Chenery II Revisited

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Abstract

Ever since the Supreme Court's 1947 decision in SEC v. Chenery Corporation*, known as* Chenery II*, agencies have enjoyed wide latitude to develop policy through individual adjudications in addition to rulemaking.* Chenery II *has never been completely uncontroversial, and in recent years, calls to overturn or limit it have been expressed in increasingly fervent tones. Agency policymaking by adjudication has emerged as a new front in the struggle over the administrative state.*

Against the backdrop of such calls, this Article revisits some of the fundamental questions concerning the Chenery II *doctrine. I argue in favor of retaining* Chenery II*'s core procedural holding. Indeed, except where the organic statute requires rulemaking, courts should never set aside an agency order because that order announces a policy that the court concludes should have been announced through rulemaking. But even if courts lack power to hold that agencies have violated procedural law by failing to use rulemaking in announcing a particular policy, the policy itself remains subject to more substantive limitations: it must have been the product of "reasoned decision-making," and it must comport with applicable binding law. I argue that courts can adapt these limitations, as applied to particular policies adopted via adjudication, to address the gravest concerns raised by* Chenery II*'s skeptics. Finally, I evaluate two "soft" constraints on agency policymaking by adjudication, designed to influence agencies' procedural decisions without purporting to control them. I argue that these soft limits, though plausibly justifiable, may have real costs and reap uncertain benefits. It is at best unclear whether they should be adopted.*

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Introduction

Every law student taking administrative law learns that, in *SEC v. Chenery Corp.* ("*Chenery II*"),[1] the Supreme Court broadly blessed agencies' ability to formulate policy through adjudication as opposed to rulemaking.[2] So, an agency like the Federal Trade Commission ("FTC") might promulgate regulations to specify "unfair or deceptive acts or practices" under section 5 of the FTC Act.[3] However, it might also condemn certain behavior as part of an adjudicatory proceeding involving particular parties, who may or may not have had reason to know how the FTC would likely rule, creating a precedent warning that similar behavior will likely be found to violate the Act going forward.[4] The class might go on to explore various limits that the Supreme Court or the lower courts have flirted with when it comes to so-called "policymaking by adjudication." But students are cautioned not to be quick to conclude that an agency has transgressed the limits of *Chenery II*. The cases holding so are few and far between.[5] A cozy consensus has emerged that agencies are more or less free to formulate

1 332 U.S. 194 (1947).

2 *See id.* at 196.

3 Federal Trade Commission Act of 1914, Pub. L. No. 63-203, 38 Stat. 717 (codified as amended at 15 U.S.C. §§ 41–58); 15 U.S.C § 45.

4 *See, e.g.*, Ford Motor Co. v. FTC, 673 F.2d 1008, 1009–10 (9th Cir. 1981).

5 *See, e.g.*, Ronald M. Levin, *The Case for (Finally) Fixing the APA's Definition of "Rule,"* 56 Admin. L. Rev. 1077, 1089 (2004) (noting the paucity of cases).

policy through a process of case-by-case adjudication,[6] whether that adjudication involves a traditionally judicial dispute between two parties or something like licensing or the dispersal of benefits.[7]

Judges and scholars have long expressed varying degrees of uneasiness with the fact that agencies have in practice been granted wide latitude to make policy via adjudication.[8] Dissenting in *Chenery II*, Justice Jackson rebuked the agency for engaging in "administrative authoritarianism" when it refused to allow certain transactions absent a controlling regulation.[9] The period from the middle of the last century through the early 2000s saw a number of writings expressing concern

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6 Of course, and as will become important at various points later in this Article, agency adjudicators must abide by the normal requirements of administrative law when making policy via adjudication. *See, e.g.*, Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 415–16 (1971) (review for compliance with statutory mandate); Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 366–72 (1998) (review of fact-finding); FCC v. Fox Television Stations, Inc. (*Fox Television I*), 556 U.S. 502, 517–18 (2009) (review for reasoned decision-making).

7 On the varied nature of administrative adjudications, see Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 Wash. U. L. Rev. 377, 393–94 (2021). Many administrative adjudications are "informal," meaning that the Administrative Procedure Act ("APA") does not require the agency to follow trial-like processes, though the category of informal adjudication itself contains many different procedural varieties. *See id.*; *see also* Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 Cal. L. Rev. 141, 143 (2019) (discussing how many adjudications that are technically informal under the APA can be "formal-like" in the amount of procedure afforded). Much policymaking by adjudication that makes its way into the courts is the product of decisions by agency heads or other bodies with final appellate authority, sitting in review of decisions by lower-level agency officials. *See* Bremer, *supra*, at 414.

8 I speak, in this Article, in terms of agencies making policy or announcing principles via adjudication. For a recent argument that agencies engaged in policymaking by adjudication may be issuing what are actually APA "rules" via adjudication, see Matthew C. Stephenson, *Embedded Rules*, 39 Yale J. on Regul. Bull. 59 (2021). Some of the below may support the view that, to the extent agencies are truly issuing rules via adjudication, most of those rules are properly characterized as interpretive rules or policy statements not subject to notice-and-comment requirements. *See infra* notes 390–404 and accompanying text (defending view that policies announced via adjudication are not binding in the way legislative rules are); *see also* Stephenson, *supra*, at 59–60. Other arguments may point in the direction of easing some of the restrictions courts place on the issuance of nonlegislative rules generally. *See, e.g.*, *infra* notes 189–97 and accompanying text (questioning whether courts should draw a distinction between pronouncements that are "truly" interpretive and those that are not); *see also* Stephenson, *supra*, at 64 (urging that courts harmonize the doctrines that apply to nonlegislative rules and to policymaking by adjudication). That said, I attempt to sidestep the question of whether the doctrine that applies to policymaking by adjudication should be fully harmonized with that which applies to nonlegislative rules issued outside of an adjudicatory process. *See infra* note 91 (holding open the possibility that courts may validly treat gratuitous agency statements differently than those that are issued in the course of resolving a particular matter).

9 The dissent, joined by Justice Frankfurter, was not published until the term following *Chenery II*. *See* 332 U.S. 194, 216 (1947) (Jackson, J., dissenting).

with agency policymaking by adjudication, though only pockets of resistance to *Chenery II*'s core holding.[10]

In the last few years, however, worries about agency policymaking by adjudication have been expressed more forcefully, and opposition to *Chenery II* itself has intensified. Focusing specifically on the retroactive effect of much agency policymaking by adjudication, Professors Kristin Hickman and Aaron Nielson write that "creating new duties and then applying those duties to past conduct" can be described as "*literally* Orwellian."[11] In the most extensive anti-*Chenery II* article in recent memory, Professors Gary Lawson and Joseph Postell argue that, in some circumstances, agency policymaking by adjudication might actually be unconstitutional as a sort of delegation of power to make law through adjudicatory processes that Congress itself does not possess.[12] And outside of academic circles, then-White House Counsel Don McGahn ripped *Chenery II* for letting agencies "announce new rules . . . without

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10 A healthy amount of scholarship was penned in the decades following *Chenery II* arguing that rulemaking was generally superior to adjudication on good governance grounds, though it largely declined to question *Chenery II* as a doctrinal matter. *See, e.g.*, Warren E. Baker, *Policy by Rule or* Ad Hoc *Approach—Which Should It Be?*, 22 L. & CONTEMP. PROBS. 658, 671 (1957); Cornelius J. Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729, 757 (1961); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 922, 972 (1965); *see also* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1403 n.69 (2004) (noting that "the drift of these articles was fairly uniform: agencies should use rulemaking more often than they did"). Similar good governance concerns pushed Judge Henry Friendly to articulate a set of limits on agency policymaking by adjudication, a project that ultimately met its fate at the hands of the Supreme Court. *See infra* notes 78–85 and accompanying text (discussing the *Bell Aerospace* litigation). More recently, Lisa Bressman and Elizabeth Magill, in separate articles, argued that *Chenery II* stands as a kind of administrative-law outlier in shielding certain agency decisions—decisions to formulate policy via adjudication as opposed to rulemaking—from meaningful judicial review. *See* Magill, *supra*, at 1385; Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 534–35 (2003).

11 Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron*'s Domain*, 70 DUKE L.J. 931, 974 (2021) (quoting NetworkIP, LLC v. FCC, 548 F.3d 116, 122 n.5 (D.C. Cir. 2008)); *see also* Aaron L. Nielson, *Three Wrong Turns in Agency Adjudication*, 28 GEO. MASON L. REV. 657, 667 (2021) (arguing that *Chenery II* was a "wrong turn, at least when taken too far"). At the Volokh Conspiracy blog, Jonathan Adler expressed his view that the Supreme Court should "corral (or cancel) *Chenery II* when the opportunity arises," explaining that "[f]or those concerned about the size, scope, and arbitrary power exercised by the administrative state, *Chenery II* is far more important than *Chevron*." Jonathan H. Adler, *Summary Reversal of Sixth Circuit in* Calcutt v. FDIC *Reaffirms the Importance of* Chenery I, VOLOKH CONSPIRACY (May 22, 2023, 12:22 PM), https://reason.com/volokh/2023/05/22/summary-reversal-of-sixth-circuit-in-calcutt-v-fdic-reaffirms-the-importance-of-chenery-i/ [https://perma.cc/WZ8G-CVTN]. The related phenomenon of agency "regulation by enforcement," where agencies use litigation instead of rulemaking in order to shape the law, has come under scrutiny. *See* Chris Brummer, Yesha Yadav & David Zaring, *Regulation by Enforcement*, 96 S. CAL. L. REV. 1297, 1301–02 (2024).

12 Gary S. Lawson & Joseph Postell, *Against the* Chenery II *"Doctrine"*, 99 NOTRE DAME L. REV. 47, 61–64 (2023). Lawson and Postell's argument is, importantly, limited to agency action that implicates life, liberty, and property. *See id.* at 51.

any fair notice to the parties being regulated."[13] Putting agency policymaking by adjudication in the same category as other kinds of "subregulatory actions," McGahn condemned it as "illegitimate" and called for limiting of *Chenery II* as necessary to "preserv[e] individual liberty in the face of the burgeoning Leviathan."[14]

Against the backdrop of such calls, this Article revisits some of the fundamental questions concerning the *Chenery II* doctrine. First, I argue in favor of retaining *Chenery II*'s core procedural holding. Indeed, I make a case for the view that courts should never set aside an agency order because that order announces a policy that the court concludes should have been announced through rulemaking.[15] In that sense, then, *Chenery II*, which has been taken to largely insulate agencies from challenge based on their failure to proceed via rulemaking, should be maintained and even strengthened.[16]

In defending *Chenery II*'s core, I do not rely on the normative attractiveness of adjudication as a tool for the formulation of policy; indeed, it seems quite plausible that rulemaking is, at least in many circumstances, the superior policymaking device.[17] In some ways, then, this Article fits into the older line of scholarship that, while arguing for the greater use of rulemaking, would not disturb *Chenery II* in any fundamental way.

I believe, however, that the case for *Chenery II*'s procedural holding is more unassailable than even many of its defenders have appreciated.[18] It is not just that, when agencies do select between adjudication

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13 Aaron Nielson has helpfully retranscribed McGahn's remarks dealing with *Chenery II*. *See* Aaron L. Nielson, *D.C. Circuit Review—Reviewed: "I Vote for* Chenery I*, not* Chenery II*,"* YALE J. ON REGUL. (Nov. 24, 2017), https://www.yalejreg.com/nc/d-c-circuit-review-reviewed-i-vote-for-chenery-i-not-chenery-ii/ [https://perma.cc/5MUR-DFRP].

14 *Id.*

15 The exception is when the agencies' organic statute requires rulemaking. *See* Lawson & Postell, *supra* note 12, at 48 (noting that statutes can require agencies to proceed via rulemaking). I set aside such circumstances here, as does most of the literature on *Chenery II*. *See, e.g.*, Magill, *supra* note 10, at 1389.

16 For example, I argue that the procedural constraint seemingly imposed by a majority of Justices in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969), should be abandoned, and the question of retroactivity is reconceptualized as a substantive constraint on agencies' decision-making. *See infra* Part III.

17 For an article exploring when policymaking by adjudication might, in fact, be superior, see generally Todd Phillips, *A Change of Policy: Promoting Agency Policymaking by Adjudication*, 73 ADMIN. L. REV. 495 (2021).

18 Some of the arguments advanced in this Article bear a family resemblance to those advanced in the small, more openly pro-*Chenery II* literature. *See generally* Russell L. Weaver, Chenery II*: A Forty-Year Retrospective*, 40 ADMIN. L. REV. 161 (1988); William D. Araiza, *Agency Adjudication, the Importance of Facts, and the Limitations of Labels*, 57 WASH. & LEE L. REV. 351 (2000) [hereinafter Araiza, *Agency Adjudication*]; William D. Araiza, *Limits on Agency Discretion to Choose Between Rulemaking and Adjudication*, 58 ADMIN. L. REV. 899 (2006) [hereinafter Araiza, *Limits*]; Russell L. Weaver & Linda D. Jellum, Chenery II *and the Development of Federal*

and rulemaking, agencies have greater ability than courts to weigh the relevant considerations, as goes the classic justification for *Chenery II*.[19] As Professor Elizabeth Magill pointed out in her classic article, this is true of many agency decisions that are scrutinized more thoroughly than agencies' choice of policymaking form.[20] So, what is the more complete case for *Chenery II*? It is partly that agency "policymaking by adjudication" is just the inevitable byproduct of administrative law doctrines that themselves have strong foundations—in particular, the reason-giving requirement[21] and the obligation to decide cases consistently.[22] It is partly—because of the inevitability of agency policymaking by adjudication—that agencies will engage in it in many circumstances where the agency cannot be said to have even made a *choice* to develop policy through adjudication as opposed to rulemaking.[23] It is partly that, due to both of the above observations, courts will have difficulty developing judicially manageable standards to rein in agency policymaking by adjudication.[24] More than that, however, the standards that courts will be tempted to reach for would operate at cross-purposes with other important values served by administrative law. Part of this project thus serves as a reminder for courts—and others—considering changes to *Chenery II* to "[l]ook [b]efore [y]ou [l]eap."[25] The post-*Chenery II* world might not be as great as one imagines it.

That said, even if courts lack power to hold that agencies have violated procedural law by failing to use rulemaking in announcing a particular policy, the policy itself remains subject to more substantive limitations: it must have been the product of reasoned decision-making, and it must comport with applicable binding law. I argue that courts can use these requirements to address some of the core concerns raised by *Chenery II*'s skeptics.

Administrative Law, 58 Admin. L. Rev. 815 (2006). I will draw on those articles, as well as depart from them in various ways, in what follows.

19 *See, e.g.*, 1 Kristin E. Hickman & Richard J. Pierce Jr., Administrative Law Treatise 526–27 (6th ed. 2019); Richard J. Pierce Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 Duke L.J. 300, 308; Jeffrey J. Rachlinski, *Rulemaking Versus Adjudication: A Psychological Perspective*, 32 Fla. St. U. L. Rev. 529, 531 (2005); *see also* Magill, *supra* note 10, at 1416–19 (considering agency expertise as the first possible justification for the *Chenery II* principle before questioning whether expertise provides a full explanation for it).

20 *See* Magill, *supra* note 10, at 1416.

21 *See infra* text accompanying note 162.

22 *See infra* text accompanying notes 96–97.

23 *See infra* text accompanying notes 144–53.

24 *See infra* text accompanying note 139.

25 *See* Will Baude, *The "Look Before You Leap" Principle*, Volokh Conspiracy (June 29, 2023, 6:11 PM), https://reason.com/volokh/2023/06/29/the-look-before-you-leap-principle/ [https://perma.cc/4AYZ-6DRM].

First, I suggest that the question of whether to make a given policy "retroactive"—meaning simply to apply the policy in question to the parties to the adjudication—be reconceptualized as a policy matter subject to reasoned decision-making requirements.[26] That is, statutes may be written to give an agency discretion regarding whether to apply a particular policy, announced in the adjudication at issue, to the parties at hand or to craft a kind of exception with respect to them and similarly situated parties. When agencies are given such discretion, whether to grant such an exception represents a decision regarding the stringency of the policy itself and depends on policy judgments usually thought, with good reason, to rest within the primary purview of the agency.

Conceived in that way, retroactivity would be subject to limitations familiar to courts in reviewing other matters over which agencies maintain discretion: courts would ensure that the agency has made the choice based on the factors relevant under the statute and that its choice was reasonably explained, including by assessing whether the agency had examined alternative forms of transition relief available to it.[27] Such transition relief might include pure nonretroactivity or decisions about, for example, whether to assess a fine or order only forward-looking relief.[28] Although the agency would, under this framework, ultimately receive deference on the bottom-line determination regarding whether and how to make the policy "retroactive" to the parties at issue and similar matters, such requirements would guard against the prospect of administrative arbitrariness in the same way they do with respect to other dimensions of agencies' policymaking discretion.[29] And recognizing that agencies may, pursuant to their relevant statutes, retain discretion regarding whether to make policies retroactive to the adjudication in question would make agencies freer than they are now perceived to be to except present parties from a newly announced policy.[30] In these ways, my proposal should provide some comfort to those most concerned with agency policymaking by adjudication because of its supposedly natural retroactive effects.

In suggesting that retroactivity questions should, as a general matter, be considered as raising policy issues, I acknowledge that there may be some constitutional limits on agencies' ability to make policies retroactive. At least when faced with a potential deprivation of liberty or property, procedural due process principles require that parties

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26 *See infra* Part III.

27 *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 48 (1983). On the scope of agencies' obligation to respond to alternatives, see generally Daniel T. Deacon, *Responding to Alternatives*, 122 MICH. L. REV. 671 (2024).

28 *See infra* Section III.B.

29 *See, e.g.*, Bressman, *supra* note 10, at 473–74 (stating that a purpose of reasoned decision-making requirements is "to prevent arbitrary administrative decision-making").

30 *See infra* Section III.B.3.

receive notice of the standards they must satisfy. Such notice might be given in the adjudication itself, as long as it is adequately done prior to the agency's decision.[31] On the more substantive side, fair notice principles may constrain agencies when it comes to levying fines or penalties on the basis of past conduct.[32] The exact contours of constitutional fair notice are outside the scope of this Article. But given that retroactivity generally involves judgments about tradeoffs similar to those over which agencies traditionally—and rightly—receive deference, courts should have the burden to articulate constitutional limitations backed by a constitutional theory sufficient to justify the reallocation of ultimate authority to the judiciary.[33]

The second requirement particularly relevant to agency policymaking by adjudication is more straightforward and more clearly reflected by the current caselaw: in addition to following applicable statutes, agencies-as-adjudicators must also follow regulations the agency previously promulgated using notice-and-comment procedures.[34] Challenges alleging that an agency has violated its own regulations present legal questions amenable to judicial resolution.[35] Courts have occasionally erred, however, in thinking that agencies have a kind of "*Chenery II* power" to add to requirements imposed by regulations where principles such as *expressio unius est exclusio alterius* would normally indicate that the regulations in question occupy the field.[36] Based on that mistake, they have concocted a series of further limitations on *Chenery II* itself by questioning the agency's "decision" to effectively amend prior regulations through adjudication as opposed to rulemaking.[37] Instead, the entire inquiry should be reduced to whether the regulations allow or disallow, including implicitly, the policy in question. Where disallowed by principles such as *expressio unius*, that should be the end of the

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31 *See infra* Section III.B.4.

32 *See infra* Section III.B.4.

33 *See infra* Section III.B.4.

34 *See* Thomas W. Merrill, *The* Accardi *Principle*, 74 Geo. Wash. L. Rev. 569 (2006). This limitation might be considered quasi-procedural in that its practical effect is to require the agency to use notice-and-comment procedures if it wants to depart from the regulation in question. But the courts' holding in successful challenges invoking agency regulations, as I would have it, would simply be that the agency violated an applicable regulation, not that it erred in some antecedent procedural choice to proceed via adjudication, *see infra* Part IV—indeed, as mentioned above, in many cases it will not be clear there ever was such a choice. *See supra* note 23 and accompanying text.

35 Of course, various deference regimes may come into play. *See, e.g.*, Kisor v. Wilkie, 588 U.S. 558, 566–73 (2019) (explaining precedent supporting deference to agency's interpretation of its own ambiguous regulations).

36 *See infra* Part IV.

37 *See, e.g.*, Patel v. INS, 638 F.2d 1199, 1203–04 (9th Cir. 1980) (holding that the court abused its discretion in choosing adjudication over rulemaking because the resulting requirement was "broad" and "of prospective application").

matter: the agency's policy may not stand.[38] Where agency regulations do not stand in the way of the policy in question, however, courts should not intervene regarding the agency's procedural method.

