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POLICYMAKING BY THE ADMINISTRATIVE JUDICIARY

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INTRODUCTION

Administrative agencies adjudicate massive numbers of individual disputes, far exceeding the number resolved by courts. Generally, administrative adjudications determine the individual rights and duties created through an administrative program.¹ Similar to the judicial process, the adjudicative function of the administrative process involves a substantial amount of agency policy. However, despite its importance, the development of policy within the agency adjudicative machinery is little understood, even by the administrative adjudicative personnel engaged in it. Therefore, a close look at the policymaking function and the responsibility of administrative adjudicators, especially those at the hearing level, is needed.²

To some extent, administrative policymaking is similar to judicial law-making in the general common-law system.³ Thus, this Article looks to

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1. ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 14 (1947) ("[A]djudication is concerned with the determination of past and present rights and liabilities."); see Paul Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739, 739 n.1 (1976).

2. "The term 'policy' encompasses a wide variety of decisions that advance or protect some collective goal of the community as a whole (as opposed to those decisions that respect or secure some individual or group right)." 1 CHARLES H. KOCH, JR., *ADMINISTRATIVE LAW AND PRACTICE* 6 (2d ed. 1997) (citing Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1059 (1975), reprinted in RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 82 (1977)); see HENRY HART & ALBERT SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 141 (William Eskridge & Philip Frickey eds., 4th ed. 1994) (stating that "[a] policy is simply a statement of objective."). Setting policy is the most important function assigned to agencies. James Landis declared: "The ultimate test of the administrative [institution] is the policy that it formulates; not the fairness as between the parties of the disposition of a controversy on a record of their own making." JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 39 (1938).

3. See HART & SACKS, *supra* note 2, at 164 ("The body of decisional law announced by the courts in the disposition of these [individual] problems tends always to be the initial and continues to be the underlying body of law governing the society.").

studies of that lawmaking process, and draws on insightful theoretical works to aid in conceptualizing the issues.⁴ Empirical studies on the influences and motivations behind judicial decisionmaking begin the inquiry into administrative policymaking.⁵ However, the substantial differences between judicial lawmaking and administrative policymaking require this Article's analysis to ultimately reach beyond the implications of these studies.

Administrative agencies usually have considerable policymaking responsibility and hence administrative adjudicators operate in policy-rich environments. The agency's substantial policymaking role serves to complicate the adjudicator's policy function more so than the conventional judiciary. While administrative adjudicative processes follow a hierarchy similar to the judicial process, the adjudicators throughout administrative adjudications—from the hearing level to administrative review—have more policy-related responsibilities than their counterparts in the conventional judiciary. However, the role of the courts in administrative adjudications further complicates the policymaking aspect of administrative adjudications. Although a court's role is closely confined by the judicial review doctrine, it necessarily injects the courts and conventional judges into this perpetually active policymaking environment. Thus the administrative judiciary, in this case incorporating courts, works in a complex and dynamic policymaking context.

Take for example the mundane case of the Sunbeam grill.⁶ Safeway Bread held a memorial day outing for its employees. Safeway purchased a Sunbeam gas grill for the hamburgers and hotdogs. The specifications for the grill called for a twenty-pound gas tank. Safeway's head of maintenance decided that a twenty-pound tank was inadequate and adapted the grill to use a forty-pound tank. Unfortunately, an Occupational Safety and Health Administration (OSHA) compliance officer attended the cookout. He concluded the grill as adapted violated the Occupational Safety and Health Act of 1970 (OSH Act) and issued a citation. Safeway requested a hearing with the Occupational Safety and Health Review Commission (OSHRC), a separate agency designed to adjudicate such violations. Safeway argued that its

4. Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1 (1994); Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 852-54 (1994); Evan H. Caminker, *Allocating the Judicial Power in a "Unified Judiciary,"* 78 TEX. L. REV. 1513, 1515 (2000); DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 2, at chap. 4; HART & SACKS, *supra* note 2; Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987) [hereinafter Schauer, *Precedent*]; Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615 (2000) [hereinafter Schauer, *Incentives*].

5. Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997) [hereinafter Revesz, *Environmental Regulation*]; Richard L. Revesz, *Ideology, Collegiality, and the D.C. Circuit: A Reply to Chief Judge Harry T. Edwards*, 85 VA. L. REV. 805 (1999) [hereinafter Revesz, *Ideology*]; Richard L. Revesz, *Litigation and Settlement in the Federal Appellate Courts: Impact of Panel Selection Procedures on Ideologically Divided Courts*, 29 J. LEGAL STUD. 685 (2000) [hereinafter Revesz, *Litigation and Settlement*]; Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE. L.J. 2155, 2174 (1998).

6. *Sec'y of Labor v. Safeway, Inc.*, OSHRC Docket No. 99-0316, 2000 Occupational Safety and Health Decisions (CCH) ¶ 32,157 (July 12, 2000) [hereinafter *Safeway*].

conduct should be governed by OSHA's *Compressed Gases Standards*.⁷ These standards state that "[t]he in-plant handling, storage, and utilization of all compressed gases . . . shall be in accordance with Compressed Gas Association Pamphlet P-1-1965."⁸ The pamphlet did not proscribe adapting gas grills to accommodate larger gas tanks. However, OSHA argued that the use of the Sunbeam grill did not fall within the OSHA standard's definition. Thus, OSHA urged that Safeway had violated OSH Act § 5(a)(1): "Each employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees . . ."⁹ After a hearing, the administrative judge concluded that Safeway violated the Act.¹⁰ In the course of deciding this trivial dispute, the administrative judge made significant policy-related choices. These choices arguably add to the agency law regarding both the legislation and the agency's policy pronouncement. If reviewed, the review authority would have to develop or at least confirm these choices and thereby further add to the body of agency law. Thus, the Safeway example confirms that any administrative adjudicative, no matter how trivial, may confront and even contribute to the evolution of administrative policy.

In any administrative case, the numerous agency policymaking processes present the administrative judiciary with a complex array of policy pronouncements. Collectively called "rulemaking," most agencies have processes designed to carry out these responsibilities (including any formal policy statements). Rulemaking is a quasi-legislative process, and its goal is to make general pronouncements with future effect.¹¹ Agency policy is often developed through rulemaking. Rules, policy statements, and similar pronouncements—like legislation—often impact the public through individual adjudications. However, like legislation, these devices are limited in the number of individual disputes they can resolve. The administrative judiciary must apply legislative and regulatory policy, and in the process of doing so resolve interstitial policy issues raised by both. Even though most agencies possess general policymaking processes, administrative adjudications remain a critical part of administrative policymaking. At this level, legislation is somewhat removed and the agency policy pronouncements

7. 29 C.F.R. § 1910.102 (2004).

8. *Id.*

9. 29 U.S.C. § 654(a)(1) (2000). The *OSHA Field Operations Manual* set out a four-part test for finding a violation of this "general duty clause." OSHA FIELD OPERATIONS MANUAL pt. IV-4 (6th ed. 1994).

10. *Safeway*, *supra* note 6.

11. The Federal Administrative Procedure Act § 551(4) provides: "'[R]ule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . ." 5 U.S.C. § 551(4) (2000) [hereinafter APA]. The 1961 Model State Administrative Procedure Act, after which most state APAs are modeled provides: "'[R]ule' means each agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency." MODEL STATE ADMINISTRATIVE PROCEDURE ACT, 1961 Act § 1(7), 15 U.L.A. 185 (2000) [hereinafter 61 MSAPA].

provide another tier of general pronouncement. Administrative adjudicators must honor legislative policy and administrative policy resolutions, and at the same time exercise the expansive policymaking roles they hold. This Article explores and argues for the enhancement of the policy contribution of administrative adjudicators.

I. PLACE OF ADJUDICATION IN THE DEVELOPMENT OF ADMINISTRATIVE POLICY

Well-established administrative law doctrine holds that agencies have considerable authority in deciding how to proceed.¹² For generations, this doctrine has dictated that agencies may develop policy in adjudication as well as rulemaking. The doctrine and its impact on policymaking in administrative adjudications is best explained by a few of the classic cases associated with its development.

Faced with the question presented in its most basic form, the Supreme Court, in *Securities and Exchange Commission v. Chenery*¹³ (“*Chenery II*”), definitively established the authority to make agency law in adjudication.¹⁴ The SEC refused to approve the reorganization of a utility company seeking reorganization under the recently enacted Public Utility Holding Company Act because company insiders received special advantages from their purchases. Neither the Act nor any SEC rule proscribed the conduct. Although there was no fraud involved, the SEC took the opportunity to establish for the first time a policy against insider trading.

In a prior case, *Securities and Exchange Commission v. Chenery*¹⁵ (“*Chenery I*”), the Court stated that “before transactions otherwise legal can be outlawed or denied their usual business consequences, they must fall under the ban of some standards of conduct proscribed by an agency of government authorized to prescribe such standards.”¹⁶ *Chenery II* dispelled the notion that this language required an agency (where the standard is unclear) to make a general rule before proceeding through case-by-case enforcement adjudications. In *Chenery II*, the Court stated: “The absence of a general rule or regulation governing management trading during reorganization did not affect the Commission’s duties in relation to the particular proposal before it.”¹⁷ Thus, the Court held that the SEC may develop administrative policy while adjudicating an individual dispute in addition to developing such policy through generalized rulemaking.¹⁸

12. For further discussion see 1 KOCH, *supra* note 2, § 2.12, for an explanation of an agency’s choice between rulemaking and adjudication.

13. SEC v. Chenery Corp., 332 U.S. 194 (1947) [hereinafter *Chenery II*].

14. See *id.* at 203.

15. SEC v. Chenery Corp., 318 U.S. 80 (1942) [hereinafter *Chenery I*].

16. *Id.* at 92-93.

17. *Chenery II*, *supra* note 13, at 201.

18. This making of agency law or administrative policymaking must be sharply distinguished from statutory interpretation. The distinction is crucial to the authority of federal courts and hence it has been well expressed in that context. Field, for example, observed that “‘federal common law’ . . . refer[s] to

Justice Jackson, dissenting in *Chenery II*, would have required the SEC to give notice of the agency law before applying the law¹⁹—in short, Jackson would have required the agency to first make a generally applicable “rule.” Tersely commenting on the issue, Jackson suggested some problem with an agency making agency law through cases under any circumstances: “Even if the Commission had, as the Court says, utilized this case to announce a new legal standard of conduct, there would be hurdles to be cleared”²⁰ Implicit from the remainder of the opinion, Jackson thought it inherently unfair to order forfeiture of property based on law created in the same case prohibiting the conduct. Indeed, such *post hoc* condemnation seems questionable in the abstract, but the common-law process itself contemplates such case-by-case lawmaking.²¹ In light of this tradition, and perhaps more practically because the administrative process needs the policy development alternative even more so than the judicial process, federal courts have refused to second guess procedural choices of agencies.²² In other words, federal law does not “require rulemaking.”²³

any rule of federal law created by a court . . . when the substance of that rule is not clearly suggested by federal enactments—constitutional or congressional.” Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 890 (1986) (emphasis omitted). Merrill expressed the necessary contrast between lawmaking and interpretation: “‘Federal common law’ . . . means any federal rule of decision that is not mandated on the face of some authoritative federal text—whether or not that rule can be described as the product of ‘interpretation’ in either a conventional or an unconventional sense.” Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 5 (1985). Since agencies have substantial policymaking authority, the distinction is crucial to allocating authority between agencies and courts. While courts dominate statutory interpretation, they must give considerable difference to agency policy decisions. Charles H. Koch, Jr., *Judicial Review of Administrative Policymaking*, 44 WM. & MARY L. REV. 375, 376 (2003). This basic doctrine makes an understanding of the workings of administrative policymaking all the more important.

19. *Chenery II*, *supra* note 13, at 217.

20. *Id.* at 215. Jackson did not elaborate because that was “something the Commission expressly declined to do.” *Id.*

21. However, even in the common-law system, courts are constrained. Federal courts, for example, rarely have the authority to make law but are confined to some variety of interpretation. ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* § 6.1 (4th ed. 2003); see John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 121 (1998) (explaining the development of judge-made law and its relevance to the administrative system).

22. *E.g.*, *United States v. Cinemark USA, Inc.*, 348 F.3d 569, 580 (6th Cir. 2003) (“Agencies have discretion to choose between rulemaking and adjudication.”); *Davis v. EPA*, 348 F.3d 772, 785 (9th Cir. 2003) (“Absent express congressional direction to the contrary, agencies are free to choose their procedural mode of administration.”).

23. While required rulemaking has not been adopted in the federal system, it is often required either by legislation or judicial decision in state administrative law. 1 KOCH, *supra* note 2, § 2.12. Statutes in some states require prior notice of the law, sometimes called “required rulemaking.” *E.g.*, FLA. STAT. ANN. § 120.54(1) (Harrison 1999); *Megdal v. Oregon State Bd. of Dental Exam’rs*, 605 P.2d 273, 274 (Or. 1980); *Cleveland Freight Lines, Inc. v. Ohio PUC*, 402 N.E.2d 1192, 1195 (Ohio 1980) (“[W]hen there is not a definite commission rule, order, or decision forbidding a particular practice, the imposition of a substantial penalty is unreasonable.”); *accord*, *Duane Hall Trucking, Inc. v. Utah PSC*, 737 P.2d 983, 986 (Utah 1987). Bonfield, one of the drafters of the 1981 model state act, has long advocated some requirement of rulemaking. ARTHUR EARL BONFIELD, *STATE ADMINISTRATIVE RULE MAKING* § 4.4.1 (1986); see also Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 ADMIN. L. REV. 551, 572 (2001) (“One of the reasons for the proliferation of this doctrine in states . . . may be that it allows better oversight of the rulemaking process, especially given the weak oversight capacity of state legislatures when agencies operate outside of their rulemaking processes.”).

Since *Chenery II*, the Court has continually affirmed the general principle that agencies have broad discretion to develop agency law through adjudication. The most important affirmation of this principle is found in *NLRB v. Wyman-Gordon Co.*²⁴ The NLRB ordered Wyman-Gordon to furnish a list of names and addresses of employees eligible to vote in a “recognition” election. The order was based on a general pronouncement derived from a prior administrative adjudication, *Excelsior Underwear*.²⁵ The appellate court refused to enforce a subpoena in aid of an administrative action against Wyman-Gordon because it found that the order was based on a rule made in a prior adjudication and never promulgated according to proper rulemaking procedures. Reversing the appellate court, the Supreme Court refused to compel the agency to establish agency law through rulemaking process before applying it to an adjudication, affirming the principle of administrative discretion to develop agency law in adjudication.²⁶ To this day, this remains the law in the federal system.²⁷

Wyman-Gordon additionally softened the distinction between rule and precedent in the administrative adjudicative context. Formally, judgments in individual cases focus on resolving past issues in an individual dispute, while rules focus on future agency policy. Nonetheless, by definition, precedent has general applicability and future effect.²⁸ More to the point,

24. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

25. *Excelsior Underwear*, 156 N.L.R.B. 1236 (1966).

26. Strauss’ observations about the increasing challenges to the common-law process are relevant to its administrative version:

We could see a number of linked results from these challenges: a heightening of judicial discretion over what issues get decided; an emphasis on law-making rather than case-deciding as the basis on which this discretion gets exercised; a dramatically lowered exposure of trial and intermediate courts to principled public correction; and a temptation for the high court, then, to speak in simple terms it might expect to have broad impact rather than respond to the subtle particulars of complex facts.

Peter L. Strauss, *Courts or Tribunals? Federal Courts and the Common Law*, 53 ALA. L. REV. 891, 894-95 (2002).

27. A plurality of the justices indicated that, but for the unique aspects of this particular case, they would require an agency to make a rule through rulemaking procedure rather than allow it to announce rules of general applicability in the course of an individual adjudication. Most administrative law practitioners believed that if the question came up without the special facts in *Wyman-Gordon*, the Supreme Court would demand rulemaking procedures for general administrative pronouncements. This case arrived at the Supreme Court in the form of *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). Here again, the NLRB seemed to have set a rule without using rulemaking procedures. The Board certified buyers in the company’s purchasing and procurement department as a bargaining unit. *Id.* at 269. The company argued that buyers had always been considered “managerial employees” and that the agency’s decision changed the law. *Id.* The appellate court agreed and said that the agency must use rulemaking to change general agency policy. *Id.* The Supreme Court remanded the decision so that the NLRB could apply the proper legal standard, but it refused to require that the NLRB use rulemaking procedures. The Court said that an agency “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 [agency’s] discretion.” *Id.* at 294. Thus, the Court reaffirmed the well-established principle that an agency may develop policy through adjudication.

