Chapter 2

Use of Rulemaking or Adjudication for the Setting of Policy: A Comparison

Enabling statutes typically delegate to administrative agencies the central responsibility for policymaking in the area covered by the statute. It is accepted that agencies are generally free to decide whether to formulate policy through rulemaking or adjudication. This principle follows from the structure of the Administrative Procedure Act (APA), whose two main procedural sections are “Rule making” and “Adjudications.” Apart from rulemaking and adjudication, there are, of course, a variety of informal means by which administrative agencies articulate policy under a statute. Among these are press releases, speeches, statements, letters, advisory opinions, rulings, negotiation and litigation strategies, and a host of other types of communications. The extent to which these informal means of articulating policy are binding on the public will vary, but their binding effect usually will be significantly less than that

1. The constitutionality of Congress’s delegation of policymaking authority to administrative agencies has been frequently questioned. However, not since the 1930s, when the Supreme Court invoked the so-called nondelegation doctrine to strike down portions of the New Deal legislation (e.g., Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)), has the Court relied on this principle to invalidate a statutory delegation. See Indus. Union Dep’t AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 674–75 (1980) (Rehnquist, J., concurring); Am. Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 543–44 (1981) (Burger, C.J., dissenting). See also Mistretta v. United States, 488 U.S. 361 (1989) (finding that a statute delegating authority to issue sentencing guidelines to the United States Sentencing Commission does not violate the nondelegation doctrine) and most recently, and definitively, Whitman v. Am. Trucking Ass’ns, 531 U.S. 457, 474 (2001) (unanimously reversing a D.C. Circuit decision that Environmental Protection Agency (EPA) standard-setting violated the nondelegation doctrine).


of a “rule” issued after rulemaking or an “order” after adjudication. As a matter of practice, most significant agency policy decisions are formulated as either rulemaking or adjudication. This chapter discusses the considerations, legal and other, that typically enter into an agency’s deliberations in deciding whether to develop policy through rulemaking or adjudication.

Some agencies charged with enforcing regulatory statutes rely almost exclusively on decisions made in adjudicative proceedings for making policy to be applied in future cases. The National Labor Relations Board (NLRB) has traditionally been considered the best example. Over the years, the NLRB was widely criticized by courts and commentators for its failure to use rulemaking. In one notable but isolated instance, the NLRB did utilize rulemaking to develop policy on appropriate collective bargaining units for certain facilities in the health-care industry. Twenty years later, in late 2010, the Board again began to engage in rulemaking.

Most other agencies routinely use rulemaking to develop “legislative” policy. These rulemaking agencies are typically also charged with bringing administrative or judicial enforcement actions against those who violate the agency’s statute or rules issued


6. But see Elizabeth Magill, Agency Choice of Policymaking Form, 71 U. CHI. L. REV. 1383, 1384 (2004) (pointing out that “agencies have a range of policymaking forms to address problems within its purview,” most notably legislative rulemaking, guidance, administrative enforcement actions, and judicial enforcement actions). This thoughtful and comprehensive article explores the “puzzle” presented by the doctrine that:

>[A]n agency can choose among its available policymaking tools and a court will not require it to provide an explanation for its choice. This judicial reaction is out of step with the rest of the law of judicial review of agency action. Courts usually demand that agencies provide reasoned explanations for their discretionary choices, but there is no such reason-giving requirement when agencies select their preferred policymaking form.

Id. at 1385. See also Jeffrey J. Rachlinski, Rulemaking Versus Adjudication: A Psychological Perspective, 32 FLA. ST. L. REV. 529 (2005) (decrying the unwillingness of courts to review this policy choice).


under its authority. These enforcement proceedings, although adjudicative, frequently also make policy, filling in the interstices of a statute and agency rules. Thus, many agencies regularly make policy through both rulemaking and adjudication and are confronted with the problem of choosing the more appropriate route in a particular situation. In this connection, note that the increasing complexity of rulemaking may result in more policy being made through enforcement proceedings and less through rulemaking. Few observers would applaud such a result.  

A. Legal Constraints on Choosing Rulemaking or Adjudication

1. Statutory Requirements

Some agencies have their discretion limited by a statutory mandate requiring them to issue rules on a particular issue. Environmental law provides numerous examples. In such situations, the agency must use rulemaking, although the content, timing, and procedures used may involve significant opportunities for the exercise of agency discretion.

2. Statutory Authority

“It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.” Many statutes contain

10. But see Katie R. Eyer, Administrative Adjudication and the Rule of Law, 60 ADMIN. L. REV. 647, 651 (2008) (“[P]osit[ing] that this apathetic (or sometimes hostile) attitude toward adjudicative lawmaking may not be as unambiguously appropriate as the current literature would seem to suggest.”).