This Article proceeds as follows. Part I summarizes the Supreme Court's caselaw on agency policymaking by adjudication. Part II turns to defending *Chenery II*'s core procedural holding and the wide latitude it grants agencies to formulate policy by adjudication. Part III then takes up the retroactivity issue, arguing that courts have thought about retroactivity in the wrong way and that agencies' decisions regarding whether to apply the policy in question to the parties at hand should be thought of as a matter involving the substantive scope of the policy. Part IV turns to issues raised when an agency adjudicates against the background of previously promulgated or proposed regulations. Finally, Part V returns to the procedural side of the ledger and examines whether, in light of the limitations defended along the way, courts should additionally place various "soft" limits on agency policymaking by adjudication designed to raise the costs of agency policymaking by adjudication or nudge agencies in the direction of rulemaking.[39] I argue that these soft limits seem plausibly justifiable but that the case for them may be shakier than appears at first glance. If one thinks about administrative law in cost-benefit terms, it is at least not clear that embracing such limits would leave us in the black.

I. The Supreme Court's Caselaw

The Supreme Court has issued three, perhaps four,[40] decisions squarely dealing with agency policymaking by adjudication. This Part provides a brief refresher.

Chenery II grew out of a reorganization plan submitted to the Securities and Exchange Commission ("SEC" or "Commission") by the Federal Water Services Corporation ("Federal").[41] Under the Public Utility Holding Company Act of 1935,[42] the SEC had the statutory responsibility to ascertain whether Federal's plan was "'fair and

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38 *See infra* Part IV.

39 The first such limit involves requiring agencies to give reasons for why they have chosen to articulate a particular policy via adjudication as opposed to rulemaking. Section V.A. The second would allow agency policymaking by adjudication but manipulate the consequences of agencies' procedural choices in order to make rulemaking more enticing. Section V.B. Prior to *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), the most obvious method for doing so would be to deny agencies *Chevron* deference when they proceed via adjudication. With *Chevron* off the books, it is harder to see how courts might proceed using this strategy. Section V.B.

40 This Article puts aside the possible fourth, *Morton v. Ruiz*, 415 U.S. 199 (1974), for being basically inscrutable.

41 332 U.S. 194, 197 (1947).

42 15 U.S.C. § 79 (2003), *repealed by* Energy Policy Act of 2005, 42 U.S.C. §§ 16451–16463.

equitable' or 'detrimental to . . . the interest of investors.'"[43] During the period in which Federal's plans of reorganization were being formulated, insiders of the corporation engaged in certain stock transactions designed to ensure that they retained control of the reorganized entity.[44]

In the order under review in *SEC v. Chenery Corp.* ("*Chenery I*"),[45] the predecessor case to *Chenery II*, the Commission concluded that the proposed reorganization did not pass muster, and, at the recommendation of the Commission, the plan was amended so that the insiders would be required to surrender their stock and not convert it into shares of the new corporation.[46] The agency defended its rejection of the initial plan on the basis of its understanding that Federal's managers were bound by certain fiduciary-type obligations articulated by courts of equity, obligations that the Commission believed would have been breached under the original plan.[47] In setting aside the SEC's order, the Supreme Court concluded that the Commission had misread the relevant caselaw.[48] Nevertheless, the Supreme Court indicated that the Commission may have been able to act on the basis of its own discretion, as opposed to its understanding of judicial precedent, in rejecting Federal's preferred plan under the relevant statutory standards.[49] However, in the order under review, the SEC had not done so, and the Court found that fatal.[50]

On remand, the SEC again rejected a proposal that would have allowed Federal's insiders to convert shares purchased during the contemplated reorganization to those of the new company.[51] This time, the SEC took up the Supreme Court's suggestion and based its determination squarely on its own view of the statutory standards read in light of the Act's purposes.[52] Federal's management again complained to the courts;[53] now they argued that the Commission was prohibited from announcing a prohibition on transactions of the type in question in the context of Federal's particular adjudication,[54] and the SEC had not promulgated a rule on the matters in question prior to the submission of Federal's plans.[55] Because nothing prohibited the transactions in

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43 SEC v. Chenery Corp. (*Chenery I*), 318 U.S. 80, 82–85 (1943) (quoting 15 U.S.C. § 79g, k (repealed 2005)).

44 *Chenery II*, 332 U.S. at 197.

45 318 U.S. 80 (1943).

46 *Id.* at 85.

47 *Id.* at 87.

48 *Id.* at 87–89.

49 *Id.* at 89–92.

50 *Id.* at 92.

51 *Chenery II*, 332 U.S. 194, 196 (1947).

52 *Id.* at 199.

53 *See id.* at 198–99.

54 *Id.* at 199–200.

55 *Id.* at 198.

question at the time they were made, management argued that the SEC was required to enter an order blessing Federal's proposed plan.[56]

In the second appeal, the Supreme Court sided with the SEC, broadly blessing agencies' ability to engage in policymaking by adjudication.[57] *Chenery II*'s reasoning will be woven into the Sections that follow, so this Part provides only a briefly recap. First, in a comparatively neglected passage of the opinion,[58] the Court intimated that accepting the challengers' arguments would prevent the SEC from performing its legal obligations.[59] The Commission had a *duty* to decide whether the proposed plans were or were not "fair and equitable." Requiring the SEC to bless every transaction not covered by a previously announced legislative-type rule would hamstring the agency in performing that responsibility.[60] Second, although suggesting that rulemaking was to be preferred in many instances, the Court recognized there may be situations where proceeding to formulate general policy by adjudication was appropriate.[61] And it is the agency that is best equipped to make the choice of how to proceed.[62] Finally, the Court hinted that there may be situations where the retroactive effect of a policy announced via adjudication may render an agency's decision invalid, but it found no such problem in the case at hand.[63]

Although *Chenery II* broadly blessed the legality of agency policymaking by adjudication, several decades later, the Court indicated that there may in fact be some limits on agencies' ability to issue what looks like rules without undertaking a rulemaking. The story of *NLRB v. Wyman-Gordon Co.*[64] begins with the decision of the National Labor Relation Board ("NLRB" or "Board") in a prior adjudication, not directly under review in *Wyman-Gordon*, involving the Excelsior Underwear company.[65] In an administrative adjudication following a failed attempt to unionize the Excelsior Underwear workforce, the Board purported to establish a policy that, for union elections, employers must provide a list of names and addresses of employees for purposes of facilitating union outreach.[66] But the Board declined to apply that policy in

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56 *Id.* at 199.

57 *See id.* at 208–09.

58 *See infra* note 98 and accompanying text.

59 *See Chenery II*, 332 U.S. at 200–02 (stating that, if the SEC understood the transaction not to comport with statutory standards, "an order giving effect to the amendment merely because there was no general rule or regulation covering the matter would be unjustified").

60 *See id.* (quoting 15 U.S.C. § 79k (repealed 2005)).

61 *Id.* at 201–03.

62 *Id.* at 203.

63 *See id.* at 203–04.

64 394 U.S. 759 (1969).

65 *See id.* at 761–62.

66 *Id.* at 763.

order to set aside the election involving the parties to the Excelsior Underwear proceeding.[67] In a later adjudication, the NLRB invoked the names-and-addresses policy against Wyman-Gordon, citing its decision in *Excelsior Underwear Inc.*[68] In subsequent litigation, Wyman-Gordon argued that the *Excelsior* "rule" was invalid.[69]

In a highly fractured decision, a majority of Justices agreed that the order in *Excelsior* amounted to a procedurally invalid rule, but a slightly different majority nevertheless upheld the Board's actions against Wyman-Gordon. The various opinions wove together considerations of various sorts, but, with respect to *Excelsior*'s validity, the rationale most clearly embraced by a majority of Justices was that the NLRB had improperly announced a purely prospective policy without going through rulemaking proceedings.[70] That judgment appeared tied to the definition of rule in the Administrative Procedure Act ("APA"),[71] which speaks in terms of the prospective effect of rules.[72] The NLRB's error was thus promulgating what was formally a rule under the APA but without going through notice-and-comment proceedings—or otherwise meeting an exception to notice and comment.[73] At the same time, a majority of the Court declined to upset the Board's determinations with respect to Wyman-Gordon.[74] The plurality explained that the Board had applied the names-and-addresses policy to Wyman-Gordon, and therefore the actions under review did not suffer the same infirmity as that involving Excelsior Underwear.[75] And although the Board had cited *Excelsior* in directing Wyman-Gordon to provide the list, remanding under the circumstances would amount to an "idle and useless formality" given the NLRB's ability to simply retake the challenged actions without purporting to rely on *Excelsior*.[76] Other Justices concurred in

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67 *Id.*

68 156 N.L.R.B. 1236 (1966); *see Wyman-Gordon*, 394 U.S. at 761–62.

69 *See Wyman-Gordon*, 394 U.S. at 762.

70 *See id.* at 765 (plurality opinion); *id.* at 775–76 (Douglas, J., dissenting); *id.* at 780 (Harlan, J., dissenting); *see also* Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 Harv. L. Rev. 1924, 1942 (2018) ("A more plausible and much narrower reading of the ruling is that the problem in *Excelsior Underwear* was that the order was prospective only.").

71 Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

72 *See Wyman-Gordon*, 394 U.S. at 780 (Harlan, J., dissenting); 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 designed to implement, interpret, or prescribe law or policy").

73 *See, e.g.*, *Wyman-Gordon*, 394 U.S. at 776 (Douglas, J., dissenting) ("The difficulty is that [the NLRB] chose a different course in the *Excelsior* case and, having done so, it should be bound to follow the procedures prescribed in the Act . . . .").

74 *See id.* at 766 (plurality opinion); *id.* at 770 (Black, J., concurring).

75 *Id.* at 766.

76 *Id.* at 766 n.6. The plurality's footnote 6 continues to stand for the proposition that *Chenery I* does not require remanding to the agency when doing so would be pointless. *See* Calcutt v. Fed. Deposit Ins. Corp., 598 U.S. 623, 629 (2023).

the judgment because they found no illegality involving the *Excelsior* order in the first place.[77]

The final installment of the Supreme Court's policymaking-by-adjudication trilogy came in *NLRB v. Bell Aerospace Co.*[78] That case dealt with, among other things, whether the NLRB was required to institute a rulemaking proceeding in order to classify a certain category of employees as nonmanagerial.[79] The Second Circuit had held, in an opinion by Judge Friendly, that the Board was so required.[80] The Court of Appeals first concluded that the Board's determination that the employees at issue were nonmanagerial would represent a reversal of the NLRB's prior position.[81] It then pointed to a variety of factors, largely cobbled together from various opinions in *Wyman-Gordon*, together indicating that the Board was required to act through rulemaking.[82] "The Board was prescribing a new policy . . . 'to fit all cases at all times,'" and it did not purport to provide notice to potentially affected parties.[83] The court also intimated that acting to establish the policy at issue through adjudication was not a practical necessity in labor representation cases.[84] And it found that "the argument for rule-making is especially strong when the Board is proposing to reverse a long-standing and oft-repeated policy on which industry and labor have relied."[85]

The Supreme Court disagreed with the Second Circuit's conclusion and broadly reaffirmed agencies' ability to announce policy through adjudication. The Court noted that it had blessed the practice in *Chenery II*, quoting liberally from that decision, and reaffirmed that "the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion."[86] The Court then stated that "[a]lthough there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion or a violation of the Act, nothing in the present case would justify such a conclusion."[87] The Court noted that the agency may well have had good reason to act "in a case-by-case manner."[88] Turning to the other side of the ledger, the Court then stated:

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77 *Wyman-Gordon*, 394 U.S. at 770 (Black, J., concurring).

78 416 U.S. 267 (1974).

79 *Id.* at 291–92.

80 *See* Bell Aerospace Co. v. NLRB, 475 F.2d 485, 495 (2d. Cir. 1973).

81 *Id.*

82 *Id.* at 495–96.

83 *Id.* at 496 (quoting NLRB v. Wyman-Gordon Co., 394 U.S. 759, 777 (1969) (Douglas, J., dissenting)).

84 *See id.*

85 *Id.* at 496–97.

86 NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974).

87 *Id.*

88 *Id.*

> The possible reliance of industry on the Board's past decisions with respect to buyers does not require a different result. 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 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.[89]

Thus, in its last pronouncement on the issue, the Supreme Court underscored that agencies have a general ability to announce policy through adjudication, but it held out the possibility of some limits on that practice.[90]

II. Defending the Core of *Chenery II*

This Part defends a strong *Chenery II* principle: courts should not intervene when faced with a claim that an agency has erred by announcing a particular policy through adjudication as opposed to rulemaking.[91] This Part brackets, for the moment, issues involving retroactivity and nonretroactivity, leaving such matters to Part III.

I begin by explaining why policymaking by adjudication is the natural byproduct of administrative adjudication as practiced pursuant to the APA. Far from being an aberrant phenomenon in need of special justification, policymaking by adjudication is inevitable when agency adjudicators are required to give reasons for their decisions and to maintain consistency in their treatment of like cases. In light of that inevitability, courts would face intractable administrability problems in identifying which kinds of agency policies nevertheless must be announced through rulemaking and not adjudication. Moreover, many of the rules courts would be tempted to reach for would operate in practice to deny agencies the ability to decide matters on stated grounds that they believe to be the best. In this way and others, embracing such rules would subvert other important goals of administrative law.

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89 *Id.* at 295.

90 *See id.* at 294–95.

91 I assume, for purposes of discussion, that the policy is announced in the course of resolving a specific case before the agency—whether a licensing application, union certification dispute, particular enforcement action, or something else. A different set of considerations may apply when an agency announces a policy that is not connected to any such pending matter and labels the action an adjudication. *See* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 770 (1969) (Black, J., concurring) (stressing that the *Excelsior* policy "was adopted by the Board as a legitimate incident to the adjudication of a specific case before it"); Safari Club Int'l v. Zinke, 878 F.3d 316, 333–35 (D.C. Cir. 2017).

A. The Inevitability of Policymaking by Adjudication

Many explanations for the broad *Chenery II* principle boil down to the idea that when faced with a choice between developing policy by rulemaking or by adjudication, agencies are better positioned than courts to weigh the relevant considerations.[92] Although that is some part of the puzzle, I begin in a different, and more fundamental, place. What one might call agency "policymaking by adjudication" is simply the natural byproduct of systems of adjudication that have been subject to requirements of administrative law, requirements that have themselves been imposed in service of due-process-type values. This rather simple observation helps to better understand *Chenery II*'s foundations and undermines a recent objection to policymaking by adjudication that, as I understand, would imply that policymaking by adjudication may be illegal even when an agency lacks the ability to make policy through other ways—such as rulemaking.

Agency policymaking by adjudication is inevitable in the following sense.[93] First, Congress has the constitutional ability to invest agencies with adjudicatory authority provided certain conditions are met.[94] Second, agencies must offer contemporaneous justifications for their actions, including in adjudications.[95] Third, agencies must provide consistent explanations for their actions over time or acknowledge and explain inconsistencies.[96] In other words, they must follow their own precedent or provide reasons for departing from it.[97]

Add to the above the Court's recognition in *Chenery II* that agencies have a duty to adjudicate according to the standards set by Congress—the SEC had the duty, the responsibility, to decide whether

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92 *See supra* note 19 and accompanying text.

93 For an argument for the inevitability of *Chenery II*, which overlaps in some respects with my argument that policymaking by adjudication is inevitable, see Weaver & Jellum, *supra* note 18, at 824–27.

94 *See* Crowell v. Benson, 285 U.S. 22, 53–64 (1932). There are active questions concerning how broadly the Constitution allows agency adjudication and in what subject areas. And in *Jarkesy v. Securities and Exchange Commission*, the Supreme Court shrank, to an as-yet-unknown degree, the domain in which agencies may initially adjudicate certain claims, particularly when civil penalties are at stake. *See* 144 S. Ct. 2117, 2139 (2024). We can set that uncertainty aside here, for the present question is whether there is a problem with agency policymaking by adjudication within whatever domains the Constitution allows administrative adjudication to occur.

95 *See Chenery I*, 318 U.S. 80, 94 (1942) ("[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained."); *see also* Dep't of Com. v. New York, 588 U.S. 752, 780 (2019) (explaining that judicial review "is ordinarily limited to evaluating the agency's contemporaneous explanation").

96 *See, e.g.*, Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973).

97 Nat'l Treasury Emps. Union v. Fed. Lab. Rels. Auth., 404 F.3d 454, 457–58 (D.C. Cir. 2005) ("The [Agency's] failure to follow its own well-established precedent without explanation is the very essence of arbitrariness.").

transactions required to be presented to it were "fair and equitable."[98] And finally, consider that in making those determinations, the law will occasionally not be clear because how the standards apply to the facts at hand may not have been addressed by the statute itself, agency regulations, or other sources of law.[99]

Under the conditions described above, agencies will inevitably make policy through adjudication. Take the facts of *Chenery II*.[100] The agency was under the statutory obligation to decide whether a transaction involving the facts at issue was "fair and equitable."[101] No prior statute or regulation answered that question.[102] The agency had to say yes or no.[103] Its yes or no answer, and the reasons it gave for its determination, would then serve as precedent that would govern transactions with the same or sufficiently similar facts.[104] The "policy" was thus established in the order at issue in *Chenery II* that such transactions were not "fair and equitable,"[105] though the agency could presumably depart from that precedent in future proceedings if it wished, so long as it provides a valid justification for the new policy.[106] A "yes" answer would have functioned similarly—establishing a policy that such transactions

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98 *See supra* notes 59–60 and accompanying text; *see also* Weaver & Jellum, *supra* note 18, at 820 (expanding on why the SEC had to decide whether the transaction in question met the statutory standards and could not simply have blessed the transaction because it lacked a rule on point).

99 *See* Weaver, *supra* note 18, at 168–69. Of course, that may not *always* be the case. Mature adjudicative systems may have a greater proportion of cases that reflect what Ronald Cass called—somewhat misleadingly—the "judicial model" of agency adjudication, in which the agency acts solely as a "neutral arbiter weigh[ing] evidence and ascertain[ing] facts" in the context of settled law. Ronald Cass, Agency Review of Administrative Law Judges' Decisions 117 (1983) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/project-report-recommendation-83-3 [https://perma.cc/J9ED-B4XU]. *See generally* Rebecca S. Eisenberg & Nina A. Mendelson, *The Not-So-Standard Model: Reconsidering Agency-Head Review of Administrative Adjudication Decisions*, 75 Admin. L. Rev. 1 (2023) (canvassing the wide range of decisions, from the technical and the low-profile to the politically freighted, that agency adjudicators must make). But it will inevitably be so, in some number of cases, that the agency and its adjudicators must decide. *See* Weaver, *supra* note 18, at 168–69.

100 332 U.S. 194 (1947). It should not matter whether the facts were undisputed or established through the adjudicatory process itself.

101 *See supra* notes 59–60 and accompanying text.

102 *Chenery II*, 332 U.S. at 198.

103 *See id.* at 208 (explaining the SEC's need to determine whether a company's plan of reorganization satisfied the "fair and equitable" rule).

104 *See* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 765–66 (1969) (plurality opinion) ("Subject to the qualified role of stare decisis in the administrative process, [adjudicated cases] may serve as precedents.").

105 *See Chenery II*, 332 U.S. at 208 (reinstating SEC's rejection of company's reorganization plan as not "fair and equitable").

106 *See Fox Television I*, 556 U.S. 502, 515 (2009) (explaining that an agency must at least "show that there are good reasons for the new policy" and "display awareness that it *is* changing position").

were allowed under the statute. Either way, policymaking by adjudication has occurred.

Viewing agency policymaking as the natural byproduct of administrative adjudication within the confines of administrative law has several implications. First, it reveals the extent to which agency policymaking by adjudication is bound up with agencies' democratic responsibility to administer statutes pursuant to instructions provided to them by Congress. Because agencies often possess discretion, few these days would subscribe to the view that agencies act as "mere transmission belt[s] for implementing legislative directives in particular cases."[107] But precisely because agencies *do* have discretion in many cases—and are invested with that discretion by Congress—agency policymaking by adjudication has an important role to play in completing Congress's scheme by fleshing out legislative standards in the context of particular cases.[108] Agencies flesh out such standards by providing reasons for their determinations, reasons that will often cut somewhat more broadly than the case at hand.[109] Those reasons can then be scrutinized to make sure they accord with the underlying statute and the agency's prior pronouncements. Agency policymaking by adjudication need not be seen as aberrant and thus in need of special justification. It is part and parcel of administration itself.[110]

Second, that agency policymaking by adjudication goes hand in hand with agency adjudication itself should further alert us to the possibility that such policymaking was ubiquitous at the time of the APA's passage in 1946, well before the decades traditionally associated with the rise of rulemaking.[111] Indeed, what we would today call agency policymaking by adjudication was a well-known phenomenon in the years prior to 1946. In a 1934 report commissioned by the Brookings Institution and described as resulting from ten years of study, the authors wrote that "[a]dministrative agencies can settle cases coming before them, both on their merits and also with the avowed purpose of furthering a particular social or economic policy that has been initiated

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107 *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675 (1975).

108 *See* Emily Bremer, *Power Corrupts*, 41 YALE J. REG. 426, 428 (2024) ("Administrative agencies . . . bear the principal responsibility for keeping [legislative] promises by giving effect to the law in the real world.").

