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Illuminating a Bureaucratic Shadow World: Precedent Decisions under California's Revised Administrative Procedure Act

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ILLUMINATING A BUREAUCRATIC SHADOW WORLD: PRECEDENT DECISIONS UNDER CALIFORNIA'S REVISED ADMINISTRATIVE PROCEDURE ACT¹

Michael Douglas Jacobs

SUMMARY

This article discusses the significance and effect of California's recently enacted Administrative Precedent Decision Statute, Government Code Section 11425.60.² Section 11425.60 authorizes agencies governed by the adjudication provisions of the Administrative Procedure Act to designate decisions containing significant legal or policy determinations as precedents.³ The statute expressly prohibits reliance on a decision as precedent unless the agency has designated the decision as precedential and indexed the decision in a publicly available list of agency precedents.⁴ This article examines the nature of administrative precedent and the bounds of adjudicatory lawmaking discretion under Section 11425.60.⁵ This article contends that Section 11425.60 grants agencies the power to evolve through case-by-case adjudication, and that standards of general application have the same force and effect as regulations.⁶ Furthermore, this article contends that judicious exercise of the authority vested in Section 11425.60⁷ will facilitate public and

1. This article is in partial fulfillment of the requirements for the Master of Judicial Studies degree program at the University of Nevada, Reno. I am grateful to James T. Richardson, Elizabeth Francis, Daniel P. Ryan, and Stephen P. Angelides for their counsel and valuable comments on the manuscript. I am also indebted to Jennifer Gee, Stephen E. Hjelt, Nathaniel Sterling, Melvin Fong, Heather Cline Hoganson, Melissa G. Crowell, Karl S. Engeman, Joshua S. Ben-Yehuda, Jerry L. Whitfield, Herbert F. Bolz, the editors and staff of the Journal of the NAALJ, and Barbara A. Jacobs, for their gracious assistance.

2. CAL. GOV'T CODE § 11425.60 (West Supp. 2001).

3. *Id.*

4. *Id.*

5. *See infra* pp. 265-67.

6. *See infra* pp. 281-83.

7. CAL. GOV'T CODE § 11425.60 (West Supp. 2001).

agency compliance with agency regulatory policies, advance the goals of equity and consistency in adjudicatory decision making, and promote agency accountability.

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I. INTRODUCTION

In 1995, the California Legislature enacted Government Code Section 11425.60⁸ as part of a comprehensive reform of the California Administrative Procedure Act's ("APA") adjudication provisions.⁹ Section

8. All undesignated statutory provisions cited in this article refer to California Government Code Sections. CAL. GOV'T CODE § 11425.60 (West Supp. 2001), available at <http://www.leginfo.ca.gov> (last visited Jan. 27, 2002).

9. The 1995 APA legislation was enacted on the recommendation of the California Law Revision Commission, a statutory body charged with responsibility to examine California statutory and common law and to make recommendations on needed reforms. CAL. GOV'T CODE § 8289 (West Supp. 2001). The 1995 reform legislation evolved from a concurrent resolution of the Legislature directing the Commission to study and make recommendations on administrative law. 1987 Cal. Stat. Res. Ch. 47 (24). The Commission began the study in 1990 and submitted its recommendation on adjudication reforms in January 1995. ADMINISTRATIVE ADJUDICATION BY STATE AGENCIES, 25 CAL. L. REVISION COMM'N REPORTS 55, 79 (1995). See generally CAL. GOV'T CODE § 11374-11500 (West Supp. 1992). The 1995 legislation became operative on July 1, 1997. The reform measures, contained in APA chapters 4.5 and 5, expand and modernize the APA and constitute the first major legislative changes to administrative adjudication since California adopted the APA in 1945. For a behind-the-scenes account of the APA reform process, see Michael Asimow, *Speed Bumps*

11425.60 requires state agencies, governed by APA adjudication¹⁰ provisions, to designate a decision¹¹ or part of a decision that contains a significant and recurring legal or policy determination of general application as precedent.¹² In addition, Section 11425.60 requires state agencies, governed by APA adjudication provisions, to maintain a publicly available index of their precedents.¹³ A decision may not be relied on as precedent unless it is designated as precedential and indexed by the agency as provided in Section 11425.60.¹⁴

Section 11425.60 expressly exempts the designation of precedent decisions from APA rulemaking requirements and declares that an agency's designation of a decision as precedential "is not rulemaking."¹⁵ The section immunizes an agency's designation of a decision as precedential or its failure to do so from judicial review,¹⁶ granting agencies absolute discretion to decide which legal and policy determinations are significant and merit precedential treatment. Section 11425.60 expressly applies prospectively, to decisions issued on or after July 1, 1997, but also authorizes agencies to designate earlier decisions as precedents.¹⁷

Section 11425.60 requires agencies to update the index of their precedent decisions at least annually, unless the agency has not designated a precedent since the most recent index update.¹⁸ The agency must make the index available to the public by subscription and annually publicize

on the Road to Administrative Law Reform in California and Pennsylvania, 8 WIDENER J. PUB. L. 229 (1999). Professor Asimow served as the California Law Revision Commission's principal consultant on the administrative law project and the 1995 legislative reforms reflect his immense scholarship. *Id.* at 231.

10. The APA defines "adjudicative proceeding" as "[a]n evidentiary hearing for determination of facts pursuant to which an agency formulates and issues a decision." CAL. GOV'T CODE § 11405.20 (West Supp. 2001).

11. The APA defines "decision" as "[a]n agency action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person." CAL. GOV'T CODE § 11405.50 (West Supp. 2001).

12. CAL. GOV'T CODE § 11425.60(c), (b) (West Supp. 2001).

13. CAL. GOV'T CODE § 11425.60(c) (West Supp. 2001).

14. CAL. GOV'T CODE §§ 11425.10(a)(7), .60(a) (West Supp. 2001).

15. As used in this article, the term "rulemaking" denotes the formal process of adopting and promulgating administrative regulations. The APA defines "regulation" as, "[e]very rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of the state agency." CAL. GOV'T CODE § 11342.600 (West Supp. 2001).

16. CAL. GOV'T CODE § 11342.600 (West Supp. 2001).

17. CAL. GOV'T CODE § 11425.60(d) (West Supp. 2001).

18. CAL. GOV'T CODE § 11425.60(c) (West Supp. 2001).

its availability in the California Regulatory Notice Register.¹⁹ Most private litigants involved in administrative adjudicatory proceedings will not have a subscription to precedent decision indices or know of the existence of the register. To further improve public access to agency case law, the legislature should amend the APA to require agencies to publish their precedent decisions or the indices of their precedents on the Internet.²⁰

Section 11425.60 represents the California APA's first explicit recognition of adjudication as an authoritative mechanism for certifying new law and policy. Administrative common law, however, has long regarded adjudicatory lawmaking as a legitimate attribute of integrated administrative powers.²¹ The United States Supreme Court stated, "[w]ithin traditional agencies — that is, agencies possessing a unitary structure — adjudication operates as an appropriate mechanism not only for fact-finding, but also for the exercise of delegated lawmaking powers, including lawmaking by interpretation."²² Professor Thomas Merrill contends that the power of administrative agencies to interpret

19. *Id.* The CALIFORNIA REGULATORY NOTICE REGISTER, published by the California Office of Administrative Law, contains notices of proposed action by state agencies to adopt, amend, or repeal regulations promulgated in the California Code of Regulations. CAL. GOV'T CODE § 11346.4 (West Supp. 2001), available at <http://www.oal.ca.gov/notice.htm> (last visited Jan. 16, 2002).

20. Several California agencies publish their precedent decisions on the Internet. For example, the California Department of Social Services, Community Care Licensing Division's Web site, which contains an explanation of precedent decisions, displays the agency's precedent index, and provides links for downloading copies of the agency's precedents. California Community Care Licensing Division, at <http://cclld.ca.gov/docs/precedent-cover.htm> (last visited Jan. 16, 2002). Other agencies that make their precedent decisions available on the Internet include the Employment Development Department, at <http://www.edd.ca.gov/txprecdt/txpdnl.htm> (last visited Jan. 16, 2002); California Public Employees Retirement System, at <http://www.calpers.ca.gov/about/board/decision/preced.htm> (last visited Jan. 16, 2002); Public Employment Relations Board, at <http://www.perb.ca.gov/html/decisions.htm> (last visited Jan. 16, 2002); California Department of Insurance, at <http://www.insurance.ca.gov/docs/FS-Legal.htm> (last visited Jan. 16, 2002) and California Occupational Safety and Health Appeals Board, at http://www.dir.ca.gov/oshab/decisions/DAR_Decisions.html (last visited Jan. 16, 2002). A statute mandating Internet publication of precedents would complement the existing APA provision requiring the California Office of Administrative Law to make available free of charge on the Internet the text of the California Code of Regulations, the official compilation of all state agency regulations. CAL. GOV'T CODE § 11344(a) (West Supp. 2001).

21. See, e.g., *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), *Weiss v. State Bd. of Equalization*, 256 P.3d 1 (Cal. 1953).

22. *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 154 (1991).

the law is inherent in the executive branch's constitutional authority.²³ Agencies make law through the adjudicatory mode whenever decision-makers construe ambiguous enactments or determine whether broadly drawn legal standards apply to the facts of specific cases.²⁴ Administrators routinely engage in interpretive lawmaking to make statutes and regulations practicable, understandable, and responsive to societal needs.²⁵ In Justice Cardozo's words, "[t]here are gaps to be filled. There are doubts and ambiguities to be cleared. There are hardships and wrongs to be mitigated if not avoided."²⁶

23. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992). Professor Merrill asserts federal agency interpretive powers derive from the Constitution's grant of "executive power" to the President and its mandate the President shall see that the laws are "faithfully executed." *Id.* at 1004 (quoting U.S. CONST. art. II, §§ 1, 3). The California Constitution contains similar language: "The supreme executive power of this State is vested in the Governor. The Governor shall see that the law is faithfully executed." CAL. CONST. art. V, § 1. According to Merrill,

The conferral of these powers would seem to presuppose that the President and those who serve under [the President's] direction have the capacity to ascertain the meaning of the law. Indeed, law interpretation is an inevitable and necessary byproduct of the performance of the constitutional functions of the executive branch. Just as courts must interpret the law in order to resolve cases and controversies that arise within their jurisdiction, so executive officials must interpret the law in order to promulgate regulations, bring enforcement actions, instruct employees how to carry out programs, or perform any of the other myriad tasks entrusted to agencies. In fact, because only a fraction of executive actions end up in court, administrative actors engage in law interpretation with greater frequency and over a wider range of cases than courts do. If only the courts had the capacity to interpret law, our system of government could not continue to function.

Merrill, *supra*, at 1004 (footnotes omitted).

24. See Michael Asimow, *The Adjudication Process*, in ADMINISTRATIVE ADJUDICATION BY STATE AGENCIES, 25 CAL. L. REVISION COMM'N REPORTS 447, 541 (1995). Asimow states, "[s]ome people have argued to me that agencies are not making any significant law or policy through their adjudicatory decisions, simply finding facts. I doubt this. Every agency is confronted by vague statutory terms, such as 'unprofessional conduct' or 'moral turpitude' or 'gross negligence.' Their decisions make law." *Id.* at 539 n.306.

25. See Michael Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. REV. 1157, 1192 (1995). "An agency frequently has occasion to interpret the meaning of statutes or other legal texts such as its own regulations, judicial decisions, or the common law. It might engage in legal interpretation when carrying out any of its functions: adjudicating cases, engaging in rulemaking, advising regulatees or its own staff, or exercising discretion." *Id.*

26. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 14 (Yale University Press 1921). Judges and scholars have discredited the notion that adjudication operates as an instrumentality for the mechanical application of "discovered" law. See, e.g., *Newman v. Emerson Radio Corp.*, 772 P.2d 1059, 1062-64 (Cal. 1989). This "myth" of discovered law, as former Chief Justice Roger Traynor characterized it (Roger J. Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 HASTINGS L.J. 533, 535 (1977)), has long been criticized as unrealistic and out of touch with practical judicial realities. See, e.g., Beryl Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L.