11. For example, under the Resource Conservation and Recovery Act of 1976, EPA was required to promulgate performance standards for the treatment, storage, or disposal of certain hazardous wastes within 18 months of the statute’s enactment, following opportunity for public hearing and consultation with appropriate federal and state agencies. 42 U.S.C. § 6924(a). See also 42 U.S.C. § 7409 (requiring EPA to adopt national ambient air quality standards under the Clean Air Act). In one case, the D.C. Circuit rebuked EPA for attempting to use adjudication instead of rulemaking. See Michigan v. EPA, 268 F.3d 1075 (D.C. Cir. 2001) (holding that EPA could not determine jurisdictional issues over Indian country relating to federal operating permits under the Clean Air Act on an adjudicative case-by-case basis, where Clean Air Act required it to follow notice-and-comment rulemaking).

12. The statute limits EPA discretion on the contents of the rules by listing seven types of requirements that must be included in the standards. 42 U.S.C. § 6924(a)(1)–(7). Time limits for completion of agency rulemaking action are common but controversial. See discussion supra Part I(C).

explicit authority for the agency to promulgate “legislative” rules. Thus, for example, the Occupational Safety and Health Administration (OSHA) is authorized to issue “occupational safety and health standard[s].” 14 The National Highway Traffic Safety Administration (NHTSA) is directed to issue motor vehicle safety standards that “shall be practicable, shall meet the need for motor vehicle safety and shall be stated in objective terms.” 15 Other statutes, while not explicitly authorizing legislative rules, contain language authorizing agencies to “make such rules and regulations as may be necessary to carry out the provisions” of the Act. 16 Such an authorization clearly enables an agency to promulgate procedural, organizational, or other “housekeeping” rules 17 and probably also enables an agency to issue nonbinding guidelines or interpretations of its statutory authority. These powers are now quite widely accepted and may even be deemed within an agency’s “inherent” authority. Moreover, decisions of the Supreme Court and the D.C. Circuit indicate judicial willingness to find legislative rulemaking authority in such language. 18

remedy of the Violence Against Women Act of 1994 exceeded Congress’s power under the Interstate Commerce Clause, and Lopez struck down federal regulation of guns near schools as an unconstitutional exercise of Congress’s powers under the Commerce Clause. But see Gonzales v. Raich, 545 U.S. 1 (2005) (holding that the Controlled Substance Act’s criminalization of purely intrastate activity, specifically the growing and consumption of medical marijuana, did not violate the Commerce Clause); Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000), cert. denied sub nom. Gibbs v. Norton, 531 U.S. 1145 (2001) (upholding a Fish and Wildlife Service regulation under the Endangered Species Act limiting the taking of red wolves on private land as constitutional under the Interstate Commerce Clause). See also United States v. Comstock, 130 S. Ct. 1949 (2010) (upholding, under the Necessary and Proper Clause, a federal civil-commitment statute that authorizes the Department of Justice to detain a mentally ill, sexually dangerous federal prisoner beyond the date the prisoner would otherwise be released if a state will not receive and incarcerate the prisoner). The Supreme Court has also, pursuant to the Tenth Amendment, struck down federal laws requiring states to enact or administer regulatory programs. See Printz v. Ravalli County, 521 U.S. 898 (1997) (finding portions of Brady handgun law requiring local officials to run background checks to be unconstitutional); New York v. United States, 505 U.S. 144 (1992) (striking down a law requiring states to “take title” of toxic waste sites or to enact legislation providing for disposal). Courts have also held that an agency’s rule has extraterritorial effect only if Congress has indicated its intent to give the agency such authority and the agency has clearly exercised it. See Nieman v. Dryclean U.S.A. Franchise Co., 178 F.3d 1126 (11th Cir. 1999).

17. See 5 U.S.C. § 301 for specific authority for agency adoption of “housekeeping rules.”
18. See Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 713–14 (2011) (stating that the question of whether Congress “delegated authority to the agency generally to make rules carrying the force of law” does not turn on whether Congress’s delegation of authority was general or specific (quoting United States v. Mead Corp., 533 U.S. 218, 226–27 (2001))); Thorpe v. Housing Auth., 393 U.S. 268, 277 n.28 (1969) (interpreting HUD’s statute granting it the power to “make, amend, and rescind such rules and regulations as may be neces-
One of the most significant early cases on this issue is *National Petroleum Refiners Ass’n v. FTC*,\(^\text{19}\) in which the D.C. Circuit construed the Federal Trade Commission’s enabling statute giving the agency only general “rules and regulations” authority as authorizing legislative rulemaking by the agency. The court, relying largely on Congress’s concern with the “judicial delay, inefficiency and uncertainty” involved in the adjudicatory process, concluded that the “broad undisputed policies” that motivated the framers of the Federal Trade Commission Act of 1914\(^\text{20}\) would be furthered by assigning substantive rulemaking authority to the agency.\(^\text{21}\)