109 *See* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 641 (1995) (arguing that "ordinarily, to provide a reason for a decision is to include that decision within a principle of greater generality than the decision itself" and that "[w]hen we provide a reason for a particular decision, we typically provide a rule, principle, standard, norm, or maxim broader than the decision itself" (emphasis omitted)).

110 *See* Bremer, *supra* note 108, at 428–31 (arguing for an increased focus on administration in administrative law).

111 *See id.* at 449 (describing "standard story" in which agencies began to make greater use of their rulemaking authorities in the 1970s).

by the legislature or the executive."[112] It then went on to list various advantages of formulating policy via administrative adjudication—advantages that will sound familiar to modern ears.[113] As far as agency practices, Professor Emily Bremer has described how the Federal Communications Commission ("FCC") used a combination of adjudication and rulemaking to formulate policy in the decades prior to the APA.[114] It is not difficult to find further instances of agency policymaking by adjudication in the pre-APA period.[115]

And yet, as Bremer has written, the APA did not expressly place limits on agencies' ability to formulate policy by adjudication.[116] That is not because no one called for such limits. Bremer documents calls for agencies to use rulemaking to a greater degree as early as the 1930s.[117] While developing legislation that would eventually culminate in the APA, Congress had before it statutory language that would have announced "a declared preference for rulemaking over adjudication."[118] But it adopted neither it nor anything similar.[119]

Third, the inevitability of agency policymaking by adjudication complicates some of the broadsides leveled against the practice. Start with Justice Jackson's invocation of administrative "authoritarianism" in *Chenery II*.[120] For one, viewed in the above frame, the course of events in *Chenery II* seem not so dissimilar from what happens all the time in courts, both state and federal—a broad standard is applied

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112 Frederick F. Blachly & Miriam E. Oatman, Administrative Legislation and Adjudication 202–03 (1934).

113 *See id.* at 202–08.

114 *See* Bremer, *supra* note 108, at 452–53.

115 *See, e.g.*, NLRB v. Pa. Greyhound Lines, Inc., 303 U.S. 261, 263–64, 271 (1938) (upholding NLRB's determination that it could require employers to withdraw recognition from a previously employer-dominated labor organization and to post notices of such withdrawal, even after the employer had been ordered to cease and desist controlling the organization). At the Supreme Court level, an intriguing allusion to agency policymaking by adjudication can be found in a somewhat hard to parse passage by none other than Justice Frankfurter, who would go on to dissent in *Chenery II*. In upholding the FCC's chain broadcasting regulations, Justice Frankfurter emphasized that the Commission would retain the ability to refine its regulatory standards in the context of particular cases, writing for the Court:

> The Commission . . . did not bind itself inflexibly to the licensing policies expressed in the Regulations. In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the 'public interest, convenience, or necessity.' If time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations.

Nat'l Broad. Co. v. United States, 319 U.S. 190, 225 (1943) (quoting 47 U.S.C. § 307(c)(1)).

116 *See* Bremer, *supra* note 108, at 450.

117 *See id.*

118 *Id.*

119 *Id.*

120 *Chenery II*, 332 U.S. 194, 216 (1947).

in a particular case to the parties at hand, and the court's resolution serves as precedent going forward.[121] More fundamentally, because the SEC had the obligation to apply the statutory standard at hand, and because it had to decide whether the *Chenery* reorganization could go forward, it *had to* apply whatever the "new policy" was going to be to those before it.[122] The "authoritarianism" critique would, therefore, seem to draw its strength not from the sense that principles of fairness required that the agency decline to make "new law" but instead from the belief that such principles demanded that it make new law in favor of the regulated entity. I further address variations on this when we turn to the retroactivity question.[123] For now, the point is simply that, in circumstances similar to *Chenery II*, the critique seems more a substantive objection than a demand that the agency should have refrained from making policy outside of the rulemaking process.

Viewing agency policymaking by adjudication as the natural byproduct of agency adjudication subject to the requirements of administrative law also undercuts a recent argument that the practice involves an unconstitutional delegation by Congress of the authority to "make law" via adjudicatory processes.[124] Professors Gary Lawson and Joseph Postell argue that because Congress lacks authority to make law through adjudication, Congress may not be able to "subdelegate" such authority to administrative agencies, at least in some subset of cases involving private rights.[125] Perhaps, Lawson and Postell allow, Congress could authorize agencies to prescribe "new standards of conduct" using rulemaking, which more closely resembles a legislative-type process.[126] But agency policymaking by adjudication goes too far in that

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121 *See infra* Section III.A (further investigating the analogy between agencies and courts).

122 *See supra* notes 100–06 and accompanying text; *see also* Eisenberg & Mendelson, *supra* note 99, at 59 (noting other circumstances in which agencies lack the choice to make policy other than by rulemaking).

123 *See infra* Part III.

124 *See* Lawson & Postell, *supra* note 12, at 48–49.

125 *See id.* at 61–67. One initial comment on this formulation: I do not believe it is right to reduce the constitutionality of agency authority to whether Congress can "subdelegate" this or that function. Indeed, the modern nondelegation caselaw denies that Congress can constitutionally delegate—or subdelegate—its authority at all. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001). Rather, Congress authorizes agencies to do things using its Article I powers, including the Necessary and Proper Clause, and agencies exercise the executive power in carrying out their tasks. *Cf.* INS v. Chadha, 462 U.S. 919, 954 n.16 (1983) (explaining that although agency action can "resemble 'lawmaking,'" executive power is not "legislative," and it is therefore subject to checks distinct from "the approval of both Houses of Congress and the President"). No subdelegation need be involved. But we can put aside this possibly semantic debate for present purposes, and I recognize that Lawson and Postell are operating within a different framework than that reflected in present-day caselaw. *See* Lawson & Postell, *supra* note 12, at 51.

126 *See* Lawson & Postell, *supra* note 12, at 59–60.

it untethers the act of "lawmaking" from the processes that Congress itself must follow.[127]

With admirable modesty, Lawson and Postell concede that they have not made an "airtight" case against the constitutionality of the broad *Chenery II* principle,[128] suggesting instead that "there are sufficient questions about the constitutionality of the practice to warrant caution before concluding that agencies have a free hand to choose how to make law."[129] In the same spirit, I do not claim to have a knock-down rejoinder, especially as we proceed from very different premises.[130] But some of the above observations weaken the intuitive appeal of the Lawson-Postell view. Lawson and Postell frequently talk of agencies "mak[ing] law"[131] or "creat[ing] new standards of conduct"[132] in the same sense that legislation does but through an adjudicatory process. That is not really correct, however. As explained above, agencies are making bottom-line determinations regarding matters presented to them and, because of requirements imposed upon them by administrative law, giving reasons for those determinations that then apply as precedent—precedent that can be departed from if the agency overcomes certain explanatory burdens.[133] Indeed, in the next adjudication, the agency presumably must be receptive to parties' arguments that the agency depart from its own precedent and give reasons for the retention of its prior policy if that is what the agency chooses, lest the agency face challenge for failing to consider an alternative.[134] That is what makes policies announced via adjudication different from both agency regulations and statutes, neither of which can be departed from by way of an individual adjudication.[135]

Thus, can it be that what are ultimately constraints—the reason-giving requirement and the obligation to follow precedent or to explain departures from it—are what transform agency adjudication into forbidden "lawmaking"? That seems odd. Would it be a better world were agencies to simply make decisions in a "yes" or "no" manner, with no reasons given, and where the agency could simply disregard what it had previously concluded without explanation? That would seem to threaten the kind of "immanent principles of due process" that Lawson

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127 *See id.*

128 *Id.* at 61.

129 *Id.* at 64.

130 *See, e.g.*, *id.* at 51 (explaining that aspects of their argument depend on a view of the Constitution's original meaning not reflected in current case law).

131 *E.g.*, *id.* at 63.

132 *E.g.*, *id.* at 54.

133 *See supra* notes 100–06 and accompanying text.

134 *See* Deacon, *supra* note 27, at 710–11 (explaining that an agency should have to explain its decision to retain the status quo when urged to change course).

135 *See infra* notes 386–404 and accompanying text (defending this difference).

and Postell elsewhere invoke.[136] But Lawson and Postell's article is devoted to explaining why agency policymaking by adjudication—or lawmaking as they would have it—is uniquely unconstitutional, not why agency adjudication *per se* is.[137]

B. Policing Policymaking by Adjudication

Even if some degree of policymaking by adjudication is inevitable, the question remains whether courts might nevertheless find that an agency has, in particular circumstances, abused its discretion by choosing to make certain *kinds* of policies through adjudication as opposed to rulemaking. Judicial efforts to police agencies in that often illusory choice would face insurmountable problems. The issues are essentially two, which often work in tandem. First, given the inevitability of policymaking by adjudication,[138] such efforts would raise grave concerns regarding whether there are judicially manageable standards that could be applied to set aside any individual act of agency policymaking by adjudication. In this respect, my argument elaborates John Manning's suggestion that administrability concerns are an important part of explaining *Chenery II*'s permissiveness.[139] Second, the practical effect of policing agency policymaking by adjudication would, in many cases, be to limit agencies' ability to act based on grounds they believe to be the best or to encourage agencies to give insincere grounds for their actions, thus undermining other important administrative law values.[140]

Before diving in, one caveat. Many of the difficulties explored below assume a judicial setting—they describe issues that *courts* would have to grapple with if *Chenery II* were eroded. Sketching out those difficulties is not to imply that agencies may never err, consciously or not, by failing to address certain issues through rulemaking; as stated above, there may well be a case that rulemaking is often superior on a number of grounds.[141] Nor does it necessarily lead to the conclusion that efforts to police agency adjudication outside of the judicial setting should be abandoned. Although full consideration of such matters is outside the scope of this Article, there may be a place for jawboning by politicians or for agency-imposed limitations.[142] But that agencies may

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136 *See* Lawson & Postell, *supra* note 12, at 63.

137 *See id.* at 47.

138 *See supra* Section II.A.

139 *See* John F. Manning, *Nonlegislative Rules*, 72 Geo. Wash. L. Rev. 893, 901 (2004).

140 *See infra* note 179 and accompanying text.

141 *See supra* note 17 and accompanying text.

142 *See* Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against* Chevron *Deference in Immigration Adjudication*, 70 Duke L.J. 1197, 1239–42 (2021) (arguing that the immigration agencies should move to greater reliance on notice-and-comment rulemaking via use of "internal administrative law").

err does not mean courts are justified in engaging in intrusive methods of judicial review—through a variety of deference doctrines, principles of reviewability, and the like, administrative law in fact tolerates predictable agency error when the costs of judicial scrutiny would exceed its benefits.[143]

To begin to see the costs associated with limiting *Chenery II*, consider that, in many cases, it will be difficult—if not impossible—to isolate any discrete "choice" the agency has actually made between adjudication and rulemaking. Arbitrary and capricious review, the presumptive vehicle for policing agency policymaking by adjudication, applies only where the agency has made a choice.[144] But because agency policymaking by adjudication is the inevitable byproduct of agency adjudication,[145] it is hard to fault an agency for making policy in the specific adjudication under review—the agency had no choice *at that point in time*. The fault of the agency, if any, was the "choice" to leave the law unclear in the first place, presumably by failing to promulgate a rule dealing with the situation.

Viewed from this angle, the difficulties become apparent. In many circumstances, the agency will never have made such a choice. A party might apply for a permit, or seek the approval of a transaction, shortly after the statute is passed and before the promulgation of a rule is practically possible.[146] Even where that is not the case, it may be difficult, if not impossible, to isolate any choice an agency has made to formulate policy via adjudication and not rulemaking. There may be many reasons that an agency has not formulated a rule on point—failure to foresee the issue in question and resource limitations compounded by requirements pertaining to section 553 notice-and-comment proceedings perhaps chief among them.[147]

Of course, sometimes it may be possible to reasonably impute to an agency a kind of choice to develop law through adjudication as opposed to rulemaking. The NLRB, for example, has famously—or infamously—shied away from rulemaking, making nearly all of its law

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143 *See e.g.*, Kisor v. Wilkie, 588 U.S. 558, 564, 568, 571 (2019) (explaining "potent . . . but cabined" rule "that a court should defer to the agency's construction of its own regulation," which is "attuned to the comparative advantages of agencies over courts in making such policy judgments").

144 *See* Nat'l Tire Dealers & Retreaders Ass'n, Inc. v. Brinegar, 491 F.2d 31, 37 (D.C. Cir. 1974).

145 *See supra* notes 93–106 and accompanying text.

146 *See, e.g.*, *Chenery II*, 332 U.S. 194, 198 (1947) (addressing SEC's decision to bar purchase of preferred stock where "neither Congress nor the Commission had promulgated any general rule proscribing such action").

147 *See* Peter L. Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law*, 74 COLUM. L. REV. 1231, 1245 (1974) ("The failure to use rulemaking is far less a product of conscious departmental choice than a result of impediments to the making of rules created by the Department's internal procedures.").

through adjudicative processes.[148] A pattern of agency enforcement proceedings, over which the agency maintains agenda control, may also be more likely to be the product of some antecedent choice to eschew rulemaking.[149] But even in those situations, any choice we might impute to the agency is quite unlike choices that administrative law is adept to handle—such as whether to raise or lower emissions standards as part of a particular proceeding.[150] The NLRB's historical use of adjudication to develop policy seems to be more the product of a kind of cultural orientation than a decision that was made at some point in time.[151] Likewise, a decision to focus enforcement resources on an area that could also be addressed through rulemaking is not the kind of decision that would typically be evident from an administrative record focused on the specific agency adjudication at issue. Such record will rarely illuminate the agency's past internal deliberative decision-making or the factors that led the agency down the path it is on today.[152] Thus, more intrusive methods of judicial review would have to be devised, methods that would be designed to probe agency officials' past programmatic decision-making regarding how to allocate agency resources and why. And even if such decision-making could be brought to light, it is here that the classic justification for *Chenery II*, the courts' relative weakness when it comes to assessing the kind of considerations at play, would apply with most force.[153]

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148 *See Facilitating the Use of Rulemaking by the National Labor Relations Board*, ADMIN CONF. OF THE U.S. (June 14, 1991), https://www.acus.gov/sites/default/files/documents/91-5.pdf [https://perma.cc/4R73-2RXQ].

149 *See* Cary Coglianese & Daniel E. Walters, *Agenda-Setting in the Regulatory State: Theory and Evidence*, 68 ADMIN. L. REV. 93, 96 (2016) (describing decisions regarding whether to undertake certain enforcement actions as part of agencies' agenda-setting role).

150 *See, e.g.*, Sierra Club v. EPA, 939 F.3d 649, 674 (5th Cir. 2019) (upholding the Environmental Protection Agency's ("EPA") approval of state's emissions determination using arbitrary and capricious standard).

151 *See* Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274, 274–75 (1991) (describing NLRB's decades-long commitment to developing policy via adjudication).

152 *See, e.g.*, *Compiling a Decision File and an Administrative Record*, U.S. FISH & WILDLIFE SERV. (Mar. 2, 2007), https://www.fws.gov/policy-library/282fw5 [https://perma.cc/D9K4-7FYW] (describing the administrative record as only containing documents relevant to agency's "decision-making process" for a particular "final [agency] decision").

153 One further word—or two—on the enforcement context. It cannot be that agencies are prohibited, full stop, from announcing policies in adjudications that have resulted from agency-brought complaints—that is impossible in a world where law inevitably contains gaps and ambiguities. *See* Kisor v. Wilkie, 588 U.S. 558, 566 (2019). And so, courts would still have to develop criteria to separate tolerated agency policymaking from that which is disallowed. I argue below that such attempts will be fraught with problems. *See infra* notes 157–64.

To the extent that enforcement proceedings raise the possibility that an agency will unfairly, or with illicit motives, single out particular parties, I argue below that agencies should generally be required to explain why they are applying the policy to the parties at hand, or why they are levying

Perhaps for these reasons, the limits on agency policymaking by adjudication most often proposed, and in isolated cases adopted, have not involved assessing some antecedent choice to develop law through adjudication, even though *Chenery II* is usually conceived of as involving "agency choice of policymaking form."[154] Rather, the agency's fault lies not in some past decision to proceed via rulemaking or adjudication but in deciding an adjudication before it *in a particular way*, a way that should have suggested the need for rulemaking.[155] In the case actually before it, the agency presumably should have employed different reasoning while undertaking a rulemaking to govern future cases, or it should have held the adjudication in abeyance, if possible, until a rulemaking could be concluded.[156]

Framed in this way, the issue then becomes how to identify when an agency's reasoning has touched some danger zone indicating the need for rulemaking and requiring a judicial order setting aside the results of a particular adjudication in question. Let us go through the possibilities. To preview: each will suffer from one or both of the problems identified at the outset of this Section.

First, perhaps the problem is that the agency has decided the adjudication in question in a way that is too general, too unconnected to the particular facts at hand, or in a way that "fit[s] all cases at all times."[157] The intuition pointing toward rulemaking here is pretty simple. Before the formulation of a general kind of policy, the agency may well benefit from hearing from the broad constituency affected by the policy.[158] That constituency would also benefit from the kind of notice provided pursuant to rulemaking proceedings.[159]

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a fine as opposed to ordering prospective relief, at least where they have discretion in the matter. *See infra* Section III.B.3.

154 *See* Magill, *supra* note 10, at 1405–06.

155 *See, e.g.*, First Bancorporation v. Bd. of Governors of the Fed. Rsrv. Sys., 728 F.2d 434, 438 (10th Cir. 1984); Lawson & Postell, *supra* note 12, at 88–89.

156 *See* Lawson & Postell, *supra* note 12, at 87 ("[W]hile the law since *Chenery II* has been generous towards agencies' ability to make law through adjudications, there is no *conclusive* presumption that agencies can simply make policy through adjudication without engaging in rulemaking first.").

157 Bell Aerospace Co. v. NLRB, 475 F.2d 485, 496 (2d Cir. 1973) (quoting NLRB v. Wyman-Gordon Co., 394 U.S. 759, 777 (1969) (Douglas, J., dissenting)).

158 *See* Shapiro, *supra* note 10, at 930 ("One of the substantial advantages claimed for rulemaking is that it requires the agency to allow general participation in the deliberative process by all those who may be affected by the rule, while no such opportunity is afforded in adjudication.").

159 *See* Pierce Jr., *supra* note 19, at 308–09.

The beginning of the difficulty, however, is that there is no stable way to draw a distinction between policies that are too general to be announced through adjudication and those that are not. Every agency decision in an adjudication will be attached in some way to the facts of the case before it.[160] If it is not, the agency would face a separate arbitrary-and-capricious challenge.[161] How general an agency's resolution of the adjudication will appear to be amounts to a function of the facts the agency thinks are relevant in a legal or policy sense and how many other cases out in the world share those facts. The level of generality at which the agency decides to resolve a given adjudication is, therefore, somewhat outside of the control of the agency itself. How widely shared specific facts are is certainly outside the agency's ambit. And, if the agency sincerely believes the facts it chooses to highlight are the relevant ones under the statute, that, in some sense, is as well.

Thus, not only would having courts decide how general is too general pose a difficult line-drawing problem, but it is also, in some sense, incoherent to say that an agency has acted improperly in resolving an adjudication at one level of generality versus another. Indeed, the agency would be acting insincerely, in a way otherwise worthy of condemnation, if it chose to resolve the adjudication on grounds other than that which it felt were the genuine ones.[162] But that is what courts would be inviting if they limited agencies in adjudications to deciding cases pursuant only to facts peculiar to the parties. The *Bell Aerospace*[163] Court, drawing on *Chenery II*, recognized as much, writing that agencies have a "statutory duty to decide the issue at hand in light of the proper standards and that this duty remained 'regardless of whether those standards previously had been spelled out in a general rule or regulation.'"[164]

To make things more concrete, consider the following cases. In the proceedings challenged in *First Bancorporation v. Board of Governors of the Federal Reserve System*,[165] one of the few cases to set aside an agency adjudication for the generality of its reasoning, the agency concluded that a certain category of bank account could not be offered on an unregulated basis.[166] It did so because it found that such accounts would undermine the public policy objectives of the relevant statute.[167] That conclusion would certainly set policy at some level of

160 *See* Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962) (the agency's decision must draw a "rational connection between the facts found and the choice made").

161 *See id.*

162 *See* Dep't of Com. v. New York, 588 U.S. 752, 783–84 (2019).

163 416 U.S. 267 (1974).

164 *Id.* at 292 (quoting *Chenery II*, 332 U.S. 194, 201 (1947)).

165 728 F.2d 434 (10th Cir. 1984).

166 *See id.* at 438.