While an adjudicative decision may have future effect as precedent, its primary purpose is to resolve the dispute and its effect is said to be retrospective. Unlike adjudicative decisions, administrative rules are prospective, and are intended to have future effect as well as general applicability. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 218 (1988) (Scalia J., concurring). In a manual published shortly after the APA’s enactment to advise federal agencies, the Attorney General explained the differ-

adjudicators, especially the agency heads, often consciously aim to create agency law in their adjudicative decisions—although usually not so blatantly as the NLRB in the *Excelsior* case. Justice Black, concurring in *Wyman-Gordon*, challenged the plurality's suggestion that an agency may not make a prospective pronouncement in an adjudication.²⁹ Noting the fuzzy boundary between rulemaking and adjudication, Black observed:

[I]n exercising its quasi-judicial function an agency must frequently decide controversies on the basis of new doctrines, not theretofore applied to a specific problem, though drawn to be sure from broader principles reflecting the purposes of the statutes involved and from the rules invoked in dealing with related problems. If the agency decision reached under the adjudicatory power becomes a precedent, it guides future conduct in much the same way as though it were a new rule promulgated under the rule-making power³⁰

This affirmed the position Black took in a dissent some 26 years before in *Chenery I*, arguably the position adopted by the Court five years later in *Chenery II*.³¹ In *Chenery I*, Black asserted that an agency is free to “evolve” its law, relying on the wisdom of prior judicial opinion among other sources,³² “[t]hat the Commission has chosen to proceed case by case rather than by a general pronouncement does not appear to me to merit criticism That Act gives the Commission wide powers to evolve policy standards, and this may well be done case by case”³³ The time span between these cases and the present has evolved this view into one of the most well-established doctrines of administrative law.³⁴

ence:

The object of the rule making proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent's past conduct. Typically, the issues relate not to the evidentiary facts, as to which the veracity and demeanor of witnesses would often be important, but rather to the policy-making conclusions to be drawn from the facts.

ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 14 (1947); *see also* *United States v. Florida East Coast Ry.*, 410 U.S. 224, 244-46 (1973).

29. *Wyman-Gordon*, 394 U.S. at 775 (Black J., concurring) (“I see no good reason to impose any such inflexible requirement on the administrative agencies.”).

30. *Id.* at 770-71.

31. *Id.* at 772.

32. *Chenery I*, *supra* note 16, at 97-98.

33. *Id.* at 99-100.

34. RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 279 (3d ed. 1999) (“[A]n agency can establish general rules applicable to large groups of people through an order issued in a proceeding conducted as an adjudication.”); ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 102 (2001).

The idea of rulemaking by adjudication is that over time and out of a sequence of adjudications aimed at discrete problems as they present themselves, agency standards of broad application should emerge. This notion . . . has been sufficiently strong to make the case that an agency should have the discretion to determine whether a particular problem is better solved by rulemaking by making rules through adjudication.

Id.; KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 6.8 (“Efforts to require rulemaking have failed in federal law.”); 1 KOCH, *supra* note 2, § 2.12.

Thus, as it should be, policy is made in administrative adjudications just as it is made in common-law judicial processes. The common-law system recognizes the value of this interstitial policymaking. Because adjudicative policymaking takes place within administrative structures exercising considerable policymaking responsibility, administrative adjudicators have both a richer opportunity and graver responsibility than their counterparts in the conventional judiciary. A careful analysis of this aspect of administrative adjudication requires considerable attention. Essentially, policymaking starts at the beginning of the adjudicative process, and administrative judges have a critical role in optimizing policymaking. Therefore, the focus must be on improving the administrative judges' understanding of their role in the process.

II. THE PIVOTAL ROLE OF ADMINISTRATIVE LAW JUDGES

As discussed above, administrative adjudications are part of the administrative policymaking process, and administrative policymaking is pervasive and dynamic. The next step is to look inside the adjudicative machinery at the distribution of policymaking responsibilities. Traditional judicial organization dictates the structure of the administrative adjudicative process, and that structure helps us to understand the allocation of policymaking responsibility. The Anglo-American trial is the template for adjudications.³⁵ However, while administrative adjudications use the trial as a model, they may and often do deviate from that model, sometimes substantially.³⁶ Nonetheless, the basic structure replicates court systems in terms of the hierarchy of adjudicators as well as the trial-like hearing procedures employed.³⁷ Therefore, an agency engaging in adjudications has a hearing-level adjudication, much like a trial court, and at least one opportunity for appeal within the agency. The administrative process may employ a nearly infinite num-

35. The trial-like model, or "formal adjudication," is sometimes required by statute. *E.g.*, APA, *supra* note 11, §§ 554, 556-57; 61 MSAPA, *supra* note 11, § 9; MODEL STATE ADMINISTRATIVE PROCEDURE ACT (1981) Article IV, chap. II [hereinafter 81 MSAPA].

36. In developing procedural designs, administrative law has often been eclectic, especially in its early years. For that reason, it has looked with a more positive attitude and practical eye at the civil-law systems. Because this Article is about one of the functions of adjudicators, it sometimes makes reference to the judicial function and procedural usage of the civil-law system. References to the civil-law system free the inquiry from the common-law procedural dogma because the civil system is based on a very active role for trial-level judges. Henry Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1290 (1975). The civil system is judge controlled, as opposed to the common-law model which is lawyer controlled. The civil system focuses on the judge and judges play the crucial role. It is called the "inquisitorial" model because its doctrines aim at gaining the truth. It is no less adversarial than the common-law "adversarial" model, as decisions are contested among judges as well as lawyers. The difference may be that the judges have a moral responsibility to assure an equal and fair process, a responsibility not just to ensure that the rules of the game are observed, but also that the decision is the best possible. In this fundamental sense, civil-law judges share a key ethic with administrative judges in many systems.

37. See generally LLOYD D. MUSOLF, *FEDERAL EXAMINERS AND THE CONFLICT OF LAW AND ADMINISTRATION* (1953); Gerald M. Pops, *The Judicialization of Federal Administrative Law Judges: Implications for Policymaking*, 81 W. VA. L. REV. 169 (1979).

ber of variations on this basic adjudicative structure and any discussion of the allocation of policymaking within the administrative adjudications must account for this structural diversity.³⁸ However, this presents little difficulty for this discussion, because even very informal adjudicative processes have a hierarchy of adjudicators which match closely enough to conventional judicial organization.

Analyzing the administrative adjudicative hierarchy requires some agreement on the terms used to distinguish adjudicative responsibilities. The administrative officials, at all levels, engaged in adjudicative decisionmaking will be called “administrative adjudicators.” These administrative adjudicators are distinguished from judiciary branch judges, collectively called “the courts” or “conventional judges.” Hearing-level administrative adjudicators will be called “administrative judges.”³⁹ Higher-level administrative adjudicators will be called the “administrative review authority” or simply the “review authority.”⁴⁰ The pinnacle of authority in the agency will be termed the “agency head,” referring to either a single official or a collegial body. The review authority may be the agency head or some individual or body delegated the authority to review the administrative judge’s decision. In the end, the agency, as an institution, must adopt a policy position in order for it to have weight and hence the administrative review authority, either the agency head or its representative, has the final word—the power to speak for the “agency” as a whole.⁴¹ Thus, the hierarchical system centralizes the policymaking authority in a superior review authority, but the administrative judges, sitting at the initial adjudicative stage, necessarily play

38. See *United States v. Mead Corp.*, 533 U.S. 218, 236 (2001) (“That feature is the great variety of ways in which the laws invest the Government’s administrative arms with discretion, and with procedures for exercising it, in giving meaning to Acts of Congress.”).

39. A literal reading of the Constitution may require Congress to vest all judicial functions in Article III courts, but long tradition has established alternative federal courts and agencies with adjudicative functions. Richard Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 916, 916-17 (1988) (remarking that “Article III literalism” is “unthinkable”). Many federal and state statutes refer to administrative adjudicative officials as “judges” of some variety.

40. The term “administrative judge” represents a search for a universal term. It includes all officials—federal, state or local—who have hearing-level adjudicative responsibilities, regardless of official title. The nature of the hearings over which they preside varies in the level of formality, and often their specific title is affected by the nature of the hearing. Administrative law has used any number of terms: hearing examiner, hearing officer, or some term including the word “judge.” Previously, I have grouped them as “presiding officials.” 2 KOCH, *supra* note 2, § 5.26. This term does not carry the necessary stature; these adjudicators are judges, even if they are not acting under Article III of the U.S. Constitution. Increasingly, “administrative law judge (ALJ)” has been adopted as the generic term. Unfortunately, the federal system creates some confusion because the term “administrative law judge” has become a special civil service category, whereas all other federal presiding officials are lumped together as “administrative judges.” PAUL VERKUIL ET AL., *THE FEDERAL ADMINISTRATIVE JUDICIARY* 7 (1992); see also John H. Frye III, *Survey of Non-ALJ Hearings Programs in the Federal Government*, 44 ADMIN. L. REV. 261 (1992). The distinction is necessary because ALJs have special protection, whereas other presiding officials hired by agencies have no more than the usual civil service protection. States do not adopt this distinction and their law may employ any of a number of terms. To escape this morass, I have adopted “administrative judge” as a universal term.

41. Daniel Gifford, *Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure*, 66 NOTRE DAME L. REV. 965, 980 (1991) (“This role of the agency head as the final adjudicating authority is recognized throughout the [Administrative Procedure] Act.”).

a critical role. This Article adopts the perspective that all adjudicative officials act on and depend upon the work of administrative judges.

A. *Administrative Judges' Contribution to the Body of Agency Caselaw*

The role of the administrative judges is pivotal. Administrative judges cannot decide individual cases without finding and applying administrative policy.⁴² A sense of obedience to that policy is driven by the norms of stability and consistency regarding adjudicative decisions and equality among litigants, assuring that like cases are treated alike. On the other hand, a living administrative policy regime requires constant adjustment. Wooden adherence to dictated policy tips the balance too far in favor of *laissez faire*. The balance between growth and equal treatment pervades the adjudicative system. The interaction between the “inferior” and the “superior” administrative adjudicators dictates to some extent how that balance is struck in a particular administrative program.⁴³

The common perception is that administrative adjudicators are likely to be too committed to the agency's positions.⁴⁴ For example, veterans' cases give rise to the complaint that the agency appoints judges who are imbued

42. While decorum demands that the administrative judges say that they take policy rather than make policy, this is no more true of administrative judges than it is of trial-level judges.

[W]hile the primary task of trial judges is factfinding, legal reasoning and interpretation of legal texts remains a vital part of the work of a federal district judge. Indeed, some researchers have concluded that the federal trial bench is a better-suited laboratory for study of judicial discretion than the federal appellate courts.

Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1415 (1998) (citing Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 263-64 (1995)). While administrative judges focus on factfinding, they often find the need to consider policy issues. Justice Scalia's list of judicial functions still works. He observed that, in addition to determining credibility, administrative judges perform many other important functions: they make findings of fact of an often extraordinarily difficult nature, not primarily dependent upon the credibility of demeanor evidence; they make important decisions regarding statutory law and *agency policy*; they write opinions that marshal the facts and frame the issues in a comprehensible fashion; and they conduct proceedings so as to assure a full and informative record.

Antonin Scalia, *The ALJ Fiasco-A Reprise*, 47 U. CHI. L. REV. 57, 71 (1979) (emphasis added). “These functions are absolutely vital to the administrative process.” *Id.*

43. For example, a North Carolina statute requires the administrative judge to give “due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency.” N.C. GEN. STAT. § 150B-34(a) (2005); see Julian Mann III, *Administrative Justice: No Longer Just a Recommendation*, 79 N.C. L. REV. 1639, 1651-52 (2001) (observing that demonstrating expertise often presents a problem).

44. Daye's study provides support for this perception. Charles E. Daye, *Powers of Administrative Law Judges, Agencies, and Courts: An Analytical and Empirical Assessment*, 79 N.C. L. REV. 1571, 1617 (2001) (“Thus, the small proportion of decisions that favored the petitioners in the OAH is one part of the picture.”); *Parchman v. USDA*, 852 F.2d 858, 866 (6th Cir.1988).

[A] judge should be careful not to give the impression that a particular view of the law prevents a careful consideration of the law and facts applicable to any given case. When an entire career has been spent in the service of one governmental agency, it can be easy for a judge to slip into a stance that may appear to be advocating, rather than judging, those interests.

Id.

with the agency's culture.⁴⁵ Nonetheless, the frequency with which adjudicators actually disagree with agency policy is not particularly relevant to this discussion, although the impact of those disagreements and the disturbance in the administrative scheme are significant, even if they occur infrequently. Moreover, the point of inquiry is how free administrative judges should feel in venturing to disagree with agency policy.⁴⁶

1. Precedent

This analysis begins with the question of the binding effect of agency law created through adjudication. *Stare decisis* is not the rule in administrative adjudications.⁴⁷ Thus, as a matter of doctrine, administrative adjudicators are not required to follow administrative precedent.⁴⁸ Rather, administrative law has developed a degree of flexibility in its approach to caselaw. On the other hand, agencies cannot ignore their prior cases.⁴⁹ Thus, they are allowed to continually adjust their precedent so long as they apply the new view until faced with a sound reason for adjusting that view;⁵⁰ they are held to precedent only until a change can be justified.⁵¹ The effect of precedent is further weakened by the agency's authority to interpret it. An agency has the power to interpret its own precedent as well as to make justifiable ad-

45. James T. O'Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process is Needed to Provide Fairness to Claimants*, 53 ADMIN. L. REV. 223, 228 (2001).

46. Daye found that, while administrative judges agreed with the agency about three-quarters of the time, they disagreed in a significant number of cases. Daye, *supra* note 44, at 1616.

47. *Texas v. United States*, 866 F.2d 1546, 1556 (5th Cir. 1989) ("An agency . . . is not bound by the shackles of *stare decisis* to follow blindly the interpretations that it, or the courts of appeals, have adopted in the past.").

48. *S. Shore Hosp., Inc. v. Thompson*, 308 F.3d 91, 102 (1st Cir. 2002) (holding that an agency may refine, reformulate, or even reverse its precedent based on new insights, changed circumstances, and the desire to correct a mistake).

49. *Borough of Columbia v. Surface Transp. Bd.*, 342 F.3d 222, 229 (3d Cir. 2003) ("If an agency departs from its own precedent without a reasoned explanation, the agency may be said to have acted arbitrarily and capriciously."); *Ramaprakash v. FAA*, 346 F.3d 1121, 1124 (D.C. Cir. 2003) ("[A]gency action is arbitrary and capricious if it departs from agency precedent without explanation."); *Consol. Edison Co. v. Fed. Energy Regulatory Comm'n*, 315 F.3d 316, 323 (D.C. Cir. 2003) ("Normally, an agency must adhere to its precedents in adjudicating cases before it.").

50. *South Shore Hosp., Inc.*, 308 F.3d at 102 (citing *Rust v. Sullivan*, 500 U.S. 173, 186-87 (1991), and *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983)).

51. *Borough of Columbia*, 342 F.3d at 229; *Fertilizer Inst. v. Browner*, 163 F.3d 774, 778 (3d Cir. 1998); *Utahns for Better Transp. v. United States Dep't of Transp.*, 305 F.3d 1152, 1165 (10th Cir. 2002) ("Agencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departure.") (emphasis added); *Ramaprakash*, 346 F.3d at 1124; *British Steel PLC v. United States*, 127 F.3d 1471, 1475 (Fed. Cir. 1997). *But see* *McClatchy Newspapers, Inc. v. NLRB*, 131 F.3d 1026, 1035 (D.C. Cir. 1997) (allowing an agency to overrule portions of prior decisions without extensive explanation), *cert. denied*, 524 U.S. 937 (1998). The explanation requirement varies with the circumstances of the individual case. "If . . . an agency merely implements prior policy, an explanation that allows this court to discern 'the agency's path' will suffice." *WLOS TV, Inc. v. FCC*, 932 F.2d 993, 995 (D.C. Cir. 1991). Or, if the court finds the past agency decisions to involve materially different situations, the agency's explanation need not be particularly elaborate. *Hall v. McLaughlin*, 864 F.2d 868, 873 (D.C. Cir. 1989). The D.C. Circuit allowed an agency to "distinguish precedent simply by emphasizing the importance of considerations not previously contemplated, and that in so doing it need not refer to the cases being distinguished by name." *Env'tl. Action v. FERC*, 996 F.2d 401, 411-12 (D.C. Cir. 1993).

justments to the precedent.⁵² Thus, in application, administrative precedent has effect, but the effect is not binding, or *stare decisis*.⁵³

Administrative law replaces formalism with an approach to caselaw that balances a range of values. *Stare decisis* recognizes, but overemphasizes, one of these values: stability.⁵⁴ The notion of stability serves the individual values of predictability and reliance.⁵⁵ Undoubtedly, these considerations are important to a fair administrative system. Citizens should be able to rely on a current understanding of agency law and take action under some reliable prediction of administrative reaction. Administration should seek consistency over time and within a program,⁵⁶ yet each new precedent potentially eliminates a viable option.⁵⁷ Schauer, while recognizing the value of predictability, observed the trade-off between predictability and other values.⁵⁸ He asks, without providing a generalized answer: "To what extent is a

52. See *Entergy Serv., Inc. v. FERC*, 319 F.3d 536, 541 (D.C. Cir. 2003); *Cassell v. FCC*, 154 F.3d 478, 483 (D.C. Cir. 1998) ("An agency's interpretation of its own precedent is entitled to deference . . .").

53. A strict doctrine of *stare decisis* is not followed by modern courts—if it ever was. *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) ("The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command."); see James C. Rehnquist, *The Power That Shall be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U. L. REV. 345, 347 (1986); Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 91 (1991) ("These sources of indeterminacy in dealing with precedents have the effect of enabling the Justices to engage in conscientious disagreements over the scope of precedents, to consider new or renewed arguments, and to contribute to the evolution of constitutional doctrine."). Still, administrative adjudicators are free in principle as well as practicality.

54. Schauer, *Precedent*, *supra* note 4, at 601 ("Arguments premised on the values of reliance, predictability, and decisional efficiency all share a focus on stability for stability's sake.").