This issue has taken on added importance after the Supreme Court’s decisions in *Christensen v. Harris County*\(^\text{22}\) and *United States v. Mead Corp.*,\(^\text{23}\) which held that


\(^{21}\) *Nat’l Petroleum Refiners Ass’n*, 482 F.2d at 683–87. Two years later Congress confirmed the FTC’s authority to issue legally binding trade regulation rules, albeit with additional procedural requirements, by enacting the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified at 15 U.S.C. § 57a). The GAO has weighed in recently on several other issues concerning the breadth of agency rulemaking authority. See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, CREDIT CARDS: FAIR DEBT COLLECTION PRACTICES ACT COULD BETTER REFLECT THE EVOLVING DEBT COLLECTION MARKETPLACE AND USE OF TECHNOLOGY 49–51 (GAO-09-748, 2009) (describing the FTC’s lack of rulemaking authority to administering the Fair Debt Collection Practices Act and suggesting that Congress remedy this); U.S. GOV’T ACCOUNTABILITY OFFICE, CONSUMER SAFETY: BETTER INFORMATION AND PLANNING WOULD STRENGTHEN CPSC’S OVERSIGHT OF IMPORTED PRODUCTS 16 (GAO-09-803, 2009) (describing the CPSC’s mandate to conduct more than 40 rulemakings under its new legislation and the delays in completing them).


agency interpretations should receive *Chevron* deference only when Congress has delegated power to the agency to make rules with the force of law and the agency has rendered its interpretation in the exercise of that power. Professor Thomas Merrill and Kathryn Watts have provocatively argued that the original (and better) understanding is that only those rulemaking grants that are “coupled with a statutory provision imposing sanctions on those who violate the rules” should be understood to authorize rules with the force of law, and that “rulemaking grants not coupled with any provision for sanctions should be understood to authorize only interpretive and procedural rules.”

3. Judicial Constraints

The Supreme Court in *SEC v. Chenery Corp. (Chenery II)* first enunciated the general rule that the choice between rulemaking and adjudication is primarily the agency’s to make. The case involved the Securities and Exchange Commission’s (SEC’s) disapproval of a public utility holding company’s reorganization on the ground that the reorganization violated standards of fairness derived from the SEC’s interpretation of the relevant Act. In effect, the Commission both formulated a rule and applied it in the adjudication before it. The Supreme Court, although observing that “[t]he function of filling in the interstices of the Act should be performed, as much as possible, through the quasi-legislative promulgation of rules to be applied in the future,” ultimately gave the agency the option: “the choice made between proceeding by general rule or by individual, ad hoc litigation,” the Court said, “is one that lies primarily in the informed discretion of the administrative agency.”

The Supreme Court gave a bigger boost to policymaking by rulemaking in *United States v. Storer Broadcasting Co.* In that case, the Federal Communications Commission (FCC) issued a notice of proposed rulemaking to amend its rules limiting the number of radio and television stations an entity could own or control. After the notice, but before the adoption of the amendment, Storer Broadcasting Company, which already held the maximum number allowed under the new proposal, applied for an additional station. Storer also participated in the rulemaking proceeding by opposing the proposal, but the Commission adopted the rule and simultaneously dismissed Storer’s application for the new station as violative of the new rule. Storer, on judicial review, claimed it was deprived of a “full hearing,” which the Commission’s
rules made a prerequisite to the denial of applications. The Supreme Court upheld the Commission’s power to issue such rules and to deny the application without hearing on the basis of the rule. The Court did, however, caution that the rules must be flexible enough to permit applicants to seek amendments or waivers.29

Storer did not result in any rush by agencies to employ rulemaking, but other agencies and courts did slowly follow its lead. The Federal Power Commission began to use rulemaking to set gas rates, an action previously undertaken through individual trial-type proceedings, and the Supreme Court approved this development in Federal Power Commission v. Texaco, Inc.30 and In re Permian Basin Area Rate Cases.31 The Civil Aeronautics Board’s move toward rulemaking was upheld by the courts despite claims that the rules, in effect, modified existing certificates without adjudicatory hearings. Especially influential was American Airlines, Inc. v. CAB, where Judge Harold Leventhal wrote that “rulemaking is a vital part of the administrative process . . . and . . . is not to be shackled, in the absence of clear and specific congressional requirement, by importation of formalities developed for the adjudicatory process and basically unsuited for policy rulemaking.”32

As rulemaking became more and more pervasive, the issue no longer was whether rulemaking was a proper mechanism for policymaking. Rather, the arguments focused on whether formulating general policy rules through adjudication constituted a circumvention of the notice-and-comment provisions of § 553 of the APA.33 This criticism was particularly leveled at the NLRB, whose refusal to employ rulemaking was well known.

