger policy issues if it has in front of it the facts of a particular party, even if the policy ultimately chosen applies generally to all similarly-situated parties.

Instead, a court's main concern should be the unfairness of retroactive application. But the Box 4 situation, featuring a fact-specific situation and a change in the agency's legal position, suggests that allowing the agency to apply the rule purely prospectively can mitigate the retroactivity problem.

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240. *See supra* note 237 (explaining potential dangers of agency circumvention of rulemaking process).

241. *See* Eastern Enters. v. Apfel, 524 U.S. 498, 549 (1998) (Kennedy, J., concurring in judgment and dissenting in part) (discussing "unprecedented" nature of law that should be invalidated as unfairly retroactive).

242. *See supra* Part V.B.2 (discussing retroactivity problem in *First Bancorporation*).

Here, prospectivity may cause additional problems because it is inconsistent with the idea of adjudication as the passing of judgment on historical actions. But in Box 4 the concerns with pure adjudicative prospectivity are lessened because the fact-specificity (and thus the lack of automatic applicability of the rule to other parties) limits the scope of the agency action and thus makes it more akin to adjudication. Just as reliance on facts limits a common-law decision, so too does it limit a Box 4 decision. This limitation on the scope of the agency's action also serves to protect the participation rights of non-parties because they retain a realistic right to challenge the application of that rule to themselves on the grounds that their facts are distinguishable from those of the litigant in the earlier adjudication. The rule proposed above does require some investigation into the fact-specificity of the agency's action, but this investigation is different from the investigation performed in *First Bancorporation*. Specifically, the investigation entailed in this proposal is far more limited in scope and is performed in a context of potentially allowing agencies to do what courts had not allowed them to do in the past (i.e., adjudicate prospectively). By contrast, *First Bancorporation*'s analysis spoke to the agency's choice between rulemaking and adjudication,[243] a choice that the Supreme Court has conferred on the agency's discretion.[244]

VI. The Anti-Circumvention Principle

The previous part of this Article suggested a limited role for courts in policing an agency's choice between rulemaking and adjudication. This part adds to that discussion the Ninth Circuit's anti-circumvention rule and considers whether any further judicial role is warranted.

A. Circumvention of the Rulemaking Process

Ninth Circuit cases have defined "circumvention" as the de facto amending of a recently-adopted regulation[245] or as the bypassing of a pending rulemaking.[246] The Ninth Circuit has found violations of this "anti-circumvention" principle in two early cases only, *Ford Motor* and *Patel*.[247] In *Patel*, the court struck down an agency's attempt to impose a particular requirement on a visa applicant when that requirement had been considered, but then elimi-

243. *See* First Bancorporation v. Board of Governors, 728 F.2d 434, 437-38 (10th Cir. 1984) (finding abuse of discretion where agency "improperly attempt[ed] to propose legislative policy by an adjudicative order").

244. *See* NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974) (asserting that "the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion").

245. *See* Ruangswang v. INS, 591 F.2d 39, 45-46 (9th Cir. 1978).

246. *See* Ford Motor Co. v. FTC, 673 F.2d 1008, 1010 (9th Cir. 1981).

247. *See id.*; Patel v. INS, 638 F.2d 1199 (9th Cir. 1980).

nated, from a then-recently promulgated regulation.[248] According to the *Patel* court, the agency circumvented the rulemaking process when it interpreted the regulation to include the requirement it had explicitly dropped from the regulation's text.[249]

The *Ford Motor* court found circumvention in a slightly different context. It noted that the agency had conducted the challenged adjudication while it was conducting a rulemaking on the same issue.[250] The court did not explicitly express concern over the bare fact that the agency was conducting an adjudication while the rulemaking was pending. Obviously, a flat prohibition on adjudications during a related rulemaking would severely hamstring the agency's ability to deal with problems that arose during the rulemaking process. Given how long that process can be,[251] such a flat prohibition would be severe indeed, and might even have the perverse effect of dissuading the agency from commencing rulemakings. Instead, the problem was that the adjudication imposed a new legal requirement which was at the same time at issue in the rulemaking. Thus, the result in *Ford Motor* was not that an agency would have to suspend all adjudications during the pendency of a related rulemaking; rather, it could not impose during that period any new rule on a topic that was the subject of a pending rulemaking.[252] Thus, *Ford Motor* can be seen as extending *Patel*'s holding against an agency incorporating through adjudication a principle that had been dropped from a recently-completed rulemaking also to prohibit such incorporation during a pending rulemaking on a similar topic. Later Ninth Circuit cases have not expanded the anti-circumvention test beyond these two circumstances.

