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Mandating State Agency Lawmaking by Rule

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I. INTRODUCTION

In the past, federal law has been relatively clear that an administrative body vested with authority to issue rules and to adjudicate individual cases may develop its law through either means, so long as Congress has not specified otherwise and the agency does not abuse its discretion.[1] This means that federal law has not generally required agencies, as soon as feasible and to the extent practicable, to elaborate agency law by rule in rulemaking proceedings. Most states have followed federal law in this regard. However, the courts of a number of states and recent model state legislation are moving in a different direction. They appear to be in the process of establishing a mandatory gen-

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1. *See infra* Section II.

eral preference for the elaboration of state agency law by rule rather than by ad hoc order.[2]

This article will explore the growing movement to impose a legally binding preference for rulemaking as the primary means of state agency lawmaking. The present effort will begin with a description of the widely established view that absent specific legislation to the contrary, agencies vested with authority to issue rules and to decide individual cases have broad discretion to choose the procedural means—rulemaking or adjudication—by which they make their law. That will be followed by an analysis of the reasons why and the extent to which a preference for state agency lawmaking by rule is desirable, and the reasons why such a preference for this particular means of agency lawmaking is especially justifiable in state government as compared to the federal government. An examination of the decisions of several state courts will then reveal the basis and scope of a judicially mandated preference for state agency lawmaking by rule in the absence of statutes explicitly requiring that result. Finally, legislative proposals calculated to impose on state agencies a general duty to elaborate their law primarily through rulemaking will be examined in light of objections to such a statutory innovation.

This article concludes that a binding general preference for state agency lawmaking by rule rather than by ad hoc order is both desirable and feasible, so long as that general preference is subject to a rule of reason. It also concludes that general statutory provisions on this subject should be adopted by the several states and that, in the absence of such provisions, state courts would be fully justified in imposing on agencies in specified circumstances a binding general preference for administrative lawmaking by rule.

II. State Agency Discretion to Determine Its Lawmaking Modality: The Dominant View

State legislatures ordinarily delegate express or implied authority to their agencies to issue rules after rulemaking proceedings and to issue orders after adjudicatory proceedings. As a result, legislative delegations enable agencies to elaborate agency law in a form — rules —that resembles statutes, and also in a form — orders — that resembles the case-by-case, common-law precedents of courts. That is, administrative agencies are typically authorized to make their law by directly binding prescriptive statements of general applicability in rulemaking and by individual decisions of particular applicability in adjudication which

2. *See infra* Sections IV and V.

serve as precedent for future cases. Since agencies are usually authorized to use these two different procedural modalities as means by which to elaborate their law, they must inevitably choose, in particular situations, to do so by rule, by ad hoc order, or by both. The scope of their discretion to utilize, for this purpose, one modality rather than the other, therefore, becomes significant.

To understand the dominant state view concerning agency discretion to choose the means by which it makes law one must first understand federal law on this subject. The reason for this is that most states have uncritically adopted for their own use in this area analogous federal law, usually citing one or more of three principal United States Supreme Court cases on this subject as precedents for their action. As a result, a brief description of these federal cases follows.

The first, and probably most widely cited federal case dealing with the freedom of agencies to choose the means by which they make their law is *SEC v. Chenery Corp.*[3] This case involved an SEC decision holding that certain corporate insiders could not profit from trading in the stock of their corporation while it was in the process of reorganization. The agency based its determination on the Public Utility Holding Company Act. The insiders insisted that if the SEC desired to prohibit such conduct it could do so only by issuing a rule that was prospective in nature and that prohibited insider profiteering of the specific type in question.

The United States Supreme Court disagreed, refusing "to say that the Commission, which had not previously been confronted with the problem of management trading during reorganization, was forbidden from utilizing this particular [adjudicatory] proceeding for announcing and applying a new standard of conduct."[4] Indeed, the Court stressed that there was a clear place for agency lawmaking on a case-by-case basis, and that "the choice made between proceeding by general rule or by individual ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."[5] The Court explained the reasons for its decision in this way:

> To hold that the Commission had no alternative in this proceeding but to approve the proposed transaction, while formulating any general rules it might desire for use in future cases of this nature, would be to stultify the administrative process. That we refuse to do.
>
> Since the Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rule-making

3. 332 U.S. 194 (1947).
4. *Id.* at 203.
5. *Id.*

> powers, it has less reason to rely upon ad hoc adjudication to formulate new standards of conduct within the framework of the Holding Company Act. The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise. . . . Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.[6]

In the second principal case on this subject, the United States Supreme Court was faced with a challenge to the validity of an NLRB order requiring an employer to furnish a union, prior to a collective bargaining election, a list of the names and addresses of its employees. The order was based on an earlier NLRB decision requiring employers to provide such lists; but the earlier agency decision was prospective only, because it did not apply the requirement to the parties in that particular case.[7] In a subsequent case involving the Wyman-Gordon Co., the NLRB applied the prospective requirement first announced in its earlier decision in a way that invalidated a bargaining election because of the employer's failure to provide such a list of employees to the union. *NLRB v. Wyman-Gordon Co.*[8] required the Supreme Court to decide whether Wyman- Gordon Co. was correct in asserting that the NLRB action was invalid because the agency had originally used adjudication rather than rulemaking to adopt the requirement that an employer must furnish a list of employees to unions in these circumstances.

While a majority of the Court upheld the action of the NLRB in *Wyman-Gordon,* it split two ways on the justification for that result. In an opinion for four members of the Court, Justice Fortas concluded that the wholly prospective nature of the employee list requirement announced by the NLRB in its earlier case made the requirement a rule; and because that rule had not been issued by the use of rulemaking proceedings, it was invalid. But Justice Fortas refused to overturn the Board's action in *Wyman-Gordon,* apparently because he believed that

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6. *Id.* at 202.
7. *Excelsior Underwear Inc.,* 1966-156 NLRB Dec. (CCH) ¶ 20,180.
8. 394 U.S. 759 (1969).

in this particular case the Board had adjudicated anew the requirement announced in its earlier case. As a result, the NLRB could properly apply that requirement to Wyman-Gordon Co. in this case.[9] Justice Black, writing for three members of the Court, also upheld the order of the Board in *Wyman-Gordon;* but he did so on the ground that the choice between proceeding by rule or by ad hoc order on a case-by-case basis was one that was committed to agency discretion.[10]

The Fortas plurality opinion and the two dissents in *Wyman-Gordon* agreed that the wholly prospective nature of the employee list requirement announced in the earlier NLRB case demonstrated that the requirement should have been issued by the use of rulemaking procedures rather than in the course of an individual adjudication.[11] However, these opinions did not appear to challenge the basic *Chenery* principle that the choice of proceeding by rulemaking or adjudication to elaborate agency law is up to the agency. Instead, they only appear to insist that if agencies desire to issue rules (statements of general applicability and *future* effect implementing, interpreting, or prescribing law) they must follow rulemaking procedures; and if they desire to issue orders (statements of particular applicability declaring individual rights based on past facts) they must follow adjudicatory procedures.

The third principal decision of the United States Supreme Court on the subject of agency freedom to choose the means by which it engages in lawmaking is *NLRB v. Bell Aerospace Co.*[12] In that case the Supreme Court addressed the authority of the NLRB to determine whether buyers were managerial employees exempted from the requirements of the National Labor Relations Act. The Court of Appeals had concluded that the Board could proceed only by rulemaking in making that determination.[13] On review, the Supreme Court determined otherwise and indicated that the agency was free, on remand, to proceed either by rulemaking or by adjudication to determine whether

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9. *Id.* at 766.

10. *Id.* at 772.

11. *Id.* at 765-66 (plurality opinion), 775 (Douglas, J., dissenting), 780 (Harlan, J., dissenting).

12. 416 U.S. 267 (1974). Another United States Supreme Court case that may be relevent to this question is Morton v. Ruiz, 415 U.S. 199 (1974), decided several months before *Bell Aerospace.* The *Ruiz* opinion stated that the agency involved was required to issue rules, and was prohibited from engaging in wholly ad hoc lawmaking, with respect to the criteria applicable to the grant or denial of the particular government benefits at issue in that case. This conclusion seems to rest upon the provisions of the agency's own adopted procedures and the "abuse of discretion" prohibition contained in the Federal APA. *Id.* at 231-35. *See infra* Section *IV* D. However, decisions of the United States Supreme Court before and after *Ruiz* do not require federal agencies, generally, to prefer lawmaking by rule over lawmaking by ad hoc order. Some lower federal courts disagree, at least in certain contexts. *See infra* text accompanying notes 142-51.

13. 416 U.S. at 273.

the buyers in that or other situations were managerial employees exempt from the National Labor Relations Act. In doing so, the Court stressed that

> [t]he views expressed in *Chenery II* and *Wyman-Gordon* make plain that the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion. Although there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion. . . , nothing in the present case would justify such a conclusion. . . . The Board's judgment that adjudication best serves. . . [its] purpose is entitled to great weight.[14]

These three United States Supreme Court cases demonstrate that federal agencies vested with both rulemaking and adjudicatory powers may, except to the extent a statute provides otherwise, develop their law either by rule or by order on a case-by-case basis, or by both means; that their discretion as to the means by which they make their law on a given subject is broad and will not be disturbed unless it is abused; that there is a strong presumption in favor of the agency's choice of lawmaking modality so that a person challenging its propriety in a given situation has the burden of persuading a court that the agency decision was an abuse of discretion; that the Supreme Court has not clearly defined the unusual circumstances in which an agency decision to elaborate its law by adjudication rather than by rulemaking would be improper; and that if an agency decides to issue a rule—a statement of general applicability and future effect implementing, interpreting, or prescribing law—it must follow applicable rulemaking procedures and cannot do so in an adjudication. As reflected in these decisions of the United States Supreme Court, federal law does not create any general preference for agency lawmaking by rule. Instead, it leaves agencies relatively free to determine, in their own discretion, whether they will elaborate their law on a particular subject primarily by rulemaking or by adjudication.

Most states have uncritically followed federal law in this regard. Numerous state court opinions declare that state agencies vested with authority to issue rules and to engage in adjudication have almost unfettered discretion to choose the means by which they elaborate their law. A study of the many state court opinions adopting this view suggests that it is based almost entirely on the belief that federal law has settled this matter for the states, rather than on an analysis of the state

14. *Id.* at 294.

administrative process problem at which this law is directed and a conclusion that the merits of current federal law make its adoption in the state context desirable. However, individual states are free to make their own choice on this subject, except to the extent that the federal constitution requires otherwise. And the federal constitution does *not* prohibit a state from generally requiring its agencies to prefer rulemaking over adjudication as a means of lawmaking, so long as that requirement is qualified by a rule of reason.

The typical state court opinion on this subject asserts that where an administrative agency is authorized to develop its law by rulemaking or by adjudication, the agency has broad discretion, in the absence of a specific statute to the contrary, to select which of these procedures it will employ to make law on a particular subject.[15] State court opinions announcing this conclusion often cite *Chenery* and sometimes *Wyman-Gordon* and/or *Bell Aerospace* to support that proposition.[16] Potential differences between state and federal agencies or the contexts in which they operate that might be relevant to the wisdom of applying that federal law principle to the state administrative process are not discussed. Furthermore, none of these state cases suggest that state agencies must use rulemaking rather than adjudication as their principal means of lawmaking, or even that they must do so to the extent practicable and feasible. Indeed, as a group, they appear to support the proposition that state agencies delegated the authority to issue rules and to decide individual cases are usually free to elaborate their law primarily if not exclusively by ad hoc adjudication.

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15. Potts v. Bennett, 487 So. 2d 919, 921 (Ala. Civ. App. 1985); Amerada Hess Pipeline Corp., v. Alaska Pub. Util. Comm'n, 711 P.2d 1170, 1178 (Alaska 1986); ALRB v. California Coastal Farms, Inc., 31 Cal. 3d 469, 473, 645 P.2d 739, 743, 183 Cal. Rptr. 231, 235 (1982); Anheuser-Busch, Inc. v. Department of Business, 393 So. 2d 1177, 1182 (Fla. Dist. Ct. App. 1981); Young Plumbing and Heating Co. v. Iowa, 276 N.W.2d 377, 382 (Iowa 1979); Consumer Protection Div. Office of the Attorney Gen. v. Consumer Publishing Co., 304 Md. 731, 753-54, 501 A.2d 48, 60 (1985); Town of Brookline v. Commissioner of Dept. of Envtl. Quality Eng'g, 387 Mass. 372, 379, 439 N.E.2d 792, 799 (1982); Massachusetts Elec. Co. v. Department of Pub. Util., 383 Mass. 675, 679, 421 N.E.2d 449, 451 (1981); AFSCME Council 25 v. Wayne County, 152 Mich. App. 87, 98 393 N.W.2d 889, 894 (1986); American Way Life Ins. Co. v. Commissioner of Ins., 131 Mich. App. 1, 2, 345 N.W.2d 634, 635 (Mich. App. 1983); Bunge Corp. v. Commissioner of Revenue, 305 N.W.2d 779, 785 (Minn. 1981); Occidental Chem. v. New York State Envtl. Facilities, 125 Misc. 2d 1046, 1050, 480 N.Y.S.2d 838, 841 (N.Y. Sup. Ct. 1984); Dressler Coal Corp. v. Call, 4 Ohio App. 3d 81, 84, 446 N.E.2d 785, 789 (1981); Mollinedo v. Texas Employment Comm'n, 662 S.W.2d 732, 738 (Tex. Ct. App. 1983); State Bd. of Ins. v. Deffebach, 631 S.W.2d 794, 799 (Tex. Ct. App. 1982).

16. *See* cases cited *supra* note 15.

III. Reasons State Agencies Should Prefer Lawmaking By Rule

To understand the reasons why a general preference for state agency lawmaking by rule rather than by ad hoc adjudication is desirable one must first appreciate the practical differences between law embodied in rules and law embodied in orders. A rule is an agency statement of general applicability and future effect that implements, interprets, or prescribes law or policy or the organization, procedures, or practice requirements of an agency. It includes a statement that amends, repeals, or suspends another rule. As a result, rules create binding law in the form of statements directly applicable to all those to whom they are addressed. Agencies are also bound by their own rules. However, for good cause a rule may, under some circumstances, and within specific limitations, be waived by the issuing agency; but if not, a rule directly binds all those within its terms, whether or not they participated in the rulemaking proceeding from whence the rule originated.[17]

On the other hand, an order is an agency statement of particular applicability determining the rights of specific parties on the basis of their special circumstances. So orders only result in the ad hoc adoption of principles of law that are necessary to solve the particular cases in which those principles are announced. Nevertheless, they may serve as precedent in similar future cases. An order is not binding directly on any persons other than the parties to that particular case. Therefore, persons other than the specific parties to that case have the right to argue that the precedent should not be followed in their case, and that the agency should consider de novo whether the principle on which the precedent rests should apply in their case.[18] In reality, however, principles of law declared in particular cases tend to have the same effect as rules. The reason for this is that once an agency adjudicates a principle of law as part of the resolution of a specific case, the agency tends to follow that principle uncritically in all similar future cases, without any serious reexamination. To that extent, the practical effect of agency law issued in an order does not differ from agency law issued in a rule.

The typical state administrative procedure act contains two sepa-

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17. *See generally* A. Bonfield, State Administrative Rule Making § 3.3 (1986); 1 C. Koch, Jr. Administrative Law And Practice § 2.3 (1985); B. Schwartz, Administrative Law § 4.1-2 (2d ed. 1984).

18. *See* sources cited *supra* note 17. *See also* Berg, *Re-examining Policy Procedures: The Choice Between Rulemaking and Adjudication,* 38 Admin. L. Rev. 149, 177, 178 (1986); Young Plumbing and Heating Co. v. Iowa Natural Resources Council, 276 N.W.2d 377, 382-83 (Iowa 1979).

rate sets of procedures—one for rulemaking and one for adjudication.[19] While agencies delegated authority to issue rules and to decide individual cases normally have broad discretion as to the means by which they may make particular law, they are bound by their state act to follow scrupulously the procedures appurtenant to whatever means of lawmaking they actually choose in a particular instance. So, "either means [of agency lawmaking] may be used so long as the [appropriate] statutory procedure is complied with."[20] As a result, "[i]f an agency relies upon a rule. . . to support its action, the rule must have been promulgated in accord with the [rulemaking] procedure in effect at that time."[21] An agency may not issue a rule in an adjudication.[22] Similarly, an agency may not decide a particular case through the use of rulemaking procedures; it must use applicable adjudication procedures to issue such an individual decision with precedential value.