Before the legislature enacted Section 11425.60, the question remained unsettled in California whether adjudicatively created interpretive law retained its authority beyond the formative case. Dicta contained in pre-Section 11425.60, California Courts of Appeal, and Supreme Court decisions express unquestioning approval of the principle announced in the United States Supreme Court's second decision in *SEC v. Chenery Corp.*²⁷ ("Chenery II"), that agencies have discretion to use either rulemaking or adjudication to introduce new law.²⁸ On the other hand, before the Legislature's adoption of Section 11425.60, the California Office of Administrative Law ("OAL")²⁹ construed APA rulemaking statutes to prohibit agencies from relying on previous adjudicative decisions as precedents absent express statutory authority.³⁰

REV. 1, 4-5 (1960). "No sophisticated legal scholar today would fail to agree that 'the fiction of mere law-finding by courts is being relegated to the shelf of forgotten things by both judges and jurists,' and that the 'creative nature of much judicial activity has become a commonplace . . .'" *Newman*, 772 P.2d at 1063. Regarding the creative aspect of judicial lawmaking, Justice Frankfurter candidly acknowledged, "Construction, no doubt, is not a mechanical process and even when most scrupulously pursued by judges may not wholly escape some retrospective infusion so that the line between interpretation and substitution is sometimes thin." *Shapiro v. United States*, 335 U.S. 1, 42-43 (1948) (Frankfurter, J., dissenting). See generally MORRIS R. COHEN, *LAW AND THE SOCIAL ORDER* (Wm. M. Gaunt & Sons, Inc., photo reprint 1994) (1933).

[M]ost modern jurists are outgrowing the superstitious awe of the printed word and its magic potency. The meaning of a statute consists in the system of social consequences to which it leads or of the solutions to all the possible social questions that can arise under it. These solutions or systems of consequences cannot be determined solely from the words used, but require a knowledge of the social conditions to which the law is to be applied as well as of the circumstances which led to its enactment. Legal rules relate to human life, and grammar or formal logic alone will not enable us to deduce their juridical consequences.

Id. at 131; see also Charles Grove Hains, *General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges*, 17 ILL. L. REV. 96 (1922), in PHILIP SHUCHMAN, COHEN AND COHEN'S READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 250 (1951).

Some time, no doubt, more facts regarding the personal element in the administration of justice will be rendered available, and, perhaps, a better educated public will be prepared to know the truth — namely, that the process of judicial decision is determined to a considerable extent by the judges' views of fair play, public policy, and their general consensus as to what is right and just.

Id. at 254.

27. 332 U.S. 194 (1947). See also *infra* Part III for a detailed discussion of *Chenery II*.

28. *Id.* at 202-03.

29. The OAL, an executive branch agency, reviews all adopted regulations that are subject to the California APA for compliance with statutorily mandated standards. CAL. GOV'T CODE § 11340.1 (West 2001) (creating the OAL). See also Marsha N. Cohen, *Regulatory Reform: Assessing The California Plan*, 1983 DUKE L.J. 231 (1983) (surveying APA rule-making requirements and critiquing OAL's oversight role).

30. Before Section 11425.60 was enacted, a few state agencies had authority to desig-

No published judicial decision directly addressed OAL's argument. Some agencies adopted OAL's position and purportedly rejected the legal relevance of previous adjudicative decisions. Such a policy encouraged *sub silentio* reliance on a body of concealed case law. Adjudicators could not cite previous decisions as authoritative, but nevertheless drew upon them to lessen the burden of continually redetermining settled issues of law. Thus, innovations and interpretations introduced in adjudicative decisions influenced future outcomes, but provided a lamentably dim beacon to guide the course of agency law.

Further frustrating the case-to-case predictability and uniformity of adjudicative decisionmaking, the public had no access to the prior decisions of most agencies except through backdoor channels or Public Records Act requests.³¹ The lack of public access to an agency's operative case law imperiled the integrity of the adversarial process, placing at a disadvantage everyone except agency personnel and the few who closely observed the agency's activities. Government Code Section 11425.60 enables open, consistent, and predictable application of agency case law by recognizing the legitimacy of adjudicatory lawmaking and by requiring agencies to make their precedential legal and policy determinations available to everyone.³²

This article examines the nature of administrative precedent and the bounds of agency lawmaking discretion under Government Code Section 11425.60. This article contends that Section 11425.60 authorizes agencies to promulgate, through adjudicative decisions, standards that have the binding force and effect of law. Until a precedent is expressly reversed or modified, it constrains the scope of agency enforcement discretion and controls the resolution of the same issues in subsequent cases.

The legislature intended the grant of adjudicatory lawmaking powers by Section 11425.60 in part to advance a cardinal state policy proscribing bureaucratic "underground law."³³ Because Section 11425.60 pro-

nate precedent decisions under their respective organic statutes. The agencies included the Unemployment Insurance Appeals Board (CAL. UNEMP. INS. CODE § 409 (West 2001)), the State Personnel Board (CAL. GOV'T CODE § 1985.2 (repealed)), and the Fair Employment and Housing Commission (CAL. GOV'T CODE § 12935(h) (West 2000)).

31. The California Public Records Act (codified at CAL. GOV'T CODE §§ 6250-6270 (West 2001)). Some agencies, including the Public Utilities Commission, Agricultural Labor Relations Board, and Public Employment Relations Board, published their adjudicative decisions before the 1995 APA reforms were enacted.

32. CAL. GOV'T CODE § 11425.60(c) (West 2001).

33. ADMINISTRATIVE AUTHENTICATION BY STATE AGENCIES, 25 CAL. L. REVISION

hibits agencies from relying on a decision as precedent unless the decision has been designated as precedential and indexed, unjustified failure to designate determinations of significant recurring legal issues as precedential will promote "underground" reliance on those determinations by adjudicators. Moreover, because Section 11425.60 exempts the failure to designate precedents from judicial review, agencies that simply ignore the statute may be held accountable only through less direct political controls. In that regard, Professor Asimow suggests that the force of public criticism or censure by the Legislature would provide a sufficient motive to impel agency action.³⁴

Before the 1995 APA reforms, most state adjudicatory proceedings were conducted outside the purview of the APA.³⁵ Chapter II discusses the 1995 APA's solution to the problem of unguided adjudicatory power that predominated under the former statutory scheme. Chapter III discusses the federal bench's long-standing acceptance of agency case-by-case lawmaking and reviews published California judicial decisions expressing approval of the federal doctrine. Chapter IV explores the nature of administrative precedent and discusses the relevance of "fair notice" and "consistency" principles to precedent decisions. Chapter V discusses structural and doctrinal limitations on agency discretion to formulate new law and policy through adjudication.

II. THE 1945 APA AND THE NEED FOR REFORM

The California APA established formal trial-type procedures for state agency adjudication on a foundation of essential due process safeguards.³⁶ The Act's most significant and enduring contribution to the fairness and integrity of the adjudicative process was the creation of the Office of Administrative Hearings, an office within the Department of General Services staffed by a corps of independent state hearing officers.³⁷ The 1945 APA represented a great achievement in advancing the

COMM'N REPORTS 55, 163 (1995).

34. See Michael Asimow, *The Adjudication Process*, in ADMINISTRATIVE ADJUDICATION BY STATE AGENCIES, 25 CAL. L. REVISION COMM'N 447, 541 (1995).

35. See COHEN, *supra* note 26, at 238-39.

36. See CAL. GOV'T CODE § 11425.10 (West 2001).

37. See generally Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455 (1986) (discussing the preeminent status of an independent adjudicator among due process values); see also Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias In Agency Decisionmaking*, 57 U. CHI. L. REV. 481 (1990) (discussing the line between appropriate political control and independent bias in agency decisionmakers). In 1985, the Legislature changed the civil ser-

rule of law in administrative adjudication, but from the outset it had a conspicuous shortcoming. The APA's procedures and safeguards applied only to enumerated agencies and only to the proceedings specified by the agencies' constituent statutes.³⁸

The California Legislature adopted the 1945 APA principally to establish uniform procedures in adversarial evidentiary hearings conducted by state licensing agencies. In the decades following the APA's adoption, adjudicatory activities by non-APA agencies expanded dramatically, without concomitant legislative resolve to structure those activities. By the 1990s, the APA covered only a small fraction of state agency adjudicatory proceedings.³⁹

Non-APA adjudication under the former statutory regime operated under an eclectic assortment of uncodified bureaucratic folkways, enabling statutes, regulations, and a few, but important, reforms imposed by the courts.⁴⁰ Institutional inertia and incessant competing calls on agency attention and resources prevented many non-APA agencies from promulgating standards to govern adjudicatory hearing procedure. The need for a statewide approach to administrative adjudication, emphasizing procedural uniformity and the participatory rights of the public, was apparent and long overdue. The absence of explicit standards to curb agency adjudicatory discretion subjects the public to the desultory impulses of individual officials and the risk of thoroughgoing corruption.⁴¹

vice title of Office of Administrative Hearings hearing officers to administrative law judge. CAL. GOV'T CODE § 11502 (West 2001).

38. Former CAL. GOV'T CODE § 11501 (West 1992) (amended 2001). "[T]he Administrative Procedure Act itself is restricted in its application to implement only those functions of a state agency to which it is expressly 'made applicable by the statutes relating to the particular agency,' [[CAL.] GOV'T CODE § 11501 (West 1992) (amended 2001)] and this restriction has been strictly construed by the courts." See *Serenko v. Bright*, 70 Cal. Rptr. 1, 6 (Ct. App. 1968) (quoting *Bertch v. Soc. Welfare Dep't of Cal.*, 289 P.2d 485, 487 (Cal. 1955); *Taliaferro v. Ins. Comm'n of Cal.*, 298 P.2d 914, 916 (Cal. Ct. App. 1956)).

39. Michael Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. REV. 1067, 1073 (1992) (stating that approximately ninety-five percent of state agency adjudications fell outside the APA's purview).

40. See ADMINISTRATIVE ADJUDICATION BY STATE AGENCIES, 25 CAL. L. REVISION COMM'N REPORTS 55, 79 (1995).

41. A recent report by a California State Senate committee emphasizes the need to circumscribe agency discretion by clear statutory standards and close-range legislative oversight. CAL. S. INS. COMM'N. THE DEP'T OF INS.: IN RUBBLE AFTER NORTHRIDGE (August 28, 2000), at <http://www.sen.ca.gov/htbin/testbin/seninfodated?sen.committee.standing.insurance.reports> (last visited Jan. 27, 2002) (finding that former California Insurance Commissioner Chuck Quackenbush grossly abused his discretionary powers by running the State Insurance Department as a privately-held satrapy).

The 1995 reform legislation redressed the legislature's delegation of unchecked adjudicatory power to agencies cast adrift from the APA by simply reversing the 1945 APA's coverage formula. Whereas the original APA covered only agencies listed in the Act and applied only when expressly required by the named agencies' enabling statutes, the revised APA's administrative adjudication provisions mandate fundamental procedural safeguards by default. Under the revised California APA, minimum due process guarantees and enumerated public interest protections apply "whenever the federal or state Constitution or a federal or state statute" requires an adjudicatory hearing.⁴² The APA codifies these foundational guarantees and protections in an Administrative Adjudication Bill of Rights.⁴³ Unless a state or federal statute or federal regulation provides otherwise,⁴⁴ the Bill of Rights mandates the following basic protections in all agency adjudicatory proceedings covered by the APA: the right to notice of the agency action; the right to obtain a copy of the agency's governing procedure; the right to a neutral presiding officer; the right to a public hearing; the right to present and rebut evidence; the right to language assistance; the right to a written decision based on the record; and a restriction on ex-parte communications.⁴⁵

The Administrative Adjudication Bill of Rights also prohibits agencies from relying on a previous adjudicative decision as precedent unless the agency has designated the decision as precedential and has made the decision available to the public.⁴⁶ This provision was designed in part to safeguard litigants and the public against the inherent unfairness of an agency's informally relying on interpretive conventions hidden in unpublished case law to support a decision or justify regulatory action.

42. CAL. GOV'T CODE § 11410.10 (West 2001).

43. CAL. GOV'T CODE §§ 11425.10-.60 (West 2001).

44. CAL. GOV'T CODE §§ 11415.20, 11425.10(b) (West 2001).

45. CAL. GOV'T CODE § 11425.10. The ADMINISTRATIVE ADJUDICATION BILL OF RIGHTS applies also to adjudicatory hearings of non-governmental entities created by statute to administer a state function (CAL. GOV'T CODE § 11410.60 (West 2001) (defining such entities as "quasi-public")) and to local agency hearings where required by statute (CAL. GOV'T CODE § 11410.30 (West 2001)).