167 *See id.*

generality—nonparty banks that offered accounts of the kind in question would be subject to the precedential effect of the agency's conclusion in future proceedings.[168] But if the agency understood such accounts to be inconsistent with the statute, what was it supposed to do? Contrive an explanation that seemed more particular with respect to the specific parties before it? The court in *First Bancorporation* seemed to want the agency to engage in a discussion more specifically tied to the bank's actual customers.[169] But that does not really achieve anything if it turns out that the bank's customers are, in the relevant respects, similar to everyone else's. Again, the policy's generality is just the product of facts in the world and what is legally relevant to the decision.

A similar conundrum is posed by *Chenery II* itself. The facts there were not in dispute.[170] The transactions were what they were, and an agency judgment either that they were condemnable or not condemnable would have resulted in a policy allowing or prohibiting such transactions at the identical level of generality.[171] The same would be true if the facts initially were in dispute, but the agency concluded, pursuant to fact-finding otherwise entitled to deference, that the facts were one thing as opposed to another.[172]

In such circumstances, it would appear freakish to condemn an agency explanation for operating at too high a level of generality. To say that an agency should have resolved a case in a way more particular to the parties—if that is even possible—is to say that the agency should have evaded its duty to resolve the case on the grounds it understood to be the correct ones and embraced a result contrary to its expert judgment, which is something administrative law typically discourages. Alternatively, courts might hold agencies liable for failing to stay proceedings in the adjudication until a rulemaking can be concluded, in effect forestalling agencies from employing certain grounds for their decision but not requiring agencies to provide contrived reasoning.[173] But that is an option that may not often be practically or procedurally available, particularly in light of the extended time it takes to conclude

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168 *See id.*

169 *See id.* ("The Board examined no specific facts as to the potential adverse effects of unregulated Foothill NOW accounts.").

170 *Chenery II*, 332 U.S. 194, 207 (1947).

171 *See, e.g.*, NLRB v. Wyman-Gordon Co., 394 U.S. 759, 765–66 (1969) (plurality opinion) ("Subject to the qualified role of stare decisis in the administrative process, [adjudicated cases] may serve as precedents.").

172 *See, e.g.*, Tex. Tech Physicians Assocs. v. Dep't of Health & Hum. Servs., 917 F.3d 837, 844 (5th Cir. 2019) ("We defer to the agency's findings of fact if they are supported by substantial evidence.").

173 *Cf.* Bauer v. DeVos, 325 F. Supp. 3d 74, 108, 110 (D.D.C. 2018) (concluding that agency's decision "to stay twenty-two sections of [a] final rule" pending judicial review was arbitrary and capricious because it "offer[ed] no explanation").

a rulemaking proceeding.[174] It invites an impossible guessing game by agencies concerning what kinds of reasoning will be judged too general and thus require the stay of an adjudication. And it threatens to judicially reorient agency resources in a way that administrative law doctrines seek to avoid.[175] In short, it is not an attractive or viable option.

A second potential, and related, limit would task courts with deciding whether a given agency pronouncement was too command-like to have been issued via adjudication—commands, after all, are the classic stuff of rules. Apart from the fact that the policy announced by the NLRB in the *Excelsior* case was not applied to the parties at hand, some Justices seemed additionally perturbed that the addresses-and-names policy was described as "a requirement" such that "[f]ailure to comply . . . shall be grounds for setting aside" elections.[176] But because policies announced in the course of adjudications are never binding in the way regulations are[177]—because, in other words, the agency may always depart from them in the next adjudication[178]—and to say that an agency's policy too closely resembles a command is to fault it for its choice of wording when that choice has no practical consequence. An agency pronouncement that, for example, a given advertising practice is unfair or deceptive in the context of a particular adjudication *is* to announce that the same practice is, from the agency's present point of view, prohibited going forward. Whether the agency states that implication forthrightly or not may affect how "command-like" the agency's pronouncement appears, but it does nothing to change how free the agency is to depart from its position in a subsequent adjudication, how free future parties are to urge the agency distinguish or make an exception for their case, and the like. All that a limitation on "command-like" policies would do, potentially, is require the agency to more carefully

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174 *See, e.g.*, U.S. Gov't Accountability Off., GAO-09-205, Federal Rulemaking 5 (2009) ("[T]he average time needed to complete a rulemaking across our 16 case-study rules was about 4 years, with a range from about 1 year to nearly 14 years . . . .").

175 On such considerations barring or severely limiting review in other contexts, *see, e.g.*, WildEarth Guardians v. U.S. EPA, 751 F.3d 649, 656 (D.C. Cir. 2014) (upholding EPA's denial of a petition for rulemaking under the "extremely limited and 'highly deferential standard that governs our review of an agency's denial of a rulemaking petition" and "declin[ing] to second-guess EPA's decision to prioritize regulatory actions in a way that best achieves" statutory objectives); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 891 (1990) ("[R]espondent cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made.").

176 *Wyman-Gordon*, 394 U.S. at 763 (plurality opinion) (quoting Excelsior Underwear, Inc., 156 N.L.R.B. 1236, 1239–40 (1966)).

177 *See infra* note 390 and accompanying text.

178 *See, e.g.*, United Student Aid Funds, Inc. v. King, 200 F. Supp. 3d 163, 170 (D.D.C. 2016) ("Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change." (quoting Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 221 (2016))).

hide its views on the future-oriented effects that adjudication always has, undermining rather than serving notice values.[179]

Next possibility: a court might inquire into whether an agency has transgressed the bounds of its discretion by announcing a policy via adjudication that is not sufficiently rooted in "preexisting legal norms," such that it appears to come "out of thin air."[180] Another way to put the concern is that when an agency acts in a way that cannot really be described as involving interpretation but rather constitutes pure policymaking, the agency is not really acting as a court and should choose to employ processes suited to legislative as opposed to judicial decision-making.[181] And here is one circumstance where due-process-infused notice considerations might point most strongly toward notice-and-comment rulemaking.[182]

Again, however, things begin to break down once you consider how to implement an administrable limitation based on such worries. All agency decision-making, including in adjudications, must be rooted at some level in "preexisting legal norms."[183] Congress must supply such norms, although they can be fairly broad under current caselaw, according to the nondelegation doctrine.[184] Agencies must apply those norms,[185] and they must do so in ways that respect the limits of the statute in question.[186]

In an important sense, then, the "out of thin air" limitation is a real one.[187] If an agency policy is not legally supportable under the statute in question, the agency cannot apply it in an adjudication, just as it could not through rulemaking.[188] There are parts of Justice Jackson's dissent in *Chenery II* that read as if he is making this point, and, if that is the case, any disagreement I have with him may be thinner than first imagined: while I might disagree with the conclusion that the policy in *Chenery II* was insupportable under the statute in question, if it was in fact insupportable, I would have no problem with the courts setting it aside.[189]

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179 *See, e.g.*, FCC v. Fox Television Stations (*Fox Television II*), 567 U.S. 239, 253 (2012) (recognizing that agencies are required "to provide a person of ordinary intelligence fair notice of what is prohibited" (quoting United States v. Williams, 553 U.S. 285, 304 (2008))).

180 Lawson & Postell, *supra* note 12, at 54, 66.

181 *See Wyman-Gordon Co.*, 394 U.S. at 765 (plurality opinion) (denouncing agency's argument that it could formulate new policy through adjudication rather than "rule-making provisions of the Administrative Procedure Act" without applying the policy "therein").

182 *See* Lawson & Postell, *supra* note 12, at 88–89.

183 *Id.* at 54.

184 *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472–75 (2001).

185 *See, e.g.*, Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 410–13 (1971).

186 *See* 5 U.S.C. § 706(2)(C) (agency action set aside if unlawful).

187 *See* Lawson & Postell, *supra* note 12, at 66.

188 *See* 5 U.S.C. § 706(2)(C) (agency action set aside if unlawful).

189 *Chenery II*, 332 U.S. 194, 216 (1947) (Jackson, J., dissenting) ("The truth is that in this decision the Court approves the [agency]'s assertion of power to govern the matter *without* law . . . ."

Such a limit would not be internal to the *Chenery II* doctrine, however. Agencies must follow their statutes in all contexts and when employing any procedure.

My understanding, however, is that proponents of limiting agency adjudicators to applying "preexisting legal norms"[190] mean something more than agencies must follow whatever statutory norms apply. Rather, the limit would prevent agencies from embracing policies through adjudication that, though supportable in the thin sense, cannot be described as genuinely *interpreting* those norms.[191] Nothing in the dictionary is likely to give you much guidance on whether the transactions at issue in *Chenery* were "fair and equitable"[192]—or so the critique would go.

The question then becomes whether courts can properly limit agency adjudicators to acting in ways that merely interpret such preexisting norms, as opposed to creating what might be deemed new policy pursuant to them.

Here, it is tempting to simply invoke authority. Decades of administrative law scholarship has questioned whether courts can draw a stable line between acts of interpretation and lawmaking in the context of the interpretive rules exception to notice-and-comment rulemaking.[193] I would add that, when it comes to agency adjudication, much decision-making occurs pursuant to statutory norms written in such a way that even those who hold a stronger-than-the-average-law-professor belief in the distinction between interpretation and lawmaking would concede that an act of policymaking discretion is inevitable. As Professor Jeffrey Pojanowski has written in an article otherwise defending a "neoclassical" view of interpretation, statutory standards invoking

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(emphasis added)). There is another sense in which an agency policy, announced in an adjudication, might be insupportable under a statute. Some statutes merely prohibit actions that are made unlawful by agency rule or regulation. Section 10(b) of the Exchange Act is a prominent example. *See* 18 U.S.C. § 78j(b). In such cases, therefore, the result of an agency adjudication needs to draw support not only ultimately from the statute but also from a previously promulgated agency regulation. *Cf.* Am. Min. Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993) (holding that an agency cannot breathe life into an otherwise inoperative statute through an interpretive rule not issued via notice and comment). In such cases, the issue then becomes whether agency policies are supportable under both the underlying statute and some agency regulation. *See* A.C. Pritchard & Robert B. Thompson, A History of Securities Law in the Supreme Court 137–40 (2023) (describing the courts' reception to the SEC's expanding use of § 10(b) and SEC Rule 10b-5 in order to prohibit insider trading); *see also infra* Part IV (arguing that courts may properly ask whether a policy adopted via adjudication violates a governing regulation).

190 Lawson & Postell, *supra* note 12, at 54.

191 *See* Lawson & Postell, *supra* note 12, at 66 ("Everyone understood that the agency [in *Chenery II*] was creating a new norm of conduct out of thin air.").

192 *Chenery II*, 332 U.S. 194, 204 (1947) (explaining SEC's view of what "fair and equitable" meant under the statute).

193 *See* Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 Admin. L. Rev. 263, 317–19 (2018) (summarizing scholarship).

reasonableness or the public interest present "cases in which there is no surface upon which traditional lawyers' tools can have purchase."[194] Applying such standards in the context of particular cases therefore requires recourse to considerations that will smack of policymaking, not the application of legal tools oriented to meaning. And indeed, turning to the judicial analogy, it may be the case that federal statutes primarily implemented by judges and not agencies may be less likely to contain such open-textured commands, but when they do, even courts rely on policy-laden determinations that cannot be cleanly tied to the "meaning" of the text.[195]

Thus, whether an agency determination made during an adjudication appears like policymaking or interpretation may depend more on the underlying statutory standard than any choice the agency can be said to have made. Consider, again, the situation in *Chenery II*, where the question was whether a certain complex set of transactions resulted in a reorganization that was "fair and equitable."[196] Or consider, to borrow from a well-known teaching case on the interpretive-rule exception, an agency determining how many feet high a fence must be to adequately contain certain dangerous animals.[197] Those questions cannot be answered "by a process reasonably described as interpretation."[198] Agencies in such circumstances would therefore be hamstrung, effectively unable to reach determinations within their domain without risking condemnation for excessive policymaking by adjudication.

One response to the above may be to return to the agency's antecedent failure to flesh out broad standards like those above *through rulemaking*, such that the agency ensures that all is left for its adjudicators to do is interpret—in some genuine sense—its own regulations. But that focus brings its own difficulties. The first is the classic justification for the *Chenery II* doctrine—namely agencies' greater expertise when it comes to deciding how much fleshing out should be done through adjudication as opposed to rulemaking.[199] Another is the fact that agencies may often lack the practical ability to conduct a sufficient number of rulemakings to reduce their adjudicators' task to mere interpretation.[200] In light of the inevitable gaps and ambiguities in the agency's own rules,

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194 Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 Harv. L. Rev. 852, 893–94 (2020).

195 *See, e.g.*, Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. Cal. L. Rev. 405, 431, 442 (2008) (characterizing the courts' decision-making in antitrust cases).

196 332 U.S. 194, 204 (1947).

197 *See* Hoctor v. USDA, 82 F.3d 165, 168 (7th Cir. 1996).

198 *Id.* at 170.

199 *See supra* note 19 and accompanying text.

200 *See* Kisor v. Wilkie, 588 U.S. 558, 566 (2019) (discussing "familiar" ambiguity in regulations "often" due to "the well-known limits of expression or knowledge").

courts would still be confronted with deciding whether agency adjudications represent "genuine" interpretations of their regulations, triggering the set of concerns associated with the interpretive-rules exception.[201] And the process of deciding whether agencies had left statutory standards "too unclear" or whether more rulemaking is required implicates the kind of considerations that courts have traditionally invoked both to defer to agencies' decisions not to launch rulemaking proceedings in response to a petition and to eschew "programmatic" challenges alleging agency failure to adequately implement a statutory scheme in a general sense.[202]

The fundamental problem with requiring agencies to settle all issues through rulemaking, however, is that it amounts to a demand not only that agencies promulgate some number more regulations but also that those regulations be of a certain kind. After all, if the agency regulations themselves are open-ended and call for the kind of policy determinations that are inevitable when a written law speaks in terms of fairness or reasonability or similar, that presumably would not solve the problem.[203] But what that does is rob the agency of a policy judgment—to rely on standards instead of rules, for example—that would otherwise be open to it.[204] Thus, it would transform what purports to be a procedural question regarding how agencies implement statutes into a substantive requirement that agencies settle matters in a particular way, contrary to how the agency would have done so, and without any statutory warrant in either the APA or the underlying statute.

Turn then to the final possibility. Perhaps the problem arises when an agency, in the adjudication under review, has departed from its prior precedent by contradicting its prior reasoning or even pulling a 180.[205] In this view, it is not agency policymaking by adjudication per se that is the problem but agency *reversals* of policy through adjudication. Recall the facts of *Bell Aerospace*, where the NLRB determined that

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201 *See supra* note 189 and accompanying text.

202 *See, e.g.*, WildEarth Guardians v. U.S. EPA, 751 F.3d 649, 656 (D.C. Cir. 2014) (upholding EPA's denial of a petition for rulemaking under the "extremely limited and highly deferential standard that governs our review of an agency's denial of a rulemaking petition" and "declin[ing] to second-guess EPA's decision to prioritize regulatory actions in a way that best achieves" statutory "objectives"); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 891 (1990) ("[R]espondent cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made.").

203 *See Kisor*, 588 U.S. at 566.

204 *See Chenery II*, 332 U.S. 194, 203 (1947) (explaining that some "problem[s] may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule"); *cf.* Vincy Fon & Francesco Parisi, *On the Optimal Specificity of Legal Rules*, 3 J. INSTITUTIONAL ECON. 147, 147 (2007) ("Incomplete legal precepts can be purposefully enacted as a way to optimize the lawmaking and adjudication functions.").

205 *See, e.g.*, Bell Aerospace Co. v. NLRB, 475 F.2d 485, 495 (2d Cir. 1973), *aff'd in part and rev'd in part*, 416 U.S. 267 (1974).

certain workers were nonmanagement in an alleged reversal of its prior stance.[206] Or imagine that, prior to the transaction at issue in *Chenery II*, the agency had determined that there was nothing wrong with the kind of transactions engaged in by the insiders in that case.[207] Here, concerns of notice or fairness tied to the retroactive effect of the agency's determination may point toward the desirability of notice and the kind of purely prospective resolution that comes with rulemaking.[208]

Again, however, serious administrability problems present themselves. It cannot be that *every* agency position taken in an adjudication can only be reversed (or revised?) through rulemaking. Indeed, that would seem perverse from the standpoint of those who favor limits on policymaking by adjudication. It would transform every agency adjudication of first impression into a forum for the agency to announce not only principles that apply prospectively through the workings of agency stare decisis but true substantive rules that are binding in future agency adjudications unless and until they are changed through rulemaking.[209] There are good reasons, however, for the traditional view that regulations are binding in adjudications whereas adjudicative precedents are just that—precedents which can be departed from using the same process by which they were created,[210] a kind of symmetry-of-procedure rule that is also reflected in other contexts.[211]

So, it must be that a limitation on agency reversals of policy would only apply to some subset of reversals that would be deemed too dramatic, too consequential, or too unexpected to be done by anything other than rulemaking. This provides a nice segue to the next Part. That is because the problem posed by agency reversals, thus conceptualized, is just one instantiation of the general problem raised when agencies apply policies in circumstances where the parties' reliance interests may be upset by the application of the policy. What I argue is that courts should recognize such situations as involving policy questions, not legal or procedural ones, and therefore, agencies should shoulder an explanatory burden when applying policies with such retroactive effects, but the resulting explanations should be upheld if reasonable.

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206 *See id.*

207 *Contra Chenery II*, 332 U.S. 194, 198 (1947) ("[N]either Congress nor the [agency] had promulgated any general rule proscribing [the] action [in question] . . . .").

208 *See* Weaver, *supra* note 18, at 197 (noting special concern with "second impression rules" issued via adjudication); *see also* NLRB v. Majestic Weaving Co., 355 F.2d 854, 860 (2d Cir. 1966).

209 *See* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 765–66 (1969) (plurality opinion) ("Subject to the qualified role of stare decisis in the administrative process, [adjudicated cases] *may* serve as precedents." (emphasis added)).

210 *See infra* notes 390–99 and accompanying text (setting forth such reasons).

211 *See* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 102 (2015) (rejecting view that interpretive rules may become ingrained such that their revision requires notice-and-comment rulemaking).

III. Retroactivity, Antiretroactivity, and Fair Notice

This Part confronts the fact that policies announced via adjudication are typically applied "retroactively" to the parties to the proceeding in which they are announced. The retroactive aspect of agency policymaking by adjudication, and not the announcement of a policy per se, is what many critics fasten on when articulating what it is about agency policymaking by adjudication that most is most "Orwellian"—or similar.[212] The dominant judicial approaches, at least as articulated, have treated questions of retroactivity as requiring exceptional treatment. Because retroactivity is viewed as a necessary aspect of adjudication, or because it is seen to raise fairness concerns of a particular kind, normal administrative law principles have given way to special judicial policing of administrative retroactivity.

This Part argues against such retroactivity exceptionalism and in favor of subjecting the retroactivity question to normal principles of administrative law. In particular, courts should recognize that agencies may have a choice when it comes to whether to apply the rule announced to the parties at hand or to grant a kind of exception with respect to them, and a majority of the Supreme Court was wrong in *Wyman-Gordon* to the extent it indicated otherwise. Given that, courts should approach issues of retroactivity along similar lines as they treat other issues where agencies have a choice: by requiring agencies to shoulder a—usually modest—explanatory burden. As long as agencies provide a valid explanation, their decision to apply a policy to the parties at hand, or not, should generally stand as a matter of the APA. Apart from the APA, the Constitution may place some limitations on agencies when it comes to applying policies retroactively. But current constitutional constraints cover a much smaller terrain than the courts' jurisprudence on administrative retroactivity, and any further limitations imposed by the Constitution should be defended forthrightly as a matter of constitutional law and be backed by some constitutional theory sufficient to allocate ultimate decision-making authority to the courts.

Though, in some ways, calling for a reconceptualization of the caselaw on retroactivity is not radical. In fact, the Supreme Court has more or less embraced my framework—but perhaps because the Court's more recent cases have not used the language of "retroactivity," no one, including the lower courts, seems to have noticed. In *FCC v. Fox Television Stations, Inc.* ("*Fox Television I*"),[213] the Court faced an agency change in policy, announced in an adjudication, and held that,

212 *See, e.g.*, Hickman & Nielson, *supra* note 11, at 974.

213 556 U.S. 502 (2009).

for APA purposes, the agency need only satisfy its normal *State Farm*[214] burden, including by addressing relevant reliance interests.[215] Three years later, in *FCC v. Fox Television Stations, Inc.* ("*Fox Television II*"),[216] the Court faced the constitutional questions not before it in the prior round and recognized that the Constitution places some limits on agencies when they levy sanctions on the basis of past conduct.[217] For their part, the lower courts have continued to hew to administrative retroactivity exceptionalism as a matter of rhetoric.[218] But the bonds imposed by *Wyman-Gordon* have been loose in practice,[219] and agencies' retroactivity determinations usually stand. Rhetoric should conform to reality, and the balance of this Part sketches out how.