55. Predictability and stability are integral to assuring the rule of law. See Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 18-21 (1997); Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 357 (1978).

[A]djudication should be viewed as a form of social ordering, as a way in which the relations of men to one another are governed and regulated. Even in the absence of any formalized doctrine of *stare decisis* or *res judicata*, an adjudicative determination will normally enter in some degree into the litigants' future relations and into the future relations of other parties who see themselves as possible litigants before the same tribunal.

Id.

56. The doctrine of precedent in general furthers both temporal stability and equality: This concern for equal treatment usually surfaces in discussions about the temporal stability of legal rules, because *stare decisis* promotes the equal treatment of individuals over time. But equal treatment in a spatial sense seems an equally compelling goal. . . . [G]eographical variation in otherwise uniform rules caused by divergent judicial interpretations seems irrational and unfair.

Caminker, *supra* note 4, at 852. Geographic or intra-program variation would seem particularly repugnant in most administrative schemes. See generally Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 735-36 (1989).

57. The evolution of agency law on a case-by-case basis creates a path dependency problem. Each move in an individual case may cut off more advantageous moves in the future. See ALPHA C. CHIANG, *ELEMENTS OF DYNAMIC OPTIMIZATION* 5 (1992) ("This [example] serves to point out a very important fact: A myopic, one-stage-at-a-time optimization procedure will *not* in general yield the optimal path!"). The more adjudicators are held to past decisions, the less likely the system is to arrive at the optimum results when new needs are revealed in some future case.

58. Schauer, *Precedent*, *supra* note 4, at 598 ("[T]he value of predictability is really a question of balancing expected gain against expected loss.").

decisionmaking environment willing to tolerate suboptimal results in order that people may plan their lives according to decisions previously made?"⁵⁹

A strong commitment to precedent would prevent agencies from responding to changing circumstances and new understandings. Agencies must be given the freedom to adjust to the real world and to learn from experience. The First Circuit expressed this well-established administrative law principle: "Experience is often the best teacher, and agencies retain a substantial measure of freedom to refine, reformulate, and even reverse their precedents in the light of new insights and changed circumstances."⁶⁰ Therefore, the system allows administrative adjudicators to weigh the need for dynamic policymaking against predictability and reliance values.⁶¹

For these reasons, administrative law softens the formalism of *stare decisis*, but it does not dismiss the values which support attention to precedent. While eschewing a strong doctrine of precedent, administrative law has adopted a balanced requirement of consistency which dictates that, in general, like circumstances should be treated alike.⁶² That is, administrative law demands consistency in agency adjudicative decisions as in all other administrative decisions, but consistency attentive to the need for dynamic administration.

2. Superior Precedent

Policies expressed by the agency head in prior opinions affect adjudicative decisions throughout the adjudicative hierarchy. We can start to under-

59. *Id.* at 597. Kornhauser shows that this judgment is complicated by the tension between efficient outcomes during different time periods. Lewis A. Kornhauser, *An Economic Perspective on Stare Decisis*, 65 CHI.-KENT L. REV. 63, 89 (1989) ("In some contexts, therefore, a court will maximize social welfare by adhering to a legal rule that fails to maximize social welfare in the particular period."); see also Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93, 113 (1989) (conceding that this observation, while critical, "greatly has enriched our understanding of a complex legal phenomenon").

60. *Davila-Bardales v. Immigration & Naturalization Serv.*, 27 F.3d 1, 5 (1st Cir. 1994). *But see* *Prof'l Airways Sys. Specialists v. Fed. Labor Relations Auth.*, 809 F.2d 855, 859 (D.C. Cir. 1987) ("Fidelity to law requires more than mechanical incantations about the life and growth of the law.").

61. This freedom is recognized in the principles of judicial review. Administrative policy decisions are reviewed for arbitrariness. Often this review takes the form of "hard look" review, where the reviewing court assures that the agency took a hard look at the issues. The court would arrogate policymaking power if it took a hard look itself. For a further discussion, see 3 KOCH, *supra* note 2, § 12.31. In short, judicial review law facilitates policymaking by allowing the agencies great freedom. This freedom is not justified by the studies of skewed judicial decisionmaking used in Part III for insights into potential influences acting on the administrative judiciary, but rather by the understanding that agencies, not courts, are assigned the task of, and are better able to make, policy decisions. The liberty review law provides the agencies with great scope and hence the quality and fairness of policy depends on the administrative policymaking itself. Administrative adjudication must be examined as one of the vehicles of that policymaking.

62. *Henry v. INS*, 74 F.3d 1, 6 (1st Cir. 1996).

[A]gencies do not have *carte blanche*. While a certain amount of asymmetry is lawful, an agency may not 'adopt[] significantly inconsistent policies that result in the creation of conflicting lines of precedent governing the identical situation.' . . . In other words, administrative agencies must apply the same basic rules to all similarly situated supplicants.

Id. (quoting *Davila-Bardales v. INS*, 27 F.3d 1, 5 (1st Cir. 1994), and *Williston Basin Int'l Pipeline Co. v. FERC*, 165 F.3d 54, 65 (D.C. Cir. 1999) (citations omitted)).

stand the nature of the effect on administrative judges by looking closely at the general principles of hierarchical judicial control. Understanding the dynamics of administrative adjudication policy, as with judicial lawmaking, starts with understanding the nature and extent of the obedience generally required of lower-level adjudicators. Caminker provides us with an extensive body of useful scholarship on the question of the lawmaking function of “inferior” courts.⁶³ Although the “inferior” courts Caminker studies are those below the Supreme Court, his observations about the policymaking relationship offer insights useful for analyzing the administrative adjudicative hierarchy.

Caminker posits a nonhierarchical system in which courts at all levels have equal lawmaking authority.⁶⁴ Interestingly, such a system is not merely hypothetical. As strange as such a system might feel to common-law lawyers, Caminker notes the error in dismissing the system as implausible because the system apparently works in civil-law countries.⁶⁵ Moreover, some administrative systems, especially in the states to be discussed in subpart V.A, are increasingly giving the administrative judges such autonomy. Caminker examines the possible gains accrued from disobedience by an inferior adjudicative authority, or “underruling.” Disobedience may spur reform; indeed, some refusal to follow prior authority is a necessary element to reevaluation. Still, in the end, Caminker concludes that the benefits of disobedience are ambiguous, conceding that “one might identify discrete instances in which the benefits of forced rethinking likely outweigh the costs, but a flat prohibition of underruling might better balance benefits and costs over the entire range of cases.”⁶⁶ These observations support a cabined opportunity for experimentation and even disobedience at the administrative judge level.⁶⁷

63. Caminker, *supra* note 4, at 1515 (noting that levels of the judiciary “enjoy somewhat different packages of judicial power *vis-a-vis each other*, depending on their specific role and placement within the integrated and hierarchical Article III system”).

64. Caminker, *supra* note 4, at 826.

One can certainly imagine an institutional regime in this country in which district courts, courts of appeals, and the Supreme Court all behave as autonomous law-declaring actors. . . . [T]he non-precedent-based hierarchy would grant district courts great lawmaking power, subject only to case-by-case error correction by superior courts in a limited number of instances.

Id.

65. It is legitimate to say that lower courts are not bound by higher court decisions as in the common-law systems, hence they may and do engage in “underruling.” But, there is a difference between formality and practice here. As a leading comparative law text observes:

A quick look round the Continent shows that matters are not really very different there. It is true that there is never any legal rule which compels a judge to follow the decisions of a higher court, but the reality is different. In practice a judge of the [French or German appellate court] today can count on being followed by lower courts just as much as a judgment of an appeal court in England or in the United States.

KONRAD ZWEIGERT & HEIN KOTZ, INTRODUCTION TO COMPARATIVE LAW 262 (1998).

66. Caminker, *supra* note 4, at 864-65.

67. One study of judges found that more qualified judges “were significantly more likely to strike out from the mainstream and adopt marginal theories.” Sisk et al., *supra* note 42, at 1481. In short, the better the judges, the more likely they are to venture to improve agency policy. It is likely that they will also make a real contribution in doing so. This finding suggests that the better administrative judges will

Administrative judges also have an interpretative function that gives them some opportunities with respect to precedent. Caminker posits two distinct uses an inferior adjudicative authority might make of precedent even if they felt generally obligated to apply prior decisions. Under a literal model, the lower courts make decisions according to their best understanding of the current law of the superior court.⁶⁸ Under Caminker's "proxy model," the lower court attempts to put itself in the place of the superior court and *predict* how that court would decide the case.⁶⁹ Caminker found that "it is difficult to credit the claim that inferior courts obey superior court precedents because inferior courts must independently interpret the law and the precedents count as a part of that law—indeed, a part superior to other sources of written law."⁷⁰ He suggests instead that "when there is a higher court precedent on point, lower courts do not themselves interpret and apply the law; rather, they apply the law as their superior court has interpreted it."⁷¹ Thus, an administrative judge, like a lower court, is using the precedent rather than "obeying" it. The administrative judge is attempting to predict how the agency will decide the case rather than simply following prior decisions. Whether an inferior adjudicator *should* approach superior precedent in this way is not clear: "[P]redictive behavior ought to be deemed a proper exercise of judicial power if it is consistent with the institutional values"⁷² Thus, the agency and its adjudicators might best interact on the issue. Caminker would not choose the predictive model unless it would "actually generate greater correspondence" within the adjudicative hierarchy.⁷³ Caminker finds that obedience generally should be the norm, with some allowance for creative deviation.

Obedience to the highest authority's decisions produces the economic results of fewer cases and efficient resolution of recurring issues. Schauer found, as a major justification relevant to administrative adjudications, that obedience conserves decisionmaking resources.⁷⁴ Caminker tested the proposition that "the desire to reduce the inefficiencies a multitiered adjudicatory process generates justifies present doctrine."⁷⁵ He found that "judicial

display exactly the kind of "disobedience" that will contribute to the policymaking enterprise. This not only confirms that we should seek the best administrative judges, but my study found that federal administrative judges (state judges were not studied) have fairly high qualifications. Charles Koch, Jr., *Administrative Presiding Officials Today*, 46 ADMIN. L. REV. 271, 290 (1994) ("The quality of the presiding officials as a group is impressive and there is little difference between the qualifications of ALJs and AJs [judges with formal APA protection and those without].").

68. Caminker terms this model, somewhat confusingly, the "precedent" model, even though the two models both begin with the precedent. Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspect of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1 (1994).

69. *Id.* at 16.

70. *Id.* at 26.

71. *Id.* at 27 (referring to this as the "subject-transfer" perspective).

72. *Id.* at 31.

73. *Id.* at 44. This finding depends on the data used to make the predictions.

74. Schauer, *Precedent*, *supra* note 4, at 599.

75. Caminker, *supra* note 4, at 839.

economy provides a strong rationale for a duty to obey hierarchical precedent only in certain contexts.”⁷⁶

The call for obedience in the administrative adjudicative context is heightened by the evolution of the administrative judge position. Shapiro observed that obedience to higher precedent in the administrative process should recognize the sub-delegation of authority from which the administrative judges act.⁷⁷ The adjudicative hierarchy, including the evolution of today’s administrative judges, began because the agency heads could not preside at hearings themselves.⁷⁸ Thus, administrative judges began as agents of the agency head and have retained this character despite evolving into a discrete institution. In this respect, they are quite distinct from the lower courts. Attention to the dictates of the higher authority, at least in policy matters, is compelled by administrative law’s general allocation of authority as well as the aforementioned generalized benefits for sound adjudication.⁷⁹

The judicial approach to superior precedent has ramifications for the public at large. If judges do no more than apply the precedent as it exists, guidance information is available and concrete. The more judges stray from strict application and literal interpretation, the less confidence the public has in its understanding of agency policy. Hence, freeing the judges leaves the litigant and the public less sure of agency law. However, it also presents the public with an opportunity in the face of contrary law. The approach to superior precedent then creates a continuum between certainty and clarity on the one hand and the opportunity, both for the agency and the litigants, for dynamism and tailoring to individual circumstances.

Administrative law recognizes that a strong sense of precedent may affect the system’s ability to do individual justice. In his study of the massive Social Security Administration adjudications, Mashaw observed:

Objectification of standards, the use of presumptions, the routinization of evidentiary development, all tend to overgeneralize, to pigeonhole, to leave gaps. Rulemaking necessarily constrains sensitive exercise of individualized discretion. This characteristic of

76. *Id.* at 841.

77. Sidney Shapiro, comments (on file with the author).

78. FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE 43 (1941) (“The heads of the agency cannot, through press of duties, sit to hear all the cases which must be decided.”).

79. This history explains to some extent why administrative appellate review is *de novo*. The federal APA codifies this tradition when it provides: “On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision” 5 U.S.C. § 557(b) (2000); *Janka v. Dep’t of Transp.*, 925 F.2d 1147, 1149 (9th Cir. 1991) (noting that Section 557(b) provides that the decision of a presiding officer does not become the decision of the agency if there is “an appeal to . . . the agency” and that the agency may therefore conduct “plenary review of an ALJ’s decision”). However, some administrative schemes, particularly in the states, impose more limited review. Rossi, *supra* note 23, at 572. If such a scheme is limited to the administrative review authority’s ability to “correct” *findings of fact*, the shift of burden can be justified.

clear decision rules, *like vagueness*, can introduce errors or skew them systematically and inappropriately in one direction.⁸⁰

In recognition of this dilemma, administrative law has adopted the view that wooden reliance on precedent may create unfairness and injustice if not tempered with individualizing discretion.⁸¹

While the judges should have some freedom then to adjust or even disobey superior precedent, reasonably strong control by the administrative review authority is necessary to allow it to balance flexibility and growth of agency policy against consistency and equality.⁸² The opinions of higher adjudicative authorities have the benefit of analysis percolating through the adjudicative machinery with the lower-level adjudicators providing differing analyses and reaching different conclusions in individual cases.⁸³ Lower-level policy-related freedom requires the availability of administrative review to assure against improper or incorrect policy determinations. Justice seems best served by a norm of obedience in which the lower-level adjudicators generally seek to obey agency policy expressed in superior precedent, and where an administrative review authority representing the agency as an institution is available to test that obedience but take advantage of studied disobedience.

So, in many ways, rather than engaging in the “correction” of the policy conclusions of administrative judges, the agency is capturing the benefits of different perspectives. The judges bring an individual and a “street-level” perspective, and the agency adds sensitivity to societal and cumulative values.⁸⁴ The system acquires some balance when the administrative judges force the agency to justify cumulative objectives as against practical reality

80. JERRY MASAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* 107 (1983) (emphasis added).

81. *Brehmer v. FAA*, 294 F.3d 1344, 1348 (Fed. Cir. 2002).

A “policy” is just that It indicates the standards an agency generally will follow in conducting its operations. It is not, however, a black letter rule that the agency is required to follow in all cases without regard to the circumstances of the particular situation before it.

Id.

82. Administrative adjudicators, like courts, are likely to attempt to protect their policy choices. Studies demonstrate that judges formulate their actions so as to protect their policy preferences. Smith and Tiller delved into the strategies lower courts undertake to protect their policy choices. Joseph Smith & Emerson Tiller, *The Strategy of Judging: Evidence from Administrative Law*, 31 J. LEGAL STUD. 61 (2002). Thus, they identify that “a key insight of the strategic instrument theory is that the policy choice of the court is reflected through a combination of the court’s policy outcome and instrument selection, not through the policy outcome alone.” *Id.* at 68. Both the judge and the agency are likely to choose actions that protect their policy choices and somewhat confuse the pure policy issue. Avoiding the question of whether the agency should act in such a way to protect its policy, its judges should not attempt through strategic behavior to limit the agency’s policy choices. The judges’ job, in fact, is to alert the agency to the policy issues first, and offer their own solution second.

83. Caminker, *supra* note 4, at 860. Caminker concedes that some jurists and scholars are skeptical. *Id.*

84. See *United States v. Morgan*, 313 U.S. 409, 421 (1941) (“Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case.”); *FTC v. Cement Inst.*, 333 U.S. 683, 701 (1948).

and individual consequences. On the other hand, like trial judges, administrative judges are not held to the same level of external scrutiny.⁸⁵ The review stage serves the dual function of holding a judge responsible outside the hearing room and allowing for the open analysis of a judge's initiatives. Thus, a review authority must have the final say, but it should measure lower-level decisions against policy integrity, the potential for improvements on the prior policy position, and valuable specificity in application.⁸⁶

However, the appeal and review process is necessarily fitful and reactive, and hence often incapable of assuring either general policy integrity or optimum policy development.⁸⁷ Although the opportunity for a superior tribunal to deal with a variety of lower-level approaches enhances the agency's policymaking, both as the ultimate adjudicative authority and in performing its other policymaking functions, the opportunity presented by review is not sufficient. More creative alternatives should supplement the appeal and review process in order to better capture these advantages. Such alternatives might include disciplining judges who fail to uphold policy integrity.⁸⁸ Independence might be insured by a body comprised of other judges.⁸⁹ More positive approaches to interaction on policy, such as confer-

85. See Mitu Gulati & C.M.A. McCauliff, *On Not Making Law*, 61 LAW & CONTEMP. PROBS. 157, 188 (1998) (noting that district court judges "sit alone and do not have the benefit of the intellectual debate among a panel").

