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The Constitutional Foundations of *Chenery*

ABSTRACT. The Supreme Court regularly upholds federal legislation on grounds other than those stated by Congress. Likewise, an appellate court may affirm a lower court judgment even if the lower court's opinion expressed the wrong reasons for it. Not so in the case of judicial review of administrative agencies. The established rule, formulated in *SEC v. Chenery Corp.*, is that a reviewing court may uphold an agency's action only on the grounds upon which the agency relied when it acted. This Article argues that something more than distrust of agency lawyers is at work in *Chenery*. By making the validity of agency action depend on the validity of the agency's justification, *Chenery*'s settled rule enforces an aspect of the nondelegation doctrine that has been obscured by more recent decisions that understand nondelegation as involving only a demand for legislative standards, or "intelligible principles." The neglected arm of the nondelegation doctrine, which *Chenery* enforces, holds that a delegation is constitutionally valid only if it requires the agency exercising the delegated authority to state the grounds for its invocation of power under the statute. *Chenery*'s enforcement of this norm polices the political accountability of agency action by ensuring that accountable decision-makers, not merely agency lawyers, have embraced the grounds for the agency's actions, and it promotes the regularity and rationality of agency decision-making by enforcing a practice of reason-giving. This nondelegation account of *Chenery* explains why agencies must engage in reasoned decision-making to obtain deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* *Chenery* insists that, to receive *Chevron* deference, accountable agency actors must explain the bases for their decisions that bind with the force of law. By grounding *Chenery* in the enforcement of the nondelegation doctrine, this account also suggests that the President's own exercise of statutory power is not immune from *Chenery*'s demands.

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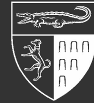

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INTRODUCTION

Administrative agencies may act with the force of law, but their obligations to give reasons for their decisions are very different from those that apply to Congress or the federal courts. A background rule of constitutional law is that Congress is not required to "articulate its reasons for enacting a statute."[1] Thus, a court generally may uphold the constitutionality of federal legislation despite the fact that Congress has not provided any formal statement of reasons for it. A similar rule of review applies to appellate consideration of lower court judgments. The settled principle is that if the "decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."[2]

Precisely the opposite background presumption applies to administrative agencies. One "fundamental" and "bedrock" principle of administrative law is that a court may uphold an agency's action only for the reasons the agency expressly relied upon when it acted.[3] The Supreme Court's 1943 decision in *SEC v. Chenery Corp.* provides the classic formulation of this principle in American administrative law: "[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its actions can be sustained."[4] Thus, in sharp contrast to the

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1. U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980); *see also infra* Subsection I.C.1 (discussing this background rule).
2. Helvering v. Gowran, 302 U.S. 238, 245 (1937); *see also infra* Subsection I.C.2 (discussing this settled rule). *See generally* People's Mojahedin Org. of Iran v. U.S. Dep't of State, 182 F.3d 17, 23 n.7 (D.C. Cir. 1999) (noting the contrast between the role of reasons in review of district court decisions and in review of agency action); Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 19-26 (2001) (describing the contrasts among the role of reasons in judicial review of agency action, legislation, and judicial decisions).
3. SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194, 196 (1947); Konan v. Attorney Gen. of the U.S., 432 F.3d 497, 501 (3d Cir. 2005); *see also, e.g.*, Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983) (characterizing the rule as "well established"); Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 549 (1978) (stating that the Court has made this rule "abundantly clear"). *See generally* SEC v. Chenery Corp. (*Chenery I*), 318 U.S. 80 (1943). For an example of reliance on the *Chenery* principle in the Supreme Court's last Term, see *Gonzales v. Thomas*, 126 S. Ct. 1613, 1615 (2006), in which the Court remanded a case based on the *Chenery* rule.
4. *Chenery I*, 318 U.S. at 95; *see also id.* at 87 ("Since the decision of the Commission was explicitly based upon the application of principles of equity announced by courts, its validity must likewise be judged on that basis. The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.").

background presumption in constitutional review of legislation and in appellate review of lower court judgments, the court reviewing an agency action will not supply or substitute justifying reasons on behalf of the agency. The *Chenery* principle makes the validity of agency action depend upon the validity of contemporaneous agency reason-giving.

The *Chenery* principle has been taken as settled since it was announced, and administrative law has grown up around it, incorporating the principle into new structures. The growth and shifts in administrative law since *Chenery* have been significant: to name a few headliners, the enactment of the Administrative Procedure Act (APA),[5] the Supreme Court's development of the *Chevron* doctrine[6] and the hard look mode of review,[7] presidential assertion of increasingly formal review and influence over agency action,[8] and Congress's continued allocation of vast discretionary powers to administrative agencies. Throughout these developments, which have come to characterize contemporary administrative governance, the *Chenery* principle has quietly and steadily grown in scope. The *Chenery* decision itself involved review of a formal adjudication, in which the SEC had relied upon erroneous legal principles to justify a decision that might have been sustained on other grounds.[9] The principle now applies in review of every form of agency action, from agency rulemaking to informal adjudication, as well as in review of all manner of deficiencies in agency fact-finding and insufficient statements of reasons, not merely to agency reliance on legally erroneous grounds.[10]

The persistence and extension of the *Chenery* principle have had tremendous practical significance for administrative government. At its core, the *Chenery* principle directs judicial scrutiny toward what the agency has said on behalf of its action, not simply toward the permissibility or rationality of its ultimate decision; *Chenery* links permissibility to the agency's articulation of

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5. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

6. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984); *see also infra* text accompanying notes 217-220 (providing a brief account of the *Chevron* doctrine).

7. *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 463-74 (1987) (characterizing the hard look doctrine, beginning in the late 1960s and early 1970s, as a requirement that agencies—and courts themselves—take a close look at regulatory benefits and disadvantages); *see also infra* text accompanying notes 84-85 (discussing the hard look doctrine).

8. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2272-2302 (2001) (documenting the rise of presidential dominance of the administrative state and the use of regulatory review).

9. *Chenery I*, 318 U.S. at 95.

10. *See infra* Subsection I.B.1.

the grounds for its action. On the one hand, that focus of judicial review gives agency officials strong incentives to attend to the justifications they provide for their actions, and it has helped make explicit reason-giving a major part of the industry of the administrative state. On the other hand, even with tremendous resources devoted to contemporaneous justification, the inadequacy of an agency's contemporaneous explanation for its decisions remains one of the most common grounds for judicial reversal and remand.[11]

Despite the fixed character of the *Chenery* principle and its far-reaching impact on administrative governance, there is a curious uncertainty concerning its basis and its fit with the core principles of administrative law that have developed alongside it and with doctrines of judicial review more generally. At times, courts have attributed the principle to the APA,[12] a statute enacted after *Chenery* that is silent on this rule of review.[13] Others have claimed that the *Chenery* principle is a necessary condition for judicial review[14] or an expression of Article III limitations on the judicial power[15]—stances that are difficult to square with the fact that federal courts routinely supply or substitute reasons on behalf of Congress and lower courts when reviewing those actors' decisions. Still others have helpfully suggested that the *Chenery* principle has a basis in separation of powers principles, but they have not specified the parameters of the separation of powers principle that *Chenery* reflects.[16]

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11. *See, e.g.*, Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1035 tbl.6 (showing that 20.7% of remands in 1985 were based on an inadequate agency rationale); Patricia M. Wald, Chief Judge, U.S. Court of Appeals for the D.C. Circuit, The Contribution of the D.C. Circuit to Administrative Law, Keynote Address at the Section of Administrative Law Fall Meeting (Oct. 1987), *in* 40 ADMIN. L. REV. 507, 528 (1988) (reporting that nearly one-third of the D.C. Circuit's reversals or remands in direct agency appeals between April 1987 and April 1988 occurred because the agency's rationale was inadequate); *see also* Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61, 72 (1997) (suggesting that inadequate agency reasoning is the most frequent ground for judicial rejection of agency decisions).

12. *See, e.g.*, Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 374-75 (1998) (suggesting that the APA established a scheme of reasoned agency decision-making that courts enforce through the *Chenery* principle); *see also infra* Section II.A.

13. *See* Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.); *see also infra* Section II.A.

14. *See Chenery I*, 318 U.S. at 94 ("[C]ourts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review."); *see also infra* note 102 (citing cases).

15. *See infra* Section II.B.

16. *See, e.g.*, Church of Scientology v. IRS, 792 F.2d 153, 165 (D.C. Cir. 1986) (Silberman, J., concurring) ("The precept that the agency's rationale must be stated by the agency itself

This Article aims to provide an alternative understanding of the *Chenery* principle and to expose its connections to other central features of administrative law, including the *Chevron* doctrine. It argues that although the conventional justifications for the *Chenery* principle are inadequate, the principle has a constitutional foundation. Specifically, the *Chenery* principle is a default rule of statutory construction that implements the nondelegation doctrine in ways that complement and reinforce that doctrine's other modes of enforcement.

The current nondelegation doctrine requires that when Congress grants binding authority to another institution, Congress must specify an "intelligible principle" or a standard to which the agency must conform.[17] Though this requirement is now treated as a stand-alone test for assessing whether a delegation exceeds Congress's constitutional authority, it was not always so. Instead, this formulation emerged as one aspect of a two-part evaluation: whether the statutory grant conditioned the exercise of authority upon an agency's stating the grounds for its invocation of the statutory authority; and whether the legislation included a sufficient standard to guide the agency's discretion in making that determination. The Supreme Court has enforced the former requirement by treating the failure of agencies to make such an express statement not only as a statutory violation, but also as a violation of the constitutional requirements governing delegation. While this requirement of an express statement of the agency's predicate grounds for action has slipped from constitutional doctrine, the *Chenery* principle's prohibition on post hoc rationales enforces this arm of the nondelegation doctrine. On this view, the nondelegation doctrine operates not merely to constrain the scope of discretion Congress may vest in others, but also to impede Congress from giving away its own prerogative to establish binding norms without providing justification for them.

The *Chenery* principle also promotes core values of the nondelegation doctrine in ways that supplement the enforcement of the intelligible principle requirement. The *Chenery* principle operates both to bolster the political accountability of the agency's action and to prevent arbitrariness in the agency's exercise of its discretion. It provides assurance that accountable

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stems from proper respect for the separation of powers among the branches of government."); Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 427-35 (concluding that the requirement of adequate reasons for agency action is a matter of separation of powers).

17. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).

agency decision-makers, not merely courts and agency lawyers, have embraced the grounds for the agency's actions, and that the agency decision-makers have exercised their judgment on the issue in the first instance.

This understanding of the *Chenery* principle has several implications for contemporary administrative law; in particular, it clarifies the relationship between the *Chenery* and the *Chevron* doctrines and exposes the extent to which they are conceptually intertwined. On the one hand, it shows that compliance with the *Chenery* principle is not just a general feature of judicial review of agency action, but also a necessary condition for an agency to receive deference under *Chevron*. Indeed, on this understanding, *Chenery* provides a structural check for the very presumptions of agency accountability, rationality, and expertise upon which *Chevron* deference is based. *Chenery* is the coin with which the agency pays for *Chevron* deference. On the other hand, *Chevron* holds implications for *Chenery*'s scope. *Chevron* clarifies that the range of determinations entrusted to the agency includes the interpretation of ambiguities and gaps in the statutes it administers.[18] And once the delegation of authority includes *interpretive* authority, as *Chevron* requires, the agency's explanation for its interpretative decisions falls within *Chenery*'s scope.

The nondelegation account of the *Chenery* principle also has intriguing implications for the scope of the President's duty to give reasons when a statute authorizes him to act with binding legal force. If the *Chenery* principle enforces the nondelegation doctrine, its foundation is sufficiently general to suggest that it should apply to the President when he exercises statutory authority to act with the force of law. Many of the Supreme Court's central nondelegation decisions involved grants of power to the President. The Supreme Court's enforcement of the requirement of express reason-giving has not excepted the President from its scope, suggesting prima facie grounds for not excusing the President from the *Chenery* principle. This treatment of the President's assertions of statutory power as on par with those of agencies also suggests that if the President were to receive *Chevron* deference, then, like an agency, he could do so only if his actions complied with the *Chenery* principle.

Part I of this Article provides a brief account of the *Chenery* principle as it emerged from two Supreme Court decisions, its growth beyond those decisions, and a comparison of the principle to the background rule in other public law contexts, such as constitutional review of legislation and appellate review of judgments. Part II examines the conventional accounts of the principle and aims to show why they are inadequate. Part III introduces the nondelegation doctrine and discusses its connection to the *Chenery* principle.

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18. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

Part IV traces the implications of the nondelegation account for administrative law, and Part V addresses the special case of the President.

I. THE *CHENERY* PRINCIPLE IN CONTEXT

Before examining the foundations of the *Chenery* principle, it is useful to sketch the principle's operation in current law. That sketch reveals the differences between the *Chenery* principle and the rules of judicial review that operate in other public law contexts—differences that have significant practical consequences for administrative governance.

A. The Chenery *Decisions*

The basic *Chenery* principle is the "simple but fundamental rule . . . that a reviewing court in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency."[19] The Supreme Court's well-known pair of *Chenery* decisions provides a good illustration of its operation.

The Public Utility Holding Company Act (PUHCA) of 1935 charged the Securities and Exchange Commission with administering the reorganization of public utility holding companies, an issue of great concern at the time.[20] In the order that gave rise to the *Chenery* litigation, the SEC prohibited officers and directors of a public utility holding company from engaging in stock purchases during reorganization.[21] The SEC had based this prohibition solely on fiduciary principles, concluding that such sales would violate the insider's fiduciary duties.[22] In its first *Chenery* decision, the Supreme Court concluded that the SEC's reading of fiduciary law was incorrect.[23] The Court also strongly suggested that the SEC had the power to prohibit these sales as an exercise of

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19. *Chenery II*, 332 U.S. 194, 196 (1947).

20. Ch. 687, § 11, 49 Stat. 803, 820-23 (repealed 2005). For a detailed and helpful account of the *Chenery* litigation, PUHCA, and the political context in which the litigation occurred, see Roy A. Schotland, *A Sporting Proposition*—SEC v. Chenery, *in* ADMINISTRATIVE LAW STORIES 169, 169-73 (Peter L. Strauss ed., 2006).

21. *See* Fed. Water Serv. Corp. (*SEC Order I*), 8 S.E.C. 893, 917-19 (1941); *see also Chenery I*, 318 U.S. 80, 81, 85 (1943).

22. *Chenery I*, 318 U.S. at 93; *see also id.* at 87 ("[The SEC's] opinion plainly shows that the Commission purported to be acting only as it assumed a court of equity would have acted in a similar case."); *SEC Order I*, 8 S.E.C. at 916-19 (revealing the same).

23. *See Chenery I*, 318 U.S. at 88, 93.

its administrative powers under PUHCA.[24] But based on the principle that the courts could not uphold an agency order on grounds other than those invoked by the agency, the Court reversed and remanded: "We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."[25] On remand, the agency reached the same conclusion prohibiting the stock purchases, but this time it based its action on an exercise of its administrative powers under PUHCA,[26] and the Supreme Court upheld the order.[27]

The *Chenery* decisions thus make clear that it matters both *who* articulates the legally sufficient basis to sustain the agency's ultimate decision and *when* that justification comes. The agency itself, not its counsel or Department of Justice (DOJ) lawyers defending the action, must state reasons sufficient to justify the agency's action, and that statement must accompany the action itself, not follow later.[28] The question is not simply whether the agency's ultimate action is permissible, but whether the agency has offered a valid explanation for it.

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24. *Id.* at 92 ("Had the Commission, acting upon its experience and peculiar competence, promulgated a general rule of which its order here was a particular application, the problem for our consideration would be very different."). The Court had occasion to address this point because, in the Solicitor General's brief on behalf of the SEC, the government attempted to recast the SEC's order, arguing that the agency had adopted the prohibition on the sales "[i]n exercising its duty" under PUHCA to determine whether the proposed reorganization plans were "detrimental to the public interest or the interests of investors or consumers" and whether they were "fair and equitable." Brief for the SEC at 22-23, *Chenery I*, 318 U.S. 80 (No. 254).