46. CAL. GOV'T CODE §§ 11425.10(a)(7), 11425.60 (West 2001).

III. JUDICIAL ACCEPTANCE OF ADMINISTRATIVE ADJUDICATORY LAWMAKING

A. *Chenery II*⁴⁷

The United States Supreme Court's decision in *Chenery II* firmly established as a principle of administrative law that federal regulatory agencies with rulemaking and adjudicatory powers have discretion to choose either mode as the mechanism for making new law.⁴⁸ The Court decided *Chenery II* against the historical backdrop of the Court's post-New Deal shift in attitude about the legitimacy of an omniscient federal bureaucracy within the three-branch constitutional framework. The case presented the question whether an agency with delegated rulemaking powers also had the power to develop and retroactively apply a new statutory interpretation in an adjudicatory proceeding.⁴⁹ The Securities and Exchange Commission ("SEC") had conducted the proceeding to determine whether to approve a registered holding company's voluntary reorganization plan under the Public Utility Holding Company Act of 1935.⁵⁰ The company's plan included a proposal by company managers to convert preferred shares they had purchased during the reorganization period into common stock of the reorganized company. Neither the SEC's regulations nor the Public Utility Holding Company Act addressed the issue of insider trading during reorganization. In the adjudicatory proceeding, the SEC found no evidence of fraud or lack of disclosure by the managers but concluded the stock purchase and proposed conversion contravened broad public interest standards enumerated in the Public Utility Holding Company Act.⁵¹ At a decision of first impression, the SEC refused to approve the reorganization plan unless the managers surrendered their preferred shares.⁵²

The corporation argued before the Supreme Court that the SEC lacked authority to apply retroactively a new construction of the Public Utility

47. SEC v. *Chenery Corp.*, 332 U.S. 194 (1947).

48. *Id.* at 202-03.

49. *Id.* at 196.

50. *Id.* at 197.

51. The Public Utility Holding Company Act authorized the SEC to approve a reorganization plan if it found the plan "fair and equitable" and allowed the SEC to disapprove the issuance of new securities that would be "detrimental to the public interest or the interest of investors." *Id.* at 204 (quoting Section 7 of the Public Utility Holding Company Act, 15 U.S.C. § 79g (2001)).

52. *Id.* at 197-98.

Holding Company Act in the adjudicatory proceeding; if the SEC desired to prohibit insider trading it would have to do so through prospective rulemaking.⁵³ The Supreme Court rejected the company's arguments and held the SEC's failure to adopt a controlling regulation did not deprive it of authority to reject the proposed reorganization plan.⁵⁴ The Court emphasized the point that the SEC, once confronted with the unique circumstances presented in the adjudication, could not avoid its statutory duty to apply the proper statutory standards, "regardless of whether those standards previously had been spelled out in a general rule or regulation."⁵⁵ The Court concluded the SEC had authority under the Act's broad mandate to develop a new regulatory standard of conduct in the adjudicatory proceeding:

Since the Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason to rely upon *ad hoc* adjudication to formulate new standards of conduct within the framework of the Holding Company Act. The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. But, any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems that arise. . . . Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.

In other words, problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to war-

53. *Id.* at 199-200.

54. *Id.* at 200.

55. *Id.* at 201.

rant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible to capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-by-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.⁵⁶

The Court also rejected the company's argument that the SEC improperly applied the new regulatory principle retroactively:

That such action might have a retroactive effect was not necessarily fatal to its validity. Every case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency. But such retroactivity must be balanced against the mischief of producing a result that 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 that is condemned by law.⁵⁷

The decision drew a stinging dissent from Justice Jackson, who rebuked the majority for approving "administrative authoritarianism" and encouraging "conscious lawlessness as a permissible rule of administrative action."⁵⁸ Jackson's critique warns that the majority's overreaching deference to agency discretion weakens the judiciary's constitutional role as a check against bureaucratic autocracy.⁵⁹ Nevertheless, since

56. *Id.* at 202-03 (citations omitted).

57. *Id.* at 203.

58. *Id.* at 217 (Jackson, J., dissenting). Jackson filed his dissenting opinion, in which Justice Frankfurter joined, more than three months after the majority opinion was filed. *Id.* at 209. Although Jackson's words are severe, one can presume they were chosen carefully.

59. In a later case, Jackson described administrative bodies as "a veritable fourth branch of government, which has deranged our three-branch legal theories." *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting). *Cf. ROSCOE POUND, ADMINISTRATIVE LAW* 65-66 (1942). ("It is true that there is no magic virtue in the number three. But it is the separation or distribution of powers that is the significant feature of our constitutional polity, and a concentration of them in a fourth [branch] is objectionable, not 'in the light of numerology' but because it brings back the type of government that our constitutions were set up to avoid.") *But see* *Plaut v. Spendthrift Farm*, 514 U.S. 211, 245 (1995) (Breyer, J., concurring.) ("[T]he unnecessary building of such walls is, in itself, dangerous, because

Chenery II the Court has not retreated from the position that agencies have broad discretion to choose rulemaking or adjudication as the vehicle to make new law and policy.⁶⁰

The *Chenery II* doctrine retained its vitality after Congress enacted the 1946 Federal Administrative Procedure Act,⁶¹ which did not play a part in the Court's *Chenery II* decision.⁶² In a Federal APA-era case, *NLRB v. Bell Aerospace*,⁶³ the Supreme Court affirmed the continuing vigor of *Chenery II* and rejected an argument that the Board violated the Act's notice and comment rulemaking requirements when it announced and retroactively applied a new regulatory principle in an adjudicatory proceeding. The Supreme Court stated:

The views expressed in *Chenery II* and *Wyman-Gordon* 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. Although there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion or a violation of the Act, nothing in the present case would justify such a conclusion. . . . It is doubtful whether any generalized standard could be framed which would have more than marginal utility. The Board thus has reason to proceed with caution, developing its standards in a case-by-case manner. . . . The Board's judgment that adjudication best serves this purpose is entitled to great weight.⁶⁴

the Constitution blends, as well as separates, powers in its effort to create a government that will work for, as well as protect the liberties of, its citizens.");

Not only does history show no example of any form of government where the three powers were really sharply separated, but modern political science has learned a general distrust of the naïve rationalism which supposes that the complicated facts of government can be readily and sharply divided into airtight *a priori* compartments.

MORRIS R. COHEN, *LAW AND THE SOCIAL ORDER: ESSAYS IN LEGAL PHILOSOPHY* 114 (Wm. M. Gaunt & Sons, Inc., photo. reprint 1994 (1933)).

60. *See, e.g.*, *Allentown Mack Sales & Serv. v. NLRB*, 522 U.S. 359 (1998); *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144 (1991).

61. 5 U.S.C. § 551 (1996).

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

63. 416 U.S. 267 (1974).

64. *Id.* at 295.

Chenery II and *Bell Aerospace* define the current federal administrative law doctrine.⁶⁵ According to Professors Davis and Pierce, the U.S. Supreme Court:

[H]as 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 potential basis for reversing an agency's decision to rely on adjudication as a means of announcing a "rule."⁶⁶

B. The Influence of *Chenery II*⁶⁷ in California

Most states follow the *Chenery II* principle and accord agencies broad discretion to develop law and policy through adjudication, as well as through rulemaking.⁶⁸ The California Supreme Court and Courts of Appeal had voiced unanimous approval of the *Chenery II* discretion

65. See, e.g., *Am. Airlines v. Dep't of Transp.*, 202 F.3d 788, 797 (5th Cir. 2000) ("Agencies have discretion to choose between adjudication and rulemaking as a means of setting policy."); *Bob Evans Farms v. NLRB*, 163 F.3d 1012, 1018 (7th Cir. 1998) ("[T]he functions of rulemaking and adjudication are not mutually exclusive; frequently adjudication is the vehicle for a statutory interpretation that is functionally equivalent to a rule."); *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 96-97 (1995) ("The APA does not require that all the specific applications of a rule evolve by further, more precise rules rather than by adjudication. The Secretary's mode of determining benefits by both rulemaking and adjudication is, in our view, a proper exercise of her statutory mandate."); *SBC Communications v. FCC*, 138 F.3d 410, 421 (D.C. Cir. 1998) ("Inherent in an agency's ability to choose adjudication rather than rulemaking is the option to make policy choices in small steps, and only as a case obliges it to.") (citing *SEC v. Chenery Corp.*, 332 U.S. 194 (1947)); *Jacks v. Crabtree*, 114 F.3d 983, 985 (9th Cir. 1997) ("[I]t is a well-established principle of administrative law that an agency to whom Congress grants discretion may elect between rulemaking and ad hoc adjudication to carry out its mandate.""). Some federal agencies, including the National Labor Relations Board, have opted to use adjudication to develop most of their substantive policies. See, e.g., *Allentown*, 522 U.S. at 374; *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 388 (D.C. Cir. 1972) ("Despite substantial and repeated scholarly and judicial criticism, the Board has largely ignored the rule making process, and has chosen rather to fashion new standards and to abrogate old ones in the context of case-by-case adjudication."). See generally STEPHEN G. BREYER, ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT AND CASES* 568 (4th ed. 1999).

66. 3 KENNETH CULP DAVIS & RICHARD J. PIERCE, *ADMINISTRATIVE LAW TREATISE* § 6.8, 273 (3d ed. 1994).

67. *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

68. 1 CHARLES H. KOCH, *ADMINISTRATIVE LAW AND PRACTICE* §212[4] (2d ed. 1997). See also Section 2-102(b) of the MODEL STATE ADMINISTRATIVE PROCEDURE ACT OF 1981, which recognizes the validity of adjudicative precedent: "A written final order may not be relied on as precedent by an agency to the detriment of any person until it has been made available for public inspection and indexed"

principle in a number of decisions issued before the California Legislature and expressly accredited administrative precedent decisions in 1995. A close reading of the decisions reveals, however, that their specific holdings did not rely on an affirmation of *Chenery II*.

In *Associated California Loggers v. Kinder* (“*Loggers I*”),⁶⁹ the California Insurance Commissioner invoked the accusation and adjudication process to enforce a new construction of a statute prohibiting unlawful rebates on insurance business.⁷⁰ Although *Loggers I* presented a procedural issue, whether affected third parties had standing to challenge the commissioner’s action, the Court of Appeal accepted the *Chenery II* doctrine that state agencies had discretionary power to develop new policies through rulemaking or case-by-case adjudication.⁷¹ The *Loggers I* court stated:

While it appears that Government Code [S]ection 11371 et seq., including [S]ection 11440, have reference to the promulgation of policy through general rules and regulations, it is clear that the commissioner can effectively promulgate general policy by a series of accusations and administrative adjudications directed at individual insurers such as is the case at bench. In short, the commissioner, by invalidating these service contracts, is promulgating a rule that in effect prohibits providers of workers’ compensation insurance from contracting to have administrative services performed by the insured.⁷²

Two years after *Loggers I*, the case came before the same court, this time on the merits. In *Loggers II*,⁷³ the court reaffirmed the principle that agencies have discretion to use rulemaking or case-by-case adjudication to make law:

As we observed in our previous opinion, the commissioner was authorized by then Government Code [S]ection 11371 to adopt regulations of general application to the industry that he is authorized to regulate. We further noted that he can, as a practical matter, effectively promulgate policy by a series of administrative ad-

69. 144 Cal. Rptr. 786 (Ct. App. 1978).

70. *Id.*

71. *Id.* at 791-92.

72. *Id.*

73. *Associated Cal. Loggers v. Kinder*, 168 Cal. Rptr. 67 (Ct. App. 1980).

judications⁷⁴

The court found, however, that the administrative record did not support the grounds relied on by the commissioner as justification for the order and affirmed the trial court's judgment declaring the commissioner's order invalid.⁷⁵

In *ALRB v. California Coastal Farms, Inc.*⁷⁶ the California Supreme Court described as a "well-settled principle of administrative law" the *Chenery II* Court's statement that "in discharging its delegated responsibilities the choice between proceeding by general rule or by ad hoc adjudication "lies primarily in the informed discretion of the administrative agency."⁷⁷ The Court's *Coastal Farms* decision did not turn on the question of agency power to develop new law through adjudication, but rather focused on the issue of the trial court's power to issue a preliminary injunction granting labor union representatives access to non-striking farm workers. Although the holding in *Coastal Farms* did not reach the question of agency power, the California Supreme Court expressed unequivocal acceptance of the *Chenery II* discretion principle as settled law in California.⁷⁸

In *F&P Growers Ass'n v. ALRB*,⁷⁹ the Court of Appeal cited the California Supreme Court's *Coastal Farms* dicta and affirmed a Board adjudicatory decision that applied a new interpretation of the unfair labor practices statutes. The appellate court stated, "[w]e see no reason to depart from the general rule that the choice between proceeding by general rule or adjudication lies primarily in the informed discretion of the administrative agency"⁸⁰

74. *Id.* at 69-70.