There are, however, a number of significant advantages of rulemaking as compared to adjudication that suggest the former should generally be preferred over the latter for state agency lawmaking.[23] Some of the advantages of rulemaking are a product of the particular procedures used in the adoption of rules and some are a product of the nature of rules without regard to the procedures employed in their adoption.[24] Consider, first, the extent to which all persons who may be affected by agency lawmaking have an opportunity to participate in an adjudication as compared to a rulemaking. Normally, only those persons who are actually parties to a particular dispute giving rise to an adjudication are notified of, or have a right to participate in, that proceeding.[25] This means that other persons who may subsequently be affected by the precedential value of an adjudicative decision of an agency do not usually have an effective opportunity to participate in its formulation. It also means that members of the general public do not have an effective opportunity to influence law made on a case-by-case, precedential basis. Liberal rights to intervene and to file amicus briefs in adjudications are not substitutes for an opportunity to participate in rulemaking proceedings on the same subjects. After all, most people

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19. REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT (1961) § 3-4 and 9-14, 14 U.L.A. 371 (1980) [hereinafter 1961 MSAPA]. The acts of most states are based on the 1961 MSAPA.

20. 276 N.W.2d at 382.

21. *Id.*

22. *Id.* at 382-83.

23. For a brief summary statement of many of the following advantages of rulemaking over adjudication see Berg, *supra* note 18, at 163-64.

24. *See* Berg, *supra* note 18, at 164.

25. *See* 1961 MSAPA, *supra* note 19, §§ 9(a), 1(5).

affected by ad hoc agency lawmaking on a precedential basis will not even know about the existence of current agency adjudications of importance to them. Even if they did, it is unlikely that all of them could or would be allowed an effective opportunity to participate in such adjudications.

In rulemaking, however, the situation is quite different. The typical state administrative procedure act requires agencies to give advance notice of proposed rules to the general public and to give an opportunity for all interested members of the general public to comment on those proposals prior to their adoption.[26] This means that persons who are not parties to an adjudication declaring new law have a better opportunity to protect their interests if the law in question is made by rulemaking rather than by adjudication. It also means that the public-at-large has a better opportunity to influence law made by rule than by order because rulemaking procedure gives members of the general public a more effective opportunity to mobilize political pressures for and against a proposed agency policy than does adjudication procedure. Agencies making policy by rule are also likely to have access to a broader base of relevent information if they make their law by rule rather than by order because a wider class of affected persons and the general public will have an opportunity to submit information to the agency about the desirability of that law before it becomes final.

Rulemaking is also better than adjudication if one wishes to ensure that an administrative lawmaking product is consistent with the popular will. The trial-type procedures typically used in the agency adjudicative process, including bans on ex parte communications and exclusivity of the record requirements, tend to protect agencies seeking to implement their own policy preferences in the course of such an adjudicative process against intervention in that process by outside political pressures. On the other hand, the notice and comment procedures typically used in the state agency rulemaking process permit and facilitate intervention in that process by members of the general public in a way that allows them to frustrate, through the use of external political pressures, agency policy preferences that are inconsistent with the will of the community-at-large as reflected in the balance of power in current interest group politics.

This, then, is another reason why state agencies should generally be required to employ rulemaking rather than adjudication for their lawmaking. Agency lawmaking cannot be deemed legitimate unless its product is consistent with the will of the community-at-large as ex-

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26. *See* 1961 MSAPA, *supra* note 19, § 3(a).

pressed by its popularly elected legislature. This is so because, in our society, sovereignty ultimately resides in the body politic and not in its many unelected administrative agents. Of course, there are two ways to ensure that agency lawmaking is consistent with the popular will.

> First, the delegation . . . [to agencies of lawmaking] authority may be made with such precise instructions concerning the end to be achieved that logic and technological competence . . . will dictate a relatively narrow range of results. Or, second, the manner of exercising an imprecise delegation may be designed to reflect the same forces that work upon the [popularly elected] legislature itself, and thus to produce approximately the same results.[27]

The first means of ensuring the accountability of agency lawmaking has generally failed because modern legislative delegations to agencies of lawmaking authority tend to be very imprecise and vague. However, the second means of ensuring the accountability of agency lawmaking has succeeded. But its success has required a highly political scheme of everyday agency lawmaking in order to ensure that the product of that process conducted under broad and vague delegations is consistent with the wishes of the legislature.[28] Since the rulemaking process permits and facilitates efforts by interested members of the general public to block, through the use of political pressures, implementation of the policy preferences of our administrative agents that are inconsistent with the balance of political power in the community, and the adjudication process does not, rulemaking is generally a more desirable agency lawmaking process than adjudication.

Agency law made by rule is generally better than agency law made by ad hoc order for another reason. Agency rules are almost always more highly visible than agency case law to members of the public. The reason for this is that members of the public can more easily ascertain the existence and specific contents of agency law that is embodied in rules than agency law embodied in adjudicatory decisions. The compilation of state administrative rules is published and is available in public libraries and law libraries in all communities in the state. State agency case law, however, is almost never published and is usually available only in the files of the agency. Even the legal right to copy those decisions contained in agency files cannot overcome this difference, and the practical problems it causes for regulated persons seeking to ascertain the precise contents of the law to which they must conform. It should be noted that federal agency case law is much more

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27. Scalia, *Two Wrongs Make a Right: The Judicialization of Standardless Rulemaking*, REG., July-Aug. 1977 at 38, 40.

28. *See id.*

frequently published and, therefore, much more easily available than state agency case law which is almost never published. Consequently, on this basis the argument for requiring agencies to make their law by rule is more compelling for state agencies than for federal agencies.

The fact that the unpublished case law of state agencies is much less visible and accessible than their widely disseminated published rules also means that the governor and legislature may not effectively monitor law made by agencies in the course of adjudications. Furthermore, neither the governor nor the legislature may use the special powers they have in many states to review effectively agency lawmaking when it is executed wholly on a case-by-case basis. The reason for this is that state administrative procedure acts vest them with such special review powers only with respect to agency rules.[29] No acceptable scheme has yet been devised for the systematic and effective review by the governor and legislature of agency law created on a case-by-case basis in adjudications.

To make state schemes for the review of agency rulemaking fully effective, state agencies must be precluded from making their most controversial policies by ad hoc order. Otherwise, state agencies could bypass completely these formidable executive and legislative review mechanisms calculated to check agency lawmaking that is inconsistent with the political will of the community-at-large. It should be noted that state administrative procedure acts contain much more formidable schemes of executive and legislative review of agency rules than currently exist in federal law.[30] As a result, there is a greater need on this basis to impose a preference for lawmaking by rule on state agencies than on federal agencies. If Congress decides to create a more effective scheme for executive and legislative review of federal agency rulemaking, it would probably increase the restrictions on the freedom of federal agencies to make law on an ad hoc precedential basis in individual cases. Otherwise such a scheme would not accomplish its objectives.

Agency lawmaking by rule is generally better than agency lawmaking by order for another reason. It is likely to be easier for members of the general public to discern current agency law from rules than from adjudications because decisional law is normally more difficult for laymen to understand. Interpretation of decisional law depends on the particular facts involved in the cases in which that law originated. Rules, on the other hand, are not dependent on the particular facts from which they first emerged. The product of adjudication is also in-

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29. *See* Bonfield *State Law In The Teaching of Administrative Law: A Critical Analysis of The Status Quo,* 61 TEX. L. REV. 95, 110-23 (1982).

30. *Id.*

ferior to the product of rulemaking insofar as it serves as a guide to the agency staff and the regulated public. Unless an adjudicatory decision is distorted with dictum relating to situations not involved in that particular case, both the agency staff and the regulated public must resort to reading a line of cases and formulating from them a statement of the principles followed by the agency with respect to a more general matter. This is not only time consuming and expensive because of its dependence upon specialized talents cultivated primarily by lawyers, but also because it tends to induce unnecessary error and conflict because of inevitable misreadings.[31]

Another advantage of rulemaking over adjudication as a means of agency lawmaking relates to efficiency. After all, a rule is a statement of general applicability while an order is only a statement of particular applicability. As a result, lawmaking by adjudication is likely to require litigation before the agency in a multiplicity of cases, whereas a single rulemaking may settle the policy questions involved in many cases without need for future litigation before the agency to resolve them.[32] That is, a single rule can eliminate issues of law in many cases, leaving only issues of disputed facts, thereby eliminating the necessity for repetitive arguments in multiple adjudications on the many policy issues that may be settled by a single rule.[33] Lawmaking by rule is also more efficient than lawmaking by order because it allows agencies to focus upon a few proceedings raising comparatively few major policy issues. When agencies make law by adjudication, however, they must often spread their attention thinly over a large number of cases that raise an even larger number of minor policy issues as well as major policy issues.[34]

Rulemaking is also generally superior to adjudication for agency lawmaking because rulemaking requires the agency to focus on the issues of law that must be decided, without being diverted, as it is in adjudication, by the more specific and parochial concerns of particular parties who wish to have their dispute resolved.[35] Of course, it may also

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31. *See* Peck, *A Critique of the National Labor Relations Board's Performance in Policy Formulation: Adjudication and Rule-making,* 117 U. PA. L. REV. 254, 272 (1968).

32. *See* Baker, *Policy by Rule or Ad Hoc Approach — Which Should It Be?* 22 LAW & CONTEMP. PROBS. 658, 664 (1957).

33. *See* Note, *The Use of Agency Rulemaking to Deny Adjudications Apparently Required by Statute,* 54 IOWA L. REV. 1086, 1100-1101 (1969).

34. *See, e.g.,* Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act,* 79 YALE L.J. 571, 590-92 (1970) ("The principal advantage of rule making is that it provides clear articulation of broad agency policy. By contrast, the entire array of [an agency's] adjudicatory decisions on a subject often gives a diffuse, overly subtle mosaic of current [agency] doctrine.").

35. *See* Fuchs, *Agency Development of Policy Through Rule-Making,* 59 NW. U.L. REV.

be argued that lawmaking by rule is undesirable because it requires agencies to make decisions in the abstract, without the benefit of an actual case to test their wisdom or to help clarify the issues involved. However, the fact that rulemaking requires an agency to make decisions in the abstract is a factor that an agency can and should consider in determining whether, in a particular situation, rulemaking is infeasible or impracticable. But the fear of abstract decisionmaking is not a sound argument for resisting the imposition on agencies of a general duty to prefer rulemaking in situations where it is feasible and practicable.

Note also that agency lawmaking by rule rather than by order is preferable because it enables the parties and decision makers in adjudications to ascertain and focus more clearly on the precise facts that must be demonstrated in such cases.[36] In adjudications, where agencies make the applicable law and also determine if it has been violated, the parties and decisionmakers often confuse the necessary facts and burden of persuasion associated with the law-applying function, with the necessary facts and burden of persuasion associated with the lawmaking function. Furthermore, an important or novel question of law may arise in an adjudication that is not necessary to a decision in that particular case. However, attempts to resolve it in that context could result in a deemphasis of the actual controversy involved, an unconscionable delay to its conclusion, a distortion of the question of law involved, and an inadequately informed and dispassionate consideration of its merits. Nevertheless, when agencies rely heavily on case-by-case decisions to make their law, attempts at resolving issues of law in adjudications that do not squarely present them are inevitable because more suitable cases for resolving those issues may be unavailable.[37]

Lawmaking by rule is also generally more desirable than lawmaking by order because the former allows an agency to initiate, on its own, changes in or elaborations of its law. On the other hand, lawmaking by order leaves the initiative for such changes or elaborations to private parties who start litigation or engage in action prompting agency enforcement proceedings.[38] In other words, an agency need not await the occurrence of a set of facts involving a particular individual to make law embodied in a rule. The agency may make that law whenever it desires, prior to any violations, and as a means of avoiding the

781, 788-90 (1965).

36. Frohnmayer, *The Oregon Administrative Procedure Act: An Essay on State Administrative Rulemaking Procedure Reform,* 58 OR. L. REV. 411, 442 (1980).

37. *See* Shapiro, *The Choice of Rulemaking or Adjudication In the Development of Administrative Policy,* 78 HARV. L. REV. 921, 937-40 (1965).

38. *See* Bernstein, *supra* note 34, at 590-92.

occurrence of such circumstances in the first place. So, rulemaking, unlike adjudication, allows an agency to create its own lawmaking time table and to implement its own system of lawmaking priorities.

In addition, rulemaking is a superior means of lawmaking with respect to matters directly affecting a significant number of persons who are not likely to be represented by lawyers. This is so because informal notice and comment rulemaking procedures are generally more accessible to persons who do not have the assistance of counsel and are easier for them to use, than are formal, trial-type, adjudicative procedures. Adjudicative procedures almost always require the assistance of counsel because of their complexity and reliance upon skills specially possessed by lawyers. Since state agencies ordinarily make law directly affecting substantial numbers of persons who are not represented by counsel either because they are too poor to afford such representation or because the matters involved have relatively small financial value,[39] those agencies should be required to make their law primarily by rule rather than by order. This argument for a rulemaking preference is less persuasive with respect to federal agencies. Persons involved in the federal administrative process are, in general, more likely to be represented by lawyers than those involved in the similar state processes. This is so because the matters dealt with by federal agencies tend to have larger financial value than the matters dealt with by state agencies, and organizations representing the poor appear to be more available to protect the interests of such persons in the federal administrative process than in the similar processes of the several states.

Another reason why state agencies should prefer rulemaking over adjudication for their lawmaking is that rules are normally prospective—they indicate the law that the agency will rely upon in the future. Adjudication, on the other hand, has the disadvantage of being inherently retrospective, declaring rights based on past acts. As a result, lawmaking by rule gives affected persons fair notice of agency law, permitting them to conduct their affairs accordingly, while lawmaking by adjudication does not. One of the most serious adverse affects of using the adjudication process for agency lawmaking, therefore, is the retroactive effect upon parties who legitimately relied upon prior law, or had no advance notice of the new law suddenly declared by the agency as a basis for its decision in their cases. Of course, courts make retroactive policy changes in the course of adjudications, "but courts have no substantive rulemaking powers."[40] The same is not true of most administrative agencies. Typically, administrative agencies have authority to

39. *See* Bonfield, *supra* note 29, at 127.

40. *See* Peck, *supra* note 31, at 273.

make their law either by rule or by order. To avoid retroactive lawmaking, agencies should make as much of their law as is possible by rule rather than by order. It may be argued that an increase in rulemaking as a means of elaborating agency policy at the expense of ad hoc lawmaking is undesirable because the prospective nature of rulemaking may encourage agencies to interpret applicable statutes more expansively than they might in adjudications whose product would be retrospective. The answer to that fear, of course, is that judicial review and legislative action is always available to check any unwarranted agency interpretations of applicable statutes in rulemaking.

Primary reliance on rulemaking for agency lawmaking is also desirable because it is more likely to assure uniform treatment of similarly situated persons than is the use of adjudication for that purpose. All persons subject to a rule are affected at the same time and in the same way.[41] Agency lawmaking by adjudication, however, increases the likelihood that agencies will draw irrelevant distinctions between substantially similar cases and allows agencies to disregard applicable precedents in some cases on the grounds they are not technically binding on other persons. Therefore, adjudication is not an especially appropriate means for the formulation of legal principles that are in fact applicable to a broad class of persons because it permits low visibility, differential agency decisionmaking of an arbitrary or capricious nature.