25. *Chenery I*, 318 U.S. at 95.

26. Fed. Water Serv. Corp., 18 S.E.C. 231, 246 (1945); *see Chenery II*, 332 U.S. 194, 199 (1947) (noting that the SEC reached the same conclusion based on the exercise of its power under PUHCA).

27. *Chenery II*, 332 U.S. at 209. *Chenery II* itself stands for an equally fundamental principle of administrative law, that agencies have broad discretion to choose the procedural form, such as rulemaking or adjudication, through which they act. *See id.* at 203. For discussion of why the *Chenery I* principle interestingly does not apply to the agency's choice of policymaking form, see M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1412-42 (2004).

28. The justification need not be published at exactly the same moment as the agency's action. *See* Tabor v. Joint Bd. for the Enrollment of Actuaries, 566 F.2d 705, 711 n.14 (D.C. Cir. 1977). Rather, the justification and the action must be announced "close enough together in time so that there is no doubt that the statement accompanies, rather than rationalizes[,] the rules." *Id.*

B. The Chenery *Principle Beyond the* Chenery *Decisions*

Perhaps prompted by the very general terms in which the *Chenery* decisions articulated this principle (or perhaps reflecting the generality of its underlying basis), the Supreme Court has extended the demand for explicit reason-giving to virtually every form of agency action and every conceivable type of deficiency in an agency's stated justification for its action.

1. Forms of Agency Action

In the *Chenery* decisions, the prohibition of post hoc rationales applied to formal, adversarial agency adjudication.[29] After the *Chenery* decisions and the APA's enactment, it was not clear whether the principle would extend beyond formal adjudication to notice-and-comment rulemaking or to myriad other forms of informal agency action. One could imagine that the distinctive concerns present in formal, on-the-record proceedings might confine the principle to that context. For instance, the *Chenery* principle might be understood as implementing or reinforcing the APA's requirement that an agency provide an extensive statement of the basis for its decision in on-the-record proceedings.[30]

The Supreme Court has moved with ease and with little focused attention past these possible grounds for limiting *Chenery*'s reach, applying it to review of agencies' informal action[31] and to notice-and-comment rulemaking conducted under APA § 553.[32] Consider *Citizens To Preserve Overton Park, Inc. v. Volpe*.[33] In *Overton Park*, the Supreme Court reversed and remanded a decision by the Secretary of Transportation to authorize the expenditure of federal

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29. *Chenery I* was decided before the enactment of the APA in 1946, but the agency action at issue was clearly a formal adjudication by the APA's terms and thus would have been governed by 5 U.S.C. §§ 556 and 557.

30. The APA provides that for on-the-record decisions the agency "shall include a statement of . . . findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. § 557(c) (2000).

31. *See, e.g.*, Camp v. Pitts, 411 U.S. 138, 139, 143 (1973); Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 417-20 (1971).

32. *See, e.g.*, Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 34, 50 (1983) (relying on *Chenery* in reviewing notice-and-comment rulemaking); Chamber of Commerce v. SEC, 412 F.3d 133, 137, 143-45 (D.C. Cir. 2005) (same); Pub. Citizen v. Fed. Motor Carriers Safety Admin., 374 F.3d 1209, 1211-12, 1218 (D.C. Cir. 2004) (same); *see also Tabor*, 566 F.2d at 710 (rejecting the suggestion that *Chenery* does not apply in review of notice-and-comment rulemaking).

33. 401 U.S. 402.

funds to support the construction of an interstate highway through a public park in Memphis, Tennessee.[34] The Secretary made no statement of reasons or findings in support of his decision[35] and had no statutory obligation to do so.[36] The Supreme Court reversed and remanded, citing *Chenery* and its progeny, on the ground that the lower courts had based their decisions on post hoc agency rationalizations of the Secretary's decision in the form of litigation affidavits.[37] Those post hoc rationalizations, the Court stated, "have traditionally been found to be an inadequate basis for review."[38]

On the heels of *Overton Park*, *Motor Vehicle Manufacturers Ass'n of the United States v. State Farm Mutual Automobile Insurance Co.*[39] illustrates the Court's clear embrace of *Chenery* in review of notice-and-comment rulemaking. In *State Farm*, the Court reversed and remanded a decision by the National Highway Traffic Safety Administration to rescind requirements that passive restraints, such as airbags or automatic feed seat belts, be installed in cars.[40] In defense of its decision before the courts, the agency cited the difficulties that a mandatory airbag standard would create.[41] The Court swiftly rejected the relevance of these arguments. "The short—and sufficient—answer to petitioners' submission is that the courts may not accept appellate counsel's *post hoc* rationalizations for agency action."[42] The Court then recited the "well established" rule that "an agency's action must be upheld, if at all, on the basis articulated by the agency itself."[43] *Chenery*'s factual context as a formal adjudication did not matter to the Court, which implicitly took the *Chenery* principle to state a more general rule of review.

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34. *See id.* at 405-06.

35. *Id.* at 417.

36. *Id.*

37. *See id.* at 419-20.

38. *Id.* at 419.

39. 463 U.S. 29 (1983).

40. *See id.* at 34, 57.

41. *See id.* at 49-50; *see also* Brief for the Federal Parties at 42-43, *State Farm*, 463 U.S. 29 (Nos. 82-354, 82-355 & 82-396) (raising concerns based on comments in the legislative history about the adaptability of airbags to smaller cars, indications that the utility of airbags was limited to head-on collisions, and the cost of airbags).

42. *State Farm*, 463 U.S. at 50.

43. *Id.* (citing Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962); and *Chenery II*, 332 U.S. 194, 196 (1947)).

2. *Types of Reason-Giving Deficits*

Nor have courts cabined *Chenery*'s application to the particular deficiency at issue in *Chenery*—agency reliance on a legal error. In his classic discussion of *Chenery*, Judge Friendly urged a distinction among reversals for inadequate explanation of reasons, unsupportable reasons, and insufficient or erroneous findings of fact.[44] The courts, however, have generally not heeded these distinctions[45] and have instead applied the *Chenery* principle in all of these circumstances.[46]

For instance, *Burlington Truck Lines, Inc. v. United States*[47] reversed and remanded an Interstate Commerce Commission order declining to intervene in a labor dispute by invoking its cease-and-desist authority and instead approving a trucking company's application to enter the relevant market.[48] While the ICC's choice of remedy clearly depended upon findings of fact and agency expertise, the Supreme Court found that the ICC's order included "no findings and no analysis here to justify the choice [of remedy] made."[49] Citing *Chenery*, the Court declined to embrace the ICC counsel's argument that a

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44. *See* Henry J. Friendly, Chenery *Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L.J. 199, 206-22. Friendly suggested that a reversal for inadequate explanation allows the court to ask the agency to think the issue over. *See id.* at 208. The *Chenery* rule as properly understood—requiring reversals for reliance on incorrect reasons—serves that second-look function as well, but also has the systemic effect of emphasizing to agencies that wrong reasons "cannot be expected to stand." *Id.* at 210. Reversals for insufficient or erroneous findings of fact also force agencies to act carefully, though Friendly cautioned against a purist insistence on remand when the finding is one that the agency could not have lawfully refused to make. *See id.* at 223-24. For Friendly, all three were potentially valid grounds for reversal, but only the second was properly associated with *Chenery*.

45. *See id.* at 206-22 (documenting decisions that conflate these distinct principles).

46. *See, e.g.*, ICC v. Bhd. of Locomotive Eng'rs, 482 U.S. 270, 283 (1987) (stating that under *Chenery* a reviewing court "may not affirm on a basis containing any element of discretion—including discretion to find facts and interpret statutory ambiguities—that is not the basis the agency used, since that would remove the discretionary judgment from the agency to the court"). *Overton Park* and *State Farm* are convenient examples of applying *Chenery* in the cases of insufficient reasons, *see* Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 417 (1971) (noting that the Secretary provided no explanation), and inadequate factual findings, *see State Farm*, 463 U.S. at 49-50 (stating that the agency offered post hoc findings on the difficulties of the airbag rule).

47. 371 U.S. 156.

48. *See id.* at 165, 174.

49. *Id.* at 167.

cease-and-desist order would have been ineffective in resolving the disruptions in service.[50]

Thus the general message to the agency is clear: under the *Chenery* principle, there is no room for a "Brandeis brief" to defend agency action.[51] Whatever the agency or DOJ lawyer is going to rely upon in defense of the action, be it the underlying rationale or the supporting facts and analysis, must be provided at the time the agency acts.[52]

3. *The Limits of* Chenery

Courts have nevertheless recognized several limitations to *Chenery*'s application.[53] Two of these limitations are important for our later discussion of the connection between the *Chenery* and *Chevron* doctrines.[54] First, the *Chenery* principle does not apply when a court reviews an agency's interpretation or action under a statute that Congress has not entrusted to that agency's administration. In *Chenery II*, the Court emphasized that the *Chenery* rule pertains to a "determination or judgment which an administrative agency alone is authorized to make."[55] Based on that limitation, courts have rejected the invocation of the *Chenery* rule when the agency interprets the APA,[56] the

50. *Id.* at 168.

51. As an attorney, Louis Brandeis submitted his celebrated "Brandeis brief," a 113-page brief providing empirical and factual support for the challenged statute, in *Muller v. Oregon*, 208 U.S. 412 (1908), and then again in later litigation. *See* Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 982-83 (1999) (describing Brandeis's tactics and assumptions about deference to the legislature).

52. Along these lines, Judge Patricia Wald has offered the pragmatic counsel to agency officials that it is "more important to 'moot' the drafters of their regulations prior to issuance than the lawyers who go to court to defend those regulations." Patricia M. Wald, *Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?*, 67 S. CAL. L. REV. 621, 639 (1994).

53. For a compact and recent exposition of the doctrine and its limits, see Harold J. Krent, *Ancillary Issues Concerning Agency Explanations*, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 197 (John F. Duffy & Michael Herz eds., 2005).

54. *See infra* Part IV.

55. 332 U.S. 194, 196 (1947).

56. *See* Baylor Univ. Med. Ctr. v. Heckler, 758 F.2d 1052, 1060 (5th Cir. 1985) (holding that when the issue is compliance with the APA's procedural requirements, as opposed to the agency's substantive mandate under enabling legislation, the rule's validity turns solely on compliance with the APA, not the agency's stated justification).

National Environmental Policy Act (NEPA),[57] or the Privacy Act[58]—statutes that are not committed to any particular agency's administration.[59]

Second, the *Chenery* prohibition does not apply when the agency's action is compelled by statute. As Judge Friendly put it, "[W]hen agency action is statutorily compelled, it does not matter that the agency which reached the decision required by law did so on a debatable or even a wrong ground, for remand in such a case would be but a useless formality."[60] Based on this premise, courts have declined to invoke the *Chenery* principle when the agency may reach but one possible conclusion under the statute.[61]

These two limitations show that agency explanation is a condition of the validity of agency action only when the action is taken under a statute that Congress has vested the agency, not the courts, with the power to implement, and only with regard to issues not clearly resolved by the statute. But even with these limitations, there is a vast domain of agency action for which *Chenery* links the action's validity to the agency's expressed justification.

C. *The Distinctiveness of* Chenery *as a Principle of Judicial Review in Public Law*

The *Chenery* principle is an outlier when viewed alongside other frameworks of judicial review in American public law.[62] As we have seen,

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57. 42 U.S.C. §§ 4321-4347 (2000); *see* Olmstead Citizens for a Better Cmty. v. United States, 793 F.2d 201, 208 n.9 (8th Cir. 1986) (declining to apply *Chenery* to the agency's interpretation of NEPA).

58. 5 U.S.C. § 552(a) (2000); *see* Louis v. Dep't of Labor, 419 F.3d 970, 977-78 (9th Cir. 2005) (holding that the Privacy Act was not committed to the Department of Labor's administration and thus that *Chenery* did not apply to the Department's rationale for withholding documents under the Act); Fattahi v. Bureau of Alcohol, Tobacco & Firearms, 328 F.3d 176, 179-80 (4th Cir. 2003) (holding that *Chenery* did not apply because the issue before the court was a violation of the Privacy Act, not a decision entrusted to the agency).

59. *See* Shea, S & M Ball Co. v. Dir., Office of Workers' Comp. Programs, 929 F.2d 736, 739 n.4 (D.C. Cir. 1991) (declining to apply *Chenery* to the review of Benefits Review Board actions in which the agency's interpretations of the statute were not entitled to special deference from the courts and the issue was "within the power of the appellate court to formulate").

60. Friendly, *supra* note 44, at 210.

61. *See, e.g.*, Koyo Seiko Co. v. United States, 95 F.3d 1094, 1099-1102 (D.C. Cir. 1996) (affirming a Department of Commerce antidumping proceeding in which the "plain language of the statute compel[led] the conclusion").

62. For a helpful comparative perspective and critique of reason-giving duties in the United Kingdom and beyond, see Michael Taggart, *Reinventing Administrative Law*, *in* PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION 311, 324, 328-35 (Nicholas Bamforth & Peter Leyland

Chenery denies courts the power to affirm agency action on grounds not stated by the agency. Precisely the opposite background presumption applies in judicial review of federal legislation or appellate review of lower court judgments, in which reviewing courts routinely supply or substitute rationales.

1. *Constitutional Review*

Judicial review of the constitutionality of federal legislation proceeds, of course, from the long-held presumption of the constitutionality of Congress's choices as an elected and coequal branch of government.[63] In exercising judicial review, the Court has implemented that presumption by upholding legislation without requiring Congress to have provided reasons for it.

A brief passage in *United States Railroad Retirement Board v. Fritz* succinctly illustrates the contrasting background rule of review: "Where, as here, there are plausible reasons for Congress's action, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,' because this Court has *never insisted* that a legislative body articulate its reasons for enacting a statute."[64] Far from making constitutional validity depend on a statement of reasons by Congress, the Court views it as "constitutionally irrelevant" whether Congress endorsed the set of reasons that the Court views as justifying the legislation.[65] Indeed, at least within the

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eds., 2003); and Michael Taggart, *The Tub of Public Law*, *in* THE UNITY OF PUBLIC LAW 455, 476-79 (David Dyzenhaus ed., 2004).

63. For a classic statement of the grounds for this presumption of constitutionality, see James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893), which argues that the Supreme Court should declare federal legislation invalid only when Congress has made a "very clear" mistake. Contemporary discussion of this presumption is legion. *See, e.g.*, Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 85-91 (2001) (documenting the traditional presumption of the constitutionality of legislation).

64. 449 U.S. 166, 179 (1980) (emphasis added) (citation omitted) (quoting Flemming v. Nestor, 363 U.S. 603, 612 (1960)); *see also* Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1656 n.349 (2001) (collecting sources for this general rule, including *Perez v. United States*, 402 U.S. 146, 156 (1971), and *Katzenbach v. McClung*, 379 U.S. 294, 299 (1964)).

65. This is not to say that the reasons for the legislation are never relevant to constitutional review. For instance, legislation enacted with an invidious discriminatory purpose is unconstitutional. *See* Washington v. Davis, 426 U.S. 229, 240 (1976) (articulating the constitutional standard); Martin Shapiro, *The Giving Reasons Requirement*, 1992 U. CHI. LEGAL F. 179, 193-94. But there is a difference between holding that an unlawful reason undermines a law's constitutionality and affirmatively requiring justification.

context of rational basis review, the Court's task is to discern whether it can "perceive a basis upon which the Congress might resolve the conflict as it did."[66] Based on this presumption, it falls to litigators to articulate a basis upon which the legislation may be upheld, making constitutional adjudication a central locus for constitutional justification. In contrast, by prohibiting the agency lawyer from performing the analogous task, the *Chenery* principle shifts the locus of justification to the agency's own reason-giving at the time of its action.