However, in NLRB v. Bell Aerospace Co.,34 the Supreme Court reaffirmed Chenery II’s rule that the choice between rulemaking and adjudication is generally the agency’s to make. The Supreme Court asserted:

[T]he Board is not precluded from announcing new principles in an adjudicative proceeding and . . . the choice between rulemaking and adjudication lies

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33. One challenge of this type, in an enforcement context, is Kaspar Wire Works, Inc. v. Sec’y of Labor, 268 F.3d 1123, 1131, 1132 (D.C. Cir. 2001) (rejecting the claim that the Secretary of Labor’s decision to impose a per instance penalty on petitioner must be done through rulemaking: “The Secretary’s decision to assess per instance penalties reflects use of an enforcement tool within her authority,” and “because the statutory authorization of per instance penalties is so clear from the statutory language, publication in the Federal Register was not required”).

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 violation of the Act, nothing in the present case would justify such a conclusion.”35

The doctrine that agencies may choose between rulemaking and adjudication has been reaffirmed in a number of court decisions.36 Challenges, however, continue to come from a variety of directions.

Some petitions for review, rather than challenging agency policymaking made through adjudication, sought to force the agency to use adjudicatory procedures to determine the rights of a party. A typical example is Wisconsin Gas Co. v. FERC,37 where sellers of natural gas challenged certain FERC orders involving the rights of sellers to recover variable costs, on the ground, among others, that they were based on informal rulemaking. The sellers claimed that because their individual rights were being affected by the orders, they “merited individualized case-by-case adjudication.”38 The D.C. Circuit rejected the argument, emphasizing “the breadth and complexity of the Commission’s responsibilities” and the “intensely practical difficulties” involved in natural gas regulation.39 It reaffirmed the principle in Chenery II that the choice between proceeding either by general rule or by individual ad hoc litigation lies primarily in the “informed discretion of the agency.”40 The court said: “[N]otice and comment rulemaking, particularly appropriate for determination of legislative

35. Id. at 294. This case eliminated much of the confusion created by NLRB v. Wyman-Gordon, Inc., 394 U.S. 759, where the Court, in a badly split decision, suggested disapproval of the NLRB’s practice of promulgating general rules through adjudication, although it did approve the agency’s application of the rule in the instant case. See also Morton v. Ruiz, 415 U.S. 199 (1974) (criticizing agency policymaking in an adjudicatory context as ad hoc); Weaver, supra note 2, at 186.
36. See, e.g., Qwest Services Corp. v. FCC, 509 F.3d 531 (D.C. Cir. 2007) (“[Petitioner] argues that such a broadly applicable order as in fact came forth . . . can only take the form of a rule, and thus must be prospective only. There is no such general principle. Most norms that emerge from a rulemaking are equally capable of emerging (legitimately) from an adjudication, and accordingly agencies have very broad discretion whether to proceed by way of adjudication or rulemaking.” (citing Bell Aerospace, 416 U.S. 267, 294–95 (1974), other citations and internal quotation marks omitted)); Panhandle E. Pipe Line Co. v. FERC, 907 F.2d 185 (D.C. Cir. 1990) (“It is far too late in the day to claim that an agency may not simplify adjudications by resolving issues in a rulemaking.” (citing Heckler v. Campbell, 461 U.S. 458, 467 (1983))). See also Tearney v. NTSB, 868 F.2d 1451 (5th Cir. 1989); Quivira Mining Co. v. NRC, 866 F.2d 1246 (10th Cir. 1989); Anaconda Co. v. Ruckelshaus, 482 F.2d 1301, 1306 (10th Cir. 1973) (upholding EPA’s denial of an adjudicatory hearing in the context of an emission standard rulemaking for sulfur oxide even though it only applied to a single entity).
37. 770 F.2d 1144 (D.C. Cir. 1985).
38. Id. at 1165. See also Anaconda Co. v. Ruckelshaus, supra note 36 (upholding EPA’s use of rulemaking procedures to issue a general rule that, in practice, covered only one company).
39. Wisconsin Gas Co., 770 F.2d at 1166 (quoting In re Permian Basin Area Rate Cases, 390 U.S. 747, 790 (1968)).
40. Id.
facts and policy of general, prospective applicability, was a manifestly reasonable method of addressing the systemic problems of the natural gas market.41