A. The Limitations of Analogy

First, a bit about what courts mean when speaking of agency policymaking by adjudication being "retroactive." Courts and scholars sometimes draw a distinction between "primary" and "secondary" forms of retroactivity.[220] Primary retroactivity involves "chang[ing] what was the law in the past,"[221] or applying a new rule of decision to "past conduct or prior events."[222] A decision attaching a new liability based on wholly past conduct is probably the classic example.[223] Secondary retroactivity involves facially prospective changes that have "retroactive effects" in that they unsettle investment-backed expectations and the like.[224] A decision to place new conditions on the renewal of a party's government-granted license to engage in certain activities, substantially limiting the forward-looking profits the party expects to enjoy, may fall in this bucket. Perhaps sensing the conceptual and normative slipperiness of the distinction between primary and secondary retroactivity,[225]

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214 463 U.S. 29 (1983).

215 *See Fox Television I*, 556 U.S. at 515, 530.

216 567 U.S. 239 (2012).

217 *See id.* at 253.

218 *See, e.g.*, Reyes v. Garland, 11 F.4th 985, 992 (9th Cir. 2021).

219 *See, e.g.*, Retail, Wholesale & Dep't Store Union v. NLRB, 466 F.2d 380, 391 (D.C. Cir. 1972) (noting limit on "[w]hatever may be the precise reach of *Wyman-Gordon*").

220 *See, e.g.*, Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 220 (1988) (Scalia, J., concurring).

221 Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1068 (1997) ("Primary retroactivity describes rules that 'change what was the law in the past'; secondary retroactivity describes nominally prospective rules with retroactive effects." (quoting *Bowen*, 488 U.S. at 220 (Scalia, J., concurring))).

222 Clark-Cowlitz Joint Operating Agency v. FERC, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (en banc).

223 *See, e.g.*, NLRB v. Wyman-Gordon Co., 394 U.S. 759, 761–64 (1969).

224 Fisch, *supra* note 221.

225 *See id.* (noting that "the scholars who initially drew this distinction recognized that both types of retroactivity present similar concerns and should be analyzed similarly").

however, courts have not been particularly attentive to it in the context of agency policymaking by adjudication. Indeed, the D.C. Circuit has suggested that every instance of policymaking by adjudication is in some sense retroactive in that it binds parties to a result using principles not previously announced,[226] and it has used the fact that "primary" retroactivity is not at play as just one consideration bearing on whether the agency's retroactive application of a policy was unjust.[227]

This Section proceeds, then, with a somewhat loose conception of what it means to be retroactive in mind—every policy not previously announced can, when applied in the course of the adjudication in question, be subject to challenge for being unduly retroactive. That capaciousness is, in part, to remain faithful to the caselaw and, in part, because deciding whether a particular agency action is retroactive in some narrower sense is a conceptually fraught enterprise.

With that in mind, one tempting place to begin an analysis of the permissibility of administrative retroactivity—or nonretroactivity—would be by analogy.[228] In announcing policies by adjudication, are agencies similar to legislatures or courts? To the extent they are like courts, retroactivity would be nothing special, and making policies or principles announced via adjudication nonretroactive is what would require special justification.[229] Historically, judicial retroactivity—using principles announced in the case at hand to resolve it and other nonfinal cases regardless of when they were initiated—has been the norm.[230] The Supreme Court once experimented with allowing federal courts to make their decisions nonretroactive, but that experiment, if not wholly concluded, has not garnered much interest in recent decades.[231] The thinking, it seems, is that required retroactivity keeps judges in their lane—courts announce principles or "policies" because doing so is necessary to decide the case at hand and pursuant to the historical understanding that judges are doing something more like law-divination than law-making.[232]

In some ways, of course, agencies are acting just like courts when they adjudicate cases and announce their reasons for doing so,[233] reasons that often resemble policies or principles that then must be honored

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226 *See* Safari Club Int'l v. Zinke, 878 F.3d 316, 332–33 (D.C. Cir. 2017).

227 *See Clark-Cowlitz*, 826 F.2d at 1084–85.

228 *See* De Niz Robles v. Lynch, 803 F.3d 1165, 1172 (10th Cir. 2015).

229 *See id.* ("[T]he more an agency acts like a judge . . . the stronger the case may be for retroactive application of the agency's decision.").

230 *See, e.g.*, Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting) (noting that "[j]udicial decisions have had retrospective operation for near a thousand years").

231 *See generally* Samuel Beswick, *Retroactive Adjudication*, 130 YALE L.J. 276, 293–98 (2020) (summarizing the history of judicial nonretroactivity).

232 *See* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring).

233 *See De Niz Robles*, 803 F.3d at 1172.

as a matter of precedent going forward.[234] Indeed, that is the thrust of much of the argument pursued in Part II. So, perhaps, as a majority of Justices appeared to agree in *Wyman-Gordon*, policies announced via agency adjudication must be made retroactive.[235]

But the judicial analogy breaks down in other respects. Unlike the Article III federal courts, agency officials are not granted life tenure and are thought of as being closer to the push and pull of partisan politics—raising a concern that agencies will single out the disfavored and use retroactivity as a particularly heavy cudgel.[236] Agency adjudication often occurs against the backdrop of rather more open-ended statutory language than the federal courts face,[237] and the category of agency adjudication includes things like licensing that look less like what courts typically do.[238] Add to that the fact that policies articulated by agencies in the course of adjudications often have a greater degree of specificity than what we typically see from courts,[239] and one may worry that agency policies are more likely to be out of the blue than principles espoused by courts.

Further, as a matter of norms, agencies tend to view themselves as less bound by notions of stare decisis than courts, so that policies announced via adjudication are less likely to be sticky than judicial pronouncements.[240] Formally, agencies are not subject to Article III and, along with that, historical notions of what comes part and parcel with the "judicial power."[241] All added together, the above gives lie to what might already be considered, in the judicial context, a kind of useful fiction that adjudicators are merely finding the law as opposed to making it.

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234 *See supra* Part II.

235 *See supra* note 70 and accompanying text.

236 *See De Niz Robles*, 803 F.3d at 1169.

237 *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–76 (2001) (referencing open-ended phrases like "in the 'public interest'" that agencies, despite nondelegation doctrine, are lawfully empowered to interpret (quoting Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–26 (1943))).

238 *See, e.g.*, Clair Aero, Inc. v. Nat'l Transp. Bd., 223 Fed. App'x 1, 2 (D.C. Cir. 2007) (addressing agency's licensing decision under arbitrary and capricious standard of judicial review).

239 *See* Daniel E. Walters, *The Self-Delegation False Alarm: Analyzing* Auer *Deference's Effects on Agency Rules*, 119 Colum. L. Rev. 85, 95 (2019) ("After all, an extensive body of social science research points to cognitive and institutional tendencies that lead administrative agencies to give primacy to providing clarity and specificity in the here and now and to ignore any future purported benefits to the agency that might come from crafting vague rules."); *cf. supra* notes 160–61 and accompanying text (arguing that agencies' duty to explain their adjudicative decisions in light of the facts at hand, which is subject to judicial review, results in greater specificity).

240 *See* Daniel M. Tracer, *Stare Decisis in Antitrust: Continuity, Economics, and the Common Law Statute*, 12 DePaul Bus. & Com. L.J. 1, 12 (2013).

241 *See* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) (rooting restrictions on judicial nonretroactivity in Article III).

As more open practitioners of lawmaking, then, perhaps agencies should be treated as akin to legislatures when it comes to the retroactivity of policies announced via adjudication. And at least some kinds of legislative retroactivity are, if not disallowed, disfavored.[242] When Congress is clear about its intention to make legislation retroactive, Congress's determination is typically subject only to rational basis review.[243] But courts hesitate to conclude that Congress intends such retroactivity—a clear statement rule requires a statute to be especially lucid about its retroactive effect, though typically only when it comes to "genuine[]," meaning something like "primary," retroactivity.[244] That is because things like "fair notice, reasonable reliance, and settled expectations" are thought threatened by legislative retroactivity,[245] which may also allow the state to "singl[e] out disfavored individuals or groups and condemn[] them for past conduct they are now powerless to change."[246] For similar reasons, then, perhaps agencies should be deterred from retroactive policymaking, whether through adjudication or rulemaking. Indeed, a clear statement principle already disallows agencies from making their regulations, announced via notice and comment, retroactive—again, at least in the "genuine" sense—unless Congress expressly invests them with such authority.[247]

Once the legislative analogy is considered, however, several disanalogies immediately come to mind, and agencies-as-adjudicators begin looking again like courts. Unlike legislatures, agencies-as-adjudicators are engaged in resolving particular matters presented to them involving parties whose "case"—whether it resembles a judicial-type dispute or something like a license or benefits application—requires resolution. In *Chenery II*, the agency needed *a* policy, at least with respect to the kind of transaction in question, in order to resolve whether Federal's reorganization should be allowed to proceed.[248] Nonretroactivity may therefore be impossible. What is more, agencies are subject to statutory

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242 *See* Landgraf v. USI Film Prods., 511 U.S. 244, 265, 272 (1994) ("[W]hile the *constitutional* impediments to retroactive civil legislation are now modest, prospectivity remains the appropriate default rule.").

243 *See* Pension Benefit Guar. Corp. v. R. A. Gray & Co., 467 U.S. 717, 729 (1984).

244 *See Landgraf*, 511 U.S. at 265, 277. In *Landgraf*, the Court indicated that such genuine retroactivity would attach depending on "whether [the statute] would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 280.

245 *Id.* at 270.

246 De Niz Robles v. Lynch, 803 F.3d 1165, 1169 (10th Cir. 2015).

247 Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).

248 As I will argue below, the agency might explain that, although reorganizations of the kind in question are generally disfavored, exceptions should be made for reorganizations proposed before the agency's pronouncement. But that, too, is a kind of policy, applied to resolve the case at hand and so "retroactive" in that sense. *See* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 762 (1969) (considering whether agency acted properly in applying policy it had announced but—due

constraints—and guidance—when applying statutes to the case at hand in a way that legislatures are not.[249] And as a matter of administrative law, agencies shoulder explanatory burdens that legislatures do not.[250]

Plus, perhaps the differences between agencies and courts are overstated—the picture painted above may be too simplistic. State common law courts often engage in more open acts of lawmaking than do their federal counterparts, and they are often composed of elected officials.[251] Though decisions by such courts are often retroactive,[252] I have not heard such lawmaking described as involving acts of "authoritarianism"—or Orwellianism. Even in the federal system, one can find pockets of federal common law where judicial lawmaking is more openly performed. Such pockets include situations where courts must, in the course of deciding cases, work out the details of what looks like rather open-ended statutory language. The Sherman Act[253] is a prominent example.[254] There, judicial decision-making more closely resembles that performed by agencies, and it is typically thought to be subject to weaker stare decisis norms.[255] Under what conditions is such decision-making legitimate? Perhaps the most persuasive answer is that such policymaking is legitimate when authorized by Congress,[256] in the same way that Congress authorizes an agency to decide cases pursuant to statutory standards, invoking fairness, reasonability, and the like.[257]

The Sections that follow make the case for treating agencies neither like courts nor like legislatures when it comes to the permissible retroactivity of policies announced via adjudication. Rather, it advocates for treating them as agencies. This means subjecting their determinations regarding "retroactivity" to the same requirements that apply to agencies' discretionary choices generally, requirements that are thought to

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to reliance interests—did not apply in prior adjudication). It is just a policy with a certain kind of exception designed to protect reliance interests. *See id.*

249 *See* 5 U.S.C. § 706(2)(C).

250 *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42–43, 43 n.9 (1983).

251 *See, e.g.*, Lucas Moench, Note, *State Court Advisory Opinions: Implications for Legislative Power and Prerogatives*, 97 B.U. L. Rev. 2243, 2246 (2017) (explaining that because "[s]tate courts are not subject to Article III's case or controversy limitations," they are not barred under the Federal Constitution from issuing prospective advisory opinions).

252 *See* Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 Harv. L. Rev. 509, 519 n.17 (1986) (noting that "retroactive application has generally been accepted in the common law evolution of tort doctrine").

253 15 U.S.C. §§ 1–7.

254 *E.g.*, Lemos, *supra* note 195, at 431.

255 *See* Kimble v. Marvel Ent., LLC, 576 U.S. 446, 461–62 (2015).

256 *See* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1, 40–48 (1985).

257 *See* Nat'l Broad. Co. v. United States, 319 U.S. 190, 225 (1943) (discussing agency's "statutory obligation[]" to regulate according to the "public interest").

address concerns such as the possibility of arbitrariness, favoritism, and tunnel vision. At the same time, it would treat the question whether to apply a rule in a way that might be considered retroactive within the primary control of the agency, recognizing that such questions involve tradeoffs among different values best performed by the agency itself, within broad bounds set by the Constitution.

B. Normalizing the Law of Administrative Retroactivity

1. The Tension

There is a seeming tension in the Supreme Court's caselaw on retroactivity. In *Wyman-Gordon*, a majority of the Court appeared to conclude that policies announced in the course of an adjudication must be applied to the parties at hand.[258] In *Chenery II* and *Bell Aerospace*, the Court indicated that, in certain circumstances, applying a policy to the parties at hand may work an undue burden and thus render the agency's order illegal.[259] Faced with such circumstances, the agency seemingly must either transgress the bounds set by *Wyman-Gordon* by making its policy nonretroactive, or it must undertake a rulemaking to announce the policy it desires, meanwhile deciding the case in hand on other grounds—or staying it indefinitely.[260]

To see how this judicial posture toward retroactivity diverges from the normal administrative law rules of the road, consider the following scenarios.

Imagine that in *Chenery II*, the SEC had said the following: "Although we think that reorganizations of this kind should, as a general matter, not be permitted, we will approve the application in this case and any other case where the application was filed prior to today because fair notice and associated concerns justify an exception regarding such applications."

Under normal principles of administrative law, and viewing the situation anachronistically under present-day law, courts would examine whether the agency policy—including its "exception"—comports with the statute.[261] They would ask whether the agency pointed to the right

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258 *See supra* notes 64–72 and accompanying text.

259 *See Chenery II*, 332 U.S. 194, 203 (1947) (declining to forbid retroactive policymaking by adjudication but determining that "such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles"); NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1973) ("[T]here may be situations where the Board's reliance on adjudication would amount to an abuse of discretion or a violation of the Act . . . .").

260 *See* Levin, *supra* note 5, at 1090–91 (2004) (noting similar tension); Araiza, *Agency Adjudication*, *supra* note 18, at 362 (same).

261 *See, e.g.*, Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42–43 (1983) (describing "arbitrary and capricious" review).

factors in determining the scope of the rule.[262] They would determine whether the agency attended to alternatives to the policy it adopted, including most likely the alternative of adopting a stricter rule that did not include the exception.[263] But as long as the agency gave a satisfactory enough explanation for why it chose the policy it did, it would survive review.[264]

Under the logic of a majority of Justices in *Wyman-Gordon*, by contrast, it is likely that the agency order is simply invalid, no questions asked, for announcing a "purely prospective" policy.[265] Indeed, the hypothetical is quite similar to the NLRB's decision in *Excelsior*, the adjudication found invalid in *Wyman-Gordon*.[266] There, the union had objected to the results of a union election because the employer had refused to supply the union with a list of the names and addresses of its employees.[267] The Board found itself "persuaded" by the union's submission and established a "requirement" that such lists should be provided.[268] The Board then stated, in a footnote, that the "rule" "will not apply in the instant cases but only in those elections that are directed, or consented to, subsequent to 30 days from the date of this Decision."[269]

Both the Board and the Supreme Court seemed to think that the reasoning given made the agency's policy one with purely prospective effect—and the majority of the Supreme Court condemned it on that basis.[270] The premise is somewhat questionable. If the "rule" considered along with its "exception" amounts to singular policy, the agency *was* applying the policy to the case at hand, it is just that the exception excused the employer from having followed the "rule" in question. More fundamentally, however, there is something odd about barring agencies from announcing their full view in the way seemingly disallowed by *Wyman-Gordon*. In both the *Chenery II* hypothetical above and in *Excelsior*, the agency was simply explaining that, although there were good reasons for a particular rule of decision as a general matter, those reasons were outweighed in the context of the particular case. That is simply the announcement of a result—"merger is approved" or "no list required"—and a full accounting of the rationale for that result—general reasons in favor of a contrary result outweighed in particular context. It would be strange if the full accounting somehow

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262 *See id.* at 43.

263 *See id.* at 51.

264 *See id.* at 42–43.

265 *See supra* notes 69–73 and accompanying text.

266 *See* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969) (plurality opinion); *see also supra* notes 69–73 and accompanying text.

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

268 *Id.* at 1239–40.

269 *Id.* at 1240 n.5.

270 *Id.* at 1246; *see supra* notes 69–73 and accompanying text.

rendered the adjudication an invalid one.[271] Indeed, it is asking—actually demanding—that the agency play coy with us. In *Excelsior*, the Board, faced with a union's demand for a list, as assuming it was under an obligation to decide the matter one way or another, would presumably have had to say "even assuming, which we do not hold, that lists should be required, the employer would be excused from providing one under the circumstances." That would seem to achieve little other than less clarity about the agency's position.

Putting that to the side, let us take a look at the Supreme Court's caselaw pulling in the other direction. Imagine that in *Chenery II* the agency had said, similarly to what it did say: "We think that reorganizations of this kind should, as a general matter, not be permitted, and we are applying that 'policy' to reject the reorganization as proposed."

Under normal principles of administrative law, review would look similar to the first hypothetical. Courts would ask whether the policy was allowable under the statute and whether the agency's reasoning was sound, including with respect to whether it considered various forms of transition relief, such as the "exception" described in the first policy, designed to blunt the impact of the policy on parties who were not in a position to anticipate it. But such review would ultimately be deferential.

Under *Chenery II* and *Bell Aerospace*, things are less clear. *Chenery II* announced that adopting a policy via adjudication might be illegal when the "ill effect of the retroactive application of [the] new standard" outweighs the "the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles."[272] *Bell Aerospace*—in the context of an agency flip-flop—likewise indicated that policymaking by adjudication might be invalid where reliance concerns are particularly substantial, where liability is imposed for past conduct, or where fines or penalties are involved.[273] But both discussions of retroactivity are quite cryptic. Neither explicitly answers whether the retroactivity question is something on which the agency receives deference, though *Chenery II* went on to review the agency's policymaking deferentially.[274] The implication of finding undue retroactivity is also left unclear. When an agency is faced with a situation where the effects of retroactivity are particularly grave, must it resort

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271 *See Wyman-Gordon*, 394 U.S. at 774 (Black, J., concurring) ("The Board's opinion should not be regarded as any less an appropriate part of the adjudicatory process merely because the reason it gave for rejecting the unions' position was not that the Board disagreed with them as to the merits of the disclosure procedure but rather that while fully agreeing that disclosure should be required, the Board did not feel that it should upset the Excelsior Company's justified reliance on previous refusals to compel disclosure by setting aside this particular election." (citation omitted)).

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

273 *See* NLRB v. Bell Aerospace Co., 416 U.S. 267, 295 (1974).

274 *See Chenery II*, 332 U.S. at 204–09.

to rulemaking if it wishes to announce the policy in question? Or may it announce such a policy in the course of an adjudication but make it nonretroactive, creating a kind of exception to the *Wyman-Gordon* rule for extreme cases? Alternatively, is it that *courts*, as a matter of judicial review, are empowered to relieve agency orders of their retroactive effect even while blessing the underlying policy going forward? Around the time of *Bell Aerospace*, the D.C. Circuit began supplying answers to such questions, and it is to those answers we will now turn.

2. The D.C. Circuit's Resolution

I will refer to the D.C. Circuit's body of case law on administrative adjudicative retroactivity as the *Retail, Wholesale* doctrine, originated from *Retail, Wholesale & Department Store Union v. NLRB*.[275] Under that doctrine, which has been widely embraced outside the Circuit,[276] the courts typically apply a "non-exhaustive list of five factors" in deciding whether an agency's retroactive application of a policy works a "manifest injustice" and is therefore invalid.[277] Those factors are

> (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.[278]

The D.C. Circuit has admitted that "[t]he precise statement of the factors to be considered has . . . varied from case to case."[279] And in spots it has stated that of "primary importance" is whether the policy in question represents a truly new rule—as in a case where the agency overrules a prior decision—or is merely a clarification.[280]

When an agency applies a policy to the parties at hand and the factors indicate that a "manifest injustice" has resulted from that application, courts invalidate the retroactive aspects of the order in question, giving the order in question "prospectively-only effect."[281] They do not,

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275 466 F.2d 380 (D.C. Cir. 1972).

276 Araiza, *Agency Adjudication*, *supra* note 18, at 374–75.

277 Clark-Cowlitz Joint Operating Agency v. FERC, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (en banc).

278 *Retail, Wholesale*, 466 F.2d at 390.

279 Williams Nat. Gas Co. v. FERC, 3 F.3d 1544, 1554 (D.C. Cir. 1993).

280 *E.g.*, United Food & Com. Workers Int'l Union v. NLRB, 1 F.3d 24, 34–35 (D.C. Cir. 1993).