Several considerations underlie this judicial reluctance to impose an uphold-only-for-reasons-given requirement in constitutional review of federal legislation. First, and most fundamentally, applying a *Chenery*-style rule in reviewing legislation would undermine core separation of powers principles. Applying a *Chenery* rule would amount to a judicial direction as to *how* Congress must go about exercising its own legislative powers across the board.[67] As a coequal branch of government with its own electoral connection, Congress need not legitimate each exercise of its constitutional authority; it "need not answer to a technocratic ideal."[68]

Second, the Article I, Section 7 process for enacting legislation already establishes a demanding standard for agreement among the Houses of Congress and the President.[69] To impose the additional procedural

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66. Katzenbach v. Morgan, 384 U.S. 641, 653 (1966).

67. *See, e.g.*, A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 375 (2001) ("Article I, Section 7 provides no warrant for a court, including the Supreme Court, to refuse to enforce a duly enacted statute on the ground that Congress's formal record does not establish the truth of an underlying congressional conclusion or prediction."). Note that the Supreme Court has suggested that in the agency context, the *Chenery* principle does impose a "general 'procedural' requirement of sorts by mandating that an agency take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency's rationale at the time of decision." Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 654 (1990).

68. William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 140 (2001); *see also* Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 225-27 (1976) (providing the classic statement of the distinction between demands for rational justification in administrative and legislative processes).

69. The demanding character of the legislative process is often cited as a means of limiting the influence of factions, of protecting persons in smaller states, and of improving the quality of legislation. *See, e.g.*, John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 238-40 (describing the benefits of the bicameralism and presentment filters for legislation); John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 712-13, 731-44 (2002) (describing bicamerialism and presentment as creating a supermajoritarian rule and defending that rule's benefits to legislation).

requirement on Congress of providing express justifications "could cause the whole process to grind to a halt[,] . . . . making legislation far more difficult and sometimes impossible."[70] At the very least, such a requirement would induce Congress to expend more of its institutional resources justifying legislation and therefore would constrain the amount of "other legislative work that Congress [could] accomplish."[71]

Third, applying a *Chenery* rule in the legislative process would create significant unpredictability for Congress.[72] In the agency context, administrative law typically requires parties to state their objections to agency action during the agency process prior to challenging the action in court.[73] No such procedural requirements apply to Congress, and as a result, Congress is even less well equipped to anticipate which aspects of its legislation it should devote resources to explaining.[74]

Based on these concerns, scholars have sharply criticized a widely discussed line of Supreme Court decisions in the last decade that has imposed increasingly demanding requirements on Congress to justify the grounds for its legislation, principally in the form of fact-finding requirements.[75] A central thrust of this criticism is that in these decisions, the Court inappropriately applied administrative law principles in review of the constitutionality of legislation.[76] These decisions have deservedly attracted careful consideration.

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70. Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1332 (1999) (criticizing scholarly defenses of heightened judicial inquiry in federalism cases into congressional processes and justifications).

71. Colker & Brudney, *supra* note 63, at 121.

72. *See* Buzbee & Schapiro, *supra* note 68, at 128-31 (arguing that "legislative record review" is more unpredictable than hard look review because few process requirements apply to legislative policy formulation).

73. Statutory requirements of exhaustion, ripeness, and finality all serve this purpose.

74. *See* Buzbee & Schapiro, *supra* note 68, at 128-31.

75. Most scholars agree that this line of decisions began with *United States v. Lopez*, 514 U.S. 549 (1995), and gained further strength in *United States v. Morrison*, 529 U.S. 598 (2000), as well as in decisions concerning how Congress may enforce the Reconstruction Amendments, such as *City of Boerne v. Flores*, 521 U.S. 507 (1997), *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), and *Board of Trustees v. Garrett*, 531 U.S. 356 (2001). *See* Bryant & Simeone, *supra* note 67, at 332-54 (describing the evolution and its antecedents in First Amendment decisions); Buzbee & Schapiro, *supra* note 68, at 109-19 (describing the evolution).

76. This point is a central argument of Bryant & Simeone, *supra* note 67, at 331, 370-73, and Buzbee & Schapiro, *supra* note 68, at 90, 119-35. Professor Frank Cross has also decried treating Congress like an agency in his critique of scholarly defenses of greater elaboration requirements, *see* Cross, *supra* note 70, at 1331-35 (suggesting that applying hard look review

For our purposes of drawing a contrast between constitutional and administrative review, it suffices to note that these decisions have not reversed the background presumption that Congress may legislate without stating reasons. At most, they show that this presumption does not apply to particular areas of heightened constitutional concern. And while the scholarly criticism of these decisions has challenged the ways in which they treat Congress like an agency, such as by requiring Congress to articulate the grounds for its actions, it has not examined the justification for the *Chenery* principle in the administrative setting.

The basis of *Chenery* in administrative law is in a sense the flip side of this line of criticism. If there are objections to applying a *Chenery* rule to constitutional review of legislation, are those objections peculiar to the review of legislation, or are they also applicable to the principle in the administrative law setting? I aim to defend *Chenery*'s justification on the agency side of the ledger (and thus to suggest obliquely that the objections to invoking the *Chenery* principle in constitutional adjudication are peculiar to that context).

2. *Appellate Review*

Constitutional review is not the only mode of judicial review in which an uphold-only-for-reasons-given rule does not apply. In *Chenery I*, Justice Frankfurter carefully distinguished the principle from "the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason.'"[77] This rule of appellate review is just as well established today as it was at the time of *Chenery*.[78]

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in constitutional cases is unfounded), and Professors Ruth Colker and James Brudney have been similarly critical, *see* Colker & Brudney, *supra* note 63, at 83 (suggesting that the Supreme Court has treated Congress akin to an agency or lower court). The thrust of this commentary can be seen as elaborating the grounds for Justice Breyer's criticism of the Court in *Garrett* for "[r]eviewing the congressional record as if it were an administrative agency record." 531 U.S. at 376 (Breyer, J., dissenting).

77. 318 U.S. 80, 88 (1943) (quoting Helvering v. Gowran, 302 U.S. 238, 245 (1937)).

78. *See, e.g.*, NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706, 722 n.3 (2001) (noting that whether the reviewing court, not the agency, erred is irrelevant in view of the settled *Helvering* rule); Palmer v. Occidental Chem. Corp., 356 F.3d 235, 236 (2d Cir. 2004) ("We may affirm on any ground with support in the record, even if it was not the ground relied on by the District Court."); Kearney v. J.P. King Auction Co., 265 F.3d 27, 41 n.18 (1st Cir. 2001) (articulating the same rule and citing *Helvering*); Guthrie v. Lady Jane Collieries, Inc., 722 F.2d 1141, 1145 n.1 (3d Cir. 1983) (same); *see also Helvering*, 302 U.S. at 246 nn.4-5 (collecting authorities). *But see* EEOC v. Nat'l Children's Ctr., Inc., 98 F.3d 1406, 1410 (D.C.

As one early court characterized the rule, "[i]t is the correctness of the judgment, not the legal reasoning by which it was reached, that an appeal challenges."[79] As the validity of the judgment is evaluated independently from the reason given for it, an appellee can support the judgment with arguments that "may involve an attack upon the reasoning of the lower court," as long as they stem from sources in the record.[80] The motivating concern behind this rule appears to be judicial economy: why remand to the lower court to correct its reasoning when the judgment is correct and the appellate court could itself correct the error?[81] An account of the *Chenery* principle must explain why the same logic is not sufficient in the agency context.

D. The Consequences of the Chenery *Principle*

The *Chenery* principle's stringent demand for agency explicitness, as compared with other public law frameworks of review, has wide-ranging consequences for administrative government. Importantly, it increases the resources that agencies must devote to explaining the decisions they make.

The *Chenery* principle does not itself indicate how demanding a court will be in assessing the reason provided by the agency.[82] A standard of review—such as the APA's mandate for reversing agency action that is "arbitrary,

Cir. 1996) (noting that, in a review for abuse of discretion, "[w]ithout a full explanation, we are unable to review the district court's exercise of its discretion").

79. *In re* Schwartz, 89 F.2d 172, 173 (2d Cir. 1937); *see also* Stoffregen v. Moore, 271 F. 680, 681 (8th Cir. 1921) ("The opinion may be wrong, and still the judgment be right.").

80. *Schwartz*, 89 F.2d at 173.

81. *See Kearney*, 265 F.3d at 41 n.18 (noting that this rule of appellate review, like the waiver of arguments not presented to the trial court, is founded on judicial economy and basic fairness). The rule would seem to promote fairness at least in the sense of not requiring the litigant that wins a correct, but improperly justified, judgment to expend additional resources in litigation.

82. If, as Professor Ronald Levin has suggested, administrative remedies are those options for relief available to a court after it has determined that the agency has acted unlawfully, *see* Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 294 (2003), then the *Chenery* principle is not itself a remedial doctrine. It rather imposes a validity condition for agency action. This does not imply that the principle has no connection to remedies; in fact, it may have several strong implications for the scope of judicial remedies. For instance, as Levin has suggested, the principle appears to provide a persuasive justification for the remedial doctrine that a court may correct an agency's error of law but lacks the power to order action that lies within the agency's delegated power. *See id.* at 365-69 (suggesting that *Chenery* provides a source of justification for the remedial doctrine of *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940)).

capricious, an abuse of discretion, or otherwise not in accordance with law"[83] and the judicial glosses on that mandate—determines how closely the court will scrutinize agency action.

But once any given standard of review is joined with the *Chenery* principle, the *Chenery* principle limits judicial review to the explanation the agency relied upon when it acted. The combination of a searching standard of review—the arbitrary and capricious standard, as widely read—with the *Chenery* principle is what characterizes the contemporary hard look doctrine of judicial review. With this combination, Professor Martin Shapiro has observed, courts have held that "a rule was *not* arbitrary and capricious only when it was well reasoned and well supported by facts."[84] As a practical matter, this conjunction requires that agencies specifically explain their policy choices, their consideration of important aspects of the problem, and their reasons for not pursuing viable alternatives.[85] The consequences of this regime are, by now, familiar. Intensive judicial scrutiny under the hard look doctrine is widely viewed as a central cause of the ossification of administrative government.[86] Because virtually any failure to explain the basis for an action can provide grounds for reversal under hard look review, agencies have incentives to

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83. 5 U.S.C. § 706(2)(A) (2000).

84. Shapiro, *supra* note 65, at 185; *see also* MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION 48-50 (1988) (describing the conjunction of the hard look standard and the requirement that an agency explain all aspects of its decision).

85. *See* Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 47-48 (1983).

86. *See, e.g.*, Buzbee & Schapiro, *supra* note 68, at 128 (agreeing with others that frequent judicial remands and detailed scrutiny of agency rationales have contributed to the "ossification" of regulatory process); William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability To Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 394 (2000) ("[T]he prospect of facing hard look review by the courts has caused administrative agencies to become reluctant to use the informal rulemaking process, with its attendant benefits of clear prior notice, widespread public participation, and comprehensive resolution of issues affecting large numbers of people or economic activities."); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 528 (1997) ("[I]t has become so difficult for agencies to promulgate major rules that some regulatory programs have ground to a halt and others have succeeded only because agencies have resorted to alternative policymaking vehicles."); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1387 (1992) [hereinafter McGarity, *Some Thoughts*] (noting that although no empirical studies of the burden on agency rulemaking exist, "it is difficult to disagree with the conclusion that it is much harder for an agency to promulgate a rule now than it was twenty years ago"); Pierce, *supra* note 11, at 71 (suggesting that the detailed demand for contemporaneous explanation requires agencies to commit tens of thousands of hours per major rule).

anticipate and address any issue that might attract attention.[87] The burden of detailed and express justification for virtually every type of regulatory action, from significant rulemaking to informal decisions about whether to grant a bank a charter, has slowed down the regulatory process.[88] Even if *Chenery* were paired with a more relaxed standard of review, it would have a similar, though less pronounced, effect. The principle would still create incentives for agencies to devote more resources than they otherwise might to contemporaneous explanation of their actions.

Moreover, despite the industry of agency justification that the *Chenery* principle has helped to create, inadequate explanation is still among the most common grounds for judicial reversal and remand.[89] These remands have a profound impact on agency priorities. Not only do they provide systematic incentives for agencies to lengthen and to enhance the proffered explanations of their decisions, but *Chenery* remands clearly impose costs on the agency in the specific cases in which they occur, forcing the agency to re-rationalize its actions or to alter its course.[90]

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87. Cross, *supra* note 70, at 1331 n.154.

88. *See* McGarity, *Some Thoughts*, *supra* note 86, at 1387-88 (documenting that the time required for typical OSHA rulemaking has increased from six months to five years with increased judicial review). The extent to which the overall quality of regulation has improved as a result of the resources agencies must devote to express reason-giving and to satisfying hard look review is a large, open question. *See, e.g.*, Richard J. Pierce, Jr., *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s*, 43 ADMIN. L. REV. 7, 27 (1991) (suggesting that demanding judicial review of the Federal Energy Regulatory Commission could induce the agency to hire more lawyers, which would emphasize the "apparent quality of decisionmaking over actual quality of decisionmaking"); Thomas O. Sargentich, *The Critique of Active Judicial Review of Administrative Agencies: A Reevaluation*, 49 ADMIN. L. REV. 599, 629-35 (1997) (suggesting that active judicial review can deter the worst abuses of power); Nicholas S. Zeppos, *Judicial Review of Agency Action: The Problems of Commitment, Non-Contractibility, and the Proper Incentives*, 44 DUKE L.J. 1133, 1147-49 (1995) (suggesting that intrusive judicial review creates incentives within agencies to emphasize law over policy and shifts power to agency and DOJ lawyers). Professor Matthew Stephenson has recently proposed a justification of hard look review that does not depend on the capacity of courts to assess the soundness of the justification offered by the agency. *See* Matthew C. Stephenson, *A Costly Signaling Theory of "Hard Look" Judicial Review*, 58 ADMIN. L. REV. 753, 755 (2006). Rather, Stephenson argues that the requirement of detailed explanation allows the agency to signal to the reviewing court its own assessment of the benefits of the action through a relatively high-quality explanation for its action. *See id.* at 766-67, 772-75.

89. *See* sources cited *supra* note 11.

90. *See* Schuck & Elliott, *supra* note 11, at 1047 (reporting that approximately 37% of remanded cases produced "major changes" in the agency's post-remand positions, and suggesting that "the mere occurrence of a remand, without more, frequently causes an agency to alter its original position in important ways").

II. THE *CHENERY* PRINCIPLE'S CONVENTIONAL JUSTIFICATIONS

How, then, is the *Chenery* principle's demand for agency articulation justified and distinguished from the background rules of review applicable to Congress and lower courts? At least from the perspective of identifying *Chenery*'s foundations, a tidy and frequently invoked answer is that the *Chenery* principle is required by the APA. This Part disputes that claim and argues that the *Chenery* principle's association with the APA is best explained on more general grounds. Nor is *Chenery* required by the nature of judicial review, nor by Article III. The most promising conventional view of *Chenery* instead stems from the idea that Congress has delegated to agencies, not the courts, the exclusive authority to select the reasons for their actions. This delegation theory provides a useful starting point for a justification of *Chenery*, but it is incomplete. In particular, it requires an account of why we should make that presumption about Congress's delegation to agencies. The nondelegation argument in Part III offers such an account.

A. As an APA Requirement

The first conventional justification for the *Chenery* principle takes it to be required by the APA.[91] Because *Chenery* was decided in 1943, three years prior to the APA's enactment, the claim that *Chenery* is justified by the APA has an anachronistic awkwardness to it, at least as applied to the decision itself.

Notwithstanding the fact that *Chenery* predates the APA, the APA has two sets of provisions that could provide a basis for *Chenery*'s current application: the requirement of reason-giving for certain forms of agency action and the specification of the arbitrary and capricious standard of review. Examination of the statute, however, reveals that neither of these provisions requires the *Chenery* prohibition.