86. Many administrative review authorities, but not all, are collegial as well.

87. "In very broad terms, if the head of the agency remains relatively free to reverse the ALJ, the values of expertise and political accountability predominate. If the head of the agency is bound to defer substantially to the ALJ, the value of objectivity and its appearance are dominant." William R. Andersen, *Judicial Review of State Administrative Action—Designing the Statutory Framework*, 44 ADMIN. L. REV. 523, 556 (1992). A controversy has persisted for generations as to the reliability or even existence of objective expertise in the administrative process. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2260-64 (2001). Justice Breyer urges a return to the concept of expertise, but this view continues to be contested. *Id.* at 2262-63 (citing STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 61, 73-74 (1993)); Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 697-715 (2000). Ackerman is described as "another prominent member of the new expertise movement." Kagan, *supra*, at 2262 n.52.

88. Koplow and I studied the Social Security administrative review authority, the "Appeals Council." We found that in mass justice programs particularly, the traditional appellate review apparatus was insufficient to assure "policy integrity." More aggressive measures, such as sampling cases involving target areas, was necessary—at least in an administrative adjudicative system that handles a massive caseload—both to assure consistency and to allow the agency to come to grips with complex questions raised within the expanse of SSA adjudications. Charles Koch, Jr. & David Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 FLA. ST. U. L. REV. 199, 279 (1990).

89. Consistent disobedience creates gaps which do not contribute to policy evolution, but can only be considered capricious and hence might justify disciplinary or training-type approaches. *Stephens v. Merit System Personnel Bd.*, 986 F.2d 493, 498 (Fed. Cir. 1993) (finding that decisional independence does not prevent an agency from requiring additional training as a disciplinary device). Members of the conventional judiciary face administrative discipline for failing to faithfully apply the law, and administrative judges should also face some discipline for failures regarding agency law. Steven Lubet, a judicial ethics expert, describes as unacceptable instances in which "[s]ome judges have demonstrated utter ignorance of the law, or sheer disregard for it, some going so far as to decide cases on the basis of 'coin flips.'" Steven Lubet, *Judicial Discipline and Judicial Independence*, 61 LAW & CONTEMP. PROB. 59, 72 (1998). Under such circumstances, disciplinary machinery is necessary to assure accountability. Lubet identified four compelling circumstances justifying disciplinary action based on legal misconduct: (1) a pattern of repeated and uncorrected legal error; (2) errors exceeding some "egregiousness quotient," including "[a] willful refusal to follow the law, as distinct from an honest and acknowledged difference

ences and training sessions, might be considered.⁹⁰ The experience and views of judges might be sought in the context of rulemaking.

3. *Horizontal Precedent*

In addition to careful, but flexible, attention to opinions from the superior authority as a way to optimize the policymaking role of the administrative judge, a judge also contributes by providing opinions for colleagues.⁹¹ “Horizontal” precedent, the impact of prior decisions by other administrative judges, raises another category of questions. As previously discussed, the agency adjudicators are not bound by prior opinions.⁹² Similar to an equity court, the administrative judge seeks to provide individual justice. Although the decisions of a higher adjudicative authority may represent agency law that a judge cannot ignore, the opinions of comparable judges have no formal authority. However, to further the goals of consistency and informed decisionmaking, judges must not ignore the work of their colleagues. Schauer observed that precedent equalizing dissimilar decisionmakers—that is, honest disagreement among judges—while beneficial to the reformation of a body of law, can create inconsistencies incompatible with the fair resolution of individual cases.⁹³ Administrative judges should

of opinion or interpretation, may manifest unfitness for judicial office”; (3) legal errors which cannot be corrected on appeal; and (4) decisions constituting a “complete abdication of the judicial function.” *Id.* at 72-74. The key is curing these consistent breakdowns in accountability without compromising independence. *Id.* at 65 (“Accountability and independence are not mutually exclusive; most often, we can have both.”).

90. Something like this was attempted in the Social Security Administration. “The SSAB [Social Security Advisory Board] was created as an oversight body when the SSA became an independent agency in March of 1995. But the SSAB, though effective at the conceptual level, is not in a position to carry out actual management reforms.” Verkuil, *supra* note 1, at 729. As discussed below, many states have constituted independent offices which supply administrative judges to various agencies. Under the Model Act Creating a State Central Hearing Agency, the chief judge may monitor the quality of the judges’ performance. Christopher McNeil, *The Model Act Creating a State Central Hearing Agency: Promises, Practical Problems, and a Proposal for Change*, 53 ADMIN. L. REV. 475, 498-500 (2001). A long time chief ALJ disagrees with the idea that chief judges should have the power to impose uniform law or policy. John W. Hardwicke, *The Central Panel Movement: A Work in Progress*, 53 ADMIN. L. REV. 419, 440 (2001).

91. Judge John Hardwicke, long time chief Administrative Law Judge for Maryland, expressed concern over this possibility. He suggested that conversations between the judges and the agency head were too dangerous and should not be permitted: “Never, never should a judge discuss on-going litigation with an outsider, including especially the agency or any other executive functionary.” John Hardwicke, comments (on file with author). Nonetheless, he approved of panel discussions involving judges, government attorneys, members of the bar, and the general public. The failure to include the agency loses some of the advantage both for the judges and the agency, hence those representing the agency might be included with considerable thought to safeguards.

92. The APA seems to require an opinion. APA, *supra* note 11, § 557(c).

93. Schauer, *Precedent*, *supra* note 4, at 600. A study of the federal administrative judiciary concluded:

The potential for interdecisional inconsistency increases with increases in the number of independent adjudicatory officers, increases in the difficulty of the disputes they resolve, and increases in the degree of subjective or normative judgment required to resolve the disputes. The potential for significant interdecisional inconsistency is a major concern because it violates a cardinal principle of our system of justice—like cases should be resolved in like manner.

conform to prior decisions, even those they disagree with, in order to assure an even-handed process.⁹⁴ More specifically, an administrative system must strike a balance between equal treatment and individualizing discretion, and individual programs might weigh these two values differently in requiring consistency among judges.

However, a strong sense of horizontal precedent may be unfair to those affected by the agency's programs, especially in mass justice programs. The sheer burden of collecting related cases renders horizontal precedent impractical for society's disadvantaged and their overstretched representatives.⁹⁵ Indeed, this unfairness is a driving force behind administrative law's preference for rules. In short, horizontal precedent is often inappropriate for a particular administrative program. While administrative judges should share knowledge and experience in handling individual cases, true authority should not be given to a colleague's prior treatment of cases in most adjudicative settings.⁹⁶

4. Conclusion

Practical as well as normative factors counsel in favor of obedience to the decisions of a higher administrative authority. This obedience may be tempered by the need to render individual justice, and *under proper circumstances*, the need to begin the adjustment of existing agency law. However, horizontal precedent should be given little weight. Administrative judges may be influenced by the wisdom of their colleagues, but they should not feel any formal compulsion to follow their lead.⁹⁷ Regardless, the policy role of administrative judges determines the nature of adjudicative policy-making in each program. Each agency should be conscious of this role and incorporate it in to their policymaking arsenal.⁹⁸ In the end, the agency is

VERKUILE ET AL., *supra* note 40, at 139.

94. Schauer, *Precedent*, *supra* note 4, at 588 ("The most obvious consequence, of course, is that a decisionmaker constrained by precedent will sometimes feel compelled to make a decision contrary to the one she would have made had there been no precedent to be followed.").

95. Gifford, *supra* note 41, at 997 ("In a mass-justice agency, adjudication is unsuited for use as a vehicle for announcing or formulating policy. The cases come too fast and in too great a volume for decisionmakers to look to other cases as guides . . .").

96. Agencies should facilitate judges' ability to share their views and experiences in other forms and forums. Conferences and training are obvious ways to accomplish this. Judges might also be encouraged to consult on individual cases. However, to the extent it applies to administrative judges, the ABA Model Code of Judicial Conduct allows judges to consult with court personnel and other judges only for emergency and administrative purposes. ABA MODEL CODE OF JUDICIAL CONDUCT Canon 3(c) cmt. [5] (2003) [hereinafter ABA CODE].

97. It is only those cases in which the judges show careful attention to the broader impact of their decision that other judges should consider the effect as something similar to precedent. On the other hand, the potential for future impact may distract hearing-level judges from their primary duty of deciding individual disputes. Schauer, *Precedent*, *supra* note 4, at 588. One study suggests that courts may decide not to publish opinions for fear that the opinions will create bad precedent. *See generally* Gulati & McCauliff, *supra* note 85.

98. The agency might also consider what support is available to administrative judges making these policy-related decisions. The Model Code of Judicial Conduct, to the extent it applies to administrative judges, provides a very narrow concession to consultation with legal experts. ABA CODE, *supra* note 96,

best situated to appraise the contribution an administrative judge may make to its policymaking.

B. Incorporating Agency Rules into Adjudicative Decisions

Administrative judges primarily rely on rules and general policy pronouncements for a general policy framework because most of an agency's policy is embodied in rules and general policy pronouncements rather than caselaw.⁹⁹ The agency head promulgates rules, and administrative law doctrine compels the agency to obey the rules or justify its disobedience. Throughout the hierarchy, agency adjudicators—including administrative judges—are required to apply rules and policy pronouncements. Thus, the melding of rules and other policy pronouncements into individual adjudicative decisions raises complex questions regarding the allocation of authority within the administrative structure. Often administrative judges' treatment of policy pronouncements creates great tension within a program's administration. A close look at the proper role of these pronouncements in a program's adjudication is needed. Additionally, this Article will consider the possible contribution of administrative judges to the quality of an agency's general policy pronouncements.

An agency must obey its own rules in order further the goal of consistency.¹⁰⁰ The basic doctrine for this requirement is derived from three "red

at Canon 3B(7)(b) ("A judge may obtain the advice of a disinterested expert on the law . . . if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond."). Consultation with experts in order to contribute to administrative policy, or "agency law," might be considered the equivalent of courts seeking legal expertise. However, this administrative law adaptation can be questioned. It might be consistent with the spirit of this provision for an administrative judge to consult a legal expert on the interpretation of agency policy, either in rules or precedent. *Id.* at cmt. 10 ("Law" denotes court rules as well as statutes, constitutional provisions and decisional law."). But, it may stretch the spirit of this freedom too far to allow a judge to consult on the wisdom or modification of agency policy. In addition, the APA prohibition against *ex parte* communication may be an impediment. APA, *supra* note 11, § 557(d); *see also* 81 MSAPA, *supra* note 36, § 4-213 (regarding the states). Arguably this provision, however, might leave room for consultation with special experts who have no stake in the outcome, and it might be read to require only that such consultations be noticed. To some extent, the law is more generous when it comes to consultation with agency staff not involved in the adjudication. *White v. Indiana Parole Bd.*, 266 F.3d 759, 766 (7th Cir. 2001) ("[N]on-record discussions between an agency's decision makers and members of the agency's staff are common and proper."); *see Greenberg v. Bd. of Governors of the Fed. Reserve Sys.*, 968 F.2d 164, 167 (2d Cir. 1992) (finding that separation of function standards are lower for administrative judges than federal judges). If an agency wants to optimize the policy contribution of its judges, it might work out some principled opportunity for them to consult. Formal guidelines and instructions may serve to legitimize support.

99. "[T]here is rulemaking, which has in the [1970s] replaced adjudication as the central mechanism of agency law giving." Scalia, *supra* note 42, at 72.

100. *A.D. Transp. Express, Inc. v. United States*, 290 F.3d 761, 766 (6th Cir. 2002) ("When an agency promulgates regulations it is . . . bound by those regulations."); *Steenholdt v. FAA*, 314 F.3d 633, 639 (D.C. Cir. 2003) ("The *Accardi* doctrine requires federal agencies to follow their own rules, even gratuitous procedural rules that limit otherwise discretionary actions."); *Ctr. for Auto Safety v. Dole*, 828 F.2d 799, 806 (D.C. Cir. 1987) (recognizing "the principle that a court will require an agency to follow the legal standards contained in its own regulations despite the fact that a statute has granted the agency discretion in the matter"). This is the law in the states as well. *E.g.*, *State Bd. of Tax Comm'rs v. Indianapolis Racquet Club, Inc.*, 743 N.E.2d 247, 251-52 (Ind. 2001); *Hudson v. Dep't of*

baiting” cases. The first and most influential, *United States ex rel. Accardi v. Shaughnessy*,¹⁰¹ involved efforts by the Attorney General to deport “unsavory characters.” The petitioner applied for suspension of deportation, which according to INS rules, should have been decided by the Board of Immigration Appeals. The rule required the Board to exercise its discretion, and the Attorney General’s efforts to avoid INS rules were found by the Court to be impermissible. *Accardi* was followed by two similar cases firmly establishing these general principles.¹⁰²

Though the doctrine is well-established, it is not inflexible. Equally well-established is the proviso that an agency may deviate from its rules for good cause.¹⁰³ Administrative judges face a duty to be faithful to the agency’s policy decisions, and this duty strengthens the need to obey the agency’s rules and policy pronouncements. Additionally, a judge’s failure to obey an agency policy reflects poorly on the agency—the judge’s violation is the agency’s violation. However, a judge may be in the best position to see reasons for an individual or even a general modification of an agency rule. Thus, an administrative judge should have flexibility to deviate from an established policy as long as the judge can adequately justify the deviation. However, because it is the agency who will ultimately be held accountable, the agency must make the final decision regarding a deviation or change.

The question of application is complicated because administrative rules may have differing force and administrative adjudicators may be bound in differing ways. Legislative rules are promulgated pursuant to delegated authority through public procedures and consequently carry the force of law.¹⁰⁴ Since policy pronouncements acquire the force of law, an agency may have a special duty to follow its own legislative rules unless it ex-

CORR., 703 A.2d 268, 273 (N.J. 1997) (“[A]n administrative agency ordinarily must enforce and adhere to, and may not disregard, the regulations it has promulgated.”).

101. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

102. In *Service v. Dulles*, 354 U.S. 363 (1957), the Supreme Court found that the discharge of a foreign service officer for disloyalty violated regulations of the State Department. *Id.* at 388. Similarly, the Court in *Vitarelli v. Seaton*, 359 U.S. 535 (1959), reinstated an Interior Department employee who had been charged with “sympathetic association” with communists in violation of the Department’s own regulations. *Id.* at 537.

103. The Court in *United States v. Caceres*, 440 U.S. 741 (1979), established the principle that an agency does not violate due process when it fails to follow its own rules. *Id.* at 741-42. Joshua Schwartz observed:

Accardi contains a passing ambiguous reference that might suggest a due process foundation for agencies’ obligation to follow their own regulations. But the overall tenor of the opinion suggests that the Court considered this obligation a necessary consequence of the regulations’ status as law binding on private parties.

Joshua I. Schwartz, *The Irresistible Force Meets the Immovable Object: Estoppel Remedies for an Agency’s Violation of Its Own Regulation or Other Misconduct*, 44 ADMIN. L. REV. 653, 671 (1992).

104. The foundational case is *Caceres*, in which the Court accepted the agency’s assertion that following the rule would have interfered with a criminal investigation. 440 U.S. at 752-54; *see also* *Revak v. Nat’l Mines Corp.*, 808 F.2d 996, 1002 n.10 (3d Cir. 1986); *Shell Oil Co. v. FERC*, 664 F.2d 79, 83 (5th Cir. 1981) (“In certain instances, no doubt, FERC may exercise its equitable discretion and stray from the use of its general regulations. In order to do so, however, FERC must articulate valid reasons for the departure.”).

presses a strong reason justifying disobedience.¹⁰⁵ Therefore, these rules bind agency adjudicators until the rule is amended or revoked.¹⁰⁶

Such policy pronouncements are distinct from policy statements which do not purport to be made from delegated authority and consequently do not carry the force of law.¹⁰⁷ Though several terms can be used to describe these pronouncements, this Article will collectively call them “nonlegislative” rules.¹⁰⁸ Nonlegislative rules are a categorically different type of pronouncement from legislative rules, and this difference should be reflected in the weight given by an agency’s adjudicators.¹⁰⁹ A nonlegislative rule is a device for announcing policy.¹¹⁰ They are intended to disclose the agency’s views and offer guidance regarding agency law.¹¹¹ Thus, an agency must

105. *E.g.*, *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (“Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”); *Chrysler Corp. v. Brown*, 441 U.S. 281, 296 (1979); *O’Sullivan v. Countrywide Home Loan, Inc.*, 319 F.3d 732, 740 (5th Cir. 2003) (“Where . . . agency regulations are promulgated under express congressional authority, they are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”) (quoting *Chevron*, 476 U.S. at 844).

106. *Clean Ocean Action v. York*, 57 F.3d 328, 333 (3d Cir. 1995); *Cnty. Action, Inc. v. Bowen*, 866 F.2d 347, 352 (10th Cir. 1989).

107. An agency may change its rules. *Voyageurs Region Nat’l Park Ass’n v. Lujan*, 966 F.2d 424, 428 (8th Cir. 1992); *Romeiro De Silva v. Smith*, 773 F.2d 1021, 1025 (9th Cir. 1985) (“An agency is bound by its regulations so long as they remain operative, but may repeal them and substitute new rules in their place.”); *see also* Macey, *supra* note 59, at 97 (responding to Kornhauser’s observations about the tension between efficient outcomes in different time periods by noting that the legislature may change inefficient legal rules).

108. *E.g.*, *Farrell v Dep’t of Interior*, 314 F.3d 584, 590 (Fed. Cir. 2002) (concluding after a survey of authority that “[t]he general consensus is that an agency statement, not issued as a formal regulation, binds the agency only if the agency intended the statement to be binding”).

