

# AGENCY STATUTORY INTERPRETATION AND POLICYMAKING FORM

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## INTRODUCTION

In *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*,<sup>1</sup> and a shorter follow-up article,<sup>2</sup> Professor Jerry Mashaw sets forth a preliminary but still very helpful defense of the divergence of agency and judicial statutory interpretation. In Mashaw's charting of the terrain, he notices, but does not have occasion to explore, the relevance of the agency's chosen policymaking form—formal adjudication, notice-and-comment rulemaking, or guidance, etc.—to its approach to statutory interpretation. In view of the different forms and occasions for statutory interpretation by an agency, Mashaw remarks, "It would be surprising for agency interpretive methodology to be invariant across these differing contexts (although it may be)."<sup>3</sup> In this short symposium

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1. Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501 (2005) [hereinafter *Norms, Practices, and the Paradox of Deference*].

2. Jerry L. Mashaw, *Exploring Agency Statutory Interpretation*, 31 ADMIN. & REG. LAW NEWS 6 (Spring 2006).

3. Mashaw, *Norms, Practices, and the Paradox of Deference*, *supra* note 1, at 525.

sium contribution, I take up this invitation to examine the relevance of the agency's policymaking form to its approach to statutory interpretation.

The core point I wish to advance is a relatively basic one—namely, that an agency's approach to statutory interpretation is in part a function of the policymaking form through which it acts. My strategy is to examine two of the most important policymaking forms—notice-and-comment rulemaking and formal adjudication—and to argue that the considerations that distinguish agency and judicial interpretation have a markedly different place in these two agency policymaking forms. For purposes of exposition, I focus on two dimensions that distinguish agency and judicial statutory interpretation: (1) the role of political influence in general, and presidential direction in particular; and (2) the role of internal management constraints, and considerations of budget in particular. As to these two dimensions, agency statutory interpretation in formal adjudication is difficult to distinguish from judicial statutory interpretation. In contrast, when the agency engages in notice-and-comment rulemaking, it is appropriately more influenced by political directions and internal management considerations. I suggest that due process constraints that apply in both formal agency adjudication and judicial adjudication draw statutory interpretation in these two contexts together, and distinguish both from agency statutory interpretation in notice-and-comment rulemaking. These arguments, if correct (and I advance them tentatively here), highlight a neglected element of a classic issue in administrative law—the agency's choice of policymaking form. The agency's choice of policymaking form is conventionally understood to involve questions of procedure, the legal effect of the agency's product, and the availability of judicial review.<sup>4</sup> Perhaps, in addition, the agency's choice should be understood as informed by the difference in interpretive constraints that accompany the agency's different policymaking forms.

### I. INTERPRETATION, IMPLEMENTATION

At the outset, it is important to note that my discussion, following Mashaw's,<sup>5</sup> takes a capacious view of what counts as agency interpretation. In particular, I treat "agency statutory interpretation" functionally as reflected in the variety of forms through which an agency implements a statute—whether in a rule, an adjudicative decision, a guidance letter, or a decision not to act. This broad view does not rely on distinguishing "interpretation"

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4. M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1390 (2004).

5. Jerry L. Mashaw, *Agency-Centered or Court-Centered Administrative Law? A Dialogue with Richard Pierce on Agency Statutory Interpretation*, 59 ADMIN. L. REV. 889, 893-903 (2007) [hereinafter *Agency-Centered or Court-Centered*].

from policymaking in the agency's practice, but rather treats an agency's implementation of a statute as its interpretation of it.<sup>6</sup>

I do not take this broad view as to what counts as agency statutory interpretation on the ground that it is conceptually or practically impossible to distinguish the elements of an agency's decision that look more like policymaking—cost-benefit analysis, for instance—from those parts of what an agency does that appear to be similar to aspects of what a court does when it interprets a statute—an agency considering the scope of its jurisdiction, for example—though doing so will not always be easy.<sup>7</sup> Rather the point of taking such an inclusive view is to set up a comparison between how agencies specify the meaning and requirements of statutes and how courts do. With that comparative purpose in mind, it does not make sense to identify only an element of what an agency does in specifying the meaning of a statute as involving interpretation—or, for that matter, to identify only a slice of the court's specification of the requirements of statute as its interpretation, as opposed to, say, its implementing doctrine.