281 Verizon Tel. Cos. v. FCC, 269 F.3d 1098, 1109 (D.C. Cir. 2001) (quoting *Clark-Cowlitz*, 862 F.2d at 1081); Epilepsy Found. of Ne. Ohio v. NLRB, 268 F.3d 1095, 1097, 1102 (D.C. Cir. 2001) (upholding underlying Board policy but denying it retroactive effect).

at least in the cases I have uncovered, require rulemaking.[282] Perhaps in light of *Wyman-Gordon*, courts have been somewhat cagier about whether agencies can deny their own orders' retroactive effect when the *Retail, Wholesale* factors demonstrate manifest injustice, but the answer seems to be that they can and, indeed, must.[283] In one case, the D.C. Circuit reviewed an agency decision to deny its order retroactive effect by asking whether such denial was adequately justified, without indicating that prospective-only orders are per se invalid.[284] When the D.C. Circuit has confronted *Wyman-Gordon* head-on, it has most often tended to reduce it to a presumption that agency orders be retroactive, which can be overcome through a demonstration of manifest injustice.[285]

Courts have largely conceptualized the *Retail, Wholesale* doctrine as imposing a legal restriction on agency action, with the result that agencies do not receive deference on whether a policy should be made retroactive.[286] *Retail, Wholesale* itself stated that "[w]hich side of th[e] balance preponderates is in each case a question of law, resolvable by reviewing courts with no overriding obligation of deference to the agency decision."[287] Subsequent decisions in the D.C. Circuit have stuck to the no-deference view,[288] though with some equivocation and not without provoking both agreement and disagreement from other circuits.[289] As an extension of the no-deference position, some courts have

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282 *See Verizon Tel. Cos.*, 269 F.3d at 1109; *Epilepsy Found.*, 268 F.3d at 1097, 1102–03 (upholding underlying Board policy but denying it retroactive effect).

283 *See United Food*, 1 F.3d at 34–35 (conceptualizing question as whether the agency "erred by 'retroactively' employing its new test in this case"); *Clark-Cowlitz*, 826 F.2d at 1081; McDonald v. Watt, 653 F.2d 1035, 1042 (5th Cir. 1981) ("Having concluded that the legal rule followed in this case was properly established through adjudication, we turn to the related but separate question whether the agency should have applied the rule to this case.").

284 *See* Qwest Servs. Corp. v. FCC, 509 F.3d 531, 539–41 (D.C. Cir. 2007) (invalidating, as inadequately justified, agency decision to make aspects of its order prospective-only).

285 *See* Gen. Am. Transp. Corp. v. Interstate Com. Comm'n, 872 F.2d 1048, 1060–61 (D.C. Cir. 1989), *reh'g denied* 833 F.2d 1029 (D.C. Cir. 1989), *cert. denied* 493 U.S. 1069 (1990); *see also Qwest*, 509 F.3d at 539 (invoking "the presumption of retroactivity").

286 *See, e.g.*, *Clark-Cowlitz*, 826 F.2d at 1094 ("Agencies possess no particular expertise on the issue of retroactivity, and reviewing courts in turn have 'no overriding obligation of deference' to an agency's decision to give retroactive effect to a new rule." (quoting Retail, Wholesale & Dep't Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972))).

287 *Retail, Wholesale*, 466 F.2d at 390.

288 *See, e.g.*, *Qwest*, 509 F.3d at 536–37 ("proceeding without deference to the Commission's determination . . . [on the] retroactive application" of the policy); Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551, 1554 (D.C. Cir. 1987).

289 *See, e.g.*, *Qwest*, 509 F.3d at 539 ("In reviewing agency decisions on retroactivity, it appears that we have generally shown little or no deference to agencies' rejection of claims that retroactivity produced manifest injustice but have been quite deferential to decisions regarding the retroactive effect of agency action where retroactivity would not work a manifest injustice." (citations omitted)); De Niz Robles v. Lynch, 803 F.3d 1165, 1168 (10th Cir. 2015) (retroactivity "raises a pure question of law we may assess de novo"); McDonald v. Watt, 653 F.2d 1035, 1042–46 (5th Cir. 1981) (stating that "[i]t may be that an agency's decision concerning retroactivity is entitled to

held that it is unnecessary for courts to have the benefit of an agency explanation regarding retroactivity.[290]

3. A Better Way?

This Section makes the case for reconstructing the courts' caselaw on retroactivity. The upshot is the following: bracketing actual constitutional limits that may be relevant, which I turn to next,[291] whether to make a policy retroactive or not should be viewed as a policy question akin to those posed whenever an agency makes a given policy more or less stringent along some dimension. The same should be true for questions such as whether to levy a fine for a statutory violation or order only prospective relief. When the statute does not tie the agency's hands, such questions present issues concerning the proper degree of transition relief that are best left to agency resolution, provided the agency has reasonably explained its choice.

As an initial matter, the courts have rooted the *Retail, Wholesale* doctrine in the APA[292] and, seemingly, in the part of the APA that allows courts to set aside agency actions that are "arbitrary and capricious."[293] It is not a constitutional doctrine, though there are related constitutional doctrines with which it is sometimes conflated and with which it partially overlaps.[294] Courts do not treat retroactivity under normal principles of arbitrary and capricious review, however, with most holding the level of permitted retroactivity to be a legal question decided without deference to the agency's views.[295]

The case for the contrary position, which would conceptualize whether to apply the policy to the parties at hand as a policy question, begins with the observation that adjudicative retroactivity questions are similar in form to other questions that are typically treated as straightforward policy issues under the APA. That conclusion builds on the insight, well-developed in the literature, that retroactivity problems are

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some deference," but that "[w]e need not resolve the question of the precise standard of review, however, because we believe that the Department abused its discretion by applying [the policy in question] to this case"); NLRB v. W.L. Miller Co., 871 F.2d 745, 748 & n.2 (8th Cir. 1989) (noting disagreement).

290 *See, e.g.*, Garfias-Rodriguez v. Holder, 702 F.3d 504, 515 (9th Cir. 2012) ("If there is no need to defer to an agency's position on the issue, there is no particular reason to remand to allow the agency to consider in the first instance whether the rule should be applied retroactively."). Again, there is some confusion on the matter. *See* Gilbert v. Fed. Mine Safety & Health Rev. Comm'n, 866 F.2d 1433, 1441–43 (D.C. Cir. 1989) (remanding to the agency to explain its position at least on whether the statutory interests involved were sufficient to overcome the ill effects of retroactivity).

291 *See infra* Section III.B.4.

292 *See, e.g.*, Cassell v. FCC, 154 F.3d 478, 483 n.4, 486 n.6 (D.C. Cir. 1998).

293 *See Gilbert*, 866 F.2d at 1443.

294 *See infra* Section III.B.4.

295 *See supra* notes 285–88 and accompanying text.

akin to, and may be indistinguishable from, the general problem of allocating the benefits and burdens that inevitably flow from legal change.[296] The effects of legal change may be managed in various ways: by grandfathering, by phase-ins, or, on the other side of the spectrum, by applying new rules rather more rigidly to present or even past conduct.[297]

In the nonadjudicative context, whether or not to grant such forms of relief would be a policy question for the agency, provided the statute does not require a particular result.[298] Imagine, for example, that an agency imposes a facially prospective rule, following notice and comment, severely limiting power plants from emitting a certain common pollutant—it has "retroactive effects."[299] The agency may decide to apply those limits to all sources, regardless of when they were built, potentially substantially affecting investments already made in existing sources. Or it may choose to apply the new limits only to new sources, or to apply them to existing sources after a phase-in period, thus managing the effects of the new rule on past investments. Assuming that the statute in question has not made the choice for the agency, there is no doubt that courts would review the issues presented as policy matters on which the agency receives deference.[300] And that is so even if the agency had previously rejected the very limits it was now embracing—i.e., in cases of flip-flops.[301]

Now return to the *Chenery II* scenarios described above. Presented with a party's application, the agency has come to the view that, as a general matter, a given reorganization should not be allowed under the statute in question. Applying that "policy" to the parties before it may limit the value of past investments made by those parties, as seemed to be the case in *Chenery II* itself.[302] The agency may manage the effects on past investment by fashioning an exception to the general policy with respect to the parties at hand—and presumably similarly situated parties. Or it may choose not to by making the policy "retroactive" with respect to those parties. Under the law described above, the correctness of that choice would ultimately be considered one for the courts—to be

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296 *See* Fisch, *supra* note 221, at 1090; Kaplow, *supra* note 252, at 518.

297 Kaplow, *supra* note 252, at 511.

298 The caveat, of course, is that under *Bowen*, an agency may not make a rule retroactive in the primary sense without special authorization. *See* 488 U.S. 204, 213–16 (1988); *supra* note 247 and accompanying text (discussing *Bowen*). Some of the discussion below may cast doubt on the Supreme Court's decision in *Bowen*, but a full analysis of retroactivity in rulemaking is outside the scope of this Article.

299 Fisch, *supra* note 221, at 1068.

300 *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983).

301 *See, e.g.*, *id.* (employing deferential arbitrary and capricious review where "agency chang[ed] its course by rescinding a[n existing] rule").

302 *See Chenery II*, 332 U.S. 194, 206 (1947) ("[P]rimary object of [company's plan] . . . was admittedly to obtain the voting power that was accruing to that stock through the reorganization and to profit from the investment therein.").

decided according to a predescribed set of factors and with, according to some courts, a presumption in favor of retroactivity.[303] But the issues involved are fundamentally similar to that involving our power plant owner. The question is whether the immediate imposition of the new policy is justified given its effects on past investments or whether a form of transition relief should be granted.

Nor does the analysis change if we are dealing with something that looks more akin to "primary" retroactivity—in which the new policy is applied in a way that appears to more directly affect obligations related to something that happened in the past.[304] As Professor Jill Fisch has pointed out, "[a] rule that retroactively imposes a million dollars in liability on a manufacturer for past pollution activities has the same wealth effect as the nominally prospective adoption of stricter emissions controls that reduce the value of the manufacturer's factory by a million dollars."[305] Or consider an agency's decision, in an adjudication, to order that certain workers receive back pay for overtime already accrued and not paid out or to order only that the employer pay such overtime going forward. In either case, the employer may be equally caught off guard by the agency's decision to award overtime at all. The difference in the two scenarios is just the size of the new liability—a difference in degree not kind.[306]

Of course, to say that retroactivity in the adjudicative context poses problems similar to that faced whenever legal actors alter legal rights and obligations, including when agencies promulgate regulations via notice and comment, is not necessarily to establish that they are policy problems on which courts should defer. Perhaps, instead, courts should go in the opposite direction and extend de novo review to all questions of appropriate transition relief.[307]

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303 *See supra* Section II.B.2.

304 Fisch, *supra* note 221. The analysis may change, at least as a doctrinal matter, when the government penalizes past conduct. *See infra* notes 344–52 and accompanying text.

305 Fisch, *supra* note 221, at 1069.

306 In the tax context, a similar point has been made by use of a hypothetical first introduced by Michael Graetz, and here summarized by Louis Kaplow:

> Consider the example of a 30-year municipal bond. Five years into the life of the bond, Congress decides to repeal the tax exemption. A nominally prospective repeal would cost the bondholder the value of the tax exemption for the remaining 25 years, which would probably constitute a significant portion of the bond's value. If Congress instead chose a nominally retroactive effective date, applying the repeal to the previous tax year as well, the loss to the bondholder would be the value of the exemption for 26 years rather than 25. Such a modest additional decrease in value surely amounts to a minor difference in degree rather than a major difference in kind.

Kaplow, *supra* note 252, at 516.

307 *See, e.g.*, De Niz Robles v. Lynch, 803 F.3d 1165, 1168 (10th Cir. 2015) (retroactivity "raises a pure question of law we may assess de novo").

A moment's reflection reveals why, as an institutional matter, agencies are the better actors to make such decisions. For one, going down the other road would open potentially all agency decision-making to de novo review, since commonplace agency decisions, including decisions such as whether to move a pollution standard from 9 parts per million of a given pollutant allowed to 8 parts per million, affect past investments.[308] Even our current Supreme Court, however, continues to favor deference to agencies on matters properly conceived of as involving policy.[309]

More broadly, the considerations generally thought relevant when allocating decision-making authority between agencies and courts support allocating decisions over retroactivity to agencies. During the Supreme Court's experiment with judicial nonretroactivity, the Court itself conceived of the issue in largely prudential terms—as involving a mix of different considerations requiring a kind of balancing.[310] Typical lawyers' tools, involving the meaning of texts and the like, have little purchase.[311] Of course, it is not the case that courts are never called on to answer such questions—but their presence counsels deference when there is another institutional actor in a superior position to address them.

Here, agencies are such an actor. The questions presented, even under the courts' view of retroactivity, involve determining whether imposition of a new policy on present parties is worth it given the statutory interests involved.[312] Those determinations, which are deeply enmeshed with the particular statutory scheme at issue, involve the kind of considerations for which agencies will have superior information and expertise.[313] Just what are the burdens involved, exactly? And how much will applying the policy in question advance the interests the statute protects? After answering those and similar questions, the

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308 *See* Kaplow, *supra* note 252, at 518 (observing that "[m]any of the concerns raised by retroactive application of a new policy relate to all policy changes").

309 *See* FCC v. Prometheus Radio Project, 592 U.S. 414, 423 (2021) (explaining that when it comes to policy courts only examine whether the agency "has reasonably considered the relevant issues and reasonably explained the decision"); Dep't of Com. v. New York, 588 U.S. 752, 777 (2019) (agencies are required only "to consider the evidence and give reasons for [their] chosen course of action," and courts should not "ask whether [the agencies'] decision was 'the best one possible' or even whether it was 'better than the alternatives'" (quoting FERC v. Elec. Power Supply Ass'n, 577 U.S. 260, 292 (2016))).

310 *See* Fisch, *supra* note 221, at 1073.

311 *See* Pojanowski, *supra* note 194, at 893 (distinguishing between questions "upon which traditional lawyers' tools can have purchase" and those that cannot and favoring deference for the latter).

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

313 *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (noting potential for even Administrator with nonbinding authority to accumulate "experience and informed judgment" worthy of deference).

issue is which side of the ledger prevails. Regardless of whether that is conceived of as involving a kind of balancing of benefits and burdens or a choice among incommensurable values, agencies are the more accountable decisionmakers when it comes to supplying that necessarily value-laden answer.[314] Thus, considerations related to both expertise and accountability justify lodging retroactivity determinations in agencies, not courts.[315]

So why have the courts, by and large, stated that de novo review is required for retroactivity questions?[316] One answer is that retroactivity is seen to present fairness concerns that justify special judicial involvement.[317] To return to the point above, however, it is difficult to see why adjudicative retroactivity presents fairness concerns different from other kinds of agency decisions that may have equally unexpected effects in undoing the benefits of past actions.[318] Moreover, as Fisch has argued, fairness concerns might cut both for and against retroactivity to the extent that it may properly be deemed unfair to deny the benefits of a new legal rule—and one that the relevant decisionmaker believes to be superior—to the party urging its adoption.[319] And in any event, courts have not taken the position that agencies may *never* apply policies retroactively in adjudications,[320] presumably because it is understood that concerns about unfairness may properly be eclipsed by other considerations—such as efficiency.[321] Indeed, courts have more commonly stated that there is a presumption *in favor* of adjudicative retroactivity that is only overcome where the balance of considerations tips most strongly against immediate application of the policy.[322] The question is which actor is the correct one to strike the balance between fairness and other values—for the reasons above, it is agencies.

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314 *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2294, 2299 (2024) (Kagan, J., dissenting) (noting "politically accountable" nature of agencies).

315 The greater expertise and accountability of agencies were often identified as the primary rationales for *Chevron* deference, but they provide an even more powerful justification for allocating pure policy questions to agencies, which agency determinations made in the course of policymaking by adjudication often involve. *See* Pojanowski, *supra* note 194, at 893 ("[Courts] lack the capacity and accountability to do more than patrol the outer bounds of reasonableness when it comes to agency policymaking."); *see also Loper Bright*, 144 S. Ct. at 2263 (stating that agencies will continue to receive policy-style deference when "the statute's meaning [is] that the agency is authorized to exercise a degree of discretion," such as when the statute uses open-ended terms "such as 'appropriate' or 'reasonable'").

316 *See supra* notes 286–90.

317 *See* Fisch, *supra* note 221, at 1084–85.

318 *See supra* notes 304–06 and accompanying text.

319 *See* Fisch, *supra* note 221, at 1084–86.

320 *See, e.g.*, *Chenery II*, 332 U.S. 194, 203 (1947).

321 *See* Fisch, *supra* note 221, at 1084–94 (discussing the tradeoff between fairness and efficiency in the context of retroactive policies).

322 *See supra* note 285 and accompanying text.

The other answer would point to the lingering effects of *Wyman-Gordon*, which seemed to deny agencies the choice whether to impose policies nonretroactively.[323] In this telling, the *Retail, Wholesale* factors provide the agency with a kind of legal excuse for nonretroactivity in cases of true "manifest injustice" but not otherwise as a matter of discretion.[324] As discussed above, the majority of Justices in *Wyman-Gordon* were wrong to the extent they claimed that an agency cannot announce a policy of the kind they did in an adjudication.[325] The agency in *Excelsior* just gave a complete explanation for its result—that the employer need not have provided a list of employees—in light of a demand made by one of the parties for such a list.[326] That the agency felt, and put on the record, that such lists should be provided going forward merely filled in its full rationale and gave notice to parties.[327] The agency remained perfectly free to alter or even abolish the list requirement in future adjudications because nothing an agency says in an adjudication is binding on it the way a legislative rule is.[328] Such an explanation need not be seen as transforming the agency order in question into an invalid "rule" as opposed to simply providing a full rationale for the result the agency reached, and the contrary view has led to deleterious consequences to the extent it has led courts down the path of thinking about retroactivity as something other than a policy question for agencies.

That leads to a final point: to the extent this Article advocates for a more deferential posture toward agencies' retroactivity determinations, critics of policymaking by adjudication may fear that the proposal is only making the problem worse from their perspective. The opposite is true. By loosening the bonds of *Wyman-Gordon*, agencies would be freer to provide exceptions to new policies with respect to the parties before them—and those similarly situated. Correspondingly, parties would be freer to ask for such exceptions. Agencies should, in many cases, be required to consider and respond to such requests under their general obligation to respond to significant alternatives raised by parties.[329] The same would be true of requests for other kinds of transition relief, such as requests to levy prospective-only relief as opposed to a fine.

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323 *See supra* note 70 and accompanying text.

324 *See supra* Section III.B.2.

325 *See supra* notes 270–71 and accompanying text. Much of my thinking tracks that of Justice Black's concurrence in *Wyman-Gordon*. *See* 394 U.S. 759, 769–75 (1969) (Black, J., concurring); *see also* Levin, *supra* note 5, at 1090–91 (criticizing Justice Harlan's reasoning).

326 *See* 156 N.L.R.B. 1236, 1239, 1240 & n.5 (1966).

327 *See supra* text accompanying notes 268–69.

328 *See infra* note 399 and accompanying text.

329 *See* Deacon, *supra* note 27, at 692–96.

Agencies' explanations for its resulting choice should be couched in the kind of considerations made relevant by the statute.[330] And in crafting such explanations, agencies would have to more forthrightly explain why, in cases where new policies are applied to the parties at hand, the tradeoffs or values at play justify such a decision.[331] In other words, they would have to explain, "why *you*?" To the extent critics worry about retroactivity as a locus for administrative arbitrariness,[332] such requirements should provide succor. But when an agency has given such an explanation and that explanation comports with the statute in question, courts should be hands off and not attempt to rebalance the relevant considerations along the lines the court believes to be "correct."

4. The Constitutional Backstop

For the reasons above, agency retroactivity determinations should generally be given deference. However, there may be certain constitutional bounds that agencies cannot transgress and that may be relevant when an agency makes a policy retroactive to the parties in question. A full consideration of these bounds would require another article, and I suspect that such bounds, at least on the more substantive end of the spectrum, may themselves be elusive. My modest purpose here is to engage in a bit of burden shifting. Because, as I have argued, determining the degree of permitted retroactivity is appropriately viewed as a policy question under the APA,[333] proponents of hard limits on adjudicative retroactivity are obligated to articulate limitations backed by a constitutional theory sufficient to justify judicial intervention in the face of action by the political branches.

The first set of possible limits, less controversial in practice, sound in the essentially procedural concern regarding parties' ability to make their case, which requires those parties know what standards may be applied. Two oft-cited cases arose in the context of constitutional challenges to state benefits programs. In *Holmes v. New York City Housing Authority*,[334] the Second Circuit confronted allegations that applications for admission to public housing were not being "processed chronologically, or in accordance with ascertainable standards, or in any other

330 *See* Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

331 *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (requiring agencies to provide satisfactory explanations for their actions that, among other things, show that the agency considered "important aspect[s] of the problem").

332 *See* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 778 (1969) (Douglas, J., dissenting) (raising "arbitrary exercise of [agency] power" as reason to prefer rulemaking, which allows public input).