109. Charles H. Koch, Jr., *Public Procedures for the Promulgation of Interpretative Rules and General Statements of Policy*, 64 GEO. L.J. 1047, 1048 (1976); *see also* Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520 (1977).

110. *E.g.*, *Consol. Edison Co. of New York v. FERC*, 315 F.3d 316, 323 (D.C. Cir. 2003).

“Policy statements” differ from substantive rules that carry the “force of law,” because they lack “present binding effect” on the agency. 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.

Id.

111. One brand of nonlegislative rule, “statements of policy,” may not have a binding effect on the agency, resulting in even more ambiguous application to administrative judges. Several courts distinguish statements of policy from other nonlegislative rules because the latter are not “binding norms” which control the agency. For example, the D.C. Circuit described a statement of policy in these terms:

An agency policy statement does not seek to impose or elaborate or interpret a legal norm. It merely represents an agency position with respect to how it will treat—typically enforce—the governing legal norm. By issuing a policy statement, an agency simply lets the public know its current enforcement or adjudicatory approach. . . . [P]olicy statements are binding on neither the public, nor the agency.

Syncor Int’l Corp. v. Shalala, 127 F.3d 90, 94 (D.C. Cir. 1997).

A statement might not be binding because it serves the dual purpose of “informing the public of the agency’s future plans and priorities for exercising its discretionary power,” as well as educating and providing direction to agency personnel who are required to implement the agency’s policies and exercise its discretionary powers in specific cases. *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1013 (9th Cir. 1987). A statement acts only prospectively and it does not establish a “binding norm.” *Id.* at 1014. Nonetheless, even a statement may confine the agency’s discretion where it would be unfair to deny the statement some effect. Ronald Levin urges that statements and interpretative rules have virtually the same effect. Ronald M. Levin, *Nonlegislative Rules and the Administrative Open Mind*, 41 DUKE L.J. 1497, 1503 (1992).

obey these pronouncements as well as legislative rules unless a deviation can be justified.¹¹²

However, an administrative judge may have considerably more freedom regarding those policy pronouncements that are not legislative rules.¹¹³ In *Morton v. Ruiz*,¹¹⁴ the Supreme Court held that an agency should not feel bound by its nonlegislative rules in the face of overriding considerations.¹¹⁵ Ruiz applied for assistance from the Bureau of Indian Affairs (BIA) and was denied assistance because of a provision in the BIA manual limiting eligibility to Indians living “on reservations.” Ruiz and his wife left the reservation to live in an Indian community a short distance from the reservation and applied for assistance during a prolonged labor strike. The Court found that the manual was not binding on the agency because it was not a legislative rule.¹¹⁶ The Court held that the agency should not follow the nonlegislative rule where the result would be unfair.¹¹⁷

This doctrine’s real impact may be felt only in situations where the administrative judge has some freedom in application. Thus, the impact of nonlegislative rules and policy pronouncements on administrative judges becomes complicated. An administrative judge should not apply a nonlegislative rule if its application would be unfair. Hence, a judge may not be technically bound by an agency policy pronouncement that is not made pursuant to a delegated authority—meaning they may be bound only to legislative rules.¹¹⁸ One example involved a seventeen-year-old woman with brain damage who was able to remain at home with extensive nursing help. The agency sought to downgrade the level of home nursing help, relying on a North Carolina Medicaid manual. The administrative judge, reviewing the change in status, found that the manual’s list of criteria for justifying the enhanced service was not exhaustive, and ruled for the claimant.¹¹⁹ Logi-

112. Michael Asimow, *Guidance Documents in the States: Toward a Safe Harbor*, 54 ADMIN. L. REV. 631, 632 (2002).

Virtually every administrative agency produces guidance documents expressing its view about the meaning of language in statutes and regulations Guidance documents of general applicability are enormously important to members of the public who seek to plan their affairs to stay out of trouble and minimize transaction costs.

Id.

113. *Steenholdt v. FAA*, 314 F.3d 633, 639 (D.C. Cir. 2003) (“The *Accardi* doctrine requires federal agencies to follow their own rules, even gratuitous procedural rules that limit otherwise discretionary actions.”); *Lake Mohave Boat Owners v. Nat’l Park Service*, 138 F.3d 759, 763 (9th Cir. 1998).

114. *Morton v. Ruiz*, 415 U.S. 199 (1974).

115. *Id.* at 232.

116. *E.g., id.* at 233-35; *United States v. Alameda Gateway Ltd.*, 213 F.3d 1161, 1167-68 (9th Cir. 2000) (finding that a litigant could not rely on a regulation because it was not intended to be binding but to act as guidance); *Warder v. Shalala*, 149 F.3d 73, 82 (1st Cir. 1998).

117. *Morton*, 415 U.S. at 233-35.

118. See Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803 (2001) (arguing generally that “publication rules,” though lacking the force of law, are important to the system, and so judges should not discourage reliance upon them).

119. *Roberts v. N.C. Dep’t of Health & Human Serv.*, 02 DHR 1138, 2003 WL 21638171 (N.C.O.A.H. Apr. 25, 2003).

cally the *Ruiz* doctrine begins at the hearing-level in order to facilitate the exercise of individual discretion in decisionmaking.

However, it is the extent of the judge's discretion that presents the real question. For years, courts have been bound by "Skidmore deference" when reviewing the application of nonlegislative rules.¹²⁰ This dictates that a court, while not bound to the rule, may find that the nonlegislative rule has the "power to persuade."¹²¹ Under *Ruiz*, if the agency has a duty not to inflexibly apply a nonlegislative rule, then perhaps administrative judges are justified in following a nonlegislative rule only to the extent they find the rule persuasive. While they are not authorized to change nonlegislative rules, they may adjust policy pronouncements under certain circumstances.

Moreover, rules rarely answer all the questions raised in an adjudication, and administrative judges often have no choice but to engage in interpretation of various types of policy pronouncements—both legislative and nonlegislative. The agency has considerable interpretive discretion, and it is well-established that an agency has broad authority to interpret its own rules.¹²² Since the agency is conceded such broad authority to interpret rules

120. The classic statement:

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Skidmore v. Swift, 323 U.S. 134, 140 (1944). The Court has consistently referred to this formulation. *E.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 237-38 (2001) (finding that an agency's ruling may be merely persuasive); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 142 (1976) (refusing to apply the EEOC guidelines).

121. *Skidmore*, 323 U.S. at 140.

122. The classic authority for this proposition is *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945) (stating that "[s]ince this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt"), but the most cited case is *Udall v. Tallman*, 380 U.S. 1, 16 (1965) (dealing with agency interpretations in general). The Supreme Court continually reaffirms this long-standing approach. *E.g.*, *Christensen v. Harris County*, 529 U.S. 576, 588 (2000) ("[A]n agency's interpretation of its own regulation is entitled to deference."); *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 356 (2000); *Auer v. Robbins*, 519 U.S. 452, 463 (1997); *Stinson v. United States*, 508 U.S. 36, 44 (1993); *Arkansas v. Oklahoma*, 503 U.S. 91, 112 (1992); *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 151 (1991).

Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated law-making powers.

Id. In *Gardebring v. Jenkins*, 485 U.S. 415 (1988), the court stated:

[W]hen it is the Secretary's regulation that we are construing, and when there is no claim in this Court that the regulation violates any constitutional or statutory mandate, we are properly hesitant to substitute an alternative reading for the Secretary's unless that alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation.

Id. at 430; *see also* *Mullins Coal Co. v. Dir., Office of Workers' Comp. Programs*, 484 U.S. 135, 159 (1987). The lower courts also often express this doctrine. *E.g.*, *Wells Fargo Bank of Texas NA v. James*, 321 F.3d 488, 494 (5th Cir. 2003) (stating that "where . . . the regulation is ambiguous as to the precise issue in contest, an agency's interpretation of its own regulation is controlling unless it is clearly erroneous").

and policy pronouncements, and even to engage in justified deviation, it follows that the agency's administrative judges may also do so—but carefully.¹²³ Like superior precedent, judges might interpret rules in order to develop agency policy.¹²⁴ Policy change must percolate up through the process, and hence each level has a role in sharpening the rule through interpretation. A judge's interpretation provides experience, which the rule and its policy will use to develop. Judges' interpretations additionally provide perspective on the policy's application, giving the agency "samples" for use in evolving future policy. Adjustments within the terms of the rule neither challenge the agency's authority nor unduly upset stability and equality. While judges may pay close attention to the language and clear meaning of a rule, a potential policymaking contribution exists when judges look behind the rule to conclude that strict application of the rule would not further its purpose in the individual case before them. That is, rather than literal strategies of interpretation, the judge may attempt to apply the rule as the agency would interpret the rule in that particular context.

However, in both interpretation and application, a judge should be mindful of the effect policy pronouncements have on the public. Regardless of the policy pronouncement's formal effect, a member of the public to which the policy applies would be ill-advised to ignore it; hence the pronouncement creates a variety of agency law.¹²⁵ The public relies on all forms of policy expression (if they recognize any difference), hence administrative judges should feel some pressure to follow a pronouncement's language. Where a person relies on a rule, a judge should follow the rule because a court will hold the agency to the rule. Even where an individual did not detrimentally rely on the rule, the administrative judge should understand that the general public looked to the rule for guidance. For a judge to take undue liberties with the language of policy statements, regardless of a

ous"); *Clark Reg'l Med. Ctr. v. Dep't of Health & Human Serv.*, 314 F.3d 241, 245 (6th Cir. 2002) ("Under the APA, an agency's interpretation of a regulation must be given controlling weight unless it is 'plainly erroneous or inconsistent with the regulation.'") (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)). *But see Christensen*, 529 U.S. at 588 ("Auer deference is warranted only when the language of the regulation is ambiguous To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation."); *Moore v. Hannon Food Serv., Inc.*, 317 F.3d 489, 494-96 (5th Cir. 2003) (finding the requirement that the rule be ambiguous was shared among the circuits, the court refused to give deference to the agency's interpretation of clear language).

123. Interpretation may not constitute amendment or repeal, so even the agency head may not use interpretation in an adjudication because a rule must be amended or repealed by the same procedure with which it was promulgated. 1 KOCH, *supra* note 2, § 4.60[2]. If the need for amendment is identified in adjudication, or if the interpretation cannot make the necessary adjustment without constituting an amendment, then the adjudicators must commend the issue to the policymaking processes of the agency.

124. *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 96 (1995) (stating that "[t]he APA does not require that all the specific applications of a rule evolve by further, more precise rules rather than by adjudication").

125. Anthony has done the most to develop this argument. Recently, he addressed circumstances under which government guidance documents, advisories, opinion letters, bulletins, inspection manuals, and press releases effectively bind persons outside the agency in a practical, as opposed to legal, sense. Robert A. Anthony, *Three Settings in Which Nonlegislative Rules Should Not Bind*, 53 ADMIN. L. REV. 1313 (2001).

particular individual's detriment in relying on the rule, seemingly disadvantages those covered by the particular administrative program. Thus, considerations of fairness counsel an administrative judge generally to give effect to both nonlegislative and legislative rules.

Like superior precedent, affording judges policy discretion regarding agency rules demands strong agency review to reassert the value of consistency, the authority of the agency over policy, and any process values compromised by straying from the rule as promulgated. A system balancing flexibility and stability requires the placement of ultimate authority in the agency. Each individual administrative program may strike the appropriate balance differently, determining the appropriate attitude for the agency's judges to take towards agency rules and policy pronouncements. Policymaking should be seen as a coordinated effort in which the judge's individual decisions contribute to policy development rather than an adversarial process in which the judge struggles against the agency's policymaking efforts.

To further this cooperative effort, an agency may consider taking advantage of judges' experiences and perspectives when developing agency rules. While ethical rules seemingly prohibit such participation, the commentary to the Judicial Code observes that "a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice To the extent that time permits, a judge is encouraged to do so" ¹²⁶ Judicial participation in administrative policymaking offers the same benefits discussed in the Code, indeed administrative judges have even more to contribute as active participants in administrative policymaking. However, the canon contains the hortatory phrase "subject to the requirements of this Code."¹²⁷ The commentary notes, "This phrase is included to remind judges that the use of permissive language in various Sections of the Code does not relieve a judge from the other requirements of the Code that apply to the specific conduct."¹²⁸

Attention to structuring judicial participation in agency policymaking is important to tapping this valuable resource and assuring that it falls within the appropriate range of judicial-type activities. For example, an agency may encourage judges to identify troublesome issues and recommendations as to possible resolutions.¹²⁹ Agencies with large numbers of administrative

126. ABA CODE, *supra* note 96, at Canon 4B, cmt. [1].

127. *Id.* at Canon 4B.

128. *Id.* at cmt. [2].

129. In order to take advantage of the expertise of judges in those systems, the French have regularized the submission by the courts of recommendations for legislation. One scholar observed:

[T]he Court of Cassation [the highest general law court] was very well placed to assess and comment upon the shortcomings of laws it applies on a day-to-day basis, notably spotting conflicting or outdated texts, and texts whose strict application may lead to injustice. The judiciary . . . being involved in the shaping of the law through its case law, could only have a positive influence on the process of law reform if someone were to take the trouble to listen to what it had to say. In fact . . . the best way to reform the law in practical terms was through

judges (or in independent corps systems described below), might create an advisory committee of judges.¹³⁰ As long as these contributions are open and made publicly available, they are not objectionable. In short, administrative adjudicators can provide a valuable resource to agencies formulating rules and policy.

III. APPROPRIATE CONSIDERATIONS IN ADMINISTRATIVE JUDGE POLICY ANALYSIS

Recognizing and advocating a role for administrative judges in administrative policymaking requires a careful inquiry into the norms for their policy judgments. Administrative judges are, and should be, active participants in the administrative policymaking function. However, if administrative judges are delegated this responsibility, and freed from the mere application of the agency's policy expression, they must be conscious of the forces likely to operate on their policy choices.

Administrative judges facing a policy issue must be consciously aware of the perceptual influences likely to affect their decisions. Guthrie, Rachlinski, and Wistrich applied the findings of one study, which identified certain honest "cognitive" distortions, to measure the impact of cognitive biases on judicial judgment.¹³¹ They noted: "Psychologists have learned that human beings rely on mental shortcuts, which psychologists often refer to as 'heuristics,' to make complex decisions. Reliance on these heuristics facilitates good judgment most of the time, but it can also produce systematic errors in judgment."¹³² These commentators demonstrate that judges are vulnerable to cognitive illusions generated by heuristics.¹³³ For example,

the joint efforts of judges and legislators acting in partnership, something . . . that the annual report of the Court was trying to achieve.

EVA STEINER, FRENCH LEGAL METHOD 115-16 (2002).

130. The conventional judiciary is a regular participant in the legislative process. Moreover, the Supreme Court in the classic separation of powers case, *Mistretta v. United States*, 488 U.S. 361 (1988), seemed to accept the employment of judges in rulemaking. The Court held that neither the Commission's placement in the judiciary or the requirement that some federal judges serve as commissioners violated separation of powers. *Id.* at 412. Surely, if these members of the judiciary may participate in, and indeed form the heart of, a rulemaking agency, there can be neither legal impediment nor ethical objection to the administrative judiciary doing likewise.

131. Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 825 (2001).

132. *Id.* at 780. *But see* Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 509 (2002) (arguing that appellate courts, unlike trial courts and many administrative adjudicators, have self-correcting mechanisms for these errors). Social psychology research has demonstrated that a conscious, rational mental process does not always lead to a better decision. *See generally* SUSAN FISKE & SHELLY TAYLOR, SOCIAL COGNITION 399-402 (2d ed. 1991). One recent study is particularly interesting. *See* Timothy Wilson & Jonathan Schooler, *Thinking Too Much: Introspection Can Reduce the Quality of Preference & Decisions*, 60 J. PERSONALITY & SOC. PSYCHOL. 181 (1991). The researchers evaluated certain types of choices in terms of the subjects' satisfaction and found that "rational" decisionmaking produced inferior choices in terms of the *subjective* preferences of those subjects. *Id.* at 190. One reported study, evaluating student course selection, suggested that some choices might be *objectively* inferior as well. That study found that the "rational" choices were inferior to the "intuitive" choices when measured against the opinions of the faculty and the recommendations of students who had previously taken the course. *Id.*

133. Guthrie et al., *supra* note 131, at 782.

measuring the effect of “framing,” the categorization of decisions according to salient reference points, they found that framing “influenced the development of legal doctrine.”¹³⁴ Along with the other heuristics, one would expect this heuristic could have some effect—even a considerable effect—on policy judgments by administrative adjudicators. The commentators’ suggested remedies thus become particularly relevant. They advise: “Only if increased attention and greater deliberation enable judges to abandon the heuristics that they are otherwise inclined to rely upon can they avoid the illusions of judgment that these heuristics produce.”¹³⁵ This supports the conclusion that the best cure for these “errors,” perhaps particularly in policy judgments, is conscious attention to these potential decisionmaking flaws.¹³⁶

Experience and anecdotal evidence suggest that judges of all varieties are not immune from personal motivations. As policymakers, administrative judges must also confront the danger of being ruled by their individual biases. Policy preferences in general have long been accepted, and to some extent encouraged, in both conventional and administrative adjudicators.¹³⁷ While administrative judges may demonstrate and express such biases, the system cannot allow these personal biases to rule administrative policy. Consequently, if administrative judges are to have a policymaking role, they must be careful to examine the motivations behind their policy choices. Additionally, the administrative review authority should recognize these biases and assure they are consistent with the administrative program.¹³⁸

Administrative judges should also be conscious of the way life experiences affect their judgment.¹³⁹ For example, Sisk, Heise, and Morriss meas-

134. *Id.* at 798.