First consider the APA's reason-giving requirements. The APA requires agencies to provide a statement of reasons for their actions when they engage

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91. *See, e.g.*, Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 374-75 (1998) (suggesting that the APA established a scheme of reasoned agency decision-making that courts enforce through the *Chenery* principle); Local Joint Executive Bd. v. NLRB, 309 F.3d 578, 583 (9th Cir. 2002) (suggesting that the APA's reasoned decision-making standard involved applying the *Chenery* rule); Women Involved in Farm Econ. v. Dep't of Agric., 876 F.2d 994, 998 (D.C. Cir. 1989) (suggesting that the court could not require a contemporaneous statement of reasons for a rule that was exempt from the APA's notice-and-comment requirements).

in informal rulemaking and formal adjudication.[92] Requiring an agency to give reasons does not itself entail that courts may uphold an agency action only on the basis of the reasons the agency gave at the time it acted. For instance, Rule 52 of the Federal Rules of Civil Procedure expressly requires federal district courts to provide a statement of their findings of fact and conclusions of law.[93] When appellate courts review judgments, however, they can affirm on any basis supported by the record, even if it was not the basis of the district court's disposition.[94] Thus, some additional grounds are required to move from the APA's reason-giving requirements to the *Chenery* principle.

Indeed, the suggestion that *Chenery* is required only insofar as the APA itself imposes reason-giving requirements on agencies fails to account for established aspects of current law. Consider the Supreme Court's decision in *Camp v. Pitts*, in which the Comptroller of Currency denied a bank charter.[95] The Court held that neither the APA's requirements for reason-giving nor the enabling statute required the Comptroller to hold a hearing or make formal findings as a basis for his action.[96] The Comptroller, however, had provided a brief basis for his conclusion in a letter. Despite the absence of procedural reason-giving or fact-finding requirements, the Court held that the Comptroller's action could be sustained only based on his own contemporaneous finding. Citing *Chenery I*, it wrote that "[t]he validity of the Comptroller's action must, therefore, stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review."[97] The Court reversed and remanded to the lower court with instructions to apply this principle in reviewing the Comptroller's action.[98] If the *Chenery* principle were solely a product of the APA's reason-giving requirements, it would not apply when the APA did not require contemporaneous reason-giving.

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92. When the agency engages in informal rulemaking, the APA requires the agency to provide a "concise general statement of [the rule's] basis and purpose," 5 U.S.C. § 553(c) (2000), and when the agency engages in formal adjudication or rulemaking, the APA requires the agency to state "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion," *id.* § 557(c)(3)(A).

93. FED. R. CIV. P. 52(a) ("In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58 . . . .").

94. *See* sources cited *supra* note 78.

95. 411 U.S. 138 (1973) (per curiam).

96. *See id.* at 140-41.

97. *Id.* at 143.

98. *Id.*

Grounding *Chenery* in the APA's judicial review provisions also requires judicial embellishment. As noted above, the statute sets forth broad substantive standards for review of agency action, such as the arbitrary and capricious standard, and it establishes when judicial review is available.[99] But those provisions are silent on the particular concern of the *Chenery* principle: whether an agency may be affirmed on grounds other than those it invoked at the time. In principle, a court could evaluate whether an agency's action was arbitrary and capricious by assessing the agency's outcomes without reference to the stated grounds of the action. As suggested above, it is the conjunction of the *Chenery* principle with this substantive standard that confines the reviewing court's attention to the way the agency justified its decision at the time it was made. The fact that in contemporary administrative law the *Chenery* principle is viewed as an aspect of hard look review does not show that *Chenery* is grounded in the arbitrary and capricious standard; it shows only that the arbitrary and capricious standard has been applied in combination with *Chenery*.

The point here is not to deny that *Chenery* could be viewed as an element of the judicial enforcement of these APA provisions. Arguments could certainly be made that *Chenery* helps to enforce them and that the *Chenery* principle is and should be associated with them. The question, however, is whether the *Chenery* principle's grounding is ultimately tied to the APA or has more general foundations. The burden of the arguments I offer in Part III is to show that there are more general foundations for the *Chenery* principle—foundations that may help to explain its role in APA review. But it should come as no surprise that when the APA is at work, it will be difficult to discern whether the APA or *Chenery*'s broader foundations drive the principle.

B. *As Necessary to Judicial Review or Article III*

Another approach is to justify the *Chenery* principle as an element of judicial review itself or as an aspect of the Article III limitations on the federal courts' power. A court-based rationale was prominent in *Chenery I*: "[T]he courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review."[100] As the Court elaborated, "[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately

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99. *See* 5 U.S.C. § 702 (2000) (specifying the right of review); *id.* § 706 (establishing standards of review).

100. 318 U.S. 80, 94 (1943).

sustained."[101] Numerous decisions embrace these claims that the principle is necessary to judicial review or to its "orderly functioning" in the administrative process.[102]

But the basic suggestion—that considering the reasons invoked to justify an action is a necessary condition for reviewing the action—is odd. Consider constitutional review of legislation. In the run-of-the-mill case, judicial review of legislation does not exclude post hoc justifications. Likewise, as noted above, appellate courts review trial court decisions without imposing a *Chenery* principle. In these cases, judicial review proceeds by reviewing outcomes, without necessary recourse to the reasons invoked by the initial decision-maker. The justification that the *Chenery* principle is necessary for judicial review is too general. If true, this justification would require applying the principle across the board and could not explain the confinement of the *Chenery* principle to review of agency action.

Perhaps, then, there is something peculiar to the "orderly functioning" of the process of judicial review of administrative action that requires the *Chenery* principle, even if it is not required for judicial review in general. On that view, the explanation for the differential application of *Chenery* would lie not in features intrinsic to the *process of review* itself, but instead in the institutional relationships among courts, agencies, and the legislature. In that case, it makes more sense to explain the difference directly with reference to those institutional relationships and not as an aspect of the process of review.

The idea that the *Chenery* principle embodies an Article III limitation on the judiciary has similar failings. The core of the Article III position is this: for a court to select the rationale upon which the agency's action will be sustained—as opposed to evaluating the soundness of the rationale the agency articulated at the time it acted—would amount to the judicial assumption of an "administrative" or even quasi-legislative function that exceeds the Article III powers of federal courts.[103]

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101. *Id.*

102. *E.g.*, Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 169 (1962) ("For the courts to substitute their or counsel's discretion for that of the Commission is incompatible with the orderly functioning of the process of judicial review."); *see also* Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 428 (1992) (White, J., dissenting) (citing *Burlington*); FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 249 (1972) (same); Inv. Co. Inst. v. Camp, 401 U.S. 617, 628 (1971) (same); Rizek v. SEC, 215 F.3d 157, 161 (1st Cir. 2000) (citing the "orderly functioning" rationale).

103. *See* Ronald M. Levin, *Administrative Discretion, Judicial Review, and the Gloomy World of Judge Smith*, 1986 DUKE L.J. 258, 274 n.81 (describing the underdeveloped Article III doctrine).

The invocation of such a limitation on the judicial power finds some support in cases from the 1930s and earlier, but it has been largely overlooked or cast aside in contemporary constitutional law.[104] Even were this limitation to flourish, however, it too would leave little room to explain constitutional review of legislation. If selecting the rationale for agency action would exceed the judicial power, then wouldn't the same be true of selecting the rationale that justifies an act of Congress? This is a clear stumbling block for an Article III account. Of course, *Chenery* may help to enforce a limitation on the power exercised by courts, but that limitation appears to be a by-product of, as opposed to the basic ground for, the *Chenery* principle.

C. *As a Principle of Deference (and Delegation)*

The most helpful conventional theory of the *Chenery* principle turns more expressly to Congress's structuring of the judicial role in reviewing agency

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104. As Levin has noted, the prospect that a form of judicial review may exceed the boundaries of Article III by taking on an "administrative" function is clearly illustrated by *Federal Radio Commission v. General Electric Co.*, 281 U.S. 464 (1930). *See* Levin, *supra* note 103, at 274 n.81. The Court held that it lacked jurisdiction to review an order of the D.C. Court of Appeals, the highest non-Article III court in the District of Columbia, because the statute granted the D.C. court an administrative, not a judicial, role. *See Gen. Elec.*, 281 U.S. at 466-67. The statute provided the Federal Radio Commission with the authority to grant and to revoke a radio license under a broad public convenience, interest, or necessity standard, *see id.*, and granted the D.C. court authority to review the Commission's order, to hear additional evidence, and to revise the Commission's order and "enter such judgment as to it may seem just," *id.* at 467.

The Supreme Court held that the powers granted to the D.C. court were "purely administrative," in the sense that they made the D.C. court into "a superior and revising agency in the same field." *Id.* Because the D.C. court was a non-Article III tribunal, Congress could vest it with such administrative powers. But the Supreme Court held that it would exceed the Court's own Article III powers to take jurisdiction over an appeal from this administrative decision. *See id.* at 468-69. The Court "cannot give decisions which are merely advisory; nor can it exercise or participate in the exercise of functions which are essentially legislative or administrative." *Id.* at 469. This idea of an Article III limitation on judicial engagement in "essentially legislative or administrative" functions has little hold, at least in its express form, in contemporary constitutional law, *see* Levin, *supra* note 103, at 274 n.81, though it might be reflected in recent decisions that have denied judicial review for lack of judicially manageable standards, *see* Vieth v. Jubelirer, 541 U.S. 267 (2004); Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006); *see also* Maryland v. United States, 460 U.S. 1001, 1004 (1983) (Rehnquist, J., dissenting from summary affirmance without opinion) (suggesting that an act granting the district court jurisdiction to approve a civil antitrust settlement is without a standard and thus may not "admit[] of resolution by a court exercising the judicial power established by Art. III of the Constitution").

action. This account suggests that the principle is an aspect of judicial respect for the authority that Congress has delegated to the agency.

Chenery sets out the following reasoning:

> If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.[105]

In numerous decisions, the Court has reiterated the view that applying the *Chenery* principle "is not to deprecate, but to vindicate the administrative process, for the purpose of the rule is to avoid 'propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency.'"[106]

This suggestion is initially counterintuitive: how can it be that *reversing* the agency for acting on reasons that are not sustainable is more respectful or deferential to the agency than *affirming* the agency action for reasons that the agency did not express but that its counsel has argued?[107]

One promising place to start is with the idea that Congress has granted the agency, not the court, exclusive power to determine the basis of the agency's actions. The *Chenery* Court's analogy to the jury suggests this view. The Court noted that "where the correctness of the lower court's decision depends upon a

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105. *Chenery I*, 318 U.S. at 88; *see also id.* at 94 ("We do not intend to enter the province that belongs to the Board, nor do we do so." (quoting Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197 (1941))).

106. *Burlington*, 371 U.S. at 169 (alteration in original) (citation omitted) (quoting *Chenery II*, 332 U.S. 194, 196 (1947)); *see also* INS v. Orlando Ventura, 537 U.S. 12, 16 (2002) (denying that an "appellate court [could] intrude upon the domain which Congress has exclusively entrusted to an administrative agency" (alteration in original) (quoting *Chenery I*, 318 U.S. at 88)); Heckler v. Lopez, 463 U.S. 1328, 1333 (1983) (quoting the "propel" language of *Chenery II*, 332 U.S. at 196); *Sperry & Hutchinson*, 405 U.S. at 249 (quoting *Burlington*); *Inv. Co. Inst.*, 401 U.S. at 628 ("Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands."); Fed. Power Comm'n v. United Gas Pipe Line Co., 393 U.S. 71, 73 (1968) (quoting the "propel" language of *Chenery II*, 332 U.S. at 196).

107. The corollary of this rule, as Levin has suggested, is that "a court also may not *reject* an agency action by making its own determinations on an issue that lies within the agency's discretionary authority." Levin, *supra* note 82, at 367-68. This is a shorthand statement of the basic principle of judicial deference to agencies' determination of matters within their province.

determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury."[108] It then stated that "[l]ike considerations" applied to review of administrative orders.[109] By making a finding of fact, a court of appeals would exceed its institutional role (review) by usurping a function of the jury (initial fact-finding); when a jury trial occurs, the jury, not the appeals court, has exclusive dominion over fact-finding.

For the analogy between usurpation of the jury's role and the *Chenery* principle to hold, the power to select the rationale for an agency's action must be understood as an essential element of that action, a matter over which the agency has exclusive power. On that understanding, for a court to substitute or supply reasons for the agency action would amount not to a form of deference to the agency, but rather to a usurpation of the agency's role. That appears to be the implied understanding in the Court's suggestion that the *Chenery* principle prevents courts from "intrud[ing] upon the domain which Congress has exclusively entrusted to an administrative agency."[110] Thus, the *Chenery* principle can be seen as embodying respect for the agency based on the premise that Congress has granted the agency the exclusive power to select the rationale for its own actions.

On this delegation theory, the grant of substantive discretion to the agency also vests the agency with the power to select the reasons for its actions; the delegation, on this view, is a grant of authority to take actions for reasons that the agency expressly endorses, not merely to take actions. At a basic level, this seems to be an appealing understanding of the character of congressional delegation. Part of the reason for the delegation, after all, is for the agency to exercise its expertise.

One difficulty, however, is that when Congress delegates authority to agencies, it rarely indicates an intent that courts police the agencies' exercise of authority through the *Chenery* rule of review. Thus, this delegation view would have to take the *Chenery* principle as a *presumption* about the conditions that Congress aims to impose when it grants substantive discretion to the agency. Viewed this way, the delegation theory has a strong similarity to the *Chevron* doctrine, which also relies upon a presumption—indeed, a concededly fictive presumption[111]—of congressional intent. For *Chevron*, the presumption is that

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108. *Chenery I*, 318 U.S. at 88.

109. *Id.*

110. *Id.*; *see also* Louis v. Dep't of Labor, 419 F.3d 970, 978 (9th Cir. 2005).

111. *See, e.g.*, Ronald M. Levin, Mead *and the Prospective Exercise of Discretion*, 54 ADMIN. L. REV. 771, 792 (2002) (noting wide agreement that *Chevron* relies on a fiction concerning

the grant of authority to bind with the force of law also carries with it a grant of interpretive authority.[112] On the delegation theory of *Chenery*, the parallel presumption is that the grant of substantive authority carries with it the exclusive power to select the reasons that can be relied upon to justify the action.

For some, this might be the right place to rest in the search for a justification of *Chenery*. Emphasizing that the principle is founded on a presumption about Congress's intent in delegating power to the agency seems to make sense of the courts' persistent claim that *Chenery* expresses deference to the agency. It also conveys the background assumption that Congress delegates in part so that agencies will exercise their expertise and flexibility in view of changing conditions, and it suggests that *Chenery* provides a way to ensure that the agencies will do so.

But there are reasons not to stop here. The delegation theory, as explicated thus far, links the *Chenery* principle to a presumption about how Congress would want courts to review agency action. Other than the basic idea that Congress grants agencies authority because of their expertise and responsiveness, we do not yet have reasons of principle or policy for making this uphold-only-for-reasons-given presumption about Congress's intentions.[113] Further, the delegation theory provides only a thin explanation of what would be so terribly wrong with a court's defying the *Chenery* principle and affirming for post hoc reasons. A fuller understanding of why courts construe delegations as including such an implied condition on the grounds for review may help to explain what interests the *Chenery* principle protects.

III. THE NONDELEGATION DOCTRINE AND THE *CHENERY* PRINCIPLE

The previous Part argued that neither the APA alone, nor the process of judicial review, nor Article III grounds the *Chenery* principle. It suggested that the inquiry should focus instead on the idea that the demands of *Chenery* stem from the delegation of authority to the agency. This Part argues that the nondelegation doctrine provides a basis for courts to read the *Chenery*

Congress's intent to allocate interpretive authority); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 871-72 (2001); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 ("[A]ny rule adopted in this field represents merely a fictional, presumed intent . . . .").

112. *See infra* text accompanying notes 247-250.

113. *See* David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 203, 223 (arguing that policy judgments should inform presumptions of congressional intentions about *Chevron*'s application).

principle, at least as a default rule of statutory construction, into delegations of authority to act with the force of law.