This broad conception of what counts as agency statutory interpretation has clear implications for the argument for divergence of agency and judicial interpretation. In particular, the more inclusive the account of agency statutory interpretation, the more straightforward the argument becomes for divergence in interpretive approaches, as agencies do many things that courts do not as part of their process of statutory implementation. I do not see this terminological choice as a problem as long as one remains self-conscious about its implications, for instance, by guarding against the reflex to examine the agency's approach to interpretation solely with respect to features that distinguish good judicial statutory interpretation—the current paradigm of legal interpretation—as opposed to the considerations that are part of sound public administration.<sup>8</sup>

## II. POLITICS IN AGENCY RULEMAKING AND ADJUDICATION

Two core premises animate the argument for divergence in agency and judicial statutory interpretation: (1) “Agencies have a different institutional role in our legal order than do courts,”<sup>9</sup> and (2) the interpretive commitments of the interpreter are in part a function of the interpreter's institutional role.<sup>10</sup> From these two premises, the argumentative path to exposing the

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6. *See id.* at 897-98.

7. *See id.*

8. Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 677 (2007).

9. Mashaw, *Agency-Centered or Court-Centered*, *supra* note 5, at 901.

10. *Id.*

grounds for divergence in agency and judicial interpretive approaches is to locate salient differences in institutional role.

Perhaps the most fundamental difference, and the difference with which I shall begin, is that “agency officials are concededly political [actors,] . . . [u]nlike judges.”<sup>11</sup> As Professor Peter Strauss puts it:

[T]heir wages in theory and their resources in reality are hostage to the appropriations process; they spend much of their time testifying to congressional committees, responding to inquiries or demands from the President, members of Congress, or assorted presidential or congressional offices; they may be called to account for the decisions they take in ways a judge could never conceive for her function.<sup>12</sup>

Political oversight is a basic feature of agency life. Virtually all agencies remain in some dialogue with the White House on the implementation of policy,<sup>13</sup> and likewise face the recurrent prospect of being called to account for their decisions before congressional committees.<sup>14</sup> At this high level of abstraction, an agency implements its statute in a context in which the agency as a whole is viewed as appropriately influenced by the views of current politicians. The same is not conceded with regard to judges. As Strauss sums up the point, “part of what distinguishes agencies from courts in the business of statute-reading is that we accept a legitimate role for current politics in the work of agencies.”<sup>15</sup>

The formal role of political contacts and direction, however, depends on the form of the agency’s policy implementation. Consider two very basic differences in the law governing formal adjudications and notice-and-comment rulemakings: (1) in adjudications, the APA prohibits *ex parte* contacts,<sup>16</sup> including contacts with political actors,<sup>17</sup> whereas in notice-and-comment rulemaking, the APA includes no such prohibition;<sup>18</sup> and (2) con-

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11. Peter L. Strauss, *When the Judge is not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 329 (1990).

12. *Id.*

13. See, e.g., Lisa Schultz Bressman & Michael P. Vandenberg, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2006) (describing the presidential control model and agency experience in EPA with regulatory review by the White House).

14. See Jack M. Beer, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 121-27 (2006) (describing the scope and mechanisms for congressional oversight of agencies).

15. Strauss, *supra* note 11, at 335.

16. Administrative Procedure Act (APA), 5 U.S.C. § 557(d) (2006).

17. See *Prof'l Air Traffic Controllers Org. v. FLRA*, 685 F.2d 547, 567 (D.C. Cir. 1982); *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1538-39 (9th Cir. 1993).