Ford Motor and *Patel* express related concerns with an agency turning its back on rulemaking. While *Patel* concerned an agency implicitly repudiating *the results* of its own rulemaking process, *Ford Motor* concerned an agency ignoring the rulemaking *process* itself, specifically its own determination that policy could be best set via a general regulation.[253] Both applications

248. *See Patel*, 638 F.2d at 1204.

249. The *Patel* court also found a parallel to *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). In *Patel*, the INS relied on a previous adjudication, *In re Heitland*, as support for its imposition of the extra visa requirement. *Patel*, 638 F.2d at 1202-03. Like *Excelsior*, however, the *Heitland* rule was pure dicta: *Heitland* decided a case under previous regulations and simply stated that would repeat its imposition of this extra visa requirement in future cases dealing with the then-newly promulgated rules. *See id.* at 1202; *see also supra* notes 245-48 and accompanying text (discussing Ninth Circuit cases defining "circumvention" of rulemaking process).

250. *See Ford Motor*, 673 F.2d at 1010.

251. *See supra* note 170 (explaining potential delays in administrative processes).

252. *See* Ford Motor Co. v. FTC, 673 F.2d 1008, 1010 (9th Cir. 1981).

253. *Compare* Patel v. INS, 638 F.2d 1199, 1202 (9th Cir. 1980) (noting that agency considered and rejected requirement during rulemaking) *with Ford Motor*, 673 F.2d at 1010

of the principle, however, assume that agencies make the initial determination of the subject's amenability to rulemaking. The anti-circumvention principle therefore accords a great deal of deference to the agency. Ultimately, the court is not restricting the agency's choice between rulemaking and adjudication. Instead, the rule only forces the agency to live with the consequences of its choice. Thus, under *Ford Motor*, if the agency chooses to impose a requirement by the notice and comment process, the agency cannot short-circuit the notice and comment testing by imposing the requirement in a pending adjudication. *Patel* closes the circle: As the proposed extra visa requirement ultimately failed the notice and comment testing, the INS could not reimpose it via an adjudication.[254]

So understood, the circumvention test resembles judicial attempts to determine when an agency action comes within the general policy or interpretive rule exemption to the notice and comment requirements of Section 553 of the APA.[255] In many of those cases, courts have recognized the difficulty of distinguishing when an agency has promulgated a substantive rule from when it has merely interpreted a rule or announced general guidelines. Thus, courts have considered, as part of their analyses of the issue, the agency's own characterization of the statement.[256] Reliance on the agency's own characterization of its statement makes sense: because an interpretive rule or general policy has no legal binding effect, an agency's argument that a statement is not a substantive rule means that the agency will be forced to litigate the appropriateness of that guideline or policy every time it initiates an adjudication.[257] Because 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.[258]

(recognizing that pending rulemaking and adjudication sought to remedy same problem but criticizing agency's rule).

254. *See Patel*, 638 F.2d at 1204.

255. *See* 5 U.S.C. § 553(a) (1994) (setting forth exemptions to notice and comment requirement).

256. *See, e.g.*, American Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1047 (D.C. Cir. 1987) (recognizing that agency's characterization of its own action is factor to be considered); Telecommunications Research & Action Ctr. v. FCC, 800 F.2d 1181, 1186 (D.C. Cir. 1986); Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 539 (D.C. Cir. 1986) ("The real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations"); Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33, 39 (D.C. Cir. 1974).

257. *See, e.g., Pacific Gas*, 506 F.2d at 38-39.

258. Of course, describing its actions as simply policy statements instead of as binding regulations also results in real benefits to the agency. For example, a policy statement does not have to go through the notice and comment process although it may immediately affect private parties, who may conform their conduct to the agency's policy in order to avoid litigation and/or sanctions. For a more general discussion of agencies' use of informal means to coerce private parties to change their conduct, see Noah, *supra* note 190.