Lawmaking by rule might be deemed inferior to lawmaking by order precisely because rules are statements of general applicability rather than of particular applicability and, therefore, mandate uniform treatment for all those subject to their provisions. The argument is that agencies should not be bound to apply agency law to all cases within its ambit. Universal application of agency law necessarily results in unreasonable consequences. Agencies must, therefore, be free to elaborate and apply agency law in an ad hoc manner. This, of course, can be accomplished more easily when agency law is made in adjudications. The ad hoc elaboration and application of agency law might also be deemed to result in fairer regulation because the contents of the law and the application of the law can be carefully tailored to the facts of each case, thereby avoiding the overgeneralizations inherent in rulemaking which necessarily results in a product that is of general applicability.[42]

This argument is unpersuasive. Agencies have always had some prosecutorial discretion in the application of their rules. As a result, agencies may refuse to apply a rule to inappropriate circumstances oth-

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41. *See* 1 F. COOPER, STATE ADMINISTRATIVE LAW 178-80 (1965).

42. *See* E. BARDACH & R. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS (1982).

erwise within the rule's ambit. Also, as long as third party rights are not adversely affected, an agency may waive the applicability of a rule to a particular individual on the ground that its application in that specific instance would be unfair or without value to the public interest. Further, the main principle embodied in a rule may be drawn as broadly or narrowly as an agency deems wise. A rule can also have as many narrowly drawn exceptions to its main principle as the issuing agency thinks prudent. In addition, agency application of a rule to a particular factual situation which is inconsistent with the purpose of the rule, or which otherwise causes an unreasonable result, may be successfully challenged under almost all state administrative procedure acts because those statutes typically prohibit arbitrary or capricious agency action. Lastly, rules need not always eliminate the discretion of an agency to tailor its actions to particular factual circumstances. Indeed, rules may expressly confer such discretion on an agency and specify some or all of the factors that must be considered in exercising that discretion.

In considering the desirability of a required preference for state agency rulemaking we should not forget that we have had decades of experience with agency lawmaking that was predominantly ad hoc. Experience demonstrates that abusive agency action is much more likely to result from ad hoc agency lawmaking than from lawmaking that is of general applicability. What we need, therefore, is a clear preference for agency lawmaking by rule in order to minimize low visibility agency decisionmaking of an arbitrary or capricious nature.

It has been asserted that the "procedural advantages of rulemaking . . . are headed for extinction" because the courts and legislature have moved a great deal of rulemaking from informal notice and comment procedures, to much more formal trial-type procedures.[43] If so, many of the arguments for a general rulemaking preference discussed earlier would be weakened. Note, however, that *state* agency rulemaking under the provisions of the 1961 MSAPA, which has been adopted by most states,[44] is of the simple notice and comment variety rather than the more complex hybrid or adjudicative variety found in many recent federal statutes governing particular agency rulemaking.[45] As a result, the procedural advantages of rulemaking over adjudication for most state agency lawmaking are not headed for extinction although, admit-

43. Scalia, *Back to Basics: Making Law Without Making Rules,* REG. July-Aug. 1981 at 25, 26.

44. 1961 MSAPA, *supra* note 19, § 3 at 387.

45. *See* Rago, *Rulemaking Under the Model State Administrative Procedure Act: An Opportunity Missed,* 34 ADMIN. L. REV. 445, 458-60 (1982).

tedly, they have been substantially diminished for many federal agencies.

Prior discussion demonstrates that state agency lawmaking by rule is generally superior to state agency lawmaking by order. It also demonstrates that the advantages of rulemaking over adjudication for administrative lawmaking are greater, in a number of important respects, for state agencies than for federal agencies. First, state agency decisions in particular adjudications are virtually never published while the decisions of many federal agencies are published. This makes public access to state agency case law much more difficult, in general, than public access to federal agency case law, or public access to state agency rules which are virtually always published. Second, the legislatures of most states have established comprehensive and effective means for the gubernatorial and legislative review of state agency lawmaking by rule, while Congress has not established any similar scheme with which to review the rules of federal agencies. For this reason, there is a special need to ensure that state agencies (but not federal agencies) make their law primarily by rules which are subject to these elaborate review mechanisms rather than by orders which are not. Third, persons affected by state agency proceedings are far less likely to be represented by lawyers than persons affected by federal agency proceedings. As a result, there is a greater need for state agencies than for federal agencies to make agency law through rulemaking proceedings that do not usually require the use of the special skills of lawyers, than through adjudicatory proceedings where the use of the special skills of lawyers are often essential. Finally, the procedural advantages of rulemaking over adjudication for most agency lawmaking are greater for state agencies than for federal agencies because virtually all state rulemaking is still of the simple notice and comment variety, while a great deal of the federal rulemaking authorized in recent years is of a hybrid variety and, therefore, is more complicated and expensive. All of these reasons suggest that a preference for agency lawmaking by rule is more justified for state agencies than for federal agencies.

Nevertheless, it is clear that state agencies may not and should not dispense entirely with case-by-case lawmaking. There will always be some ambiguities in existing agency rules that will need to be answered in individual cases. The decisions in those cases will inevitably constitute an ad hoc law of precedential value that will supplement agency rules. In addition, there will always be unforseen issues left unanswered by rules. Even good decisionmakers are not omniscient enough to anticipate all future problems that may arise within their jurisdiction, and to solve them in advance by rule. So, for example, lawmaking in the course of adjudications may be warranted to deal with the perpe-

trators of unforeseen harmful acts. Otherwise the perpetrator of such an act could not be stopped "until a rule against the practice was first adopted and he was then found to have engaged in the practice after adoption of the rule."[46]

There are other situations in which agency lawmaking on a case-by-case basis is the only possible or sensible way for an agency to proceed. Case-by-case agency lawmaking may be better than rulemaking, for example, in those particular situations in which the agency does not yet feel it is in a position to make generally applicable law because of the agency's current lack of expertise; or because the distinctions in the area are so numerous or complex that the agency is not yet in a position to articulate them in the form of a generally applicable legal principle; or because the lack of a concrete factual setting would make any general principle of law adopted too theoretical to be useful or sensible. Further, in some situations agency law made by adjudication may be superior to agency law made by rulemaking because adjudication is less likely to be over-inclusive or under-inclusive than rulemaking.[47] That is, given the general inability of rules to deal with novel or unanticipated factual situations, and the great likelihood that rules will cover unnecessary or unintended circumstances because of their general applicability, lawmaking through adjudication may be "more cost-effective, less cumbersome, and more palatable politically" in some situations than agency lawmaking in the form of rules.[48]

It seems clear, therefore, that agency lawmaking by ad hoc adjudication can not and should not be entirely eliminated. Agencies must retain authority to make law on a case-by-case basis whenever, and to whatever extent, the use of rulemaking is genuinely infeasible or impracticable. However, in all other circumstances the advantages of rulemaking as compared to adjudication suggest that state agencies should be *required* to elaborate their law by rule, and should be prohibited from relying primarily on adjudication for the performance of that function. Nevertheless, this duty should be subject to a moderating principle so that rulemaking would be required for this purpose only when, and to the extent, it is feasible and practicable under the circumstances. This means that state agencies authorized to issue rules and decide individual cases would lose their currently broad discretion to choose, freely, between rulemaking and adjudication in the making of their law. The two competing lawmaking modalities would no longer

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46. Scalia, *supra* note 43, at 28.

47. ADMINISTRATIVE CONFERENCE OF THE U.S., A GUIDE TO FEDERAL AGENCY RULEMAKING 82-83 (1983).

48. *Id.* at 83.

be co-equal choices. Agencies would be required to employ rulemaking rather than adjudication unless they could justify their assertion that the former could not reasonably be employed for the purpose in light of the relevent circumstances.

It could be argued, however, that the price of enforcing such a duty on agencies, including the costs of all kinds that might result from any ambiguities in the precise scope of the obligation, would make the imposition of that duty undesirable. There is an answer to this criticism of a mandatory preference for state agency rulemaking. The costs flowing from the imposition of such a requirement are unlikely to be as great as critics assert; and the many benefits of such a requirement indicated in prior discussion are, in any case, likely to far outweigh whatever costs the requirement is likely to engender. Few people suggest, for example, that the almost universal prohibition against arbitrary, capricious, or unreasonable agency action, should be eliminated because it costs too much to enforce that prohibition in absolute terms, or in relation to its benefits. As a result, imposition of a requirement that state agencies make as much of their law by rule as is feasible and practicable under the circumstances is fully justified.

IV. Judicial Imposition of Rulemaking Requirements

A. *Generally*

A few state courts have restricted the general freedom of state agencies to choose between rulemaking and adjudication for the elaboration of their law. These courts have required agencies in their respective jurisdictions to engage in lawmaking by rule rather than by order in various circumstances and to specified extents. They have, therefore, denied state agencies delegated the authority to issue rules and to decide individual cases the virtually unfettered opportunity those agencies had previously exercised to choose adjudication rather than rulemaking as the primary means of elaborating their law. The most unusual aspect of this preference for agency lawmaking by rule is that it has been created by the courts in the absence of any statute expressly requiring that result. Consequently, this preference for administrative rulemaking is wholly a product of judicial, rather than legislative, creativity.

In considering court decisions requiring state agencies to use rulemaking rather than adjudication for specified lawmaking, care should be taken to distinguish from the subject at hand cases requiring agencies to follow rulemaking procedures rather than adjudicatory procedures in situations where an agency had attempted to issue a "rule" in an adjudication. As noted earlier, agencies must follow *rulemaking* procedures when they issue "rules"; they may not issue a statement

qualifying as a "rule" by using adjudicatory procedures. There are state cases in which an agency had issued a statement of law that qualified as a de facto "rule" through the use of procedures appropriate only to ad hoc adjudication. The courts invalidated such agency action because it was required to be accomplished by the issuance of a de jure "rule" after appropriate rulemaking procedures.[49] Cases of this kind are inapposite to the present discussion.[50] These cases cannot be cited

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49. *See, e.g.,* the following line of New Jersey cases: Metromedia Inc. v. Director, Div. of Taxation, 97 N.J. 313, 328-37, 478 A.2d 742, 748-755 (1984); Department of Envtl. Protection v. Stavola, 103 N.J. 425, 436-38, 511 A.2d 622, 628-29 (1986) (both cases apparently holding that the particular agency determinations of law involved were de facto rules, and, therefore, could not be applied to particular persons in the absence of the prior issuance of de jure rules adopted in conformance with applicable rulemaking procedures); Texter v. Department of Human Serv., 88 N.J. 376, 443 A.2d 178 (1982) (impliedly suggesting that agencies could not issue a de facto rule amending an existing rule by an adjudicatory order but, instead, must do so, if it chooses to do so, by a rule subject to rulemaking procedures). *Cf.* Airwork Serv. Div. v. Director, Div. of Taxation, 97 N.J. 290, 300-02 478 A.2d 729, 734, 735 (1984) (apparently holding that a particular agency determination was an order rather than a rule and, therefore, the agency could use adjudicatory procedures rather than rulemaking procedures for its issuance).

It should be noted, however, that at least some of the language used by the New Jersey Supreme Court might suggest that agencies are required, in certain circumstances, to make law by de jure rules rather than by de jure orders, and that the agency action involved was held void not because it constituted a de facto rule adopted without benefit of required rulemaking procedures but, instead, because the agency failed to make law by rule in the first place. *See* 103 N.J. at 436-39, 511 A.2d at 628-29. Nevertheless, a careful analysis of this entire line of New Jersey cases suggests that the latter reading of this language is probably incorrect because these cases presented situations in which the court believed that the agencies involved had improperly attempted to issue de facto rules without following required rulemaking procedures. See also *613 Corp. v. Division of State Lottery*, 210 N.J. Super. 485, 510 A.2d 103 (1986), discussed *infra* note 139.

Boller Beverages, Inc. v. Davis, 38 N.J. 138, 183 A.2d 64 (1962), is a peculiar New Jersey case because it is difficult to ascertain from an isolated reading of that opinion whether the agency action involved was invalid because it was a de facto rule that was issued without the benefit of rulemaking procedures, *id.* at 155, 183 A.2d at 73 (action here "amounts to *ad hoc* legislation"), or because the agency enabling act required it to make law on the particular subject involved by rule rather than by order, *id.* at 154, 183 A.2d at 72 ("We are unable to divine a legislative intent to empower ad hoc lawmaking in the [specific] categories in which the promulgation of general rules and regulations is authorized"), or because the court exercised an inherent judicial authority to invalidate as unfair administrative lawmaking by ad hoc order when the agency in question was also authorized to engage in such lawmaking by rule, *id.* at 155; 183 A.2d at 73 ("Where an administrative agent is given full rule-making power, he must, in all fairness, bottom an alleged violation on general legislation before he may rule in a particular case"). However, a later case appears to make clear that the reason for the insistence of the court in *Boller Beverages* that the agency was required to make the law involved through rulemaking proceedings and could not do so by ad hoc order was that the agency determination in question was of "general applicability" and, therefore, was a rule de facto but not de jure. Metromedia, Inc. v. Director, Div. of Taxation, 97 N.J. 313, 329, 478 A.2d 742, 750 (1984).

50. There is also an inapposite but interesting line of Florida cases that might be misread to suggest that a court may require an agency delegated authority to make law by adjudication as well as by rulemaking to do so by rule in specified situations. However, the actual holding of these cases is far more limited and makes them inapposite to the subject of this section—the authority of courts to *require* agencies to prefer rulemaking over adjudication for their lawmaking in specified circumstances. In fact, these Florida cases hold that an agency authorized to make law either by

for the proposition that a court has required an agency to make its law, in specified circumstances, by rule rather than by order; instead, they may only be cited for the proposition that when an agency issues a statement that in fact qualifies as a "rule," it must do so by the use of rulemaking procedures, and cannot do so through the use of adjudicatory procedures.

There are, however, state cases explicitly holding on one basis or another that state agencies must, in specified situations, engage in lawmaking by rule rather than by order. In those situations, courts have insisted that the agency must make its law in a form that qualifies as a "rule" and by procedures appropriate to the issuance of a "rule," and may not choose to do so in a form that qualifies as an "order" and by procedures that are appropriate to the issuance of an "order." These cases are the focus of this section because these cases establish, to one extent or another, a preference for agency lawmaking by rule.

In three respects this state court development has been quite limited. First, it has occurred only in a handful of states. Second, the judicial imposition of a mandatory preference for state agency rulemaking has been justified on several different bases, some of which are dubious. Third, the required rulemaking obligations imposed on agencies by state courts have been narrow in scope, so they do not satisfy the need for a broad-scoped, general preference for state agency lawmaking by rule. As a result, these judicial developments are not an adequate substitute for an express legislative solution to this problem. Absent such a solution, however, some of these judicial developments seem more promising than others, and are worthy of emulation by other state courts.

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rulemaking or by adjudication may do so by adjudication only if the record of the adjudicatory proceeding contains fully adequate reasons and factual support for the ad hoc law it creates, and the parties to the proceeding were given an opportunity to challenge the foundation for the new case law principle adjudicated therein. These cases, then, do not prohibit agency lawmaking by ad hoc order; instead, they insist that such a policymaking *order* may be de jure only if it is backed by fully adequate justifications in the record of the adjudicatory proceeding. *See* McDonald v. Department of Banking and Fin., 346 So. 2d 569, 582-83 (Fla. Dist. Ct. App. 1977); Anheuser-Busch, Inc. v. Department of Business Regulation, 393 So. 2d 1177, 1182 (Fla. Dist. Ct. App. 1981); Florida Cities Water Co. v. Florida Pub. Serv. Comm'n., 384 So. 2d 1280, 1281 (Fla. 1980); Florida Pub. Serv. Comm'n v. Indiantown Telephone System, Inc. 435 So. 2d 892, 895-96 (Fla. Dist. Ct. App. 1983).

A perusal of these Florida cases will indicate, however, that the Florida courts have not been reluctant to suggest situations in which they believed agency lawmaking by rule was preferable to lawmaking by order. But they have not *required* agencies to make their law by de jure rule rather than by de jure order in such situations in the absence of a provision in an agency's enabling act mandating that they do so by rule. *See* A. ENGLAND AND H. LEVINSON, FLORIDA ADMINISTRATIVE PRACTICE MANUAL §§ 9.05, 9.07, 12.24 (1979).