The principle that an agency is free to choose rulemaking or adjudication has also arisen in the context of court suits to compel an agency to institute rulemaking proceedings. In Arkansas Power & Light Co. v. ICC,42 the court, after noting that courts will compel rulemaking only in “extremely rare instances,” asserted that an even stronger case for deference to the agency determination exists where the selected alternative to rulemaking is not maintenance of the status quo but “formulation of standards through case-by-case adjudication.”43

There are times, however, when courts have found that an agency abused its discretion in choosing to make law by order rather than by rule. For example, agencies are not free to overrule one of their legislative rules in an adjudication.44

In other cases, it may be an abuse of discretion for an agency to announce a new ruling in an adjudication to parties who had justifiably relied on the law as it was when they undertook their conduct.45 A more controversial broadside was issued in

41. Id. Indeed, in the view of the court, case-by-case adjudication in these circumstances “may have been entirely inappropriate,” because the agency, by applying an adjudicatory order to the individual seller, would be subjecting that seller to unfair competition from other sellers not yet the subject of agency orders. Id. at 1166–67 n.36. The court further stated that case-by-case adjudication would open the agency to the objection that it was “unfairly effectuating a general policy change without the necessary industry-wide data and commentary.” Id. See also Mobil Oil Exploration & Producing Se., Inc. v. United Distrib. Cos., 498 U.S. 211, 227–28 (1991) (sustaining FERC rulemaking on abandonment of gas supply contracts that eliminated the need for individualized hearings on such abandonments); Quivira Mining Co. v. NRC, 866 F.2d 1246, 1261 (10th Cir. 1989); Hercules Inc. v. EPA, 598 F.2d 91 (D.C. Cir. 1978).

42. 725 F.2d 716 (D.C. Cir. 1984).

43. Id. at 723. See also British Caledonia Airways Ltd. v. Civil Aeronautics Bd., 584 F.2d 982 (D.C. Cir. 1978) (upholding the agency’s choice of declaratory order procedure under § 554(d) of the APA instead of rulemaking, despite the industry-wide impact of the order).

44. See, e.g., Tunik v. Merit Sys. Prot. Bd., 407 F.3d 1326, 1341–42, 1345–46 (Fed. Cir. 2005) (citing United States v. Nixon, 418 U.S. 683, 695–96 (1974)) (finding that the Board erred in reversing an earlier holding because it had, in the intervening time, codified the earlier decision in a rule issued after notice and comment). The dissenting judge argued that the earlier decision, and thus the rule, were both ultra vires. Id. at 1346–52 (Schall, J., dissenting). See also Am. Fed’n of Gov’t Emps., AFL-CIO v. Fed. Labor Relations Auth, 777 F.2d 759 (D.C. Cir. 1985) (“[A]n agency seeking to repeal or modify a legislative rule promulgated by means of notice and comment rulemaking is obligated to undertake similar procedures to accomplish such modification or repeal . . . .”).

45. The Supreme Court has described this as “the doctrine that an administrative agency may not apply a new rule [announced in an adjudication] retroactively when to do so would unduly intrude upon reasonable reliance interests.” Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc., 467 U.S. 51, 60 n.12 (1984) (citing Bell Aerospace, supra note 34, at 295). This issue had earlier been thoroughly plumbed in Retail, Wholesale & Dep’t Store Union, AFL-CIO v. NLRB, 466 F.2d 380 (D.C. Cir. 1972), cert. denied, 459 U.S. 999 (1982), where the NLRB had relied on one of its recently decided cases that had reversed an earlier case, thus making the employer’s conduct—which was legal at the time it occurred—an unfair labor practice. In the circumstances, the court found this to be an abuse of discretion. The court listed the following consid-
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Ford Motor Co. v. FTC, where the Ninth Circuit set aside an FTC cease-and-desist order against a car dealer because the credit practice rule announced in that adjudication should have been promulgated through rulemaking. The court’s use of broad language, stating that “this adjudication changes existing law and has widespread application... the matter should have been addressed by rulemaking,” led to extensive criticism of the decision, and the Ninth Circuit has subsequently “refrained from striking down adjudications on the ground that the agency should have proceeded instead by rulemaking.”