333 *See supra* Section III.B.3.

334 398 F.2d 262 (2d Cir. 1968).

reasonable and systematic manner."[335] In *White v. Roughton*,[336] the court considered a complaint alleging, among other things, that a state assistance program was being operated "without published standards for eligibility."[337] Both courts found that the allegations amounted to federal constitutional violations under the Due Process Clause of the Fourteenth Amendment.[338] As the *Holmes* court put it, "due process requires that selections among applicants be made in accordance with 'ascertainable standards.'"[339]

These cases comport with cases in the federal context holding that when an agency changes "a controlling standard of law," the affected party "must be given notice and an opportunity to introduce evidence bearing on the new standard."[340] The issue in such situations is a procedural-due-process-type worry that the parties do not know how to satisfy the relevant standards because the standard that will be applied by the agency is, in one way or another, unknown.[341] Some courts have suggested that the solution requires something like a rulemaking.[342] The better cases hold that as long as the parties have notice of the standards that may be applied in advance, whether via a rulemaking or otherwise, and including by way of the adjudication in question, due process is satisfied.[343] Procedural due process is properly concerned with obtaining the relevant goals—a party's ability to make their case, the reduction of error, et cetera—and not with prescribing the exclusive means to do so.[344]

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335 *Id.* at 264.

336 530 F.2d 750 (7th Cir. 1976).

337 *Id.* at 751.

338 *See id.* at 754; *Holmes*, 398 F.2d at 265.

339 *Holmes*, 398 F.2d at 265 (quoting Hornsby v. Allen, 326 F.2d 605, 609–10 (5th Cir. 1964)).

340 *See, e.g.*, Hatch v. FERC, 654 F.2d 825, 835 (D.C. Cir. 1981).

341 *See, e.g.*, *id.*

342 *See White*, 530 F.2d at 754 (finding that "written standards and regulations" were necessary to ensure that the program in question was administered in a "fair and consistent" manner). A federal district court in D.C. similarly concluded that the development of written standards was required for the administration of a benefits program run by the District of Columbia. *See* Lightfoot v. District of Columbia, 339 F. Supp. 2d 78, 89–92 (D.D.C. 2004), *rev'd and remanded*, 448 F.3d 392 (D.C. Cir. 2006). Neither case, it should be noted, quite held that the equivalent of notice-and-comment rulemaking must be used to promulgate such standards. *See id.* (recognizing need for only "ascertainable, written standards"); *White*, 530 F.2d at 754 (same). In the federal context, two other cases have relied on similar reasoning in concluding that a federal statute required the Secretary of Agriculture to conduct a rulemaking proceeding. *See* Matze v. Block, 732 F.2d 799, 803 (10th Cir. 1984); Curry v. Block, 738 F.2d 1556, 1564 (11th Cir. 1984).

343 *See Lightfoot*, 448 F.3d 392, 398 (D.C. Cir. 2006) ("There is certainly no conceivable due process claim that could be predicated on the notion that an agency must proceed to establish such standards through rulemaking rather than case-by-case determinations.").

344 *See* Mathews v. Eldridge, 424 U.S. 319, 334 (1976); Adrian Vermeule, *Deference and Due Process*, 129 HARV. L. REV. 1890, 1895, 1903–04 (2016).

The second set of limits are more substantive in nature. Courts have found it particularly constitutionally troublesome when agencies attempt to *sanction* past conduct without providing a requisite degree of fair notice.[345] The Supreme Court reaffirmed the constitutional requirement of fair notice in the second *FCC v. Fox Television* case.[346] The Fifth Amendment, the Court explained, "requires the invalidation of laws that are impermissibly vague," such as when "the statute or regulation under which it is obtained 'fails to provide a person of ordinary intelligence fair notice of what is prohibited.'"[347] In *Fox Television II*, the Court invalidated the sanctions applied to television stations, in various administrative adjudications, for violations of the FCC's "fleeting expletives" policy, a policy that the Court found had not been adequately spelled out at the time of the conduct in question.[348] A large body of caselaw in the lower courts has also applied fair notice in order to constrain results in agency adjudications.[349] Those courts have consistently looked outside of the statute or regulation being applied to determine whether constitutionally adequate fair notice has been provided.[350]

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345 *See, e.g.*, *Fox Television II*, 567 U.S. 239, 253 (2012).

346 *Id.*

347 *Id.* (quoting United States v. Williams, 553 U.S. 285, 304 (2008)).

348 *See id.* at 254–58.

349 *See, e.g.*, Gen. Elec. Co. v. EPA, 53 F.3d 1324, 1325 (D.C. Cir. 1995) (as corrected June 19, 1995). The D.C. Circuit has occasionally intimated that fair notice has a purely constitutional dimension but that "normal" administrative law also provides a—presumably broader—set of protections from sanctions based on unclear law—protections that are sometimes conflated with the *Retail, Wholesale* doctrine and sometimes not. *See id.* at 1329; Satellite Broad. Co. v. FCC, 824 F.2d 1, 3 (D.C. Cir. 1987); Rollins Env't Servs. (NJ) Inc. v. U.S. EPA, 937 F.2d 649, 655 (D.C. Cir. 1991); *see also* Hickman & Nielson, *supra* note 11, at 974 (distinguishing between "Due Process" and "due process" and arguing that "even if these retroactivity concerns do not rise to the level of outright unconstitutionality, they nonetheless affect perceptions regarding the fairness and political legitimacy of agency actions"). Again, my preference would be for courts to more carefully delineate between constitutional and nonconstitutional concerns, leaving the balancing of nonconstitutional considerations to agencies because of their superior institutional capabilities in weighing various policy factors. *See supra* Section III.B.3.

350 *See Gen Elec. Co.*, 53 F.3d at 1333; Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551, 1559 (D.C. Cir. 1987). Note that constitutional fair notice, properly conceptualized, does not actually restrain agencies from announcing new policies in the course of adjudications. *See, e.g.*, *Chenery II*, 332 U.S. 194, 203 (1947) ("refus[ing] to say that the [SEC] . . . was forbidden from . . . announcing and applying a new standard of conduct" in adjudication). It constrains agencies from using such policies as the basis for sanctioning past conduct. *See, e.g.*, *Fox Television II*, 567 U.S. at 258. Thus, courts have upheld as permissible agency interpretations announced in the course of adjudications, even while vacating sanctions based on the same interpretation. *See Gen. Elec. Co.*, 53 F.3d at 1333–34. For that reason, fair notice concerns are absent where an agency announces a new policy in an adjudication—or completely reverses course from a previously announced policy—but declines to sanction conduct occurring prior to the adjudication in question. Such an action might raise an issue under *Wyman-Gordon*, though I have argued that *Wyman-Gordon* should be abandoned in the relevant respect.

Perhaps owing to its origins in the criminal law context, constitutional fair notice principles are concerned with the sanctioning of past conduct.[351] Fines or penalties for past behavior present the most obvious candidates for review. In both focusing on sanctions and on penalizing wholly past conduct, the constitutional limit, therefore, covers much less terrain than that which is covered by the *Retail, Wholesale* doctrine, though courts have occasionally stretched what it means for an agency to levy sanctions.[352] The precise boundaries of that terrain are beyond the scope of this Article. The point I would underscore, however, is that if managing the effects of legal change involves, as a general matter, policy-type questions on which agencies are, because of their superior expertise and accountability, better positioned to answer, then it should be the burden of those advocating for greater judicial intervention to articulate a sound constitutional basis for disallowing particular results.[353] Thus, it would be preferable that such bounds, whatever their precise scope, be clearly articulated as constitutional limits and be defended by a sound constitutional theory sufficient to justify allocating ultimate decision-making authority to the courts, notwithstanding the justifications for agency deference articulated above. Such a posture would recognize that agencies may properly trade off nonconstitutional fairness concerns against other policy objectives.

IV. Amending, Circumventing, and Violating Regulations

This Part focuses on the second substantive limit on agencies' ability to make policy via adjudication: such policies must comport with—not violate—existing agency regulations, promulgated via notice and comment, just as they must comport with governing statutory law. That limit is uncontroversial, in a black-letter sense.[354] However, particularly in the Ninth Circuit, a failure to fully appreciate it has spawned a series of more penumbral limitations on agencies' ability to "evade" rulemaking procedures. I argue that everything in this area should be reduced to whether the agency has violated or failed to follow on-the-book regulations, judged according to the applicable deference framework, and that the more penumbral limitations should be abandoned.

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351 *See, e.g.*, *Fox Television II*, 567 U.S. at 253.

352 *See, e.g.*, *id.* at 255 (finding that although the agency declined to levy fines against one broadcaster, the other consequences attaching to the agency's order amounted to a sanction); Radio Athens, Inc. v. FCC, 401 F.2d 398, 404 (D.C. Cir. 1968).

353 For such an articulation, see, for example, *Fox Television II*, 567 U.S. at 258 (setting aside agency orders after agency "failed to give [parties] fair notice"). *See also supra* notes 345–50 (analyzing examples of courts articulating due process constraints on agency action).

354 *See* Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 690 (D.C. Cir. 1973); Jeffrey S. Lubbers, *The Potential of Rulemaking by the NLRB*, 5 FIU L. Rev. 411, 416 (2010); Weaver, *supra* note 18, at 201–03.

In the Ninth Circuit, the story begins with *Ruangswang v. INS*.[355] The Ruangswangs were an immigrant couple seeking status adjustments in order to stay in the country.[356] Mrs. Ruangswang, as the court referred to her, claimed that she was exempt from an otherwise applicable requirement to obtain a certification from the Secretary of Labor regarding the effect of her employment on the American labor force.[357] The stated basis for her exemption was that she was an "investor" as defined by then-existing Immigration and Naturalization Service ("INS") regulations.[358] INS conceded that Mrs. Ruangswang met the "objective requirements" of the investor-exemption regulation.[359] The Board of Immigration Appeals ("BIA") nevertheless denied her relief after applying an additional requirement, not reflected in the regulations, that the investment in question "tend to expand job opportunities" or otherwise ensure that the noncitizen's function will "not be as a skilled or unskilled laborer."[360]

On appeal, the Ninth Circuit invalidated the BIA's denial.[361] Applying deferential review to the agency's construction of its own regulations, the court held that "[t]here simply is no room for the agency to interpret the regulation so as to add another requirement."[362] Therefore, the BIA had not "applied the correct law."[363] The court should have ended there. Somewhat curiously, however, the court went on to ask whether the BIA nevertheless could have validly established the new standard through an adjudication—notwithstanding the fact that it was not reflected in the regulations.[364] Viewing this as a *Chenery II* issue, the court concluded that Mrs. Ruangswang lacked notice that the new requirement would be applied to her at the time she made the relevant investment and that, therefore, under *Bell Aerospace*, it was an abuse of discretion to apply it to her.[365]

In *Patel v. INS*,[366] the Ninth Circuit followed a similar pattern.[367] *Patel* had the same set of facts as *Ruangswang*, but Patel arguably did have notice that the BIA would apply the relevant additional requirement when he made his investment.[368] The court nevertheless found

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355 591 F.2d 39 (9th Cir. 1978).

356 *Id.* at 41.

357 *Id.* at 41–42, 42 n.2.

358 *Id.* at 41–42.

359 *Id.* at 42.

360 *Id.* at 43 (quoting *In re* Heitland, 14 I. & N. Dec. 563, 567 (B.I.A. 1975)).

361 *See id.* at 46.

362 *Id.* at 43–44.

363 *Id.* at 43.

364 *See id.* at 44.

365 *See id.* at 45–46.

366 638 F.2d 1199 (9th Cir. 1980).

367 *See id.*

368 *See id.* at 1200–03.

that, under the *Chenery II* line of cases, the agency could not apply the additional requirement in Patel's case.[369] It variously invoked the fact that the additional requirement was "a broad requirement of prospective application," that the INS "itself had recognized the desirability of establishing" a similar requirement by regulation when it had proposed such a requirement through a notice of proposed rulemaking, and that the agency "eventually failed to include the job-creation standard in its rule."[370] The BIA had thus "circumvent[ed] the rulemaking procedures of the APA" in adding the requirement through adjudication.[371]

That brings us to *Ford Motor Co. v. FTC*.[372] In an administrative adjudication, the FTC charged Francis Ford, Inc., an auto dealership, and various affiliates with violating section 5 of the FTC Act by engaging in certain practices related to the provisioning of consumer credit.[373] In an administrative appeal, the full Commission decided that the relevant practices did violate the Act.[374] The Ninth Circuit vacated.[375] Unlike in the immigration cases, there were no regulations on point.[376] But expanding on *Patel*, the court held that the FTC had abused its discretion in condemning the practices in question via adjudication.[377] The court expressed concern that the "adjudication changes existing law, and has widespread application."[378] It further pointed to the fact that the FTC had initiated a still-pending rulemaking on related credit practices.[379] Viewing this as evidence that the FTC itself thought rulemaking in the area to be desirable, the court concluded that the issues addressed by the adjudication should also be addressed by rulemaking.[380] Because of the considerable tension between the court's invocation of the generality of the FTC's order and the Supreme Court's *Chenery II* caselaw, subsequent courts and commentators have generally understood *Ford Motor Co.* to stand for the idea that agencies may not "circumvent"

369 *See id.* at 1204–05.

370 *Id.* at 1203–04.

371 *Id.* at 1204.

372 673 F.2d 1008 (9th Cir. 1981).

373 *Id.* at 1008–09.

374 *Id.* at 1009.

375 *See id.* at 1010.

376 *Compare* Ruangswang v. INS, 591 F.2d 39, 41–42 (9th Cir. 1978) (discussing immigration claimant's argument that she qualified for an exemption to existing regulation), *with Ford Motor*, 673 F.2d at 1009 (considering whether FTC was permitted to announce new policy in adjudication rather than rulemaking).

377 *Ford Motor*, 673 F.2d at 1009–10.

378 *Id.* at 1010.

379 *See id.*

380 *See id.*

pending rulemaking proceedings by resolving related issues through adjudication.[381]

The final case in the series is *Montgomery Ward & Co. v. FTC*.[382] In broad strokes, the facts in *Montgomery Ward* were similar to those in *Ruangswang* and *Patel*. The FTC had previously promulgated regulations with which Montgomery Ward had seemed to comply.[383] In the adjudication in question, however, the FTC determined that Montgomery Ward had failed to satisfy additional requirements that it now deemed appropriate.[384] The Ninth Circuit conceptualized the question on appeal as whether the FTC had merely interpreted the existing regulations or had functionally amended them.[385] Putting the question in terms of notice, the court wrote that "[a]n 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."[386] And pointing to the definition of "rulemaking" in the APA, which references amendments to rules, the court held that amendments to regulations must be done through rulemaking processes.[387] On that basis, the Court held that at least certain of the FTC's new requirements could not be applied.[388]

The Ninth Circuit should have resolved all of these cases using its initial insight from *Ruangswang*: where regulations apply, agency adjudicators must decide cases according to those regulations and, where they do not, they have acted contrary to law.[389] It is black-letter administrative law that validly promulgated regulations are legally binding and cannot be altered in subsequent adjudications, whereas policies announced in adjudications may be.[390] Cases such as *Ruangswang*, *Patel*, and *Montgomery Ward* all involve situations where certain requirements were spelled out in regulations, and the agency attempted to add certain other requirements in a subsequent adjudication.[391] The interpretive question is thus whether the regulations are properly read to preclude the application of the additional requirement the agency now

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381 *See, e.g.*, Union Flights, Inc. v. Adm'r, FAA, 957 F.2d 685, 688–89 (9th Cir. 1992) (reading *Ford Motor Co.* for the proposition that agency may not use adjudication to "bypass a pending rulemaking proceeding"); *see also* Araiza, *Limits*, *supra* note 18, at 907 (explaining Ninth Circuit's potential move away from *Ford Motor Co.*'s holding).

382 691 F.2d 1322 (9th Cir. 1982).

383 *Id.* at 1324–25.

384 *See id.* at 1326–27.

385 *Id.* at 1329.

386 *Id.*

387 *See id.*

388 *Id.* at 1332.

389 *See supra* notes 355–65 and accompanying text.

390 *See* Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 690 (D.C. Cir. 1973); Lubbers, *supra* note 354; Weaver, *supra* note 18, at 201–03.

391 *See supra* notes 355–71, 382–88 and accompanying text.

seeks to impose. In many cases, principles such as *expressio unius est exclusio alterius* will provide an affirmative answer to that question and mean that the agency's addition of a new requirement is not so much an amendment as a violation of the regulation in question. Of course, the agency may argue that the "new" requirement is not so new and is merely an elaboration on an existing aspect of the regulation in question. That is again simply an interpretive question and the normal stuff of administrative law to be decided by whatever deference regime is appropriately applied to the interpretive question.

One might respond that I have been simply assuming the correctness of the background administrative law rule that regulations are binding on agency adjudicators in the sense that adjudicators cannot depart from these regulations in the same way they can from policies developed through prior adjudications.[392] Indeed, Russell Weaver has expressed some puzzlement about the consensus view that regulations are binding in such a way.[393] It is true that nothing in the APA exactly says that rules promulgated via notice-and-comment processes bind adjudicators, whereas policies announced by the adjudicators themselves can be altered the next time around.[394]

On a textual level, perhaps here is where some use can be made of *Montgomery Ward*'s observation that the definition of rulemaking includes actions that amend a rule, and therefore, the exclusive way to change the terms of regulations is through rulemaking processes.[395] Or perhaps one might concoct a kind of structural argument drawn from the APA's division of agency functions between legislative and nonlegislative modes[396] and the background understanding that legislation binds courts.[397]

In any event, there are strong functional arguments in favor of retaining the traditional principle that agency regulations bind adjudicators, even at the top of the agency. I discuss below various incentives that the law may create for agencies to act through notice-and-comment processes—incentives that might be considered valuable to the extent that rulemaking is seen as preferable to adjudication as a mode for making policy.[398] One simple incentive is granting legislative rules binding effect until altered through a subsequent rulemaking as it allows an agency to lock in a preferred policy with less risk that it will be altered as soon as

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392 *See* Weaver, *supra* note 18, at 201–07.

393 *See id.* at 205–07.

394 *See* 5 U.S.C. §§ 551–559, 701–706.

395 *See supra* notes 382–88.

396 *See* Montgomery Ward & Co. v. FTC, 691 F.2d 1322, 1329 (9th Cir. 1982) (drawing from the APA's definition of "rulemaking"); *see also supra* note 387 and accompanying text (noting structural argument).

397 *See* Weaver, *supra* note 18, at 205–07.

398 *See infra* Part V.

the agency changes hands. Moreover, much of what makes rulemaking preferable in most people's eyes—its settlement function, its ability to provide notice, et cetera—would be gone in a world where rules could be altered in subsequent adjudications. Indeed, doing rulemaking at all would lose much of its value. Under the current system, rules can be used to take matters off the table in subsequent adjudication so that agencies do not have to constantly redecide issues.[399] Not so in a world where every agency rule is subject to contestation by the parties in an adjudication.[400] For that simple reason, it would be preferable to keep to the standard position that rules promulgated via notice and comment bind agency adjudicators.

So, the Ninth Circuit was on the right track when it initially concluded that something is amiss when an agency departs from applicable regulations in deciding an adjudication.[401] Where the Ninth Circuit erred was in seeming to conclude—in contexts where the agency's resolution of a case seemed to diverge quite dramatically from what was envisioned by the regulations—that an agency might nevertheless have a *Chenery II* "power" to add to the requirements in question.[402] The court then concocted a set of ad hoc limitations on *Chenery II*, seemingly designed to disallow the agency from pulling off a fast one.[403] In *Ford Motor Co.*, those limitations became unmoored when the court applied them where the agency adjudicators were not operating against the backdrop of existing regulations.[404] The limitations that the Ninth Circuit reached for all suffer from serious problems.

First, the problems associated with basing limits around the "generality" of the agency's reasoning are discussed above.[405] Those limits are also in serious tension with *Bell Aerospace*.[406]

Second, the real "notice" issue in *Ruangswang* was created by the agency violating regulations that it was bound to follow,[407] a problem that holding agencies accountable for such violations would remedy. In a counterfactual world in which the requirement imposed by the BIA was an interpretively valid elaboration on existing regulations (or statute), any notice problem would simply reduce to the "retroactivity" issues addressed by the *Retail*, *Wholesale* line of cases.[408] Indeed, the

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399 *See* Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 690 (D.C. Cir. 1973).

400 *See* Phillips, *supra* note 17, at 512 (noting stability in the law that rulemaking provides).

401 *See supra* notes 355–65 and accompanying text.

402 *See supra* notes 364–65 and accompanying text.

403 *See supra* notes 366–88 and accompanying text.

404 *See* 673 F.2d 1008, 1009–10 (9th Cir. 1981).

405 *See supra* notes 155–75 and accompanying text.

406 *See supra* note 164 and accompanying text (quoting NLRB v. Bell Aerospace Co., Inc., 416 U.S. 267, 292 (1974)).