B. Principle of Statutory Construction

The Oregon Supreme Court has devised the most defensible justification for a court to impose on agencies, in the absence of an express statutory requirement, a fairly broad obligation to prefer rulemaking over adjudication for administrative lawmaking. Although this obligation originated in Oregon cases involving occupational licensing, it appears to have a broader application and common sense legitimacy. The rulemaking obligation announced by the Oregon Supreme Court is embodied in a general principle of statutory construction. That general principle is this: In the absence of clear evidence to the contrary, a legislature is presumed to have intended agencies that have been delegated express authority to issue rules and express or implied authority to decide individual cases, subject to a vague statutory standard, to elaborate that statutory standard by rule rather than by order, as soon as feasible and to the extent practicable. The justification for this judicially imposed rulemaking obligation is a putative legislative intention based on the assumption that a reasonable legislature under the circumstances defined by this principle would be likely to have intended that result if it had considered the question.

The many substantial reasons indicated earlier for generally preferring rulemaking over adjudication for state agency lawmaking justify the reasonableness of this judicial assumption. The reasonableness of this assumption about legislative intentions is also supported by the two criteria defining the applicability of this principle—a legislative delegation of lawmaking power to an agency under a vague statutory standard and an express delegation to that agency of authority to implement its powers by rule. The legislature should have understood that a delegation of lawmaking authority to an agency under a vague statutory standard would necessarily require significant agency refinement and elaboration of that standard. Further express delegation to the agency of rulemaking power appears to suggest that rulemaking should be used as *the* principal surrogate for the legislature's inaction in further refining and elaborating the statutory standard. The fact that an agency in such circumstances was also expressly or impliedly vested with adjudicatory power is easily explained by the need to provide a means by which the agency-created law could be enforced against particular violators. In the described situation, therefore, the vesting of adjudicatory power in an agency is not necessarily any indication that the legislature was willing to permit the agency to elaborate the vague statutory standard primarily by order rather than by rule. Of course, if this judicial assumption of legislative intention turns out to be unwarranted, the legislature can quickly remedy it by statute.

A better understanding of the justification, nature, and scope of the judicially imposed rulemaking requirement in Oregon can be obtained from an analysis of the principal Oregon Supreme Court case on the subject. *Megdal v. Oregon Board of Dental Examiners*[51] required the Oregon Supreme Court to review an order of the State Board of Dental Examiners revoking Megdal's dental license on the ground that he had engaged in "unprofessional conduct."[52] The conduct deemed "unprofessional" consisted of an intentional misrepresentation by Megdal when he obtained malpractice insurance. In the process of securing the insurance, Megdal had stated that certain dentists were employed by him in his Oregon practice when, in fact, they were employed by him in his California practice.[53] Megdal argued that the "unprofessional conduct" standard contained in the agency enabling act was too vague to be applied to him without prior agency elaboration of its specific contours by rule.[54]

The Oregon Supreme Court initially rejected a claim that the due process clause of the fourteenth amendment required the agency to elaborate the "unprofessional conduct" statutory standard by rule prior to its application.[55] The court then determined that the legislature intended the Board to create its own more specific standards for "unprofessional conduct" rather than to rely upon more specific standards of conduct currently recognized in that profession,[56] or adopted by the legislature in the language of the statute.[57] Finally, the court concluded that in creating more specific standards pursuant to this delegation of lawmaking authority, the agency was required to do so primarily by rule rather than by order because the legislature intended that result.

In justifying its conclusion that the Board was required to elaborate the statutory standard by rule prior to its application in a particular case, the Oregon Supreme Court first noted that the agency enabling act provided that the Board was expressly authorized to "make and enforce rules . . . for regulating the practice of dentistry."[58] While the enabling act did not unambiguously indicate that *rules* of the Board must be used to give more specific content to the "unprofessional conduct" standard, "there are reasons to believe this is the legislative pol-

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51. 288 Or. 293, 605 P.2d 273 (1980).

52. The enabling act explicitly authorized revocation of dental licenses for "unprofessional conduct." *See* Or. Rev. Stat. §679.140 (1)(c) and (5)(d) (1987).

53. 288 Or. at 295, 605 P.2d at 274.

54. *Id.*

55. *Id.* at 296-303, 605 P.2d at 274-78.

56. *Id.* at 306, 605 P.2d at 280.

57. *Id.* at 308-11, 605 P.2d at 281-82.

58. *Id.* at 311, 605 P.2d at 282 (construing Or. Rev. Stat. §679.250 (7) (1987)).

icy."[59] Those reasons included the need to assure fair notice to licensees of the specific conduct that might cause loss of their licenses.[60] The court went on to note that the legislature had made the policy of required rulemaking express in over thirty occupational licensing statutes, while it did not do so in the enabling act of the Board of Dental Examiners.[61] It believed this fact to be irrelevant, however, because "the difference of the potential impact, when one occupation is given fair notice of obligatory standards of propriety by prior rulemaking and another occupation is given no such prior notice, is too pronounced to be attributed to the legislature without some showing that it was intended."[62] As a result, the court concluded that the agency must elaborate the standard of "unprofessional conduct" primarily by rule, even in the absence of an express legislative direction. Its conclusion was based on the following principle: "[W]hen a licensing statute contains both a broad standard of 'unprofessional conduct' that is not fully defined in the statute itself and also authority to make rules for the conduct of the regulated occupation, the legislative purpose is to provide for the further specification of the standard by rules, unless a different understanding is shown."[63]

In light of this principle, the failure of the Board of Dental Examiners to issue rules further elaborating the statutory "unprofessional conduct" standard and to proscribe by *rule* the type of conduct for which Megdal's license had been revoked, was fatal. As a result, the court held that the revocation of his license in these circumstances was improper.[64] After all, "when the statute itself offers no further definition, the legislative delegation to the agency calls for such questions to be resolved in principle by rules rather than being confronted and disputed for the first time in charging a particular respondent directly under a conclusory term such as 'unprofessional conduct.' "[65]

The court was careful, however, to make clear that it was not requiring the impossible. It pointed out that any requirement that the agency "catalogue" by rule every kind of "professional misconduct" might well be "infeasible."[66] As a consequence, the principle on which the decision rested did not require rules imitating a "detailed criminal

59. *Id.*

60. *Id.*

61. *Id.* at 311-12, 605 P.2d at 282.

62. *Id.* at 313, 605 P.2d at 283.

63. *Id.* at 313-14, 605 P.2d at 283.

64. *Id.* at 321, 605 P.2d at 287.

65. *Id.* at 315, 605 P.2d at 284.

66. *Id.* at 314, 605 P.2d at 283-84 (quoting Board of Medical Examiners v. Mintz, 233 Or. 441, 448, 378 P.2d 945, 948 (1963)).

code."[67] Instead, what was necessary was rulemaking adequate "to serve the two purposes of giving notice of censurable conduct and confining disciplinary administration to the announced standards."[68] The agency could accomplish its need to regulate adequately the profession and to accomplish those purposes without resorting to unhelpful rules containing a "catchall clause that is as general as the standard it purports to elucidate."[69] It could, for example, indicate the particular types of relationships covered by the term "unprofessional conduct." In the end, therefore, the Oregon Supreme Court required rulemaking in these circumstances only as soon as feasible and to the extent practicable.

Three members of the Oregon Supreme Court specially concurred in the result of the *Megdal* case—but on grounds that were significantly different from those noted above.[70] These Justices agreed that the Board of Dental Examiners should be required to elaborate the statutory standard of "unprofessional conduct" by rule prior to proceeding against Megdal in a particular case. They disagreed, however, with the imputed legislative intent analysis of the majority opinion.[71] The author of the concurring opinion stated that while he agreed the Board was required to elaborate the statutory standard of "unprofessional conduct" by rules, it was "a fiction to hold that the statutory scheme and legislative history" compelled that result.[72] His view was that it is "more realistic to hold that the court, pursuant to its power to review the decisions of the Board, is empowered to require the promulgation of such standards [by rule]."[73]

To justify the conclusion that a reviewing court has authority to create a common-law requirement that agencies must elaborate their law primarily by rule rather than by order in circumstances where the potential sanction for violation of a statutory standard is "severe," the statutory standard is "particularly vague," and the standard is not illuminated by "a well understood meaning,"[74] the concurring opinion initially relied upon a statement by Kenneth Culp Davis. Davis had written that a reviewing court had inherent authority to create a common law requiring agencies to adopt "rules to guide the exercise of [their]

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67. 288 Or. at 314, 605 P.2d at 284 (1980).

68. *Id.* at 314, 605 P.2d at 284.

69. *Id.*

70. *Id.* at 321-24, 605 P.2d at 287-88 (Denecke, C.J., Tongue and Peterson, JJ., specially concurring).

71. *Id.*

72. *Id.* at 321, 605 P.2d at 287 (Denecke, C.J. concurring).

73. *Id.*

74. *Id.* at 323-24, 605 P.2d at 288.

administrative discretion."[75] However, Davis did not mention any specific legitimating authority for that proposition other than the desirability of the result. The concurring opinion in *Megdal* also relied upon an earlier Oregon Court of Appeals case for the conclusion that a court could create this requirement wholly on the basis of its common-law powers.[76] In *Sun Ray Drive-In Dairy Inc. v. Oregon Liquor Control Comm'n*, [77] the intermediate appellate court of Oregon reviewed the denial of a liquor license by a state agency. The agency had relied upon a statute authorizing the denial of such a license if there were "sufficient licensed premises in the locality" and the license was not required by the "public interest or convenience."[78] The court of appeals invalidated the action of the agency on the ground that the agency had not previously adopted rules elaborating these broad and vague statutory standards.[79] The court stated that a "legislative delegation of power in broad statutory language such as the phrase 'demanded by public interest or convenience' places upon the administrative agency a responsibility to establish standards by which that law is to be applied. The legislature has provided for such rulemaking in the Administrative Procedure Act."[80] A commentator has suggested a number of reasons for the conclusion of the court in *Sun Ray Dairy* that the agency must elaborate the statutory standard by rule before it may apply the standard in a particular case. Those reasons included the fact that rulemaking:

> (1) permitted public scrutiny of agency policy; (2) assured greater public confidence; (3) permitted interested parties to be heard in the formulation of policy; (4) permitted applicants to know in advance the standards of consideration; (5) assured even-handed treatment; (6) provided consistency in internal agency treatment of cases resolved without litigation; (7) enabled parties and decision makers in a contested case to know what facts must be demonstrated or found; and (8) minimized inconsistent, ad hoc, or ad hominim decisions. The court also emphasized the key interrelationship between written standards and adequate scrutiny of agency decisions through informed legislative oversight and probing judicial review.[81]

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75. *Id.* at 322, 605 P.2d at 288 (citing K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 6.13 at 225 (1976)).

76. *Id.*

77. 16 Or. App. 63, 517 P.2d 289 (1973).

78. *Id.* at 65, 517 P.2d at 290.

79. *Id.* at 70, 517 P.2d at 292.

80. *Id.* at 70, 517 P.2d at 292-93 (citations omitted).

81. Frohnmayer, *supra* note 36, at 442 (quoting Sun Ray Drive-In Dairy, Inc. v. Oregon Liquor Control Comm'n, 16 Or. App. 63, 72-75, 517 P.2d 289, 293-94 (1973)).

The court in *Sun Ray Dairy* did not, however, indicate the specific source of its authority to require such rulemaking.

The concurring opinion in *Megdal* assumed that the order of the court in *Sun Ray Dairy* prohibiting the agency from "act[ing] on the application until it had adopted rules governing the issuance of licenses"[82] was based entirely on a "common law principle" created by that court in the exercise of its inherent judicial powers, rather than on the putative intention of the legislature.[83] This assumption seems unjustified. As noted earlier, the opinion of the court in the *Sun Ray Dairy* case did *not* indicate the precise source of its authority to require such rulemaking. Consequently, the result in *Sun Ray Dairy* may be viewed as resting upon a judicial assumption that the legislature impliedly intended the agency to elaborate the principal contours of that vague statutory standard by rule rather than by order. If that is so, the *Sun Ray Dairy* case is consistent with the approach of the *Megdal* majority opinion rather than with the approach of the *Megdal* concurring opinion.

Further support for the putative legislative intention approach of the majority opinion in *Megdal* can also be found in the admission of the concurring opinion in *Megdal* that "the legislature did not address the issue of whether the Dental Board must promulgate rules defining 'unprofessional conduct.' "[84] Consequently, neither the relevant legislative history nor the relevant statutory text *precluded* the otherwise rational and functional assumption announced in the majority opinion that the legislature would have intended the agency, in these circumstances, to elaborate the statutory standard primarily by rule, if it had actually addressed the issue. The soundest conclusion, therefore, is that reached by the majority rather than the concurring opinion in *Megdal*.

It should be stressed that court-required rulemaking that is based upon an implied legislative intention has clearer legitimacy than court required rulemaking that is based wholly on the inherent powers of the judicial branch. This is so because the authority of the legislature to require agencies to make law by rule rather than by order is much clearer than the authority of the courts to impose such a requirement on agencies entirely on the basis of the courts' inherent powers to assure the effectiveness of judicial review.[85] An implied legislative inten-

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82. 288 Or. at 323, 605 P.2d at 288.

83. The concurring opinion in *Megdal* states that "[a]ttempting to reach the same result by interpreting the statute in my opinion can result, as I think it has in this case, in a very strained interpretation of a statute." *Id.*

84. *Id.* at 322, 605 P.2d at 287.

85. Professor Davis may also have suggested that courts have some inherent authority ancillary to their review powers over administrative action to require agencies in some situations to

tion approach to this problem also has the virtue of inviting legislative intervention in situations where the attributed legislative intention proves to be misplaced; and it has the additional virtue of assigning to the legislature an intention that is entirely reasonable and functional in light of the special advantages of agency lawmaking by rule as compared to agency lawmaking by ad hoc order.

Broadly stated, the principle established by the *Megdal* case is this: In the absence of clear evidence to the contrary, the legislature is presumed to intend an agency that has been delegated express authority to issue rules and express or implied authority to decide individual cases, subject to a vague statutory standard, to elaborate that statutory standard by rule rather than by order, as soon as feasible and to the extent practicable. This presumption would enable the courts, in the absence of statutes expressly mandating that result, to require agencies in such situations to elaborate the major contours of their law by rulemaking rather than by adjudication, but only to the extent that rulemaking is not disfunctional under the circumstances. However, even when it is stated in these broad terms, the *Megdal* principle does not fully satisfy the need for a general mandatory preference for agency lawmaking by rule.

First, the *Megdal* principle appears to be limited to situations in which agency lawmaking occurs pursuant to a statute containing a *vague* standard and, therefore, it is inapplicable to a great deal of

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engage in lawmaking by rule rather than by ad hoc order. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7:26 at 131 (2d ed. 1979). The justification for the judicial imposition of such a common law requirement wholly on the basis of inherent judicial power is unclear, but it may relate to the need of reviewing courts to ascertain whether or not particular agency action is consistent with agency law or practice and, therefore, is reasonable, or is inconsistent with agency law or practice and, therefore, is arbitrary or capricious, within the meaning of the review standards incorporated in the agency enabling act or in the state administrative procedure act. In addition, or in the alternative, the authority of a court to require agency rulemaking in some situations may relate to a perception of inherent judicial power to ensure, generally, that agencies act in a reasonable rather than in an arbitrary manner. The court, therefore, may have inherent authority over an agency's choice of lawmaking modality since this very choice may be arbitrary or capricious in particular circumstances.

In any event, in addition to the *Megdal* concurring opinion, a number of state cases hint at the existence of a common law judicial power to require agency lawmaking by rule in particular circumstances. Other cases state that courts have the power to impose rulemaking requirements in particular circumstances. These cases do not indicate any source for this judicial authority over agency lawmaking, thereby creating the inference that such authority derives from inherent judicial powers. One such case may be Boller Beverages, Inc. v. Davis, 38 N.J. 138, 155, 183 A.2d 64, 73 (1962), (stating that the agency must "in all fairness, bottom an alleged violation on general legislation before . . . [it] may rule in a particular case" in situations where the "agency has been given full rule-making power."). However, *Boller Beverages* can be explained on a basis other than the inherent common law power of a court to require an agency to engage in lawmaking by rule rather than lawmaking by order in such circumstances. *See supra* note 49.

agency lawmaking that occurs under statutory standards that are not of that character. Second, the *Megdal* principle is also apparently limited to situations in which the agency delegated lawmaking authority under a vague statutory standard has *expressly* been delegated authority to implement its powers by rule and, therefore, it is inapplicable to a great deal of agency lawmaking that occurs in situations where rulemaking powers may only be implied. However, because the rulemaking requirement of *Megdal* is based upon an assumed legislative intention, the *vague* statutory standard and the *express* delegation of rulemaking authority may be desirable or even essential criteria in light of the need to justify the reasonableness of that assumption. In any case, to the extent these limitations on the otherwise desirable *Megdal* doctrine persist, they indicate that it is not a fully satisfactory substitute for a more broad-scoped mandatory preference for agency lawmaking by rule.

