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Agency Choice of Policymaking Form

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An administrative agency delegated some task—protect the environment, assure the integrity of the securities markets, improve auto safety—might carry out that obligation by adopting a rule, bringing or deciding a case, or announcing its interpretation of a statute. In fact, it might rely on all of those quite distinct tools in the course of implementing its statutory mandate. Agencies are unique institutions in this respect. Most government actors are not free to select from a menu of policymaking tools. The legislature adopts statutes; prosecutors bring cases; courts decide cases brought to them by parties. Confining legislatures, prosecutors, and courts to particular ways of doing their jobs is no accident. Those assignments spring from the most essential aspects of the Constitution's design. But the typical administrative agency is not so constrained. Most agencies can rely on policymaking tools that look like legislating, enforcing, *and* adjudicating.

This strange state of affairs, oddly enough, is considered normal. To be sure, the peculiar mix of powers—part legislative, part executive, part judicial—that Congress is constitutionally permitted to bestow on administrative agencies generates much of the heat in the debate over their constitutional status. But that is usually where interest in the issue ends. The nonconstitutional dimensions of agencies' ability to rely on a mix of policymaking tools generate little interest or investigation.[1] This Article aims to rectify that by identifying, evaluating, and coming to terms with the phenomenon of agency choice of policymaking form. That phenomenon can be simply stated: the typical administrative agency is authorized to use a range of distinct policymaking forms to effectuate its statutory

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[1] There is an important literature, now nearly thirty years old, that takes up the question of when an agency should rely on adjudication and when it should rely on rulemaking. See the discussion of that literature in note 69.

mandate, and its choice about which tool to rely on appears, at first glance at least, to be unregulated by courts.

Part I of the Article will focus on the policymaking forms available to agencies. What tools do statutes and case law typically make available to agencies? What is the significance of the choice among them? And what choices do agencies make? A typical administrative agency is authorized by statute and case law to use a range of policymaking forms to address problems within its purview. Consider, for an illustrative example, the Securities and Exchange Commission (SEC), which is authorized by various statutes to regulate the securities markets. Imagine that the SEC is concerned that a certain kind of financial transaction may violate the antifraud provisions of those laws. The SEC is authorized by statute and governing precedent to take the following actions. It might promulgate a *legislative rule* prohibiting the transaction. If valid, the rule would operate just like a statute; private parties would be required to refrain from engaging in the transaction or face sanctions. The SEC might also bring an *administrative enforcement action* against an individual who has engaged in the transaction. That proceeding would be conducted before an SEC adjudicator; if the adjudicator vindicated the agency's action, the object of the enforcement action would face the authorized sanctions. The SEC might also choose to bring a *judicial enforcement action*. This route would be much like the administrative enforcement action—the agency would select the object of the action and, if the court vindicated the agency's position, sanctions would follow—but the proceeding would take place in the federal courts. Finally, the SEC might choose to provide *guidance*—for example, through congressional testimony, speeches, or a more formalized "release"—advising interested parties of its concerns about the transaction. Though it would surely influence the behavior of private actors, that guidance would be advisory only; it would not on its own have binding legal effect. The SEC is thus authorized to take one of four paths to address the transaction with which it is concerned: legislative rule, administrative adjudication, judicial enforcement, or guidance. The SEC is not alone in this respect. Many agencies can rely on an assortment of policymaking forms—often something like this standard set—to effectuate their policy judgments.

The agency's choice among these policymaking forms matters because, as suggested above, each is distinct. The differences are significant and they run along three dimensions: the process the agency follows, the legal effect of the instrument, and the availability and nature of judicial examination of the agency's action. I describe these differences in more detail in Part I.

The availability of multiple policymaking tools is one reason why agencies have gone about their business in such varying ways. In the 1950s and 1960s, most administrative agencies implemented their statutes by

deciding individual cases; by the 1970s, a detectable shift had occurred and most administrative agencies pursued their mandates by promulgating legislative rules. Despite the broad trend toward rulemaking, policymaking form continues to vary across agencies. The National Labor Relations Board and the Federal Trade Commission, for instance, largely make policy by adjudicating individual cases. The Federal Communications Commission, by contrast, largely makes policy by promulgating legislative rules.

That agencies often have multiple tools available to effectuate a given policy objective is interesting in itself. But the judicial reaction to this fact, which I take up in Part II, heightens the intrigue. That judicial reaction, at least at first blush, can be simply described: hands-off. An agency can choose among its available policymaking tools and a court *will not* require it to provide an explanation for its choice. This judicial reaction is out of step with the rest of the law of judicial review of agency action. Courts usually demand that agencies provide reasoned explanations for their discretionary choices, but there is no such reason-giving requirement when agencies select their preferred policymaking form. I will examine the plausible reasons why courts might not require agencies to offer explanations for their choices of form. None of these explanations is satisfying because none offers a way to distinguish those decisions where courts demand explanations for choice of form from those decisions where courts do not.

After setting forth this puzzle, Part II will offer an explanation for it. Courts have the ability to react to agency choices of procedure without demanding that an agency provide an explanation for its choice. That is because courts have a surprising degree of control over the consequences of an agency's choice of form. Courts are the primary architects of the standards by which agency action will be assessed (arbitrary-and-capricious, substantial evidence, reasonable interpretation of law), and they also have leeway to determine who can bring a suit to challenge agency action and when that suit can be brought. In addition, courts have some ability to shape the procedures that an agency must follow when it relies on a policymaking tool. By adjusting the consequences of choosing one form or another—for instance, intensifying the standard of review, permitting a party to sue at a particular point, or shaping the procedures that must be followed—courts have the opportunity to respond to whatever concerns they might have about an agency's choice. This judicial freedom to design the elements of an agency's procedural form explains the otherwise puzzling vitality of the principle that agencies are permitted to select their preferred policymaking form without providing an explanation for that choice. It is not that courts permit agencies to choose their form without evaluation; courts in fact review those choices, but they do so in a roundabout way.

Parts I and II identify and analyze the phenomenon of agency choice of policymaking form. This task is the main object of the Article because these features of administrative law and practice are not now considered worthy of notice. After noticing them, though, the next step is to come to terms with them. Part III starts that task. There, I will consider how an agency might choose its preferred policymaking form, identify the aspects of that choice that might worry us, and discuss whether and how administrative law might further respond to those concerns.

I. MULTIPLE AND DISTINCT AVENUES TO EFFECTUATE REGULATORY GOALS

A. A Menu of Policymaking Forms

Most federal agencies have a variety of policymaking tools available to them to achieve their policy objectives. While considerable variation exists among agencies, one can identify a standard set of policymaking forms.[2] Many agencies have the authority to promulgate legislative rules, which are akin to statutes in that they prospectively set forth a general substantive standard of conduct for a class of private actors. Many agencies can also implement the statutes they administer in case-specific contexts. This includes administrative adjudication (an enforcement action, a licensing proceeding, or a benefit determination) and judicial enforcement actions.[3] Agencies can also rely on an array of guidance documents to express policy judgments: enforcement guidelines, policy statements, interpretive rules (explicating a statute or regulation), and the like. Although they can undoubtedly influence the behavior of private actors, such guidance documents are not formally binding.

A typical agency can thus rely on an assortment of policymaking instruments. It can make policy generally; it can make policy through an individual case; it can act generally or case-specifically in a way that binds private parties; or it can advise interested parties of its views or its intended course of action.

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[2] The hundreds of statutes that authorize agency activities and the rules of agency procedure adopted pursuant to those statutes mean that generalizing across agencies is hazardous. Although I recognize the hazard, the generalizations contained in this Article are both defensible and useful. The Administrative Procedure Act (APA) itself, 5 USC §§ 551–59, 701–06 (2000), provides a common default framework, one that contemplates nearly all of the categories identified here, that guides almost every agency in at least some contexts. Centralized White House review of agency activity likewise tracks at least some of the categories identified here. As such, one can talk sensibly about a standard set of policymaking forms as a matter of practice.

[3] Some agencies can litigate on their own behalf, and others are represented by the Department of Justice. See Michael Herz and Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies' Programs*, 52 Admin L Rev 1345, 1345–49 (2000); Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 Cal L Rev 255, 263–73 (1994) (describing assignments of litigating authority).

What sources of authority make these policymaking forms available to the agency? Agencies are created, and thereby limited, by the legal instruments (usually statutes)[4] that create them, charge them with a mission, and confer powers on them. An agency can exercise lawmaking authority only if it is authorized to do so by the legislature. Thus, an agency must have statutory authority to promulgate legislative rules or conduct administrative adjudication.[5] Statutory authorization is also the usual basis for agency authority to enforce a statute in federal court.[6]

What a statute can authorize, it can also restrict or fail to authorize. Statutes that authorize agency action often confer—or have been interpreted to confer—the power to promulgate legislative rules, conduct administrative adjudication, and enforce the relevant statute in federal courts. But sometimes Congress declines to permit an agency to use one or more of the standard policymaking tools identified here. The Equal Employment Opportunity Commission (EEOC), for instance, does not have the authority to issue legislative rules that further define the prohibitions on discrimination contained in Title VII of the Civil Rights Act.[7] It

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[4] The Environmental Protection Agency, for an example of an exception, was originally created by executive action. See Richard Nixon, *Special Message to the Congress about Reorganization Plans to Establish the Environmental Protection Agency and the National Oceanic and Atmospheric Administration*, in *Public Papers of the Presidents of the United States: Richard Nixon 1970* 578 (GPO 1971).

[5] See Thomas W. Merrill and Kristin E. Hickman, Chevron*'s Domain*, 89 Georgetown L J 833, 876–77 (2001) (indicating that Congress must grant powers to agencies and that Congress often gives only a subset of powers to agencies); 5 USC § 558(b) (noting that a sanction may not be issued unless a statute gives the agency that power).

While the authorization requirement is accurate as a matter of black letter law, it is an oversimplification because it leaves out the important role that agencies and courts have played in interpreting statutory grants of rulemaking authority. A few important agencies have been authorized to issue legislative rules pursuant to so-called "general grants" of rulemaking power. A typical general grant, such as that authorizing the Federal Trade Commission (FTC), permits the agency to "make rules and regulations for the purpose of carrying out the provisions of this subchapter." 15 USC § 46(g) (2000). For years it was assumed that this provision authorized the issuance of rules governing FTC practice and procedure, but nothing more. In 1962 the FTC asserted that the general grant authorized the issuance of legislative rules (called Trade Regulation Rules in FTC parlance). It is highly doubtful, however, that the general grant was intended to convey such authority. See Glen O. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U Pa L Rev 485, 490–96 (1970) ("The Commission's argument in support of rulemaking is based less on a solid case of actual authority than on an implicit conclusion that rulemaking procedures are inherently a preferable mode of policy formulation."); Thomas W. Merrill and Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv L Rev 467, 504–07 (2002) (arguing that the original grant of power to the FTC did not contain rulemaking power). Nonetheless, Judge J. Skelly Wright, in a well-known opinion, sustained the FTC's claim. *National Petroleum Refiners Association v FTC*, 482 F2d 672 (DC Cir 1973). See Merrill and Watts, 116 Harv L Rev at 554–57, 562–65 for a discussion on the judicial assumption of agency rulemaking authority and a critical look at the opinions of Judges Wright and Friendly creating that assumption. For more on Judge Friendly's view, see note 120.

[6] The executive may have some inherent authority to enforce the law even without statutory authorization. The question rarely arises, however.

[7] See 42 USC § 2000e-12(a) (2000) (only authorizing the EEOC to issue procedural regulations). See also George Rutherglen, *Employment Discrimination Law: Visions of Equality in Theory*

can offer its construction of the statute (called interpretive guidelines), but those constructions do not have binding legal effect.[8] Nor does the EEOC have general authority to enforce antidiscrimination laws before its own administrative tribunal.[9] It only has the authority to investigate and seek conciliation of charges prior to litigation and to intervene in privately initiated suits or bring its own judicial enforcement actions in the federal courts.[10] These limitations obviously narrow the range of policymaking forms available to the EEOC. The limitations have not, however, eliminated entirely the existence of multiple instruments to effectuate a given policy. To pursue a policy goal, the EEOC might issue interpretive guidelines or bring an enforcement action. In any event, Congress has not often so limited the policymaking tools available to an agency. A range of significant agencies—the Environmental Protection Agency (EPA), the Federal Communications Commission (FCC), the Food and Drug Administration (FDA), the Federal Energy Regulatory Commission (FERC), the Federal Trade Commission (FTC), the National Labor Relations Board (NLRB), and the SEC—are authorized at least in some contexts to promulgate legislative rules, conduct administrative adjudication, and initiate judicial enforcement.[11]

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and Doctrine 105 (Foundation 2001) (noting that the grant of authority solely to issue procedural regulations "implies that substantive regulations issued by the EEOC do not have the force of law").

8 See Merrill and Hickman, 89 Georgetown L J at 857 (cited in note 5) (noting that interpretive guidelines receive deference but are not accorded the force of law). This is slightly complicated by the fact that Title VII provides a complete defense to actors whose actions are taken "in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission." 42 USC § 2000e-12(b). As Rutherglen points out, the courts have not used this safe harbor provision to transform the EEOC's substantive interpretations, embodied in various interpretive guidelines, into legally binding rules. See Rutherglen, *Employment Discrimination Law* at 106 (cited in note 7) (noting that courts give deference but not the force of law to the interpretive guidelines). The EEOC is authorized to promulgate one kind of "substantive" legislative rule. Confusingly enough, this authority is for "procedural" regulations under the Civil Rights Act. See 42 USC § 2000e-12(a).

9 See Rutherglen, *Employment Discrimination Law* at 53 (noting that "an adjudicative role for the EEOC has been repeatedly rejected").

10 42 USC § 2000e-5(b) (granting the authority to investigate and conciliate); 42 USC § 2000e-6 (authorizing the initiation of civil actions by the EEOC); 42 USC § 2000e-5(f)(1) (authorizing courts to permit the EEOC to intervene in privately initiated suits).

11 On the EPA, see, for example, the Clean Air Act, 42 USC § 7409 (2000) (requiring the EPA to establish national ambient air quality standards); 42 USC § 7413(a)(2)–(3) (2000) (permitting the EPA to enforce the statute through administrative or judicial enforcement); the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 USC § 9601 et seq (2000) (authorizing a mixture of public and private enforcement mechanisms). On the FCC, see the Communications Act of 1934, 47 USC § 154(i) (2000) (authorizing the FCC to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this subchapter, as may be necessary in the execution of its functions"); 47 USC § 401 (2000) (authorizing the FCC to initiate civil actions to enforce FCC orders). On the FDA, see the Federal Food, Drug, and Cosmetic Act, 21 USC § 371(a) (2000) (granting the FDA the authority to promulgate "regulations for the efficient enforcement of this chapter"); *National Nutritional Foods Association v Weinberger*, 512 F2d 688 (2d Cir 1975) (holding that 21 USC § 371(a) grants the FDA the authority to issue legislative rules interpreting the act); 21 USC § 334 (2000) (granting the FDA the authority to seize products unlawfully

Congress can also require an agency to implement certain statutory provisions through only one of the policymaking forms, usually legislative rules. Environmental law provides many examples.[12] Outside of environmental law, however, that sort of statutory directive is not as common.[13] Even where an agency is required to implement a particular statutory provision through the issuance of legislative rules in the first instance, the agency is likely to have a range of policymaking tools available later down the line. The agency will need to determine whether and how to address subsequent developments and, in doing so, the agency is likely to have some options. It may be able to choose among amending the rule, offering guidance, or, if the agency believes that the behavior falls within the ambit of the existing rule, bringing an administrative or judicial enforcement action.

While an agency needs statutory authorization to rely on certain policymaking tools, others are available without congressional authorization. Supreme Court precedent indicates that, even in the absence of the power to promulgate legislative rules or administratively adjudicate, an

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introduced into the market). On FERC, see the Department of Energy Organization Act, 42 USC § 7172 (2000) (granting FERC licensing and rate-approval authority and the power to enforce decisions through adjudications); 42 USC § 7173(a) (2000) (granting rulemaking power and the power to issue statements of policy). On the FTC, see the Federal Trade Commission Act of 1914, 15 USC § 45(b) (2000) (authorizing the FTC to conduct administrative adjudication); 15 USC § 53(b) (2000) (authorizing the FTC to seek injunctions to enforce the organic statute and agency orders); 15 USC § 57a (2000) (authorizing the FTC to promulgate substantive rules). See also note 5 (discussing the FTC's substantive rulemaking authority). On the NLRB, see the National Labor Relations Act, 29 USC § 156 (2000) (granting the NLRB power to make rules and regulations); 29 USC § 160 (2000) (authorizing the NLRB to initiate administrative adjudications to prevent unfair labor practices and to petition a court of appeals to enforce NLRB orders). On the SEC, see the Securities and Exchange Act, 15 USC § 78u-2 (2000) (authorizing the SEC to seek civil penalties for violations); 15 USC § 78u-3 (authorizing the SEC to issue cease-and-desist orders following administrative proceedings); 15 USC § 78u-1 (authorizing judicial enforcement by the SEC for violations of certain provisions of securities laws); 15 USC § 78w(a) (authorizing the SEC to issue rules). See also Merrill and Watts, 116 Harv L Rev at 511–16, 565–70, 582–84 (cited in note 5) (arguing that the FDA and the NLRB were not intended by Congress to possess general legislative rulemaking authority, although the courts have found them to possess such power).

[12] See, for example, 42 USC § 7661a(b) (2000) (providing, under Title V of the Clean Air Act, that the EPA *shall* adopt regulations to establish "minimum elements of a permit program to be administered by any air pollution control agency"); 42 USC § 7409 (providing that the EPA *shall* adopt national ambient air quality standards); *Ethyl Corp v EPA*, 306 F3d 1144, 1149–50 (DC Cir 2002) (holding that the EPA must establish standards by regulation when required by statute); Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 Admin L Rev 547, 551–52 (2000) (noting that "many agency-administered statutes are drafted in ways that render issuance of a legislative rule as an indispensable predicate to the agency's ability to use any other mechanism to implement the statute" and discussing the Clear Air Act in this context).

[13] See Richard J. Pierce, Jr., 1 *Administrative Law Treatise* § 6.9 at 374 (Aspen 4th ed 2002) ("Most agency-administered statutes confer on the agency power to issue rules and power to adjudicate cases, leaving the agency with discretion to choose any combination of rulemaking and adjudication it prefers.").

agency statutorily authorized to gather information and to judicially enforce a statute has the authority to issue rulings interpreting that statute.[14]

There are, then, caveats to this Article's initial observation that many agencies have a range of standard tools to implement a given policy objective. But the caveats do not swallow the basic point that almost all agencies have some range of policymaking forms, and often the standard set, available in many circumstances.

B. Distinct Features of the Policymaking Forms

The choice among these forms matters because each form has distinct elements. The significant differences run along three dimensions: the procedure the agency must follow, the legal effects of the agency's action, and the availability and intensity of judicial examination of the agency's action if it is challenged in court.

1. Process.

Each form has a different procedure associated with it. An agency that conducts a legislative rulemaking usually must follow "notice-and-comment" procedures: informing the public of its proposed rules, soliciting comment on those proposals, and responding in a reasoned way to significant objections to the agency's proposed course of action.[15] These requirements may sound minimal, and the Congress that set them forth likely envisioned them to be,[16] but today, promulgating an important legislative rule is a labor-intensive enterprise. While there are many reasons for this, it is unquestionably due in part to judicially imposed requirements that an agency must follow if it expects to survive a challenge to its

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[14] See *Skidmore v Swift & Co*, 323 US 134 (1944) (holding that an agency without the power to issue legislative rules or administratively adjudicate, yet authorized to gather information about conditions of employment in industry and to enforce the Fair Labor Standards Act in federal courts through injunction actions, has the authority to issue interpretive bulletins and informal rulings about the applicability of the Act; such interpretive rulings are entitled to some deference from courts); Pierce, 1 *Administrative Law* § 6.4 at 325 (cited in note 13) (citing *Skidmore* for the proposition that "any agency has the inherent power to issue interpretative rules").

[15] See 5 USC § 553 (outlining the rulemaking procedures).

[16] See John F. Duffy, *Administrative Common Law in Judicial Review*, 77 Tex L Rev 113, 184 n 355 (1998) (summarizing legislative history supporting the view that the APA was "an outline of minimum essential rights and procedures"), quoting the Report of the Committee on the Judiciary, House of Representatives, on S7, A Bill to Improve the Administration of Justice by Prescribing Fair Administrative Procedures, HR Rep No 79-1980, reprinted in Administrative Procedure Act: Legislative History, S Doc 248, 79th Cong, 2d Sess 233, 250 (1946); Senate Judiciary Committee Print, June 1945, reprinted in Administrative Procedure Act: Legislative History, S Doc 248, 79th Cong, 2d Sess 11, 17–21 (1946); Report of the Committee on the Judiciary on S7, A Bill to Improve the Administration of Justice by Prescribing Fair Administrative Procedures, S Rep 79-752, reprinted in Administrative Procedure Act: Legislative History, S Doc 248, 79th Cong, 2d Sess 185, 199–201 (1946).

action in court—requirements that affect an agency even if its rule does not wind up in court.[17]

Formal administrative adjudication often, though not always, involves a trial-like hearing.[18] It affords a more limited class of persons—often just the parties to the agency action, though sometimes a larger group—extensive participation rights, including many of the trappings of adversarial judicial process. Parties present evidence and have opportunities for cross-examination; the presiding judge is insulated from the agency's investigation and prosecution arm and enjoys other attributes of independence; and the decision is based exclusively on the record of the hearing.[19]

The procedures associated with judicial enforcement will be the most familiar to non-administrative lawyers. The government, usually the Department of Justice representing the agency, brings an action against a party (or, in the case of a seizure, a product) alleging a violation of a statute or regulation. The object of the action possesses the familiar procedural protections available in court systems and can challenge the procedure the agency followed or the substantive validity of its action. The court assesses the validity of the agency's action and renders a judgment.

The final category—called here "guidance documents"—is a large and varied one. Common types are policy statements (announcing how an agency is likely to conduct itself in the future) and interpretive rules (offering the agency's interpretation of a statute or regulation). Such guidance can be embodied in a wide range of agency instruments of varying formality: manuals used by agency personnel, private letter rulings, advice given over the phone, and public notices such as press releases or congressional testimony. Some of these instruments are designed to control the discretion of the agency's front-line bureaucrats, some to advise regu-

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[17] There is a large literature on the "ossification" of the rulemaking process. See generally William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals through Informal Rulemaking?*, 94 Nw U L Rev 393 (2000); Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 Admin L Rev 61 (1997); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 Tex L Rev 483 (1997); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 Tex L Rev 525 (1997); Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and the Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 Wis L Rev 763; Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 Duke L J 1385 (1992); Jerry L. Mashaw and David L. Harfst, *The Struggle for Auto Safety* (Harvard 1990).