There is a similar "good news and bad news" quality to the anti-circumvention rule. The notice and comment process carries real benefits for the agency: Not only are the procedural requirements less onerous than those in any given adjudication against an alleged statutory violator,[259] but the promulgation of the rule affects every party in the industry and thus achieves a wholesale effect that considerably lessens the agency's enforcement burdens.[260] On the other hand, starting down the rulemaking road also carries costs for the agency, not the least of which is the loss of flexibility to change the results of that process. Of course, the agency can always alter or amend a rule; however, such a change must itself be promulgated pursuant to the notice and comment process.[261] As Chief Judge Wald of the D.C. Circuit has noted, "[t]o sanction any other course would render the requirements of § 553 basically superfluous in legislative rulemaking by permitting agencies to alter their requirements for affected public members at will through the ingenious device of 'reinterpreting' their own rule."[262]

The anti-circumvention principle echoes Chief Judge Wald's statement. Instead of seeking to circumvent the rulemaking process by reinterpreting the promulgated rule in the abstract, in *Patel* and *Ford Motor* the agency attempted to circumvent the process by amending the rule via adjudications under that rule.[263] In both situations the agency had promulgated a rule and then was trying to use other means to change the substance of the rule. The D.C. Circuit rejected the use of wholesale "reinterpretation" to effect that

259. Although the APA itself does not prescribe procedures for informal agency adjudications, it does for formal, on the record adjudications, and Congress requires those relatively formal procedures in a variety of contexts. Even in informal adjudications, due process requires some type of hearing, usually more than the paper hearing required under the APA. *See generally* Mathews v. Eldridge, 424 U.S. 319 (1976). *See also* National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 691 (D.C. Cir. 1973) (noting that "when delay in agency proceedings is minimized by using rules, those violating the statutory standard lose an opportunity to turn litigation into a profitable and lengthy game of postponing the effect of the rule on their current practice").

260. *See, e.g., National Petroleum Refiners*, 482 F.2d at 690 (discussing "administrative efficiency" advantage of rulemaking over adjudication).

261. *See* National Family Planning & Reprod. Health Ass'n v. Sullivan, 979 F.2d 227, 231-32 (D.C. Cir. 1992); *see also* 5 U.S.C. § 553(e) (1994) (authorizing interested private parties to petition for promulgation, alteration or repeal of any rule).

262. *National Family Planning*, 979 F.2d at 231-32; *see also* Homemakers North Shore, Inc. v. Bowen, 832 F.2d 408, 412 (7th Cir. 1987) ("A volte face . . . may be an attempt to avoid the notice and opportunity for comment that the Administrative Procedure Act requires for the alteration of a rule. When an agency gets out the Dictionary of Newspeak and pronounces that for purposes of its regulation war is peace, it has made a substantive change for which the APA may require procedures.").

263. *See supra* notes 248-54 and accompanying text (discussing circumvention in *Patel* and *Ford Motor*).

change, and the Ninth Circuit rejected the use of retail reinterpretation (via adjudication) to accomplish that same end.[264] At base, the idea is simple: If the agency wishes to reap the benefits of rulemaking, it must also pay the costs – here, the costs being those entailed in respecting the integrity of the rulemaking process.

In essence, then, the Ninth Circuit's anti-circumvention principle seeks to guard the integrity of the rulemaking process by ensuring that an agency not be able to manipulate the process once it has embarked on it, but without interfering with the initial agency decision that the matter is fit for rulemaking. The principle is sound and plays an important role in administrative law. Still, it does not fully answer the problem of inappropriate agency decisions to use adjudication as opposed to rulemaking.

B. Beyond Circumvention: Agency Courts and the Nature of Adjudication

Beyond the anti-circumvention rule, is there any hope for a more general answer to the puzzle of when courts should force an agency to act via a rulemaking? Is there a principle that indicates when an issue is inherently appropriate for either adjudication or rulemaking? To answer this question it is appropriate to reconsider the attributes of adjudication.