407 *See* 591 F.2d 39, 43–44 (9th Cir. 1978).

408 *See supra* Section III.B.2.

Ninth Circuit has applied *Retail, Wholesale* in exactly such situations: the agency has imposed an arguably "new" requirement but one that appears allowable as an elaboration of existing regulations.[409] As discussed, such cases should be dealt with using the normal reasoned decision-making requirements and not under a special separate test for retroactivity, and the same analysis would hold here.[410]

Third, another set of limitations suggested by the Ninth Circuit involve "circumventing" the rulemaking process in a way other than violating a valid on-the-books regulation. The court has intimated, for example, that when an agency has demonstrated that a given requirement could have been imposed through rulemaking but was not, imposing it through adjudication might amount to illegal circumvention.[411] It is also said that when an agency uses adjudication to resolve issues similar to those raised by a pending rulemaking, the agency may be guilty of illegally "bypassing" the regulatory process.[412]

Any anticircumvention rule not tied to the violation of actual on-the-books regulations suffers from serious problems. For one, it would be hard to administer. Whether a rule is violated depends on traditional lawyers' tools for determining meaning.[413] Whether the rulemaking process has been circumvented turns on difficult, policy-infused determinations regarding whether an agency's past actions have demonstrated that the policy in question could have been adopted through rulemaking or whether pending rulemaking proceedings are sufficiently related to the policy in question that such policy should have been considered and accepted or rejected through rulemaking. Second, the anticircumvention cases have tended to focus on whether a certain policy *could* have been addressed through rulemaking,[414] but the relevant question is whether a policy *should* be adopted through rulemaking or whether the agency retains discretion to impose it instead in an adjudication. Third, allowing things like notices of proposed rulemaking to limit the ways in which an agency may decide future adjudications gives binding substantive effect to things that lack the force of law. Proposals are exactly that, and treating them as having the power to shape substantive outcomes would be to introduce a kind of procedural violation, not avoid one.

In addition, other doctrines can perform much of the work that the anticircumvention rule seeks to do. If, as in *Ruangswang* and *Patel*, the

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409 In fact, it did so in another part of *Montgomery Ward* not discussed above. *See* 691 F.2d 1322, 1332–34 (9th Cir. 1982).

410 *See supra* Section III.B.3.

411 *See supra* notes 366, 367, 371 and accompanying text.

412 *See supra* notes 372–81 and accompanying text.

413 *See, e.g.*, Ruangswang v. INS, 591 F.2d 39, 43–44 (9th Cir. 1978) (applying "principles of agency interpretation").

414 *See supra* notes 355–88 and accompanying text.

"legislative history" of applicable regulations reveals that the requirement the agency now seeks to impose was considered and rejected,[415] that may be relevant in deciding whether there has been an actual violation of those regulations—though as with statutes, the courts should be careful when making inferences from a history of failed amendments.[416] When it comes to "bypassing" ongoing rulemaking processes, the parties in ongoing adjudications are presumably free to reference comments, filings, and arguments made in related notice-and-comment proceedings. To the extent they are relevant, the agency in the adjudication may be under an obligation to respond to critiques or alternatives to the policy in question that have been brought to its attention as part of its obligation to engage in reasoned decision-making,[417] thus reducing the fear that agencies will resolve open issues in adjudications as a means of avoiding the analytical obligations typically associated with rulemaking.

A final limit discussed by the Ninth Circuit, most prominently in *Montgomery Ward*, involves adjudications that effectively "amend" existing regulations.[418] This limit is innocuous to the extent that it reduces to the question of whether existing regulations have been violated.[419] Professor William Araiza has argued that giving a procedural gloss to agencies' obligation to follow their own regulations has benefits.[420] Introducing the additional bit of nomenclature may have drawbacks as well, however. It invites questions about whether there is a different standard for determining whether an agency has "amended" a regulation as opposed to merely violating it.[421] In *Montgomery Ward*, the Ninth Circuit seemed to return once again to concerns about proper notice in discussing whether an agency has illegally amended its regulations via adjudication.[422] It would be preferable to focus on the more straightforwardly substantive inquiry regarding whether an existing regulation has been violated, using the typical lawyerly tools for answering that question. That mitigates notice problems but without having to orient the

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415 *See* Patel v. INS, 638 F.2d 1199, 1202 (9th Cir. 1980); *Ruangswang*, 591 F.2d at 43–44.

416 *See, e.g.*, Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990) ("Congressional inaction lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.'" (quoting United States v. Wise, 370 U.S. 405, 411 (1962))).

417 *See* Deacon, *supra* note 27, at 692–96.

418 *See* Montgomery Ward & Co. v. FTC, 691 F.2d 1322, 1329 (9th Cir. 1982).

419 *See Ruangswang*, 591 F.2d at 43–44 (finding that agency did not apply "proper law" when it added to a rule during its adjudication in part because "[t]here simply [was] no room" in the regulation for the amendment).

420 *See* Araiza, *Limits*, *supra* note 18, at 910–13.

421 *See, e.g.*, *Montgomery Ward*, 691 F.2d at 1329.

422 *See supra* notes 382–88 and accompanying text.

question around the more amorphous issue of whether a "reasonable person" would be on notice of this or that application of a regulation.

V. Soft Constraints on Policymaking by Adjudication

This final Part circles back, in light of all that has been said above, to the core procedural question raised by *Chenery II*: agencies' use of adjudication as opposed to rulemaking in order to announce policies.[423] In particular, I examine two sets of "soft" constraints on agencies' ability to make policy through adjudication.[424] These constraints do not result in courts effectively ordering agencies to use rulemaking as the vehicle for announcing certain kinds of policies, as would the constraints discussed in Part II, but they are designed to raise the costs of or influence agencies' procedural decisions.

The first would impose a duty on agencies to explain why they have proceeded by adjudication as opposed to rulemaking—that is, agencies would have an explanatory burden not only with respect to the policy in question but also with respect to why the agency announced that policy through adjudication. Provided the agency gives a sufficient justification, however, the agency would still have the power to announce a given policy through adjudication.

The second category of constraint involves attempts to influence agency choice of policymaking form through manipulating the consequences of an agency's decision to proceed via adjudication. For example, and most prominently, when agencies announce policies via adjudication they might be denied the deference they would normally receive had they gone through rulemaking.

I argue that, although such measures may be desirable because of the general advantages of rulemaking, among other reasons, the case for them is less straightforward than one might think, especially in a post-*Chevron*[425] world. It is, at best, unclear whether the benefits of such soft constraints outweigh their potential cost.

A. Duty to Explain

Why should an agency have to explain its choice to make policy through adjudication versus rulemaking? If one thinks that rulemaking may often represent a superior option for the formulation of general policies, such a duty may have value. Going back to *Chenery II*'s observation that, though rulemaking is generally preferable, agencies may

423 *See* 332 U.S. 194, 203 (1947).

424 *See infra* Sections V.A–.B.

425 467 U.S. 837 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

have valid reasons to act through adjudication,[426] a duty to explain would allow courts to discern whether an agency has such reasons and, if not, to send agencies back to the procedural drawing board.[427] More broadly, and as Professor Lisa Schultz Bressman has argued, a duty to explain may operate as a check on administrative arbitrariness.[428] Indeed, in part as a check on such arbitrariness, agencies typically must give reasons, reviewable by courts, when they exercise their discretion in order to make particular choices.[429] From this angle, it would appear anomalous for agencies to face no reason-giving requirement when they choose to make policy through adjudication as opposed to through some other form.

That courts have historically not required much by way of reason-giving[430] when it comes to policymaking by adjudication thus stands as something of a puzzle. Magill has argued that the solution to the puzzle may lie in the observation that, though courts do not do much by way of directly reviewing agencies' choice of policymaking form, they do retain control over the consequences of agencies' choices.[431] I return to this mechanism of control in Section V.B. For now, let me suggest a few additional reasons that may caution against imposing upon agencies a duty to explain their decision to make policy through adjudication.[432]

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

427 *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

428 *See* Bressman, *supra* note 10, at 555 (arguing that "a requirement that agencies supply the standards that guide and limit their discretion" would help combat concerns for arbitrariness).

429 *See id.* at 528.

430 Magill, *supra* note 10, at 1385.

431 *See id.* at 1426–42.

432 As an initial matter, the failure of courts to demand agencies account for their choice to make policy through means other than rulemaking may not actually be as anomalous as it might initially appear. The complaint at the heart of such cases is that the agency failed to act through a particular kind of procedure—typically notice-and-comment procedures. *See Chenery II*, 332 U.S. 194, 203 (1947). But when agencies' procedural options are not dictated by the APA, the lesson of *Vermont Yankee* is that courts cannot fault agencies for failing to act through certain kinds of procedure. *See* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 543 (1978) ("Absent constitutional constraints or extremely compelling circumstances the 'administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" (quoting FCC v. Schreiber, 381 U.S. 279, 290 (1965))). That is so even though agencies retain discretion to self-impose procedures in addition to those required by the APA. *See id.* at 524. *See generally* Merrill, *supra* note 34. An agency's failure to do so might well be considered a "choice" reviewable as a matter of arbitrary-and-capricious review or as an abuse of discretion. *See, e.g.*, *State Farm*, 463 U.S. at 43. Indeed, in the years prior to *Vermont Yankee*, the D.C. Circuit repeatedly concluded that the nature of the agency's decision required the adoption of certain procedures. *See, e.g.*, Int'l Harvester Co. v. Ruckelshaus, 478 F.2d 615, 649 (D.C. Cir. 1973) ("It is contemplated that, in the interest of providing a reasoned decision, the remand proceeding will involve some opportunity for cross-examination."). But the practice of reviewing agencies' failure to adopt "gratuitous" procedures was decisively rejected by the Supreme Court, *see Vt. Yankee*, 435 U.S. at 543, and I am not aware of post-*Vermont Yankee* caselaw requiring agencies even to give reasons with respect to their procedural choices.

For one, under my reworking of the caselaw concerning retroactivity, which I have suggested is not terribly far from where courts stand today, agencies would have an explanatory burden with respect to their decisions concerning retroactivity.[433] That is, agencies would have to defend their choice to apply the policy in question to the parties at hand, at least where the statute allows them that choice. Such a requirement would address some of the concerns that otherwise support an obligation to explain the agency's supposed procedural choice to proceed via adjudication by making the agency publicly articulate why statutory interests are best served by immediate application of the policy to these parties. Importantly, such an obligation would also provide a stable locus for judicial review. Because the agency has, by hypothesis, a choice over whether to make a certain policy retroactive in the very proceeding in question, such a decision can be considered in a similar manner to any other decision that the agency makes regarding the scope of the announced rule.

By contrast, as argued above, it may be difficult in many cases to isolate any choice that the agency actually made—with respect to the action under review—to proceed via adjudication as opposed to rulemaking.[434] In such cases, it will, therefore, be unclear what exactly the agency must explain.[435] Courts in APA cases sit in review of discrete agency actions—or failures to act—and not in judgment of an agency's overall course of conduct.[436] When an agency makes policy in a particular action, the substantive contours of that policy are self-evident.[437] But as suggested above, when it comes to the adjudication actually at issue, it may often not be very clear at all that the agency chose to make the policy in question through adjudication.[438] And isolating when *any* such choice was made, and what the nature of the choice was, may involve a

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Thus, the general rule would seem to be that, though agencies' substantive choices are reviewable for abuse of discretion, agency procedural choices, including but not limited to choices that can be characterized as about choice of policymaking form, are not. Perhaps it might be argued that the real anomaly is *Vermont Yankee* itself, but reversing from the course set by that decision would involve a more thorough reworking of administrative law doctrine that would not be limited to the traditional domain covered by the choice-of-policymaking-form literature. *See* Jack M. Beerman & Gary S. Lawson, *Reprocessing* Vermont Yankee, 75 GEO. WASH. L. REV. 856, 858 (2007) ("*Vermont Yankee* is almost universally regarded as one of the most important administrative law decisions issued by the Supreme Court. And . . . the case has had a major doctrinal impact . . . .").

433 *See supra* Section III.B.3.

434 *See supra* notes 144–53 and accompanying text.

435 *See supra* notes 144–47 and accompanying text.

436 *Cf.* Magill, *supra* note 10, at 1395 (arguing courts do not review the "basis for the agency's decision"). *But see* Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 372 (1998) (doing more searching review of agency's past course of decision-making).

437 *See supra* notes 160–61 and accompanying text (arguing that agencies' duty to explain their adjudicative decisions in light of the facts at hand results in greater specificity).

438 *See supra* notes 144–47 and accompanying text.

degree of messiness that review of agencies' substantive choices simply does not.[439] Thus, it is not quite right to say that "[c]hoosing a policy-making tool is a discrete, affirmative act,"[440] at least not in many cases. As argued, making policy by adjudication is the natural byproduct of a system in which agency adjudicators must decide cases in circumstances where the legal background involves no controlling regulation, a background that may be the product of a number of causes, only some of which—if any—may be described as involving an affirmative choice by the agency.

In addition, some of the justifications for imposing reason-giving requirements apply with less force in the context of agency choices—if they may be described as such—to make policy by adjudication. One of the primary reasons for requiring agencies to explain their discretionary choices is to ensure that agencies are operating according to their statutory mandates.[441] Agencies must make decisions according to the factors that the statute makes relevant,[442] and they must refrain from making decisions based on statutorily irrelevant factors.[443] Requiring agencies to explain the basis for their decision-making reveals for reviewing courts whether or not agencies are fulfilling these obligations. However, there typically are no criteria supplied in a statute's text for determining whether to proceed by adjudication as opposed to rulemaking.

That means courts would largely be at sea in determining whether agencies' proffered reasons for proceeding via adjudication are acceptable. We can assume that a duty to explain would not be satisfied by an agency's stipulation that "all things considered, adjudication was the superior course."[444] Thus, courts would need a way of determining when an agency's decision is adequately supported. What are agencies likely to say when required to explain why they have chosen to make policy through adjudication? They may well say they simply overlooked the issue and never really made a choice. Or they may select among *Chenery II*'s grab bag of reasons—plus likely others—for proceeding via adjudication, and in most if not all cases, some of those reasons will sound plausible. At that point, it is unclear what courts should do. As stated above, there will likely not be statutory grounds for reviewing the reasons given. And so the courts might simply accept agencies' reasons at face value or with a substantial helping of deference.[445]

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439 *See supra* notes 144–53 and accompanying text.

440 Magill, *supra* note 10, at 1422.

441 *See* Deacon, *supra* note 27, at 689.

442 Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

443 *See id.*

444 *See supra* Section III.B.3.

445 *See* Bressman, *supra* note 10, at 544 (advocating for a reason-giving requirement but explaining that agencies' explanations should be provided deference).

My primary fear is that courts, without the benefit of statutory law to guide the inquiry, would go in the other direction by using the review of an agency's explanation for proceeding via adjudication as a springboard for a more thoroughgoing review of the agency's procedural decision. The agency's reasons for going with adjudication would be balanced against the court's estimation of the benefits of proceeding by rulemaking. At that point, the duty to explain really becomes simply another way to eliminate the core of *Chenery II* in favor of a more searching review of agency policymaking by adjudication.[446] For reasons given in Part II, above, such a move would be mistaken.

B. Consequence-Manipulation

One of the more popular proposals to indirectly influence agencies' choice to make policy via means other than notice-and-comment rulemaking involves judicial manipulation of the consequences of the agency's decision, typically by denying the agency deference it would have in theory received had it proceeded through rulemaking. In her article on agency choice of policymaking form, Elizabeth Magill put forward the Supreme Court's decision in *United States v. Mead Corp.*[447] as a possible example of such a strategy.[448] In that case, the Court denied *Chevron* deference to certain customs rulings that were not produced through formal adjudication or notice-and-comment rulemaking.[449] Another case that may be viewed in a similar light is *Christopher v. SmithKline Beecham Corp.*,[450] where the court denied an agency the deference normally afforded to agency interpretations of their own regulations because the interpretation in question resulted in "unfair surprise" and indicated that proceeding through notice and comment would not have triggered such surprise.[451] More broadly, during the *Chevron* period, various scholars argued for denying agencies *Chevron* deference when the interpretation in question was the product of adjudication or a certain kind of adjudication, sometimes for the express purpose of influencing agencies to do more work through rulemaking.[452]

Such strategies raise two questions: will they work, and are they worth it? There may be reason for doubt on both scores.

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

447 533 U.S. 218, 221 (2001).

448 *See* Magill, *supra* note 10, at 1421.

449 *See Mead*, 533 U.S. at 221.

450 567 U.S. 142 (2012).

451 *Id.* at 156 (quoting Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 170–71 (2007)).

452 *See, e.g.*, Hickman & Nielson, *supra* note 11, at 964.

First, one might generally be skeptical that agencies respond in particularly predictable ways to the incentives created by the intricacies of various deference doctrines.[453]

Second, the viability of using deference-manipulation to influence agency choice of policymaking form took a hit with the Court's overruling of *Chevron*.[454] If courts are to exercise their independent judgment in all categories of cases going forward, it is, of course, not possible to use *Chevron* as a kind of carrot designed to influence agencies' choice of procedural form.

One may wonder, however, how much of a sea change *Loper Bright Enterprises v. Raimondo*[455] will represent when it comes to policymaking by adjudication. Recall that many cases involving agency policymaking by adjudication do not really involve interpretive issues of the sort that *Chevron* either did or did not apply to.[456] An agency determination, made via adjudication, that a particular height of fence is "appropriate" for tiger enclosures is unlikely to trigger an interpretive question *Chevron* once governed.[457] Rather, such cases are litigated as "pure policy" cases, with the applicable standards being supplied by *State Farm*.[458] For its part, *Loper Bright* indicated that such policy determinations will still receive deferential, arbitrary-and-capricious-style review by the courts.[459]

If deference-manipulation is to be a viable strategy going forward, then, the question becomes whether we are comfortable turning off—or turning down—the deference owed to agencies on those types of policy determinations, a kind of deference that even skeptics of the administrative state seem uncomfortable jettisoning.[460] After all, even in the adjudication context, where agencies may possess less information than they would have had they proceeded via rulemaking, agencies remain more expert *than courts*. And they remain more accountable *than courts*.[461] Thus, displacing agencies' policymaking authority via more stringent review has real costs.

Third, if it is correct that much agency policymaking by adjudication happens "accidentally," because the agency simply failed to foresee

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453 *Cf.* Walters, *supra* note 239, at 92 ("My analysis reveals that agencies did not measurably increase the vagueness of their rules in response to *Auer*. If anything, rule writing became more specific over time despite *Auer*'s increasing prominence.").

454 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

455 144 S. Ct. 2244 (2024).

456 *See supra* notes 193–94 and accompanying text.

457 *See supra* notes 195–98 and accompanying text.

458 *See* 463 U.S. 29, 43 (1983).

459 *Loper Bright*, 144 S. Ct. at 2263; *see supra* text accompanying note 194.

460 *See supra* note 309 and accompanying text.

461 *See Loper Bright*, 144 S. Ct. at 2294, 2299 (Kagan, J., dissenting) (noting "politically accountable" nature of agencies).

an issue or because an issue comes before it prior to rulemaking being a practical possibility, efforts to incentivize agencies to settle more issues through rulemaking may not make much of a difference.[462] In addition, we might not be confident that, given their limited resources, agencies can really do much more rulemaking than they currently do.[463] I do not have the sense that cutting back on policymaking by adjudication will really "create time" for the agency to engage in further rulemaking.[464] Nor do I have the sense that agencies are currently operating with much excess capacity being left on the table. Plus, doing more rulemakings may not even predictably reduce the amount of policymaking by adjudication that agencies do. Rather, agency adjudicators would be deciding more cases that involve the inevitable ambiguities, lacunae, et cetera, in the regulations themselves.[465]

Conclusion

Administrative policymaking is facing challenges on multiple fronts. The major questions doctrine has been applied to limit agency policymaking when it comes to rulemaking in particular. Recent litigation threatens to take away rulemaking authority from certain agencies completely. *Chevron* has been overruled. And on the adjudicative side, agency policymaking by adjudication has come under increased scrutiny. This Article has made the case that courts, and scholars, should pump the brakes when it comes to dismantling *Chenery II*'s core holding. Policymaking by adjudication is a natural feature of administration under law. Judicial attempts to police such policymaking would do more harm than good, and there are other ways to achieve limits on administrative arbitrariness, ways that would not implicate the sorts of problems posed by direct review of agencies' policymaking methods.

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462 *See supra* Section II.A.

463 *Cf.* Dorit Rubinstein Reiss, *The Benefits of Capture*, 47 Wake Forest L. Rev. 569, 596 (2012) ("Agencies are regularly understaffed and overworked . . . .").

464 *Cf.* U.S. Gov't Accountability Off., *supra* note 174 ("[T]he average time needed to complete a rulemaking across our 16 case-study rules was about 4 years, with a range from about 1 year to nearly 14 years . . . .").

465 *See supra* Section II.A.