[18] Compare *Pension Benefit Guaranty Corp v LTV Corp*, 496 US 633, 655 (1990) (contrasting the trial-type procedures required for formal adjudication under 5 USC §§ 554, 556–57 with the "minimal" procedural requirements required for informal adjudication in this case).

[19] See 5 USC §§ 556–57 (outlining the procedures for formal adjudications and rulemaking). The descriptions in the text are of so-called formal adjudications. There is also a large category of informal adjudications, during which the procedures the agency follows are much less standardized and less reminiscent of judicial adjudication. See Michael Asimow, ed, *A Guide to Federal Agency Adjudication* 145–61 (ABA 2003).

lated parties how to comply with regulatory requirements or how the agency will exercise its enforcement discretion, and others to advance the agency's position about its authority with respect to a one-time but important controversy. While there are significant differences within this category of agency action, an important unifying feature is that, in contrast to the other policymaking forms examined here, guidance documents permit the agency to develop policy relatively cheaply. Agencies have internal processes that govern the development of these forms of guidance.[20] But an agency is not required to present its view to an administrative tribunal or court, and the agency does not have to solicit or respond to public comment.[21]

A final aspect of the procedures followed for policymaking forms is the review mechanisms internal to the executive branch. There are varied agency-specific processes, but the focus here is on the review of agency policymaking that other executive branch actors sometimes conduct. The existence and scope of this review varies based on the policymaking form on which the agency relies.

One important review process is conducted by the Office of Management and Budget (OMB). President Reagan, in Executive Order 12291, first established a comprehensive review program for agency rulemaking.[22] While his successors have modified certain elements of that Executive Order, they embraced the central tenets of the Reagan effort.[23] Those tenets include an annual government-wide planning process, in which all agencies (now including so-called independent agencies) are required to identify their major regulatory objectives for the year,[24] and a centralized review process—conducted by the Office of Information and Regulatory Affairs (OIRA), located in OMB.[25] Only "significant regulatory actions" are subject to this OIRA review process. Regulatory action includes any substantive agency action that promulgates or is expected to lead to the promulgation of a final rule or regulation.[26] Any significant regulatory action must be forwarded to OIRA for review and approval,

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20 The FDA's appears to be the most formalized. See note 32.

21 5 USC § 553(b) (providing that the notice and publication guidelines do not apply to guidance documents). See also the discussion of limited presidential control over these policymaking forms in Elena Kagan, *Presidential Administration*, 114 Harv L Rev 2245, 2290–99, 2306 (2001).

22 See Exec Order No 12291, 3 CFR § 127 (2004).

23 Kagan, 114 Harv L Rev at 2277–81, 2284–90 (cited in note 21) (discussing the maintenance of Reagan's executive order by the first President Bush and the retention of many of its important aspects by President Clinton).

24 *Regulatory Planning and Review*, Exec Order No 12866 § 4, 3 CFR § 638 (2004) ("Planning Mechanism").

25 Id § 6, 3 CFR § 644 ("Centralized Review of Regulations").

26 An action is defined as "significant" if it meets the following criteria: may have an annual effect on the economy of $100 million or more; may create a serious conflict with an action taken by another agency; may alter the budgetary impacts of entitlements, grants, user fees, or loan programs; or raises "novel legal or policy issues." Id § 3(f), 3 CFR § 641.

and must be accompanied by an assessment of the costs and benefits of the action.[27]

While the process outlined in the Executive Order brings many important actions within its reach, some are excluded. Independent agencies participate in the government-wide planning process, but are not required to submit their significant regulatory actions for review and approval.[28] Some whole categories of agency action are excluded as well. Agency adjudications are not subject to any sort of review by OIRA, nor are most guidance documents issued by agencies.[29]

Another important review mechanism internal to the executive branch arises from the fact that the Department of Justice (DOJ) controls most litigation on behalf of federal agencies. That near-monopoly means that most agencies wishing to bring judicial enforcement actions must persuade lawyers in the Justice Department or the U.S. Attorneys' offices that the action should be brought.[30]

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[27] Among significant regulatory actions, *economically* significant actions are singled out for more elaborate OIRA review. The agency must identify and attempt to quantify the costs and benefits of the regulation, and the "underlying analysis" of that calculation must be included in the submission to OIRA. See id § 6(a)(3)(C), 3 CFR § 645; Kagan, 114 Harv L Rev at 2285–86 (cited in note 21) (noting the requirement of centralized review of cost-benefit analyses prepared by the agencies).

[28] See Exec Order No 12866 § 3(b), 3 CFR § 641 (defining "agency" to exclude those identified as independent agencies in 44 USC § 3502(10)); id § 6, 3 CFR § 644 (stating that only entities defined as agencies are required to participate in centralized review of individual regulations); id § 4(b)–(c), 3 CFR § 642 (including agencies as well as independent agencies in the annual planning processes of developing the regulatory agenda and regulatory plan). See also Richard H. Pildes and Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U Chi L Rev 1, 29 (1995):

> President Clinton has moved to incorporate the independent agencies within the system of presidential oversight, at least in a modest way. The unified regulatory agenda, including all proposed regulations, will require the participation of the independents. More important, the annual regulatory plan must include submissions from the independent agencies, and here the Vice President has an opportunity to advise and consult.

[29] Exec Order No 12866 § 3(d)–(f), 3 CFR § 641 (defining regulatory action and significant regulatory actions to which the Executive Order applies to include only "agency statements of general applicability and future effect, which the agency intends to have the force and effect of law"); Pierce, 1 *Administrative Law* § 7.9 at 498, 501 (cited in note 13) (noting that adjudications are not subject to executive review).

[30] See Neal Devins and Michael Herz, *The Battle That Never Was: Congress, the White House, and Agency Litigation Authority*, 61 L & Contemp Probs 205, 207 (1998) ("The basic, though not inflexible, rule is that agencies may not employ outside counsel for litigation; they must refer all matters to DOJ."); Neal Devins and Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U Pa J Const L 558, 563 (2003):

> In the most common arrangement, an agency [without independent litigating authority] prepares a referral package, describing the case and justifying the need for judicial action, which it sends to the relevant division or section within DOJ. The decision whether to proceed, and then the actual handling of the litigation if such a decision is made, is in the hands of the DOJ.

An agency has some control over the litigation. The DOJ will not bring a judicial enforcement action except at the request of an agency. Devins and Herz, 5 U Pa J Const L at 562–63. Nonetheless, the DOJ sometimes declines to bring an enforcement action that the agency seeks, which creates tension between the DOJ and the client agency. Id at 569–70. See also id at 587–88:

> Agencies *would* bring some cases that DOJ refuses to because in general agencies are more

2. Legal effects.

As already observed, whether and how private parties are bound by the agency's action also varies based on the form. At one extreme is a legislative rule that, if valid, operates like a statute. An order produced in administrative adjudication binds only the party to that proceeding, but some orders, such as those issued at the conclusion of an NLRB or FERC adjudication, operate as precedent such that similarly situated parties are likely to comply.[31] In judicial enforcement, the object of the government's action is bound only if a court vindicates the agency's position. Finally, while guidance documents come in all sorts of forms, they do not of their own force have legal effect on parties outside the agency.[32] As with the government's position taken in an enforcement action, that legal status can change if the agency's view is approved by a court. When an agency's construction of a statute or legislative rule contained in an interpretive rule is vindicated in a court proceeding, for instance, that view becomes binding on the party challenging the interpretation and, as precedent, on other parties within the court's jurisdiction.[33]

> willing to run litigation risks than is DOJ. . . . The different attitudes toward litigation risk and nonsubstantive grounds of decision are predictable given the different interests and agendas between DOJ and a programmatic agency. For DOJ, success is measured solely by winning percentage in the courts. . . . For the agency, success is a function of [winning percentage in the courts *and* in nonjudicial enforcement and] the advancement of a particular policy agenda.

See also Barbara Allen Babcock, *Defending the Government: Justice and the Civil Division*, 23 John Marshall L Rev 181, 185–88 (1990) (describing the tension between the DOJ and the agencies it represents in judicial enforcement).

31 See *NLRB v Wyman-Gordon Co*, 394 US 759, 765–66 (1969) ("Adjudicated cases . . . generally provide a guide to action that the agency may be expected to take in future cases. Subject to the qualified role of *stare decisis* in the administrative process, they may serve as precedents."); Richard J. Pierce, Jr., 2 *Administrative Law Treatise* § 11.5 at 816 (Aspen 4th ed 2002) ("Except for some slight variations from one agency to another, each of the many federal agencies that systematically collect and publish reasoned opinions in formal adjudications uses a system of precedents that is comparable to the system the courts use."); Pierce, 1 *Administrative Law* § 6.9 at 380 (cited in note 13) (asserting that *Wyman-Gordon* stands for the proposition that "an agency cannot apply to future cases a 'rule' announced in a prior adjudicatory case if that 'rule' is predicated on facts that are contested in a subsequent case," and giving an example of FERC attempting to use an adjudicative order as a "rule"); Rossi, 1994 Wis L Rev at 833 (cited in note 17) ("FERC's reform of electricity regulation through ad hoc decisionmaking . . . exemplifies the emergence of precedent through adjudication. The legal rules and policies developed in and reinforced through adjudicative proceedings at FERC have had the same practical effects as would rules promulgated through the formal or informal processes of the APA.").

32 See Merrill and Hickman, 89 Georgetown L J at 903–05 (cited in note 5) (noting that policy statements and the like have no binding legal effect). See also Food and Drug Administration, *Good Guidance Practices*, 21 CFR § 10.115(d)(1) (2004) (observing that "[g]uidance documents do not establish legally enforceable rights or responsibilities" and "do not legally bind the public or the FDA").

33 See *United States v Mead Corp*, 533 US 218, 232 (2001) ("[I]nterpretive rules may sometimes function as precedents."); Robert A. Anthony, *"Interpretive" Rules, "Legislative" Rules, and "Spurious" Rules: Lifting the Smog*, 8 Admin L J Am U 1, 12–13 (1994) ("[A]n agency can make an interpretive document binding upon private parties as a *practical* matter . . . [and] affected parties must abide by it or get the courts to set it aside."); Robert A. Anthony, *Interpretive Rules, Policy Statements,*

3. Availability and scope of judicial review.

Whether, when, and how the agency action can be challenged in court can vary based on the form. Many legislative rules can be challenged at what is called the "pre-enforcement" stage, that is, before the agency has brought an enforcement action against an allegedly noncomplying party.[34] Policies adopted in the course of adjudication, logically enough, can be challenged only after the proceeding has reached its end point and an order has been produced.[35] The guidance documents on which agencies rely often cannot be challenged in an anticipatory way; courts may refuse to review the validity of an agency's position in such documents until the agency takes action against a regulated party based on them.[36]

The intensity (or, in administrative law parlance, the "scope") of review the court will use to assess the agency's action may also vary—at least at the doctrinal level—based on the form. As will be discussed in further detail below, some agency actions are not reviewable at all; that is, a court will not evaluate the basis for the agency's decision. But reviewable agency actions are subject, at a minimum, to the arbitrary-and-capricious test of the Administrative Procedure Act[37] (APA) and discretionary agency choices are examined under this test. Additional standards of review can apply depending on the nature of the agency's action. An agency's interpretation of a statute contained in a legislative rule or an adjudication will be judged under the familiar two-step test outlined in *Chevron USA, Inc v Natural Resources Defense Council, Inc.*[38] If an agency's interpretation of a statute is contained in a guidance document, a

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Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?, 41 Duke L J 1311, 1327–30 (1992) (discussing when nonlegislative rules have binding effect).

34 In *Abbott Laboratories v Gardner*, 387 US 136 (1967), the Court created a two-part test for determining the availability of pre-enforcement review that requires courts to "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Id at 149. For a basic overview of pre-enforcement review, see Pierce, 2 *Administrative Law* § 15.14 at 1069–71, 1082–88 (cited in note 31). For a discussion of the wisdom of delaying review of agency rules, see Mark Seidenfeld, *Playing Games with the Timing of Judicial Review: An Evaluation of Proposals to Restrict Pre-enforcement Review of Agency Rules*, 58 Ohio St L J 85, 127 (1997) (suggesting that delaying review of rules until an agency attempts to enforce them would be best done by Congress, and then only in limited circumstances).

35 See 5 USC § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."); Pierce, 2 *Administrative Law* § 15.11 at 1036–38 (discussing the requirements of exhaustion and final agency action in the context of judicial review).

36 Ripeness and finality are the typical bars to consideration. See Pierce, 2 *Administrative Law* § 15.15 at 1088–89 (noting that agency statements of policy are generally not considered final agency action ripe for judicial consideration).

37 5 USC §§ 701, 706(2)(A) (providing that a court shall hold unlawful and set aside agency actions that are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); *Citizens to Preserve Overton Park, Inc v Volpe*, 401 US 402, 413–14 (1971) (noting that the arbitrary-and-capricious test applies to all reviewable actions).

38 467 US 837, 842–43 (1984). See also text accompanying notes 157–59.

test less deferential to the agency applies.[39] A court will assess whether the factual findings contained in an agency order produced after an on-the-record adjudication are supported by "substantial evidence."[40]

C. Consequences of the Choice of Form

An agency's selection of a policymaking tool thus matters for self-evident reasons. Each form should be thought of as a package with specific features—the procedure the agency must follow; whether and how the agency's action binds private parties; whether and when the agency's action can be challenged in court; and the standard that a court will apply when that suit is brought. The choice among them is likely to have an effect on policy formulation and, in any event, is a consequential choice from the perspective of parties who follow the agency's activities. A (very) simplified example illustrates. Imagine that the SEC is concerned about a financial transaction that is cropping up with increasing frequency. The agency decides that this transaction should be considered fraudulent under the securities laws. The SEC will choose among three possible forms to articulate its view that the transactions are unlawful: administrative adjudication, legislative rulemaking, or the issuance of a guidance document.

Consider first the choice between an administrative enforcement action and promulgating a legislative rule prohibiting the transaction. Imagine that the agency chooses to rely on adjudication. A common lament is that agency reliance on administrative adjudication in the enforcement context is unfair because it permits the agency to pick a sympathetic target and to present its view in a friendly forum (depending on the agency), and may mean that a newly minted legal obligation will be imposed retroactively on a single target. For those who think that the transaction represents serious fraud, administrative adjudication may also be a disappointment because its reach is less broad than that of a legislative rule; its precedential effect may be limited by some facts peculiar to the chosen target, and, in any event, it does not bind all parties in the same way that a valid legislative rule would. The facts of the individual case may also inappropriately distort the evaluation of the broader policy questions, and, without broad public input, the agency may not gather the information and consider the arguments that would be a predicate to the development of a sound rule.

This is not to say that all criticism would evaporate if the SEC chose legislative rulemaking. Those who believe the agency should act quickly to respond to the transactions may view a legislative rule as too cumbersome. Some also might argue that an incremental, adjudication-based ap-

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39 The test that applies comes from *Skidmore*, 323 US at 139–40. See also *Mead*, 533 US 218.

40 5 USC § 706(2)(E).

proach is more appropriate because of the absence of consensus on an appropriate general policy, or the nature of the transactions of concern to the SEC—relevant factual differences within the category of transactions the SEC wants to prohibit, or perhaps the quickly changing nature of the transactions. Still others might be skeptical of the seriousness of the threat posed by the particular transactions and will view a legislative rule as especially unwise because the agency will devote too many resources to prohibiting an unthreatening transaction. Critics who are generally skeptical of SEC regulation of the securities markets would take the same position. On their view, the agency should take a hands-off approach to securities markets, and, if it is to regulate the market at all, that regulation certainly should not be in the form of the strongest medicine possible.

Consider now the SEC's choice between the use of its lawmaking power (adjudication or rulemaking) on the one hand and the issuance of a guidance document on the other. If the agency chooses to exercise its lawmaking power, arguments akin to those canvassed above might be raised. If one views the transactions as nonthreatening, then the agency is inappropriately using resources where an issue does not warrant that level of attention. If one views the transactions as threatening, then the use of lawmaking power is too cumbersome (when compared to the option of some form of guidance) given the need for quick response. If the agency chooses to issue a guidance interpretation, one might likewise make arguments akin to those discussed already—for instance, that the agency is not taking the threats posed by the transactions seriously enough. Aside from these arguments, though, a distinct set of concerns can be raised about an agency's decision to rely on guidance documents to express policy judgments. One concern is that the agency may act unwisely (and thus unfairly) when it raises a red flag about a set of transactions without the more extensive vetting of views that would occur if the agency presented its view to an administrative tribunal or sought public comment on its position. This concern is accentuated by the realization that, even when the agency acts in an advisory capacity, its views have unquestionable real-world consequences. In the securities market context, for instance, SEC disapproval, even when expressed in an advisory capacity, can doom a transaction.

This discussion does not demonstrate that any or all of these concerns necessarily will be valid in a particular situation. Evaluating an agency's choice of procedure in a specific context would require a more detailed understanding of both the problem the agency is confronting and the possible regulatory responses. Rather, the discussion is aimed at emphasizing what is likely an obvious point: the agency makes an important choice when it selects the policymaking form its action will take.

D. The Multiplicity of Agency Choices

The ability of agencies to choose among a range of policymaking forms might be unremarkable if agencies migrated to similar tools to effectuate similar statutory mandates. But that is not the case. The fact is that, given similar questions (which conduct is unlawful under the statute?) and similar options (rulemaking, adjudication, judicial enforcement, guidance document), agencies have made—and continue to make—different choices. The following description is far from a comprehensive account of those choices, but it should serve to illustrate the point.

1. Historical evolution.

One way to observe the phenomenon of agency choice of procedure is to examine agency behavior historically. In the decades immediately following the passage of the APA in 1946, most agencies relied on adjudicatory, case-by-case methods to make policy.[41] This began to change in the 1960s as traditional agencies such as the FTC, the FDA, and the Federal Power Commission asserted the authority to engage in substantive rulemaking and initiated major legislative rulemakings.[42] Around the same time, Congress created new health and safety agencies, such as the National Highway Traffic Safety Administration, and required them to use rulemaking in certain contexts.[43] Explaining why this migration to rulemaking occurred is complicated,[44] but there is little doubt that a shift occurred such that, by the mid-1970s, rulemaking was the primary and preferred mode of making policy for many agencies.[45] Some observers argue that we are now in the midst of yet another shift in agency behavior. Some point to the rise of agency litigation as a strategy for achieving regulatory objectives.[46] Others point to "collaborative" and

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41 See Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 Admin L Rev 1139, 1145–47 (2001) (discussing the evolution from adjudication to rulemaking); Antonin Scalia, *Back to Basics: Making Law without Making Rules*, Regulation 25, 25 (July/Aug 1981) (noting that before the 1970s agencies generally used case-by-case adjudication); Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 Harv L Rev 1263, 1295 (1962) ("Historically, policy has evolved mainly from a case-by-case approach.").

42 See Schiller, 53 Admin L Rev at 1147 (cited in note 41) (noting that these agencies "each undertook the first substantive rulemakings in their history" in the 1960s).

43 See id at 1148 (listing statutory initiatives that required agencies to use rulemaking); Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 Va L Rev 253, 256 (1986) (noting that Congress had enacted statutes meant to protect objects of regulation by requiring rulemaking).

44 See Schiller, 53 Admin L Rev at 1148–51 (explaining the shift as a response to increasing agency caseloads, criticism of administrative agencies for the lack of predictable rules and rational explanations for policies, and judicial embrace of rulemaking as a method for policymaking).

45 See J. Skelly Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 Cornell L Rev 375, 375–76 (1974) (noting that agencies had entered the "age of rulemaking").

46 See Andrew P. Morriss, Bruce Yandle, and Andrew Dorchak, *Choosing How to Regulate*, 04-03 Working Paper 3-4 (Case Research Paper Series in Legal Studies Apr 2004), online at

"flexible" regulation; examples of this trend include negotiated rulemaking, negotiated individual settlements, and the waiver of general rules in particular circumstances.[47] Some of these developments may be genuinely new, but it should not escape notice that they are also something old. Making policy through litigation, negotiated settlements, or the waiver of rules in individual contexts can be seen as a shift back to case-by-case policymaking.

2. Choice of form across agencies at a snapshot in time.

Another way to notice the diversity of preferred policymaking tools is to look horizontally across agencies at a particular point in time. Some agencies are known to rely heavily on adjudication, others on rulemaking, and others on a rich mix of the two. The NLRB and the FTC are known for their heavy reliance on adjudication as a way of making policy.[48] The FCC, by contrast, relies heavily on rules.[49] And FERC relies on both adjudication and general rules.[50]

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http://papers.ssrn.com/=530163 (visited July 23, 2004) (identifying regulation by litigation as an innovation).

[47] See generally Jon Cannon, *Bargaining, Politics, and Law in Environmental Regulation*, in Eric W. Orts and Kurt Deketelaere, eds, *Environmental Contracts: Comparative Approaches to Regulatory Innovation in the United States and Europe* 39 (Kluger 2001); Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 Duke L J 1015 (2001); Jody Freeman, *The Private Role in Public Governance*, 75 NYU L Rev 543 (2000); Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 Wm & Mary L Rev 411 (2000); Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 Admin L Rev 429 (1999); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L Rev 1 (1997); Marshall J. Breger, *Regulatory Flexibility and the Administrative State*, 32 Tulsa L J 325 (1996); Keith Werhan, *Delegalizing Administrative Law*, 1996 U Ill L Rev 423; Jim Rossi, *Making Policy through the Waiver of Regulations at the Federal Energy Regulatory Commission*, 47 Admin L Rev 255 (1995).

[48] For the NLRB, see, for example, Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 Duke L J 274, 274 (1991) ("Despite having been granted both rulemaking and adjudicatory power in its statutory charter more than half a century ago, the [NLRB] has chosen to formulate policy almost exclusively through the process of adjudication."); Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 Admin L Rev 163, 172–73 (1985) (noting that the NLRB relies on adjudication); Cornelius J. Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 Yale L J 729, 761 (1961) ("[T]he NLRB's exclusive reliance upon an ad hoc approach . . . has produced grossly unsatisfactory results."). For the FTC, see, for example, Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 Duke L J 257, 263 ("Adjudication was the primary function of the [Interstate Commerce Commission], and it was a substantial part of the business of the [FTC] as well."); Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 S Ct Rev 345, 376 (noting that the FTC operated almost exclusively through individual "cease-and-desist" proceedings until 1973's *National Petroleum Refiners Association*, 482 F2d 672, held that it had the authority to prohibit unfair trade practices by rule); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv L Rev 921, 943 (1965) ("Until recently, the FTC had confined its rulemaking efforts . . . to the issuance of advisory trade practice rules, generally at the request of industry representatives.").