The nondelegation doctrine enforces the constitutional limitation on Congress's authority to give away its powers to other entities. This limitation is generally attributed to the Constitution's provision in Article I, Section 1 that "[a]ll legislative Powers herein granted shall be vested in a Congress."[114] My core suggestion is that the *Chenery* principle supplements the enforcement of the nondelegation doctrine as it is currently formulated. This Part first identifies the aspect of the nondelegation doctrine that the *Chenery* principle enforces and then articulates the values that such enforcement promotes.

A. *Two Arms of Nondelegation*

To the contemporary ear, it may sound peculiar that the *Chenery* principle operates as a mode of enforcing the nondelegation doctrine. After all, the current (and now conventional) formulation of the nondelegation doctrine says nothing about reason-giving; rather, it requires Congress to "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform."[115]

To see the aspect of the nondelegation doctrine that *Chenery* enforces requires digging back into the context in which the intelligible principle formulation emerged. Doing so reveals that the intelligible principle requirement arose as part of a nondelegation doctrine that had two demands, not one: a requirement of a standard to guide agency action under the delegation (the focus of the intelligible principle formulation and its related enforcement regimes) and a requirement that the agency exercising the authority expressly state the grounds upon which its action is premised. It is this second requirement, which formed part of the "contingency" theory of nondelegation, that the *Chenery* principle implements.[116]

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114. U.S. CONST. art. I, § 1; *see also* Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2104 (2004) (reporting that the nondelegation doctrine is now firmly tied to Article I, Section 1).

115. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).

116. It should be noted that grounding *Chenery* in the nondelegation doctrine, with its reliance on a distinction between congressional and administrative action, puts *Chenery* at loggerheads with *Pacific States Box & Basket Co. v. White*, 296 U.S. 176 (1935). *Pacific States Box* embraced a vision of judicial review of administrative action in which the "presumption of the existence of facts justifying its specific exercise attaches alike to statutes, . . . and to orders of administrative bodies." *Id.* at 186. As the current state of the *Chenery* doctrine shows, the vision of judicial review of agency action reflected in *Pacific States Box* has not

1. *Intelligible Principles in Context*

In a long line of decisions, the Supreme Court marked the distinction between valid and invalid delegations on the basis of whether the legislation predicated the agency's (or often the President's) power to act with binding effect on a finding that a "named contingency" had occurred.[117]

Field v. Clark provides a classic statement of the contingency theory of delegation. The legislation at issue granted the President the power to suspend tariff-free imports from a given country and to impose legislatively specified tariffs instead, if the President "deem[ed]" that tariff-free trade with the country would be "reciprocally unequal and unreasonable."[118] After reciting examples of legislation that made the suspension of specified provisions, or the operation of others, depend on "the action of the President based upon the occurrence of subsequent events,"[119] the Court reasoned that because the President's power was predicated on the declaration of certain conditions, the statute did not improperly grant "legislative" authority.[120] "Legislative power," the Court stated, "was exercised when Congress declared that the suspension should take effect upon a named contingency."[121] Rather than exercising legislative power, which involved questions of "expediency and just operation," the Court reasoned that the President was merely executing the law by declaring "the event upon which [Congress's] expressed will was to take effect."[122]

The Supreme Court's enforcement of the contingency theory of delegation took a procedural turn. In particular, the Court treated an agency's failure to

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carried the day, though some advocate its return. *See, e.g.*, Richard J. Pierce, Jr., *Seven Ways To Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 95 (1995) (urging courts to reverse the judicially enforced demand for reasoned decision-making and to embrace the *Pacific States Box* approach).

117. Field v. Clark, 143 U.S. 649, 693 (1892). *See generally* JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE 132-33 (1997) (discussing the contingency theory); Lisa Schultz Bressman, Schechter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1403 & n.24, 1404 (2000) (same); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 481-88 (1989) (providing an account of early nondelegation decisions).

118. *Field*, 143 U.S. at 680 (quoting Tariff Act of 1890, ch. 1244, § 3, 26 Stat. 567, 612).

119. *Id.* at 683; *see also id.* at 683-92 (compiling statutes of this character).

120. *See id.* at 692-93.

121. *Id.* at 693.

122. *Id.* As Professor Jerry Mashaw has noted, the *Field* contingency theory is logical, but it requires one to believe, "counterfactually[,] that whether a tariff is 'unreasonable' is a question of fact rather than a political judgment." MASHAW, *supra* note 117, at 132.

make a finding of the predicate contingency as a violation of constitutional principles that could not be remedied by post hoc averments, not merely as a violation of the statutory requirement to make such predicate determinations. The Court demanded that the official state the grounds for his actions even in the absence of a statutory requirement to do so, thus treating the requirement as a default rule of statutory construction.

The Court's decision in *Mahler v. Eby*[123] is illustrative of this line of authority. In *Mahler*, the Court rejected the argument that an immigration statute's "undesirable residents of the United States" standard was too broad a standard for determining which eligible persons were deportable,[124] but it reversed the Secretary of Labor's orders of deportation on the grounds that the orders did not include express findings of those circumstances.[125] Relying extensively on its prior decision in *Wichita Railroad & Light Co. v. Public Utilities Commission*,[126] the Court emphasized that a valid delegation must constrain the power granted by imposing prescribed procedures: "In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function."[127] The Court read the statute as requiring a finding by the Secretary as a condition precedent to deportation and held that the validity of the Secretary's order "must rest upon the needed finding."[128]

Indeed, the Court expressly embraced the rule in *Wichita Railroad* that "the lack of an express finding [could not] be supplied *by implication*" or by reference to litigation documents before the agency, concluding that such a defect "goes to the existence of the power on which the proceeding rests."[129] And, as in *Wichita Railroad*, the Court in *Mahler* based its conclusion that the lack of findings regarding the contingency conditions was fatal to the validity of the Secretary's action not only "on the language of the statute, but also on general principles of constitutional government."[130] Thus we see the Court enforcing the contingency theory of delegation in a very specific fashion: when the specification of contingency conditions is necessary to the constitutional

123. 264 U.S. 32 (1924).

124. *Id.* at 40-41 (quoting Act of May 10, 1920, ch. 174, 41 Stat. 593, 593 (repealed 1952)).

125. *See id.* at 41-44.

126. 260 U.S. 48 (1922).

127. *Mahler*, 264 U.S. at 44 (quoting *Wichita R.R.*, 260 U.S. at 59).

128. *Id.* at 43-45 (quoting *Wichita R.R.*, 260 U.S. at 59).

129. *Id.* at 45 (emphasis added).

130. *Id.* at 44.

validity of the statute, the agency must make a determination that those conditions are present in order for its action to be constitutionally valid; that determination cannot be supplied by the agency in litigation or by the reviewing court.[131]

While the Court enforced the contingency theory by requiring the agency to make an express statement that it found the contingency—and declining to find such statements by implication—it exercised little scrutiny of how much discretion was afforded by the statute's articulation of the contingency. For instance, the Court upheld statutes that broadly defined the contingency to include determining who were the "undesirable residents of the United States,"[132] finding that utility rates were "unjust, unreasonable, unjustly discriminatory or unduly preferential,"[133] and deeming tariffs "reciprocally unequal and unreasonable."[134] Each of these contingencies is effectively a broad standard for when the agency could trigger the authority granted by the statute. And the Court later expressly characterized the doctrine as permitting Congress not only to specify factual predicates for executive action, but also to establish primary standards for invoking the powers delegated.[135]

131. *Cf.* Pan. Ref. Co. v. Ryan, 293 U.S. 388, 448 (1935) (Cardozo, J., dissenting) ("If legislative power is delegated subject to a condition, it is a requirement of constitutional government that the condition be fulfilled. In default of such fulfilment, there is in truth no delegation, and hence no official action, but only the vain show of it.").

132. *Mahler*, 264 U.S. at 40 (quoting Act of May 10, 1920, ch. 174, 41 Stat. 593, 593 (repealed 1952)).

133. *Wichita R.R.*, 260 U.S. at 55 (quoting An Act Relating to Public Utilities and Common Carriers, ch. 238, § 43, 1911 Kan. Sess. Laws 417, 436).

134. Field v. Clark, 143 U.S. 649, 680 (1892) (quoting Tariff Act of 1890, ch. 1244, § 3, 26 Stat. 567, 612).

135. *See Pan. Ref.*, 293 U.S. at 426 ("Congress may not only give such authorizations to determine specific facts but may establish primary standards, devolving upon others the duty to carry out the declared legislative policy . . . ."); *see also* Fed. Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 279 (1933) (affirming the requirement that the Radio Commission make decisions to grant licenses "as public convenience, interest, or necessity requires" (quoting Radio Act of 1927, 47 U.S.C. § 84 (1932) (repealed 1934))); N.Y. Cent. Sec. Corp. v. United States, 287 U.S. 12, 20 n.1 (1932) (approving the delegation to the ICC to determine whether "acquisition . . . by one . . . carrier[] of the control of any other such carrier . . . will be in the public interest" (quoting Interstate Commerce Act, 49 U.S.C. § 5(2) (1926) (current version at 49 U.S.C. §§ 11,323-11,326 (2000)))); Avent v. United States, 266 U.S. 127, 129 (1924) (upholding the requirement that the ICC determine when there is a "shortage of equipment, congestion of traffic or other emergency requiring immediate action" in deciding whether to suspend railway car service under the Transportation Act of 1920, ch. 91, 41 Stat. 456, 476); Monongahela Bridge Co. v. United States, 216 U.S. 177, 185-86 (1910); Union Bridge Co. v. United States, 204 U.S. 364, 366 (1907); Buttfield v. Stranahan, 192 U.S. 470, 494-96 (1904).

It was against this background—requiring the agency to make express statements that the statutory contingencies or conditions were satisfied, but with little scrutiny of how much discretion the stated conditions or contingencies granted—that the Court articulated the "intelligible principle" requirement in *J.W. Hampton, Jr., & Co. v. United States*.[136] In *Hampton*, the Supreme Court upheld an act that granted authority to the President to adjust tariff rates if he found that the duties specified in the legislation did not equalize the differences in the cost of production of goods in other countries.[137]

The contingency theory framed the Court's analysis. The *Hampton* Court began by noting that Congress had frequently found it necessary to repose in an executive officer the determination of when the conditions specified in an act had occurred.[138] As in *Field*, the Court held that the statute at issue merely permitted the President to declare the occurrence of the contingency from which the legislative consequences would follow.[139] The Court proffered the intelligible principle formulation as a response to a potential counterargument that these general principles did not apply to a delegation of *rate-setting* authority: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."[140] In *Hampton* itself, the intelligible principle formulation did not displace, but rather supplemented, the contingency theory.

The Supreme Court's decision in *Panama Refining Co. v. Ryan*[141] most clearly embraces these two strands of nondelegation operating alongside each other. In *Panama Refining*, the Court struck down, on nondelegation grounds, section 9(c) of the National Industrial Recovery Act (NIRA)[142] as well as the President's orders (and those of his subdelegates) under the Act.[143]

The Court framed the analysis of the nondelegation challenge as "whether the Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the President's action; [and] whether the

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136. 276 U.S. 394, 409 (1928).

137. *See id.* at 401-02 (quoting Tariff Act of 1922, ch. 356, § 315(a), (c), 42 Stat. 858, 941-43 (repealed 1930)).

138. *Id.* at 407.

139. *See id.* at 410-11.

140. *Id.* at 409.

141. 293 U.S. 388 (1935).

142. National Industrial Recovery Act, ch. 90, § 9(c), 48 Stat. 195, 200 (1933), *invalidated by Pan. Ref.*, 293 U.S. 388.

143. *See* 293 U.S. at 414-33.

Congress has required any finding by the President in the exercise of the authority to enact the prohibition."[144] The Court's analysis collapsed the first two elements, leaving the nondelegation inquiry with two parts—whether Congress had declared a policy or standard, and whether the Act required the President to state the predicate grounds for his action under the statute.

In the most familiar passages in *Panama Refining*, the Court concluded that section 9(c) and its surrounding statutory context did not provide a sufficient standard or policy to guide the President's exercise of discretion to prohibit the transportation of oil withdrawn in violation of state law[145]: "Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited."[146]

But the constitutional infirmities did not end there. The Court concluded that the President's executive orders under the Act were constitutionally invalid because they included no statement of the predicate grounds for his actions.[147] The Court reasoned that even if it were possible to ascertain the prerequisites for the President's action under section 9(c), "it would still be necessary for the President to comply with those conditions and to show that compliance as the ground of his prohibition."[148]

After emphasizing that the President must articulate a finding for the constraints on delegation to be effectual, the Court rebutted the suggestion that judicial review of the President's actions was unavailable. On the contrary, the Court noted that when a citizen may be punished for the crime of violating such a "legislative order of an executive officer," due process of law requires that the order be authorized and that the basis for the executive officer's determinations be stated.[149] The Court then specifically embraced *Mahler* and

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144. *Id.* at 415.

145. *See id.* at 414-20.

146. *Id.* at 430.

147. *See id.* at 431-32.

148. *Id.* at 431.

149. *Id.* at 432. One might object that it is due process of law, not the requirements of the nondelegation doctrine, that grounds the express statement requirement. On this view, the express statement requirement might provide grounds for *Chenery* itself—an adjudication—and even for the requirement's application to adjudications more generally, but not justify its application to agency rulemaking, which generally does not trigger due process protections. *See* Pac. States Box & Basket Co. v. White, 296 U.S. 176, 186 (1935). While *Panama Refining*, *Mahler*, and *Wichita Railroad* did involve adjudication against individual entities, which raises due process concerns, each decision embraced the express statement requirement as part of its analysis of delegation. *See Pan. Ref.*, 293 U.S. at 431-32; Mahler v. Eby, 264 U.S. 32, 42-46 (1924); Wichita R.R. & Light Co. v. Pub. Utils. Comm'n, 260 U.S.

Wichita Railroad, reaffirming that the failure of the official to make express findings violates principles of constitutional government and that such a failure cannot be overcome "by implication."[150]

Panama Refining, moreover, concluded that the President's action was constitutionally invalid for lack of a finding despite the fact that the statute did not expressly require one.[151] The Court thus treated the express statement requirement as necessary to the validity of the statute, a background default rule of construction required by "the constitutional restriction applicable to such a delegation."[152] It was then easy work to conclude that the President failed to satisfy the requirement. That failure of articulation, like the failure of an agency to do the same, rendered the President's executive order "without constitutional authority."[153]

48, 58-59 (1922). And in *Panama Refining*, in which the Court linked due process to the requirement that the official's "determinations must be shown," *Pan. Ref.*, 293 U.S. at 432, it did so in the context of addressing the availability of judicial review of a legislative order that imposed criminal liability, and within its larger nondelegation analysis, *see id.* at 431-32. Finally, to the extent that the nondelegation doctrine and the due process protections both aim to check arbitrary government action, it makes sense that their application and requirements may overlap. For a discussion of the connection between the nondelegation doctrine and due process of law, including these decisions, see Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1553-56 (1991).

150. *Pan. Ref.*, 293 U.S. at 433 (quoting *Wichita R.R.*, 260 U.S. at 59); *see also supra* text accompanying notes 123-131 (discussing *Mahler*). Indeed, these violations of the contingency theory, not the Court's holding that the Act was invalid for failure to supply a sufficient standard, may best explain the grounds upon which the decision turned. Unlike section 3 of the NIRA, which was struck down in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), for lack of a sufficient standard to guide the President's discretion, the powers granted in section 9(c) cabined the President's discretion. Section 3 of the NIRA granted the President power to approve and modify "codes of fair competition" proposed by industry groups, National Industrial Recovery Act, ch. 90, § 3, 48 Stat. 195, 196-97 (1933), *invalidated by Schechter Poultry*, 295 U.S. 495, but contained none of section 9(c)'s limitations on the President's power, *see supra* text accompanying note 142. Justice Cardozo explained his own decision to dissent in *Panama Refining* and to join the Court in *Schechter Poultry* on precisely these grounds. *See Schechter Poultry*, 295 U.S. at 551-54 (Cardozo, J., concurring); *Pan. Ref.*, 293 U.S. at 434-37 (Cardozo, J., dissenting) (arguing that section 9 contained a sufficient standard and limit on the scope of the discretion granted to the President).