75. *Id.*

76. 645 P.2d 739 (Cal. 1983).

77. *Id.* at 235-36; *Accord* *Mein v. San Francisco Bay Conservation and Dev. Comm'n*, 267 Cal. Rptr. 252, 255-56 (Ct. App. 1990) (citing *Coastal Farms*, 645 P.2d at 743-44, as authority for the "well-settled principle of administrative law that agency has discretionary choice between proceeding by rulemaking or adjudication").

78. *Accord* *ALRB v. Superior Court*, 546 P.2d 687, 700-01 (Cal. 1976).

79. 218 Cal. Rptr. 736 (Ct. App. 1985).

80. *Id.* at 742; *Accord* *20th Century Ins. Co. v. Garamendi*, 878 P.2d 566, 606 (Cal. 1994), affirming the Insurance Commissioner's broad implied powers under the agency's statutory rate regulation authority to "establish rules to resolve various interstitial legal, policy, and technical issues." The Court also noted, "[a]n administrative official may frame rules deliberately in quasi-legislative proceedings to adopt regulations. Or [the official] may develop rules ad hoc in the course of quasi-adjudicatory review." *Id.* (alterations in original). See also *Goleta Valley Cmty. Hosp. v. Dep't of Health Servs.*, 197 Cal. Rptr. 294, 297 (Ct. App. 1983) (dicta) ("Like courts, agencies may overrule prior decision or practices and may initiate new policy or law through adjudication") (alterations in original).

Despite apparent unanimous acceptance of the *Chenery II* discretion principle by California's higher courts, the respected California Office of Administrative Law ("OAL") maintained (in its pre-July 1, 1997 determinations) that agencies did not have the power to use adjudication as an agent to promulgate new law or create binding interpretations absent an express statutory exemption from APA rulemaking requirements.⁸¹ The OAL supported that argument by relying on the APA's broad definition of "regulation"⁸² and the APA mandate that "no state agency shall issue, utilize, enforce, or attempt to enforce any . . . order, standard of general application, or other rule, which is a regulation as defined in [the APA] . . . unless [it] . . . has been adopted as a regulation . . ."⁸³ The California Law Revision Commission comments to Section 11425.60 suggest the Legislature had OAL's contentions in mind when it declared in Section 11425.60(b) that "designation of a decision or part of a decision as a precedent decision is not rulemaking and need not be done under [APA rulemaking procedures]. . . ."⁸⁴

81. See, e.g., 1993 OAL DETERMINATION NO. 1; 1999 OAL DETERMINATION NO. 9, 30 n. 40 ("OAL's position since 1986 has been that, absent an express statutory exemption from the APA, agency precedent decision systems violate the APA."). The Legislature authorized OAL to issue "determinations" on the issue whether any agency guideline, standard, or purported rule constitutes a regulation subject to APA rulemaking requirements. CAL. GOV'T CODE § 11340.5(b) (West 2001). The APA mandates OAL to file its determinations with the Secretary of State (CAL. GOV'T CODE § 11340.5(c)(1) (West Supp. 2001)), and make its determinations known to the agency, the Governor, and the Legislature (CAL. GOV'T CODE § 11340.5(c)(2) (West Supp. 2001)), publish its determinations in the California Regulatory Notice Register (CAL. GOV'T CODE § 11340.5(c)(3) (West Supp. 2001)), and make its determinations available to the public and the courts (CAL. GOV'T CODE § 11340.5(c)(4) (West Supp. 2001)). OAL's determinations are subject to judicial review and any interested person may petition the court to set aside or modify a determination. (CAL. GOV'T CODE § 11340.5(d) (West Supp. 2001)) In *Frankel v. Kizer*, the Court of Appeals stated, "[O]AL determinations are only entitled to due consideration. The ultimate resolution of such legal questions . . . rests with the courts." *Frankel v. Kizer*, 21 Cal. App. 4th 743, 751-52 (Ct. App. 1993) (alteration in original) (quoting *Grier v. Kizer*, 219 Cal. App. 3d 422, 432 (Ct. App. 1990)). As previously noted, no California published court decision expressly addressed OAL's determinations regarding agency precedent decision systems.

82. The APA defines "regulation" as "[e]very rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure . . ." See 5 U.S.C.A. § 551 (West 2000). See also *infra* note 9 and accompanying text.

83. CAL. GOV'T CODE § 11340.5(a) (Deering 1997) (derived from former CAL GOV'T CODE § 11347.5 (West 2002)).

84. The Commission comments to the statute note OAL's argument rejecting the validity of agency precedent decisions and cite 1993 OAL DETERMINATION NO. 1. (CAL. L. REVISION COMM'N, CAL. GOV'T CODE § 11425.60 (West Supp. 2001)).

IV. THE NATURE OF ADMINISTRATIVE PRECEDENT

Government Code Section 11425.60 details substantive and procedural requirements for agency precedent decisions, but does not expound upon the nature of agency adjudicative precedent. Furthermore, it does not explicitly define the extent to which precedent decisions legally bind nonparties and the agency.⁸⁵ As discussed in Part A below, the language of Section 11425.60 and the Law Revision Commission comments to Sections 11425.60 and 11425.50(e) evince the statutory intent to grant agencies the power to establish legally binding interpretations and regulatory standards through precedent decisions.⁸⁶ Part B discusses “fair notice” requirements applicable to adjudicative precedents that purport to declare binding standards. Part C discusses the administrative law principle requiring consistency in adjudicatory decisionmaking.

A. The Binding Effects of Precedent Decisions

In *Pacific Legal Foundation v. Unemployment Insurance Appeals Board*,⁸⁷ the California Supreme Court characterized the Board’s precedent benefit decisions as “akin to agency rulemaking, because they announce how governing law will be applied in future cases.”⁸⁸ The Court

85. Section 11425.60 does not define “precedent” but the term has a well-established meaning in the jurisprudence of the courts: “[A] judicial decision . . . that serves as a rule for future determinations in similar or analogous cases: an authority to be followed in courts of justice.” WEBSTER’S NEW INT’L DICTIONARY 1783 (3d ed. 1986). Cf. *E.A. Stephens & Co. v. Albers*, 256 P. 15, 16 (Colo. 1927):

So far as we have been able to determine the diligence of counsel has spread before us all “the law and the Gospels’ touching the question at issue. Four chapters of the Bible, department bulletin No. 1151 of the United States Department of Agriculture, Belden on Fur Farming for Profit, Harding on Fox Raising, Darwin’s Origin of Species, Shakespeare’s Henry IV, St. John Lucas, Suetonius, Aesop’s Fables, the Tale of the Spartan Youth, the Harvard Law Review, the Albany Law Journal, the Central Law Journal, the London Law Times, the Criminal Law Magazine, and certain anonymous writers, not to mention numerous statutes and court decisions, adorn and illuminate their briefs. Leaving with reluctance all these landmarks save the last two mentioned, we turn to the question here at issue”

86. CAL. GOV’T CODE § 11425(e) (West 2001).

87. *Pac. Legal Found. v. Unemployment Ins. Appeals Bd.*, 624 P.2d 244, 247-48 (Cal. 1991) (involving a Board precedent benefit decision). The Legislature granted precedent decision authority to the Unemployment Insurance Appeals Board in a 1967 amendment to CAL. UNEMP. INS. CODE § 409 (West Supp. 2001).

88. *Id.* at 247. See also *Am. Fed’n of Labor v. Unemployment Ins. Appeals Bd.*, 28 Cal. Rptr. 2d 210, 213 (Ct. App. 1994) (stating that “[p]recedent decisions are akin to agency

quoted from a letter to the Governor, written by the author of legislation granting affected nonparties standing to seek judicial review of the Board's precedents: "[f]or all practical purposes, precedent benefit decisions are regulations and should be treated accordingly."⁸⁹

Administrative regulations embody rules and standards of general application that have the same binding force and effect as legislative enactments.⁹⁰ California Government Code Section 11425.60 authorizes agencies to designate as precedential a decision or part of a decision that contains a "significant legal or policy determination of general application that is likely to recur."⁹¹ This language and the provision of Section 11425.60 exempting precedents from APA rulemaking requirements reveal the legislature's objective to confide in agencies substantive law-making power under the precedent decision statute.

The Law Revision Commission's comments regarding APA Sections 11425.60 and 11425.50 lend support to this construction.⁹² The Commission's comment regarding Section 11425.60 states that the statute "recognizes the need of agencies to be able to make law and policy through adjudication as well as through rulemaking" and seeks "to encourage agencies to articulate what they are doing when they make new law or policy in an adjudicative decision."⁹³

Section 11425.50(e) declares, "[a] penalty may not be based on a guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule subject to [APA] Chapter 3.5 . . . unless it has been adopted as a regulation pursuant to Chapter 3.5 . . ."⁹⁴ The Law Revision Commission comment regarding Section 11425.50 states, "[a] penalty based on a precedent decision does not violate subdivision

rulemaking and, therefore, judicial recourse is available under [S]ection 409.2 to persons affected by the precedent similar to recourse generally available against regulations.").

89. *Id.* (internal quotations omitted). The quoted letter pertained to the legislation enacting CAL. UNEMP. INS. CODE § 409.2 (West Supp. 2001). That statute provides, "[A]ny interested person or organization may bring an action for declaratory relief in the superior court in accordance with the provisions of the Code of Civil Procedure to obtain a judicial declaration as to the validity of any precedent decision of the appeals board . . ." CAL. UNEMP. INS. CODE § 409.2 (West Supp. 2001).

90. *See* ALRB v. Superior Court, 546 P.2d 687, 693 (Cal. 1976) ("[A] regulation adopted by a state administrative agency pursuant to a delegation of rulemaking authority by the Legislature has the force and effect of a statute."). *Accord* Simi Valley Adventist Hosp. v. Bonta, 96 Cal. Rptr. 2d 633 (Ct. App. 2000).

91. CAL. GOV'T CODE § 11425.60(b) (West Supp. 2001).

92. The California courts regard Law Revision Commission comments as a reliable guide to legislative intent. *See, e.g.*, Estate of Propst, 788 P.2d 628, 635 (Cal. 1990).

93. CAL. GOV'T CODE § 11425.60 cmt. 142 (West Supp. 2001).

94. CAL. GOV'T CODE § 11425.50(e) (West Supp. 2001).

(e).⁹⁵ This statement, of course, presupposes that agencies have the power under Section 11425.60 to promulgate enforceable standards of conduct through precedent decisions.⁹⁶

B. Fair Notice

Under established due process doctrine, enactments that prescribe standards of conduct must express those standards with sufficient clarity and precision to provide fair notice to affected persons of the boundary between lawful and prohibited conduct.⁹⁷ In *People v. Superior*

95. CAL. GOV'T CODE § 11425.50 cmt. 140 (West Supp. 2001). See also 9 WITKIN, CALIFORNIA PROCEDURE (1999) Administrative Proceedings, section 57 (b) ("A penalty may properly be based on a precedent decision, since it is not an 'underground rule.'").

96. The federal courts recognize agency power to create binding law through adjudication. See, e.g., *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974) (stating that "An administrative agency has available two methods for formulating policy that will have the force of law. An agency may establish binding policy through rulemaking procedures by which it promulgates substantive rules, or through adjudications which constitute binding precedents."). But see *NLRB v. Wyman-Gordon*, 394 U.S. 759 (1969) (Fortas, J., plurality opinion). In a plurality opinion, the Court stated:

Adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein. They 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. But this is far from saying, as the Solicitor General suggests, that commands, decisions, or policies announced in adjudication are "rules" in the sense that they must, without more, be obeyed by the affected public.