18. See APA, 5 U.S.C. § 553; *Elec. Power Supply Ass'n v. FERC*, 391 F.3d 1255, 1266 (D.C. Cir. 2004) (noting well-established law that § 557(d)'s prohibitions on *ex parte* contacts do not apply to rulemaking under § 553). Debate in the courts persists as to the contours of a due process prohibition on *ex parte* contacts applicable to notice-and-comment

templated and actual rulemakings are subject to regulatory review by OMB,<sup>19</sup> whereas formal adjudications have not been subject to OMB oversight.<sup>20</sup>

Strong background values support the prohibition on ex parte contacts in formal adjudication, just as they support the prohibition in judicial adjudication. Ex parte contacts are generally thought to undermine the opportunity for litigants to rebut ex parte evidence and arguments, thus conflicting with core due process ideas of fair play.<sup>21</sup> As Professor Thomas McGarity notes, “[a]bsent any constraints on presidential intervention, it is possible for affected parties to channel vital information and arguments to the agency through the White House or OMB and for the agency to rely upon that information without first exposing it to the critical light of public comment.”<sup>22</sup> Indeed, in the extreme case in which an ex parte presidential directive was to dictate the outcome of an adjudication, it would violate the core principle of *Morgan v. United States*<sup>23</sup> that “[t]he one who decides must hear.”<sup>24</sup> The official that purported to make the decision, the agency, would not be the actual decisionmaker, and the actual decisionmaker, the President, would not have satisfied even the minimum requirements of “hearing.”<sup>25</sup>

The distinct place of agency adjudication in the executive branch has long been acknowledged. Chief Justice Taft’s opinion in *Myers v. United*

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rulemakings. *Compare* Home Box Office, Inc. v. FCC, 567 F.2d 9, 56-57 & n.125 (D.C. Cir. 1977) (embracing broad requirement of disclosure of ex parte contacts in notice-and-comment rulemaking based in due process, not the APA); *Action for Children’s Television v. FCC*, 564 F.2d 458, 474-77 (D.C. Cir. 1977) (limiting *Home Box Office’s* prohibition to notice-and-comment proceedings involving “competing claims to a valuable privilege”); *Sierra Club v. Costle*, 657 F.2d 298, 402 (D.C. Cir. 1981) (declining to apply *Home Box Office* to rulemaking involving general policymaking); *Elec. Power Supply Ass’n*, 391 F.3d at 1263, 1266 (noting *Home Box Office* was based on due process clause and limited by *Action for Children’s Television* and *Sierra Club*). But whatever residual prohibition on ex parte contacts imposed by due process in notice-and-comment rulemaking, it is clear that its prohibition is far less stringent than the prohibitions applicable in formal adjudication.

19. Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *amended by* Exec. Order No. 13,258, 3 C.F.R. 204 (2003) *and by* Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 23, 2007), *reprinted as amended in* 5 U.S.C. § 601 (2000), *revoked by* Exec. Order No. 13,497, 74 Fed. Reg. 6113 (Jan. 30, 2009) (revoking Exec. Order Nos. 13,258 and 13,422).

20. *See, e.g.*, Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *amended by* Exec. Order No. 13,258, 3 C.F.R. 204 (2003) *and by* Exec. Order No. 13,422, 72 Fed. Reg. 2,763 (Jan. 23, 2007), *reprinted as amended in* 5 U.S.C. § 601 (2000) (§3(d) defining “regulation” as “agency statement of general applicability and further effect, which the agency intends to have the force and effect of law”); Magill, *supra* note 4, at 1393 (noting that adjudications are not subject to OMB review under Exec. Order No. 12,866).

21. Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 459 (1987).

22. *Id.* at 458; *see also* *Morgan v. United States*, 298 U.S. 468, 481 (1936).

23. 298 U.S. 468.

24. *Id.* at 481.

25. *See id.* at 481-82.

*States*<sup>26</sup> clearly carves out adjudication from the class of decisions over which the President may exert control. “[T]here may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals,” the *Myers* Court notes, “whose decisions after hearing[s] affect [the] interests of individuals, the discharge of which the President can not in a particular case properly influence or control.”<sup>27</sup> While this statement in *Myers* is hardly a recipe for agency independence in adjudication, it at least acknowledges that within the context of an adjudicative proceeding, agency adjudicators must be isolated from political direction.