151. *See Pan. Ref.*, 293 U.S. at 406; *see also id.* at 448 (Cardozo, J., dissenting) (arguing that the analogy to *Mahler* and *Wichita Railroad* was not appropriate because in those cases, the power granted to the President was not "so conditioned" on a finding).

152. *Id.* at 433 (majority opinion); *see also id.* at 420 ("The question whether such a delegation of legislative power is permitted by the Constitution is not answered by the argument that it should be assumed that the President has acted, and will act, for what he believes to be the public good. . . . While the present controversy relates to a delegation to the President, the basic question has a much wider application.").

153. *Id.* at 433.

We see, then, a nondelegation doctrine with at least two operating elements. The doctrine polices the scope of the discretion Congress may give away by specifying standards that must be satisfied before the agency may invoke the authority granted. That is the concern of the intelligible principle formulation. But the doctrine also requires the agency to make an express statement of the basis for its action under those standards, even when the statute does not itself expressly require such a statement. Both aspects are, of course, connected. Prescribing conditions under which the agency may invoke its authority does little work without some oversight of agency claims that the predicate conditions are satisfied.[154] Likewise, merely requiring a public statement of the grounds for an agency action makes little sense without standards with which to evaluate those grounds.

2. *Enforcement and Underenforcement*

Since the Supreme Court's 1935 decisions in *Panama Refining* and *A.L.A. Schechter Poultry Corp. v. United States*[155] invalidating different provisions of the same statute, the Court has steadfastly declined to invalidate legislative delegation on nondelegation grounds.[156] The focus of the familiar story of this nonenforcement has been the intelligible principle element of the nondelegation doctrine. By the time of *Whitman v. American Trucking Ass'ns*,[157] and considerably before, the Court presented the intelligible principle formulation as a complete statement of the nondelegation doctrine; the doctrinal requirement that agencies and executive officers make express statements of findings or grounds—so prominent in *Panama Refining*, *Mahler*, and *Wichita Railroad*—had fallen by the wayside.[158] It is these express

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154. *Cf.* Ethyl Corp. v. EPA, 541 F.2d 1, 68 (D.C. Cir. 1976) (Leventhal, J., concurring) ("Congress has been willing to delegate its legislative powers broadly—and courts have upheld such delegation—because there is court review to assure that the agency exercises the delegated power within statutory limits, and that it fleshes out objectives within those limits by an administration that is not irrational or discriminatory.").

155. 295 U.S. 495.

156. *See, e.g.*, Bressman, *supra* note 117; Manning, *supra* note 69; Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000). The Court has been so permissive as to what counts as an intelligible principle that most commentators have concluded that this formulation is simply not enforced through constitutional review. *See, e.g.*, Merrill, *supra* note 114, at 2109 ("[A]s far as the Supreme Court is concerned, the nondelegation doctrine imposes no effective constraint on congressional legislation.").

157. 531 U.S. 457 (2001).

158. *See id.* at 472. *Compare* Touby v. United States, 500 U.S. 160, 165-67 (1991) (invoking the intelligible principle test, but also noting the statutory requirements of findings), Fed.

statement demands of the nondelegation doctrine, however, that the *Chenery* principle implements.

The Court's reluctance to enforce the intelligible principle doctrine is frequently attributed to the fact that it invites the Court to "second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."[159] In response to the reluctance to engage in *Marbury*-style judicial review without a more manageable judicial standard, courts and commentators have identified other guises through which the nondelegation doctrine is enforced.[160]

Some have focused on alternative ways of enforcing the intelligible principle test. The Supreme Court itself has professed that its predominant mode of enforcing the intelligible principle doctrine has been through the canon of constitutional avoidance.[161] In this avoidance form, the Court adopts narrowing constructions of a statutory delegation in order to avoid directly

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Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 558-60 (1976) (noting the requirement that the President find that preconditions specified in the legislative standard have been met), *and* Lichter v. United States, 334 U.S. 742, 785-86 (1948) (invoking the intelligible principle test but also noting that the statute required officials to act upon findings of excessive profits), *with* Clinton v. City of New York, 524 U.S. 417, 484-87 (1998) (Breyer, J., dissenting) (relying on the intelligible principle formulation and mentioning the presidential determination only incidentally), Loving v. United States, 517 U.S. 748, 771-73 (1996) (invoking the intelligible principle test without any mention of the need for findings), Mistretta v. United States, 488 U.S. 361, 372-79 (1989) (treating the intelligible principle test as a sufficient nondelegation test without any mention of the need for findings), *and* Nat'l Cable Television Ass'n v. United States, 415 U.S. 336, 341-43 (1974) (construing the statute narrowly to avoid directly confronting *Hampton* and *Schechter Poultry*, without any mention of findings requirements).

159. *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting); *see* Manning, *supra* note 69, at 241-42 (noting the same).

160. Not everyone agrees that enforcement of anything resembling the traditional prohibition on delegation is appropriate. *See, e.g.*, Merrill, *supra* note 114, at 2099, 2101 (arguing that the nondelegation doctrine should be replaced by the "exclusive delegation" doctrine that only Congress may delegate legislative power); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002) (arguing that the only limitation on delegation of legislative power is that members of Congress may not delegate their power to vote on legislation or to exercise other powers of legislators).

161. *See Mistretta*, 488 U.S. at 373 n.7 ("In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional."); Bressman, *supra* note 117, at 1409-11 (describing the canon of avoidance and clear statement doctrines as surrogates for the nondelegation doctrine); Manning, *supra* note 69, at 223, 242-45 (describing constitutional avoidance as the exclusive mode of enforcement of the nondelegation doctrine); Merrill, *supra* note 114, at 2103 n.16 (collecting examples of enforcement through constitutional avoidance).

determining whether the statute contains an intelligible principle.[162] In addition, Professor Lisa Bressman identified, as another guise for the intelligible principle doctrine's enforcement, the requirement that agencies themselves articulate standards that limit their discretion,[163] such as those imposed by the D.C. Circuit in *American Trucking Ass'ns v. EPA*.[164]

Others have suggested that the Court enforces the interests of the intelligible principle formulation through doctrines of statutory interpretation that aim to provide incentives for Congress to act. Professor Cass Sunstein, for instance, has argued that doubts about judicial administrability suggest that the intelligible principle doctrine is usefully supplemented by a wide array of statutory construction canons that limit agency discretion or require clear congressional statements.[165] In a similar vein, Professor John Manning has suggested that the canon of reading general statutory directions in light of more specific directions furthers nondelegation interests.[166]

This discussion about modes of enforcement of the nondelegation doctrine has not, however, given sustained attention to the contingency theory's requirement that agencies must state the predicate conditions justifying their invocation of the statute, nor has it attended to the ways in which the *Chenery* principle operates to enforce this express statement aspect of the nondelegation doctrine.

The parallels between *Chenery* and this aspect of the nondelegation doctrine are quite striking. Both doctrines specify the source and timing of the justification for the agency's actions. In particular, under both *Chenery* and the

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162. *See, e.g.*, Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 646 (1980) ("A construction of the statute that avoids [an] open-ended grant [of legislative power] should certainly be favored."); *Nat'l Cable Television Ass'n*, 415 U.S. at 341-43 (adopting a narrowing construction of a statute based on the principle of constitutional avoidance); Manning, *supra* note 69, at 242-43 ("Where a statute is broad enough to raise serious concerns under the nondelegation doctrine, the Court simply cuts it back to acceptable bounds.").

163. Bressman, *supra* note 117, at 1415. Bressman has also identified the enforcement of standards through constitutional avoidance as such a guise. *See* Lisa Schultz Bressman, *Disciplining Delegation After* Whitman v. American Trucking Ass'ns, 87 CORNELL L. REV. 452, 454 (2002) (arguing that using constitutional avoidance to implement administrative standards requirements is a preferred mode of enforcing nondelegation concerns following *American Trucking*). Requiring an agency to set standards is one component of requiring it to explain the bases for its actions. *See id.* at 464.

164. Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1037-38 (D.C. Cir. 1999) (remanding to the agency to articulate an intelligible principle to guide its implementation of the statute), *rev'd in part sub nom.* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 473 (2001).

165. *See* Sunstein, *supra* note 156, at 316.

166. *See* Manning, *supra* note 69, at 267-76.

express statement doctrine, the agency's statement of the grounds for its action is a necessary predicate to the exercise of delegated authority. Both doctrines expressly prohibit the agency from evading those requirements by having another institution, such as a court, supply the necessary justification by implication, or by having the agency's own counsel do so in the process of litigation, as opposed to at the time of the agency's action. Moreover, as to the types of justifications to which these doctrines apply, the express statement aspect of the contingency theory is not more narrowly concerned with the factual grounding of agency action than is the *Chenery* principle. Recall that the Supreme Court routinely upheld statutes with predicate "contingencies" involving broad standards of reasonableness or the public interest, not just the determination of specific facts.[167] As a result, the contingency theory operated as a requirement of an express statement of the predicate grounds for executive or agency action; the *Chenery* principle does the same. While the express statement aspect of traditional nondelegation doctrine has slipped from the constitutional doctrine, the *Chenery* principle actively enforces it. The familiar story of underenforcement of the nondelegation doctrine is thus incomplete; it is really a story about the underenforcement of the intelligible principle requirement, not the entire doctrine.

B. Chenery *and Nondelegation Values*

The discussion of the nondelegation doctrine thus far has sought to locate the intelligible principle requirement in the context in which it arose and to expose an aspect of the doctrine—the contingency theory's express statement requirement—that has been obscured, at least as a matter of express constitutional doctrine, and that the *Chenery* principle enforces. But what values does this enforcement promote? A strong argument can be made that the *Chenery* principle's implementation of the express statement requirement provides support for the constellation of values served by the nondelegation doctrine—promoting political accountability of decision-making as well as nonarbitrariness and regularity.[168]

167. *See supra* text accompanying notes 132-135.

168. Along the way, these arguments may suggest, though perhaps decades late, that there is more to the express statement enforcement of the contingency theory than might initially appear.

1. Democratic Accountability

One of the central values invoked to justify the nondelegation doctrine in general is promoting political accountability of decision-making. Proponents of a strictly enforced nondelegation doctrine claim that this value tips decidedly in their favor.[169] Defenders of broad delegations claim that such delegations improve the accountability and responsiveness of government.[170] Whether one understands accountability as the extent to which the decision-maker can be "monitored and controlled," or as the connection between the decision-maker and the people,[171] the *Chenery* principle promotes agency accountability. The *Chenery* prohibition promotes conditions for political control and monitoring of the regulatory process in several different respects. At a basic level, the prohibition provides a structural assurance that the grounds for agency policy have been embraced by the most politically responsive and public actors within the agency—whether a single administrator or a commission.[172] This concern is evident in one of the Court's repeated refrains on *Chenery*: "Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands."[173] While agency administrators have general control over the arguments that the agency's own appellate lawyers make, allowing courts to select post hoc

169. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 77-78, 132 (1980).

170. *See, e.g.*, MASHAW, *supra* note 117, at 147-56 (exposing several ways in which agencies that operate under broad delegations may be more democratically responsive than those that operate under specific legislation); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95-97 (1985). *See generally* Merrill, *supra* note 114, at 2141-42 (discussing proponents and opponents of the idea that nondelegation promotes accountability, and arguing that the term "accountability" is ambiguous); Sunstein, *supra* note 156, at 319-20 (describing democratic accountability as one of the main concerns of proponents of the "conventional" nondelegation doctrine).

171. *See* M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1181 (2000) (distinguishing these two conceptions of accountability).

172. *See* Krent, *supra* note 53, at 200.

173. Inv. Co. Inst. v. Camp, 401 U.S. 617, 628 (1971); *see also* FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 245-50 (1972) (relying on the same rationale as a basis for a *Chenery* remand); Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 169 (1962) (declining "to substitute [its own] or counsel's discretion for that of the [agency]"); Church of Scientology v. IRS, 792 F.2d 153, 165 (D.C. Cir. 1986) (Silberman, J., concurring) ("If courts were to accept an agency counsel's position that significantly differed from the agency's position, they would in effect substitute a judicial interpretation for the agency's.").

rationales would blur the lines of political responsibility.[174] If a court selected a validating basis for the agency's action that the agency itself had not articulated, then the grounds for the White House, Congress, and the public to hold the agency administrator or commission responsible for the rationale would be diminished. *Chenery* thus promotes conditions for agency officials to be held responsible for their positions and generally enforces the idea that those in whom Congress has vested authority have independent discretion to articulate reasons for their actions, not a discretion that can be supplanted by the intervention of the courts, or otherwise, such as by the President.[175]

The *Chenery* principle also protects the conditions for political checks on agency decision-making that occur during the process of developing policy. A fundamental feature of the American administrative state is that the President may exert substantial influence over agency policy. With respect to executive agencies, the President's power of nomination and power to remove executive officials at will provide a structural assurance of substantial presidential control. For these agencies, the President's regulatory review executive orders, which require extensive agency consultation with and disclosure to the White House, reinforce presidential monitoring and influence over administrative agencies' major activities.[176] Within the process of regulatory review, for instance, the White House (acting through the Office of Information and Regulatory Affairs (OIRA), as part of the Office of Management and Budget (OMB)) can return a proposed regulation to an agency and require it to alter the rationale upon which it relied.[177] Recent empirical work also suggests that a

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174. That blurring becomes even more prominent when the rationale is furnished by the Solicitor General's office in representing the agency before the Supreme Court. While the agency lawyers have opportunities to influence the Solicitor General's office, they do not directly control the representation. As a result, if the Court upheld an agency's action on grounds proffered by the Solicitor General before the Court, the connection between the rationale and the agency would be even more attenuated. *See* Krent, *supra* note 53, at 204 n.29 (noting a possible difference between the Solicitor General's arguments and the views of agency heads).

175. *See* Kevin M. Stack, *The President's Statutory Powers To Administer the Laws*, 106 COLUM. L. REV. 263, 322 (2006); Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. (forthcoming June 2007) (manuscript at 6, 10-14), *available at* http://ssrn.com/abstract=949649.

176. *See, e.g.*, Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *as amended by* Exec. Order No. 13,258, 3 C.F.R. 204 (2003).

177. *See id.* § 6(b)(3) (specifying OIRA's right to return significant agency regulations); *see, e.g.*, Letter from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, Executive Office of the President, to Kay Cole James, Dir., Office of Pers. Mgmt. 1 (Dec. 18, 2002), http://www.reginfo.gov/public/return/opm_return_letter.pdf (returning a proposed regulation to an agency based on "significant concerns with the justification for the

wide array of White House offices and officials assert influence and exercise checks on agencies throughout the regulatory process.[178] If a court were to uphold an agency's action on a basis not articulated by the agency at the time it acted, it could be selecting a ground that was rejected by the executive oversight officials in the process of regulatory review. That type of affirmance would undermine the political control exerted over agency action during the review process.[179]

Even with regard to an independent agency over which the President has less direct influence, the transparency of the agency's decision-making process—enforced by many of the APA's procedural requirements for rulemaking or formal adjudication—allows both executive branch officials and the public to consider and respond to the agency's proposed course of action and to challenge the agency's premises and findings. While the general agency process applicable to both independent and executive agencies is far from perfect, it enforces public disclosure and the opportunity for public response at multiple levels. Notice-and-comment rulemaking proceedings, for instance, require the agency to issue a notice of proposed rulemaking that references the legal authority and substance of the rule,[180] to disclose the scientific basis for the rule in order to allow adequate opportunity to comment,[181] to provide an opportunity for interested persons to comment, and to issue a statement of basis and purpose.[182] Part of what these procedures do is make public, over an extended period of time, the agency's development of its position, thus allowing interested parties to comment on the proposed rule and to seek mid-course revisions.

The same transparency and process protections do not apply to agency counsel, the Solicitor General, or DOJ lawyers in their choice of argument to defend an agency action. By prohibiting grounds other than those relied upon by the agency, the *Chenery* doctrine provides an assurance that the grounds

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proposed alternative" and the failure to "explain why the existing cost principles are not sufficient").