[49] See Jonathan Blake, *The "Vast Wasteland" Speech Revisited*, 55 Fed Commun L J 459, 462 (2003) ("[O]ver the past four decades, the FCC has relied increasingly on rulemaking and bright-line

Governmental review of proposed corporate mergers illustrates the divergent procedural choices that agencies can make when exercising similar legal authority. The DOJ, the FCC, and the FTC all possess authority to conduct before-the-fact review of certain corporate mergers and acquisitions. The DOJ and the FTC exercise their authority under federal antitrust laws while the FCC exercises its authority under the Communications Act. These agencies have chosen to exercise their authority in different ways.

Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976,[51] parties to certain mergers or acquisitions are required to provide the DOJ and FTC with notification of a proposed transaction prior to its closure. The notification is designed to facilitate enforcement of antitrust laws by allowing government regulators to identify and challenge anticompetitive mergers prior to their completion. In implementing this authority, the DOJ and the FTC have issued merger guidelines that set forth how the government will determine whether a proposed merger will have anticompetitive effects.[52] The guidelines indicate how the government will define the product and geographic markets in which the merging parties participate, measure the level of market concentration in these markets before and after the merger, and predict whether there will be harm to competition in those and other markets following the merger. While these guidelines do not in and of themselves determine the validity of any particular merger, the instructions they contain are detailed enough that they have predictable effects in particular cases. The guidelines, for instance, endorse the use of a specific index for measuring market concentration (the Herfindahl-Hirschman Index, or HHI). If the relevant market has a certain score on the HHI after the merger and, again as measured by the

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tests and has drastically cut back on hearings and case-by-case determinations."); Mary C. Dollarhide, Note, *Surrogate Rule Making: Problems and Possibilities under the Administrative Procedure Act*, 61 S Cal L Rev 1017, 1032 (1988) ("The FCC was one of the first administrative agencies to abandon the adjudicatory model and regularly employ rule making in formulating substantive policy."); Ernest Gellhorn and Glen O. Robinson, *Rulemaking "Due Process": An Inconclusive Dialogue*, 48 U Chi L Rev 201, 202 n 6 (1981) (noting that the FCC was an exception to federal agencies' reluctance to use rulemaking processes, and it "turned to the rulemaking process as a means of formulating substantive policy as early as the 1940s").

50 Rossi, 1994 Wis L Rev at 799 (cited in note 17) (noting that FERC has created limited procompetitive incentives for non-utility generators by developing policy through ad hoc adjudicative proceedings); Michael C. Blumm, *A Trilogy of Tribes v. FERC: Reforming the Federal Role in Hydropower Licensing*, 10 Harv Envir L Rev 1, 16 (1986) (noting that hydroelectric facility licensing carried out by FERC is done on an individual adjudicatory basis); Nicholas W. Fels, *Beyond the Stopwatch: Determining Appellate Venue on Review of FERC Orders*, 1 Energy L J 35, 45 (1980) ("[FERC] often acts by nationwide rulemakings.").

51 Pub L No 94-435, Title II, § 201, 90 Stat 1390 (1976), codified as amended at 15 USC § 18a (2000).

52 U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines (Revised 1997), online at http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html (visited July 23, 2004).

HHI, the merger will increase market concentration by a specific number of points, then the guidelines provide that the agency will classify the industry as "highly concentrated" and the merging firms will have the burden of showing that the merger will not damage competition.[53] The guidelines thus decisively resolve important questions about antitrust enforcement.

The FCC's merger review authority springs from a different statute entirely, but its authority bears a more than passing similarity to the antitrust agencies' pre-merger review. Under the Communications Act, the FCC is authorized to review the transfer or acquisition of telecommunications licenses. Sections 214(a) and 310(d) of the Act authorize the FCC to determine whether transfers or acquisitions of such licenses are in the "public interest, convenience and necessity."[54] Under the Act, the FCC is authorized to approve, disapprove, or approve with conditions the transfer of these licenses.[55] Under the reigning interpretation of the public interest standard in the merger context, the FCC has stated that it will evaluate the "competitive effects" of the merger and will approve the merger only if its procompetitive effects outweigh its anticompetitive effects.[56]

The FCC has given content to this "competitive effects" standard on a case-by-case basis in the course of evaluating a series of high-profile telecommunications mergers.[57] In its order approving the MCI/WorldCom merger in 1998, for instance, the FCC announced that it would evaluate the effect of the merger on "potential competition."[58] The FCC an-

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53 Id § 1.51. See James A. Langenfeld, *The Merger Guidelines as Applied*, in Malcolm B. Coate and Andrew N. Kleit, eds, *The Economics of the Antitrust Process* 41, 47–51 (Kluwer 1996) (discussing the HHI).

54 47 USC § 310(d) (2000); 47 USC § 214(a) (2000) (prohibiting transfers unless they would serve "the present or future public convenience and necessity").

55 47 USC §§ 214(a), 310(d). See also 47 USC § 303(r) (2000) ("[The FCC shall] prescribe such ... conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter."); 47 USC § 214(c) (2000) ("The [FCC] ... may attach to the issuance of [a § 214 authorization] such terms and conditions as in its judgment the public convenience and necessity may require."). See also Daniel E. Troy, *Advice to the New President on the FCC and Communications Policy*, 24 Harv J L & Pub Policy 503, 505–09 (2001) (discussing the FCC's review of mergers).

56 See Rachel E. Barkow and Peter W. Huber, *A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers*, 2000 U Chi Legal F 29, 43–45. This consideration of "competitive effects," Barkow and Huber point out (and lament), does not track traditional antitrust analysis or DOJ and FTC review of mergers. See id at 45–48.

57 See id (discussing the FCC's reaction to the proposed MCI/WorldCom, Bell Atlantic/NYNEX, and SBC/Ameritech mergers).

58 See id at 45; *In the Matter of Application of WorldCom, Inc and MCI Communications Corp for the Transfer of Control of MCI Communications Corp to WorldCom, Inc*, 13 FCC 18025, 18034–35 ¶ 14 (1998) (indicating that mergers will not be approved if they reduce competition). Anticompetitive mergers were also of concern to the FCC in *In the Applications of NYNEX Corp and Bell Atlantic Corp for Consent to Transfer Control of NYNEX Corp and Its Subsidiaries*, 12 FCC 19985, 20063 ¶ 157 (1997) ("*Bell Atlantic/NYNEX Merger Application*") (noting that anticompetitive harms have to be analyzed when deciding whether to approve a merger), and *In re Applications of Ameritech Corp and SBC Communications Inc for Consent to Transfer Control of Corporations Holding Com-*

nounced in another case that it will consider the effect a merger would have on its ability to regulate; the FCC will have heightened concerns about a merger if it will reduce the number of separately owned firms in similar businesses that can provide a benchmark for evaluating the conduct of industry actors.[59] Finally, the FCC has announced in other cases that it will consider the effect of the merger on underserved customers.[60]

The FCC's ad hoc method of making merger policy has been criticized.[61] Whether these criticisms are apt is not the point for present purposes; the point is simply that the FCC has chosen a different way of making merger policy than the antitrust agencies. While it might have issued general guidelines—for instance, adopting a rule that the FCC would consider the effects of a merger on "potential competition"—it has decided instead to adopt standards piecemeal in the course of individual cases.

3. Choice of form within a single agency.

It is helpful to observe the choice of policymaking form in one more context. Agencies often have the ability to choose among various methods of making policy while implementing a single statutory provision. The Immigration and Naturalization Service's (INS) revision of one of its visa programs provides a nice illustration of this phenomenon.[62] The immigra-

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mission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules, 14 FCC 14712, 14766 ¶ 114 (1999) ("*SBC/Ameritech Merger Application*") (expressing concern about the reduction in the number of benchmarks). Due to this concern about benchmarking, in both cases the FCC demanded conditions placed on the mergers.

59 See Barkow and Huber, 2000 U Chi Legal F at 46 (cited in note 56) (noting the FCC's heightened concern over the merging of large incumbents in the telephone business); *Bell Atlantic/NYNEX Merger Application*, 12 FCC at 20058–62 ¶¶ 147–56 (expressing concern about loss of competitors that provide benchmarks).

60 See Barkow and Huber, 2000 U Chi Legal F at 47–48 (discussing the FCC's concern for underserved customers when analyzing a merger); *SBC/Ameritech Merger Application*, 14 FCC at 14878–79 ¶¶ 400–02 (approving the merger subject to conditions designed to improve services for low-income customers).

61 See Troy, 24 Harv J L & Pub Policy at 507 (cited in note 55) (claiming that the conditions placed on mergers were defective and questioning the agency's impartiality); Statement by Commissioner Harold Furchtgott-Roth, *FCC Review of Telecom Mergers: A Symposium* 3–4 (Progress and Freedom Foundation Apr 2000) (expressing displeasure with the FCC's role in telecommunications mergers).

62 The SEC's implementation of its insider-trading prohibition would be another excellent example. Over the course of decades, the SEC has relied on legislative rules (for example, Rule 10b-5, 17 CFR § 240.10b-5 (2004) (rule against insider trading), Rule 14e-3, 17 CFR § 240.14e-3 (2004) (rule against trading on insider information in conjunction with tender offers)), administrative enforcement (for example, *In the Matter of Cady, Roberts and Co*, 40 SEC 907, 907 (1961) (deciding a case of first impression regarding trading on nonpublic dividend information), *In the Matters of Investors Management Co, Inc*, 44 SEC 633, 634–35 (1971) (deciding a case involving trading on nonpublic earnings reports)), judicial enforcement (for example, *Securities and Exchange Commission v Texas Gulf Sulphur Co*, 401 F2d 833, 839–42 (2d Cir 1968) (litigating a case based on trading of material, nonpublic information), *United States v O'Hagan*, 521 US 642, 647 (1997) (litigating a case based on

tion laws make a certain number of visas available to aliens who enter the United States to establish a new commercial enterprise.[63] The "immigrant investor" must invest a substantial amount of capital in an enterprise that will create jobs.[64] In 1997, following a sharp upswing in the number of applicants for such visas, the INS conducted an investigation and concluded that the program was being abused. According to the INS, as a result of creative financing arrangements, many immigrant investors were not committing sufficient capital to the new commercial enterprises. Though the agency had approved some visas with just such financing arrangements, the agency concluded that these arrangements violated the law and its regulations.[65] To remedy this problem, the INS adjusted—or, clarified—its criteria for granting the visas.[66] Generally speaking, the INS's newly articulated criteria were aimed at ensuring that investors contribute more cash up front.

In implementing this change, the INS had a number of choices. It could have amended its underlying regulation, making clear that certain kinds of financing arrangements were not permitted. It could have brought a single case to establish the new criteria. It also could have issued an interpretive rule, providing further elaboration of the regulation. It did not rely solely on any of those options. Instead, it articulated its new standards (originally in a memo signed by the general counsel), placed all applications on hold, and then applied the standards in four individual visa applications that it designated as "precedent decisions."[67] Under INS regulations, precedent decisions are designed to "serve as precedents in all proceedings involving the same issue(s).... [T]hey are binding on all Service employees in the administration of the Act."[68]

II. JUDICIAL REACTION TO AGENCY CHOICE OF POLICYMAKING FORM: THE *CHENERY* PRINCIPLE

That agencies can and do choose among distinct policymaking forms to implement their policy goals is interesting in itself.[69] But the judicial re-

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trading of misappropriated material, nonpublic information)), and many releases.

63 8 USC § 1153(b)(5) (2000).

64 For a full description of the requirements, see the regulations promulgated by the INS (now, U.S. Citizenship and Immigration Services) to implement the provision, 8 CFR § 204.6 (2004).

65 See Memorandum of the General Counsel, *Sections 203(b)(5) (EB-5) and 216A of the Immigration and Nationality Act*, Dec 19, 1997, reprinted in Interpreter Releases 332–33 (Mar 9, 1998) (concluding that several financial arrangements were not proper ways of obtaining a visa).

66 Id at 343 ("[T]he actions to be taken based on this memorandum would not result from a reassessment of current Service policy, but would directly derive from existing statutory and regulatory law.").

67 The four precedent decisions are *In re Ho*, 22 I & N Dec 206 (BIA 1998); *In re Hsiung*, 22 I & N Dec 201 (BIA 1998); *In re Izummi*, 22 I & N Dec 169 (BIA1998); and *In re Soffici*, 22 I & N Dec 158 (BIA 1998).

68 8 CFR § 103.3(c) (2004).

69 There is an important, if now dated, literature focusing on agency choices between adjudica-

action to this phenomenon makes it even more so. As I will develop below, with a few exceptions, an agency will not have to explain to a court why it chose a particular policymaking form.[70] This freedom, it is worth

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tion and rulemaking that develops a normative take on the choice between those two policymaking tools. Authors debated the relative merits of rulemaking and adjudication as policymaking tools and attempted to identify when an agency should pursue its goals through one or the other. See, for example, Ralph F. Fuchs, *Development and Diversification in Administrative Rule Making*, 72 Nw U L Rev 83, 93–96 (1977); Robinson, 118 U Pa L Rev at 513–35 (cited in note 5); Shapiro, 78 Harv L Rev at 921–26 (cited in note 48). See also Peter L. Strauss, *Rules, Adjudication, 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, 1253–54 (1974) (discussing the advantages of adjudication); Warren E. Baker, *Policy by Rule or* Ad Hoc *Approach—Which Should It Be?*, 22 L & Contemp Probs 658, 671 (1957) (concluding that rulemaking should be preferred over ad hoc decisionmaking). To say that there was a debate, however, implies more diversity of opinion than can be found in that literature. Although Glen Robinson's 1970 article is an exception, see Robinson, 118 U Pa L Rev at 513–28 (indicating that the author was indifferent between the choice of adjudication and rulemaking), the drift of these articles was fairly uniform: agencies should use rulemaking more often than they did. See, for example, Pierce, 1 *Administrative Law* § 6.9 at 378 (cited in note 13); Shapiro, 78 Harv L Rev at 972. The NLRB provided a prime example. Its failure to rely on rulemaking as a policymaking tool was universally lamented. See Merton C. Bernstein, *The NLRB's Adjudication–Rule Making Dilemma under the Administrative Procedure Act*, 79 Yale L J 571 (1970); Peck, 70 Yale L J 729 (cited in note 48).

Some of Colin Diver's work in the early 1980s focused on the distinct question of when a rule or a standard was the ideal form of an administrative command. Diver's ambition was to identify the optimal *precision* of agency commands. See Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 Yale L J 65, 66 (1983) (describing his ambition as creating a "standard for standards"). The law and economics literature on the choice between rules and standards also seeks to answer the question that Diver tackled. See Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules*, 11 J L, Econ, & Org 150 (1995). There is no necessary connection between choice of form and the rule/standard distinction. An agency could use a legislative rule to announce either a rule or a standard.

[70] While the argument is not developed here, this feature of administrative law doctrine may undermine a key claim of the "McNollgast" thesis about agency procedures. That thesis is that Congress controls agencies (and thereby assures that the rents extracted in the legislative arena are delivered) through the identification of procedures that agencies must use to create policy. See Matthew D. McCubbins, Roger G. Noll, and Barry R. Weingast ("McNollgast"), *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 Va L Rev 431 (1989); Matthew D. McCubbins, Roger G. Noll, and Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J L, Econ, & Org 243 (1987). Others have pointed out difficulties with the thesis. See, for example, Steven P. Croley, *Public Interested Regulation*, 28 Fla St U L Rev 7, 31–49 (2000) (arguing that "administrative decisionmaking procedures actually foster agency autonomy and independence from the legislature"); Glen O. Robinson, *Commentary on "Administrative Arrangements and the Political Control of Agencies": Political Uses of Structure and Process*, 75 Va L Rev 483, 484–85 (1980) (noting that, where the enacting coalition could not come to agreement on the substance of the agency's policy choice, controlling the agency's choice by procedure or structure seems unlikely; that the McNollgast theory does not easily account for procedural forms that are available to agencies; and finally that the theory ignores the role courts play). See also David B. Spence and Frank Cross, *A Public Choice Case for the Administrative State*, 89 Georgetown L J 97, 135–36 (2000) (noting that lack of statutory specificity undermines the theory of tight congressional control); David B. Spence, *Administrative Law and Agency Policy-making: Rethinking the Positive Theory of Political Control*, 14 Yale J Reg 407, 430–32 (1997) (discussing the failure of presidents to control agencies even when agency heads were chosen based on ideological grounds). The critique of the McNollgast theory arising from this Article would be that procedure is actually a poor mechanism of congressional or executive control given that agencies can freely choose among their procedural tools. Some of the forms might not be useful tools of congressional control, and, in any event,

emphasizing, does not mean that the agency is free to *design* its policymaking tools. The features of the forms are fixed by statute and judicial interpretation, and an agency must adhere to the basic features of whatever form it has selected. But, so long as it does so, it is usually free to choose its policymaking form without the threat that a court will ask it to explain itself. This judicial stance is out of step with the remainder of the law of judicial review of agency action. I will evaluate the possible reasons for the shape of this doctrine and dismiss each of them as unpersuasive. Finally, I will offer an alternative explanation for this otherwise puzzling judicial reaction to agency choice of procedure: because the judiciary has indirect opportunities to shape the consequences of an agency's choice of form, it need not directly evaluate the choice of form in any given case.

A. The *Chenery* Principle and (Non)Review of Agency Choice of Form

1. Orthodox doctrine.

The core of the principle that an agency is free to choose its policymaking form was established long ago and is limited to the specific context of the choice between rulemaking and adjudication. The 1947 case that is now treated as the fountainhead of this doctrine is the second of two cases titled *SEC v Chenery Corp*[71] (*Chenery II*). The question in both *Chenery* cases was the permissibility of an SEC policy prohibiting officers, directors, and controlling stockholders of holding companies from purchasing preferred stock during the course of a reorganization, during which that stock would be converted into common stock in the new company. Prior to considering a reorganization plan by the Federal Water Service Corporation, the SEC had no general rule prohibiting such trades by management. Arguing that preexisting equitable principles prohibited such trades, however, the SEC refused to approve Federal's reorganization plan, which called for preferred stock purchased by the management during the reorganization period to be converted into common stock in the new company.[72] In the first *Chenery* case, the Supreme Court refused to affirm the order based on the reasoning the Commission offered.[73] On remand, the SEC adopted the same order but provided different justifications for it. The D.C. Circuit then reversed the Commission's action, holding, in essence, that the SEC could not adopt its policy in the course of an adjudication, where the SEC's new view would be retroactively applied. The SEC's action was invalid, according to the court, because it had "prescribed no fixed standards of conduct which would ban the stock pur-

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they will vary in how useful they will be in this regard.

71 332 US 194 (1947).

72 See *SEC v Chenery Corp*, 318 US 80, 84–86 (1943) (*Chenery I*).

73 Id at 87–90.

chases in question, nor promulgated before or since any rule applicable thereto."[74]

In *Chenery II*, the Supreme Court reversed the D.C. Circuit and upheld the SEC's action.[75] According to the Court, the SEC's new justifications—basically, arguments about the meaning of the statute—for its bar on management trading during a reorganization were adequate. The Court also held that the SEC's requirement could be applied for the first time in the context of an individual adjudication "regardless of whether those standards previously had been spelled out in a general rule or regulation."[76] While the Court observed that an agency should rely on prospective rules wherever possible, it warned that a "rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise."[77] According to the Court, an agency had to retain the ability to proceed on a case-by-case basis because unexpected problems may arise, the agency may not have sufficient experience to generate a general rule, or the problem the agency was addressing may be specialized or varying so as not to justify a general approach to the problem.[78] After discussing these reasons why an agency might need to proceed on a case-by-case basis, the Court observed, in subsequently oft-quoted language: "[T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency."[79]

Though the subsequent doctrinal history did not unfold this way, *Chenery II* might actually have become the anchor for a doctrine that closely examined an agency's choice of form. The Court expressed a preference for legislative rules and identified the circumstances that would make case-by-case development of policy appropriate—inexperience,

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74 *Chenery Corp v SEC*, 154 F2d 6, 11 (DC Cir 1946).

75 332 US at 209.

76 Id at 201. The Court admitted that the retroactive effect of a rule announced in adjudication could sometimes be unacceptable, but this was not such a case:

> [S]uch retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.

Id at 203.

77 Id at 202.

78 Id at 202–03.

79 Id at 203. The Court cited *Columbia Broadcasting System v United States*, 316 US 407 (1942), as support for this proposition. There, the Court observed:

> Of course, the Commission was at liberty to follow a wholly different procedure. Instead of proclaiming general regulations applicable to all licenses, in advance of any specific contest over a license, it might have awaited such a contest to declare that the policy which these regulations embody represents its concept of public interest.

Id at 421.

complexity, and unforeseen circumstance. If the Supreme Court and lower courts had focused on that aspect of the case, courts would permit agencies to choose administrative adjudication only where those reasons were present, but otherwise require agencies to proceed by rule. In 1969, a splintered opinion affirming an NLRB order seemed to suggest that a doctrine policing agency choice of procedure might be on the horizon.[80] In fact, between 1969 and 1974 some lower courts reversed agency adjudications and required agencies to issue legislative rules instead.[81] Finally, in *NLRB v Bell Aerospace Co*,[82] a case that ultimately reaffirmed the *Chenery* principle, the Court indicated that "there may be situations

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[80] Some members of the Supreme Court cast doubt on the *Chenery II* dicta in *NLRB v Wyman-Gordon*, 394 US 759 (1969). There, the question was the validity of an NLRB order requiring the Wyman-Gordon Company to furnish a union with a list of names and addresses of company employees eligible to vote in a union election. The NLRB had first decided that such a list must be provided in union elections in an earlier NLRB case called *Excelsior Underwear, Inc*, 156 NLRB 1236 (1966). However, in adopting the requirement in that case, the NLRB had applied it prospectively only. The NLRB then sought to apply the *Excelsior* requirement to the union election held at Wyman-Gordon. In a splintered opinion, the Court upheld the NLRB's order. Justice Fortas, writing for four justices, stated that the original *Excelsior* rule was invalid because, given that it was general and prospectively applied, it was the exercise of "quasi-legislative" power and therefore could only be adopted through legislative rulemaking (requiring notice-and-comment proceedings) and not in the course of an adjudication. *Wyman-Gordon*, 394 US at 765. Nonetheless, Justice Fortas upheld the NLRB order because—independent of any valid, preexisting NLRB precedent—the NLRB could "unquestionably" require Wyman-Gordon to furnish the list of employees in the course of the NLRB's adjudication of an individual case. Id at 766. Justice Black, writing for three Justices, also upheld the NLRB's order, but sharply disagreed that the underlying *Excelsior* rule was improper. Id at 769–75 (Black concurring). The NLRB had followed all the requirements of adjudication in *Excelsior* and, as long as that was so, the NLRB was free to do what Justice Black argued it did in *Excelsior*: adopt a general, prospective policy that grew out of the case adjudicated. Id at 770–74. The plurality, according to Justice Black, undermined the principle that it was primarily up to the agency to decide whether to proceed by rulemaking or adjudication, a principle Justice Black took to be established by *Chenery II*, the National Labor Relations Act (NLRA), and the APA. Id at 772–75.