46. 673 F.2d 1008 (9th Cir. 1981).
47. Id. at 1009.
49. William D. Araiza, Agency Adjudication, the Importance of Facts and the Limitations of Labels, 57 Wash. & Lee L. Rev. 351, 370 (2000). Professor Manning suggests that “[m]ore typically, post-Bell Aerospace decisions have relied on rather idiosyncratic grounds to reject an agency’s procedural choice.” John F. Manning, Nonlegislative Rules, 72 Geo. Wash. L. Rev. 893, 909 n.96 (2004). He characterizes Ford Motor Co. as “holding that the agency impropriely proceeded by adjudication where the order has ‘general application’ and adopts ‘the precise rule that the [agency] has proposed, but not yet promulgated’ in a notice-and-comment proceeding.” Id. (quoting Ford, 673 F.2d at 1010). He also mentions two other cases:

Matzke v. Block, 732 F.2d 799, 802 (10th Cir. 1984) (concluding that rulemaking was required where Congress had indicated “an urgent need for relief” from farm foreclosures and where “it seem[ed] a bit late to begin the accumulation of decisional guides” under a new statute passed for that purpose). . . and Patel v. INS, 638 F.2d 1199, 1202 (9th Cir. 1980) (holding that an agency may not use adjudication to add a regulatory requirement that “had been expressly discarded during . . . rule-making proceedings”).

Id. He concludes that:

Such decisions do not establish a meaningful general restriction on the procedural discretion established by Chenery II and confirmed by Bell Aerospace. Indeed, the Ninth Circuit, which had taken the lead in developing post-Bell Aerospace limits on agency choice, subsequently suggested that its (non-reliance-based) limits apply only when an agency employs adjudication to “amend a recently adopted rule” or “to supplant a pending rule-making proceeding.”

Id. (quoting Cities of Anaheim, Riverside, Banning, Colton & Azusa v. FERC, 723 F.2d 656, 659 (9th Cir. 1984)).
In *Independent U.S. Tanker Owners Committee v. Lewis*, the court addressed the following issue: “What is the effect of an invalidly promulgated rule upon an adjudicative decision that relies on that rule when the decision, without any rule, would have been within the discretion of the agency?” Or, as the court bluntly rephrased the question: “MarAd having botched the rulemaking, the question is whether the subsequent adjudication . . . can still be upheld in its own right.” The answer apparently depends on the nature of the rule and its impact on the challenger; in this case, the court refused to invalidate the decision.

**B. Practical Considerations in Choosing Rulemaking or Adjudication**

Rulemaking and adjudication both can be used to establish standards of conduct for those who are regulated. Both types of decisionmaking can be used to create the necessary predicate for penalizing violators of those standards. They both require the assembly of sufficient factual information to support wise policy judgments. Nevertheless, various advantages are associated with each procedure.

**1. Advantages of Rulemaking**

In the last two decades, most commentators have espoused the benefits of rulemaking over adjudication for policymaking. A former ACUS General Counsel summarized these benefits as follows:

1. A rule formulated after rulemaking, “with its wider notice and broader opportunities for participation[,] is fairer to the class of persons who would be affected by a new ‘rule’ than” a rule announced in an adjudication. “Such broader participation also makes rulemaking more efficient as an information-gathering technique for the agency.”

2. “Rulemaking is superior to adjudication as a means of making new law because rulemaking is normally prospective while adjudication normally involves prescribing consequences for past conduct or present status.”

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50. 690 F.2d 908 (D.C. Cir. 1982).
51. Id. at 920.
52. Id. at 922.
54. Berg, supra note 48, at 163.
55. Id.
3. “The articulation of a generally applicable rule provides greater clarity to those affected as well as greater uniformity in enforcement.”

4. “Rulemaking is more efficient from the agency’s point of view because its procedures offer more flexibility, at least when the choice is between the notice-and-comment requirements of section 553 of the APA and the formal adjudicatory procedures of sections 554, 556, and 557 of the APA. Two of the most significant elements of this flexibility are the agency’s broad control over the procedure for the presentation of information and argument and the agency’s freedom to resort to its staff expertise without the inhibitions of separation of functions requirements.”

5. “Since the agency is better able to control the scope and the pace of a rulemaking proceeding, use of rulemaking to formulate policy gives the agency better control of its agenda and enables it to define and to focus on the policy issues without the distractions of individual adjudicative issues” or the need to wait for issues to arise in a case.

6. “Rulemaking is also more efficient for the agency because it can result in the adoption of a general principle which can thereafter be applied without reexamination,” thereby eliminating the need for many case-by-case adjudications.