178. *See* Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2006).

179. The Supreme Court's decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), curtails the extent to which judicial constructions would also constrain the agency's future action under the statute. In *Brand X*, the Court held that agencies are not bound to prior judicial constructions of ambiguities or gaps in statutes that the agencies administer.

180. *See* 5 U.S.C. § 553(b) (2000).

181. *See* United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 251 (2d Cir. 1977).

182. *See* 5 U.S.C. § 553(c).

upon which the agency's action will be evaluated have been exposed to the public light. *Chenery* thus insists that timing matters; it makes the validity of agency action in part a matter of the agency's prior public statements and the opportunity for such statements to attract the attention of the executive, Congress, and the public. And because the agency officials are not directly elected, the very ways in which the *Chenery* principle promotes political monitoring and control also augment the connection between the agency official and the electorate.

The *Chenery* principle's contributions to political monitoring and control are distinct from those of the intelligible principle doctrine. In theory, that doctrine ensures a statutory standard against which agency action can be judged. This safeguard provides one condition for agency monitoring, but it does not help to monitor agencies during the process of implementing statutory directives. The *Chenery* principle, in contrast, does just that by ensuring that the grounds of agency action can be attributed to accountable officers of the agency and are available for evaluation by the executive branch and the public during the process of policy formation.

2. *Nonarbitrariness and the Rule of Law*

Promoting rule of law values is also a core purpose of the nondelegation doctrine. The nondelegation doctrine aims to protect against arbitrary agency decision-making and to promote regularity, rationality, and transparency. Professor Kenneth Davis championed nonarbitrariness as a principal aim of the nondelegation doctrine,[183] and other commentators have elaborated on this focus,[184] with its ready connection to the Supreme Court's decision in *Schechter Poultry*.[185] As Professor Peter Strauss has written, a basic purpose of the nondelegation doctrine is to ensure that the agency is prepared "to justify its behavior to outside assessors in accordance with principles of regularity and legality."[186]

The *Chenery* reason-giving principle directly promotes these rule-of-law values. At a basic level, it requires agencies to engage in a practice of reason-

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183. *See* 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 208 (2d ed. 1978).

184. *See, e.g.*, Bressman, *supra* note 117, at 1424-31; Peter L. Strauss, *Legislative Theory and the Rule of Law: Some Comments on Rubin*, 89 COLUM. L. REV. 427, 441-44 (1989).

185. 295 U.S. 495, 539-42 (1935) (striking down section 3 of the NIRA as an unconstitutional delegation of legislative power for granting the President the authority to amend proposed codes "as he pleases").

186. Strauss, *supra* note 184, at 443.

giving to justify their outcomes. A practice of reason-giving, as Professor Frederick Schauer has explained, involves several closely related commitments; reasons have the logical structure of "propositions of greater generality than the conclusions they are reasons for."[187] A reason, by virtue of being more general, will include the basis for its own conclusion and more.[188] "Because it is good to write thank-you notes" is a reason that includes more than the basis only for the particular note written, and "because it is good to show appreciation" is an even more general step.[189] When we give a reason for an action, that reason-giving creates a "prima facie commitment to other outcomes falling within [the] scope" of the reason.[190] This is not to say that a decision-maker can never depart from the outcomes that fall within the scope of a reason previously offered, but rather that once the decision-maker has given a reason, she has some burden of persuasion when she seeks to depart from such outcomes.[191]

To translate these general ideas into the agency context, when an agency gives a reason to justify its course of action, it makes a commitment to that reason. And because reasons have greater generality than the outcomes they support, giving a reason typically implies a commitment to outcomes falling within the reason's scope. The Supreme Court's decision in *State Farm* nicely illustrates this constraining influence of reason-giving.[192] Recall that the agency had rescinded its rule requiring "passive restraints" in the form of automatic seatbelts and airbags in cars, based almost exclusively on faults it found in automatic seatbelts.[193] The agency had previously concluded that airbags were effective, and its defense of the rescission did not depart from that view, reiterating that the agency "has no basis at this time for changing its earlier conclusions in 1976 and 1977 that basic air bag technology is sound and has been sufficiently demonstrated to be effective in those vehicles in current use."[194] The Court took the agency to task for providing no grounds to resist a conclusion that fell within the scope of this reason—that the agency should require airbags: "Given the effectiveness ascribed to airbag technology by the

187. Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 638 (1995).

188. *See id.* at 639.

189. *See id.* at 640.

190. *Id.* at 648.

191. *Id.* at 649.

192. Motor Vehicle Mfrs. Ass'n of the U.S.v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

193. *See id.* at 46-48; *see also supra* text accompanying notes 39-43.

194. *State Farm*, 463 U.S. at 48 (quoting NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., FINAL REGULATORY IMPACT ANALYSIS, at XI-4 (1981)).

agency, the mandate of the Act to achieve traffic safety would suggest that the logical response to the faults of detachable seatbelts would be to require the installation of airbags."[195] Thus, the giving of a reason—that airbags were effective—provided a set of grounds to which the agency committed itself, as well as a basis for evaluating its own future actions implicating those grounds.

The ever-mounting accumulation of reasons given by the agency contributes to nonarbitrariness and regularity in a way that supplements the intelligible principle doctrine. The provision of a standard or a set of boundaries within which the agency must operate, although important, does not itself provide a check on whether agency action that falls within those boundaries will be arbitrary or irrational. By enforcing the demand for an ongoing process of reason-giving and justification, the *Chenery* principle encumbers agencies with the rationales for their actions. Indeed, it makes each agency action to which it applies a source of constraint for future actions. Thus, far from articulating only the broad boundaries within which the agency must operate, as the intelligible principle requirement does, the *Chenery* principle ensures that each step casts a shadow for the placement of each subsequent step. The agency must then either follow the projection of reasons that it has embraced or justify why a departure is necessary. This enforced practice promotes conditions for rationality, regularity, stability, and principled accountability within the boundaries of acceptable discretion.

3. *Judicial Manageability*

As noted above, a primary basis for the Supreme Court's reluctance to directly enforce the intelligible principle doctrine through *Marbury*-style judicial review is a concern for the lack of a judicially manageable standard.[196] It is worth noting that the *Chenery* principle does not encounter the same set of judicial manageability concerns.

The manageability concerns with the intelligible principle doctrine appear whether it is enforced directly through constitutional review or indirectly through constitutional avoidance or an insistence that agencies develop standards. The core judicial competence concern is that the intelligible principle doctrine calls for the courts to evaluate the "permissible degree of policy judgment" granted to an agency.[197] "No metric is easily available to

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195. *Id.*

196. *See supra* text accompanying notes 159-160.

197. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001) (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

answer" how much discretion is too much.[198] As a result, judicial enforcement of the intelligible principle doctrine is likely to lead to "ad hoc, highly discretionary rulings."[199]

The use of the avoidance canon to enforce the intelligible principle doctrine does not eliminate the need to make decisions about the degree of authority granted to an agency. As Manning has shown, in the context of avoidance courts still must distinguish between delegations that are questionable and those that are not;[200] that determination also involves questions of degree. Thus, "[t]he move from judicial review to avoidance does not eliminate the difficulties in judicial line-drawing; it simply moves the line."[201]

Relying on agency articulation of standards as a mode of enforcing the nondelegation doctrine, as the D.C. Circuit did in its *American Trucking* decision before it was reversed, also confronts an analogous concern. Evaluating agency standards, like policing statutes for intelligible principles, involves making determinations about degree—i.e., whether the standard is sufficiently constraining. That inquiry displaces the line-drawing from constitutional law to agency action, but it still raises questions about the permissible degree of an agency's policy discretion.

The *Chenery* principle does not confront these particular manageability problems. At one level, the *Chenery* principle, as noted, makes a procedural demand: it requires that the justifications for the action be articulated at particular times and by particular actors. The application of the *Chenery* principle thus focuses the courts' attention on whether the asserted grounds for the agency's action have shifted, say, from the time of action to the time of litigation. That kind of judgment is central to the modern judicial role; it is involved, for instance, when courts determine whether a litigant has stated an objection adequately to preserve it for appellate review.[202]

And perhaps more importantly, the *Chenery* principle does not by its nature involve the line-drawing regarding the proper scope of agency discretion that is front-and-center for the intelligible principle doctrine at all levels of its enforcement. Indeed, because the *Chenery* principle operates to restrict the

198. Sunstein, *supra* note 156, at 327.

199. *Id.*

200. *See* Manning, *supra* note 69, at 257-59.

201. *Id.* at 258.

202. *See, e.g.*, Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 174-75 (1988) (assessing whether a trial colloquy was sufficient to preserve an objection despite the fact that trial counsel did not incant particular words in making the objection).

domain of reasons upon which the court may uphold an agency's action, it would appear, if anything, to make such review more manageable.

C. Scope, Fit, and Constitutional Status

On this nondelegation account, the *Chenery* principle enforces a limitation on Congress's power to delegate authority to bind with the force of law. By requiring the agency to expressly state the grounds for its action, *Chenery* erects a barrier to Congress's giving away its own prerogative to act without articulating grounds for its actions. Put another way, *Chenery* operates to impede Congress from delegating its own prerogative of obscurantism.[203] On this view, part of the tradeoff for Congress's choice to delegate authority is that the recipient of that power must be more articulate about the grounds for its action than Congress would be. At this point it is worth entertaining several objections that help to clarify this account.

1. Scope

One objection to this understanding of *Chenery*'s basis concerns the fit between the scope of the *Chenery* principle and the scope of the nondelegation doctrine. It is clear that the *Chenery* principle applies in judicial review of agency adjudication and agency rulemaking.[204] Because the prohibition on giving away "legislative" powers most readily brings to mind a prohibition on an agency's issuing binding, general, and prospective rules, the question arises whether the nondelegation doctrine can ground *Chenery*'s application in review of agency adjudication as well as in rulemaking.

Despite the apparent link between nondelegation and rulemaking, the nondelegation prohibition is not triggered solely by agency rulemaking. One way to see this is to start with the well-established doctrine (established, indeed, by *Chenery II*) that an agency generally has broad discretion to choose how to implement a statutory grant of power, whether through rulemaking or through adjudication.[205] Whether Congress's grant of power to the agency exceeds constitutional boundaries cannot depend on the agency's own choice of procedural format—adjudication or rulemaking. Otherwise the agency itself

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203. *See* United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252 (2d Cir. 1977) ("[A]gencies do not have quite the prerogative of obscurantism reserved to legislatures.").

204. *See supra* text accompanying notes 32-43.

205. *See Chenery II*, 332 U.S. 194, 203 (1947); Magill, *supra* note 27, at 1405-12 (providing an account of *Chenery II*'s rule).

could cure an unconstitutional grant of authority (and defeat a constitutional challenge) simply by opting to act through one procedural form rather than another, even though the terms of the statutory grant of authority were the same. Indeed, the need for a standard to guide agency action, and for a statement of reasons why the standard is met, is just as pressing, and perhaps more so, when the agency adjudicates (and therefore declares the legal consequences of past events) as when it acts through rulemaking.[206]

Based on the premise that the nondelegation prohibition is not limited to agency action in a rulemaking form, there is no disjuncture between grounding *Chenery* in the nondelegation doctrine and *Chenery*'s core applications in review of agency adjudication. In addition, it is worth noting that as a mode of enforcing the nondelegation doctrine, the *Chenery* principle, like the intelligible principle formulation, does not prohibit Congress from granting broad powers to other institutions to make binding prospective rules. For those concerned that strict enforcement of the conventional doctrine would disrupt the necessary operations of modern administrative government,[207] the minimalism of the *Chenery* principle in this respect should be greeted with approval (or at least relief).

2. American Trucking

One might also object that this account runs afoul of the Supreme Court's decision in *Whitman v. American Trucking Ass'ns.*[208] *American Trucking* rejected the idea that an agency's own standard-setting could cure an otherwise unconstitutional delegation: "The very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would *itself* be an exercise of the forbidden legislative authority."[209] Does the nondelegation account of *Chenery*, like the approach the Court rejected in *Whitman*, cast agencies in the role of curing an otherwise unconstitutional delegation?

206. The sense of outrage from the normally restrained Justice Jackson in his dissenting opinion in *Chenery II* is one indication of this. *See Chenery II*, 332 U.S. at 213-16 (Jackson, J., dissenting) (arguing that retroactive application of a new standard of conduct in the adjudication amounts to the "assertion of power to govern . . . *without* law," an objection that would not apply if the SEC had issued a rule or regulation with prospective effect).

207. *See* MASHAW, *supra* note 117, at 148-57 (making the case for broad delegation of Congress's substantive authority).

208. 531 U.S. 457 (2001).

209. *Id.* at 473.

The key point here is that the nondelegation account aims to ground the *Chenery* principle as a default rule of statutory construction. By treating the *Chenery* principle as an implied incident of delegation, courts avoid interpreting statutes as vesting power in the agency to act without stating the basis upon which it invokes the statutorily granted authority. In other words, courts avoid interpreting statutes as violating one aspect of the contingency theory of delegation. The account thus does not put the cure to a nondelegation problem in the hands of agencies, but rather suggests that courts enforce the nondelegation doctrine in part through the *Chenery* prohibition. *American Trucking* did not disallow the use of constitutional avoidance to enforce the nondelegation doctrine, at least in its conventional form.[210] The difference here is that instead of relying on avoidance to narrow the substantive discretion the statute grants to the agency, the courts impose an express statement construction to enforce the express statement demand of the nondelegation doctrine.

3. *Constitutional Status*

But what is the constitutional status of this default rule of construction? Could Congress legislatively overrule it in a particular case? On the one hand, the idea that *Chenery* carries forward enforcement of the express statement requirements suggests that it states a rule of construction that Congress could not reverse. On the other hand, a more modest position is also available. The *Chenery* principle might be best understood as what Professor Ernest Young has called a "resistance norm."[211] Such norms and doctrines provide "obstacles to particular governmental actions without barring those actions entirely."[212] Resistance norms reflect the idea that not all constitutional values are implemented by courts in the form of an absolute prohibition on conduct. Rather, a wide variety of norms raise the cost to the government of acting in a particular way but do not wholly bar it from doing so. The best examples of judicial doctrines promoting such resistance norms are clear statement rules

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210. *See* Bressman, *supra* note 163, at 454-55, 469 (arguing that *American Trucking* did not foreclose courts from requiring administrative standards through constitutional avoidance).

211. Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1552 (2000).

212. *Id.* at 1585; *see also* Sunstein, *supra* note 156, at 335 (arguing that nondelegation canons are catalysts for congressional consideration, not express constitutional prohibitions).

and constitutional avoidance doctrines.[213] When a court imposes a clear statement rule requiring Congress to make clear its intention to act in an area of constitutional sensitivity, it heightens the cost for Congress to legislate in that field. Likewise, when the Court invokes constitutional avoidance in its construction of a statute, it is not saying that Congress could never pass a statute with a meaning that raises serious constitutional questions—only that if Congress intends to do so, it must be clear about it.[214]

As a resistance norm, *Chenery* would effectively require that if Congress wished to except an agency from *Chenery*'s reason-giving demands, it would have to say so explicitly. Such a default rule furthers important constitutional values, even though it stops shy of stating a constitutional barrier to congressional action. First, the default rule highlights to participants in the legislative process the constitutional values at stake—which, as Young has suggested, can have the effect of increasing opposition to the legislation by furnishing an argument rooted in constitutional values.[215] Second, it increases the political costs of enacting such a statute by requiring agreement on an express statement of intent not to impose the *Chenery* principle.[216] Third, it avoids relying exclusively on a direct constitutional prohibition. The resistance norm conception of *Chenery* has the advantage of greater modesty in the constraints it imposes on Congress, but it otherwise functions similarly to a

213. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 286 (1994) (describing the avoidance canon as a constitutionally inspired clear statement rule); Young, *supra* note 211, at 1552.