Whatever doubt *Wyman-Gordon* cast on *Chenery II* was eliminated in *NLRB v Bell Aerospace Co*, 416 US 267 (1974). There, the Court considered the permissibility of an NLRB ruling that certain employees (buyers in a procurement department of an aerospace products company) were covered by the NLRA. The Court rejected the NLRB's reading of the NLRA and remanded the case to the board for a determination of the case applying the legal standard the Court had announced. Id at 291. The Court also squarely held that, on remand, the NLRB was free to determine that the buyers were covered by the NLRA in the course of an adjudication. Id at 294–95. The Second Circuit had held that a determination that the employees were covered by the Act could be made only through a legislative rulemaking because it would be contrary to prior rulings and would be a general rule designed to fit all appropriate cases. The Supreme Court reversed that holding, strongly reaffirming the principle—albeit in dicta—established in *Chenery II*. See id at 290–92.

[81] See *NLRB v Coca-Cola Bottling Co*, 472 F2d 140, 142 (9th Cir 1972) (per curiam) (encouraging, but not requiring, the NLRB to hear more evidence since circumstances had changed); *Bell Aerospace Co v NLRB*, 475 F2d 485, 496 (2d Cir 1973) (Friendly) (concluding that rulemaking was necessary in this instance and adjudication was improper), revd, 416 US 267 (1974). See Robinson, 118 U Pa L Rev at 509 (cited in note 5) (suggesting that agency freedom to choose between rulemaking and adjudication, as endorsed in *Chenery II*, may have been changed by *Wyman-Gordon*).

[82] 416 US 267 (1974).

where . . . reliance on adjudication would amount to an abuse of discretion."[83]

Despite these signals suggesting serious, judicially enforced constraints on an agency's choice of procedure, the doctrine has evolved to emphasize the breadth of an agency's discretion to choose between rulemaking and adjudication. Supreme Court precedent is now clearly read to hold that an agency can proceed by adjudication even in circumstances that might, based on the *Chenery II* discussion, call for the promulgation of a legislative rule—that is, even if the problem is foreseeable, general, and the agency has a clear sense of the policy it would like to adopt.[84] The agency's choice of procedure is not, in doctrinal terms, "unreviewable."[85] Under *Bell Aerospace*, the choice can be reviewed for "abuse of discretion," and a few lower courts have invalidated an agency's reliance on adjudication instead of rulemaking.[86] They do so, however, in very limited contexts—where the agency is departing from a previously established rule and the retroactive application of the new rule would be especially burdensome[87]—and the most far-reaching cases are outliers that are difficult to square with Supreme Court instructions.[88] A leading administrative law treatise describes the state of the law this way:

> The Court has not even suggested that a court can constrain an agency's choice between rulemaking and adjudication in any opinion since *Bell Aerospace*. Nor has it suggested any content that might be given its vague reference to "abuse of discretion" as a po-

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83 Id at 294.

84 See id at 292–94 (offering reinterpretations of *Chenery II* and *Wyman-Gordon*).

85 See 5 USC § 701(a) (stating that judicial review is not available where "statutes preclude judicial review" or "agency action is committed to agency discretion by law"); *Heckler v Chaney*, 470 US 821, 837–38 (1985) (holding that an FDA decision not to exercise enforcement authority is presumptively unreviewable under the APA). See also Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 Minn L Rev 689 (1990).

86 The cases are discussed in William D. Araiza, *Agency Adjudication, the Importance of Facts, and the Limitations of Labels*, 57 Wash & Lee L Rev 351, 365–76 (2000) (analyzing circuit court cases that hold an agency's reliance on adjudication to be an "abuse of discretion" under *Bell Aerospace*; identifying three reasons why courts sometimes invalidate an agency's choice to adjudicate: (1) the functional inappropriateness of adjudication to the question at hand; (2) unfairness due to the retroactive effect of the adjudication; and (3) a previous indication by the agency that it would resolve a question through rulemaking). The most important cases are *First Bancorporation v Board of Governors of the Federal Reserve System*, 728 F2d 434, 437–38 (10th Cir 1984) (holding that the Board of Governors of the Federal Reserve abused its discretion by adopting a policy with general applicability in the course of adjudication); *Matzke v Block*, 732 F2d 799, 802 (10th Cir 1984) (holding that the Secretary of Agriculture must implement a debt relief statute by regulations); *Curry v Block*, 738 F2d 1556, 1564 (11th Cir 1984) (same); *Ford Motor Co v FTC*, 673 F2d 1008, 1010 (9th Cir 1981) (holding that the FTC abused its discretion when it used adjudication rather than rulemaking to adopt a new rule with widespread applicability); and *Patel v Immigration and Naturalization Service*, 638 F2d 1199, 1204 (9th Cir 1980) (holding that the Board of Immigration Appeals abused its discretion when it applied new requirements for investor visas in the course of an adjudicatory proceeding).

87 See, for example, *Patel*, 638 F2d at 1205.

88 Compare *First Bancorporation*, 728 F2d at 438, with *Bell Aerospace*, 416 US at 267.

> tential basis for reversing an agency's decision to rely on adjudication as a means of announcing a "rule." [Court decisions on the subject] must be taken as a flat rejection of any judicial attempt to constrain agencies from developing "rules" through the adjudicatory process.[89]

In short, if an agency statutorily authorized to proceed by rulemaking and adjudication wishes to pursue a policy, it is up to that agency to decide whether it will issue a rule or rely on administrative adjudication.

This doctrine has some limits worth noting. As should be obvious already, the principle only operates with respect to the range of policymaking tools available; if Congress has dictated that an agency implement a statutory provision only through a specified policymaking form, as it sometimes does, the agency must use that policymaking tool. Another constraint on an agency's choice of procedure is the Constitution, which can sometimes require the agency to proceed by adjudication. If an agency action will deprive an individual of life, liberty, or property, the requirements of procedural due process may compel the agency to hold a face-to-face administrative hearing before, or after, the deprivation.[90] While important, this constitutional constraint operates in limited contexts. In the broad run of federal regulation, the Due Process Clause does not require an adjudicatory hearing.[91] Finally, an agency might also be required to engage in rulemaking or adjudication if it previously has stated that it would use one form or the other to decide a particular question.[92]

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89 Pierce, 1 *Administrative Law* § 6.9 at 382 (cited in note 13).

90 See *Mathews v Eldridge*, 424 US 319, 335 (1976) (outlining a balancing test to determine what type of process is due before the deprivation); *Goldberg v Kelly*, 397 US 254, 262–63 (1970) (indicating that pre-deprivation due process is required when a person may be forced to suffer "grievous loss"). There are some lower court cases, now moribund, that required agencies to promulgate rules based on the Due Process Clause. See *White v Roughton*, 530 F2d 750, 753–54 (7th Cir 1976):

> Defendant . . . has the responsibility to administer the [general assistance] program to ensure the fair and consistent application of eligibility requirements. Fair and consistent application of such requirements requires that Roughton establish written standards and regulations. . . . [D]etermin[ing] eligibility based upon [the defendant's] unwritten personal standards . . . is clearly violative of due process.

See *Holmes v New York City Housing Authority*, 398 F2d 262, 265 (2d Cir 1968) ("[D]ue process requires that selection among [housing] applicants be made in accordance with 'ascertainable standards.'"); *Baker-Chaput v Cammett*, 406 F Supp 1134, 1140 (D NH 1976) ("[T]he establishment of written, objective, and ascertainable standards [for a state's general welfare program] is an elementary and intrinsic part of due process."). See also Pierce, 1 *Administrative Law* § 6.9 at 385–87 (discussing cases).

91 The basic distinction between those cases where a face-to-face hearing might be required and those where it will not comes from two cases decided early in this century. See *Londoner v City and County of Denver*, 210 US 373, 386 (1908) (holding that a face-to-face hearing was required when a city raised the tax assessment on a few property owners); *Bi-Metallic Investment Co v State Board of Equalization*, 239 US 441, 445–46 (1915) (holding that no individualized hearings were required when a state agency revalued all taxable property in a jurisdiction).

92 This is one way to understand the otherwise perplexing *Morton v Ruiz*, 415 US 199 (1974). In *Ruiz*, the Court held that the Bureau of Indian Affairs (BIA) could not establish through adjudi-

Thus, there are exceptions to the principle that an agency is generally free to choose between rulemaking and adjudication, but they do not dramatically diminish the scope of the basic principle: a court will generally not tell an agency that it should have engaged in rulemaking instead of adjudication, or vice versa, because the choice between them is up to the agency.

2. *Chenery* as a broader principle.

The classic *Chenery* choice is limited to the context where the agency is choosing between rulemaking and administrative adjudication. Even limited to that context, the principle is worthy of attention. But the principle actually operates more broadly than this. While the broader principle is not explicitly recognized, an agency is generally free to choose among *all* of its available policymaking forms and, as long as the agency respects the elements of the form it has chosen, its choice of preferred form will not be directly evaluated by courts.

It is difficult to document the claim that the *Chenery* principle operates with respect to all of the agency's available policymaking forms. That appears to be the assumption of agencies, those interested in agency activity, and the courts, but it is an implicit one. The shape of administrative practice, however, confirms this understanding. Many agencies regularly employ a mix of policymaking tools on a given issue—sometimes promulgating or amending a rule, sometimes bringing an enforcement action, and sometimes issuing a guidance document.[93] No interested party seems to think that challenging an agency's choice of policymaking form is a winning strategy, nor do agencies feel obligated to explain or defend their choices of form. There is much grumbling, for instance, about the FCC's failure to adopt general standards to guide its individual merger determi-

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cation an eligibility rule for a government assistance program. In the course of deciding individual cases, BIA had established that Native Americans were eligible for the program only if they lived on a reservation. BIA had never published the rule in the Federal Register or the Code of Federal Regulations (CFR), though it was available in BIA offices. The Court reversed the BIA when it tried to apply this rule to an individual applicant for assistance benefits. It observed: "No matter how rational or consistent with congressional intent a particular decision might be, the determination of eligibility cannot be made on an *ad hoc* basis by the dispenser of the funds." Id at 232. Taken seriously, this broad language would cast doubt on the holding of *Bell Aerospace*. *Ruiz* has not, however, been read to undermine that case. See Fuchs, 72 Nw U L Rev at 102 (cited in note 69) (noting that *Ruiz* should not be taken to preclude agencies from using adjudication to create policy); Pierce, 1 *Administrative Law* § 6.9 at 382–85 (cited in note 13) (noting that the broad interpretation of *Ruiz* is not the law). Two other ways of understanding the case narrow its reach: (1) the BIA, in failing to publish the eligibility rule in the Federal Register and CFR, failed to follow its own procedures; (2) the trust obligation of the United States to Native Americans imposes a heightened obligation on the BIA to make its eligibility requirements known.

[93] See, for example, note 62 (discussing a hypothetical SEC implementation of an insider-trading prohibition) and text accompanying notes 62–68 (discussing an INS revision of one visa program). See also note 50 (noting FERC's reliance on both adjudication and rulemaking as a general matter).

nations,[94] but apparently none of the grumblers views it as a plausible legal claim to charge that the agency has "abused its discretion" through its failure to adopt general enforcement guidelines.

As also noted earlier, agencies' preferred policymaking tools have evolved since the adoption of the APA in 1946. This evolution has involved not only movements between rulemaking and adjudication, but also, in the present period, what appears to be an increased reliance on guidance documents.[95] This changing shape of agency practice is possible only to the extent that agencies are generally free to choose their preferred policymaking forms. Just as in the classic *Chenery* situation, if an agency chooses to issue a policy statement, a court will not take seriously the claim that the agency should have instead promulgated a legislative rule.

3. Choice, not design, of procedural form.

While an agency can choose from a range of distinct policymaking forms, the features of the forms—the procedure that must be followed, the legal effect of the action, and the availability and scope of review that will be operative in court—are fixed not by the agency but by statute and judge-made law.[96] The process and the legal effect of each form establish a floor below which the agency cannot fall. If an agency attempts to go below that floor, a court will step in and enforce the features of the form the court reads the agency to have chosen. Stated this way, the point seems perfectly obvious. Of course an agency cannot issue a press release and then treat the release as if it had the legal effect of a legislative rule.

Such clarity can be obscured by the context in which the question arises.[97] The boundary between a legislative and an interpretive rule provides a good example of this confusion.[98] A legislative rule requires a no-

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94 See for example Barkow and Huber, 2000 U Chi Legal F at 42–48 (cited in note 56).

95 See Todd D. Rakoff, *The Choice between Formal and Informal Modes of Administrative Regulation*, 52 Admin L Rev 159, 168 (2000) (noting a striking increase in the number of FDA guidance documents issued in recent years). See also notes 41–46 and accompanying text.

96 Agency regulations can also be an important source of law that dictate some features of the forms. For instance, although statutes or case law would not otherwise require it, an agency might require that certain guidance documents be the subject of public comment. See Food and Drug Administration, *Good Guidance Practices*, 21 CFR § 10.115(f)(1) (2004) (asking for public input on guidance documents). If an agency so binds itself, it will be required to adhere to its own regulations. This source of law is of course subordinate to the statutory and judge-made law that fixes the features of the policymaking forms.

97 For an excellent discussion of several illustrative cases, see generally William Funk, *When Is a "Rule" a Regulation? Marking a Clear Line between Nonlegislative Rules and Legislative Rules*, 54 Admin L Rev 659 (2002) (advocating for the use of a simple notice-and-comment test for determining whether a rule is legislative).

98 There are legions of examples of courts requiring agencies to adhere to the elements of whatever form it has chosen. For instance, in *Bowen v Georgetown University Hospital*, 488 US 204, 213 (1988), the Court held that rulemaking generally could sometimes have retroactive effect, but that, in the specific case, the Department of Health and Human Services was not given the authority

tice-and-comment process and, if valid, creates a legal norm that is legally binding on parties that come within its reach. An interpretive rule is the mirror image of that: no notice-and-comment process is required but the rule is an interpretation of an already-existing legal norm and therefore does not have legal effects on private parties. In the typical litigated case, an agency will have issued a statement (without conducting notice-and-comment rulemaking) about what parties should do to comply with a particular statutory or regulatory obligation. The party to whom that rule of conduct potentially applies challenges its validity on the ground that it is a procedurally defective legislative rule because it was not issued after a notice-and-comment process. The agency's reply is that, in fact, the announcement is merely an interpretive rule and therefore need not have gone through notice-and-comment process; it does not, the agency will admit, create a legal obligation of its own force, but it is an interpretation that the court should embrace.[99] Courts are then required to answer a difficult question: whether the agency pronouncement is an interpretive rule or a (procedurally defective) legislative rule.[100] This body of law is a muddle, but it does nothing to diminish the principle that the agency can select its preferred policymaking tool. Instead, it underscores an important aspect of the court-agency relationship with respect to choice of procedure, one that is the centerpiece of this Article's positive explanation for the vitality of the *Chenery* principle: agencies may select their form, but they may not design it. Other sources of law—especially judge-made law—control the features of the forms.

B. The Puzzle of the *Chenery* Principle

If agencies were generally free to make important decisions without the prospect of serious judicial evaluation, the judicial reaction described here would be unremarkable. But agencies are not, to understate the point dramatically, free to act without the threat of judicial examination. The details of the modern doctrine of judicial review of agency action defy easy summary, but the broad outlines are unmistakable. After shedding many of the traditional restrictions on the judicial examination of

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to make retroactive rules. For a discussion of the general question of retroactivity in rulemaking, see William V. Luneburg, *Retroactivity and Administrative Rulemaking*, 1991 Duke L J 106.

[99] See, for example, *Warder v Shalala*, 149 F3d 73, 78–79, 82–83 (1st Cir 1998) (involving a plaintiff's challenge to an agency rule on the grounds that the rule was procedurally invalid because notice-and-comment procedures were required, while the agency maintained that the rule was interpretive and therefore notice-and-comment procedures were not necessary); *General Motors Corp v Ruckleshaus*, 742 F2d 1561, 1563 (DC Cir 1984) (same).

[100] See, for example, *Syncor International Corp v Shalala*, 127 F3d 90, 93–94 (DC Cir 1997) (discussing how to distinguish substantive and interpretive rules); *Takhar v Kessler*, 76 F3d 995, 1002 (9th Cir 1996) (concluding that the "Compliance Police Guides" were interpretive rules); *United States v Piper*, 35 F3d 611, 619 (1st Cir 1994) (concluding that the "note" in question was an interpretative aid).

executive action, courts now examine a large slice of agency decisionmaking, sometimes rather intensely. The dominant narrative of modern administrative law casts judges as key players who help tame, and thereby legitimate, the exercise of administrative power. The animating normative objectives of this review are easy to state, at least at a general level. Judges closely evaluate administrative action in order to guard against arbitrary or corrupt uses of state power.

Under current doctrine, judicial review of agency action is "presumptively" available.[101] This is a far-reaching presumption. There are, to be sure, some agency actions that are not subject to judicial review, that are, as an administrative law specialist would say, "unreviewable." Congress can, subject to constitutional constraints, statutorily preclude review of agency action.[102] And under the APA, actions that are "committed to agency discretion" are also not reviewable.[103] The categories of unreviewable action, while important, have not swallowed—indeed have not come close to swallowing—the basic presumption of reviewability.[104] Final agency actions challenged at the appropriate time by a suitably injured litigant can usually be reviewed by the courts.

In conducting review of agency action, courts will assess whether the agency's result is within the scope of its lawful authority. If the FDA requires drug manufacturers to follow certain good manufacturing practices at their plants, it must have statutory authority to impose those requirements. But a court will do much more than that. It will also make certain that the agency adhered to the relevant procedural requirements set forth in the APA and other applicable statutes. And it will review, under varying standards of review, the agency's factual findings, legal conclusions, and exercises of discretion. This examination is conducted pursuant to statute, but the judicial gloss on the statutes—especially the APA—is as (if not more) important as the underlying requirements imposed by Congress.

The agency's choice among its policymaking tools is most aptly characterized, as the Court did in *Chenery* and *Bell Aerospace*, as an "exercise

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101 See *Citizens to Preserve Overton Park, Inc v Volpe*, 401 US 402, 410 (1971) (stating that agency action is subject to judicial review unless there is clear congressional intent to preclude judicial review); *Abbott Laboratories v Gardner*, 387 US 136, 140–42 (1967) (same).

102 5 USC § 701(a)(1) (stating that judicial review under the APA is not available if "statutes preclude judicial review").

103 5 USC § 701(a)(2); *Overton Park*, 401 US at 410.

104 See *Heckler*, 470 US at 830 (holding that agency action is unreviewable under the APA where "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion"). Unreviewable action is a relatively small category to begin with and the lower courts have narrowed it even further. As Ron Levin has demonstrated, for instance, the lower courts have exploited the possible exceptions to *Heckler*. See Levin, 74 Minn L Rev at 756–61 (cited in note 85). Among other important developments, the D.C. Circuit has held that *Heckler*'s nonreviewability rule does not apply to an agency's refusal to institute rulemaking proceedings. See *American Horse Protection Association, Inc v Lyng*, 812 F2d 1 (DC Cir 1987).

of discretion." In other words, there is not usually statutory law that requires an agency to use one policymaking tool over another.[105] As described above, black letter doctrine holds that an agency's choice among its policymaking tools can theoretically be an "abuse of discretion."[106] This standard has been articulated in case law without attention to its statutory source, but its natural home is the APA's scope-of-review provision that instructs a court to hold unlawful and set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[107] In practice, though, the category of choices of procedure that are abuses of discretion is nearly empty. The consequences of this legal rule are evident on the ground: an agency does not feel obligated to explain, much less defend, why it chose a particular policymaking tool; and the agency is not asked to do so by parties or courts. An agency's choice of procedure is not in doctrinal terms "unreviewable," but it might as well be.

This virtual nonreview of agency choice of form is out of step with judicial examination of other agency exercises of discretion.[108] Other discretionary choices are reviewed under the same test that provides the statutory home for *Bell Aerospace* and *Chenery*, that is, the APA's arbitrary-and-capricious test. That test, as one would predict, is a big tent. It is context dependent. It varies in intensity depending on the nature of the agency action and on the credibility of the agency's decision. The greater the magnitude of the agency action, the more intense the judicial examination is likely to be. A court will review an agency's choices made in a high-stakes legislative rulemaking more intensely than it will a routine agency decision of less magnitude.[109] Given the context-dependent nature of this test, no general statement can capture what that review will be like in a given circumstance.

Nonetheless, while the intensity of review depends heavily on context, a basic requirement that the agency supply a reasoned explanation for its discretionary choice does not. At a minimum, the agency will be

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105 One effort has been made to argue that the APA itself, by defining "rule" and "order," supplies law that constrains the choice between rulemaking and adjudication. See William T. Mayton, *The Legislative Resolution of the Rulemaking versus Adjudication Problem in Agency Lawmaking*, 1980 Duke L J 103.

106 See notes 84–89 and accompanying text.

107 5 USC § 706(2)(A).

108 Lisa Bressman also argues that *Chenery II* is in tension with other features of judicial review of agency action. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 NYU L Rev 461, 535–36 (2003).