Even more disappointing than the inadequacy of an expansive reading of the *Megdal* doctrine for present purposes is the failure of the Oregon Supreme Court to read that doctrine as expansively as it might have. Indeed, the recent Oregon Supreme Court case of *Trebesch v. Employment Division*[86] may have narrowed the potential applicability of the rule of construction first announced in *Megdal.* If this is so, it is unfortunate, and further supports the urgent need for a statutory solution to this problem.

In *Trebesch* the issue was whether the agency "was required to promulgate a rule defining the statutory phrase 'systematic and sustained effort to obtain work' before it could deny claimant extended unemployment benefits for failing to fulfill the statutory requirement."[87] Although the court's resolution of the issue in this particular case was ambiguous,[88] its analysis and elaboration of the *Megdal* principle suggests an unwillingness to engage in its broad generalization. After identifying the issue in *Trebesch,* the court noted that the answer to this question could not be found in the due process clause of the fourteenth amendment, in a common law of judicial review, or in any

86. 300 Or. 264, 710 P.2d 136 (1985).

87. *Id.* at 266, 710 P.2d at 137.

88. The court held that if the responsible agency official

> perceive[s] himself to have comprehensive review powers to consider interpretations of law . . . the term must be interpreted by rule and the absence of a rule before application to this claimant would compel reversal. On the other hand, [if he does not have such powers, he] may address the standards required for an adequate work search by order on reconsideration in light of the facts of this case.

Id. at 277, 710 P.2d at 143.

provision of the state Administrative Procedure Act.[89] "Rather, the answer is a matter of statutory interpretation, the relevant statutes being those regulating the particular agency whose action is challenged."[90] The role of the courts was to explain the "methodology" by which one may determine whether the legislature intended the agency to engage in lawmaking by rule rather than by order in a particular situation.[91]

Trebesch began its analysis of the *Megdal* principle by noting that the case "does not mean that all [statutory] terms delegating policymaking discretion [to an agency] can be applied only after rulemaking."[92] The legislature may, of course, expressly require an agency to elaborate a particular statutory term by rule prior to its application in a particular case.[93] When that happens, the job of the court is easy. However, absent such an express directive,

> the *breadth and kind of responsibility delegated to the agency by the statutory term* (fact-finding, applying an ambiguous law, or developing policy) will be one, but not a dispositive, factor which may indicate an implicit directive from the legislature for rulemaking. *In addition, the tasks the agency is responsible for accomplishing,* and the structure by which the agency performs its mandated tasks, all of which are specified in an agency's authorizing legislation, must be examined as a whole in order to discern the legislature's intent with regard to rulemaking.[94]

Therefore, in the *Trebesch* case, the Oregon Supreme Court construed the *Megdal* principle to mean that in situations where the legislature has not expressly indicated its intentions with respect to mandatory agency rulemaking, courts must determine those intentions by analyzing a number of factors. These factors include "the character of the statutory term," "the authority delegated and the tasks assigned to the agencies," and "the structure by which the agencies execute their tasks."[95] While the Court does not explain exactly how these factors are to be applied, the court is clear that they must all be considered in an effort to ascertain the legislature's putative intention.

One can hardly object to the fairness of this multi-factored, contextual approach to assigning a putative legislative intention with respect

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89. *Id.* at 267, 710 P.2d at 137-38.

90. *Id.* at 267, 710 P.2d at 138. The court noted that the state administrative procedure act only provided uniform procedures for the making of rules rather than mandating a preference for agency lawmaking by rule.

91. *Id.*

92. *Id.* at 270, 710 P.2d at 139.

93. *Id.*

94. *Id.*, (emphasis added).

95. *Id.* at 270, 710 P.2d 139-40.

to the duty of an agency to engage in lawmaking by rule when the relevant statutes do not expressly resolve that question. But it should be noted that this approach would substitute a full-scale, particularized inquiry producing unpredictable and inconsistent results, for a broad rule of construction based on *Megdal* that would be easier to apply and that would yield relatively predictable and consistent results. In light of the significant advantages of rulemaking over adjudication for agency lawmaking, courts would be warranted in conveying the following message to the legislature: Whenever statutes are facially silent with respect to the obligation of a particular agency to elaborate a vague statutory term by rule rather than by order, courts will assume that the legislature intended the agency to do so, as soon as feasible and to the extent practicable, by rule, in all situations in which the legislature explicitly vested the agency with rulemaking authority. If the legislature does not believe that principle of construction is accurate generally, or in particular situations, it can alter it by statute. But unless the legislature does so, such a principle of construction is more reasonable, functional, and practical than a multi-factored, in-depth analysis of probable legislative intent on this question of the kind adopted by the recent *Trebesch* case.

C. *Due Process Requirement*

The highest courts of several states have suggested another possible basis for a judicially imposed preference for agency lawmaking by rule. They have indicated that in some circumstances the failure of an agency to elaborate its law by rule prior to the application of that law in a particular case may constitute a denial of due process. The Colorado Supreme Court actually invalidated particular agency action on due process grounds because it was convinced that the agency's failure to elaborate its law by rule was so unfair in the circumstances as to be unconstitutional. In *Elizondo v. Department of Revenue,*[96] the Colorado Supreme Court reviewed the action of the Motor Vehicle Division of the State Department of Revenue suspending Elizondo's driver's license and denying his request for a probationary license during the suspension period.[97] The statute authorizing the Department to issue probationary licenses during a suspension did not indicate the criteria the Department should use when it determined whether to issue probationary licenses in particular cases.[98] The Department was authorized,

96. 194 Colo. 113, 570 P.2d 518 (1977).
97. *Id.* at 115, 570 P.2d at 519-20.
98. *Id.* at 116, 570 P.2d at 520.

but not required, by its enabling act to issue rules to facilitate the execution of its licensing functions. Despite this authority, the Department had issued no rules to guide its hearing officers when they decided whether to grant or deny probationary drivers' licenses.[99]

The Supreme Court of Colorado held in *Elizondo* that "due process requires . . . the Department of Revenue [to] promulgate rules . . . to guide hearing officers in their decisions regarding requests for probationary licenses," and that "these rules . . . must be sufficiently specific to inform the public what factors will be considered relevant by Department hearing officers, so that requests for probationary licenses may be supported by relevant evidence and arguments."[100] This conclusion was justified in these circumstances because the Department's failure to issue rules specifying the criteria for the issuance or denial of a probationary license

> has left the granting or denial of probationary drivers' licenses solely to the unfettered discretion of individual hearing officers. As a result, neither the public nor the courts have any means of knowing in advance what evidence might be considered material to any particular decision. Nor is there any assurance that each hearing officer will not, consciously or subconsciously, follow standards quite different from those applied by his or her colleagues.[101]

As a result, the situation was so unfair that it amounted to an unconstitutional denial of due process of law. The court in *Elizondo* cited no United States Supreme Court cases to support its conclusion that the due process clause of the fourteenth amendment required the Department to structure the agency's discretion to issue probationary licenses by rule rather than by ad hoc order. However, the Colorado Supreme Court did cite a number of lower federal court cases[102] and two state supreme court cases as a basis for such a requirement.[103]

Elizondo appears to be correct that in some situations an agency's previous failure to elaborate its law by rule may be so unfair as to

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99. *Id. See also id.* at 118; 570 P.2d at 521 ("By failing to follow that statutory *suggestion*" that it issue rules confining its discretion, the Department acted so unfairly as to violate due process) (emphasis supplied).

100. *Id.* at 118-19, 570 P.2d at 522.

101. *Id.* at 118, 570 P.2d at 521.

102. *Id.* at 118-19, 570 P.2d at 522 (citing Holmes v. New York City Hous. Auth., 398 F.2d 262 (2d Cir. 1968); Barnes v. Merritt, 376 F.2d 8 (5th Cir. 1967); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964); City of Santa Clara v. Kleppe, 418 F. Supp. 1243 (N.D. Cal. 1976); Baker-Chaput v. Cammett, 406 F. Supp. 1134 (D.N.H. 1976); St. Augustine High School v. Louisiana High School Athletic Ass'n, 270 F. Supp. 767 (E.D. La. 1967); Smith v. Ladner, 288 F. Supp. 66 (S.D. Miss. 1966)).

103. *Id.* (citing City of Atlanta v. Hill, 238 Ga. 413, 233 S.E.2d 193 (1977); Pennsylvania State Bd. of Pharmacy v. Cohen, 448 Pa. 189, 292 A.2d 277 (1972)).

preclude specific agency action against a person in a particular case. But it would be a mistake to conclude that the fourteenth amendment due process clause requires state agencies to elaborate all delegations to them of lawmaking authority under vague statutory standards by rule rather than by ad hoc decision before they may be exercised in particular cases. The Alaska Supreme Court has noted, for example, that "[t]he process of making new law in the course of an administrative adjudication does not constitute a *per se* violation of due process," and that "[t]he adequacy of process does not [necessarily] depend on the advance adoption of standards."[104] The Alaska Supreme Court has also indicated, however, that it would require agency elaboration of its law by rule "to the extent necessary to assure a fair administrative process."[105] But it has not indicated when a "fair administrative process" might require such rulemaking except to note that "vagueness or lack of notice" might in particular circumstances induce that result.[106]

The majority opinion in the Oregon *Megdal* case is also instructive in this regard. The court in that case rejected the claim that the revocation of an occupational license on the grounds of "unprofessional conduct" was a violation of due process in a situation where that vague statutory term had not been further defined by agency rules.[107] In dealing with the due process issue, the *Megdal* court noted that due process prohibited the imposition of penal sanctions for the violation of an excessively vague law, and that it prohibited the retrospective creation of crimes.[108] Consequently, agency lawmaking that is the basis for imposing penal sanctions must be executed by rule to the extent necessary to provide fair notice of the specific conduct subject to punishment, and to the extent necessary to avoid the ex post facto creation of criminal conduct. However, these arguments for requiring administrative lawmaking by rule rather than by ad hoc order are applicable only to the administration of laws whose violations are subject to penal sanctions. They are not helpful tools with which to require administrative lawmaking by rule in schemes that cannot be characterized as penal.[109]

Nevertheless, the Oregon court in *Megdal* admitted there was some support for the proposition "that a prior specification of grounds should be a prerequisite of due process in administrative as well as

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104. Amerada Hess Pipeline Corp. v. Alaska Pub. Util. Comm'n, 711 P.2d 1170, 1178 (Alaska 1986).

105. *Id.*

106. *Id.*

107. Megdal v. Oregon State Board of Dental Examiners, 288 Or. 293, 296-303, 605 P.2d 273, 274-78 (1980).

108. *Id.* at 299, 605 P.2d at 276.

109. *Id.* at 300, 605 P.2d at 276.

penal deprivations."[110] It also recognized that the Supreme Court of Pennsylvania had joined together two otherwise unrelated propositions—the notion that a penal statute must provide fair notice of the conduct it prohibits and the notion that access to a governmentally regulated occupation is protected by due process[111]—to produce a new principle. According to that principle, the grounds to revoke an occupational license "for 'grossly unprofessional conduct' must be limited to those further spelled out in the statute or in [agency] rules, because 'revocation of licenses and permits for conduct not specifically defined or prohibited by the statute, would render the statute unconstitutional on grounds of vagueness in violation of the Due Process Clause of the Fourteenth Amendment.' "[112] But the majority opinion in the Oregon *Megdal* case noted that there was no support in the decisions of the United States Supreme Court for the conclusion of the Pennsylvania court that the standards utilized in the administration of occupational

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110. *Id.* at 301, 605 P.2d at 277 (citing K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES 28, 224 (1976), and Note, *Due Process Limitations on Occupational Licensing*, 59 VA. L. REV. 1097, 1104-06 (1973)).

111. 288 Or. at 301, 605 P.2d at 277 (construing Pennsylvania State Bd. of Pharmacy v. Cohen, 448 Pa. 189, 292 A.2d 277 (1972)).

112. *Id.* (citing Pennsylvania State Bd. of Pharmacy v. Cohen, 448 Pa. 189, 198-99, 292 A.2d 277, 282 (1982)).

This case held invalid an order of the Board of Pharmacy suspending a pharmacist's license for one year and revoking indefinitely his pharmacist's permit. *See id.* The pharmacist in question did not violate any of the thirteen specific grounds constituting "grossly unprofessional conduct" that were listed in the agency's enabling act or any rules of the agency. *Id.* at 195-96, 292 A.2d at 280. The court held, first, that the thirteen specific grounds constituting "grossly unprofessional conduct" were intended by the legislature to be exhaustive and, therefore, the agency could not add to them by any further lawmaking on the basis of the statutory term "unprofessional conduct." *See id.* at 196-98, 292 A.2d at 280-81. The court held, second, that the agency could suspend or revoke licenses for additional reasons "upon proof of violation of any properly adopted rules . . . promulgated by the Board." *Id.* at 197-98, 292 A.2d at 281. But, the court noted, it was "only by means of these statutorily granted rule-making powers that the Legislature has empowered the Board to provide additional grounds for sanctions," and the Board had not done so. *Id.* at 198, 292 A.2d at 281-82. The result in this Pennsylvania case, therefore, was wholly a product of statutory interpretation rather than a requirement of due process.

However, in deciding that the legislature had limited the Board's authority to suspend or to revoke such licenses to those enumerated in the agency enabling act and to those enumerated in its rules, the court indicated that this construction of the agency enabling act was influenced by constitutional considerations. The court stated that the creation of additional grounds for license suspension or revocation through retroactive agency lawmaking by adjudication would present serious due process, fair notice, and void-for-vagueness problems. *See id.* at 198, 199, 292 A.2d at 282. In arriving at that conclusion the court stressed that the licensing statute in question imposed "sanctions" and, therefore, "must satisfy the requirements of notice and a clear description of what is prohibited conduct [imposed] on all penal statutes by the Fourteenth Amendment." *Id.* at 199, 292 A.2d at 282. That is why it concluded that "[t]he function of prohibiting new conduct or practices in the pharmacy profession rests with the Legislature or with the Board through its rule-making authority." *Id.* at 202, 292 A.2d at 284.

licensing laws "must meet those for penal laws."[113] The court in *Megdal* did note that there were some lower federal court cases that might be viewed as requiring agencies delegated lawmaking authority of a nonpenal nature under a vague statutory term to elaborate that term by rule before they sought to apply it in particular cases.[114] Nevertheless, it deemed these cases to be "inconclusive" and refused to find that the Board of Dental Examiners had acted unconstitutionally because it revoked Megdal's license on the grounds of "unprofessional conduct" in the absence of agency rules further refining the meaning of that statutory term.[115]

However, on the basis of the cases deemed "inconclusive" by the court in the Oregon *Megdal* case, Kenneth Culp Davis has argued that "[t]he law may be in the early stages of a massive movement toward judicially required rulemaking that will reduce discretion that is unguided by rules or precedents."[116] This new law will allow agencies that use systems of precedents to continue to rely upon them rather than rules. On the other hand, "agencies without systems of precedents may be judicially required to use their rulemaking power to provide guiding standards."[117] The purpose of the development described by Davis is to ensure that agencies structure the exercise of their discretionary powers by the adoption of standards that will reduce the likelihood that those powers will be exercised in a wholly arbitrary manner. Davis notes that this development could be partly based on the idea that "in some circumstances the lack of rules or standards is so unreasonable that due process is denied."[118] For this proposition he cites several cases decided by the United States Court of Appeals.