Another major advantage of policymaking through rulemaking is the broader binding effect of rules. Valid legislative rules are binding and enforceable on the public; that is, they have the force and effect of law. Adjudicatory decisions and orders, on the other hand, are typically binding only on the parties involved, and the rule stated in the proceeding would have precedential effect only in subsequent adjudications. This principle was stated by the D.C. Circuit in National Petroleum Refin-

56. Id.
57. Id. See infra Part III, ch. 6(E) (discussing separation of functions).
58. Berg, supra note 48, at 163.
59. Id. at 163–64.
61. See, e.g., NLRB v. St. Francis Hosp., 601 F.2d 404 (9th Cir. 1979) (holding that NLRB could announce a prospective policy in an adjudication, but had to allow parties in subsequent enforcement actions to challenge application of the policy to them). This should not be read to require the agency to re-decide these issues de novo every time, but the agency would need to entertain arguments and explain why they are unavailing. After a while, litigants might give up on finding new arguments, but the main difference is that if it were a “rulemaking rule,” the agency would not have to entertain arguments. (With one caveat—if a party seeks a waiver from a rulemaking rule and can make a good argument, the agency would have to respond to it—but courts have also allowed agencies to respond that they have a policy of denying all requests for waivers from a particular rule, cf. the FAA’s long-standing age-60 rule for pilots. See, e.g., Yetman v. Garvey, 261 F.3d 664 (7th Cir. 2001). The current FAA pilot age rule is at 14 C.F.R. §121.383 (2010), but the age limit is now 65.
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ers Ass’n v. FTC, a case upholding the FTC’s authority to define violations of the FTC Act through regulations. The court noted that one benefit of rulemaking was that the principal issue in future enforcement cases would simply be whether the defendant in fact violated the rule. In that case, the FTC had issued a rule requiring posting of gasoline octane ratings. It therefore would only have to prove that a defendant’s gasoline pumps were not properly marked with octane ratings. Had no rule requiring postings of octane ratings been promulgated, the FTC would have been obliged to prove that the failure to post was an unfair trade practice, a “laborious process” that might well have to be repeated each time a new enforcement case was brought.

This principle, based on the Supreme Court holding in Storer Broadcasting, that an agency may rely on a rule promulgated under the notice-and-comment procedures of the APA to limit the issues to be litigated in a subsequent adjudicative proceeding, was reaffirmed by the Supreme Court in Heckler v. Campbell. In that case, the Secretary of Health and Human Services (HHS), after notice-and-comment rulemaking, promulgated a medical-vocational “grid” to be applied in disability hearings under the Social Security Act. A claimant’s qualifications for work were determined on an individual basis, but the guidelines directed the conclusion whether work existed in the national economy that the claimant could perform. The Supreme Court upheld government reliance on the guidelines, saying that although the Social Security Act requires an individualized trial-type determination of the claimant’s disability, HHS may resolve a “general factual issue,” such as the question of the availability of jobs in the national economy, “as fairly through rulemaking as by introducing the testimony of vocational experts at each disability hearing.” The Court reaffirmed this decision in 2001 in a case involving the Bureau of Prisons.

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63. 482 F.2d at 690–91. But note that policy statements have their advantages too. As the D.C. Circuit stated in upholding the agency’s explanation for why it declined to apply a revised policy statement to a case that was pending when a policy was revised: “When an agency hears a case under an established policy statement, it may decide the case using that policy statement if the decision is not otherwise arbitrary and capricious. If, however, the agency changes its policy statement before the case is complete, it must explain why the pending case should be decided on the basis of the old versus the new policy.” Consol. Edison Co. of N.Y., Inc. v. FERC, 315 F.3d 316, 323 (D.C. Cir. 2003).
64. 461 U.S. 458 (1983).
65. Id. at 460–62.
66. Id. at 468. But see Broz v. Heckler, 711 F.2d 957 (11th Cir. 1983), modified, 721 F.2d 1297 (11th Cir. 1983) (holding that in disability hearings, the effect of claimant’s age on his or her ability to work must be determined on a case-by-case basis).
67. Lopez v. Davis, 531 U.S. 230 (2001) (holding that the Bureau of Prisons had discretion, under the governing statute, to promulgate regulation categorically denying early release to prisoners whose felonies involved use of a firearm). See also Munoz v. Sabol, 517 F.3d 29 (1st Cir. 2008). For affirmation of this principle in another regulatory setting, see Massachusetts v. United
2. Advantages of Adjudication

Among the advantages of adjudication and the disadvantages of rulemaking are the following:

1. Rulemaking’s increasing procedural complexity can be avoided. New statutes and executive orders have imposed many additional requirements on the rulemaking process. Whatever their benefits in other respects, clearance provisions (OMB review, paperwork reduction provisions), impact statements (regulatory impact analyses, regulatory flexibility analyses), statutes requiring more cumbersome hybrid procedures, and “hard look” judicial review tend to make rulemaking by some agencies a more difficult and protracted venture.\(^{68}\) If an area is equally susceptible to regulation by adjudication or rulemaking—where, for example, a small number of firms are engaged in the regulated activity—policymaking through adjudication may be seen as more efficient.\(^{69}\)

2. Modifications can be made more easily. Specific rules may become obsolete more quickly than more general statutory standards. However, modifications or repeal of rules for policy or technical reasons may be difficult or protracted because a new rulemaking has to be conducted. This may be especially difficult for agencies governed by “hybrid” rulemaking statutes or for rules defined as “major rules” under E.O. 12,866. Changing policy established by adjudication may, therefore, consume much less time.