NLRB v. Wyman-Gordon, 394 U.S. 759, 765-66 (1969) (Fortas, J., plurality opinion) (citation omitted). The U.S. Supreme Court decided *Wyman-Gordon* five years before *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267 (1974). The *Bell Aerospace* decision follows *Chenery II* and quotes from the *Wyman-Gordon* plurality opinion, omitting, however, Justice Fortas's dicta that regulatory standards developed through adjudication do not have the force of law. *Id.* at 293-94. See also Ronald A. Cass, *Models of Administrative Action*, 72 VA. L. REV. 363 (1986). Cass points out the following:

The [*Wyman-Gordon* Court] plainly desired to segregate two processes, one legislative in nature, the other judicial. Despite the obvious appeal of the bipolar model, however, the justices could not adhere to it consistently. In *Wyman-Gordon*, the Court upheld the application of the improperly adopted 'rule' because a procedurally proper adjudicative order applied the rule's mandate to the *Wyman-Gordon* Company. In *Bell Aerospace* the Court effectively abandoned its effort to keep the two processes distinct and adopted an opinion that clearly resembled the *Chenery* decision. Rather than focus on the language of the APA, the Court stressed the desirability of making some policy judgments through the adjudicatory process, despite the general advantages of rulemaking for that task.

Cass, *supra*, at 383-84. See generally *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807 (1973) (providing an overview of the importance and settled policy of precedent in administrative proceedings).

97. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) ("It is established that a law

Court,⁹⁸ the California Supreme Court stated: “[w]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited”⁹⁹ Due process also requires enactments to provide explicit guidelines to prevent “arbitrary and discriminatory” enforcement of the law.¹⁰⁰ As the court stated, “[a] vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”¹⁰¹

In *Cranston v. City Of Richmond*,¹⁰² the California Supreme Court applied the fair notice test to quasi-legislative enactments: “the prohibition against vagueness extends to administrative regulations affecting conditions of governmental employment as well as to penal statutes”¹⁰³ The Supreme Court has stated, however, that the Constitution tolerates a lesser degree of specificity in an administrative prescription than required of a penal statute:

[W]hen an administrative regulation is challenged the standard of constitutional vagueness is less strict than when a criminal law is attacked. “In the field of regulatory statutes governing business activities, where the acts limited are in a narrow category, greater leeway is allowed.” “The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement.”¹⁰⁴

fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits.”) (quoting *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03); see also *Morrison v. State Bd. of Educ.*, 461 P.2d 375, 387 (Cal. 1969) (stating that “[c]ivil as well as criminal statutes must be sufficiently clear as to give a fair warning of the conduct prohibited, and they must provide a standard or guide against which conduct can be uniformly judged by courts and administrative agencies.”). The due process interests in fair notice are protected by the United States Constitution and the California Constitution. U.S. CONST. amend. V, XIV; CAL. CONST. art. I, § 7.

98. 758 P.2d 1046 (Cal. 1988).

99. *Id.* at 1049.

100. *Id.*

101. *Id.*

102. 710 P.2d 845 (1985).

103. *Id.* at 850 (quoting *Bence v. Breier*, 501 F.2d 1185, 1188 (7th Cir. 1974)). Accord *Diamond Roofing Co., Inc. v. Occupational Safety and Health Review Comm’n*, 528 F.2d 645, 649 (5th Cir. 1976) (stating that: “If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express.”). But see *In re Perry*, 882 F.2d 534 (9th Cir. 1989).

104. *Ford Dealers Ass’n v. Dep’t of Motor Vehicles*, 650 P.2d 328, 339 (Cal. 1982) (citations omitted). See also *B. C. Cotton, Inc. v. Voss*, 39 Cal. Rptr. 2d 484, 500 (Ct. App. 1995) (finding that: “[I]mprecision in a regulatory measure may in appropriate cases be

According to the California courts, administrative civil sanctions do not involve punishment, even though such sanctions may carry the “sting of punishment.”¹⁰⁵

“Administrative proceedings are civil in nature. With particular reference to a proceeding to revoke or suspend a license or other administrative action of a disciplinary nature, it has been held in this state that such proceeding is not a criminal or quasi-criminal prosecution. The purpose of such a proceeding is not to punish but to afford protection to the public . . . by eliminating from the ranks of practitioners those who are dishonest, immoral, disreputable, or incompetent.”¹⁰⁶

Prospective lawmaking by adjudication invokes the same vagueness concerns that bear upon legislative enactments. Thus, the California courts should apply to precedent decisions the constitutional touchstone that determines whether agency regulations meet fair notice requirements. The fair notice doctrine has been fully integrated into federal administrative law:

Due process requires that parties receive fair notice before being deprived of property. The due process clause thus “prevents . . . deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires.” In the absence of notice — for example, where the regulation is not sufficiently clear to warn a party about what is expected of it — an agency may not deprive a party of property by imposing civil or criminal liability. Of course, it is in the context of criminal liability that this “no punishment without notice” rule is most commonly applied. But as long ago as 1968, we recognized this ““fair notice”“ requirement in the civil administrative context [E]lementary fairness compels clarity in the statements and regulations setting forth the actions with which the agency expects the public to comply. This requirement has now been thoroughly incorporated into administrative law.¹⁰⁷

cured by construction and application.”).

105. *People v. Damon*, 59 Cal. Rptr. 2d 504, 519 & n.20 (Ct. App. 1996).

106. *Id.* at 519 (quoting *Borror v. Dep't of Investment*, 15 Cal. App. 3d 531, 540 (Ct. App. 1971) (citations omitted)).

107. *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995) (citations omit-

C. CONSISTENCY

A fundamental corollary of adjudicatory lawmaking power constrains agencies to follow their precedents consistently or adequately explain the reasons for not doing so.¹⁰⁸ The consistency principle, which Justice Breyer refers to as a “procedural principle” of administrative law,¹⁰⁹ resembles the judicial *stare decisis* doctrine, but appropriately permits agencies substantial discretion to make reasoned changes from previous policies.¹¹⁰ The United States Supreme Court has stated, “[W]e fully recognize that [regulatory] agencies do not establish rules of conduct to last forever, and that an agency must be given ample latitude to adapt their rules and policies to the demands of changing circumstances.”¹¹¹

In *Weiss v. State Board of Equalization*¹¹², the California Supreme Court, influenced by the post-New Deal administrative jurisprudence of the federal bench, endorsed the principle that agencies have discretion to

ted). *Accord* *Satellite Broad. Co., Inc. v. FCC*, 824 F.2d 1, 3-4 (D.C. Cir. 1987). In *Satellite Broad. Co.*, the court stated that:

Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule The Commission through its regulatory power cannot, in effect, punish a member of the regulated class for reasonably interpreting Commission rules. Otherwise the practice of administrative law would come to resemble “Russian Roulette.” The agency’s interpretation is entitled to deference, but if it wishes to use that interpretation to cut off a party’s right, it must give full notice of its interpretation.

Id. See generally Timothy A. Wilkins, *Regulatory Confusion, Ignorance of Law, and Deference to Agencies*, 49 SMU L. REV. 1561 (1996). (Professor Wilkins’s article analyzes the significance of *General Electric*, and discusses the “regulatory confusion” defense in light of the due process standards articulated by the court. According to Wilkins, regulatory confusion results when persons subject to a regulation cannot reasonably ascertain the meaning of the regulation or the agency’s interpretation of the regulation.)

108. See generally Daniel J. Gifford, *Discretionary Decisionmaking In The Regulatory Agencies: A Conceptual Framework*, 57 S. CAL. L. REV. 101 (1983) (examining discretionary decision making by regulatory agencies); L. Harold Levinson, *The Legitimate Expectation that Public Officials Will Act Consistently*, 46 AM. J. COMP. L. 549 (1998) (exploring the “consistency principle” in American law and how government agencies deal with conflicting laws).

109. STEPHEN G. BREYER, ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 452 (4th ed. 1999).

110. See generally cases collected in Ernest H. Schopler, Annotation Comment Note, *Applicability of Stare Decisis Doctrine to Decisions of Administrative Agencies*, 79 A.L.R. 2d 1126 (1999) (discussing the rule of *stare decisis* and precedent in administrative adjudication). See also Harold J. Krent, *Reviewing Agency Action for Inconsistency with Prior Rules and Regulations*, 72 CHI.-KENT. L. REV. 1187 (1997) (discussing the role of judicial review).

111. *Motor Vehicle Mfgs. Ass’n of United States, Inc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 42 (1983) (citations omitted).

112. 256 P.2d 1 (Cal. 1953).

disregard policies announced in earlier decisions so long as the agency's action is not arbitrary or unreasonable.¹¹³ The Court stated, "[D]ue process . . . probably . . . permits substantial deviation from the principle of stare decisis. Like courts, agencies may overrule prior decisions or practices and may initiate new policy or law through adjudication."¹¹⁴

In *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*,¹¹⁵ the Supreme Court explained the principle forbidding unexplained departures from precedent as an aspect of fidelity to the agency's statutory mandate:

A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to. From this presumption flows the agency's duty to explain its departure from prior norms. The agency may flatly repudiate those norms, deciding, for example, that changed circumstances mean that they are no longer required in order to effectuate congressional policy. Or it may narrow the zone in which some rule will be applied, because it appears that a more discriminating invocation of the rule will best serve congressional policy. Or it may find that, although the rule in general serves useful purposes, peculiarities of the case before it suggest that the rule not be applied in that case. Whatever the ground for the departure from prior norms, however, it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's man-

113. *Id.* at 3.

114. *Id.* (quoting 3 KENNETH CULP DAVIS & RICHARD J. PIERCE, ADMINISTRATIVE LAW § 168 (3d ed.1994)). See also, *Citicorp N. Am., Inc. v. Franchise Tax Bd.*, 100 Cal. Rptr. 2d 509, 522-23 (Ct. App. 2000) ("Adherence to an outmoded rule for the sake of consistency in the face of compelling reasons to change is not a virtue . . ."). See also *Californians for Political Reform Found. v. Fair Political Practices Comm'n*, 71 Cal. Rptr. 2d 606, 616 (Ct. App. 1998) ("In the general case, of course, an administrative agency may change its interpretation of a statute, rejecting an old construction and adopting a new. Put simply, [a]n administrative agency is not disqualified from changing its mind . . ."). "As long as the change is constitutionally and legislatively permissible, an agency would be remiss in not adapting its interpretation of the rules to fit the practicalities and present economic conditions dictating a change." *Citicorp N. Am.*, 100 Cal. Rptr. 2d at 522.

115. 412 U.S. 800 (1973).

date.¹¹⁶

The federal courts uniformly follow the principle articulated in *Atchison*.¹¹⁷ For example, in *Greyhound Corp. v. ICC*,¹¹⁸ the Court of Appeals for the District of Columbia Circuit stated:

This court emphatically requires that administrative agencies adhere to their own precedents or explain any deviations from them. Of course, the agency is free to make reasoned changes in its policies. However, as this court noted in *Columbia Broadcasting System, Inc. v. FCC*, there is an “equally essential proposition that, when an agency decides to reverse its course, it must provide an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law.”¹¹⁹

The court found that the Commission’s order against Greyhound Corporation deviated from the results the Commission had decreed in prior similar cases as well as from the standards the Commission applied to reach those results.¹²⁰ Further, the court noted the order failed to make even “passing reference” to the Commission’s previous decisions.¹²¹

116. *Id.* at 807-08. Many federal court decisions invoke APA judicial review standards as a substantive prohibition against unexplained departures from precedent. (Section 706(2)(A) of the federal APA mandates a reviewing court to set aside agency action found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . .”). See, e.g., *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996). In *Yueh-Shaio Yang* the Supreme Court stated:

Though the agency’s discretion is unfettered at the outset, if it announces and follows — by rule or by settled course of adjudication — a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned as “arbitrary, capricious, [or] an abuse of discretion” within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

Id.

An agency action that constitutes an unexplained departure from precedent must be reversed as arbitrary and capricious within the meaning of §706 of the APA. This doctrine makes it far more difficult for any agency to make adjudicatory decisions based on undisclosed, impermissible motives If an agency treats individuals differently, it must acknowledge and explain that difference in treatment.

3 KENNETH CULP DAVIS & RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE § 11.5 (3d ed. 1994).

117. 412 U.S. 800 (1973).

118. 551 F.2d 414 (D.C. Cir. 1977).

119. *Id.* at 416 (quoting *CBS, Inc. v. FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971)).

120. *Id.*

121. *Id.* at 417.