The first of these lower federal court cases cited by Davis was *Holmes v. New York City Housing Authority.*[119] That case involved a state agency that processed a huge volume of applications for public housing. In doing so, the agency denied approximately eight applications for each one granted.[120] Yet, the agency had no ascertainable stan-

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113. 288 Or. at 302, 605 P.2d at 277.

114. *See id.* at 303, 605 P.2d at 278 (citing Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969) (university must develop "misconduct" standards for expelling students); Holmes v. New York City Hous. Auth., 398 F.2d 262, (2d Cir. 1968) (agency must develop standards for grant and denial of public housing); White v. Roughton, 530 F.2d 750 (7th Cir. 1976) (agency must develop standards for eligibility for public assistance); Hornsby v. Allen, 326 F.2d 605, 610 (5th Cir. 1964) (city must develop standards for the grant and denial of liquor licenses).

115. *See id.*

116. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7:26 at 128 (2d ed. 1979).

117. *Id.*

118. *Id.* at 131.

119. 398 F.2d 262, 265 (2d Cir. 1968).

120. *Id.* at 263.

dards of any kind to guide the exercise of its discretion. The court held that "due process requires [in these circumstances] that selections among applicants be made in accordance with 'ascertainable standards.' "[121]

However, the *Holmes* case does not necessarily require, as a matter of due process, agency creation of these standards by rule rather than by a reliance upon a system of precedents created in individual cases. While it may be possible to infer a *rulemaking* requirement from the opinion of the court, that inference is not mandatory. The same is true of a number of other lower federal court cases that rely upon the requirements of due process in order to force agencies to create standards to govern the exercise of their discretionary powers. While these cases may require the agencies involved to create such standards to ensure that the agencies do not exercise their discretionary powers in a wholly unstructured and arbitrary manner, they do not appear to require those standards to be created by rule rather than by a system of precedents created in individual cases.[122] And it should be noted that the reliance of agencies upon a system of precedents, as well as on rules, establishing standards governing their discretion, can go a long way towards securing the due process objective of these cases—the elimination of entirely random, unpredictable, unprincipled, and capricious, low visibility agency decisionmaking in particular cases.

On the other hand, some lower federal court cases may more clearly suggest that a due process, administrative standards requirement can only be satisfied by the issuance of rules. For example, *White v. Roughton*[123] involved the validity of an administrator's action in denying or terminating financial assistance to individuals claiming benefits under an established program of the public body involved. No written standards governed the eligibility for such aid or the amounts that would be made available in particular cases. Instead, the administrator and his staff determined eligibility and the amount of benefits on the basis of "their own unwritten personal standards."[124] In these circumstances, the court held that the lack of written standards vested "virtually unfettered discretion" in the administrator and his staff and, therefore "is clearly violative of due process."[125] It insisted that "[f]air and

121. *Id.* at 265.

122. *See, e.g.*, Hornsby v. Allen, 326 F.2d 605, 610 (5th Cir. 1964); Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, 596-98 (D.C. Cir. 1971).

123. 530 F.2d 750 (7th Cir. 1976).

124. *Id.* at 754.

125. *Id.*

consistent application of such [eligibility] requirements requires that [the administrator] establish written standards and regulations."[126]

Another case that is worth mentioning in this connection is *Soglin v. Kauffman.*[127] The issue in that case was whether a public university could suspend particular students for non-academic "misconduct" without having previously elaborated the specific content of that term by rule. The court held that the university could not do so because the term "misconduct," unaided by "rules" that would have increased its particularity, was void for vagueness as a matter of due process.[128] *Soglin* is clear that "such sanctions [as suspension or expulsion must] be administered in accord with preexisting *rules.*"[129] However, the case does not stand for the more general proposition that agencies must structure their discretion by rule rather than by a system of individual case precedents in all circumstances where due process may require them to create operating standards in order to avoid arbitrary action. The reason for this conclusion is that the court in *Soglin* unambiguously treated the university disciplinary proceeding as a *penal* proceeding, noting specifically that "[t]he use of 'misconduct' [alone] as a standard in imposing the *penalties* threatened here" violates the requirements of due process of law.[130] By analogizing the university disciplinary proceeding in question to the criminal process and the due process, void-for-vagueness requirements applicable to the criminal process, the court limited the applicability of the *Soglin* case to other situations in which the administrative process is being used for clearly penal rather than regulatory purposes.

The United States Supreme Court has not confirmed the general thesis that due process may require agencies operating outside of the penal process to structure their discretion by rule rather than by a system of individual case precedents so as to assure fair notice to persons who may be affected and to avoid wholly arbitrary administrative action. Indeed, the discussion in Part II of this Article of the principal United States Supreme Court cases dealing with the discretion of agencies to choose the modality by which they make law, appears to demonstrate that such a general thesis is *un*likely to be received warmly in that quarter. As noted, there are also few (if any) lower federal court decisions that would unambiguously support this thesis, although a significant number of lower federal court cases seem to agree that, in par-

126. *Id.*
127. 418 F.2d 163 (7th Cir. 1969).
128. *Id.* at 168.
129. *Id.* (emphasis supplied).
130. *Id.* (emphasis supplied).

ticular circumstances, the risk of arbitrary agency decisionmaking without further elaboration of the standards or criteria used by an agency to exercise its discretion may be so high as to be unfair in a due process sense.

Consequently, it is unlikely that due process doctrine will generally require agencies operating outside of any penal process to elaborate their law primarily by rule rather than by order. Due process, therefore, does not appear to be a promising substitute for a legislative solution to the problem addressed by this Article. At best, due process may require agencies to elaborate their law by rule rather than by order in some rare instances where the agency process is of a nonpenal character. The inertia of existing law on this subject and the strong presumption of the validity of agency action[131] are likely to minimize the number of situations in which agencies are required by due process to make their law primarily by rule. Those situations are also likely to be very unpredictable as well as infrequent.

The reason for that unpredictability is the methodology currently used by the courts to determine whether particular procedures employed by an agency are so unfair as to violate due process. The applicable methodology requires a court to engage in a balancing process in which it considers three factors:

> [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[132]

One conclusion seems inevitable with respect to the application of these amorphous factors to a particular situation in order to determine whether the agency involved must elaborate its law in that context primarily by rule. In practice, the application of these factors is likely to yield results that are very hard to predict beyond the justified assump-

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131. *See, e.g.*, United States v. Chemical Found., 272 U.S. 1, 14-15 (1926); Transcentury Properties, Inc. v. State, 41 Cal. App. 3d 835, 843-44, 116 Cal. Rptr. 487, 492 (1974); Colorado Health Facilities Review Council v. District Court, 689 P.2d 617, 623 (Col. 1984) (en banc); Mathiasen v. State Conservation Comm'n, 246 Iowa 905, 910, 70 N.W.2d 158, 161 (1955); New England Tel. & Tel. Co. v. Public Util. Comm'n, 448 A.2d 272, 279 (Me. 1982); Taub v. Pirnie, 3 N.Y.2d 188, 195, 144 N.E.2d 3,6, 165 N.Y.S.2d 1, 5, (1957). *See also* 2 F. COOPER, STATE ADMINISTRATIVE LAW 450, 451 (1965); 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 11.04, at 56 n.34, § 11.06 (1958); C. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 1.28 (1985); 29 AM. JUR. 2d Evidence § 172 (1962).

132. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

tion that the odds are overwhelmingly in favor of an affirmance of the agency's determination because of the existing general state of the law on this subject, and the strong presumption in favor of the validity of agency action.[133] So, while due process may be of some marginal utility in efforts to increase agency lawmaking by rule, it is not an effective tool with which to establish a clear mandatory general preference for administrative rulemaking.

D. Abuse of Discretion

The typical state administrative procedure act provides that a court may reverse agency adjudicative action if it is "arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion."[134] In addition, reviewing courts are often expressly or impliedly authorized to set aside agency action on that basis by particular agency enabling acts and by the inherent judicial powers vested in state courts by the state constitution or the common law. As a result, reviewing courts may be called upon to determine whether an agency's use of adjudication rather than rulemaking to announce new law was "arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion." While the implementation of this judicial review standard may result in a court imposing a preference for agency lawmaking by rule in some particular situations, those situations will be very rare and narrowly defined. There are two reasons for this conclusion. First, a strong presumption of validity normally attaches to agency action.[135] Second, state courts have almost always upheld as reasonable exercises of agency authority the choices of agencies in particular circumstances to develop their law by ad hoc order rather than by rulemaking. Nevertheless, a number of state and federal courts operating under similar judicial review standards[136] have suggested that there are situations in which agency lawmaking by order rather than by rule would be an abuse of discretion.

For example, several state courts have indicated that while agencies have broad discretion in choosing the lawmaking modality to be used in particular situations, the courts will review an agency's choice in order to ensure that the agency did not abuse its discretion or act

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133. *See* sources cited *supra* note 131.

134. *See* 1961 MSAPA, *supra* note 19 § 15(g)(6) at 430-31. The acts of most states are based on the 1961 MSAPA. 14 U.L.A. 357 (1980).

135. *See* sources cited *supra* note 131.

136. *See* 5 U.S.C. § 706 (2)(A) (1983), for the similar standard to be applied by federal courts when they review federal agency action: "arbitrary, capricious, an abuse of discretion."

arbitrarily or capriciously.[137] However, in the particular cases in which these state courts indicated their willingness to review, on an abuse of discretion standard, an agency's choice to elaborate its law on a case-by-case basis in adjudication rather than by rulemaking, they almost always upheld the action of the agency, and did so on a perfunctory basis.[138] Only one state case, other than those discussed earlier in this section under the statutory construction and due process categories, actually holds an agency's choice to engage in lawmaking by ad hoc order rather than by rulemaking to be an abuse of discretion on the particular facts before the court. That case is not helpful because the precise basis for the court's conclusion that the state agency abused its discretion in deciding to proceed by adjudication is unclear.[139]

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137. Potts v. Bennett, 487 So. 2d 919, 921-22 (Ala. Civ. App. 1985) (agency's choice to proceed by adjudication was not arbitrary or unjust); Town of Brookline v. Commissioner of the Dep't of Envtl. Quality Eng'g, 387 Mass. 372, 379-80, 439 N.E.2d 792, 799 (1982) (agency's choice to proceed by adjudication was not an abuse of discretion); Bunge Corp. v. Commission of Revenue, 305 N.W.2d 779, 785 (Minn. 1981) (agency's choice to proceed by adjudication was not arbitrary or capricious or an abuse of discretion); 613 Corp. v. Division of State Lottery, 210 N.J. Super. 485, 493, 510 A.2d 103, 111 (1986) (agency's choice to proceed by adjudication was an abuse of discretion).

138. *See* cases cited *supra* note 137.

139. 613 Corp. v. Division of State Lottery, 210 N.J. Super. at 485, 510 A.2d at 103 (1986). It held that the agency abused its discretion when it denied a lottery ticket vendor's license to a particular applicant on the basis of the controversial nature of the applicant's principal business, because the agency had not previously issued a rule embodying such a policy. *Id.* at 500, 510 A.2d at 111. The precise basis for the court's conclusion that the agency abused its discretion by proceeding on the basis of adjudication rather than by rulemaking to establish this policy is unclear.

It is possible that the court in this case decided only that the agency had established a de facto rule in the form of a policy of "general applicability" and "continuing effect," *id.* at 498, 510 A.2d at 110, denying licenses on that ground, ("It appears likely that a policy of denying licenses to what the Lottery deems 'controversial enterprises' has been established," *id.* at 497, 510 A.2d at 109), and, therefore, that the failure of the agency to make such a de facto policy de jure by issuing a formal rule after following required rulemaking procedures was improper, ("If an agency determination constitutes an 'administrative rule,' it must comply with the procedural requirements of the Administrative Procedure Act to be valid," *id.* at 498, 510 A.2d at 110). If so, this case is similar to a number of other New Jersey cases invalidating an agency's action in an adjudication because the agency had issued a policy of general applicability and continuing effect—a de facto rule—that it had not made de jure by following required rulemaking procedures. *See* cases cited *supra* note 49.

It is also possible, however, that this intermediate appellate court concluded, on the basis of a misreading of an earlier state supreme court decision, (*see Boller Beverages, Inc. v. Davis,* 38 N.J. 138, 183 A.2d 64 (1962), discussed *supra* note 49), that an agency "delegated full rulemaking power. . . must bottom an alleged violation on general legislation [an agency rule] before it can. . . [decide a particular case]," 210 N.J. Super. at 498, 510 A.2d at 110, and that an agency in such circumstances may not proceed wholly on the basis of adjudication *unless* it demonstrates that it must do so in order "to respond to specialized or unforseen problems," *id.* at 499, 510 A.2d at 110, which were not present in the instant case, *id.* at 499-500, 510 A.2d at 110-11. Or, the holding of this case may have been based on a misreading by this intermediate appellate court of another earlier state supreme court decision, (*see* Texter v. Department of Human Serv., 88 N.J. 376, 443 A.2d 178 (1982), discussed *supra* note 49), for the proposition that "where the subject

Some federal cases have more clearly suggested particular circumstances in which federal agencies would abuse their discretion if they proceeded to elaborate their law by ad hoc order rather than by rule. After noting that agencies normally have broad discretion to choose the means of lawmaking modality employed in particular contexts, the United States Supreme Court indicated in *NLRB v. Bell Aerospace Co.*[140] that an agency might have to proceed by rule rather than by order in three situations: if "the adverse consequences" of retroactive lawmaking are so substantial because of past reliance on prior agency decisions "that the . . . [agency] should be precluded from reconsidering the issue in an adjudicative proceeding;" if "some new liability is sought to be imposed on individuals for past actions that were taken in good-faith reliance on . . . [agency] pronouncements;" or if the imposition of fines or damages was involved.[141] There is no other clear indication from the United States Supreme Court of circumstances in which agencies engaged in lawmaking *without penal consequences* would abuse their discretion if they chose adjudication rather than rulemaking for this purpose. There are, however, a number of lower federal court cases that have spoken on the subject.

The most important of these cases is *Ford Motor Company v. Federal Trade Commission,*[142] a decision of the United States Court of Appeals. In *Ford Motor Co.* the Federal Trade Commission had challenged, in a particular agency adjudication, the lawfulness of certain practices of an automobile dealer in repossessing cars from defaulting purchasers.[143] That adjudication was the first agency action against a dealer for such conduct; and it was clear that industry practice had been to do what the dealer involved in this case had done.[144] The court held that the decision of the agency to proceed by adjudication rather than by rulemaking was an abuse of discretion because "the rule of the case made below will have general application. It will not apply just to Francis Ford. Credit practices similar to those of Francis Ford are wide spread in the car dealership industry."[145] In short, even though the

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matter of a quasi-judicial adjudication encompasses concerns that transcend those of individual litigants . . . rulemaking procedures should be followed." *Id.* at 498-99, 510 A.2d at 110. In any case, to the extent the latter basis for finding an abuse of discretion in agency lawmaking by adjudication differs from the first basis, it will be discussed in the context of more explicit federal case law on the subject. *See infra* text accompanying notes 142-53.

140. 416 U.S. 267 (1974).

141. *Id.* at 295.

142. 673 F.2d 1008 (9th Cir. 1981), *cert. denied,* 459 U.S. 999 (1982). *See generally* Berg, *supra* note 18.

143. 673 F.2d at 1008-09.

144. *Id.* at 1009-10.

145. *Id.* at 1110.

Federal Trade Commission had issued an order through appropriate adjudicatory procedures that was directed solely at the parties involved in the particular case, the court held the agency had abused its discretion because it should have proceeded by rulemaking rather than by adjudication to establish the new law in question.