3. Conflict can be minimized. At least one commentator has explained the NLRB’s previously steadfast reluctance to abandon the making of policy through adjudication as based on a desire to avoid political conflicts with congressional oversight committees and other overseers.\(^{70}\) The premise is that the slow, case-
by-case accretion of policy is less dramatic or visible, easier to modify, and yet also more impregnable to political attack.  

4. Adjudicatory decisions can be situation-specific, thus potentially avoiding overinclusiveness or underinclusiveness. Rules may unintentionally be overinclusive, reaching unanticipated fact situations, thereby deterring socially desirable behavior or imposing unnecessary costs on society. On the other hand, a rulemaking intended to create a predicate for regulatory sanctions may lead to rules whose terms miss some of the conduct sought to be affected. Subsequent enforcement adjudications may be more easily rebuffed as a result. A related advantage of adjudication is that it may permit a better targeting of resources. Enforcement against egregious violators of statutory standards is thought by some to be more cost-effective, less cumbersome, and more politically palatable than attempting to promulgate an industry-wide standard.

The Supreme Court in *NLRB v. Bell Aerospace Co.* focused on a somewhat different reason why some agencies use adjudications for certain types of policymaking activity. In concluding that it would have been difficult or impossible for the NLRB to issue a general rule on the determination of managerial status of “buyers” under the National Labor Relations Act for the purpose of determining appropriate units, the Supreme Court said:

There must be tens of thousands of manufacturing, wholesale and retail units which employ buyers, and hundreds and thousands of the latter. Moreover, duties of buyers vary widely depending on the company or industry. It is doubtful whether any generalized standard could be framed which would have more than marginal utility. The Board thus has reason to proceed with caution, developing its standards in a case-by-case manner with attention to the specific character of the buyers’ authority and duties in each company.

Finally, it should be noted that the APA does contain an often overlooked provision permitting agencies “to issue a declaratory order to terminate a controversy or remove uncertainty.” A few agencies have taken advantage of this provision to an-

71. *Id.*
73. See also Eyer, *supra* note 10, at 660–63 (touting the benefits of adjudicative lawmaking in producing consistency).
75. *Id.* at 294–95 (citation omitted).
76. 5 U.S.C. § 554(d).
nounce a policy as a declaratory order after giving what amounts to notice and comment, and the courts have upheld them. 77

3. Summary

Clearly, an interplay between rulemaking and adjudication exists under the APA. Rules issued after public participation in notice-and-comment proceedings establish general principles that will be binding on the public and can be applied to individual parties in adjudicatory proceedings. Rulemaking may not ordinarily be used as a substitute for individualized adjudication without implicating due process considerations; however, rules issued after informal proceedings may limit the issues to be adjudicated in subsequent proceedings and reduce the agency burden in establishing statutory violations. Ultimately, unless the statute requires otherwise, 78 however, it is up to the agency to determine which method of policymaking it wishes to use in a particular context. 79

77. See Jeffrey S. Lubbers & Blake D. Morant, A Reexamination of Federal Agency Use of Declaratory Orders, 56 ADMIN. L. REV. 1097 (2004); see also supra note 43. In Qwest Services Corp. v. FCC, 509 F.3d 531, 536 (D.C. Cir. 2007), the D.C. Circuit made clear that “a declaratory ruling can be a form of adjudication” and that the FCC’s use of a declaratory order was allowable even though the Commission’s “process started out as a rulemaking,” but later was “split” “into a dual one, half rulemaking and half adjudication.”

78. See, e.g., Michigan v. EPA, supra note 11.

79. See Araiza, supra note 49, stating:

Unless the agency’s choice violates a constitutional guarantee (i.e., the fair notice requirement of the non-retroactivity principle), or unless the agency’s choice reflects an internal inconsistency in how the agency uses that discretion (i.e., if it tries to circumvent its own decision that rulemaking is the appropriate modality), the choice between “adjudication” and “rulemaking” must be left with the agency.