109 Compare *Motor Vehicle Manufacturers Association v State Farm Mutual Insurance Co*, 463 US 29, 46–57 (1983) (conducting a searching analysis of an agency decision to revoke a passive-restraint rule), with *NLRB v Curtin Matheson Scientific, Inc*, 494 US 775, 777, 786–96 (1990) (deferring to the NLRB's practice of deciding on a case-by-case basis whether strike replacement workers support or oppose the union as empirically rational and consistent with the relevant statute).

required to provide an explanation for its choice.[110] The agency's rationale must be sufficient to persuade the court that the agency exercised its discretion in a *reasoned* way—that the agency considered the important alternatives and settled on its course of action for sensible reasons.[111]

There is simply no such reason-giving requirement imposed on an agency when it selects its choice of form. Herein lies the starkest and most basic contrast between choice-of-form decisions and other exercises of discretion by agencies. Under present doctrine and the rules that have grown up in the shadow of that doctrine, an agency is free to choose from among its available policymaking forms and it need not offer an explanation for why it chose one or another. It can make that choice for a good reason, a bad reason, or no detectable reason.[112]

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110 See, for example, Ronald M. Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report*, 38 Admin L Rev 239, 253–64 (1986); Lisa Schultz Bressman, *Review of the Exercise of Discretion, 3d Draft* (ABA 2001), online at http://www.abanet.org/adminlaw/apa/restatement8-2001.doc (visited July 23, 2004). See also Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 Fordham L Rev 17, 21–26 (2001) (discussing the need for administrative agencies to give reasons for their decisions).

111 Jerry Mashaw elegantly captures the point. See Mashaw, 70 Fordham L Rev at 26 (cited in note 110):

> The path of American administrative law has been the path of the progressive submission of power to reason. . . . Administrators must not only give reasons, they must give complete ones. We insist that they be authentic by demanding that they be both transparent and contemporaneous. "Expertise" is no longer a protective shield to be worn like a sacred vestment. It is a competence to be demonstrated by cogent reason-giving.

112 As observed earlier, there is a rich if now largely dated literature about agency choice of form. See note 69. That literature did not focus heavily on the judicial doctrine governing agency choice of procedure. To the extent that the normative judgment animating many of those works was a preference for more agency rulemaking, they might be read to be implicitly critical of what we now know to be the doctrine. But that literature did not criticize or attempt to explain the judicial reaction to an agency's choice of procedure. David Shapiro's article, for instance, identifies several obstacles to the greater use of legislative rulemaking by agencies. See Shapiro, 78 Harv L Rev at 972 (cited in note 48):

> The failure to make full use of the rulemaking power is attributable in part to administrative inertia and reluctance to take a clear stand, in part to the result of conceptual distinctions expressed or implicit in judicial decisions that may militate against resort to regulations, and in part to the failure of Congress to vest the agencies with adequate prescriptive rulemaking authority.

These impediments would have to be remedied before an agency could choose freely between adjudication and rulemaking. Understandably, whether a court should police that choice was a question on which Shapiro did not really focus. Glen Robinson seemed to take as a given that courts would not police agencies' choices of procedure. See Robinson, 118 U Pa L Rev at 508 (cited in note 5) ("Despite widespread dissatisfaction with the manner in which most agencies have performed (or not performed) their policy-making functions, it has been accepted that the choice of procedures is nevertheless one primarily for the agency itself to make."). For his part, Peter Strauss (writing in 1974) both described and endorsed the *Chenery* principle. See Strauss, 74 Colum L Rev at 1232 (cited in note 69):

> The Court was appropriately skeptical of the value of rigid requirements or judicial supervision in this sphere; while not denying the possibility that an agency's discretion to allocate policy formulation between rulemaking and adjudication could be abused, the Court was not disposed to find such abuse where Judge Friendly for the Second Circuit Court of Appeals had found it.

C. Attempting (and Failing) to Explain the *Chenery* Principle

What explains this judicial response to agency choices of form? The failure to ask for and evaluate reasons might make sense if these choices were somehow qualitatively different from other exercises of discretion that are reviewed by the courts. But, as I argue below, this explanation fails.

1. Agency expertise.

One explanation for the judicial treatment is that agencies possess a unique advantage over reviewing courts in making this choice. To put the idea in traditional administrative law terms, one might say that agency "expertise" requires judicial deference to the agency's choice of procedure. As Richard Pierce explains: "An agency with expertise in a particular area of regulation has an enormous advantage over a reviewing court in making this complicated judgment."[113] Or one could put this idea in terms of information asymmetry. Agencies have access to unobservable and difficult-to-verify information that reviewing courts do not, and access to that information means that the agency alone should choose the regulatory tool.[114] Whether one characterizes it as expertise or informational advantage, the argument is that an agency's familiarity with the (complicated or difficult-to-observe) issues and problems in a particular field of regulation specially equips it to decide which policymaking tool should be used.

In its simple form, this explanation proves too much. If expertise is the reason that courts refrain from examining an agency's choice of procedure, then courts should take a hands-off approach to most agency decisions. But they don't. All sorts of discretionary agency judgments are reviewed by courts: the Forest Service's decision that a road should be located in one place and not another, the National Highway Traffic Safety Administration's decision to revoke a passive restraint requirement, and

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Instead, the object of that literature was normative; writers sought to identify the circumstances under which an agency should rely on rulemaking or adjudication (the bottom line being that agencies should rely on rulemaking much more often). This focus is not particularly surprising given the context in which the literature appeared. First, the present version of the choice-of-form doctrine did not yet exist. Moreover, some features of administrative law that now make *Chenery* look especially puzzling—in particular, the presumptively available review of agency exercises of discretion under the arbitrary-and-capricious test of the APA—were still in the midst of developing. Finally, the focus on the choice between rulemaking and adjudication was, given then-existing controversies about agency practices, appropriate. In today's terms, however, those parameters are too narrow. Today, the choice between rulemaking and adjudication is not the only significant choice-of-form decision; a dominant agency choice today is between legislative rulemaking (promulgating or, more likely, amending a rule) and some form of guidance document. The implications of the *Chenery* issues have thus expanded.

[113] Pierce, 1 *Administrative Law* § 6.9 at 377 (cited in note 13).

[114] See McNollgast, 3 J L, Econ, & Org at 247 (cited in note 70) (noting that bureaucrats become experts in their own policy areas).

the NLRB's decision not to adopt a presumption that replacement workers hired during a strike oppose union representation are all reviewable. If courts were serious about deferring to agencies' superior expertise, then examination of the processes by which agencies have come to—and the reasons for—all of these decisions would not be necessary.

This explanation may not make sense of the shape of administrative law doctrine today, but it does provide a persuasive origin story for the *Chenery* principle. *Chenery II* was decided in 1947, just after the adoption of the APA. By 1947, the heady confidence in expert administration exhibited by New Dealers had diminished somewhat, but the underlying conviction that expert agencies would act in the public interest remained.[115] That confidence suggested that courts should take a deferential approach to agency decisionmaking because agencies were better equipped than any other actor—including the courts—to devise appropriate governmental responses to complex social problems.[116] The job of the courts was simply to free administrators to do their jobs. From this perspective, *Chenery II* can be seen as an illustration of the broader judicial attitude of the period.

The *Chenery* principle only becomes difficult to explain once the regime of which it was a part is whittled away. That whittling began in the mid-1960s, when judicial evaluation of agency decisionmaking became increasingly available and skeptical. As one might expect, these changes had their roots in shifting attitudes about administrative agencies. By the mid-1960s, the earlier vision of the expert administrator regulating in the public interest began to seem both wrong and naïve—a supposedly impartial administrator may suffer from tunnel vision, have insufficient respect for rule-of-law values, or, even worse, be in the pocket of the industry he regulates. We do not yet have one dominant account of *why* this shift oc-

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115 See Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945–1970*, 53 Vand L Rev 1389, 1400–05 (2000) (noting the initial enthusiasm for interest group pluralism); Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 Chi Kent L Rev 1039, 1048–50 (1997) (describing the public interest theory of administrative action as embracing the concepts of rationalism and comparative institutional advantage). See also Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 Stan L Rev 1189, 1266 (1986) ("[T]he post-*Schechter* era ushered in a period of unprecedented goodwill towards the regulatory system. With the final legitimation of the New Deal came ... faith in the ability of experts to develop effective solutions to the economic disruptions created by the market system."), citing *Schechter Poultry Corp v United States*, 295 US 495 (1935); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv L Rev 1669, 1682 (1975) ("It was simply assumed that agency zeal in advancing the 'unalloyed, nonpolitical, long-run interest of the public' would be assured by the professionalism of administrators or by political mechanisms through which the administrative branch would 'eternally refresh its vigor from the stream of democratic desires.'") (internal citations omitted).

116 See Schiller, 53 Vand L Rev at 1399–1410 (cited in note 115) (explaining the relationship between interest group pluralism and limitations on judicial review); Merrill, 72 Chi Kent L Rev at 1049–50 (cited in note 115) (pointing out that, even under the APA, public interest theorists envisioned a minimal role for courts in policing administrative decisions).

curred, but there is no doubt that judicial doctrine shifted. As a result of doctrinal changes, a broader set of agency decisions could be challenged by a larger group of actors, and the requirements that the agency had to satisfy when its actions were challenged became increasingly rigorous.[117] Judicial evaluation of agency rulemaking—increasingly the policymaking form of choice in this period—likewise took shape in a way that cast judges as meticulous evaluators of agency decisionmaking.[118] Courts demanded that an agency's final choice be well supported and well defended on the record before the agency.[119] This so-called "hard look" review developed mainly in the lower courts, especially the D.C. Circuit, but the Supreme Court ultimately endorsed it in 1983.[120]

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117 Among other developments, the Supreme Court loosened standing doctrine to permit a broader range of parties to challenge agency action, see *Association of Data Processing Service Organizations, Inc v Camp*, 397 US 150, 154 (1970); declared the presumption that agency action would be subject to judicial examination, see *Overton Park*, 401 US at 410; and permitted agency rules to be challenged at the so-called "pre-enforcement" stage (that is, before the rule was applied against an individual actor), see *Abbott Laboratories*, 387 US at 140.

118 Courts broadly construed the requirements of notice of an agency's intended course of action, see *United States v Nova Scotia Food Products Corp*, 568 F2d 240, 251–52 (2d Cir 1977) (requiring inclusion in the notice of the scientific data upon which the proposed rule is based), and narrowly construed the exceptions that would permit the agency to avoid notice-and-comment rulemaking requirements, see Ellen R. Jordan, *The Administrative Procedure Act's "Good Cause" Exemption*, 36 Admin L Rev 113, 120 (1984).

119 See *National Tire Dealers & Retreaders Association, Inc v Brinegar*, 491 F2d 31, 33 (DC Cir 1974) (vacating in part an agency's action because "[t]he administrative record does not adequately demonstrate that [the agency's] requirements are practicable, nor does it establish any more than a remote relation between the requirements" and the statute's purpose); *Automotive Parts & Accessories Association v Boyd*, 407 F2d 330, 342 (DC Cir 1968) (upholding a regulation issued through rulemaking where "the Administrator, on the basis of the submissions made to him, could reasonably determine that the benefits [of the regulation] far outweighed any disadvantages").

120 *State Farm*, 463 US at 46. There is evidence of an interesting disjunction between the views of lower court judges and the Supreme Court with respect to judicial examination of agency choices of form. To at least some lower court judges, the expanding availability and intensity of review of agency decisionmaking applied to agency choices of procedure. As hard look review was developing in the lower courts, those judges began to express concerns about choices of procedure. For example, while he did not actually refuse to enforce the NLRB's orders, Judge Friendly repeatedly expressed frustration with the agency's failure to engage in rulemaking. See *H&F Binch Co Plant of Native Laces and Textile Division of Indian Head v NLRB*, 456 F2d 357, 365 (2d Cir 1972) ("It is indeed surprising that the Board should so consistently have refused to utilize its rule-making power, or to develop techniques of prospective ruling and overruling save in one notable instance where it overdid this."); *NLRB v Majestic Weaving Co*, 355 F2d 854, 860 (2d Cir 1966) (stating that "[a]lthough courts have not generally balked at allowing administrative agencies to apply a rule newly fashioned in an adjudicative proceeding to past conduct," an agency's refusal to impose such regulations through rulemaking increasingly "raises judicial hackles"). In these opinions, Judge Friendly read *Chenery II* as a "pointed hint" to agencies that they should rely on rulemaking more often rather than a declaration of a broad agency authority to choose its procedural form.

In 1972, the D.C. Circuit, in an opinion written by Judge McGowan, denied enforcement of part of an NLRB order that mandated a back-pay remedy for workers on economic strike who had been replaced. At the time of the actions in the case, the company's approach was consistent with NLRB policy, but thereafter the Board's rule changed and, in the case before the court, the Board attempted to apply the new rule in an adjudicatory proceeding. The court held that the Board could not enforce the new rule retroactively. *Retail, Wholesaler and Department Store Union, AFL-CIO v NLRB*, 466

There has been a retreat from some of these developments.[121] The Court has made it more difficult to bring actions against agencies. It has tightened up standing doctrine,[122] identified certain classes of agency decisions (such as failures to enforce) that are presumptively unreviewable,[123] and articulated the now-prominent *Chevron* doctrine,[124] which, on its face anyway, requires a hefty dose of deference to agency interpretations of ambiguous statutes. But, if one is attempting to measure the availability and intensity of judicial examination of agency action, some of these developments—including the shifting rules on standing and the real measure of deference that *Chevron* represents in practice—are difficult to sort out. More to the point, while there has been retreat, it is far from wholesale. The hands-off approach to agency decisionmaking is mostly a memory—save, that is, for agency choices of policymaking tools. Courts' continuing refusal to review that category of agency decisions seems best understood as a now-anomalous holdover from a previous era.

2. Choice of form does not matter.

Another reason why courts might decline to evaluate an agency's rationale for choosing a policymaking tool is that, to the courts, the agency's choice does not matter. On this view, the substance (or outcome) of the agency policy, not the package in which it is wrapped, is critical. Given that the courts can theoretically evaluate the validity of the agency's choice regardless of the policymaking form it selects, perhaps the form is of little moment. Thus, if the FTC intends to prohibit a particular commercial practice as deceptive, the argument would be that the courts' interest is in seeing whether that prohibition is within the scope of the FTC's authority under the governing statute. A court could at some point perform that review whether the FTC chooses to employ adjudication,

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F2d 380, 391 (DC Cir 1972) ("[This] is a case where the Board had confronted the problem before, had established an explicit standard of conduct, and now attempts to punish conformity to that standard under a new standard subsequently adopted.") (internal citations omitted).

In 1973, the Second Circuit, in an opinion by Judge Friendly, also denied enforcement of a Board order, holding that if the Board wanted to articulate a new policy governing the coverage of the NLRA, one that would fit a wide range of circumstances and that represented a departure from its past practice, it would have to adopt general rules. *Bell Aerospace*, 475 F2d at 495 ("[W]hile the Board was not precluded from reversing itself . . . in light of the justified contrary belief the Board had engendered, it could not do this in the manner that was done here. This is an appropriate case in which to give effect to [*Chenery II*]."). That judgment was reversed by the Supreme Court in 1974 in an opinion that strongly reaffirmed the *Chenery II* principle as it has evolved. See *Bell Aerospace*, 416 US at 294 ("The views expressed in *Chenery II* . . . make plain 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.").

121 See Merrill, 72 Chi Kent L Rev at 1074–83 (cited in note 115); Werhan, 1996 U Ill L Rev at 447 (cited in note 47).

122 See *Lujan v Defenders of Wildlife*, 504 US 555, 562 (1992).

123 See *Heckler*, 470 US at 831.

124 See *Chevron*, 467 US at 845.

rulemaking, judicial enforcement, or a guidance document to achieve its goals. To be sure, the timing of the judicial assessment and the context in which it arises may vary, but the court's power of review itself is not dependent on the tool that the agency chooses.

This explanation does not ring true. For one, the policymaking forms are not best described as "wrapping." The form of the regulatory action dictates the legal scope of the action, the procedural rights of the parties, and the availability and nature of judicial review. Characterizing the choice between a legislative rule and a guidance document as mere "packaging" is to ignore an important difference in legal effect: the legislative rule operates like a statute, while the interpretive rule is only an opinion (albeit that of an important actor). One can, of course, overstate the practical significance of such distinctions. Some parties might conform their behavior to the agency opinion even though it is not the equivalent of a statute. But this realist point can be overstated. Agencies continue to rely on legislative rules; parties continue to take an interest in whether agencies will rely on rules. Both provide evidence that it matters whether the agency is exercising its lawmaking power.

The power-of-review explanation is also not persuasive because it misapprehends the character of judicial examination of agency action. It is not the case that the main object of that review is to determine whether the agency's result can be squared with its statutory authority. Given the broad delegations that many agencies operate under, agencies can usually reach a wide range of outcomes under the governing statute, and while a court does ask whether an agency's result is within its statutory authority, that is not all it asks. An important, perhaps even dominant, task of a reviewing court is to evaluate the way the agency reached its result—the procedure that the agency followed, the options that it considered, and the reasoning supporting its decision. It would not comport with the rest of judicial review of agency action if courts hesitated to evaluate agency choice-of-form decisions because courts could review, no matter the form, the outcome that an agency reached.

3. Lack of standards.

Another possible explanation for the judicial reluctance to evaluate agency choice of form is that courts have no standard against which to evaluate such decisions. Pierce again explains, in the context of rulemaking and adjudication: "[C]ourts are poorly situated to distinguish between circumstances appropriate for rulemaking and circumstances appropriate for the gradual evolution of rules."[125] This general argument can take two distinct forms.

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[125] Pierce, 1 *Administrative Law* § 6.9 at 376 (cited in note 13).

a) Choice of form as analogous to other agency decisions where courts resist review. Courts might lack a way to evaluate an agency's choice of procedure because that decision is qualitatively different from other agency decisions that courts do review. This could be because there are no judicially administrable standards for assessing the choice or because judicial examination would be counterproductive. To flesh out this argument, one might try to analogize choice-of-form decisions to the few other categories of agency actions that courts refuse, or are highly reluctant, to review. Two potentially analogous cases are discretionary resource allocation decisions and decisions involving enforcement discretion. It is quite difficult to obtain judicial review of either agency choice.[126] If, for example, a party attempted to challenge the FDA's discretionary decision to pour large sums of money into the development of food labeling regulations, thereby leaving less money for enforcement of food safety regulations, that party would have a hard time getting heard in the courts. And a party would face a probably insurmountable hurdle if she attempted to get a court to review an agency's decision not to pursue a particular enforcement action, or to challenge its pattern of enforcement.

It is not easy to pin down exactly why courts resist reviewing these categories of decisions. Under the APA and the judicial gloss on it, agency decisions are unreviewable if they are "committed to agency discretion by law,"[127] and this is so where, as the Supreme Court has said, the "statute [is] drawn in such broad terms that in a given case there is no law to apply" to assess whether the agency made the correct choice.[128] But application of these concepts does not effectively distinguish those agency decisions that are unreviewable from those that are reviewable.[129] Among other things, courts do often review discretionary agency choices in cases where there is little "law to apply" from a governing statute.[130] They do this by applying a reasoned decisionmaking standard, assessing whether the agency considered relevant alternatives, and evaluating whether the agency reasoned to its conclusion in a logical way. Such a review could similarly be conducted in a case challenging a resource allocation decision or a failure to enforce the statute. A court *could* require the agency to provide an explanation for why it made its resource allocation or en-

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126 See *Heckler*, 470 US at 832 (stating that an agency's decision not to initiate enforcement proceedings is "presumptively unreviewable"); *Lincoln v Vigil*, 508 US 182, 193 (1993) (stating that agency allocation of funds from a lump sum appropriation is "committed to agency discretion by law").

127 5 USC § 701(a)(2).

128 *Overton Park*, 401 US at 410, quoting S Rep No 752, 79th Cong, 1st Sess 26 (1945).

129 See Levin, 74 Minn L Rev at 704–10 (cited in note 85) (arguing that the no-law-to-apply principle is of limited usefulness in determining which decisions are reviewable); *Webster v Doe*, 486 US 592, 608 (1988) (Scalia dissenting) ("The 'no law to apply' test can account for the nonreviewability of certain issues, but falls far short of explaining the full scope of the areas from which the courts are excluded.").

130 See Levin, 74 Minn L Rev at 752–76 (cited in note 85) (collecting cases).

forcement discretion decision and then assess whether the reasons offered were reasonable in light of the available options. But they are resistant to doing so.[131]

Whatever the reason for judicial reluctance to review these categories of decisions,[132] the most important point is that choice-of-form decisions are *not* analogous to enforcement discretion or resource allocation decisions. Choosing a policymaking tool is a discrete, affirmative act (distinguishable, as such, from a refusal to initiate an enforcement action). While some forms of decisionmaking are more expensive than others, the agency's choice is not systematically about resource allocations within broader programs. And evaluating choice of form would not seem to involve courts in the enterprise that they view as problematic, that is, openly second-guessing agency priority-setting. Because the agency has already decided to address some problem, the court is not being asked to evaluate the wisdom of the regulatory priority. Instead it is being asked to decide whether the agency's reasons for picking its preferred form are sensible. Described in this way, it seems particularly strange that courts should shrink from the task. The question is presented as devoid of substantive content; assessing whether an agency is adhering to proper procedures is a role that courts are usually willing, even eager, to take on.[133]

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131 The most likely explanation for why courts resist reviewing these categories of cases is that they view them to involve unique tradeoffs of priorities within a broader regulatory program. This sort of priority-setting, courts seem to be saying, must be done by administrators without the threat of second-guessing by the courts. The intuition seems to be that only an administrator can take the broad view necessary to set agency priorities. Judicial second-guessing would necessarily focus on individual decisions (money diverted from here to there, enforcement against this individual and not that one), and such a narrow window on the broader questions that administrators face would distort the judicial evaluation of administrative choices and uniquely interfere with agency priority-setting. The intuition that I am attributing to judges recalls Lon Fuller's description of "polycentric" problems, which, he argued, were generally unsuitable for adjudication. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv L Rev 353, 394–404 (1978). A polycentric problem is one that has multiple moving parts, and the resolution of one issue has implications for all of the others. See id at 394–96 (providing examples). In this context, judges view administrators' decisions regarding resource allocations as polycentric; review of a single moving part of the broader decision is unwise.