Ford Motor Co. appears to hold "that an agency action which changes existing law and has widespread application [in its ultimate effect] must be accomplished through rulemaking and not by adjudication,"[146] and that if an agency seeks to engage in lawmaking with that effect by means of adjudication, the agency abuses its discretion. *Ford Motor Co.* relied on an earlier United States Court of Appeals case, *Patel v. I.N.S.*,[147] for the proposition that "agencies can proceed by adjudication to enforce discrete violations of *existing* laws where the effective scope of the rules impact will be relatively small; but an agency must proceed by rulemaking if it seeks to change the law and establish rules of widespread application . . . ."[148]

There are a number of difficulties with the conclusion that an agency abuses its discretion whenever the agency uses adjudication rather than rulemaking to engage in lawmaking in these circumstances. First, as Davis notes, the principal proposition asserted in the *Ford Motor Co.* case

> that "an agency must proceed by rulemaking if it seeks to change the law and establish rules of widespread application" . . . is truly spectacular because (a) no previous law supports it, (b) both courts and agencies have at all stages in their development changed law through adjudication even when such law is of widespread application, and (c) the proposition is directly contrary to two prominent Supreme Court holdings, . . . *S.E.C. v. Chenery Corp,* and . . . *NLRB v. Bell Aerospace Co.*[149]

Second, no special circumstances appear in the *Ford Motor Co.* case that would justify the action of the court in setting aside as an abuse of discretion that particular decision of the agency to engage in ad hoc lawmaking by order rather than by rule.[150] Consequently, Davis appears to be correct when he states that federal law does not support the abuse of discretion principle concerning an agency's choice of lawmak-

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146. *See* Berg, *supra* note 18, at 155. *See also* K. DAVIS, 1982 SUPPLEMENT TO ADMINISTRATIVE LAW TREATISE § 7:25 (2d ed. 1979, Supp. 1982) [hereinafter DAVIS, 1982 SUPP.].

147. 638 F.2d 1199 (9th Cir. 1980). The case is criticized in DAVIS, 1982 SUPP., *supra* note 146 at 180.

148. 673 F.2d at 1009.

149. *See* DAVIS, 1982 SUPP., *supra* note 146 at 181-82.

150. *See* Berg, *supra* note 18, at 158-60.

ing modality that was enunciated by the *Ford Motor Co.* case, and that federal law should not do so.[151]

It is hard to justify the *Ford Motor Co.* principle as a defensible application of the "arbitrary or capricious or characterized by an abuse of discretion" standard of judicial review. After all, the courts have repeatedly held that agencies have broad discretion to choose the method by which they elaborate their law in circumstances where they have been delegated authority to do so either by rule or by order; and a strong presumption of validity attaches to agency action. The fact that agency rulemaking is a more *desirable* means of changing existing law in circumstances in which that change will affect many people does not suggest, absent special circumstances, that an agency vested with broad discretion to choose either means of lawmaking can be demonstrated to have abused its discretion, or to have acted arbitrarily or capriciously, if it instead issues an otherwise de jure adjudicatory order with that effect. Cases in at least one state express a similar view. The Florida Supreme Court has indicated that while "[a]dministrative agencies are not required to institute rulemaking procedures each time a new policy is developed, . . . that form of proceeding is *preferable* where established industry-wide policy is being altered."[152] The American Bar Association has also suggested the *desirability* of such agency action in these circumstances recognizing, however, that the existing state of the law cannot reasonably be construed to *require* that result in the absence of special circumstances.[153]

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151. *See* DAVIS, 1982 SUPP., *supra* note 146 at 183.

152. Florida Cities Water v. Florida Pub. Serv. Comm'n, 384 So. 2d 1280, 1281 (Fla. 1980) (emphasis added). *See also* Florida Pub. Serv. Comm'n v. Indiantown Tel & Tel., 435 So. 2d 892, 895 (Fla. Dist. Ct. App. 1983).

153. The Council of the American Bar Association formulated the following resolution which was subsequently adopted by the ABA House of Delegates:

> RESOLVED, That the American Bar Association approves the following principles respecting the choice between rulemaking and adjudication in administrative agency proceeding:
>
> 1. An agency is generally free to announce new policy through an adjudicative proceeding.
> 2. When rulemaking is feasible and practicable, an agency which has been granted broad rulemaking authority ordinarily should use rulemaking rather than adjudication for large-scale changes, such as proscribing established industry-wide practices not previously thought to be unlawful.
> 3. An agency should not be empowered to treat its adjudicatory decisions precisely as if they were rules. In particular, it is inappropriate to empower an agency or court to treat third-party departures from holdings in agency adjudications as, ipso facto, violations of law. Where the precedent of a prior adjudication is sought to be applied in a subsequent adjudication, a party should have a meaningful opportunity to persuade the agency that the principle involved should be modified or held inapplicable to his situation.

In sum, then, the "abuse of discretion" standard cannot be read to *require* agencies to use rulemaking rather than adjudication whenever they change the existing state of the law in a way that will have an impact of widespread application through the doctrine of stare decisis. This conclusion is justified in light of the strong presumption of validity of agency action, the broad discretion vested in most agencies to choose their lawmaking modality in particular circumstances, and the overwhelming number of cases upholding the propriety of agency choices on that subject. And even if the "abuse of discretion" standard could be read in this way by state courts, application of that standard would not solve the problem to which this paper is addressed because it would not *require* agencies delegated authority to engage in lawmaking by order as well as by rule to prefer rulemaking for *all* such lawmaking as soon as feasible and to the extent practicable. Instead, application of this standard would only require agencies to use rulemaking rather than adjudication for some narrower subset of situations. Therefore, it is not an adequate substitute for the imposition of a much more general obligation on state agencies to prefer lawmaking by rule.

E. Conclusion: Power of Courts to Require Rulemaking

Prior discussion demonstrates that under various theories and to various extents, courts may require agencies authorized to engage in lawmaking by rules as well as by orders to exercise that function by rulemaking rather than by adjudication in particular circumstances. While some of the theories discussed are sounder than others, and some hold greater promise for acceptance by the courts than others, they are not sufficient, either individually or collectively, to enforce the kind of general preference for agency lawmaking by rule proposed in part III of this Article. That is, while these theories are individually and collectively helpful in moving agencies in the direction proposed by part III of this Article, they will not ensure that, generally, state agencies authorized to make law by rule as well as by order, will do so by rulemaking as soon as feasible and to the extent practicable. The only fully satisfactory means with which to ensure such a general preference for administrative lawmaking by rule, therefore, is legislative.

Note that the "first paragraph is an expression of disapproval with the broad principle announced in Ford Motor Co." and the third paragraph attempts to ensure that an agency is "held to the procedural consequences of its choice" between the two modalities of lawmaking. *See* Berg, *supra* note 18, at 177.

V. A Legislative Solution

Prior discussion demonstrates that a mandatory preference for state agency lawmaking by rule that is fully satisfactory may be established only by legislation. Section 2-104(3) of the new Model State Administrative Procedure Act (1981 MSAPA)[154] seeks to accomplish this result. It provides that each agency must, "as soon as feasible and to the extent practicable, adopt rules . . . embodying appropriate standards, principles, and procedural safeguards that the agency will apply to the law it administers."[155] This broad and general provision attempts to compel agencies to act as speedily as possible and to go as far as they reasonably can to structure by rule the procedural and substantive discretion conferred upon them, so as to minimize arbitrary action and give fair notice to the public. That is, to the extent possible and prudent under the circumstances, this provision requires agencies initially to elaborate the major contours of their procedural and substantive discretion by rule rather than by ad hoc adjudicatory order.[156]

The specific language of this 1981 MSAPA provision requires agencies to issue both rules containing "appropriate . . . procedural safeguards" and rules containing substantive "standards [and] principles . . . that the agency will apply to the law it administers."[157] This

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154. Model State Administrative Procedure Act (1981), 14 U.L.A. 73 (1987 Supp.) [hereinafter 1981 MSAPA]. As a Reporter for the 1981 MSAPA, the author of this Article was responsible for the drafting of § 2-104.

155. *Id.*

156. An Illinois statute may have a similar purpose. However, poor drafting may interfere with the accomplishment of that result. The statute provides: "Each rule which implements a discretionary power to be exercised by an agency shall include the standards by which the agency shall exercise the power. Such standards shall be stated as precisely and clearly as practicable under the conditions, to inform fully those persons affected." Ill. Rev. Stat. ch. 127, § 1004.02 (1981). The difficulty with this statute is that it does not indicate clearly whether agencies are required, in the first place, to adopt rules to implement their discretionary powers. On its face, this provision appears applicable only to situations in which agencies have already decided to issue rules to implement their discretionary powers. It does not appear to require them initially to use rules rather than ad hoc orders to implement those powers. But this could be a misreading of the language or intention of this provision. If so, the Illinois statute is the first state law seeking to impose a mandatory preference for state agency lawmaking by rule. *See* Escalona v. Board of Trustees, State Employees Retirement Sys., 127 Ill. App. 3d 357, 469 N.E.2d 297 (1984). As subsequent discussion in the text will indicate, the MSAPA provision is superior to the Illinois statute because the former does not contain the same defects as the latter.

A recently enacted Utah statute also may have a similar purpose. Utah Code Ann. § 63-46a-3(2)(a)-(b) (Supp. 1987) provides that "[i]n addition to other rulemaking required by law, each agency shall make rules when agency action (a) authorizes, requires, or prohibits an action. . . [or] (b) provides or prohibits a material benefit." As subsequent discussion in the text will indicate, the MSAPA provision is superior to this Utah provision in so far as the MSAPA provision specifically provides that such rulemaking is required only "as soon as feasible and to the extent practicable."

157. 1981 MSAPA, *supra* note 154, at 73.

means that agencies must make a substantial effort to provide, by *rule*, procedural protections that are adequate, under the particular circumstances, to protect persons affected by agency action against improper exercises of agency power. It also requires agencies to make a substantial effort to elaborate, by *rule*, the substantive standards used in the application of the laws they administer in order to provide fair notice of their contents and some assurance that they will be consistently applied.

This model statutory provision is qualified by an express rule of reason. It only requires agencies to engage in such rulemaking "as soon as feasible and to the extent practicable." So an agency need only adopt rules of the enumerated type as quickly as it reasonably can under the particular circumstances in which it operates. Furthermore, an agency need only adopt such rules as far as—to the degree—reasonably possible under the particular circumstances in which it operates. This rule of reason embodying the standards of "feasible" and "practicable" is more demanding of agencies than the general and unstructured duty to act in a reasonable manner that is imposed upon them by the typical state judicial review provision, and less demanding of them than would be the imposition of an unqualified obligation to issue rules of this kind.

Many factors must be considered when applying the agency obligation to make the required rules "as soon as feasible and to the extent practicable." Agencies and courts must consider the individual circumstances of the relevant agency, and the particular circumstances of the subject matter to which the mandatory rulemaking requirements are to be applied. And, of course, the factors relating to the timeliness of an agency's performance of its obligation will be closely related to and intertwined with the factors relating to the detail and precision with which it must perform that obligation.

The rulemaking obligations imposed by this provision must be performed in a timely fashion. Agencies must make the required rules "as soon as feasible." The word "feasible" means "capable of being done, executed, or effected: possible of realization."[158] It also means "capable of being utilized . . . , or dealt with successfully: suitable."[159] Its synonym is "possible."[160] In determining *when* an agency, with respect to a particular matter, must make the rules required by the 1981 MSAPA provision, the following factors should be considered: the extent to which the agency had an opportunity to accumulate the neces-

158. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 831 (1976).

159. *Id.*

160. *Id. See also* American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 508-09 (1981).

sary knowledge and experience to resolve the matter by rule in a sound manner; the extent to which the performance of this rulemaking obligation would have precluded the agency from performing other more important legal obligations; the extent to which related matters or circumstances were not sufficiently settled so as to permit satisfactory resolution by rule of the issues involved; and the extent to which greater precision or detail in the agency law was possible in light of the factors relevant to the sufficiency of its precision and detail, which will be discussed next. It should be stressed, however, that in considering these relevant factors, agencies and courts must respect the fact that rulemaking of the kind required by this model statutory provision must be executed only "as soon as feasible," which means, as soon as it is capable of being done under the circumstances.

Agencies are also required by this provision of the MSAPA to elaborate their law by rule only "to the extent practicable." The word "practicable" means "possible to practice or perform: capable of being put into practice, done, or accomplished: feasible."[161] It also means "capable of being used: usable."[162] Its synonym is also "possible."[163] The *precision and detail* with which an agency must make the rules relating to a particular matter should be determined in light of the following factors: the resources available to the agency for the more detailed and precise elaboration of its law; the extent to which the formulation and adoption of more detailed and precise rules would have precluded the agency from performing other more important legal obligations; the extent to which further detail or precision would impede the achievement of lawful agency objectives; the extent to which changing circumstances or existing uncertainties make further elaboration of agency law inconsistent with lawful policies the agency wishes to achieve; the extent to which the particular questions to be addressed involve so many complex facts and policy considerations, and are of such a narrow scope, that their more detailed or specific resolution is unmanageable outside of an adjudication settling the rights of particular persons on the basis of their circumstances; the extent to which the agency has been unable to accumulate sufficient expertise to elaborate its law any further; the extent to which additional detail or precision is necessary to afford affected parties with fair notice and the forseeability of the need for additional detail or precision for this purpose; and the extent to which the agency had the time, consistent with the timeliness factors noted above,

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161. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1780 (1976).

162. *Id.*

163. *Id.*

to further elaborate its law. It should also be stressed that, in considering these factors, agencies and courts must respect the fact that rulemaking is required only "to the extent practicable," which means with as much precision and detail as is capable of being accomplished under the circumstances.

Prior discussion demonstrates that Section 2-104(3) of the 1981 MSAPA uses the terms "feasible" and "practicable" to mean that agencies must initially make their law by rule rather than by order as soon as reasonably possible and as far as reasonably possible in light of the particular circumstances of the agency and subject matter involved. This model statutory provision embodies a clear legislative determination that the values of *prompt* elaboration of agency law by rule and *detailed* elaboration of agency law by rule are to be preferred over the competing general values of agency convenience or agency preference for ad hoc law making in the course of adjudications. As a result, the 1981 MSAPA provision would fundamentally change existing law in most states by denying agencies authorized to issue rules and to decide individual cases plenary discretion to consider, on an entirely equal footing, lawmaking by rule and lawmaking by order, as alternative means with which to elaborate their law. Instead, this provision embodies a general direction to agencies mandating a clear preference in favor of lawmaking by rule, subject to a rule of reason.

Effective enforcement of this statutory preference for initial agency lawmaking by rule would not appear to be difficult. A reviewing court could invalidate the application of agency law created ad hoc in the course of an adjudication whenever the agency was required to make that law initially in the form of a rule. That is what happened in the Oregon *Megdal* case.[164] Such an invalidation of improper retrospective agency lawmaking by ad hoc adjudicatory order would be an effective means by which to induce agencies to comply with the requirements of this model statutory provision. An agency failing in some manner to perform its obligation, "as soon as feasible and to the extent practicable," to make its law by rule, could not cure its failure retrospectively; but the agency could do so prospectively by issuing the appropriate rules it should have issued previously. Those rules would then be applicable, *from the time of their effective date,* to all those within their ambit except, perhaps, to the extent particular individuals could demonstrate that the earlier agency failure to make the rules in question unduly prejudiced them at that later time.

Criticisms of the language of the 1981 MSAPA provision on the

164. *See supra* text accompanying notes 51-69.

ground that it is vague do not stand on solid ground. One cannot deny that the words "as soon as feasible and to the extent practicable" are vague. But the same may be said about many general requirements imposed on administrative bodies. Administrative procedure acts, for example, usually authorize courts to overturn agency action that is "arbitrary," "capricious," or "an abuse of discretion."[165] The effect of such a delegation of authority to the courts is to impose on agencies an obligation to act in a manner which is certainly vague at the margin. The desirability of such admittedly vague obligations, however, may best be assessed by calculating the total benefits they actually achieve in practice and comparing those benefits to the total costs associated with their everyday implementation — including the costs attributable to the fact that in some situations agencies will not be clear about the effect of those requirements on their actions. After engaging in such a comparison, the drafters of the 1981 MSAPA concluded that the total benefits obtained from agency efforts to comply with that act's mandatory preference for agency lawmaking by rule would substantially exceed the total costs of those efforts. That judgment seems sound.