The court stated, “[T]he Commission’s utter failure to come to grips with this problem constitutes an inexcusable departure from the essential requirement of reasoned decision making.”¹²² The court remanded the case to the Commission for reconsideration, giving the Commission these closing words of guidance:

We do not remand for the Commission merely to reiterate its decision with some new words of justification added. Our decision requires that the Commission affirmatively and in good faith reconsider Greyhound’s case. If after such reconsideration the Commission still deems it necessary to depart from its established precedents, then the agency may do so provided that it adequately supports its reasons. Even then, the ICC must “do more than enumerate factual differences, if any, between [this case] and the other cases; it must explain the relevance of those differences to the purposes of [the enabling statute].”¹²³

In *Silva v. Nelson*,¹²⁴ a case involving the meaning of employee “misconduct” under the unemployment insurance statutes, the California Court of Appeal reversed a trial court judgment sustaining an Unemployment Insurance Appeals Board decision that conflicted with one of the Board’s earlier precedent benefit decisions.¹²⁵ In the adjudicatory proceeding, the Board found the applicant lost his job because of a sin-

122. *Id.* at 417-18 (quoting *CBS, Inc. v. FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971)).

123. *Id.* at 418 (quoting *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965)). See, e.g., *Williston Basin Interstate Pipeline Co. v. FERC*, 165 F.3d 54, 69 (D.C. Cir. 1999).

[T]he agency appeared to “gloss over or swerve from prior precedents without discussion,” thereby foregoing reasoned decision making. It may well be that the Commission had in mind this, or another, rational explanation for its ruling. But as we have noted in the past, “without any explicit recognition by the Commission that the standard has been changed, or any attempt to forthrightly distinguish or outrightly reject apparently inconsistent precedent, we are left with no guideposts for determining the consistency of administrative action in similar cases, or for accurately predicting future action by the Commission....” If the agency’s decision adequately explains the reasons for its departure from precedent, the courts defer to the agency’s new policy. “An agency is obligated to follow precedent, and if it chooses to change, it must explain why. Once an agency justifies its change with sufficient, reasoned analysis, however, the revised policy deserves the same deference as the original policy.”

British Steel PLC v. United States, 127 F.3d 1471, 1475 (Fed. Cir. 1997).

124. 106 Cal. Rptr. 908 (Ct. App. 1973).

125. *Id.* at 909.

gle vulgar outburst at work.¹²⁶ The Board decided the employee's outburst constituted "misconduct" within the meaning of the statute, and that the employee was therefore ineligible for unemployment benefits.¹²⁷ The Court of Appeal held that neither the Board's findings nor the Board's earlier construction of "misconduct" supported the Board decision¹²⁸ and directed the trial court to issue a writ of mandate,¹²⁹ requiring the Board to set aside its decision and reinstate appellant's benefits.

As previously noted, the Unemployment Insurance Appeals Board's statutory precedent decision authority predated the APA precedent decision statute.¹³⁰ The authorizing statute, Unemployment Insurance Code Section 409,¹³¹ declares the Board's precedents shall be dispositive of similar cases: "The director and the appeals board of administrative law judges shall be controlled by those precedents except as modified by judicial review."¹³² The APA precedent decision statute contains no analogous provision, indicating the Legislature's intent to give agencies discretion to implement Section 11425.60 according to their specific needs and structural arrangements.¹³³ Although Section 11425.60 does not explicitly require agencies or adjudicators to follow precedent, the

126. *Id.*

127. *Id.*

128. *Id.* at 911. The Board's earlier precedent benefit decision construed the term "misconduct" to denote "wantonness, culpability or willfulness with wrongful intent or evil design" and that "mere mistakes, errors in judgment . . . and similar minor peccadilloes" did not rise to that level. *Id.* at 910-11 (quoting *Boynton Cab Co. v. Neubeck*, 296 N.W. 636, 640 (Wis. 1941)).

129. The California administrative mandate statute empowers the courts to invalidate an agency adjudicatory decision where the agency's action constitutes a prejudicial abuse of discretion. CAL. CIV. PROC. CODE § 1094.5 (Deering 1996). An abuse of discretion is established under the statute if the agency "has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." *Id.*

130. See *supra* note 31 and accompanying text.

131. CAL. CODE REGS., tit. 22 § 5109 (1992).

132. The Board retains the authority to overrule, modify, or refine a previous precedent decision. CAL. CODE REGS., tit. 22, § 5109(b) (1992).

133. CAL. GOV'T CODE § 11425.60 (Deering 1997). Compare, for example, Unemployment Insurance Code Section 409 with the California Medical Board's regulation implementing Government Code Section 11425.60(a): "Once the [Division of Medical Quality] designates a decision or part of a decision as precedent, the division may rely on it or that part of it as precedent . . ." CAL. CODE REGS., tit. 16, § 1364.40, subd. (b) (1992). The Board's regulation, despite its directory language, does not invest the agency with discretion to ignore controlling precedents; rather, it recognizes the agency's inherent power to deviate from precedent to correct previous mistakes, create exceptions, and change policies to accommodate unforeseen and changing conditions.

well-established consistency principle applied by the federal courts and implicitly followed by the Court of Appeal in *Silva*¹³⁴ provides a sound model for California agencies and reviewing courts.

California administrative common law and statutory judicial review standards provide ample authority for the courts to invalidate unexplained deviations from agency adjudicative precedent. Both California and federal law require agencies to identify the legal standards applied in resolving adjudicated disputes and to articulate the evidentiary nexus between the legal standards and the agency's conclusion.¹³⁵ In *Topanga Ass'n for a Scenic Community v. County of Los Angeles*,¹³⁶ the California Supreme Court held that agency adjudicative decisions must contain "findings sufficient both to enable the parties to determine whether and on what basis they should seek review and, in the event of review, to apprise a reviewing court of the basis for the board's action."¹³⁷

Consistent with *Topanga's* mandate, the APA Administrative Adjudication Bill of Rights declares adjudicative decisions "shall be in writing and shall include a statement of the factual and legal basis for the decision."¹³⁸ The Law Revision Commission comment to that Bill of Rights provision emphasizes the importance of the provision's requirements to precedent decisions:

The requirement that the decision must include a statement of the basis for the decision is particularly significant when an agency develops new policy through the adjudication of specific cases rather than through rule-making. Articulation of the basis for the agency's decision facilitates administrative and judicial review, helps clarify the effect of any precedential decision . . . and focuses attention on questions that the agency should ad-

134. *Silva v. Nelson*, 106 Cal. Rptr. 908 (Ct. App. 1973).

135. See *Fla. Gas Transmission Co. v. FERC*, 876 F.2d 42, 45 (5th Cir. 1989) (holding that the agency violated the regulated company's constitutional rights by failing to provide a reasoned explanation why agency's rule applied to the specific facts of the case).

Due process . . . guarantees that parties who will be affected by the general rule be given an opportunity to challenge the agency's action. When the rule is established through formal rulemaking, public notice and hearing provide the necessary protection. But where, as here, the rule is established in individual adjudications, due process requires that affected parties be allowed to challenge the basis of the rule. FERC must be able to substantiate the general rule.

Id. at 44.

136. 522 P.2d 12 (Cal. 1974).

137. *Id.* at 16.

138. CAL. GOV'T CODE § 11425.50(a) (Deering 1997).

dress in subsequent rulemaking to supersede the policy that has been developed through adjudicative proceedings.¹³⁹

V. DOCTRINAL LIMITATIONS ON THE SCOPE OF ADJUDICATORY LAWMAKING

A. *Structural Constraints*

Administrative agencies have only the powers expressly or implicitly granted by their enabling statutes or the Constitution.¹⁴⁰ Any administrative action that exceeds the powers granted by the agency's organic law or conflicts with a legislative enactment is void.¹⁴¹ Thus, the APA declares: "Each regulation adopted, to be effective, shall be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law."¹⁴² The APA also declares that a regulation adopted to implement a statute must be "consistent and not in conflict with the statute and reasonably necessary to effectuate the pur-

139. *Id.* (West Supp. 2002) (Law Revision Commission Comments, 1995 Addition).

140. *AFL v. Unemployment Ins. Appeals Bd.*, 920 P.2d 1314, 1329 (Cal. 1996) (citation omitted). The courts liberally construe the permissible scope of agency powers to implement their organic laws: "[Agency] powers are not limited to those expressly conferred by statute; rather, [i]t is well settled in this state that [administrative] officials may exercise such additional powers as are necessary for the due and efficient administration of powers expressly granted by statute, or as *may fairly be implied* from the statute granting the powers." *20th Century Ins. Co. v. Garamendi*, 878 P.2d 566, 583 (Cal. 1994) (emphasis in the original). Although the implied powers doctrine gives agencies broad discretion to choose the means of implementing their regulatory goals, the courts have refused to find implied authority for an agency to impose restitutive monetary remedies different in kind from those expressly authorized by statute. *See also Dyna-Med, Inc. v. FEHC*, 743 P.2d 1323 (Cal. 1987) (Commission's claim of implied authority to award punitive damages in an administrative proceeding for job discrimination rejected by the court.); *Youst v. Longo*, 729 P.2d 728 (Cal. 1987) (California Horseracing Board's enabling statutes did not authorize the Board to award compensatory or punitive damages.); *Peralta Cmty. Coll. Dist. v. FEHC*, 801 P.2d 357 (Cal. 1990) (Commission lacked implied authority to award general compensatory damages for emotional distress in an administrative proceeding for sexual harassment.); *Walnut Creek Manor v. FEHC*, 814 P.2d 704 (Cal. 1991) (Commission had no implied power to award damages for emotional distress.); *AFL v. Unemployment Ins. Appeals Bd.*, 902 P.2d 1314 (Cal. 1996) (Board lacked implied authority to award prejudgment interest on retroactive unemployment benefits.). In each case, the courts held the agency decision exceeded the statutory powers of the agency.

141. *Ass'n for Retarded Citizens v. Dep't of Developmental Servs.*, 696 P.2d 150, 153-54 (Cal. 1985).

142. CAL. GOV'T CODE § 11342.1 (Deering 1997).

pose of the statute.”¹⁴³ These fundamental constraints on rulemaking power apply with equal validity to adjudicative decisionmaking and, indeed, circumscribe all administrative agency power. In *Agnew v. State Board of Equalization*,¹⁴⁴ the California Supreme Court stated that both administrative common law principles and the provisions of the APA impose limitations on the scope of agency rulemaking authority:

Even apart from these statutory limits, it is well established that the rulemaking power of an administrative agency does not permit the agency to exceed the scope of authority conferred on the agency by the Legislature. “A ministerial officer may not . . . under the guise of a rule or regulation vary or enlarge the terms of a legislative enactment or compel that to be done which lies without the scope of the statute and which cannot be said to be reasonably necessary or appropriate to subserving or promoting the interests and purposes of the statute.” And, a regulation which impairs the scope of a statute must be declared void.¹⁴⁵

Although *Agnew* involved a challenge of a Board of Equalization tax policy and not of a regulation, the California Supreme Court stated that the principles delimiting the scope of agency regulations “are equally applicable to an administrative agency policy which has the effect of a regulation.”¹⁴⁶

Agency regulations, as well as legislative enactments, channel the scope of permissible adjudicatory discretion. As the California Law Revision Commission comment to Section 11425.60 states, “[a]n agency may not by precedent decision revise or amend an existing regulation”¹⁴⁷ This principle comports with the APA rulemaking regime, which mandates formal notice and comment procedures for the amend-

143. CAL. GOV'T CODE § 11342.2 (Deering 1997).

144. 981 P.2d 52 (Cal. 1999).

145. *Id.* at 59 (citation omitted); *see also*, *Carmel Valley Fire Prot. Dist. v. California*, 20 P.3d 533 (Cal. 2001); *Ass'n for Retarded Citizens v. Dep't of Developmental Servs.*, 696 P.2d 150, 153-55 (Cal. 1985) (explaining, “[I]f, in interpreting the statute, the court determines that the administrative action under attack has, in effect, ‘[altered] or [amended] the statute or [enlarged] or [impaired] its scope,’ it must be declared void.”) (citations omitted.). Thus, if the court concludes that the administrative action transgresses the agency’s statutory authority, it need not proceed to review the action for abuse of discretion; in such a case, there is simply no discretion to abuse.” *Id.*

146. *Agnew*, 981 P.2d at 59.