132 The "polycentric problem" theory mentioned in note 131 may put words to the judicial intuition reflected in these cases, but it does not offer a satisfying way to distinguish decisions that courts will review from those that they are reluctant to review. It rests on a false premise that review of resource allocation or enforcement decisions *uniquely* involves the second-guessing of agency priority-setting. But review of almost any agency decision requires courts to evaluate (and thus potentially to distort) the priority-setting of the agency. For instance, Jerry Mashaw and David Harfst have persuasively demonstrated that close judicial supervision of National Highway Traffic Safety Administration (NHTSA) standard-setting prompted the agency to alter its regulatory strategy. In part because of judicial second-guessing of its vehicle safety standards, the NHTSA shifted to a strategy of recalls, all but abandoning its standard-setting efforts. See Mashaw and Harfst, *Auto Safety* at 147–71 (cited in note 17) (explaining the trend in judicial opinions and reasoning that prompted the NHTSA's move away from standards and toward recalls). If fear of distorting or disrupting agency priority-setting explains judicial reluctance to review enforcement discretion or discretionary resource allocations, that concern should dictate judicial retreat in other areas as well.

133 Hard look doctrine provides one example in which courts frequently protest that they are evaluating not the wisdom of an agency's decision but rather the process—including the logic and

b) No normative baseline for assessing choice-of-form decisions. A second version of the courts-have-no-standards argument is quite different. It is that courts have no standard to assess agency selection of policymaking form because no one has such standards. On this view, when presented with a particular regulatory problem, there is no metric that could tell us whether that problem should be addressed through case-by-case development of policy, general prospective rules, or guidance. Perhaps it is not surprising that courts are reluctant to ask agencies to offer explanations that would justify their choices of policymaking tools. Without some criteria to consult, courts would not know a good reason from a bad one.

It is worth pausing to notice that this foundational question arises in an especially interesting way in the context of administrative agencies. Similar questions do arise in other contexts. For example, there is a set of doctrinal questions that can be understood to ask whether adjudication or legislation is the appropriate way to address some social problem. The reach of remedial decrees in structural reform litigation illustrates. Debate over that phenomenon has many moving parts, one of which is whether adjudication is a legitimate or wise way to address systemic problems.[134] Strands of traditional legal theory are likewise focused on identify-

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reasonableness of the agency's explanations—by which it reached its substantive conclusion. See, for example, *United States v Allegheny-Ludlum Steel*, 406 US 742, 749 (1972) ("[W]e do not inquire into the wisdom of the regulations that the Commission promulgates, and we inquire into the soundness of the reasoning by which the Commission reaches its conclusions only to ascertain that the latter are rationally supported."); Mashaw and Harfst, *Auto Safety* at 97 (cited in note 17) ("[W]hether an agency's rule is deemed arbitrary and capricious may turn as much on the agency's apparent reasoning process as on the good sense of the final judgment under review."). The doctrine of procedural due process provides another example. The Supreme Court has divided that inquiry into two questions. Is there an entitlement? If so, has proper process been followed in depriving a party of that entitlement? See, for example, *Cleveland Board of Education v Loudermill*, 470 US 532, 541 (1985) ("The categories of substance and procedure are distinct.... While the legislature may elect not to confer a property interest ... it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."). The first question is answered not by the Constitution but by other sources of positive law—state law, common law, contracts. See Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va L Rev 885, 892 (2000) ("The Court stated [in *Board of Regents of State Colleges v Roth*, 408 US 564 (1972),] that property interests are not created by the Constitution, but rather are created (and their dimensions defined by) nonconstitutional sources such as state law."). The second question is decided by the courts and is not to be defined by statutes or contracts between the citizen and the state. See *Loudermill*, 470 US at 541 ("In short, once it is determined that the Due Process Clause applies, 'the question remains what process is due.' The answer to that question is not to be found in the ... statute."), quoting *Morrissey v Brewer*, 408 US 471, 481 (1972).

[134] See Malcolm M. Feeley and Edward L. Rubin, *Judicial Policymaking and the Modern State: How the Courts Reformed America's Prisons* 298 (Cambridge 1998) ("[T]here are two ... specific objections to the implementation aspect of the prison [reform] cases: first, that judges cannot be effective when they stray so far from their established expertise and, second, that they violate the separation-of-powers principle when they do so."); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv L Rev 1281, 1304 (1976) ("One response to the positive law model of litigation would be to condemn it as an intolerable hodge-podge of legislative, administrative, executive, and judicial functions addressed to problems that are by their nature inappropriate for judicial resolu-

ing whether legislation or adjudication might be the superior model to address a given social problem. The most prominent example is the legal process school as developed and illustrated by Hart and Sacks. That school of thought asks the familiar "institutional competence" question: which governmental institution—and hence, in part, which model of governmental action—is best suited to address a given social problem?[135]

These questions echo the question addressed here—namely, is there a superior policymaking form for addressing a given problem? But the question has a distinctive cast in the administrative agency context. The critic of sweeping judicial decrees in institutional reform litigation might wish that she could force the problem to be addressed, if at all, by the legislature. The legal process adherent might wish that she could engineer the world such that only the most "institutionally competent" bodies would tackle a given social problem. But no such selection of the pathways of legal process is usually available; there is no entity that sits atop national institutions capable of centrally controlling which problem goes where.

But the administrative agency *is* just such an entity. It is charged with addressing social problems within a specified arena, it is often able to act through a variety of policymaking forms, *and* it is a centralized decisionmaker that can often control the form through which a given problem will be addressed. The administrative agency *can* select the pathways of legal process. The fact that, even in that context, we do not have rules (from the courts or, for that matter, from the legislature) dictating when an agency should choose one form or another is startling.

Do courts, then, refrain from evaluating agency choices of form because they have no normative guides to assist in that evaluation? While there will no doubt be difficult cases, it cannot be right that we have *no* criteria that suggest when adjudication, rulemaking, enforcement action, or guidance would be the best way of making policy. A rich literature has attempted to supply just such guideposts in the context of adjudication and rulemaking.[136] There are at least some cases where it seems likely that widely shared intuitions—and certainly judicial intuitions—would favor one policymaking tool over others. Imagine that an agency is considering prohibiting conduct that is both well entrenched and not context-specific. In such a case, most would prefer that the agency make policy by promulgating a legislative rule rather than by picking a sacrificial lamb and making policy through adjudication.

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tion."); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 Colum L Rev 857, 873–89 (1999) (using structural reform cases as examples of "remedial equilibration," the process of defining rights by reference to appropriate remedies).

135 See Henry M. Hart, Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 4 (Foundation 1994) (William N. Eskridge, Jr. and Philip P. Frickey, eds).

136 See note 69.

This explanation has a further difficulty. There is the obvious point that the agency is in the same boat as the court; it does not have access to a normative framework to guide its choice. If both agencies and courts lack a normative guide, it does not follow that the agency should make its decision without judicial examination of the reasons for that choice. And the lack of a normative theory does not mean that *any* reason for picking a policymaking form is acceptable. We may not know exactly when an agency should choose one form or another, but we know that the agency should not choose a form in order to punish a particular actor. As in other contexts where courts review agency decisions even though we think agency actors have greater expertise than the courts, the requirement could at least be that the agency articulate an intelligible justification for its choice. In other words, we need not have a thick theory of choice of form in order to set down some guidelines that courts could use to evaluate agency choices.

D. Explaining *Chenery*

So far, this Part has assumed that a court would evaluate an agency's choice of procedure by entertaining a party's challenge to the choice directly and evaluating whether the agency had a satisfying explanation for its selection. This assumption is plausible because the standard judicial response to exercises of agency discretion is to demand and evaluate the agency's reasons for taking the challenged action. But, as this Part explores, direct evaluation of an agency's explanation for its choice of form is not the only way a court might react to an agency's choice.

Recall that agencies are permitted to choose among their available policymaking forms but they have a limited ability to customize them. An agency can choose its form, that is, but it does not choose what follows from that choice. What follows—the process the agency must follow; the legal effect of its action; and whether, when, and under what standard the action can be challenged in court—are fixed by other sources of law. And because the relevant sources of law are open-ended, judges have played an important, indeed crucial, role in shaping that law.

The courts' ability to shape the consequences of agencies' choices of procedure provides a positive explanation for the otherwise puzzling disjunction between the judicial reaction to most agency exercises of discretion on the one hand, and judicial reaction to agency choices of form on the other. This Part argues that courts have not demanded and evaluated agency explanations for choices of form because they have not needed to do so in order to react to and, thereby, review them. This argument proceeds in two parts. Part II.D.1 documents the considerable discretion that courts have to shape important elements of the policymaking forms. Part II.D.2 demonstrates in both abstract and concrete ways how this discre-

tion can be, and has been, wielded by judges to respond to agency choices of form.

1. Judicial influence over the elements of the policymaking forms.

If the implications of choosing a policymaking tool were dictated by sources of law immune to judicial interpretation (statutes that conferred little interpretative leeway, executive orders, and internal agency procedures), then courts would have little ability to adjust those consequences. But that is not the case. Such sources all play some role in laying out the features of the policymaking forms, yet courts nonetheless exercise a surprising degree of control over the consequences of an agency's choice of form. While there is some disagreement as to particulars, that judges are the architects of much of the doctrine set forth below is widely accepted,[137] albeit sometimes bemoaned.[138]

Judges shape elements of the policymaking tools in distinct ways. Courts have the ability to respond case-by-case to particular agency choices. They often apply classic standards that permit them to rein in an agency that has made a poor decision in a single case. But those same standards also permit courts to adopt rules that structure the policymaking forms or the choice among the forms in a way that affects a wide range of regulatory decisions beyond the case at hand. Courts have adopted, for example, concrete rules about the meaning of the arbitrary-and-capricious standard, rules that have systematic effects.

a) "Scope" (or intensity) of review. The most obvious opportunity courts have to determine the content of the form an agency chooses is in their interpretation of the standards against which the court will assess the challenged agency action—or, as an administrative lawyer would say, the "scope" of judicial review of agency action.

Courts have the opportunity to structure scope-of-review doctrine in two ways. First, they are often free to determine the real meaning of the standards themselves. Second, they sometimes have the ability to decide which of several standards will apply to a particular action. Some standards of review are found in statutes; others are best described as common law developments. Whatever the source, it is fair to say that the

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137 See, for example, Martin Shapiro, *APA: Past, Present, Future*, 72 Va L Rev 447, 462 (1986) ("[Courts have] invented a host of procedural requirements that turned rulemaking into a multiparty paper trial[,] imposed a rulemaking record requirement[, and] turned the agency from a legislative rulemaker into a party at its own proceedings.").

138 See Duffy, 77 Tex L Rev at 141 (cited in note 16) ("[J]udge-made doctrines [of administrative law] are inherently unstable."); id at 142 ("From their earliest decades, the federal courts have recognized that courts established pursuant to the federal Constitution are fundamentally different from state courts, and that 'the notion of federal common law was troubling.'"), quoting Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv L Rev 883, 887 (1986).

standards are open-ended enough to permit judicial creativity in their interpretation.[139]

Consider first the scope-of-review provisions rooted in statutes. Under the APA, an agency's exercise of discretion will be set aside if it is arbitrary and capricious,[140] and an agency's factual findings in a formal proceeding (usually an adjudication) will be assessed to see whether—based on the "whole record"[141]—they are supported by "substantial evidence."[142] The substantial evidence test, in conjunction with the "whole record" requirement, was intended to reverse what Congress perceived to be overly deferential judicial examination of agency factfinding.[143] There is little discussion of the intensity of the arbitrary-and-capricious test in the legislative history of the APA,[144] but most scholars believe that the enacting

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139 See Sidney A. Shapiro and Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 Duke L J 1051, 1064–68 (1995) (maintaining that the norms governing scope of review are indeterminate); id at 1069–72 (making a similar argument about the *Chevron* doctrine in that the choice between step one and step two is subject to the court's discretion). But see Richard J. Pierce, Jr., *Legislative Reform of Judicial Review of Agency Actions*, 44 Duke L J 1110, 1113–27 (1995) (disagreeing in some respects with Shapiro and Levy's characterizations of the indeterminacy of standards governing judicial review of agency action); Gordon G. Young, *Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged Demise and Actual Status of* Overton Park's *Requirement of Judicial Review "On the Record,"* 10 Admin L J Am U 179, 181 (1996) (describing how the conflict between "the desire for broad agency discretion and . . . a yearning for vigorous judicial review of agency action in order to preserve the 'rule of law' as traditionally understood . . . has led to conflicted and vague doctrinal formulations of the scope of judicial review of agency action").

140 5 USC § 706(2)(A).

141 5 USC § 706 ("In making . . . determinations [about the appropriate scope of review], the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.").

142 5 USC § 706(2)(E).

143 See U.S. Department of Justice, *Attorney General's Manual on the Administrative Procedure Act* 109, 110 (1947); *Universal Camera Corp v NLRB*, 340 US 474, 479–82 (1951) (recalling that "[p]rotests against 'shocking injustices' and intimations of judicial 'abdication' with which some courts granted enforcement of the Board's orders stimulated pressures for legislative relief from alleged administrative excesses," and that the "whole record" requirement "found its way into the statute books when Congress with unquestioning—we might even say uncritical—unanimity enacted the Administrative Procedure Act"); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw U L Rev 1557, 1652 (1996) ("[The whole record requirement] ensured that courts would not apply the deferential 'scintilla rule,' which required a court to uphold an agency decision if even a shred of evidence supported it.").

144 There is no discussion of the meaning of the arbitrary-and-capricious test in the House and Senate reports on the bill. The Senate Report makes reference to a 1941 Attorney General's report which contains very little discussion of the arbitrary-and-capricious standard; in summarizing the existing approaches to scope of review, that report focuses primarily on review of questions of law and fact. See Attorney General's Committee on Administrative Procedure, *Administrative Procedure in Government Agencies* 87–92 (GPO 1941). Finally, there is a very short discussion of the standard in the 1941 Attorney General's report, and that discussion is referenced in the House proceedings on the bill. See Proceedings in the House of Representatives May 24 and 25, 1946, and Proceedings in the Senate of the United States March 12 and May 27, 1946, reprinted in Administrative Procedure Act: Legislative History, S Doc 248, 79th Cong, 2d Sess 295, 408–14 (1946) (extension of remarks of Representative Hobbs), quoting Appendix to Attorney General's Statement Regarding Revised Committee Print of Oct 5, 1945.

Congress imagined that judicial review of discretionary agency action would not be intrusive, that it would bear some resemblance to the post-*Lochner* understanding of judicial review of ordinary social and economic legislation.[145] These statutory standards thus have some content; they are not entirely empty vessels.

But they are pretty close. They are classic standards, the meaning of which is determined in the course of application. Just as one would expect, judges have done a great deal to shape their everyday meaning.[146] This is especially true of the arbitrary-and-capricious test. It has proven to be, in the hands of judges interpreting it, remarkably malleable. This standard is open-ended enough to permit a judge to react to what she perceives to be agency overstepping in a particular instance. But courts have also interpreted the standard in ways that have general import. It is, most importantly, the home of the "reasoned decisionmaking" requirement discussed earlier.[147] An agency must satisfy the court that it has considered all pertinent dimensions of the matter before it and must explain its resolution of contested questions in a reasoned way. Those explanations must be based on the record before the agency; no "post hoc" justifications are acceptable.[148]

The substantial evidence test, with its companion the whole record requirement, has evolved much less dramatically, but it too has proven malleable. The legislative history of the APA reveals that at least some members of Congress viewed the scope-of-review provisions as a response to insufficiently rigorous judicial review of agency factfinding. The particular complaint expressed in Congress was that courts had upheld agency factual determinations if there was *any* evidence (even a "mere

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145 See Young, 10 Admin L J Am U at 210–11 (cited in note 139) ("The [arbitrary-and-capricious] standard was a weak one, calling for scrutiny resembling that applied to ordinary economic acts of Congress challenged for violating substantive due process."). See also Peter L. Strauss, et al, *Gellhorn and Byse's Administrative Law: Cases and Comments* 602 (Foundation 9th ed 1995) (citing *Pacific States Box & Basket Co v White*, 296 US 176 (1935), as an example of the resemblance between the original understanding of judicial review under the arbitrary-and-capricious standard and rational basis review of social and economic legislation).

146 In practice, for example, the test bears no resemblance to the rationality review of social and economic legislation under the Constitution; the Supreme Court made that clear in 1983. See *State Farm*, 463 US at 43 n 9:

> The Department of Transportation suggests that the arbitrary-and-capricious standard requires no more than the minimum rationality a statute must bear in order to withstand analysis under the Due Process Clause. We do not view as equivalent the presumption of constitutionality afforded legislation drafted by Congress and the presumption of regularity afforded an agency in fulfilling its statutory mandate.

147 See Schiller, 53 Admin L Rev at 1156 (cited in note 41) (pointing out that Judge Leventhal used the phrase "reasoned decision-making" in originating hard look review in *Greater Boston Television Corp v FCC*, 444 F2d 841 (DC Cir 1970)). See also notes 110–13 and accompanying text.

148 *State Farm*, 463 US at 50 ("The short—and sufficient—answer to petitioners' submission is that the courts may not accept appellate counsel's *post hoc* rationalizations for agency action."), citing, among other cases, *Chenery II*, 332 US at 196.

scintilla") in the record supporting the agency's conclusions, without regard to the evidence in the record that contradicted or cast doubt on the supporting evidence. Whether this was an accurate statement of judicial approaches prior to the adoption of the APA, the act was intended to put an end to any such practice, a "mood" that Justice Frankfurter recognized and described in *Universal Camera Corp v NLRB* in 1951.[149] This concrete objective, however, hardly transformed "substantial evidence" into an instruction with determinate meaning. Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,"[150] a formulation that inevitably leaves a great deal of leeway in the hands of the interpreter. This point may be too obvious for elaboration, but two developments underscore it. There has long been a debate in the courts and among scholars about whether the substantial evidence test is more or less skeptical of agency decisionmaking than the arbitrary-and-capricious test,[151] a debate that is only possible with indeterminate standards. Scholars have also identified a waxing and waning of the intensity of substantial evidence review, a development that, again, is only possible with a standard that permits different manifestations.[152]

The standard for judicial evaluation of agency interpretations of law—the *Chevron* doctrine—is even more clearly the product of judicial construction in the sense that it has no statutory home; it was fashioned in the first instance by the Supreme Court. Of course, a judicially crafted doctrine can be mighty determinate, but *Chevron* is not of that variety.

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149 340 US 474, 487 (1951). See also S Rep No 79-752, reprinted in S Doc 248, 79th Cong, 2d Sess at 216–17 (cited in note 16) (Report of the Senate Judiciary Committee) (emphasizing the importance of tightening the substantial evidence test); HR Rep No 79-1980, reprinted in S Doc 248, 79th Cong, 2d Sess at 279 (cited in note 16) (Report of the House Judiciary Committee) (same); Proceedings in the House of Representatives, reprinted in S Doc 248, 79th Cong, 2d Sess at 370, 375–76, 378, 386 (cited in note 144) (House Proceedings) (stating repeatedly that the new version of the test was intended to do away with the "mere scintilla" rule).

150 *Consolidated Edison Co v NLRB*, 305 US 197, 229 (1938).

151 See *American Paper Institute, Inc v American Electric Power Service Corp*, 461 US 402, 412 n 7 (1983) (holding that the arbitrary-and-capricious test is more lenient than the substantial evidence test); *Association of Data Processing Service Organizations v Board of Governors*, 745 F2d 677, 683 (DC Cir 1984) (holding that the arbitrary-and-capricious test is the same as the substantial evidence test as applied to findings of fact); Matthew J. McGrath, Note, *Convergence of the Substantial Evidence and Arbitrary and Capricious Standards of Review during Informal Rulemaking*, 54 Geo Wash L Rev 541, 553–63 (1986) (analyzing the convergence of the two tests and arguing that Congress should not treat the substantial evidence test as more rigorous than the arbitrary-and-capricious test).

152 Shapiro and Levy, 44 Duke L J at 1065 (cited in note 139) (explaining that the substantial evidence test has been applied with varying degrees of deference in different contexts). Some scholars point to the recent case of *Allentown Mack Sales & Service, Inc v NLRB*, 522 US 359 (1998), as illustrative of a new era of intense examination of agency factfinding. See Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 Wm & Mary L Rev 679, 695 (2002) ("Justice Scalia's majority opinion utilized the APA substantial evidence standard aggressively to challenge the NLRB decision .... Justice Breyer, in dissent, believed that this approach would 'weaken the [deferential] system for judicial review of administrative action.'"), quoting *Allentown Mack*, 522 US at 397 (Breyer dissenting).

Under *Chevron*, a court will uphold an agency's construction of an ambiguous provision of the statute that the agency administers as long as its interpretation is "reasonable" or "permissible."[153] Not only does *Chevron* not have a statutory home, it actually seems to conflict with the APA, which many read to require courts to evaluate agency interpretations of law under a de novo standard.[154] Whether there is a way around this difficulty is an open question.[155] But the difficulty itself highlights the larger point pressed here: courts have a large hand in determining the effective meaning of the scope-of-review doctrine. If they did not, it would be hard to imagine that they could have fashioned *Chevron*. As for the narrower point about the indeterminacy of *Chevron* itself, asking a judge to assess whether an interpretation is "reasonable" or "permissible" grants the judge a great deal of discretion.[156]

The application of the *Chevron* doctrine illustrates the other important way that courts influence scope-of-review doctrine. In addition to straightforwardly defining the operative meaning of terms like substantial evidence or arbitrary-and-capricious, courts are often able to decide which of several standards of review apply.

Squabbles over the internal workings of the *Chevron* doctrine illustrate the point. There are two "steps" to the *Chevron* test. Under step one, the court's job is to discern whether the statute is clear or ambiguous with respect to the question before the agency. If the statute is clear, then there is no question of "deference" to the agency. But if the court determines that the statute is ambiguous on the relevant point, then it goes to step two of the test, where it will sustain any "reasonable" or "permissible" interpretation of the statute.[157] To use familiar civil procedure vocabulary, step one is a "de novo" standard of review, and step two is something closer to "clearly erroneous." A common question in *Chevron* cases is whether the case is to be decided at step one or step two. But the decision as to whether a statute is "ambiguous" such that the court should proceed to step two is not governed by rules that all interpreters will apply in the

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153 467 US at 843–44.

154 See, for example, Duffy, 77 Tex L Rev at 198 (cited in note 16) ("The problem with the 'implicit delegation' view of *Chevron* is that it violates . . . the APA.").

155 Id at 180 ("The *Chevron* doctrine rests not on a fundamental rethinking of the judicial role, nor on a judicial assessment of good policy or institutional competence, but on a straightforward, de novo interpretation of agency 'necessary and proper' clauses."). See also Merrill and Watts, 116 Harv L Rev at 480–81 (cited in note 5) ("The need to attribute some intent to Congress . . . raises the question whether there is any background principle that courts can apply in a manner that is reasonably faithful to Congress's actual intent and that simultaneously resolves disputes over the nature of delegated authority in a reasonably predictable manner.").