The leading contemporary vehicle for emphasizing this firm line prohibiting ex parte contacts (and directive influence) from executive branch officials in the process of adjudication is *Portland Audubon Society v. Endangered Species Committee*.<sup>28</sup> The *Portland Audubon* decision examined the legality of political contacts with a seven-member Committee established under the Endangered Species Act to review requests of federal agencies for exceptions from the requirements of the Act.<sup>29</sup> After the Committee granted one such exception, environmental groups sued the Committee arguing that the White House had contacted three members of the Committee and urged them to vote for an exception.<sup>30</sup> The *Portland Audubon* court held that the Committee’s decision to grant an exception was subject to the formal adjudication requirements of the APA, and that its prohibitions on ex parte contacts applied to the President, as well as to lower-level officials.<sup>31</sup> In reaching this determination, the *Portland Audubon* court reiterated the basic principle that ex parte contacts, even by executive officials, are “antithetical to the very concept of an administrative court reaching impartial decisions through formal adjudication.”<sup>32</sup> In sum, agency adjudicators must purport to exclude political influence, even from the White House, in much the same way that courts do.

In sharp contrast, in the context of notice-and-comment rulemaking, the APA’s prohibitions on ex parte contacts do not apply, and there has been an embrace of the “basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy.”<sup>33</sup> Indeed, courts and commentators have broadly en-

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26. 272 U.S. 52 (1926).

27. *Id.* at 135.

28. 984 F.2d 1534 (9th Cir. 1993).

29. *Id.* at 1537.

30. *Id.* at 1537-38.

31. *Id.* at 1543, 1545.

32. *Id.* at 1543; see also *Prof'l Air Traffic Controllers Org. v. FLRA*, 685 F.2d 547, 563 (D.C. Cir. 1982) (noting that the prohibition on ex parte contacts serves as “an instrument of fair decisionmaking”).

33. *Sierra Club v. Costle*, 657 F.2d 298, 405 (D.C. Cir. 1981); see also Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM.

dorsed the view that “[o]ur form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive” in the context of rulemakings.<sup>34</sup> Regulatory review executive orders have formalized White House supervision over an agency’s notice-and-comment rulemaking.<sup>35</sup> By their terms, the regulatory review orders do not apply to an agency’s formal adjudication decisions<sup>36</sup>—nor, despite the efforts of some advocacy groups,<sup>37</sup> do the regulatory review orders impose formal oversight over the ways in which an agency uses litigation to advance its goals.

Even recognizing that political preferences alone are generally not viewed as sufficient reasons for regulation,<sup>38</sup> it is hard to deny that the views of political actors and, in particular, the views of White House officials have an entirely different place in agency rulemaking and formal adjudication. The choice of rulemaking or adjudication determines not only whether White House support for an outcome provides a reason for the agency decisionmaker to adopt that outcome, but also whether the agency decisionmaker may even confer with political officials on the merits during the process of decisionmaking. Viewed from within the cylinder of adjudication or

L. REV. 943, 960, 978-82 (1980) (defending restrictions on the President’s ex parte contacts in adjudication and the President’s capacity to make ex parte contacts in rulemaking).

34. *Costle*, 657 F.2d at 406.

35. Exec. Order No. 12,866, 3 C.F.R. 638 (1993), amended by Exec. Order No. 13,258, 3 C.F.R. 204 (2003) and by Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 23, 2007), reprinted as amended in 5 U.S.C. § 601 (2000), revoked by Exec. Order No. 13,497, 74 Fed. Reg. 6113 (Jan. 30, 2009) (revoking Exec. Orders 13,258 and 13,422).

36. See *supra* note 19.

37. See, e.g., Center for Regulatory Effectiveness, Regulation by Litigation: Proposed Executive Order on Regulation by Litigation, available at <http://www.thecre.com/regbylit/index.html> (last visited Oct. 14, 2008) (advocating for an executive order to “[r]equire OMB to review the litigation activities of federal agencies on an annual basis, and to report to Congress, to ensure that the agencies do not use taxpayer dollars to engage in ‘Regulation Through Litigation’”).