135. *Id.* at 784. They investigate anchoring (making estimates based on irrelevant starting points), framing (treating economically equivalent gains and losses differently), hindsight bias (perceiving past events to have been more predictable than they actually were), the representativeness heuristic (ignoring important background statistical information in favor of individuating information), and egocentric biases (overestimating one’s own abilities). *Id.*

136. *Id.* at 819.

137. For example, see Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 554 (2002), noting:

A key lesson of cognitive psychology is that even people with good motives tend to make bad choices in certain, predictable circumstances. Identifying those circumstances is at least as significant to diagnosing public policy failures as is focusing on the motives of key regulatory actors.

Id. But see Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165, 1168 (2003) (noting that restructuring decisions to avoid misleading heuristics means that “[i]f this cognitive cost, like a transaction cost, might support adopting a particular legal rule constraining individual choice if the cost is high enough or an inexpensive reform reduces the cognitive cost in some way”).

138. Judge Hardwicke, the dean of panel judges, summarized:

It would be highly improper for an administrative judge to color any decision with the ALJ’s personal outlook or subjective viewpoint. However, intuition and instinct are reasonable, even necessary, for the ALJ insofar as they relate to the overarching mission of the agency on the one hand, and to requisite uncompromising fairness and impartiality for the citizen on the other.

Hardwicke, *supra* note 90, at 439.

139. It is unclear how susceptible judges, in general, are to more personal motivations because stud-

ured the proposition “that social background of personal attributes of judges shape personal and policy values that directly influence judicial decisions.”¹⁴⁰ The study generally agreed with others that sociological background characteristics are not very helpful in understanding judging.¹⁴¹ However, the study found that certain nonobjective factors affected judicial decisionmaking.¹⁴² They reported that “our study found nearly every prior employment variable of these judges, with the exceptions of law professor and political experience (and perhaps prosecutorial experience), to be significant in some manner.”¹⁴³

Career aspirations can also affect policy judgments. The study confirmed earlier research indicating that advancement affects judges.¹⁴⁴ However, career considerations may be less influential with administrative judges than with conventional judges. Administrative judges tend to be at the end of a career path, thus career motives may be less compelling. Still, adopting suggestions for countering these motivations may be helpful: “At the same time, we have discovered that this variable does not operate in isolation but evolves with the circumstances of the litigation and the theoretical underpinnings of the case.”¹⁴⁵ In other words, the system and the judges can correct the motivation if they are sensitized to it.

Of course, less innocent motivations can also affect adjudicators’ policy initiatives. One study supports the conclusion that judges pursue policy preference strategies that are sensitive to political actors.¹⁴⁶ In a separate empirical study of EPA cases, Jordan concluded:

I would not characterize these results as demonstrative strategic ideological voting. To the contrary, as Judge Wald has argued, they

ies, legal and behavioral, persist in seeing judges as otherworldly. Even legal realists, who challenge the idea that doctrines rule judges, believe that they are ruled by individual equity and sincere policy preferences rather than general principles. Even those who view judges as just another set of maximizers perceive that they maximize their view of social welfare, not—as the rest of us—their personal advantages. Schauer observed: “In sharing this common ground of belief that what really matters to judges are their sincere policy preferences . . . [investigators] tend to ignore or downplay the possibility that judges, no less than legislators and bureaucrats, have strong career-based self-interests that often inform or dominate their policy preferences.” Schauer, *Incentives*, *supra* note 4, at 620. He suggests that we consider the possibility that judges are more driven by rational self-interest than we often concede. *Id.* at 620-21.

140. Sisk et al., *supra* note 42, at 1385.

141. *Id.* at 1387.

142. *Id.* at 1470.

143. *Id.* Administrative judges might actually be less susceptible to their experience; however, it might be significant, for example, that prior prosecutorial experience does not make a difference since that is comparable to prior agency staff experience.

144. *Id.* at 1493 (“[W]e and Cohen have both confirmed that promotion potential is a factor in understanding lower federal court behavior.”) (citing Mark Cohen, *Explaining Judicial Behavior of What’s ‘Unconstitutional’ About the Sentencing Commission?*, 7 J.L. ECON. & ORG. 183 (1991)).

145. Sisk et al., *supra* note 42, at 1493.

146. A study has shown that the Supreme Court is conscious of political actors in setting its agenda. See Lee Epstein, Jeffrey A. Segal, & Jennifer Nicoll Victor, *Dynamic Agenda-Setting on the United States Supreme Court: An Empirical Assessment*, 39 HARV. J. ON LEGIS. 395, 403 (2002) (“Our analysis of the data leads us to conclude that the justices do indeed consider the preferences and likely responses of other political actors in deciding whether to grant certiorari.”).

appear to reflect differences in . . . “personalit[ies] and life experiences that lead the judge to vote Democratic or Republican” in the first place, rather than adherence to a party or personal ideological agenda.¹⁴⁷

While this is encouraging in terms of partnership, it suggests a challenge to objectivity that may create an inappropriate motivation for policy disagreements with the agency. In the end, it is the agency that is to make these types of policy judgments.¹⁴⁸ A system envisioning a policy role for administrative judges must control for the impact of personal policy biases.¹⁴⁹

Administrative judges, more so than their conventional counterparts, may also be influenced by public opinion as they contemplate policy moves. Administrative officials cannot ignore the community’s views in general, but the extent to which they should allow their perception of public opinion to drive their policy initiatives is complex. At first glance, the incorporation of public-regarding factors might be applauded. However, administrative judges’ primary concern should be the resolution of individual disputes. Therefore, public opinion is arguably inappropriate at this adjudicative stage. Moreover, if judges are expected to incorporate public wishes into decisions, on what basis should judges determine the best interests of the public? This raises the age-old conflict faced by officials in a democratic society: Should they decide what is “best,” or should they attempt to decide what the public wants? An expert theory of the administrative process suggests that adjudicators should be insulated from these factors, but if the adjudication is, at a base level, developing policy, then the process cannot remain insensitive to the public’s views. However, administrative judges might not be the proper adjudicators to weigh public opinion since discerning public opinion is arguably outside the realm of their function and expertise. Administrative judges should be sensitive to the public regarding certain factors yet still leave public opinion to the “political” elements of the administrative process.

All people, including judges, respond to the group of which they are a member.¹⁵⁰ Judge Posner observed:

[E]very judge, trial and appellate, is a member of a community of judges—the predecessors and successors of the current judges, as

147. William Jordan III, *Judges, Ideology, and Policy in the Administrative State: Lessons from a Decade of Hard Look Remands of EPA Rules*, 53 ADMIN. L. REV. 45, 99 (2001) (quoting Patricia M. Wald, *Some Thoughts on Judging as Gleaned from One Hundred Years of the Harvard Law Review and Other Great Books*, 100 HARV. L. REV. 887, 891 (1987)).

148. Moreover, administrative judges do not have the protections of members of the conventional federal judiciary—certainly not the constitutional protection—and might face more deep-rooted incentives.

149. See *supra* note 139.

150. See Gulati & McCauliff, *supra* note 85, at 161 (stating that “the behavior of judges is primarily governed by internally generated norms that can be altogether different from the officially stated organizational rules”).

well as the current judges themselves. Judicial decision making is collective in a profound sense, and the importance of institutional values in such a setting should be self-evident.¹⁵¹

Revesz's studies observed the impact of group politics in the D.C. Circuit.¹⁵² Chief Judge Edwards vituperatively challenged these studies, but Edwards appears to accept the effects a judicial community has on decisions.¹⁵³ Revesz found, in essence, a tendency towards cooperative behavior within the circuit and the individual panels. Cross and Tiller confirmed this behavior within the federal circuits and panels and asserted that it is not ideology but the dynamics of cooperation that influences judicial behavior.¹⁵⁴ Whether the behavior in the D.C. Circuit or others is crassly partisan or even ideological is irrelevant to the inquiry. Notable is that a community of judges can be expected to act cooperatively, and hence judicial decisions might be distorted by collective influences, perhaps termed internal politics or judicial culture. Individual cases should not be affected by this cultural ethos. Administrative adjudicative regimes create a variety of communities, from agencies with only a few judges to the Social Security Administration with some 1100 judges, to the state central panels analyzed below. The best solution, in the end, is conscious attention to the dangers.¹⁵⁵

Individual or collective motivations can be mitigated by a natural tendency of the judiciary in favor of impartiality and integrity.¹⁵⁶ The "rational maximizer" perception of judges would predict behavior in favor of enhancing individual policy objectives and prestige. However, public choice admits that this model lacks predictive power regarding judicial behavior, though support for this behavior is found in other public officials.¹⁵⁷ Judges

151. RICHARD POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 258 (1985); see also Lynn Stout, *Judges as Altruistic Hierarchs*, 43 WM. & MARY L. REV. 1605, 1612 (2002) (noting hundreds of studies showing that "[a]s a rule of thumb, experimenters have found that cooperation rates in social dilemmas average about fifty percent"). Three factors determine socially conscious behavior: a tendency to do what one is told by an authority figure, a sense of membership in a common group, and a degree of anticipation that one's colleagues will cooperate. *Id.* at 1615-16.

152. Revesz, *Environmental Regulation*, *supra* note 5; Revesz, *Ideology*, *supra* note 5; see also Revesz, *Litigation and Settlement*, *supra* note 5.

153. Harry T. Edwards, *Collegiality and Decision Making in the D.C. Circuit*, 84 VA. L. REV. 1335 (1998); Harry T. Edwards & Linda Elliott, *Beware of Numbers (and Unsupported Claims of Judicial Bias)*, 80 WASH. U. L.Q. 723, 723 (2002).

154. Cross & Tiller, *supra* note 5, at 2174. *But see* Richard J. Pierce Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 303-07 (explaining decisions by individual policy preferences and politics).

155. Gulati & McCauliff, *supra* note 85, at 169-70 ("Social sanctions in a closely knit group [such as judges] whose members repeatedly interact are likely to be highly effective. If these informal nonlegal sanctions work effectively, an expensive, formal enforcement system may be unnecessary.").

156. Stout demonstrated that judges will try to do the "right thing." Stout, *supra* note 151, at 1612.

157. See, e.g., Richard Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 2 (1993) ("The economic analyst has a model of how criminals and contract parties, injurers and accident victims, parents and spouses—even legislators, and executive officials such as prosecutors—act, but falters when asked to produce a model of how judges act."); Edward Rubin, *The New Legal Process, The Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1399 (1996) ("[N]o stable [public choice] theory has emerged to explain

as policymakers cannot be understood simply as rational maximizers in the public choice model. Hirschman observed:

A court, properly briefed, can—and should—ascertain and move in the direction of the public interest. . . . The courts will not always be right. As Thomas Kuhn points out, knowledge moves forward on wheels of necessary hypotheses. But unlike the radical agnosticism of the pure public choice school, it is at least a worthy enterprise.¹⁵⁸

Judges will do their jobs fairly and faithfully if they are esteemed for doing so.¹⁵⁹ This hankering after esteem affects highly visible adjudicators in an interesting way: they tend to want to impress academics and journalists.¹⁶⁰ Lower courts are less visible, and hence seek esteem from other judges and practitioners.¹⁶¹ Thus, administrative judges can be expected to perform their duties well if their contributions, including their policy roles, are valued by the agency and others.¹⁶² Agencies at odds with judges over proper policy roles likely affect the judges' performances not only in policymaking but also in other duties. Policy innovations and adjustments give judges a chance to shine and offer an opportunity for judges to perform at their best. Epstein observed that judges are likely to attempt to increase their influence and prestige but are forced to do so through excellent decisions.¹⁶³

In general, the pitfalls above do not argue against policy participation by administrative judges. Rather, judges should be conscious of potential distortions and should be trained to deal with them.¹⁶⁴ Both remedies are impeded by ignoring the policymaking role of judges. Careful agency review is necessary to mitigate individual influences in order to develop a unified and objective policy. Policy biases expressed in administrative policy should be those of the agency head who has been delegated that function, and who will ultimately be held accountable. Moreover, consistency and equal treatment within a program requires the unifying influence of the agency over administrative judges. Judges perform a formative role in the dynamics of policymaking, consequently the system should channel their

the behavior of judges . . .”).

158. Linda Hirshman, *Postmodern Jurisprudence and the Problem of Administrative Discretion*, 82 Nw. U. L. REV. 646, 704 (1998) (citation omitted).

159. Schauer, *Incentives*, *supra* note 4, at 573.

160. *Id.* at 628.

161. *Id.* at 629-31.

162. *But see* Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1052 (1995) (indicating that while “craft” is an important limitation on conventional judges because they care about the perception of their competence, administrative law doctrines are more open-ended so that administrative judges have more discretion, and hence “craft” is less of a limitation on their ideological biases).

163. Richard Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 BYU L. REV. 827, 838 (1990). The structure of the judiciary successfully counteracts certain risks. *Id.* at 831-32.

164. *See* Rachlinski & Farina, *supra* note 137, at 593 (“Probably the key insight of the cognitive psychological model is that the policymaking process should be designed to exploit the distinctive strengths, and compensate for the distinctive weaknesses, of experts and laypersons.”).

participation in order to assure integrity in the overall policymaking endeavor.

IV. BUILDING A RECORD FOR POLICYMAKING

As contributors to the administrative policymaking enterprise, administrative judges offer original solutions balancing equal treatment and consistency against individualizing and advancing administrative policy. Policy evolution is facilitated by administrative judges in an equally significant way by developing the record necessary for consideration of policy issues. Administrative judges should be aware of their responsibility, and the system should provide more opportunities for judges to fulfill this responsibility. Therefore, considering the development of the policymaking record in adjudication is particularly relevant.

A. *An Active Role for Administrative Judges in Building a Policymaking Record*

The record provides the policy analysis throughout the adjudicative machinery with the information needed to develop policy. Policy in adjudication requires that the facts compiled in the hearing-level record adequately support policy determinations and the justification for those decisions. In the end, the administrative judges must be responsible for the adequacy of the record for this purpose. Fortunately, administrative law permits administrative adjudicators to actively participate in the development of the record.¹⁶⁵

Adjudication decides individual rights or duties, consequently it focuses on facts related to the specific dispute, “adjudicative facts,” and its procedures are designed to serve this purpose.¹⁶⁶ Policymaking requires the development of more general or societal facts, called “legislative facts.”¹⁶⁷ An agency needs legislative facts to support and justify its policy conclusions. Obviously, the power to identify and find those facts constitutes a consider-

165. *Ventura v. Shalala*, 55 F.3d 900, 902 (3d Cir. 1995) (“ALJs have a duty to develop a full and fair record in social security cases.”); *Yanopoulos v. Dep’t of the Navy*, 796 F.2d 468, 471 (Fed. Cir. 1986). *But see* Jeffrey Wolfe & Lisa Proszek, *Interaction Dynamics in Federal Administrative Decision Making: The Role of the Inquisitorial Judge and the Adversarial Lawyer*, 33 TULSA L.J. 293, 298-302 (1997).

166. Adjudicative facts are “facts concerning immediate parties”—distinguished from policy-related facts or “legislative facts,” discussed below. Kenneth Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402 (1942) Kenneth Davis, later to become a major administrative law scholar, distinguished adjudicative facts from legislative facts for determining the appropriateness of judicial notice. *Id.* The distinction is also important to the rules regarding judicial notice. *See* FED. R. EVID. 201 advisory committee’s note [hereinafter EVIDENCE RULES].

167. The person who invented the distinction defined such facts: “When a court or an agency develops law or policy, it is acting legislatively. . . . [T]he facts which inform the tribunal’s legislative judgment may be called legislative facts.” 2 KENNETH DAVIS, *ADMINISTRATIVE LAW TREATISE* 283 (1960). Legislative facts are contrasted from adjudicative facts and the facts necessary to resolve the relevant individual dispute.

able part of the power to make policy. But, in adjudication, even some specific facts may be relevant to policy issues. Woolhandler's observation is particularly important for our purposes: "The line between adjudicative and legislative facts is indistinct, however, because decisionmakers use even the most particularized facts to make legal rules."¹⁶⁸ In short, the administrative adjudicative record must include facts, of whatever category, necessary to resolve policy issues as well as resolve the individual dispute.

Flexible application of the traditional evidentiary rules permitted in many administrative adjudicative settings might go some distance to facilitate a policymaking record. Administrative adjudications are governed by an array of evidentiary rules, most leaving the administrative judge with considerable discretion.¹⁶⁹ Evidence is admitted in administrative proceedings for "what it is worth." Evidence clearly relevant to a policy question, even if tangential to the specific dispute, might then be admitted as relevant to the general resolution of the controversy.¹⁷⁰

Unfortunately, the administrative hearing, like the trial, is controlled by the litigants. The record depends on the quality, energy, and—more significantly—the focus of the lawyers. Policy issues usually appear peripheral and are rarely directly relevant to the concerns of the individual litigant. The parties—even the agency staff—are not motivated to introduce those facts because they may not be necessary to resolve the particular dispute. Indeed, the parties may have some incentive to divert attention from these facts. At the hearing stage, only the administrative judge will likely feel some need for a record adequate to resolve pivotal policy issues of a broader nature. Yet, in the common-law system, judges have virtually no affirmative duty to develop the facts.¹⁷¹ The judge's role, whether a conventional or administrative judge, is to assure the "quality" of that information by applying certain preordained and traditional rules of evidence.