While this model statutory provision expresses a generalized legislative preference for rulemaking rather than adjudication as the primary method of agency lawmaking, it also indicates, as noted earlier, that this preference is not absolute. Case-by-case administrative lawmaking is sanctioned by this provision in circumstances where rulemaking is not yet "feasible" and in relation to matters as to which rulemaking is not "practicable." No agency is omniscient enough to eliminate every ambiguity in its rules, or to anticipate every question that will arise in the administration of its programs. There will always be circumstances in which the elaboration of particular details of agency law by rules will be impracticable, or the issuance, at a particular point in time, of rules to embody particular agency law, will be infeasible.

Consequently, agencies must continue to make some of their law on a case-by-case basis in adjudicatory proceedings. However, it is desirable, for the many reasons noted earlier, to ensure that as much agency law is incorporated in rules as is possible. Therefore, a means must be found to ensure that agencies incorporate in rules issued at a later time those principles of law they created initially in the course of their adjudications. Section 2-104(4) of the 1981 MSAPA seeks to ensure this result. That provision states that "as soon as feasible and to the extent practicable, [each agency must] adopt rules to supersede principles of law or policy lawfully declared by the agency as the basis

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165. *See, e.g.*, 1961 MSAPA, *supra* note 19, § 15(g)(6).

for its decisions in particular cases."[166] The practical effect of this proposed statute would be to require agencies engaged in initial lawmaking by ad hoc order under the rule of reason exception contained in Section 2-104(3), to make a serious subsequent effort to displace that case law with rules. The reasons for requiring agencies to supersede with rules, law properly made in the course of their adjudications, include almost all of the reasons advanced earlier in support of a requirement that agencies initially make their law by rule rather than by ad hoc adjudicatory order.

It should be stressed that this post hoc rulemaking provision only requires agencies, "*as soon as feasible and to the extent practicable*," to displace with rules, principles of law properly developed in their case precedent. This rule of reason is identical to the rule of reason contained in Section 2-104(3) of the 1981 MSAPA. Consequently, the discussion of the rule of reason applicable to that provision establishing a preference for initial agency lawmaking by rule is also fully applicable to this provision requiring only post hoc rulemaking.

The rules an agency makes to satisfy its post hoc rulemaking obligation need not be wholly congruent with the displaced principles of law declared by the agency in particular cases. So long as they are both substantively and procedurally within the authority delegated to the

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166. Note that this provision of the 1981 MSAPA was bracketed because the NCCUSL believed that it would be very controversial. Note also that Wisconsin has a provision in its Administrative Procedure Act stating that "[e]ach agency authorized by law to exercise discretion in deciding individual cases may formalize the general policies evolving from its decisions by promulgating the policies as rules which the agency shall follow until they are amended or repealed." Wis. Stat. § 227.11(2)(c) (1987 Supp.). However, this provision appears to be superfluous because agencies are virtually always deemed to have implied authority to codify in rules principles of law that they have lawfully adopted in particular cases. And it does not go as far as the MSAPA provision because the latter *requires* agencies to displace by rules, principles of law properly adopted in individual cases, while the former only authorizes them to do so.

On the other hand, in an apparent effort to emulate the objectives of the MSAPA provision quoted in the text, Utah recently enacted a statute providing as follows: "Each agency shall enact rules incorporating the principles of law established by final adjudicative decisions within 90 days after the decision is announced." Utah Code Ann. § 63-46a-3(6) (Supp. 1987). This provision differs from the similar 1981 MSAPA provision in three principal respects. First, the Utah provision imposes an absolute 90 day time limit for post hoc rulemaking in place of the "as soon as feasible" standard contained in the MSAPA provision. Second, the Utah provision imposes an absolute requirement for the incorporation in rules of all principles of law established in adjudication while the MSAPA provision requires such post hoc rulemaking only "to the extent practicable." Finally, the Utah provision requires the agency to *codify* in rules principles of law contained in final adjudicative decisions, while the MSAPA provision only requires the agency to adopt rules to "supersede" those principles. The MSAPA provision is clearly superior to the Utah provision. This is so because, as subsequent discussion in the text will demonstrate, each of the three variances from the MSAPA provision, noted above, is a defect. The three variances from the MSAPA provision contained in the Utah provision are undesirable because they unduly limit agency discretion and do not take account of the practical realities of day-to-day agency operation.

agency, the rules required by this provision may codify, be broader or narrower than, or prospectively overrule, the case law they displace. The validity of such a rule, therefore, will not depend upon whether the rule is an accurate codification in all respects of the agency case law it replaces. As long as the agency acts in a manner consistent with its authorizing legislation and with required rulemaking procedures, the agency may simply adopt that earlier case law as a rule without substantive alteration, adopt it with minor or substantial alterations, or repudiate for the future all or a portion of that law. The 1981 MSAPA provision only requires that, "as soon as feasible and to the extent practicable," an agency must engage in a rulemaking proceeding to consider and adopt a rule governing those subjects as to which it has developed discernible law in adjudications.

An agency that breaches its duty to displace a line of case precedent with a rule may not subsequently rely on that line of precedent. Instead, the agency must readjudicate wholly de novo whatever principles of law might apply to the particular circumstances covered by that earlier case law. Of course, this remedy may not be particularly effective in practice. In subsequent adjudication, the agency might adopt and apply the same principle of law embedded in the prior precedent upon which the agency could no longer lawfully rely, without actually reconsidering the underlying issues on their merits. Courts enforcing such a post hoc rulemaking requirement will have to be vigilant to ensure that agencies fully and fairly reconsider the propriety and desirability of prior agency case law in such circumstances rather than only appear to do so. That will not be an easy task and it will be laden with difficulties. Admittedly, the absence of a fully effective mechanism with which to ensure agency compliance with this post hoc rulemaking requirement is a problem. However, even if this provision is not, in every instance, effectively enforceable in the courts, it is desirable in order to communicate community expectations to the agencies and to facilitate the evaluation of agency performance by the legislature and the public at large.

This post hoc rulemaking requirement may also be criticized as being excessively vague. "How generally applicable must an adjudicatory determination be in order to constitute a 'principle of law or policy' " that must be displaced by a rule?[167] Where, between the extremes of an adjudicatory decision deciding the law applicable to a particular case in only the very narrowest, fact specific terms, and an adjudicatory decision announcing its decision on the basis of a legal principle with potentially broad stare decisis consequences, does a prin-

167. Scalia, *supra* note 43, at 25, 28.

ciple of law emerge that must be displaced by a rule pursuant to the requirements of this statutory provision? There is an answer to this question.

The displacement of agency case law by rules is required by this provision only "as soon as feasible and to the extent practicable." Practicability will require that a particular agency elaboration of law in an adjudication extend beyond the facts of the specific case in which that law originates before it must be embodied in a rule. This means that a principle of law declared in an agency adjudication must, in practical effect, be of potential general applicability before its displacement by a rule is required. The extent to which a principle of law declared as the basis for a particular adjudication is of potential general applicability may be ascertained from the text of the agency decision, and the nature of the particular facts and determinations involved in that case.

On the one hand, it is clear that an agency with an identifiable line of decisions based upon a particular principle of law must displace that principle with a rule "as soon as feasible and to the extent practicable." On the other hand, it is clear that an agency need not engage in any rulemaking if it only issues a single decision on a subject, and that decision appears to rest only on the peculiar or unusual circumstances of that particular case rather than on some discernible principle of more general applicability. Of course, even where there is only a single decision on a subject, that decision may be decided in such a way as to make clear that it rests on a principle broader than its unique circumstances, thus making the requirements of this post hoc rulemaking requirement fully applicable. So, this provision will require some judgments by agencies. And a reviewing court will uphold those judgments unless they constitute a clear abuse of discretion. To demonstrate such a clear abuse of discretion and overcome the presumption of agency regularity, a party will either have to demonstrate a pattern of agency decisions on a particular subject clearly establishing an agency default in its duties under this provision, or show that a single agency decision on a particular subject is written, or has been treated by the agency, in such a way as to indicate clearly its potential general applicability.

In the end, one must admit that the requirement imposed by Section 2-104(4) of the 1981 MSAPA is vague at its periphery. But so are many other general requirements imposed on agencies; and this requirement is no more vague than many other general requirements imposed on agencies for which there is broad support in our body politic. For example, as noted earlier, administrative procedure acts generally authorize courts to overturn agency action that is "arbitrary," "capricious," or an "abuse of discretion." Yet the obligations imposed on agencies by this delegation of authority to the courts are vague at the

margin and, therefore, are not without cost on that basis. Nevertheless, there is a general agreement that these impositions on agencies are valuable tools with which to assure lawful and responsible agency action. The same may be said about the requirements embodied in the 1981 MSAPA post hoc rulemaking provision. The total benefits flowing from conscientious efforts to apply that provision are likely to outweigh substantially the total costs incurred in the course of those efforts.

This is so even though the "sheer magnitude of the task [hence cost] of such codification" of agency case law in rules may be great.[168] Our society decided, long ago, that those subject to the law are entitled to fair notice of its contents, and that the public and its politically responsible officials should have an effective opportunity to monitor, and to participate in, its creation. To accomplish these important objectives we have been willing to assume all reasonable costs. There is no evidence that the costs of formally displacing agency case law with rules in the manner contemplated by this provision would be especially large or disproportionate to the benefits gained from such action. Agencies already informally codify many of their adjudicatory decisions for internal staff use even if they do not follow the rulemaking process when they do so, or make the product generally available to the public at large. How else can agencies educate their own staffs about the law they are to apply, and assure that in practice their staffs follow all applicable agency law? To that extent, the additional costs imposed by the displacement of agency case law by rules, "as soon as feasible and to the extent practicable," are likely to be much smaller than opponents might otherwise suggest.

The 1981 MSAPA post hoc rulemaking requirement has been criticized on the ground that it creates an unacceptable dilemma with respect to the fairness of agency lawmaking. "If the subsequent rulemaking [displacing agency case law] regularly endorses the holdings of earlier adjudications, they will rightly be regarded as charades."[169] On the other hand, if "they often reverse (for the future) those holdings — which have been the basis for particularized commands or even penalties in the past — then the adjudicatory process is bound to fall into deserved disrepute."[170]

This criticism does not withstand analysis. It is true that in the rulemaking proceedings to displace agency law created in adjudications, agencies may, within the scope of their delegated authority, either codify that law in the rule finally adopted, reject it as being unsound, or

168. *Id.*
169. *Id.*
170. *Id.*

modify it in some way. But surely this is not an unusual situation. From time-to-time, legislatures as well as agencies have codified, in ways that are simply declaratory of the preexisting law, common law principles as well as principles embedded in agency case law. So, too, legislatures by statute, as well as agencies by rule, have altered or abolished principles embedded in the common law or in agency case law. It seems indefensible to argue that these positive law confirmations, modifications, or repudiations of prior case law principles are unacceptable when they occur as part of an institutionalized process that requires agencies to reconsider the propriety of the law they create in the course of adjudications. When a legislature *requires* a reconsideration of agency case law, it expressly sanctions such agency action and the subsequent displacement of that agency case law by agency rules. In addition, the process of agency reconsideration in a rulemaking proceeding of principles of law established in its own cases is more democratic, more politically responsible, and more visible, than the more closed adjudication processes that initially created that law. Had the legislature itself accomplished the identical reconsideration by statute, no one could reasonably complain that anything unseemly or harmful had occurred. It is hard to see how that conclusion is altered when the legislature, instead, orders an agency to engage in such a reconsideration subject to procedures that would make its action highly visible, responsive to the public and to politically accountable officials, and consistent with the need for fully informed decisionmaking.

The post hoc rulemaking requirement contained in Section 2-104(4) of the 1981 MSAPA embodies a fair compromise between the practical need of agencies to continue making some of their law by adjudication, and the practical need of the public and their politically accountable surrogates to have agencies make as much of their law as is reasonably possible by rule. The provision is surely not perfect; there is merit in the vagueness charge and there will be some difficulty in ensuring the provision's full enforcement. On balance, however, this post hoc rulemaking requirement is a substantial advance in the existing law on this subject, and a reasonable effort to reconcile some important competing values.

A final but important point should be made about both the 1981 MSAPA provision requiring agencies initially to make their law by rule rather than by order, and the 1981 MSAPA provision requiring agencies to engage in post hoc rulemaking to displace principles of law properly adopted by ad hoc adjudication. The burden of persuasion will be on those who wish to challenge, in a court, an agency decision to proceed initially by order rather than by rule to elaborate its law on a particular subject, or an agency failure to displace by rules specified

principles of law properly declared in its adjudications. Persons challenging such agency action will have to convince the reviewing court that rulemaking by the agency was feasible at the time in question and practicable with respect to the matter in question. A combination of the usual presumption of administrative regularity[171] and the express principle of reason that modifies the requirements of these two provisions, will ensure that agencies subject to these provisions will retain some latitude within which they may use adjudication for lawmaking. But they will no longer be able to treat rulemaking and adjudication as fungible means of lawmaking. Instead, they will have to rely upon rulemaking in all situations where they do not have a really strong justification for engaging in lawmaking by ad hoc order.

VI. CONCLUSION

Most states have uncritically followed federal law by allowing state agencies authorized to issue rules and to decide individual cases to elaborate their law either by rule or by order. The only limitations imposed by these states on their agencies' choice of lawmaking modality are a general duty to act reasonably, and a duty to follow any specific statutory commands applicable to particular situations. As a result, most states have vested their agencies with a very broad discretion in choosing the means by which they will exercise their delegated lawmaking functions. This is unfortunate. Previous discussion demonstrates that state agencies should generally be required, "as soon as feasible and to the extent practicable," to make their law initially by rule rather than by ad hoc order. A number of important differences between the state and federal administrative processes were highlighted to demonstrate that such a broad-scoped rulemaking preference is more urgent for state administrative lawmaking than for federal administrative lawmaking.

A clear and binding general preference for initial state agency lawmaking by rule rather than by ad hoc order is desirable because of the overwhelming advantages of the former in most situations. Almost all of the advantages of rulemaking suggest that it would also be desirable to require post hoc rulemaking by agencies in situations where they must initially make law by order. So long as these requirements are subject to a principle of reason, they are likely to be consistent with the practical need to operate state agencies efficiently, effectively, and economically. It seems clear that the many advantages of such a

171. Recall the usual presumption of agency regularity. *See* sources cited *supra* note 131.

mandatory preference for state administrative rulemaking far outweigh its disadvantages.

This Article has demonstrated that the courts in a few states have attempted to create a binding preference for administrative lawmaking by rule in the absence of explicit statutory authority. While these efforts have been helpful, their impact has been relatively limited because only a handful of states are involved; the circumstances in which these courts have required rulemaking have been narrowly defined; and the legal justification for these judicially imposed requirements has sometimes been unclear or even dubious. Nevertheless, the Oregon courts have provided a potential basis for a relatively broad-scoped, judicially imposed preference for administrative lawmaking by rule. In the absence of a statutory solution, its efforts are worthy of emulation by other state courts because they appear to be both legitimate and consistent with sound public policy.

Nevertheless, it is clear that legislation is the best means by which to ensure a generally applicable, broad-scoped preference for state agency lawmaking by rule. In each state, a statute requiring agencies, "as soon as feasible and to the extent practicable," to elaborate their law by rule rather than by ad hoc order, in the absence of specific legislation to the contrary, would be desirable. This statute should be supplemented by a statute requiring agencies, "as soon as feasible and to the extent practicable," to displace with rules principles of law properly adopted by them in particular cases. Together, these provisions would ensure that state agencies authorized to make rules and to decide individual cases would elaborate the major contours of their law by rule, and would resort to lawmaking by adjudication only when rulemaking was disfunctional or unrealistic in the particular circumstances. Agencies would no longer be able to choose freely to make their law wholly or primarily by ad hoc order.

The benefits that would flow from increased state agency lawmaking by rule and decreased state agency lawmaking by order are likely to be considerable. They are likely to include enhanced agency attentiveness to the wishes of the general public, greater agency accountability to the governor and legislature, increased visibility for the contents of agency law, decreased opportunities for arbitrary agency action, increased agency efficiency, and better quality agency decisionmaking. There are undoubtedly costs in imposing such a mandatory general preference for rulemaking on state agencies; but the benefits that are likely to flow from such a requirement appear to exceed those costs by a substantial amount.