38. The Supreme Court’s classic decision in *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), has long been read to convey that political preferences are not sufficient to justify regulatory outcomes. See JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 226 (1990) (noting the “submerged yet powerful message” of *State Farm* is that “the political directions of a particular administration are inadequate to justify regulatory policy”); Kathryn A. Watts, *Proposing A Place for Politics in Arbitrary-and-Capricious Review*, 119 YALE L.J. (forthcoming 2009), available at <http://ssrn.com/abstract=1353519> (draft at 1-5) (noting that under *State Farm* arbitrary-and-capricious review does not permit agencies to justify their decisions in political terms, and challenging that norm). In *State Farm*, then-Justice Rehnquist dissented in part, suggesting that “[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal” of regulatory policy. See *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part). The Court’s opinion did not respond to Justice Rehnquist’s suggestion and implicitly rejected it.

rulemaking, the place of the President's views in the agency's interpretation of a statute depends upon the agency's policymaking form.

A question, then, is whether it makes sense to look at agency action confined within the context of formal adjudication or notice-and-comment rulemaking. It is clear that politics influences the agency's enforcement priorities, and thus shapes the cast of cases that are presented to the agency for adjudication. For instance, empirical studies show that the volume of agency enforcement action is a function in part of the presidential administration.<sup>39</sup> Likewise, agency enforcement staffs frequently, though not always, have high rates of success litigating before the agency's own Administrative Law Judges and Commission.<sup>40</sup> Because the agency's enforcement attorneys are not barred from contacts with political officials, they provide a stable conduit through which the views of political officials regarding the statute may enter adjudication. This highlights the presidential influence to which Justice Taft intimated in *Myers*—although the President “can not in a particular case properly influence or control”<sup>41</sup> an adjudication, the President may substantially affect agency adjudications over time, even when agency heads are protected by for-cause removal standards.

Even if we were to accept, for the purposes of argument, that the positions the agency ends up adopting in formal adjudications are not demonstrably different from the positions the agency adopts in notice-and-comment rulemakings—at least as to their correspondence to the policy positions of the White House—there remains a basic dependence of agency statutory interpretation on policymaking form. A broad convergence between the agency's interpretations and the President's positions may result from many factors, including the influence of the President's appointment powers and informal contacts between agency adjudicators and members of the administration. But even such a convergence in fact does not alter the legal or interpretive lens through which agency adjudicators must view the President's or other political actors' positions. In broad terms, the views of political actors should be, like the positions of other litigants, only as persuasive as they intrinsically merit.

Some might also object that the apparent difference in the explicit role for politics in agency action is actually a function of the type of agency at issue—-independent or executive—and not the policymaking form through

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39. See, e.g., B. Dan Wood, *Does Politics Make a Difference at the EEOC?*, 34 AM. J. POL. SCI. 503, 522-23 (1990) (documenting the difference in litigation activities of EEOC between the Carter and Reagan administrations).

40. See, e.g., Malcolm B. Coate & Andrew N. Kleit, *Does it Matter that the Prosecutor is Also the Judge? The Administrative Complaint Process at the Federal Trade Commission*, 19 MANAGERIAL & DECISION ECON. 1, 5 (1998) (showing agency win rates in appeals to the Federal Trade Commission from ALJ decisions on mergers ranging from one hundred percent to thirty eight percent).

41. *Myers v. United States*, 272 U.S. 52, 135 (1926) (emphasis added).