The common-law tradition inhibits a more active fact-gathering role for judges. Yet, somewhat inconsistently, the tradition expects judges to evolve the law. This contradiction is even more pronounced in the administrative adjudicative context. The system cannot excuse administrative judges from assuring an adequate record on facts relevant to policy issues they or the agency might face.¹⁷² Agencies must insist that judges perform this role

168. Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111, 114 (1988).

169. See Richard Pierce, *Use of Federal Rules of Evidence in Federal Agency Adjudications*, 39 ADMIN. L. REV. 1, 7 (1987).

170. Often, information supporting policy is technically hearsay, or has the feel of hearsay, and administrative law allows it. For example, often such information takes the form of reports and published studies. General admissibility of hearsay has been particularly accepted. *Richardson v. Perales*, 402 U.S. 389, 410 (1971). *But see Ezcagwuna v. Ashcroft*, 325 F.3d 396, 405-06 (3d Cir. 2003) (relying on unreliable hearsay violates procedural due process).

171. ABA CODE, *supra* note 96, at Canon 3(B)[7] ("A judge must not independently investigate facts in a case and must consider only the evidence presented.").

172. Administrative law envisions an active role for administrative judges in assuring the adequate development of specific or adjudicative facts as well. 2 KOCH, *supra* note 2, § 5.25[2]. It creates a substantial tension between this duty and the common-law tradition of passive judging. However, this piece focuses on perhaps the more compelling conceptual problem of providing an adequate record for

because policy judgments must be supported in a variety of arenas—including judicial review. Traditionally, policy decisions were subject to review under an abuse of discretion or arbitrariness standard.¹⁷³ Though limited scrutiny, these word formulas often result in a test of whether the agency considered all possibilities and had adequate support for its policy conclusions.¹⁷⁴ Therefore, the administrative judge must assure an adequate record exists for policymaking, especially when the litigants are not likely to do so.

Administrative judges must assure that the record contains the necessary technical information. Policy resolution may depend on expertise in a number of nonlegal disciplines. Administrative law grants considerable deference to the agency's expert judgment and the judges must be empowered to actively build this aspect of the record.¹⁷⁵ Administrative judges have considerable discretion to *admit* expert evidence.¹⁷⁶ The administrative judge may rely on an agency expert,¹⁷⁷ but administrative judges rarely have independent authority to *seek* other expert advice or even to call their own experts.¹⁷⁸ While party control of the record is acceptable for adjudicative issues, the policymaking function of adjudication would be greatly enhanced if administrative judges could actively seek experts related to the issues. If the expert's testimony is likely to be important to the particular adjudication, the judge could present the expert for examination by the par-

focuses on perhaps the more compelling conceptual problem of providing an adequate record for policymaking in adjudication within the common-law tradition.

173. *E.g.*, *Bureau of Alcohol, Tobacco & Firearms v. Fed. Labor Relations Auth.*, 464 U.S. 89, 98 n.8 (1983).

[A]n agency acting within its authority to make policy choices consistent with the congressional mandate should receive considerable deference from courts, provided, of course, that its actions conform to applicable procedural requirements and are not "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law."

Id.; *Ala. Power Co. v. FCC*, 311 F.3d 1357, 1371 (11th Cir. 2002) (finding the agency's policy was not arbitrary).

174. *E.g.*, *City of Dallas, Tex. v. FCC*, 165 F.3d 341, 355 (5th Cir. 1999) ("[W]e affirm the Commission's policy choice if it considered competing arguments and articulated a reasonable basis for its conclusions.").

175. *Marsh v. Ore. Natural Res. Council*, 490 U.S. 360, 377 (1989) ("Because analysis of the relevant documents 'requires a high level of technical expertise,' we must defer to 'the informed discretion of the responsible federal agency.'") (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976)); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 569 (1980) ("Administrative agencies are simply better suited than courts to engage in such [an expert] process.").

176. EVIDENCE RULES, *supra* note 166, at Rule 702. This rule requires only that the evidence proffered be reliable and relevant, and hence even a court need not assure that the expert's views are generally accepted. *Daubert v. Merrel Dow Pharm., Inc.*, 509 U.S. 579, 587 (1993).

177. *Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669, 678 (5th Cir. 1992), *cert. denied*, 506 U.S. 823 (1992).

178. Under the Model Code of Judicial Conduct, judges may seek legal advice only. ABA CODE, *supra* note 96, at Canon 3(B). JEFFREY SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS 173 (2000) ("While judges may, under certain circumstances, obtain advice concerning the law from disinterested experts, the exception does not extend to experts in other areas."). In the Model Code of Judicial Conduct, access is intentionally narrowed to "legal" experts, which as discussed below, if read generously, might be valuable in policy judgments. Consultation with other types of experts is prohibited for members of the judiciary, but administrative law might take a different view. *Id.* § 5.07.

ties. However, if the expert's advice goes to general policy issues, the advice would enter the record.¹⁷⁹

A procedure is needed which would allow a judge to complete the policymaking aspect of the adjudicative record without offending traditional principles to the point of invalidating the adjudication.¹⁸⁰ "Official" or "administrative" notice is one traditional method for empowering a judge to affirmatively build the policymaking record. Conceptually, official notice is the same as judicial notice. It enters facts into the record without the need for formal "proof." Federal Rule of Evidence 201 distinguishes between adjudicative facts and legislative facts, and focuses on the process for introducing certain categories of adjudicative facts. After some opportunity for comment, some adjudicative facts may be noticed without proof. The Federal Rules provide no procedures for admitting legislative facts. The commentators asserted that "the judge is unrestricted in his investigation and conclusion [regarding legislative facts, and] the parties do not more than to assist; they control no part of the process."¹⁸¹ The finder of fact with unbridled discretion regarding the admission of legislative facts possesses "a dangerous freedom."¹⁸² The best practice in administrative adjudications, regardless of the practice in courts, is to offer some opportunity for comment. This was recently confirmed by the Supreme Court: "[I]t is well established that, *as long as a party has an opportunity to respond*, an administrative agency may take official notice of such 'legislative facts' within its special knowledge, and is not confined to the evidence in the record in reaching its expert judgment."¹⁸³ Official notice offers the administrative judge a well-established device for obtaining the range of information necessary to build the policy-related part of the record. Consequently, judges should use it creatively and more often.

In addition, the administrative judge might consider whether options beyond those provided by the litigants are necessary for a full airing of the

179. The administrative process might learn from the civil-law system in which the judges consult the experts. CATHERINE ELLIOTT & CATHERINE VERNON, *FRENCH LEGAL SYSTEM* 129 (2000) ("The judge's powers concerning oral evidence are very wide The French judge has even greater powers in connection with expert evidence, as the normal practice is for a single neutral expert appointed by the court. Parties do not normally appoint their own experts."); ANDREW WEST ET AL., *THE FRENCH LEGAL SYSTEM* 297 (1998) ("It is for the judge to choose the expert"). However, the ABA CODE, *supra* note 96, specifically rejects this alternative. SHAMAN ET AL., *supra* note 178, at 172 ("Unlike the European system, in which judges have the primary responsibility for the development of litigative facts, American judges are generally permitted only to consider the evidence and testimony that is produced by counsel.").

180. See SIDNEY A. SHAPIRO & ROBERT L. GLICKMAN, *RISK REGULATION AT RISK: RESTORING A PRAGMATIC BALANCE* 158-64 (2003) (explaining various adjudicative procedures used by agencies to adjust the scope of regulation, including waivers, deadline extensions, and exceptions).

181. EVIDENCE RULES, *supra* note 166, Rule 201(a) advisory committee's note (quoting Henry Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 270-71 (1994), although the quote referred to "domestic law").

182. Peggy C. Davis, *There Is a Book Out . . . An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539, 1541 (1987); see also Woolhandler, *supra* note 168.

183. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 298 (2000) (emphasis added) (accepting the city council's findings regarding the harmful effect of nude dancing in a particular area of the city).

policy issue. Liberal intervention might be one established method allowing a judge to expand contributions to the record. Intervention allows the judge to permit other interested persons to raise, support, and discuss policy issues. Liberal intervention in administrative proceedings allows participation that is tangential to the specific dispute.¹⁸⁴ Over the years, administrative law has developed a sliding scale of intervention in which interested persons might participate in various forms, ranging from full party status to filing documents on a specific issue.¹⁸⁵ Administrative judges might be particularly sensitive to interveners who will contribute to the agency's, as well as their own, policy decisions.

Unfortunately, interested persons are unlikely to know about the consideration of policy issues or have the wherewithal to participate in their resolution, especially in mass justice programs. Thus, the administrative judge must be the key person. The judges must assure that key opinions are found in the record to support their policy judgments, and ultimately those of the agency. However, permitting a judge to actually solicit intervention to obtain wide policy views challenges our adjudicative traditions. However, within bounds, judges should be allowed to do so—relying on *Wyman-Gordon* for support.¹⁸⁶ Yet where the need strays too far beyond the focus of the individual dispute, the better approach may be to note the need and leave the job of considering how to incorporate broader participation to the agency. The agency may choose to exercise its rulemaking authority, an option unavailable to the judge.

Administrative judges have the authority to *gather* legislative facts and may have a duty to seek these facts when a policy issue is perceived. But, do administrative judges possess the authority to *find* policy-related facts, especially where the facts are not directly related to the case before them? Clearly, the agency's findings would be enhanced by preliminary findings by the judge responsible for providing the information necessary to make the finding—who is also in the position of applying the findings as well as the policy. Thus, administrative judges must have some authority to find policy-related facts. Especially, as this Article advocates, to the extent that administrative judges take part in the policymaking process. One obstacle facing policy analysis at the administrative judge level is the capacity of judges to find policy-related facts. Their expertise and experience might be insufficient to resolve the broad and technical facts related to a larger policy question. However, they are experienced factfinders and possess a certain type of experience and expertise. Thus, in the end, their initial findings will be valuable to an administrative review of the findings.

184. APA, *supra* note 11, at § 555(b) (“So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for presentation, adjustment, or determination of an issue, request, or controversy . . .”).

185. Brice Claggett, *Informal Action—Adjudication—Rulemaking: Some Recent Developments in Federal Administrative Law*, 1971 DUKE L.J. 51.

186. See *supra* note 24 and accompanying text.

In sum, administrative judges have a duty to assure an adequate record so that the administrative review authority can engage in policy analysis. Traditional record-building notions must be modified to create additional techniques to facilitate administrative judges carrying out this duty. Administrative law's openness to such modifications could form the legal and ethical foundation for enabling these powers. However, more than a responsibility to compile facts is necessary, some duty to engage in a preliminary finding of policy-related facts also seems appropriate.

B. Potential Unfairness from Injecting Policy-Oriented Facts into an Individual Adjudication

Assigning administrative judges the responsibility to find policy-related facts raises a question of fairness of particular concern to the private litigant. For example, a hearing-level judge's concern for the policy-related record might compel the judge to find facts not directly relevant to adjudicating the particular dispute. The litigants, both the private litigant and the agency staff, are now engaged in a policymaking proceeding and acquire the responsibility for representing either the established policy or a need for adjustment. This is an unfair burden.¹⁸⁷ A judge must weigh the fairness of doing what is essentially "agency" business at the expense of the private party. Still, the hearing level is generally the fact-gathering and finding adjudicative stage, and administrative judges remain the vehicle likely to be most effective in assuring such support.

Failure to confront the policy issues at the hearing level merely passes the fairness question to the administrative review authority. Suppose that authority, representing the agency, finds that it cannot resolve the larger policy dispute on the record before it. Unless it is satisfied to make general policy on inadequate facts, it is left with making the decision on its own experience and expertise, engaging in legislative fact-gathering itself, or returning the individual dispute for general policy-oriented facts. Any of these would force it to choose between inadequate supporting information and imposing an external burden on the litigants.

Where it cannot comfortably rely on the existing record and its own expertise, the administrative review authority might seek to improve the policymaking aspects of the adjudicative record. Traditionally, this body has more authority to add to the record than the courts. It does not violate due process to supplement the record after the hearing if the parties are notified of the intention to do so.¹⁸⁸ Whatever limits exist might be less relevant to the addition of more broadly focused policy-oriented facts and comments.

187. Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 430 (1981) ("A policy decision made in response to a highly focused grievance can easily impinge on persons not directly involved.").

188. *McQuiddy v. U.S. Dep't of Health & Human Servs.*, 888 F.2d 1047, 1048-49 (5th Cir. 1989).

Nonetheless, this solution imposes a burden on the litigants, and superimposes a tangential inquiry on their individual dispute.

Moreover, if the agency engages in policymaking at the administrative review level, other interested persons will want an opportunity to contribute facts and comments. The agency may feel competent to consider the additional interests injected into the adjudication, but those affected by the adjudicative-developed policy may feel excluded.¹⁸⁹ In addition, there is no guarantee that affected persons will even know of the new or adjusted policy, since—unlike rule changes—policy may be changed in adjudication without notice to all those potentially affected. The agency may be required to consider any new material evidence, but the duty to assure sufficient opportunity for comment should extend beyond that requirement.¹⁹⁰

Adjudicative policy development then presents the dual fairness issues of the undue burden on the litigants to endure tangential inquiries and the possible exclusion of those affected by that policy. The focus of the individual dispute resolution is deflected to the detriment of the litigants and the adjudicative process, either at the hearing or appellate level, and is not well-suited to attracting a wide range of views. In short, supporting policymaking in the adjudicative context might be unfair both to the individual litigants and to the affected public. Still, as we have seen, adjudication cannot ignore policy issues, and hence it must assure an adequate record for those issues. An agency must confront these fairness issues in developing policy in adjudication. In those cases in which the policy issue creates unfairness, the agency—perhaps at the recommendation of the judge—should consider rulemaking rather than case-by-case development of policy.

V. IMPLICATIONS OF COORDINATE ADJUDICATIVE MODELS

So far, the discussion has assumed the traditional hierarchical adjudicative structure. In the traditional model, the adjudicative bureaucracy is internal and part of an organization in which the agency head is the final authority. However, not every administrative adjudicative system follows this model. In some systems, the adjudicative machinery is structurally separated from the “administrative” functions. In these systems, the adjudicative bureaucracy is coordinated rather than internal. Having investigated a generalized “hierarchical” model, we next look at the variations in those programs using a separate or “coordinate” structure.

189. Those interests have the right to petition for rulemaking, 5 U.S.C. § 553(e), but it is not likely to satisfy them.

190. *Peabody Coal Co. v. Ferguson*, 140 F.3d 634, 637 (6th Cir. 1998) (finding that the opportunity to present new evidence to address changes in legal standards is required by due process); *Williams v. Sullivan*, 905 F.2d 214, 216 (8th Cir. 1990) (stating that a party must be given an opportunity to challenge information obtained after the hearing); *Wallace v. Bowen*, 869 F.2d 187, 191-92 (3d Cir. 1989); *Air Prods. & Chems., Inc. v. FERC*, 650 F.2d 683, 687 (5th Cir. 1981) (finding the consideration of new evidence improper unless the parties have notice).

Coordinated adjudicative processes can be divided into two categories. One coordinate model, taking over state administrative adjudications, separates the administrative judges into an independent and central hearing office providing judges to a wide range of agencies. The second model, the “split function” model, delegates the adjudicative function to an agency separate from that responsible for program administration and hence program policy development. Each model raises somewhat different questions for policymaking in adjudication.

A. *A Centralized and Separate Office of Administrative Judges*

Half the states have centralized and independent hearing offices, known generally as a “central panel” or, better, a “central hearing agency.”¹⁹¹ This structure wreaks havoc with the traditional administrative model in several ways, but here we need to focus only on its implications for policymaking. Given the fantastic increase in adjudication at the state level, the trend towards this model in the states, and the prospect—unrealized to date—that the federal government may move in that direction, the implications are important to this inquiry. In addition, the more visible division of labor revealed by these processes helps illuminate the issues discussed above.

As argued above, a dynamic system of administrative policy development starts with the administrative judges and the hearing level. It follows that this developmental mechanism gives administrative judges some freedom to question established policy, and under certain circumstances to refuse to apply that policy to the individual case, even when its application is not ambiguous. It is equally necessary that the agency have the final authority regarding policy. That authority is necessary for uniformity and consistency. Individual dispute resolution cannot be allowed to make the program generally arbitrary.

The independent hearing office structure upsets this balance. Because the program agencies lose control, the interests of consistency and equality require a strong commitment to rules and superior precedent. The panel judges, since they serve many agencies, are generalists and thus do not provide the expertise and experience inherent in the traditional scheme.¹⁹² The administrative judges are largely denied the opportunity to participate in the evolution of policy. Judges who stray from prior decisions exercise a kind of capriciousness rather than participating in the evolution of administrative

191. Flanagan identified 25 states and at least three major cities that have proposed federal adjudication for years. James F. Flanagan, *Redefining the Role of the State Administrative Law Judge: Central Panels and Their Impact on State ALJ Authority and Standards of Agency Review*, 54 ADMIN. L. REV. 1355, 1357 (2002); see also Scalia, *supra* note 42, at 79 (“The problem of improper influence would also be solved by implementing proposals for establishment of a unified ALJ corps, headed by an independent administrator.”). For several reasons, the unified panel has not been adopted in the federal system. VERKUILE ET AL., *supra* note 40, at 171-74.