147. CAL. GOV'T CODE § 11425.60 cmt. (West Supp. 2001).

ment as well as adoption and repeal of a regulation.¹⁴⁸

The principle expressed in the Law Revision Commission comment to Section 11425.60 forbids an administrative construction that impairs the scope of an agency regulation.¹⁴⁹ For example, in *Carmona v. Division of Industrial Safety*,¹⁵⁰ the California Supreme Court annulled the agency's overly restrictive interpretation of its own workplace safety regulation.¹⁵¹ The regulation governed the use of hand tools in the workplace and provided, "[h]and tools shall be kept in good condition and be safely stored. Unsafe hand tools shall not be used."¹⁵² The agency adopted the regulation under its mandate to implement California Labor Code provisions requiring California employers to do "every . . . thing reasonably necessary to protect the life and safety of employees."¹⁵³ The petitioners included a group of farm workers who sought to have the agency apply the hand tool regulation to prohibit employers from requiring workers to use short-handled hoes.¹⁵⁴

The hoes had handles approximately twelve inches long, which required workers to continuously stoop close to the ground when they used the hoes.¹⁵⁵ At the administrative hearing, medical experts testified that most workers who used the hoes over an appreciable length of time sustained severe cumulative back injuries.¹⁵⁶ The growers claimed the employees could not effectively weed the fields with long-handled hoes.¹⁵⁷ The agency decided that the hand tool regulation did not apply to short-handled hoes based on its conclusion the regulation's ban of "unsafe hand tools" applied only to "inherently dangerous" tools, and not to tools that posed a danger from the manner of their use.¹⁵⁸ The California Supreme Court, exercising its authority to interpret the regulation as a matter of law, found from the "comprehensive sweep" of the workplace safety statutes and the "clear language" of the regulation, that the agency had given the rule an unduly narrow interpretation.¹⁵⁹

148. CAL. GOV'T CODE §§ 11346-11347.3 (West 2001).

149. CAL. GOV'T CODE § 11425.60 cmt. (West Supp. 2001).

150. 530 P.2d 161 (Cal. 1975).

151. *Id.* at 162.

152. *Id.* at 163.

153. *Id.* at 162.

154. *Id.* at 162-63.

155. *Id.*

156. *Id.* at 163.

157. *Id.*

158. *Id.*

159. *Id.* at 166-67.

Commenting on the agency's interpretation, the court stated:

The agency's terminology is far from self-explanatory. Although the decision purports to draw a distinction between tools which are "inherently dangerous" and those which are only dangerous because of their "use," as a practical matter almost all "unsafe" tools are only unsafe when used and would not constitute an "inherent danger" if not in use.¹⁶⁰

The court interpreted the regulation to apply to "any hand tool which causes injury, immediate or cumulative, when used in the manner in which it was intended to be used"¹⁶¹ The court stated, "[I]f the short-handled hoe is so designed that it can be used by the worker only in a bent over posture that is dangerous to his health it could be found to be an 'unsafe hand tool.'"¹⁶²

The line between a permissible interpretation and a prohibited amendment or revision often presents a faint boundary. As illustrated by *Carmona*, the courts apply established canons of construction to determine whether an adjudicative decision crosses the line.¹⁶³ In *Montgom-*

160. *Id.* at 166 n.7.

161. *Id.* at 167-68.

162. *Id.* at 168.

163. *See, e.g.,* *Montgomery Ward & Co., Inc. v. FTC*, 691 F.2d 1322, 1329 (9th Cir. 1982). The court stated:

Thus, to determine if the choice of procedure made by the agency was an abuse of discretion, we look, in part, to the extent that the standards applied in the adjudication vary from the plain language of the rule. We also look at the agency's prior use of rulemaking and the current adjudication to see if the agency's conduct in the latter is consistent with the proceedings in the former. In *Patel v. INS*, we noted that "by adjudication, the Board attempted to add a requirement to the 1973 regulation which had been expressly discarded during its rule-making proceedings." That inconsistent behavior by the INS was significant in our decision to reverse the agency's ruling on the requirements of the regulation at issue there.

Id.

The California courts give great weight to an agency's construction of its own regulations, but the ultimate resolution of the purpose and scope of a regulation rests with the courts. *See, e.g.,* *Brown v. Fair Political Practices Comm'n*, 100 Cal. Rptr. 2d 606, 615 (Ct. App. 2000); *State Farm Mut. Auto. Ins. Co. v. Quackenbush*, 91 Cal. Rptr. 2d 381, 385 (Ct. App. 1999); *Yamaha Corp. v. State Bd. Of Equalization*, 960 P.2d 1031, 1034 (Cal. 1998). The court in *Yamaha* stated:

Courts must, in short, independently judge the text of the statute, taking into account and respecting the agency's interpretation of its meaning, of course, whether embodied in a formal rule or less formal representation. Where the meaning and legal effect of a statute is the issue, an agency's interpretation is one among several tools available to the court. Depending on the context, it may be helpful, enlightening, even convincing. It may sometimes be of little worth. Considered alone and apart from the context and circumstances that produce them,

ery *Ward*, the Ninth Circuit Court of Appeals stated that the reviewing court's inquiry also considers regulated parties' reasonable pre-adjudication understanding of the rule at issue:¹⁶⁴

Adjudication allows an agency to apply a rule to particular factual circumstances and to provide an interpretation of the required conduct in light of those circumstances. An adjudicatory restatement of the rule becomes an amendment, however, if the restatement so alters the requirements of the rule that the regulated party had inadequate notice of the required conduct. An amendment is proper only when adequate notice is provided to affected parties pursuant to appropriate rule-making procedures.¹⁶⁵

B. Retroactivity¹⁶⁶

Adjudicatory lawmaking by the courts and administrative agencies generally operate retroactively.¹⁶⁷ As Professors Davis and Pierce state, "[t]he judicial practice of retroactive lawmaking is not limited to the common law. Every time a court changes the meaning it attaches to a statute or to a provision of the Constitution and applies that new meaning to the case before it, the court has engaged in retroactive lawmaking."¹⁶⁸ Similarly, an agency engages in retroactive adjudicatory law-

agency interpretations are not binding or necessarily even authoritative. To quote the statement of the Law Revision Commission in a recent report, "The standard for judicial review of agency interpretation of law is the independent judgment of the court, giving deference to the determination of the agency appropriate to the circumstances of the agency action."

Id. (citations omitted).

164. *Montgomery*, 691 F.2d at 1332.

165. *Id.* at 1329.

166. See generally Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1063 (1997) ("Legislative retroactivity raises two distinct analytical issues: the existence of legal limitations on legislative power to regulate retroactively, and the interpretive principles to be used in assessing the extent to which legislation should be construed as retroactive.").

167. See, e.g., *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 n.23 (1994) ("The terms 'retroactive' and 'retrospective' are synonymous in judicial usage . . . They describe acts which operate on transactions which have occurred or rights and obligations which existed before passage of the act.") (quoting 2 N. SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION § 41.01 (5th rev. ed. 1993); *Borden v. Div. of Med. Quality*, 35 Cal. Rptr. 2d 905, 908 (Ct. App. 1994) (defining retroactivity in substantially similar terms).

168. 3 KENNETH CULP DAVIS & RICHARD J. PIERCE JR., ADMINISTRATIVE LAW TREATISE § 6.6 at 256 (3d ed. 1994). The presumption that judicial decisions apply retroactively is well established. See, e.g., *Newman v. Emerson Radio Corp.*, 772 P.2d 1059, 1062 (Cal.

making whenever it announces an initial interpretation, declares a new regulatory standard, or changes a previous construction. *Chenery II* and *Bell Aerospace* established that agencies have retrospective adjudicatory lawmaking authority as an incident of their mandate to administer legislatively created programs.¹⁶⁹ The courts continue to follow the holdings of those two cases.¹⁷⁰ In *Molina v. INS*,¹⁷¹ the Court of Appeals for the First Circuit stated, “[r]etroactive application of agency interpretations developed through adjudication is not automatically unlawful. To the contrary, retroactive application of new principles in adjudicatory pro-

1989) (“The general rule that judicial decisions are given retroactive effect is basic in our legal tradition. We recently reiterated in *Evangelatos v. Superior Court*, Justice (now Chief Justice) Rehnquist’s observation that ‘[the] principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student.’”) (quoting *United States v. Sec. Indus. Bank*, 459 U.S. 70, 79 (1988) (citations omitted)). In *Harper v. Virginia Dep’t of Taxation*, Justice Thomas, for a five-Justice majority, wrote:

When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Harper v. Va. Dep’t of Taxation, 509 U.S. 86, 97 (1993). Under the Supremacy Clause, the *Harper* Court’s formulation of the retroactivity rule applies to interpretations of federal law by the federal and state courts. *Id.* at 100. *Harper* suggests, however, that states may enjoy a greater degree of freedom to limit the retroactive operation of their interpretations of state law. *Id.* (citing U.S. CONST. art. VI, cl. 2).

169. See *SEC v. Chenery Corp.*, 332 U.S. 194, 209 (1947); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294-95 (1974).

170. *But cf. Landgraf*, 511 U.S. at 265-66.

[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the “principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.” In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.

Id. & n.18 (citing *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (Scalia, J., concurring) (citations omitted)). The presumption against retroactive legislation, however, does not constitute an absolute bar. As the *Landgraf* Court stated:

Retroactivity provisions often serve entirely benign and legitimate purposes, whether to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary. However, a requirement that Congress first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness.

Id. at 267-68.

171. 981 F.2d 14 (1st Cir. 1992).

ceedings is the rule, not the exception. And, agencies have broad legal power to choose between adjudication and rulemaking proceedings as vehicles for policymaking.”¹⁷²

Agency power to engage in retroactive adjudicatory lawmaking is not absolute, however, and the question whether an agency should be allowed to apply new standards and interpretations retroactively presents a question of law.¹⁷³ As the *Chenery II* Court suggested, the law does not countenance retroactive application of an adjudicatory decision where, on balance, the “ill effect of the retroactive application” is greater than the “mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.”¹⁷⁴ In *Bell Aerospace*, the Court intimated that retrospective adjudicatory lawmaking might constitute an abuse of agency discretion if such action has the effect of substantially disarranging settled reliance interests.¹⁷⁵ The Court also suggested retrospective adjudicatory lawmaking would warrant greater judicial scrutiny if fines or damages were involved.¹⁷⁶

172. *Id.* at 22-23. *Accord* *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235, 240 (D.C. Cir. 1997) (“[A]n agency may give retroactive effect to a new policy or rule adopted in the course of an adjudication so long as the resulting inequities are ‘counterbalanced by sufficiently significant statutory interests.’”).

173. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir. 1984).

174. *Chenery*, 332 U.S. at 202-03.

175. *Bell Aerospace*, 416 U.S. at 295. *See also* *Pfaff v. Dep’t of Hous. and Urban Dev.*, 88 F.3d 739, 748 n.4 (9th Cir. 1996) (“While some measure of retroactivity is inherent in any case-by-case development of the law, and is not inequitable per se, this problem grows more acute the further the new rule deviates from the one before it.”).

176. *Bell Aerospace*, 416 U.S. at 295. *See also* *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966). Judge Friendly opined:

Although courts have not generally balked at allowing administrative agencies to apply a rule newly fashioned in an adjudicative proceeding to past conduct, a decision branding as ‘unfair’ conduct stamped ‘fair’ at the time a party acted, raises judicial hackles And the hackles bristle still more when a financial penalty is assessed for action that might well have been avoided if the agency’s changed disposition had been earlier made known, or might even have been taken in express reliance on the standard previously established.

Id. (citations omitted); *Accord Pfaff*, 88 F.3d at 747-48.