which the agency acts. If the primary tool of presidential influence were regulatory review, this objection might have more force. The regulatory review orders do not subject independent agencies to the same controls that apply to executive-branch agencies.<sup>42</sup> But regulatory review is not the only means of influence over agency officials. With regard to independent agencies, there is no legal barrier to White House communications regarding the Administration's priorities. The fact that the President generally selects the chairs of independent commissions is thought to facilitate consultation between the chairs and the White House on policy issues of importance.<sup>43</sup> What triggers the strict ban on *ex parte* communications and the exclusion of political direction within the process of decision is not the type of agency, but a particular policymaking form—namely, formal adjudication.<sup>44</sup> For instance, in *Portland Audubon*, the relevant adjudicative body, the Endangered Species Committee, was comprised primarily of executive officials (including the Secretaries of Agriculture, Army, Interior, the Administrators of the EPA and National Oceanic and Atmospheric Administration, and the Chair of the Council of Economic Advisors, as well as presidential appointees from the affected states).<sup>45</sup> Despite the status of these members as part of executive, not independent, agencies, the officials were still barred from political communications in the context of a formal adjudication. This is not to say that the executive versus independent agency distinction makes no difference to the constraints faced by the agency in interpreting its statutes. The point, instead, is that the type of agency does not itself explain the difference in the place of political influence in formal adjudication and notice-and-comment rulemaking.

So we are left in a relatively familiar place in which the hard questions concern how much, and in what ways, the views of the White House, members of Congress, or political actors may influence the agency's decisions. We should expect our answers to those hard questions to depend in part on the policymaking form through which the agency makes its decision.

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42. Compare Exec. Order No. 12,866, 3 C.F.R. 638 (1993) § 3(b) (defining agency to exclude independent agencies), *with id.* at § 4(b), (c) (specifically including independent agencies in duty to prepare regulatory plan), *and id.* at §§ 5-6 (excluding independent agencies from centralized regulatory review).

43. See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 590-91 (1984).

44. The APA's prohibitions on *ex parte* contacts also apply to the nearly defunct category of formal rulemaking. See 5 U.S.C. § 557(d).

45. *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1537 n.1 (9th Cir. 1993).

## III. INTERNAL MANAGEMENT AND AGENCY POLICYMAKING FORM

Mashaw argues that another dimension of difference between agency and judicial interpretation is that agencies “have much more reason than courts to look at interpretation from the perspective of internal bureaucratic or hierarchical control.”<sup>46</sup> We might distinguish two different elements of internal bureaucratic management. First, internal management requires providing sufficient guidance to actors throughout a complex structure, involving hierarchical and horizontal relationships, so that these actors may implement their statutes consistently and effectively. Second, part of management is operating within a budget. For illustrative purposes, I focus on the role of budget considerations in formal adjudication and notice-and-comment rulemaking. I propose for consideration the prospect that (1) a legality principle associated with due process imposes a greater constraint on the considerations an agency may take into account in formal adjudication than in notice-and-comment rulemaking, and (2) under that constraint, budget factors have a different place in notice-and-comment rulemaking and formal adjudication.

Consider as a starting point the idea that when government decision-makers reach decisions to which due process applies they must follow preexisting rules or norms, that is, a principle of “rule-obedience” applies.<sup>47</sup> On this position, when a government decisionmaker does not apply preexisting norms in a particular case, the decision violates not only the applicable norms, but also this rule-obedience legality principle. To reach a decision based on rules other than those applicable is “the very antithesis of accurate decisionmaking, since accuracy is the proper application of the law to the case at hand.”<sup>48</sup> So in the context of a statutory dispute, the adjudicator must reach a decision in a way that could be described as applying the statute to the case at hand. This due-process rule-obedience norm would be violated by courts invoking considerations foreign to the statute and the statutory scheme as a basis for their application of it. The line between permissible and impermissible considerations will not be easy to draw in every case, but that difficulty does not itself negate the prospect for some such line.<sup>49</sup>

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46. Mashaw, *Norms, Practices, and the Paradox of Deference*, *supra* note 1, at 519.