192. Edward Tomlinson, *The Maryland Administrative Procedure Act: Forty Years Old in 1997*, 56 MD. L. REV. 196, 253 (1997) (“The substitution of generalist central office ALJs for specialist agency hearing examiners is nevertheless likely to reduce the role of expertise.”).

policy. This creates the danger of inconsistent policy application and removes the street-level experience from the policy process.

In addition, the panel structure replaces a specialized, program-sensitive judicial community with an isolated, generalist administrative judiciary. In a sense, this independent office suggests a community more like the traditional judiciary. While this accomplishes the goal of structural independence, it generates a different, but not necessarily beneficial, group dynamic.¹⁹³ Several studies, discussed above, show that judges work within the ethos of their judicial community. The independent hearing office will affect policy development and application. In short, this independence has a price.

Some of the disadvantages may be offset by courts reviewing the result of the independent hearing office judge's decision in which the agency has rejected the judge's policy conclusions. If the court limits itself to reviewing the agency's policy conclusions and ignoring those of the administrative judge, then it will put the agency back in charge of its policy. However, if the court weighs the two policy conclusions and chooses the one it prefers, it arrogates power to itself as well as destroys the agency's control over its policy. Neither is optimal for the operation of an administrative program, for the reasons given above.

The division also creates the specter of policymaking through litigation strategy. If the policy is at issue, it means that the policy did not exist or is unclear at the time of the administrative adjudication. The agency must fill the gap through its litigation position at the administrative hearing, uninformed by an opportunity to review the administrative judge's efforts. The agency, even in adjudication, should not be defining policy as an advocate. Moreover, much of the decision will be made by the litigation staff, further compromising the objectivity of the policy analysis. On balance, it is better to hold the separate adjudicative agency to the agency's litigation position, but even if this occurs, policymaking has been robbed of the interaction between the administrative judge and the agency on the policy issue. Hence, Flanagan observed that the "more subtle effect of ALJ independence . . . is the loss of agency experience in the application of the law and regulations."¹⁹⁴

Generally, the central office system forces agencies to make most policy moves by rules. Many see this as a good thing; commentators over the years, starting with Justice Jackson in *Chenery II*, would force agencies in

193. The empirical study by Guthrie, Rachlinski, and Witrich of errors caused by cognitive illusions, discussed above, supports the value of specialization on the bench. Guthrie et al., *supra* note 131, at 825 ("[J]udicial decision making might also benefit from specialization on the bench."). Judge Wood argues that specialization makes judging more complex and difficult to understand. Diane P. Wood, *Generalist Judges in a Specialized World*, 50 S.M.U. L. REV. 1755, 1767 (1997). On specialization generally, see Rochelle C. Dreyfuss, *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 BROOK. L. REV. 1 (1995); Rochelle C. Dreyfuss, *Specialized Adjudication*, 1990 BYU L. REV. 377.

194. Flanagan, *supra* note 191, at 1406.

this direction.¹⁹⁵ Indeed, the administrative law of some states requires rulemaking.¹⁹⁶ Added to that is the growing trend in the states to force agencies to make rules only through notice-and-comment rulemaking, and hence assure general participation in the policymaking. An unfortunate consequence is that the agency is doubly inhibited in the development of policy. First, it cannot use the adjudication to inform itself on the application and change of circumstances. Second, it cannot use guidance documents to disclose any new policy thinking or cautiously evolve policy without making an ultimate final commitment and engaging in full-blown rulemaking.

The panel system presents an ambiguity as to the effect of rules on the adjudication. The administrative judges' position as a team of generalist judges, separated into an adjudicating agency, casts them more as an administrative court.¹⁹⁷ If panel judges are seen as separate courts then it might follow that they are bound only by legislative rules—rules made pursuant to delegated authority. In the internalized hierarchical model, the agency's duty is to obey its own rules. While some freedom in application by the judges is suggested above, such policy pronouncements nonetheless express the authoritative view of the agency and hence must be given considerable force at the hearing level. When the judges are not structurally part of the agency, a fundamental question arises as to whether they are governed by the second principle at all. In that case, they might be empowered to give all rules without the "force of law" no more than *Skidmore* "power to persuade" deference.

Thus the panel system encourages administrative judges to engage in independent policymaking in several ways. But, where do panel judges get the policy they use in their own policy analysis? Is it too glib to say that they have independent authority to interpret the statute and merely go directly to the statutory language? After all, agency policy pronouncements are not actual "interpretations" but rather a product of the responsibility to carry forward the legislative policy and to make policy.¹⁹⁸ When panel judges circumvent the agency's policymaking and engage in their own policy development, even in the guise of statutory interpretation, they short-circuit the intended operation of the administrative process and rob it of one of its major advantages.

More importantly, when judges circumvent agency policymaking, they inject their own policy biases into the system and arrogate policymaking power. This Article has previously discussed legitimate sources of policy analysis upon which administrative judges may rely. Also suggested is the idea that administrative judges acting in a hierarchical process perform an

195. E.g., Gifford, *supra* note 41, at 982.

196. See *supra* note 14 and accompanying text.

197. William Swent, *South Carolina's ALJ: Central Panel, Administrative Court, or a Little of Both?*, 48 S.C. L. REV. 1, 6 (1996) ("Opponents of reform parse the phrase 'creeping judicialization' and worry about the erosion of agency policy and clout.").

198. *Chenery II*, *supra* note 13, at 194.

important function by questioning existing policy from their applied perspective or initiating change. In contrast, judges outside the agency, whose policy judgments have some finality, create potential injustice and poor program administration. If they are to engage in policy forays, then it is extremely important that their efforts are reviewed by the agency in order to protect the agency's delegated policymaking function and guard against improperly motivated policy judgments. The panels system unfortunately weakens agency review as a practical matter.

In addition, Flanagan observed that along with the panels, a second trend somewhat related to the panel movement has emerged in which state administrative judges issue decisions that are largely beyond the reach of the agencies. "This may be done directly, by eliminating agency review on most issues decided by an ALJ, or indirectly, by making it difficult or impossible for the agency to modify the ALJs [sic] decision."¹⁹⁹ In essence, this "final order" regime shifts policy enforcement—and to some extent evolution—to the courts. This shift deprives the administrative adjudication of much of its value. First, the agency, not the courts, is intended and constructed to make policy. Second, the courts become a competing policymaking authority, resulting in bifurcated and confused policy development.

It is not clear that this shift to judicial policymaking makes the policy less political. In fact, the shift may be a reaction to uncontrollable objectivity, centralized decisionmaking, or a certain brand of politics—not politics itself.²⁰⁰ Most state judges are elected and, contrary to commentary and the ABA, the electorate is more insistent than ever on that system of selecting judges.²⁰¹ While the agencies themselves are political, their decisions are usually the result of the kind of objective, expert judgments they were created to provide.²⁰² This is reinforced by the courts under some limiting re-

199. Flanagan, *supra* note 191, at 1359.

200. See Hardwicke, *supra* note 90, at 423 ("[L]egislatures instinctively distrust an expanding, independent judiciary.").

201. NATIONAL CENTER FOR STATE COURTS, CALL TO ACTION: STATEMENT OF THE NATIONAL SUMMIT ON IMPROVING JUDICIAL SELECTION 7 (2002), at http://www.ncsconline.org/D_Research/CallToActionCommentary.pdf (2002) ("Eighty-seven percent of state appellate and trial judges are selected through direct or retention elections."). The report of the ABA's Commission on the 21st Century Judiciary states:

The Commission opposes the use of judicial elections as a means of initial selection and reselection The Commission acknowledges, though, that support for judicial elections remains entrenched in many states. With that in mind, the Commission offers a series of alternative judicial selection recommendations aimed at ameliorating some of the deleterious effects of elections on the enduring principles of a good judicial system.

Id. This is not the official position of the ABA, and traditionally the ABA has been even less accepting of elected judges. *American Bar Association Commission on the 21st Century Judiciary Principles and Conclusions*, at <http://www.abanet.org/leadership/2003/journal/103.pdf> (Aug. 2003).

202. An empirical study in North Carolina produced results that suggest objective judgments. Daye, *supra* note 44. The panel judges agreed with the agency in 76% of the cases. *Id.* at 1615. Agency review reversed ALJ decisions in favor of the agency in a significant number of cases, although the number of these reversals was quite disproportionate to reversal of pro-petitioner cases. *Id.* at 1617. Still, the agency review produced only a 9.5% increase in agency-favorable decisions. *Id.* at 1619. Flanagan concluded from the whole body of data "that agency review produces results that are supported by the law and the facts."

view standard or instruction, hence the courts and the agency check each other. Making the courts the sole arbiter of administrative policy changes the politics in both kind and degree.

Moreover, only a few decisions from panel judges are subject to judicial challenge, thus the administrative judge's decision is the final word. Asimow observed:

So the real result is the ALJ makes the policy. And when an ALJ, for example, makes a big holding in favor of the private party, which is followed as precedent by other ALJs, a regulatory or beneficiary program can be halted in its tracks until the agency secures a legislative change.²⁰³

For these reasons, there is much to be said for Texas's attempt to allocate functions so that the agency retains authority over policy. Thus, the Texas statute authorized the agency to reverse ALJ decisions only on questions of "policy."²⁰⁴ The absence of a workable definition of policy led it to shift to specific grounds upon which the agency may be reversed. Given the values discussed here, it might be better to give the agency some freedom to justify their actions on the basis of protecting administrative policy. Indeed, this is reminiscent of *Chenery II* in which the U.S. Supreme Court gave the agency the opportunity to demonstrate that it engaged in its policy development function.²⁰⁵ A court should be able to measure the performance of agency policymaking responsibility without becoming a second policymaker.

What is really needed is a thoughtful effort to recapitulate in the panel system the policy exchange and allocation of authority inherent in a hierarchical system. Such a system means that the agency must have some authority to reverse the judges on policy grounds. On the other hand, it means that judges should be encouraged to experiment with policy adjustments so long as the agency can accept or reject their efforts. Central office systems should also develop formal vehicles for the judges to add their experience in applying policy to the information available to the agency. Panel judges, for example, could have the opportunity to identify cases which show a need for adjustment or new policy. Indeed, an agency may ask the hearing office for periodic reports on potential policy initiatives and changes.

B. Split-Function Models

A few administrative schemes, known as "split-function" or "split-enforcement" models, separate the adjudicative function and the enforce-

203. Michael Asimow, correspondence (on file with the author).

204. Flanagan, *supra* note 191, at 1371.

205. See *Chenery II*, *supra* note 13, at 194.

ment and policy function into two separate agencies.²⁰⁶ One agency makes policy through rulemaking and enforcement strategy while a separate agency adjudicates violations of that policy.²⁰⁷ While presenting divided policymaking results in dangers similar to the panel systems, these are structurally different in two ways. First, split-function systems are confined to one program, while the panels serve a range of programs. Second, and more important for our purposes, the adjudicative hierarchy is self-contained; both hearings and review are conducted within the separate adjudicating agency.²⁰⁸

At one point, this scheme had a number of advocates. Gifford argued: "When these [administrative] tasks raise numerous policy issues [in adjudication] . . . then the alternative [split-function] structure is optimal."²⁰⁹ Experience has not been as kind. Shapiro and McGarity concluded: "[The Occupational Safety and Health Review Commission] is the creature of a failed experiment with the split-enforcement model."²¹⁰ Strauss had a similar negative reaction to the actual results of the split-function model in mining.²¹¹ Because of these studies, the split-function model has lost its momentum. Nonetheless, Fallon argues for the split-function model in air safety even though he recognizes the loss of some of the policy evolution advantages.²¹² Is there anything different about air safety, when compared to mine safety and employee safety, which changes the calculus? The different conclusions might result from a different balance in the perceived advantages. The gains from agency participation in the adjudicative process for Fallon do not outweigh the gains from clear separation. Administrative law commentators such as Shapiro, McGarity, and Strauss, find more formidable benefits from agency control over policy questions in adjudication.

The split-function model also offends administrative law thinking by eliminating agency discretion to choose between policy development through rulemaking and adjudication. Tradition, affirmed by *Wyman-Gordon* among others, allows the agency to decide which avenue to pursue.²¹³ Administrative law has established that this discretion has significant advantages, several of which are rehearsed above. Strauss argues that by

206. See Gifford, *supra* note 41, at 1000-01.

207. The most visible such programs are in the federal system. However, many states also have programs that fit the basic split-function model. Most pervasive of these is workers compensation, which has an agency to adjudicate employee injury and health complaints. See *id.* (explaining the history of the movement toward split-function systems).

208. See George R. Johnson, Jr., *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315, 349 (1987).

209. Gifford, *supra* note 41, at 971.

210. Sidney A. Shapiro & Thomas O. McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 YALE J. ON REG. 1, 62 (1989).

211. Peter L. Strauss, *Rules, Adjudication, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law*, 74 COLUM. L. REV. 1231 (1974).

212. Richard H. Fallon, Jr., *Enforcing Aviation Safety Regulations: The Case for a Split-Enforcement Model of Agency Adjudication*, 4 ADMIN. L.J. 389, 392-93 (1991).

213. See *supra* note 19.

eliminating the ability to choose among policymaking methods, the split-function model prevents the agency from finding the best process for developing policy.²¹⁴

The Supreme Court defused concern over the aspect of split-function schemes that most troubled administrative law commentators. Many worried that the courts would arrogate power in arbitrating disputes between the agency and the adjudicative body. In *Martin v. OSHRC*,²¹⁵ the Supreme Court found that Congress intended for the Secretary of Labor's policy judgments to control over those of the Occupational Safety and Health Review Commission (OSHRC).²¹⁶ It concluded that "Congress did not intend to sever the power authoritatively to interpret OSH Act regulations from the Secretary's power to promulgate and enforce them."²¹⁷ The agency's interpretations are dominant even if offered in the context of an administrative adjudication before the adjudicating body: "Under these circumstances, the Secretary's litigating position before the Commission is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a workplace health and safety standard."²¹⁸ Thus, reviewing courts as well as the adjudicating agency may not exercise independent policy judgment.

Still, because the administrative review authority is not under the control of the agency, the system loses the policymaking contribution inherent in the appellate process. The bifurcation of responsibility prevents the agency from engaging in the traditional interstitial policymaking and totally excludes adjudicators from contributing to policymaking. Taking the adjudicators out of the policy development process is even more undesirable here than with respect to the panel systems. The split-function adjudicators are specialists, whereas the hearing judges in the panel structure are more like generalist judges who claim no special expertise in the subject matter. Thus, split-function adjudicators have potentially more to offer. This means that the system loses more by taking them out of the policymaking function. Also, they are most likely more frustrated than panel judges at their inability to participate, perhaps leading them to seek means with which to inject their own policy judgments. Mintz concluded that, while the Supreme Court has clearly instructed the OSHRC that policy questions are to be left to the Labor Department, "The Review Commission . . . has not [done so]; we may then suggest that an adjudicatory agency does not easily reconcile itself to a non-policy role as would a prosecutory official, such as the General Counsel."²¹⁹ In short, the split-function model presents disadvantages from all perspectives of the policymaking task.

214. Strauss, *supra* note 208, at 1258-59.

215. *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144 (1991).

216. *Id.* at 154-55.

217. *Id.* at 157-58; *see also* *Allegheny Teledyne, Inc. v. United States*, 316 F.3d 1366, 1378 (Fed. Cir. 2003) (agreeing with the trial court that "only the interpretation of the agency that promulgated the regulation matters").

218. *Martin*, 499 U.S. at 157.

219. Benjamin W. Mintz, *Administrative Separation of Functions: OSHA and the NLRB*, 47 CATH.

CONCLUSION

The administrative process augments two seemingly distinct governmental functions: resolving individual disputes and developing government policy. Agencies perform these functions under a mandate from the legislature and within the confines of that mandate. Most agencies are afforded substantial policymaking authority within their delegated responsibility. Indeed, the need for policy development beyond the legislative mandate is usually the reason for choosing an administrative approach over other alternatives for confronting a societal problem. Often this function is performed by a process focused on policymaking, usually some form of "rulemaking." In contrast, administrative adjudications determine individual rights and duties created through an administrative program. However, agency adjudicators must work with agency policy, hence even individual dispute resolution interacts with the policymaking function. This interaction in turn contributes to the body of administrative policy or agency law. The operation of administrative policy development within the administrative adjudicative machinery has been the focus of this Article.

In looking at the internal performance of policymaking in adjudication, we see a division of functions among the various adjudicative officials. Like the conventional judiciary, administrative judiciaries have hierarchies of decisionmakers, and administrative adjudicative officials at each level have different roles within the adjudicative machinery. Each actor contributes differently to the interpretation of statutes, rules, and other adjudicative decisions, to factfinding, and to the policy analysis necessary to the resolution of the individual disputes. This Article focused on the part played by hearing-level officials, the administrative judges, and the context in which they perform. The administrative judges launch the policy analysis as both record builders and initial decisionmakers. All other participants in the adjudicative process, including the courts, work from this initial policy analysis. However, each participant confronts its own policymaking demands. Thus, each system must find its own balance between the responsibility to do individual justice in adjudications and the need to evolve and control policy. This Article has attempted to provide the foundation and framework for doing so.

U. L. REV. 877, 917 (1998) (comparing the operation of OSHA's split-function process with the separation of prosecutorial and policymaking functions in the NLRB).