The basic attribute of adjudication is its limited formal scope. This limitation is reflected in a number of ways, including the imposition of a standing requirement,[265] the limited number of parties affected,[266] the nature of the dispositive facts as "adjudicative" rather than "legislative,"[267] and the incremental, analogical method by which common-law courts decide cases.[268]

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264. There may be some difference between these principles. Although the use of reinterpretation to change the meaning of a rule effectively would change the rule without any public comment at all, the use of adjudication would at least give the target party the right to contest the new rule's new content. However, this difference is more apparent than real. Even when the agency attempts to "reinterpret" the regulation, that "reinterpretation" would not itself be law. Instead, it would be challengeable in court in the course of an adjudication. The fact that the situation in *National Family Planning* eventually would become a situation procedurally analogous to *Patel* or *Ford Motor* indicates the tight fit of the analogy.

265. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216-227 (1974) (finding no Article III jurisdiction to hear claim when all Americans shared plaintiffs' injuries in equal fashion).

266. *See id.* (holding that grievances held by public as whole cannot form basis for Article III standing).

267. *See* United Air Lines v. Civil Aeronautics Bd., 766 F.2d 1107, 1118 (7th Cir. 1985) (noting that choice to engage in rulemaking may have crossed "well established" line between "'legislative' facts – the kind that can be found reliably without an evidentiary hearing – and 'adjudicative' facts, which cannot be" (citations omitted)); *supra* note 204 (distinguishing between adjudication and legislation).

268. *See supra* notes 59-60 and accompanying text.

Of course, not all judicial action includes all of these features. For example, some state courts are authorized to issue advisory opinions, thus obviating the need for an injured party presenting a concrete case or controversy.[269] Constitutional and statutory interpretation adjudication often has implications far beyond the positions of the individual parties to the case. And a court's interpretation of a statute may well not turn on the facts of the particular litigant, and the interpretive exercise may well not have much in common with classic common-law reasoning.[270] Nevertheless, these characteristics reflect the generally limited nature of adjudication. That limited nature not only distinguishes adjudication from legislation but also protects the rights of non-parties to the adjudication by ensuring that they have a realistic day in court when their turn comes, on the theory that the issue will not have been prejudged.[271] Thus, the search for a limit on agency discretion to act via adjudication must focus on these principles.

It is clear, however, that agencies generally have the power to use adjudications as vehicles for changing the law. *Chenery* itself vindicated this power, which courts have reiterated consistently since.[272] Any search for a principle limiting agency power to proceed by adjudication must be consistent with this fundamental principle of administrative law. One problem this power causes is the possibility of unfair retroactivity. Beyond the *Chenery* balancing test, this Article has suggested that agencies be allowed to impose some adjudicative results – namely, those growing out of fact-intensive contexts – purely prospectively. But this solution resolves only a minor issue: dealing with a situation – fact-intensive cases – where agency adjudication is already fundamentally analogous to judicial action. The harder situation arises when an agency uses adjudication to announce a generally applicable change in the law, with the change not depending in any direct sense on the facts presented by the private party unlucky enough to be chosen as the vehicle for change. In that situation, assuming no retroactivity problem, the discretion agencies enjoy, combined with the more "legislative" aspects of agency adjudication,

269. *See supra* note 63.

270. For example, a textualist might argue that the interpretive task begins and ends with the plain meaning of the statute.

271. The APA recognizes the difference between rulemaking and adjudications when determining the requirements of a fair hearing. For example, the rules for determining when the agency decision-maker has an open mind are stricter – i.e., tougher on the agency – in the case of adjudications than of rulemakings. *See* Association of Natal Advertisers v. FTC, 627 F.2d 1151, 1170 (D.C. Cir. 1979) (applying more deferential standard to prejudgment claims made in context of rulemakings than to similar claims made in context of adjudications).

272. *See, e.g.*, NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974) (reiterating that agency "is not precluded from announcing new principles in an adjudicative proceeding"); NLRB v. Wyman-Gordon Co., 394 U.S. 759, 765 (1969) (recognizing utility of adjudications in agency policymaking).

makes it difficult to conceive of judicially enforceable limits upon the agency's choice.