47. See Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1105 (1984).

48. *Id.*

49. I do not view this principle as inconsistent with Richard Pierce’s point that where a statute is silent as to a decisional factor, an agency should be permitted to consider logically relevant factors, such as the effect of its decision on the policy underlying other statutes or related problems within the agency’s jurisdiction. See Richard J. Pierce, Jr., *What Factors Can an Agency Consider in Making a Decision?*, 2009 MICH. ST. L. REV. 67, 75

The question, then, is whether this constraint has different implications as to the budget considerations that an agency may take into account in notice-and-comment rulemaking and formal adjudication. I do not take it as controversial that an agency as a whole should make decisions about how best to implement its statute on the basis of its available resources, absent some statutory prohibition on doing so. For instance, for agencies with mass justice responsibilities, such as the Social Security Administration, it has long been viewed as laudable for the agency to streamline the character of issues presented in individual adjudications by issuing highly detailed rules. For such an agency, a valid reason for issuing rules would be that they will save agency resources in adjudication (though, of course, such rules typically have other values as well, such as promoting internal consistency). Budgets matter to agencies, and the costs of administration for the agency may count as a reason for the agency to issue rules, or to issue specific types of rules.

Commentators have suggested that the same unbounded capacity to consider such institutional costs does not obtain in judicial adjudication. Judge Richard Posner, for instance, has gestured at the idea that there is a limit to a judge's capacity to consider judicial economy and docket limiting considerations, such as that a particular result or construction will open "floodgates" to litigation.<sup>50</sup> These considerations reflect judges' views of the likely costs of a decision to the judiciary or to a particular system of courts. Posner has argued that in areas of jurisdiction and procedure "where judicial economy is an accepted factor in judicial decision-making," and the answer to the dispute is "not dictated by precedent or an otherwise authoritative text, judicial economy will inevitably, and justifiably, be one of the weights that judges put in the balance in making their decisions."<sup>51</sup> Posner acknowledges, however, that evaluating caseload considerations as a factor in the interpretation of the substantive law raises different concerns.<sup>52</sup> As to the consideration of caseload considerations within the elaboration of substantive law, Posner writes that "perhaps the judges do not have the requisite knowledge and powers for this task and would compromise the perceived legitimacy of their role if they undertook it other than in cases in which 'judicial economy' is already a recognized factor in the formulation or application of legal doctrine."<sup>53</sup>

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(2009). What I am suggesting for consideration is that a due process norm does provide some outside constraint on the factors an agency may consider.

50. See RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 315-18 (1996); Toby J. Stern, Comment, *Federal Judges and Fearing the "Floodgates of Litigation,"* 6 U. PA. J. CONST. L. 377, 381 (2003).

51. POSNER, *supra* note 50, at 315.

52. *Id.* at 315-317.

53. *Id.* at 317-18.

To examine these suggestions with regard to statutory interpretation, we first can acknowledge that there is a set of statutes for which judicial economy and caseload management are established and justified considerations. Those statutes include, as Posner suggests, statutes relating to procedure and jurisdiction, as well as statutes otherwise aimed at curtailing federal litigation, such as the Prison Litigation Reform Act of 1995,<sup>54</sup> and the Private Securities Litigation Reform Act of 1995.<sup>55</sup> With regard to these statutes, there is a basis to presume that a statute empowers the federal judge to make his or her own estimation of how the particular statutory construction may affect the institutional resources of the federal judiciary. But with regard to many statutes, the basis for that presumption is not at all clear. And with regard to that potentially quite large class of statutes, for the judge to treat caseload limiting factors as considerations bearing on the substantive interpretation of the statute would raise Judge Posner's concern of "compromis[ing] the perceived legitimacy of" the judge's role. One account of why legitimacy would be compromised is that such consideration would run afoul of the rule-obedience due process norm; that is, the judge would be invoking considerations foreign to the statute to be applied. This does not imply that cost considerations, such as caseload-limiting factors, have no place in due process analysis. Under *Mathews v. Eldridge* and its progeny,<sup>56</sup> cost is clearly relevant in deciding how much process is due. In contrast, what I am proposing is that when due process applies, a rule-obedience norm constrains the extent to which the decisionmaker may rely on costs to the institution as a basis for construing the statute one way or another.

The implications of this position for agency statutory interpretation are relatively straightforward. If a due process legality norm constrains the way in which a court may consider the budget implications of their decisions for the federal judiciary, the same norm would also constrain agency adjudicators. Not only is due process formally triggered by agency adjudication,<sup>57</sup>

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54. Pub. L. No. 104-134, § 801, 110 Stat. 1321, 1321-66 (codified in part at 42 U.S.C. § 1997e) (with respect to claims by prisoners under 42 U.S.C. § 1983 regard prison conditions act requires administrative exhaustion, sets cap on attorneys fees, limits recovery to claims based on physical injury, and authorizes district courts to dismiss actions on court's own motion).