[W]e review with deference an agency’s interpretation of the statute that it has responsibility to enforce, whether that interpretation emerges from an adjudicative proceeding or administrative rulemaking Justice dictates, however, that our general rule of deference to announcements of law by adjudication has its exceptions. As the Supreme Court has cautioned, there may be situations where the [agency’s] reliance on adjudication would amount to an abuse of discretion. Such a situation may present itself where the new standard, adopted by adjudication, departs radically from the agency’s previous interpretation of the law, where the public has relied substantially and in good faith on the previous interpretation, where fines or damages are involved, and where the new standard is very broad

Since *Bell Aerospace*, the United States Supreme Court has not further delimited retroactive adjudicatory lawmaking nor has the Court rendered a decision invalidating retroactive adjudicatory lawmaking by administrative agencies. To screen the retroactive effects of agency decisions for manifest unfairness, the federal appellate courts have amplified the balancing test framed by the Supreme Court. A number of federal circuits apply a five-part analysis to determine whether to make an exception to the general rule of retroactivity:

- (1) whether the particular case is one of first impression,
- (2) whether the new rule presents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.¹⁷⁷

Professor Luneburg states that the test devised by the federal appellate courts allows a reviewing court to give due consideration both to private reliance-induced interests and the public interest in the need for regulation. Luneburg explained:

This equitable formula focuses attention on the degree of "surprise," the harm to the party burdened by the new policy, and the need, in terms of fulfilling the statutory goal, for retroactive effect. The test permits a flexibility that invites close case-by-case inquiry instead of broad generalization. Accordingly, where, for example, the burden imposed by a new rule on a party is minimal, the required showing in terms of statutory need would be similarly reduced.¹⁷⁸

and general in scope and prospective in application.

Id. (citations omitted).

177. *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 390; (D.C. Cir. 1972); *NLRB v. Oakes Mach. Corp.*, 897 F.2d 84, 90 (2d Cir. 1990); *Seldovia Native Ass'n v. Lujan*, 904 F.2d 1335, 1347-48 (9th Cir. 1990). See also Kieran Ringgenberg, *United States v. Chrysler: The Conflict Between Fair Warning And Adjudicative Retroactivity in D.C. Circuit Administrative Law*, 74 N.Y.U. L. REV. 914 (1999) (discussing judicial review under retroactivity principles and the fair warning doctrine).

178. William V. Luneburg, *Retroactivity and Administrative Rulemaking*, 1991 DUKE L.J. 106, 113 (1991).

If the agency or a reviewing court decides a new administrative interpretation or new regulatory principle should apply prospectively only, the agency may, if otherwise warranted and proper, so limit its decision or, preferably, implement the new law through notice and comment rulemaking procedures.¹⁷⁹

CONCLUSION

The California APA authorizes state agencies to evolve policy and law through rulemaking and adjudication, leaving the question of process choice to the sound discretion of administrators.¹⁸⁰ Where administrators have the power to choose, the overwhelming balance will generally favor regulations over case-by-case lawmaking, for reasons articulated by Justice Douglas in *NLRB v. Wyman-Gordon Co.*:¹⁸¹

The rule-making procedure performs important functions. It gives notice to an entire segment of society of those controls or regimentation that is forthcoming. It gives an opportunity for persons affected to be heard. . . . Agencies discover that they are not always repositories of ultimate wisdom; they learn from the suggestions of outsiders and often benefit from that advice. This is a healthy process that helps make a society viable. The multiplication of agencies and their growing power make them more and more remote from the people affected by what they do and make more likely the arbitrary exercise of their powers. Public airing of problems through rule making makes the bureaucracy more responsive to pub-

179. See, e.g., *Citicorp N. Am., Inc. v. Franchise Tax Bd.*, 100 Cal. Rptr. 2d 509 (Ct. App. 2000) (upholding a State Board of Equalization decision declaring non-retroactive a change in the Board's interpretation of the state tax code).

180. A choice exists only among agencies with integrated rulemaking and adjudicatory powers. See, e.g., *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144 (1991); *Ingalls Shipbuilding, Inc. v. Dir., Office of Workers' Compensation Programs, Dep't of Labor*, 519 U.S. 248 (1997). Some state regulatory schemes allocate enforcement and adjudicatory powers between externally separate bodies. For example, the California Unemployment Insurance Appeals Board, which adjudicates appeals of California Employment Development Department benefit rulings, has authority to implement substantive policy through adjudication but not rulemaking. The power to adopt substantive regulations governing the state unemployment insurance program is vested in the Employment Development Department. For a discussion of interagency policy clashes that sometimes occur between the administrative and adjudicatory bodies of split-function agencies see Michael Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. REV. 1067, 1161-64 (1992).

181. 394 U.S. 759, 775-80 (1969) (Douglas, J., dissenting) (citations omitted).

lic needs and is an important brake on the growth of absolutism in the regime that now governs all of us Rule making is no cure-all; but it does force important issues into full public display and in that sense makes for more responsible administrative action.¹⁸²

The California Law Revision Commission comments regarding Section 11425.60 envisage administrative case-made laws generally as impermanent measures, to be displaced where possible by formally-adopted regulations: “[A]gencies are encouraged to express precedent decisions in the form of regulations, to the extent practicable.”¹⁸³ The Commission comment reveals a legislative policy favoring the use of both adjudication and rulemaking as interrelated and complementary powers. Accordingly, the revised APA preserves agency discretion to choose the method of evolving policy, but evinces the clear intent to prohibit administrators from using adjudication to evade formal notice and comment rulemaking procedures.

The rulemaking process subjects agency discretion to rigorous statutory standards and permits wide public participation.¹⁸⁴ APA rulemak-

182. *Id.* at 777-79 (Douglas, J., dissenting).

One purpose of the APA is to ensure that those persons or entities whom a regulation will affect have a voice in its creation as well as notice of the law’s requirements so that they can conform their conduct accordingly. The Legislature wisely perceived that the party subject to regulation is often in the best position, and has the greatest incentive, to inform the agency about possible unintended consequences of a proposed regulation. Moreover, public participation in the regulatory process directs the attention of agency policymakers to the public they serve, thus providing some security against bureaucratic tyranny.

Accord Tidewater Marine W., Inc. v. Bradshaw, 927 P.2d 296, 303-04 (Cal. 1996).

See generally KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE* 65-68 (1971) (“The procedure of administrative rulemaking is in my opinion one of the greatest inventions of modern government.”).

183. CAL. GOV’T CODE § 11425.60 cmts. (West Supp. 2001). The Commission comment was drawn from Section 2-104 (4), of the 1981 Model Administrative Procedure Act, which declares that each agency shall “as soon as feasible and to the extent practicable, adopt rules to supersede principles of law or policy lawfully declared by the agency as the basis for its decisions in particular cases.” Administrative Procedure Act § 2-104(d), 15 U.L.A. 1 (1990). See also Michael Asimow, *The Influence of the Federal Administrative Procedure Act on California’s New Administrative Procedure Act*, 32 TULSA L.J. 297, 303-22 (1996) (for a discussion of the Model Act’s contribution to California procedure).

184. In *Tidewater Marine W.*, the California Supreme Court summarized the APA rulemaking process as follows:

The agency must give the public notice of its proposed regulatory action . . . ; issue a complete text of the proposed regulation with a statement of the reasons for it . . . ; give interested parties an opportunity to comment on the proposed regulation . . . ; respond in writing to public comments . . . ; and forward a file of all materials on which the agency relied in the regulatory process to the Office of

ing standards mandate regulations that are consistent with statutory authority, necessary, clearly expressed, and not duplicative of existing law.¹⁸⁵ The adjudicatory lawmaking process, on the other hand, lacks the explicit statutory safeguards inherent in rulemaking and operates largely undetected outside the administrative tribunal. Nevertheless, as the Supreme Court stated in *Chenery II*, effective administration may demand the incremental, case-by-case evolution of policies to address specialized and unforeseen problems.¹⁸⁶

Although lacking the strict formative standards that govern rulemaking, APA adjudication procedures supply adequate tools for well-informed policymaking. The adversarial hearing process contemplated by the APA facilitates a comprehensive hearing record, which the agency has significant powers to enhance. The APA permits employees or representatives of the litigant agency to assist the presiding officer in evaluating the evidence¹⁸⁷ and to give advice to the presiding officer

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Tidewater Marine W., 927 P.2d at 303 (citations omitted). Recent California legislation enhances APA notice and comment procedures by giving agencies discretion to deliver and receive information regarding proposed regulations by electronic mail or facsimile. CAL. GOV'T CODE § 11340.85(a)-(b) (West Supp. 2001). The legislation also requires every agency that maintains an Internet Web site to post to the site specified information about proposed regulations. CAL. GOV'T CODE § 11340.85(c) (West Supp. 2001).

185. CAL. GOV'T CODE § 11349.1(a) (West Supp. 2001); CAL. CODE REGS., tit. 1, § 1, et seq.

186. See generally David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965); Michael Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. REV. 1067, 1159 (1992) (arguing that agencies need adjudicatory lawmaking authority to address legal and policy issues for which statutes and regulations provide no clear roadmap solution). Asimow states:

Everyone agrees that it is desirable for agencies to resolve as many issues as possible through rules. However, it is not always feasible or practicable to answer every interpretive or policy problem through rulemaking. When an agency is newly created, or when its statute is newly amended, the agency may be quite unable to anticipate the problems it will face; it must fumble along from case to case for awhile. Even after the regulatory task of the agency has become routinized, there are always new problems, variations on old problems, unanticipated deviations from the norm, and connections overlooked by the general rules. In these situations, the agency must simply "muddle through" on a case-by-case basis. Not every case, obviously, will be the vehicle to establish new policy or make a fresh legal interpretation; many, perhaps most, cases will be routine applications of well-established law and policy, but there will always be difficult cases that require policymaking.

Id. (citations omitted).

187. CAL. GOV'T CODE § 11430.30(a) (West Supp. 2001).

concerning settlement proposals.¹⁸⁸ Except in prosecutorial cases, the APA permits agency employees or representatives to advise the presiding officer on technical issues in the proceeding, providing that the content of the advice is disclosed on the record and the parties are given an opportunity to address it.¹⁸⁹ The APA authorizes the decisionmaker to take official notice of any generally accepted technical or scientific matter within the agency's special field and of any other fact subject to judicial notice by the courts.¹⁹⁰ The Act empowers presiding officers to use their experience, technical competence, and specialized knowledge in evaluating the evidence.¹⁹¹ It permits persons whose interests will be substantially affected by the adjudication to intervene as parties¹⁹² and the agency may invite *amicus curiae* briefs to elicit the views of interested nonparties. Moreover, the APA provides that the agency itself may preside at the adjudicatory proceeding.¹⁹³

In moving adjudicatory lawmaking out of the shadows, the legislature resolved uncertainty about the incidents of administrative power and focused attention on the legitimacy of agency action. Government Code Section 11425.60 recognizes administrative precedent as a vital instrument to articulate and structure administrative discretion and to evolve agency interpretive law rationally and openly.¹⁹⁴ Precedent decision authority enhances the complement of entrusted statutory powers that permit agencies to adjust regulated interests and channel social change equitably, efficiently, and purposefully. Toward those goals, administrators have a responsibility to exercise the powers granted by Section 11425.60 judiciously, incorporating into the decisionmaking

188. CAL. GOV'T CODE § 11430.30(b) (West Supp. 2001).

189. CAL. GOV'T CODE § 11430.30(c)(1) (West Supp. 2001) (providing that the exceptions to the rule forbidding *ex parte* communications apply only where the assistant or advisor has not served as an investigator, prosecutor, or advocate in the proceeding or during its preadjudicative stage).

190. CAL. GOV'T CODE § 11515 (West 1992).

191. CAL. GOV'T CODE § 11425.50(c) (West Supp. 2001).

192. CAL. GOV'T CODE § 11440.50 (West Supp. 2001).

193. CAL. GOV'T CODE §§ 11405.80, 11517 (West Supp. 2001).

194. Michael Asimow, *Speed Bumps on the Road to Administrative Law Reform in California and Pennsylvania*, 8 WIDENER J. PUB. L. 229, 256 (1999) ("The availability of precedent decisions helps create a real system of administrative common law in which the law can be developed in a logical case-by-case manner and in which everyone will have equal access to agency law.").

process thoughtful consideration of the precedential value of agency adjudicative decisions. A system of publicly accessible precedent decisions will advance the goals of equity and consistency in adjudicatory decisionmaking, promote agency accountability, and facilitate public and agency compliance with regulatory policies.¹⁹⁵

195. Daniel J. Gifford, *Discretionary Decisionmaking in the Regulatory Agencies: A Conceptual Framework*, 57 S. CAL. L. REV. 101 (1983). Gifford said:

To the extent that a rule or precedent facilitates socially useful behavior and thereby eliminates the need for many particularized enforcement proceedings, the issuing agency also beneficially conserves its enforcement resources for other uses. Indeed, any agency decision which contributes to the consistency of the agency's regulatory approach and to improving the coherence of the regulatory scheme administered by it helps further regulatory goals by facilitating overall compliance with these goals by the regulated public.

Id. at 109.