Ultimately, it may be that agency adjudication is different from its judicial cousin simply because agencies are fundamentally different from courts. Most notably, agencies are explicitly charged with making law, unchained by the incremental, analogical reasoning method employed by courts. Instead, agencies are restrained only by the limits found in the governing statute. Given the moribund state of the non-delegation doctrine[273] and Congress's tendency to "solve" difficult issues by transferring the hard choices to an agency,[274] those limits do not impose much of a restriction on agency power.

This power is fundamentally incompatible with the limits traditionally associated with adjudication. Agency lawmaking does not require analogical reasoning based on precedent. At most, it requires substantive rationality and fidelity to the (normally broad) statutory parameters. The agency law making process requires statutory and policy analysis, but not consistency with prior agency pronouncements as long as the agency explains why it has changed its mind.[275] These characteristics of the agency's task are incompatible with the limits imposed by legal reasoning and fact-boundedness. At base, the explicit power to make law is what separates agencies from courts and makes agency adjudication fundamentally different from adjudication as classically understood. In turn, this difference makes it difficult to go beyond the modest judicial role endorsed in this Article for reviewing an agency's choice of adjudication. That role ultimately protects only two interests: private party rights to be free of unfair retroactivity and internally inconsistent agency action. Although these interests are quite fundamental, their protection leaves the agency broad discretion to choose the method by which to proceed.

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273. Recently, there has been renewed interest in the non-delegation doctrine. *See, e.g.*, American Trucking Ass'ns v. EPA, 175 F.3d 1027, 1034-40 (D.C. Cir.) (concluding that EPA's interpretation of provision of Clean Air Act would violate non-delegation doctrine), *reh'g granted in part, reh'g denied in part*, 195 F.3d 4 (D.C. Cir. 1999); City of New York v. Clinton, 985 F. Supp. 168, 181 (D. D.C.) (invalidating line item veto on non-delegation grounds), *aff'd on other grounds*, 524 U.S. 417 (1998). But until these isolated invocations of the doctrine are expanded upon, it remains fair to consider the doctrine as still dormant. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 236-42 (1997) (discussing demise of non-delegation doctrine).

274. *See* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 82-85 (1985).

275. *See, e.g.*, Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) (recognizing agency's "ample latitude" to change its policy in face of changing circumstances). However, note that such changes will face potentially significant judicial scrutiny. *See id.* at 41-42 (noting adherence to presumption that existing rule will best carry out Congress's regulatory policies).

VII. Conclusion

This conclusion brings us back to our starting point. In labeling some agency actions "adjudications" we may have succeeded only in confusing ourselves by suggesting that there is a fundamental identity between what courts do and what agency "adjudicators" do. There are, of course, significant parallels. Most importantly, both agency courts and judicial courts formally act against particular, identified parties. In turn, that action calls into operation the procedural guarantees we have come to identify with judicial action, such as the right to a hearing presided over by an impartial adjudicator with an open mind.

But the differences between agency and judicial adjudicators are even more fundamental than these similarities. Courts normally are thought to play a very different role in government than the legislature, even when courts for all intents and purposes make generally applicable law. But Congress explicitly charges agencies with a task – lawmaking – that makes them the functional equivalent of legislatures. To limit the agency's ability to carry out that fundamental task on the ground that the means chosen to accomplish it are more appropriate to law applying than to lawmaking threatens to cripple the agency's ability to use its discretion as to how best to carry out its legislative mandate.

Unless the agency's choice violates a constitutional guarantee (i.e., the fair notice requirement of the non-retroactivity principle), or unless the agency's choice reflects an internal inconsistency in how the agency uses that discretion (i.e., if it tries to circumvent its own decision that rulemaking is the appropriate modality), the choice between "adjudication" and "rulemaking" must be left with the agency This is not to say that the agency is free to act as a legislature when it wishes and as a court when it wishes. It is, instead, to say that, fundamentally, the agency is neither a legislature nor a court but a separate creature entirely This conclusion reaffirms the accuracy of Justice Jackson's observation nearly a half-century ago that the rise of administrative agencies "has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking."[276] It may be time for courts considering this issue to recognize agencies' hybrid nature, and to abandon the attempt to superimpose traditional conceptions of legislation onto agency rulemaking, and traditional conceptions of judicial action onto agency adjudication.

276. FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).