55. Pub. L. No. 104-67, 109 Stat. 737, 737 (1995) (codified in relevant part at 15 U.S.C. § 78u-4) (imposing heightened pleading standard, imposing additional burden on class representatives, and making Rule 11 sanctions mandatory); see Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5*, 108 COLUM. L. REV. 1301, 1335 (2008) (noting litigation-restricting aim of PSLRA).

56. 424 U.S. 319 (1976).

57. *Londoner v. City of Denver*, 210 U.S. 373, 385-86 (1908) (holding that due process is triggered by individual tax assessments); *United States v. Fla. E. Coast Ry. Co.*,

but the fairness rationale for the rule-obedience norm also applies. In contrast, because due process is not triggered in a garden-variety rulemaking proceeding involving general issues of policy,<sup>58</sup> the rule-obedience norm would not impose the same limitation on the range of considerations, such as budget considerations, relied upon by the agency in rulemaking as in adjudication. This differential constraint on the considerations that the agency may rely upon provides further support for the idea that agency statutory interpretation may be, at least in part, a function of the form through which the agency acts. As in the case of political considerations, ideas linked to due process draw agency interpretation more closely to judicial statutory interpretation in the context of formal agency adjudication than in agency rulemaking.

#### CONCLUSION: IMPLICATIONS FOR A CHESTNUT

The discussion thus far has meant to suggest two ways in which an agency's approach to statutory interpretation depends in part on the policymaking form through which it is acting. Specifically, I have argued that agency statutory interpretation is more closely aligned with judicial interpretation in formal adjudication than in notice-and-comment rulemaking. Of course, there are many other dimensions of difference between agency and judicial interpretation as well as many other forms of agency action. Much work remains to be done to describe and understand the weight of different interpretive considerations in different policymaking forms. But if this basic dependence of agency interpretation on policymaking form is right, it adds an element to our understanding of the agency's choice of policymaking form.

One of the most time-honored principles in administrative law is, as noted above, that the choice between rulemaking and adjudication "lies primarily in the informed discretion of the administrative agency."<sup>59</sup> The conventional understanding of the agency's choice of policymaking form is that these forms constitute a fixed menu of options for the agency, each with distinctive features. As Professor Elizabeth Magill notes, the principal differences between these policymaking forms have traditionally been understood to "run along three dimensions: the procedure the agency must follow,

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410 U.S. 224, 245 (1973) (noting classic distinction that due process applies where small number of individuals affected on individual grounds, as in adjudication).

58. *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 444-45 (1915) (holding that due process does not apply where a large number of people are affected, such as city-wide property tax increases); *Sierra Club v. Costle*, 657 F.2d 298, 392 n.462 (D.C. Cir. 1981) (noting general rule that due process clause imposes no constraints on notice-and-comment rulemaking beyond those imposed by statute).

59. *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

the legal effects of the agency's action, and the availability and intensity of judicial examination of the agency's action."<sup>60</sup>

One upshot of the ideas I have sketched is that there is another significant dimension to this choice: the choice of policymaking form may also imply a different approach to statutory interpretation. In particular, our inquiry suggests that the latitude to incorporate political preferences as well as budgetary concerns is greater in the context of notice-and-comment rule-making than in formal adjudication. If policymaking form constrains the range of interpretive options available to the agency, that constraint may be a significant factor in the agency's choice of policymaking form. Put another way, if, as is often the case, an agency seeks a particular interpretive outcome, it will select its policymaking form to fit.

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60. Magill, *supra* note 4, at 1390; *see also* Russell L. Weaver, Chenery II: *A Forty-Year Retrospective*, 40 ADMIN. L. REV. 161, 198-207 (1988) (comparing treatment of legislative and adjudicative "rules").