156 See Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L J 969, 981–85 (1992) (arguing, based on an examination of Supreme Court decisions from 1981 to 1990, that *Chevron* is often ignored by the Supreme Court and that there is no relationship between application of the *Chevron* two-step analysis and greater deference to agency interpretations).

157 *Chevron*, 467 US at 861–66.

same way. Indeed, what the rules are or should be is a question that is in dispute.[158] Unsurprisingly, whether a statute is ambiguous on the relevant question, and hence whether step one or step two applies, routinely divides judges.[159] And where there is room for disagreement, there is room for the exercise of judicial discretion.

Courts can also adopt systematic rules that determine when one standard of review will apply rather than another. The Supreme Court's holding in *United States v Mead Corp*[160] is a perfect illustration; the Court in *Mead* held that the *Chevron* framework applies only if the agency's statutory interpretation is offered when it is acting "with the force of law," as agencies do when they engage in legislative rulemaking or adjudication.[161] Under *Mead*, when an agency is not acting with the force of law, a less deferential standard of review applies to the agency's interpretation.[162] *Mead* represents a relatively (though not completely) determinate rule as to when *Chevron* will apply.[163] This rule reduces the case-by-case flexibility to determine whether *Chevron* applies, but the enunciation of the rule itself structures scope-of-review doctrine systematically by telling all agencies that there is a link between the policymaking form chosen and the standard of review applied.

b) Process to be followed. A less obvious opportunity for judicial influence over policymaking tools lies in courts' ability to shape the process associated with each tool. Courts have less freedom here than they do

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158 This disagreement was evident in the Court soon after *Chevron* was decided. See, for example, *Immigration and Naturalization Service v Cardoza-Fonseca*, 480 US 421, 432–46, 452–54 (1987) (evidencing a disagreement between Justices Stevens and Scalia about the relevance of legislative history in determining whether a statute is clear or ambiguous).

159 See Merrill, 101 Yale L J at 1027 (cited in note 156), quoting Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin L Rev 363, 373 (1986):

> I seriously doubt whether it would ever be possible to decide all deference questions without being drawn into some type of contextual or multivariate inquiry.... "[T]here are too many different types of circumstances ... to allow 'proper' judicial attitudes about questions of law to be reduced to any single simple verbal formula."

160 533 US 218 (2001).

161 Id at 231. See also *Christensen v Harris County*, 529 US 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.").

162 See *Mead*, 533 US at 232–33 (holding that *Skidmore* deference applies to agency actions that do not warrant *Chevron*-style deference).

163 See *Motion Picture Association of America, Inc v FCC*, 309 F3d 796, 801 (DC Cir 2002) (holding that, under *Mead*, the agency did not act with the force of law and thus was not entitled to deference); *Krzalic v Republic Tile Co*, 314 F3d 875, 881 (7th Cir 2002) (citing *Mead* for the proposition that agencies must do more than merely announce new rules in order to be entitled to deference). But see Adrian Vermeule, Mead *in the Trenches*, 71 Geo Wash L Rev 347, 347 (2003) ("I suggest that the D.C. Circuit's day-to-day experience with *Mead* has been unfortunate, that its *Mead*-related work product is, in a nontrivial number of cases, flawed, [a development that is] traceable to the flaws, fallacies, and confusions of the *Mead* decision itself."); Jeffrey S. Lubbers, ed, *Developments in Administrative Law and Regulatory Practice 2002–2003* ch 6 at 106 (ABA 2004) ("In application, *Mead* continues to confound lower courts.").

in shaping the scope of review because the relevant statutes are less open-ended than the scope-of-review provisions just examined.[164] Moreover, unlike substantive standards of review, some important elements of the process that must be followed for a given policymaking form—for instance, whether agency action is subject to OMB review, or whether an agency needs to secure DOJ approval for an enforcement action—are resistant to judicial tinkering. And, by Supreme Court command, courts cannot impose procedural requirements beyond those required in the relevant statutes.[165]

It would be wrong, however, to gather from this that the procedures for each form are immune to judicial influence.[166] Courts have some leeway stemming from their authority to interpret statutory terms that are far from determinate. The APA, for example, requires agencies seeking to promulgate legislative rules to provide "general notice of proposed rulemaking" and to invite parties to comment on that proposal.[167] The terms of the statute suggest minimal notice,[168] but courts have required agencies to make parties aware of the options under consideration[169] and the data and arguments upon which those proposals are based so that the parties may have an adequate opportunity to comment.[170] The "concise general" statement of "basis and purpose"[171] that is to accompany the final rule has, in the hands of judges, turned out to be not at all concise; courts have re-

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164 The requirements for adjudication conducted on the record are remarkably detailed. See 5 USC §§ 554–57. By comparison, the procedures set forth for notice-and-comment rulemaking are skeletal, but, even so, the relevant provision specifies quite a bit: an agency (barring some exception) must provide notice of its intended course of conduct, invite comment, and publish its final regulation with a "concise statement of basis and purpose" before it takes effect. 5 USC § 553.

165 When the D.C. Circuit appeared to require a face-to-face hearing in the context of legislative rulemaking, the Supreme Court reversed, admonishing that courts could not require procedures in addition to those required by statutes. *Vermont Yankee Nuclear Power Corp v Natural Resources Defense Council*, 435 US 519, 548 (1978); Schiller, 53 Admin L Rev at 1177 (cited in note 41) ("The Supreme Court was furious. In a sharply worded opinion, it reversed the D.C. Circuit.... Chief Justice Rehnquist consigned Chief Judge Bazelon's jurisprudence to the waste bin. '[T]hat agencies should be free to fashion their own rules of procedure,' he held, was 'the very basic tenet of administrative law.'"), quoting *Vermont Yankee*, 435 US at 544.

166 As with scope of review, this influence might be exercised on a one-shot basis or in a way that has systematic effects, though the latter seems more common in this area.

167 5 USC § 553(b)–(c).

168 "The notice shall include—(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 USC § 553(b).

169 *Wagner Electric Corp v Volpe*, 466 F2d 1013, 1019–21 (3d Cir 1972) (holding a rule invalid because the proposed rule did not provide adequate notice of criteria that were ultimately adopted in the final rule).

170 *Nova Scotia Foods*, 568 F2d at 251 (holding that an agency must reveal research material that is the basis for its proposed regulation).

171 The statutory provision reads, in relevant part, "After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their general basis and purpose." 5 USC § 553(c).

quired that this statement articulate and defend the agency's policy choices in light of pertinent issues raised by commentators.[172] Courts have also narrowly interpreted the many exceptions to notice-and-comment requirements identified in the APA.[173] Even in the context of adjudication, where the statutes are much more detailed in setting forth the procedures that must be followed, the courts have still played an important role. The most important judicially crafted development obligates agencies to permit participation by a broader set of parties than the statutes appear to mandate.[174]

Aside from interpreting statutory terms in ways that shaped the procedures the agency must follow, courts have also developed doctrines that can operate to require agencies to follow more elaborate procedures than statutes would otherwise require. The most important of these is the doctrine that requires agencies to follow their own rules.[175] This doctrine con-

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[172] As Judge McGowan noted:

> [I]t is appropriate for us to . . . caution against an overly literal reading of the statutory terms "concise" and "general." . . . We do expect that, if the judicial review which Congress has thought it important to provide is to be meaningful, the "concise general statement of . . . basis and purpose" mandated by Section 4 will enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.

Automotive Parts & Accessories, 407 F2d at 338.

[173] See Jordan, 36 Admin L Rev at 120–52 (cited in note 118) (collecting cases).

[174] The seminal case is *Office of Communication of the United Church of Christ v FCC*, 359 F2d 994 (DC Cir 1966), which permitted consumers to intervene in a licensing proceeding. See also Stewart, 88 Harv L Rev at 1723 (cited in note 115) ("As a result of [the expansion of judicially recognized liberty and property interests], the number of persons with a legally protected stake in any agency decision has multiplied, and standing has been liberally granted."). There is, however, some evidence of retreat from broad third-party intervention rights. See *Envirocare of Utah, Inc v Nuclear Regulatory Commission*, 194 F3d 72, 78 (DC Cir 1999) (affirming the Nuclear Regulatory Commission's decision that a competitor did not have a right to intervene in a licensing proceeding); William S. Jordan III, Envirocare v. NRC *Increases Agency Discretion to Deny Administrative Intervention: Right Result—Wrong Reason*, 30 Envir L Rptr 10597, 10597 (2000) ("[T]he prospect of judicial deference to agency intervention decisions threatens to allow agencies to turn a deaf ear to views the agencies should have to consider, and thus to undermine the legitimacy of agency decisions.").

[175] See *Vitarelli v Seaton*, 359 US 535, 539 (1959) (holding that even though no law or regulation required the Secretary to give a reason for the dismissal of an employee, once he had decided to do so, "he was obligated to conform to the procedural standards he had formulated" to govern such dismissals); *Service v Dulles*, 354 US 363, 380 (1957) ("We gather . . . that the lower courts thought that the Secretary was powerless to bind himself by these Regulations. . . . We do not think this is so."); *Accardi v Shaughnessy*, 347 US 260, 267 (1954) ("In short, as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner."). But see *American Farm Lines v Black Ball Freight Service*, 397 US 532, 538–39 (1970) (finding that "[t]he [Interstate Commerce] Commission is entitled to a measure of discretion in administering its own procedural rules in such a manner as it deems necessary to resolve quickly and correctly urgent transportation problems" and noting that "[u]nlike some rules, the present ones are mere aids to the exercise of the agency's independent discretion"). See also Harold J. Krent, *Reviewing Agency Action for Inconsistency with Prior Rules and Regulations*, 72 Chi Kent L Rev 1187, 1207–12 (1997) (noting instances in which courts have reviewed agency actions for compliance with preexisting agency rules); *Clifford v Peña*, 77 F3d 1414, 1417 (DC Cir 1996) (holding no review of administrative nonenforcement); *Berkovitz v United States*, 486 US 531, 546 (1988) ("[I]f the Bureau's policy leaves no room for an official to exercise policy judgment in performing a given act, or if the act sim-

strains an agency's action when no other source of law would do so. For instance, under the *Chenery* principle, an agency does not have to proceed by rule to announce a policy judgment. But if an agency has stated that it will make a certain policy choice through legislative rulemaking, then courts will require it to do so.[176]

c) Legal effect. Perhaps surprisingly, courts sometimes have the opportunity to determine the legal effect of an agency's action. If the agency has promulgated a final legislative rule after notice-and-comment rulemaking or completed an adjudication, the legal effect of its action will be clear. But there are less clear cases that require courts to settle the legal effect of the agency's action.

In one set of cases, courts determine the legal effect of an agency's action by characterizing the action that the agency has taken. Lack of clarity about just what action the agency has taken is more commonplace than one might expect. Adjudicating the boundary between legislative and nonlegislative rules such as interpretive rules or general statements of policy has produced many such cases. As discussed earlier, in one common pattern, the agency claims that its announcement, made without providing notice and requesting comment, is a valid interpretive rule, whereas the challenging party argues that the announcement is an invalid legislative rule because it creates rather than interprets a norm and can thus be promulgated only after notice-and-comment procedures.[177] The court is then called upon to determine whether the agency announcement is an interpretive rule (and therefore procedurally valid) or a legislative rule (and therefore procedurally invalid).

The APA does not tell courts how to make this determination.[178] A legislative rule, of course, creates a norm, while an interpretive rule clarifies an existing norm.[179] The APA does specify an important consequence that follows from the distinction: an interpretive rule is exempt from the requirements of notice-and-comment rulemaking.[180] But it has been left to

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ply does not involve the exercise of such judgment, the discretionary function exception does not bar a claim that the act was negligent or wrongful."); *Perry v Sindermann*, 408 US 593, 599–603 (1972) (holding that a discretionary decision to confer entitlements restricts an agency's ability to revoke those entitlements).

176 See note 92 (explaining *Morton v Ruiz* in these terms).

177 See notes 97–99 and accompanying text.

178 The relevant definition contained in the Act defines "rule" generally and does not distinguish between legislative and nonlegislative rules. See 5 USC § 551(4) (defining "rule" in part as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy").

179 Courts look at a number of factors to determine whether the rule has "legal effect," that is, is a legislative rule. See *American Mining Congress v Mine Safety & Health Administration*, 995 F2d 1106, 1112 (DC Cir 1993) (laying out a four-pronged test for determining whether an interpretive rule has legal effect); Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 Duke L J 381, 383–84 (discussing theoretical differences between legislative and nonlegislative rules). See also sources cited in note 33.

180 5 USC § 553(b)(3)(A).

the courts to devise tests that determine in which box an agency action fits.[181] Identifying the line between the creation of a new norm and the interpretation of an existing norm is a notoriously difficult enterprise[182] and one that leaves a great deal of discretion in the hands of the court characterizing the agency's announcement.

The second situation in which courts sometimes fix the legal effect of agency action arises in the context of agency adjudication. Under certain circumstances, a court will treat the legal rule established in an adjudication as prospective only. For instance, when the agency position prior to the adjudication was clearly established and the adjudication represented a clear departure from that position, a court might hold that the adjudication does not have retroactive effect.[183]

d) Availability of judicial review. There is one final area in which courts have importantly shaped the elements of policymaking tools available to agencies. Through the doctrines of reviewability and standing, courts have had a large hand in determining *whether* a party can sue to challenge agency action and, if so, *which* party can sue. Courts have also used the doctrines of ripeness, finality, and exhaustion to determine *when* a proper party can sue.

Standing, in its constitutional and statutory dimensions, is the best-known place where courts have structured the rules of play. A party must have an injury-in-fact that is individual and concrete, can be traced to allegedly unlawful government action, and is redressable by the relief sought from the complaining party.[184] If the challenge to government action is brought under the APA, the party must also be within the "zone of interest" arguably protected or regulated by the statute.[185] There is endless controversy swirling around this doctrine, but there is no dispute about

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181 See *Air Transport Association of America, Inc v Federal Aviation Administration*, 291 F3d 49, 55–56 (DC Cir 2002) (distinguishing legislative rules from interpretive rules); *General Electric Co v EPA*, 290 F3d 377, 385 (DC Cir 2002) (holding that an EPA document setting forth criteria for risk assessment for PCBs was an invalidly promulgated legislative rule); *American Mining Congress*, 995 F2d at 1112 (holding that Program Policy Letters defining what qualifies as a "diagnosis" are interpretive rules).

182 The distinction is akin to that between making the law (legislating) and implementing the law (executing). See M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U Pa L Rev 603, 618–23 (2001) (giving reasons for the difficulty in drawing boundaries between these functions).

183 See *Epilepsy Foundation of Northeast Ohio v NLRB*, 268 F3d 1095, 1097 (DC Cir 2001) ("The Board erred . . . in giving retroactive application to its current interpretation. . . . Employees and employers alike must be able to rely on clear statements of the law by the NLRB."); *Williams Natural Gas Co v FERC*, 3 F3d 1544, 1554 (DC Cir 1993) ("In [a situation that] may give rise to questions of fairness, it may be necessary to deny retroactive effect to a rule announced in an agency adjudication in order to protect the settled expectations of those who had relied on the preexisting rule.").

184 *Lujan*, 504 US at 560–61 (listing the three criteria for standing as injury-in-fact, causation, and redressability).

185 *National Credit Union Administration v First National Bank & Trust Co*, 522 US 479, 488 (1998); *Data Processing*, 397 US at 153.

the point relevant here, that the courts are the doctrine's architects. Neither the constitutional rules nor the "zone of interest" test springs fully formed from the sources of positive law upon which they rest.[186]

Almost as obvious, at least to the administrative lawyer, is that the doctrines of reviewability are the product of judge-made common law. The APA sets forth certain circumstances in which review of administrative action is not available,[187] and these statutory terms have undeniably guided the courts. Even so, the APA instructions do not predict judicial doctrine, save for the "easy" case where Congress has clearly precluded review in a statute.[188] The other decisions holding agency actions "unreviewable" are much more difficult to trace back to statutes. Courts have held, as noted earlier, that agency refusals to take enforcement action and agency decisions about overall priority setting are unreviewable.[189] These rules are products of judge-made common law; they do not come directly from the APA.[190]

Several doctrines dictate the timing of a challenge to administrative action. The three primary doctrines require that the administrative action be final,[191] that the party have exhausted appropriate administrative remedies,[192] and that the action be "ripe."[193] Ripeness, which governs when an otherwise final action is ready for court review, is the most important

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186 See, for example, Peter M. Shane, *Returning Separation-of-Powers Analysis to Its Normative Roots: The Constitutionality of* Qui Tam *Actions and Other Private Suits to Enforce Civil Fines*, 30 Envir L Rptr 11081, 11084–85 (2000) (tracing the zone of interest test to the APA's language conferring standing on those "adversely affected or aggrieved by agency action *within the meaning of a relevant statute*"), quoting 5 USC § 702.

187 5 USC § 701(a)(1)–(2) (stating that agency actions are reviewable except where precluded by statute or where committed to agency discretion by law).

188 These cases are not, in fact, easy. Courts sometimes go out of their way to read explicit statutory preclusion provisions narrowly in order to avoid the constitutional question of Congress's power to close the courts. See *Johnson v Robison*, 415 US 361, 366–67 (1974) (noting that finding a statute bars judicial review "would, of course, raise serious questions concerning [its] constitutionality ... and in such case 'it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [questions] may be avoided'"), quoting *United States v Thirty-Seven Photographs*, 402 US 363, 369 (1971). On the other hand, courts sometimes find "implied preclusion," even in the absence of a specific statutory provision. See, for example, *Block v Community Nutrition Institute*, 467 US 340, 345 (1984) ("Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.").

189 *Heckler*, 470 US at 832; *Vigil*, 508 US at 192. See also notes 126–31 and accompanying text.

190 See Levin, 74 Minn L Rev at 695 (cited in note 85) ("At face value, [the APA] seems to say that every enabling statute that grants some discretion to an agency creates a sphere of administrative conduct that the courts must not examine. That conclusion, however, would be absurd."). But see *Webster*, 486 US at 608–10 (Scalia dissenting) (arguing that the APA codified the existing exceptions to reviewability that had developed as part of the pre-APA common law).

191 *Sampson v Murray*, 415 US 61, 74 (1974).

192 *Shalala v Illinois Council on Long Term Care, Inc*, 529 US 1, 12–13 (1999).

193 Id.

of these. In a pair of landmark cases decided in 1967,[194] the Supreme Court announced a two-part test to determine whether agency rules could be challenged at the pre-enforcement stage, that is, before the agency enforced the rule against an alleged violator. The test asks the court to evaluate the "fitness of the issues for judicial decision" at the pre-enforcement stage and the "hardship to the parties of withholding court consideration" until the rule is enforced in an individual proceeding.[195] In operation, the test has facilitated pre-enforcement review of many legislative rules.[196] There is little doubt that the courts are the architects of the doctrine as well.[197] Review is available not because a statute or constitutional provision dictated that it be available, but because the courts, reasoning like common law courts, decided that the benefit of such review outweighed its costs.

2. Judicial freedom as an explanation for the *Chenery* principle.

Courts' ability to shape some of the consequences of an agency's choice of procedure explains the continued strength of the *Chenery* principle. Part II.D.1 demonstrated that judge-made law structures important elements of the policymaking tools from which agencies choose. This Part links that fact to the continued vitality of the *Chenery* principle by showing that this freedom gives courts tools to respond to whatever concerns they might have about an agency's choice of procedure. As I develop further in Part III, there are three worries that courts might have about agency choices of procedure: lack of procedural fairness, inability to develop sound policy, and strategic behavior by the agency.[198] Because the judicial discretion documented in Part II.D.1 permits courts to respond to *any* of these concerns, courts need not revisit *Chenery II* and develop a doctrine governing the appropriate uses of each policymaking tool. This Part will first make the point in the abstract and then point to examples that bear it out.

Imagine that a court is unhappy with an agency's procedural choice. Given the strength of the *Chenery* principle, the court will not be given

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194 *Abbott Laboratories*, 387 US at 149; *Toilet Goods Association, Inc v Gardner*, 387 US 158, 162 (1967).

195 *Abbott Laboratories*, 387 US at 149.

196 The Court anticipated this effect. See id at 154–55 ("The Government contends ... that if the Court allows this consolidated suit, then nothing will prevent a multiplicity of suits in various jurisdictions challenging other regulations. The short answer to this contention is that the courts are well equipped to deal with such eventualities.").

197 See Duffy, 77 Tex L Rev at 163–67 (cited in note 16) (arguing that the Court's administrative ripeness jurisprudence essentially relegates the APA to the status of a restatement); id at 167 ("Where, then, does ripeness doctrine come from? The easy answer is that it comes from *Abbott*, and if the Supreme Court were a common-law court with a general jurisdiction, that answer might be sufficient.").

198 See also Part I.C.

the opportunity to demand that the agency explain why it selected its form. Even so, the court is likely to have tools at its disposal to react to the agency's choice. One category of possible responses would permit the court to invalidate the action. The court might ratchet up the standard of review and hold that the action was arbitrary and capricious, the interpretation was unreasonable or impermissible, or the finding lacked substantial evidence. It might characterize the agency action so that the most skeptical standard of review applies and then invalidate the action. It might reshape the procedure required and hold that the procedure the agency followed was inadequate. Or it might narrow the legal effect of what the agency did so that the action cannot apply to the party the agency claims violated the policy. The second category of responses would permit a suit to go forward. The court might hold that a particular party has standing or that the challenge is "ripe" and can therefore proceed. These judicial responses, to the extent that they are driven by concerns about agency choices of policymaking form, could be rooted in concerns about particular agency actions or systemic trends in agency behavior.

Consider more specifically the plausible concerns—and plausible responses—that courts might have about three common procedural choices. Imagine first that an agency is relying on informal rulemaking. The court might be concerned that the primary standards of review that are likely to apply (the arbitrary-and-capricious standard and/or the *Chevron* standard) are too deferential or, alternatively, too intrusive; in response, courts could intensify or weaken that standard of review. Or perhaps the worry is that the procedures that have to be followed—notice, opportunity for comment, and consideration of the material presented—are either too burdensome or not burdensome enough. Again, a court might tweak them in either direction.

Now suppose that the agency is relying on adjudication to make policy. A court might worry that adjudication excludes consideration of broader perspectives; in response, a court might require broader participation rights. It might be concerned that the agency has buried its policy judgments in the particularized facts of a case; in response, the court could ratchet up the substantial evidence standard and look more closely at the basis for the agency's decision. If the worry is that adjudication will have brutal retroactive effects, the court could interpret the adjudication to apply only prospectively.

Finally, imagine that the agency is relying on a guidance document. A court might worry that the agency chose to issue guidance for what we might call strategic reasons—that is, to coerce private parties to comply with the agency's views without going through the effort to promulgate a legislative rule—or that the guidance is poorly thought out because it was not vetted outside of the agency. The court might hold that the agency's so-called guidance in fact amended a preexisting rule and is therefore

procedurally defective. Or it might treat the guidance as ripe for review and permit a challenge at an early stage. It might also apply less deferential standards of review to the agency judgments contained in the guidance. In short, if a court's views of procedural fairness, development of sound policy, or institutional integrity are offended by an agency's choice of procedure, the court might have the ability to respond by adjusting the elements of the forms.

The claim here is not only that judges *can* use their considerable discretion to respond to agency choices of form; it is also that they *have* done so. Administrative law provides several examples that suggest that judges have, in fact, adjusted the elements of procedural forms partly in reaction to agency decisions to rely on those tools. The judicial transformation of the requirements of legislative rulemaking provides the first, and most complicated, example. As recounted earlier, in the mid-1960s and 1970s, courts reshaped the requirements that an agency had to satisfy if it relied on notice-and-comment rulemaking. Judges fashioned innovative doctrines: agencies were required to provide comprehensive notice, were limited in their ability to rely on exceptions to the notice-and-comment requirements, were required to explain in a reasoned way how they had settled on their course of action in the face of objections, and faced preenforcement review of many of their rules. In sum, agencies were required to persuade courts of the inclusiveness, comprehensiveness, and reasonableness of their actions.[199]

This judge-led transformation in the rules of play cannot be understood in a vacuum. It must be read in light of the movement (some might say stampede) toward rulemaking in this period.[200] Judges were, it should be said, supporters of—even cheerleaders for—agencies' increasing reliance on rulemaking.[201] But they would not have been so enthusiastic if reliance on rulemaking had meant that agencies faced, as the APA seemed to suggest, almost no procedural obligations and only minimal judicial review. The skeletal provisions of the APA that governed informal rulemaking required no elaborate process, and the arbitrary-and-capricious test did not suggest a particularly skeptical look at agency actions.[202] This did not stop courts from relying on those provisions as they beefed up the procedural requirements for rulemaking and intensified the scope-of-review that would be applied to agency rulemaking. In establishing the

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199 See Schiller, 53 Admin L Rev at 1142 (cited in note 41) (stating that hard look review was conceived as a solution to the perception of agencies as "arbitrary, inefficient, and inevitably captured by the interests they were supposed to regulate"); Merrill, 72 Chi Kent L Rev at 1064 (cited in note 115) ("Courts were expanding the availability of judicial review, and were imposing new rights of intervention and hearing requirements, precisely in order to make agency processes more representative, and thereby to counteract the effects of agency capture.").

200 See notes 41–42 and accompanying text.

201 See Schiller, 53 Admin L Rev at 1150–51 (noting Judge Friendly's advocacy of rulemaking).

202 Id at 1140–41 (explaining the initial enthusiasm for informal rulemaking's ease and speed).

rules of play for rulemaking, judges must have been influenced by the contours of formal adjudication, the policymaking form with which they were most familiar. That form provided extensive procedural rights (of notice and an opportunity to be heard) to those involved in the adjudication, required the agency's decision to be based on a record, and was subject to relatively searching judicial examination. Judges thus embraced rulemaking, but they also modified it so that it contained the features of adjudication that judges deemed necessary to the formulation of fair and rational policymaking.

This judicial influence over the consequences of an agency's choice of rulemaking can be understood to be a substitute—albeit an imperfect one—for a doctrine that inquired into the reasons for agency reliance on a policymaking form. Without *Chenery II*, courts might have developed doctrines that set forth the circumstances in which rulemaking was appropriate.[203] That option was not doctrinally available, so courts instead reshaped what was required when an agency relied on rulemaking. Their willingness to endorse agency reliance on this policymaking tool, that is, was dependent on their ability to adjust the elements of the policymaking form to take account of the concerns they had.

A similar, though less complicated, story can be told about judicially created doctrines governing adjudication. First, consider public participation rights. As courts encouraged and embraced notice-and-comment rulemaking as a policymaking tool, the exclusion of parties from adjudication began to look anachronistic. Instead of requiring agencies to rely on rulemaking under certain circumstances, the courts recognized participation rights for parties who were interested in (but were not the objects of) adjudications and thus made some adjudications look a little bit more like rulemaking.[204] Nonretroactivity jurisprudence fits a similar pattern. One virtue of rulemaking is that it is prospective and binds all parties at once—a feature appealing to courts and absent from adjudication. Once again, courts might have developed doctrines suggesting that sometimes—when the reliance interests are particularly great—agencies must employ rulemaking and not adjudication. Instead, courts developed a doctrine that permits courts occasionally to deem adjudicatory decisions nonretroactive.

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203 Indeed, some lower courts attempted to do so until that route was foreclosed by the Supreme Court. See text accompanying notes 80–83.

204 See *National Welfare Rights Organization v Finch*, 429 F2d 725, 734–35 (DC Cir 1970) (holding that welfare recipients satisfy both requirements of standing to intervene in an agency adjudication of a state's conformity with welfare regulations); *United Church of Christ*, 359 F2d at 1006 (holding that an agency must permit representatives of the public to intervene in licensing actions); *Scenic Hudson Preservation Conference v Federal Power Commission*, 354 F2d 608, 616 (2d Cir 1965) (holding that agencies must permit parties whose aesthetic and economic interests are affected to participate in agency adjudication). These cases are discussed in Stewart, 88 Harv L Rev at 1728–31 (cited in note 115).

Finally, in an example drawn from contemporary judicial decisionmaking, courts appear to be increasingly concerned about the oft-repeated charge that agencies are "regulating by guidance"—that is, relying on interpretive rules or policy statements instead of legislative rules to effectuate their policy judgments.[205] Consistent with *Chenery II*, courts are not demanding to know why an agency relied on guidance in a particular case. They are instead reshaping the consequences of that reliance. The *Mead* decision has been, and should be, read to force the agency to give something up—namely, *Chevron* deference—if it chooses to announce its interpretation of a statute or regulation through a guidance document.[206] Courts also appear to be treating certain guidance documents as final and ripe, and therefore open to pre-enforcement challenge, in cases where black letter timing doctrines might suggest that the positions they contain are not immediately subject to challenge.[207] That this reaction is based in part on concerns about inappropriate agency reliance on guidance documents is evident in the frustration that courts express on this very point.[208] Finally, courts have limited the effect that guidance documents can achieve. If an agency has previously interpreted a statute or regulation and that interpretation is not embodied in a legislative rule, the agency cannot rely on guidance to change that interpretation; changing a preexisting legal interpretation is the sole province of the legislative rule.[209]

While these three examples bear out the claim that adjusting the consequences of an agency's choice of form can and should be seen as a substitute—albeit one with different contours—for inquiring directly into the agency's reasons for choosing a particular policymaking form, it bears mention that whether a court has options by which it can respond to an agency's choice will depend on the context. I am not suggesting that judicial reaction to agency decisions is entirely free of statutory, precedential, or factual constraints such that a court can do whatever it wants. Nor do I intend to suggest that the important developments in administrative law

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205 See J.B. Ruhl and James Salzman, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 Georgetown L J 757, 781–82 (2003).

206 See Bressman, 78 NYU L Rev at 536–41 (cited in note 108) (defending this move toward more limited deference and arguing that it should continue).

207 See *Appalachian Power Co v EPA*, 208 F3d 1015, 1020–21 (DC Cir 2000) (holding that a guidance document can be reviewable if the issuing agency treats it as controlling or as equivalent to a legislative rule).

208 Id at 1020 (observing that it is a "familiar" practice for agencies to issue guidance documents to clarify regulations and that "[a]n agency operating in this way gains a large advantage").

209 See *Alaska Professional Hunters Association, Inc v Federal Aviation Administration*, 177 F3d 1030, 1034 (DC Cir 1999). See also *Paralyzed Veterans of America v DC Arena LP*, 117 F3d 579, 586 (DC Cir 1997) ("Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking."). For criticism of this position, see William S. Jordan III, *News from the Circuits*, 29 Admin & Reg L News 19, 20 (Fall 2003) (describing *Alaska Professional Hunters* as a "virus" that "continues to mutate doctrinally and expand geographically").

discussed in the three examples given above should be seen solely as responses to agency choices of form. Either claim would reach too far. I mean instead to suggest that courts have many possible tools to use to react to agency choices of form, and that some historically detectable judicial innovations should be read, in part, as reactions to the policymaking form that an agency has chosen.

This judicial response to choices of form serves a function that has been implicit but should now be made explicit. Over time, judicial reactions will influence how an agency chooses its form in the first instance because the choice is naturally influenced by the consequences that follow. To the extent that judges can reshape those consequences, they are able to regulate the agency's choice. The strength of this effect is difficult to pin down, because many other factors are obviously at work,[210] but its direction cannot be in doubt. A more intrusive standard of review increases the likelihood that agency action will be set aside, and an agency that has spent time developing policy will seek to avoid this result. The *sub rosa*, indirect "review" identified in this section, then, is a method by which courts regulate agencies' choices of form.[211] Whether this review is adequate in light of the concerns one might have about agency choice of form is an important normative question. This Article does not answer that question, but the next Part outlines the relevant considerations.

III. COMING TO TERMS WITH AGENCY CHOICE OF FORM

The main object of this Article has been to describe the phenomenon of agency choice of form and to explain positively the judicial reaction to it. I have focused on this question because it is not now treated as worthy of attention by observers of the administrative state—its constituent parts are known, but they are considered unremarkable.

In this Part, I take preliminary steps toward coming to terms with agency choice of policymaking form. Fully doing so requires three levels of analysis. First, we need a good positive account of agency decisions about policymaking instruments. That description will permit us to pursue the second level of analysis, identifying the concerns that such decisionmaking provokes. Those two steps of analysis are independent from, but set the stage for, a final step: the evaluation of whether and how effectively administrative law responds to these agency choices.

What, then, do we know about how agencies choose their policymaking tools? There are few efforts to describe or explain how agencies

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210 See Strauss, 74 Colum L Rev at 1245–48 (cited in note 69) (describing complexities in one agency's rulemaking procedures that make it a disfavored method of regulation).

211 This method, it is worth noting, is different in form from the standard judicial response to agency exercises of discretion, which is to ask for and evaluate agency reasons for those decisions. Because indirect review presents a unique form of judicial control of administrative action, it is interesting in its own right.

choose among their available policymaking forms.[212] The main theories that model bureaucratic behavior seem ill-suited to predict those choices. For instance, even if one accepts the classic view that bureaucrats attempt to budget-maximize—more or less successfully, depending on how one views their relationship to their legislative sponsors—it is not at all clear what that would mean for their choice of policymaking form.[213] It is similarly difficult to predict policymaking form using the public choice–inspired view that agencies deliver rents to the industries that they regulate. One important effort, by Emerson Tiller and Pablo Spiller, does model agency decisions about procedure. Their decision cost framework—suggesting that agencies want to achieve policy objectives at the lowest net cost—takes account of judicial reaction to agency choices of policymaking instruments.[214] The following hypothesis differs from their model, but builds on and advances that work.

Informed by the conceptualization contained in this Article, one can construct a preliminary hypothesis about how agencies choose their policymaking forms. Agency decisionmakers pursuing a given policy objective are free to choose from a menu of policymaking tools but are not free to design those tools. As they consider their options, they will evaluate the various tools in terms of the salient features identified earlier—the procedure the agency would have to follow, the legal effect of the action, and the terms on which that action might be challenged in the courts.[215] Con-

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212 To my knowledge, there are three case study efforts. One is Peter Strauss's mid-1970s study of policymaking at the Department of Interior, 74 Colum L Rev 1231 (cited in note 69). The other two are focused on the EPA. Andrew P. Morriss, Bruce Yandle, and Andrew Dorchak focus on the EPA's choice of regulatory tools in its regulation of heavy-duty diesel engines. See Morriss, Yandle, and Dorchak, *Choosing How to Regulate* (cited in note 46). James Hamilton and Christopher Schroeder focus on the EPA's choice between legislative rules and guidance documents in the context of hazardous waste laws. See James T. Hamilton and Christopher H. Schroeder, *Strategic Regulators and the Choice of Rulemaking Procedures: The Selection of Formal vs. Informal Rules in Regulating Hazardous Wastes*, 57 L & Contemp Probs 111 (Spring 1994).

213 For a simplified survey of the various theories, see Kenneth A. Shepsle and Mark S. Bonchek, *Analyzing Politics: Rationality, Behavior, and Institutions* 345–79 (Norton 1997) (discussing William Niskanen and his critics, the bilateral bargaining model associated with Gary Miller and Terry Moe, and the principal-agent model associated with McNollgast). See also Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U Chi L Rev 345, 380–87 (2000), for a nice application of many of these theories in the context of cost remedies imposed on the government.

214 See Emerson H. Tiller and Pablo T. Spiller, *Strategic Instruments: Legal Structure and Political Games in Administrative Law*, 15 J L, Econ, & Org 349, 351–52 (1999). In Tiller and Spiller's view, judicial reactions mean that agencies might choose inaction or multiple adjudications over rulemaking even though, without judicial evaluation, the agency would choose rulemaking. Id at 358–62. There is much to admire in their model, and my effort here is consistent with, though different from, it. My hypothesis about agency decisions takes account of several additional factors important to agency choice, factors that I view as salient. It also takes account of the dynamic effects that judicial reshaping of policymaking forms has over time. Finally, my argument in Part II.D suggests that courts have many more options to react to agency choices than Tiller and Spiller assume.

215 Peter Strauss's study of the Interior Department suggests that this is too deliberative. See Strauss, 74 Colum L Rev at 1236–43 (cited in note 69).

sider a simple hypothetical case involving nutrition labeling. Imagine that the manufacturers of certain small food products are failing to include FDA-required nutrition labels on their packaging. Suppose that under the relevant statute and governing regulations, the nutrition labels must be affixed to products unless it would be "impracticable" to do so.[216] The manufacturers have decided that, because of the small size of their goods, it is impracticable to include the labels. The FDA does not agree with the food manufacturers' view.

The FDA might choose from the following options. It might amend the regulation to further define the meaning of "impracticable." It might bring an enforcement action (seize the product or seek an injunction), taking the position that the manufacturers' practice is unlawful under the governing regulations. Finally, the agency might issue a guidance document setting forth its view that it is practicable for the manufacturers to affix nutrition labels to their products. In deciding how to respond, the FDA likely would consider both the scope (how many manufacturers and products?) and the nature (are there important factual differences among manufacturers?) of the behavior that it is trying to affect. Assume that many manufacturers are declining to include nutrition labels and that the different products do not present many unique characteristics. How will the FDA make its choice?

The FDA will choose its preferred course of action after evaluating the salient features of each form. To agency decisionmakers, some of those features will be appealing and others will not be. That decisionmaking process might look something like the following.

Consider first the possibility of amending the underlying regulations. From the agency's perspective, this route is costly because it is labor-intensive and relatively slow. The agency will have to publish notice and seek comments, and it may need to navigate through OIRA review within the executive branch. Once it promulgates the rule, the agency might face a pre-enforcement challenge to its action. If the agency labors through that process, though, and it can defend its rule in court, it will obtain quite a victory: the rule will bind the regulated parties as if it were a statute.

Now consider the enforcement action. The FDA might seize a product or bring an injunction action in the federal courts. This permits fairly quick action—it avoids notice-and-comment procedures and the OIRA review process. The FDA, however, might face a form of "review" in the sense that it may have to persuade DOJ litigators that one or the other

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216 In fact, the FDA regulation on this matter spells out in great detail which small packaged products are exempt from the nutrition labeling regulations. See Food and Drug Administration, *Good Guidance Practices*, 21 CFR § 101.9(j)(13) (2004) (providing that small packages with less than twelve square inches of available label space need not bear labels, provided that the labels they do have contain instructions on how to obtain nutrition information and that nutritional claims are not made on the packages). I use the hypothetical because it captures, simply, a typical regulatory issue.

action should be brought. On the one hand, the FDA would likely be pleased that it could pick the target and have its judgment tested in the context of an individual case, rather than abstractly in pre-enforcement review. On the other hand, singling out an individual actor will guarantee *some* opposition, and the object of the action will be guaranteed the rather extensive procedural protections available in the federal courts. Whether the agency wins or loses, the judgment binds only as precedent, a weaker legal effect than the legislative rule.

Finally, the FDA might provide the industry with guidance on the matter.[217] Guidance is relatively cheap to produce; it does not require the agency to present its view to the public for comment or to a court for evaluation. Of course, it also does not formally bind any particular actor or group of actors, but it may still be effective at influencing conduct. A party attempting to challenge the terms of the guidance will probably have a difficult time—a court may decide that a challenge is not "ripe" until the agency takes an action based on the guidance. But if a court does allow a challenge, the agency's legal interpretation and reasoning will be evaluated and the court will be less deferential to the agency than it would be if the agency had adopted a legislative rule.

This abbreviated example is intended to illustrate that an agency's choice of procedure will be determined by the consequences that follow from one choice or another. In other words, the features of the forms will shape how an agency chooses one form or another.

What might concern us about the agency's choice among these forms? A few worries can be identified. At the outset there is a concern about agency priority-setting. If, in the grand scheme of things, it is silly for the FDA to worry about the failure of small food manufacturers to include nutrition labels on their products, then the devotion of *any* FDA resources to the matter is unwise. It is more unwise the more resources the agency devotes to the problem—if the agency chooses rulemaking instead of guidance, there is a greater waste of resources. This concern, however, is not specific to agency choice of form. It is, rather, a generic one that cuts across all types of agency decisionmaking.

There are three other worries that are unique to the agency's choice of form. One is that the agency will pick a form that is unfair to parties interested in the agency's position. If, for example, the FDA issues a guidance document, those most interested in and affected by it will not be guaranteed the right to comment on the agency's proposed resolution of the question. Or if the FDA brings an enforcement action, the burden of contesting the agency's position will fall on the agency-selected object of the action, which may have had no prior notice of the problem.

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[217] See, for example, Food and Drug Administration, *Labeling Questions and Answers I & II*, online at http://www.cfsan.fda.gov/~dms/lab-ind.html (visited July 23, 2004).

Another concern is that the agency will make bad policy. If the agency chooses guidance or enforcement action, its decision may be ill-considered because it has received less input and evaluation than is warranted. On the other hand, if it chooses rulemaking, the agency may be bogged down in too much process.

A final concern is that the agency will be allowed to act "strategically" in choosing its policymaking form. Here the fear is that the agency will be able to achieve its goal only (or mainly) because of the form it chose. Because the agency is able to choose the way its policy will operate and be evaluated in court, it may pick a form that is difficult to review, is not intensely reviewed, or is reviewed under circumstances favorable to the agency. If the agency secures its policy judgment solely (or primarily) because it picked its form to take advantage of these sorts of factors, that is troubling. For example, if a court vindicates the FDA's view in an enforcement proceeding solely because the facts of the case are particularly favorable to the agency, or because the target of the action has few legal resources, then the agency has obtained a policy victory—a victory that is now precedent for similarly situated parties—only because it had the ability to strategically control the context in which its judgment would be assessed.

How does administrative law respond to these concerns about fairness, functional utility, and strategic choice of form?[218] As the last Part demonstrated, the first impression that courts ignore agency choices-of-form is wrong. Courts actually have a method available to them for policing agency choice of form, and the examples provided there also suggest that courts *have* adjusted policymaking tools in order to respond to concerns about the fairness, utility, or strategic possibilities associated with particular agency choices of procedure. The judicial review identified there *could* be effective in responding to whatever concerns courts might have because it is an ex post control on agencies. After-the-fact review permits courts to detect the existence of the problems they are looking for and, as the last Part also demonstrated, courts have many tools available to respond to those concerns.

To say that the indirect review identified in this Article could be effective in responding to concerns about agency choice of procedure is not to say that the response reflected in the law is normatively appropriate. For one thing, the current model of control, after-the-fact and ex post review, has negative consequences (the lack of predictability and clarity) that might outweigh the benefits that such a perspective provides. Furthermore, it may be that judicial reactions to choice of procedure are sys-

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218 The fact that there are worries about agency choices, it bears mention, does not mean that courts should step in. Other actors—agency administrators, OMB reviewers, or Congress—could respond to these concerns.

tematically wrong. Courts, that is, might worry about, and devote resources to, unproblematic agency choices.

Putting these concerns aside, what tools do we need to grapple with the three concerns outlined above? Each is daunting in its own right. To assure that an agency has selected a fair procedure that is likely to yield rational policy and is not acting "strategically," we need a robust guide that reveals, in a given set of circumstances, which forms are fair to the relevant parties, likely to elicit rational policymaking, and the "natural" ones to use (a departure from the natural form may be a signal of strategic action). No doubt we can arrive at some basic principles, though perhaps only at a fairly high level of generality. It will be difficult, perhaps even impossible, to derive a set of principles finely tuned enough to predict when one specific form should be used instead of another. Whether the challenges of such an ambitious normative project can be met is an open question.

CONCLUSION

This Article has taken as its primary focus a backstage phenomenon in administrative law and practice. Everyone knows that agencies choose their policymaking forms, that they choose differently across time and across agencies, and that courts do not directly inquire into that choice. But these facts are not considered worthy of attention. This Article is, first and foremost, an argument that they do merit our attention and investigation. It has argued that agency choice of procedure is both crucial and little understood as a positive matter. It has also demonstrated that judicial reaction to that choice is not, as it first appears, hands-off. Courts do in fact review such choices—albeit indirectly—by altering the consequences of those choices.

This Article has answered some questions, but it has raised others. The indirect form of judicial review identified here not only provides an explanation for the vitality of *Chenery II*. It also opens a window onto another model of judicial review of agency action, one that should be understood to stand alongside the conventional approach to judicial control of administration. The comparison between the two models of judicial review—one direct, the other indirect—must await future investigation. This Article has also laid the groundwork for an effort to come to terms with agency choice of form as both a positive and a normative matter. The normative analysis cannot be fruitfully undertaken without a good theoretical and descriptive account of how agencies actually choose among their available options. This Article has started us down that road, but there is a long way to go. Many questions have thus been raised by this investigation. But the effort will have succeeded if it has convinced the reader that this backstage player should be invited out onto the stage.