214. Young, *supra* note 211, at 1552; *see also* Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1213-16 (2006) (explaining the connection between constitutional avoidance and clear statement rules). Perhaps the APA's reason-giving requirements could amount to such a statement that Congress intends for *Chenery* not to apply in certain circumstances. *See* Women Involved in Farm Econ. v. Dep't of Agric., 876 F.2d 994, 998 (D.C. Cir. 1989) (suggesting that the court could not require a contemporaneous statement of reasons for a rule that was exempt from the APA's notice-and-comment requirements). As noted above, some reject the idea of a nondelegation doctrine imposing any greater check than preventing particular members of Congress from delegating their voting powers. *See* Posner & Vermeule, *supra* note 160, at 1721-22. On that view, this account of *Chenery* would propose the principle as a judicially devised clear statement rule. The acceptability of such a clear statement rule on that understanding is another matter. *See id.* at 1761 (arguing that given the absence of a nondelegation doctrine, construing statutes narrowly "can be justified, if at all, only on the ground that the underlying interpretive theory lets the judges employ clear statement canons that lack constitutional underpinnings"). For a challenge to Posner and Vermeule's account of the nondelegation doctrine, see Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003).

215. *See* Young, *supra* note 211, at 1608.

216. *See id.* at 1608-09.

constitutional barrier. As Congress has evinced little interest in overruling *Chenery*, the question of the ultimate status of the default, although foundational in some respects, has relatively little practical bearing.

To summarize, the *Chenery* principle is based on the idea that the agency has the duty of providing a contemporaneous statement of reasons for its actions and lacks the power to have its actions upheld for reasons supplied by others. But if *Chenery* is to be justified as an incident of delegation, we need grounds for understanding statutory delegations as including this requirement. The idea that the *Chenery* principle enforces the nondelegation doctrine provides those grounds. That prospect emerges only once we see that the nondelegation doctrine itself involves not only an inquiry into statutory standards to guide agency action, but also a requirement that the agency specify why it meets those standards. *Chenery* enforces that second aspect of the nondelegation doctrine by functioning as a default rule of statutory construction to impose statement-of-grounds requirements. Enforcing this doctrine promotes political accountability (by making sure that the most accountable officials within the administration take responsibility for agency rationales) and legal regularity (by committing the agency to particular reasons). This approach supplements the traditional nondelegation doctrine with a judicial focus on the process and rationality of agency action. It also does not encounter the line-drawing problems that the intelligible principle doctrine raises either in direct enforcement or in enforcement through avoidance or demands for administrative standards. As an enforcement mechanism of the nondelegation doctrine, *Chenery* both serves as an obstacle to Congress's giving away its own prerogative to make law without a formal statement of reasons and highlights the costs of doing so.

IV. ***CHENERY*** IN THE AGE OF ***CHEVRON***

This understanding of *Chenery* as a mode of enforcing the nondelegation doctrine has direct implications for its relationship to other doctrines in administrative law. In particular, it exposes the extent to which the *Chenery* and *Chevron* doctrines are conceptually intertwined, with each having implications for the other. In capsule form, it highlights why compliance with *Chenery* is a necessary condition for *Chevron* deference, as well as how *Chevron* clarifies the scope of *Chenery*'s application.

A. The Chenery *Principle as a Condition for* Chevron *Deference*

Chevron, very briefly, established the familiar framework of review under which a reviewing court is bound to accept reasonable agency constructions of

a statute as long as the statute does not clearly resolve the issue.[217] The basic *Chevron* inquiry has two steps. First, does the statute clearly speak to the issue? Second, if it does not, is the agency's interpretation a reasonable one?[218] *Chevron* makes clear that courts should presume that a delegation of authority to an agency to administer a statute includes a delegation of *interpretive authority* to adopt reasonable interpretations of any ambiguity or gap in the statute. It is also now widely agreed that *Chevron* rests on a presumption about congressional intent—in particular, the intent to grant this interpretive authority to agencies rather than to courts.[219] The core basis for this presumption, as identified by the *Chevron* opinion itself, is that specialist agencies have greater expertise than generalist judges, and agencies' formulations of policy are more politically accountable than those of judges.[220] The clearest point of connection between *Chevron* and *Chenery* is that compliance with the *Chenery* principle operates as a condition for the agency to receive deference in *Chevron* Step Two. Simply put, a court should not defer to an agency's construction of a statute at *Chevron* Step Two unless the agency embraced that construction at the time it acted, not merely in litigation. The basic logic of this structure seems relatively clear: the deference the Court applies at Step Two is implicitly conditioned on the agency's having worked through the problem, with reason-giving as the overt expression of its exercise of discretion and expertise. This view is in a sense an elaboration of the statement in *Chevron* that the reviewing court should defer to "a reasonable interpretation made *by the administrator* of an agency."[221]

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217. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

218. *See id.* As I discuss in detail below, the *Chevron* inquiry now includes a prior step, appropriately called *Chevron* Step Zero, *see* Merrill & Hickman, *supra* note 111; Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2006), which determines whether the *Chevron* framework applies to the agency's action, *see infra* notes 246-250 and accompanying text.

219. *See* Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 812 & n.35 (2002) (arguing that *United States v. Mead Corp.*, 533 U.S. 218 (2001), put to rest "the speculation that *Chevron* rests on something other than congressional intent"); Sunstein, *supra* note 218, at 198 (noting that the reading of *Chevron* based on a presumption about congressional intent has prevailed).

220. *Chevron*, 467 U.S. at 865 ("Judges are not experts in the field, and are not part of either political branch of the Government. . . . While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . . .").

221. *Id.* at 844 (emphasis added).

The D.C. Circuit's decision in *Kansas City v. Department of Housing & Urban Development* provides a crisp example.[222] Kansas City challenged the termination by the Department of Housing and Urban Development (HUD) of an agreement providing the city with a housing grant, claiming that it was entitled to a hearing prior to termination.[223] The D.C. Circuit concluded that the *Chevron* framework applied to the question and that the statute was ambiguous with respect to the city's entitlement to a hearing.[224] Accordingly, the court was required to assess the statutory question under the second step of *Chevron*.[225] The statutory construction for which HUD sought deference, however, "was never promulgated by the Secretary, or his designee, nor by administrative regulations, nor by decisions in agency adjudications; rather, agency counsel contend[ed] that the permissible construction of the statute for which it [sought] approval [was] the agency's litigation posture in this case."[226] The court sternly declined to grant the agency deference, illustrating that the *Chenery* principle operates as a condition on *Chevron* deference: "In whatever context we defer to agencies, we do so with the understanding that the object of our deference is the result of agency decision-making, and not some *post hoc* rationale developed as part of a litigation strategy."[227] Thus, *Chenery* states a necessary condition for *Chevron* deference: the agency's own contemporaneous reliance on the rationale for which it seeks deference.[228]

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222. 923 F.2d 188 (D.C. Cir. 1991).

223. *Id.* at 191.

224. *Id.*

225. *Id.* at 192 (internal quotation marks omitted).

226. *Id.*

227. *Id.*; *see also* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988) ("[W]e have declined to give deference to an agency counsel's interpretation of a statute when the agency itself has articulated no position on the question . . . ."); Bank of Am. v. FDIC, 244 F.3d 1309, 1319-21 (11th Cir. 2001) (stating that the *Chenery* principle usually operates within Step Two of the *Chevron* analysis, and citing additional authorities); Am.'s Cmty. Bankers v. FDIC, 200 F.3d 822, 835 (D.C. Cir. 2000) (reaching the same conclusion); Envtl. Def. Fund v. EPA, 898 F.2d 183, 189 (D.C. Cir. 1990) (holding that under *Chevron* "[w]e cannot sustain an action merely on the basis of interpretive theories that the agency might have adopted and findings that (perhaps) it might have made"); Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313, 315, 332 (1996) (noting administrative law's established demand for reasoned explanation operating alongside *Chevron*).

228. In this respect, this account reveals that *Chenery* persists as a condition for *Chevron* deference over a more general class of agency actions than those in which the agency falsely believes that its interpretation is compelled by its governing statute. As Professor Michael Herz has correctly pointed out, "[T]he basic premise of *Chevron* loses all validity if the court goes to step two where the agency stopped at step one." Michael Herz, *Deference Running Riot:*

Indeed, courts will ensure that the justifying rationale for an agency's decision was clearly relied upon by the agency.[229]

The nondelegation account of *Chenery* helps to explain why the demand for reasoned decision-making is part and parcel of the reasonableness inquiry at *Chevron* Step Two. On this account, the *Chenery* doctrine provides a check that the core presumptions upon which *Chevron* is based—the exercise of agency expertise and the agency's political accountability—are satisfied. First, the principle requires the grounds for the agency's decision to be articulated by the agency at the time it acted, not merely by its lawyers during litigation. As discussed above, that provides assurance that the politically accountable members of the agency embrace the action's rationale.[230] At the same time, it also ensures that the rationales presented to the court have been developed within the agency process, thus promoting the ability of the President and his staff to monitor and respond to the agency's rationale. Further, the core demand for reason-giving and justification provides a check that the agency has exercised its expertise.[231] Indeed, the *Chenery* condition on an agency's receiving *Chevron* deference suggests that deference may be warranted only

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Separating Interpretation and Lawmaking Under Chevron, 6 ADMIN. L.J. AM. U. 187, 229 (1992); *see also* Arizona v. Thompson, 281 F.3d 248, 253-55 (D.C. Cir. 2002) (holding that *Chevron* deference does not apply to an agency's interpretation that its course is compelled by statute). But the nondelegation account of *Chenery* suggests we can go further: the premises of *Chevron* lose validity, or at least must be actively overlooked, when the court embraces a rationale in Step Two upon which the agency did not rely.

229. For instance, in *Railway Labor Executives Ass'n v. ICC*, 784 F.2d 959, 970-71 (9th Cir. 1986), the court concluded that, in the ICC's decisions to approve railway acquisitions, the agency's choice of whether to impose conditions protecting railway workers was within its discretion and was subject to review under *Chevron*'s second step. The ICC's orders approving the railway transfer did not, however, expressly consider imposing labor protection conditions on the railway seller. *See id.* at 971. Despite the ICC's discretion to decline to impose such conditions, the court required some justification for its decision not to do so. The ICC offered a viable rationale for its order in the course of litigation. *See id.* at 973-74 (requiring an explanation for the agency's action in review under *Chevron* Step Two and the arbitrary and capricious requirement). However, within the court's arbitrariness analysis—which would fall under *Chevron* Step Two—the agency's timing for invoking that viable rationale mattered, as *Chenery* suggests it should: "It would be improper for us to accept as a sufficient justification for the ICC's decision not to impose labor protections on [the seller railway] a reason that was not even hinted at in the ICC orders that we are reviewing." *Id.* at 974; *see also* Holland v. Nat'l Mining Ass'n, 309 F.3d 808, 810, 816-18 (D.C. Cir. 2002) (refusing to uphold an agency interpretation when the agency's grounds for it were not clear); *infra* text accompanying notes 235-241.

230. *See supra* text accompanying notes 172-175.

231. *See* Mashaw, *supra* note 2, at 26 ("'Expertise' is no longer a protective shield to be worn like a sacred vestment. It is a competence to be demonstrated by cogent reason-giving.").

when there is some assurance that the general *Chevron* presumptions hold as to the agency's proffered interpretation.[232]

B. The Scope of Chenery *Under* Chevron

Chevron has a corresponding implication for the type of agency failures of reason-giving to which the *Chenery* principle applies. *Chevron* clarifies that a court may not uphold an agency's decision on how to interpret a statutory ambiguity or gap for post hoc reasons.

The Supreme Court made clear in *Chenery* that the prohibition on post hoc reasons applies only when the court reviews "a determination or judgment which an administrative agency alone is authorized to make."[233] Some courts have concluded that the *Chenery* principle applies only to lapses in agency fact-finding or policymaking rationales but does not extend to an agency's failure to articulate the basis for its interpretation of statutes that the agency administers.[234] Regardless of whether that was a plausible position prior to *Chevron*, it does not make sense once *Chevron* is in the picture.

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232. This suggests grounds for understanding the fit between the demand of reasoned decision-making reflected in arbitrary and capricious review under the APA and *Chevron*'s reasonableness inquiry at Step Two. The lower courts have evinced confusion about whether these are separate tests or whether the arbitrariness question is part of the Step Two analysis. Commentators have inclined toward viewing arbitrary and capricious review as part of the Step Two inquiry. *See* Ronald M. Levin, *The Anatomy of* Chevron, 72 CHI.-KENT L. REV. 1253, 1263-71, 1285 (1997) (illustrating the debate in the D.C. Circuit and arguing for the equivalence of *Chevron*'s second step and arbitrariness review); M. Elizabeth Magill, *Step Two of* Chevron v. Natural Resources Defense Council, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES, *supra* note 53, at 85, 93-102 (providing a compact statement of the confusion and debate surrounding the relationship between arbitrary and capricious review and *Chevron* Step Two analysis, and arguing that agency interpretations at Step Two should be subject to the requirement of reasoned evaluation associated with arbitrary and capricious review). The nondelegation account of *Chenery* suggests that the demand for contemporaneous reason-giving (treated as part of the arbitrary and capricious review) should be part of the Step Two inquiry because it polices the core presumptions upon which *Chevron* is based.

233. *Chenery II*, 332 U.S. 194, 196 (1947); *see also Chenery I*, 318 U.S. 80, 88 (1943) ("If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment.").

234. *See, e.g.*, Ark. AFL-CIO v. FCC, 11 F.3d 1430, 1440 (8th Cir. 1993) (concluding that *Chenery* does not apply to legal determinations); N.C. Comm'n of Indian Affairs v. Dep't of Labor, 725 F.2d 238, 240 (4th Cir. 1984) ("We do not, however, perceive there to be a *Chenery* problem in the instant case because the question of interpretation of a federal statute is not 'a determination or judgment which an administrative agency alone is authorized to make.'"

Once the delegation of substantive authority to an agency is viewed as including *interpretive authority*, as *Chevron* holds, then the *Chenery* prohibition should also apply to the agency's interpretation of the ambiguities and gaps of a statute that it administers. By clarifying the scope of authority delegated to the agency, *Chevron* also expands the range of issues as to which the agency must set forth contemporaneous grounds for its decision. At a practical level, this means that agencies must explain the bases for their interpretations of statutes they administer. The *Chenery* principle, in other words, attaches to the statutory interpretations that *Chevron* puts in an agency's hands.

The D.C. Circuit's decision in *Holland v. National Mining Ass'n*[235] illustrates this demand. In *Holland*, the D.C. Circuit reviewed the Commissioner of the Social Security Administration's decision to apply nationwide a construction of the Coal Industry Retiree Health Benefits Act of 1992 that the Eleventh Circuit had adopted.[236] The Eleventh Circuit had concluded that the Commissioner's interpretation of "reimbursements" was inconsistent with the statute's plain meaning and had ordered the Commissioner to recalculate based on that plain meaning.[237] The central ground for the D.C. Circuit's reversal and remand to the agency was that it could not discern the basis for the agency's decision to apply the Eleventh Circuit's construction of the term "reimbursements" nationwide. The agency, the court reasoned, might have acted because it (1) believed that in view of Eleventh Circuit's decision, it had no other choice but to do so, (2) decided that in view of the Eleventh Circuit decision, which applied to certain coal payers, considerations of uniformity in administration justified nationwide application of the same interpretation, or (3) embraced the Eleventh Circuit's interpretation as an exercise of its own reasoned judgment on the meaning of the Act.[238] The court suggested that reasons (1) and (2) would not qualify the agency's action for *Chevron* deference but that reason (3) would.[239] "[I]n a case involving the meaning of a statutory term that the agency has delegated authority to interpret, the agency must evince reasonableness *as to the meaning of the statute* to deserve deference."[240] Even though the court could imagine grounds upon which the agency acted that

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(quoting *Chenery II*, 332 U.S. at 196)); Milk Transp. v. ICC, 190 F. Supp. 350, 355 (D. Minn. 1960) (citing *Chenery I* for the same proposition).

235. 309 F.3d 808 (D.C. Cir. 2002).

236. *See id.* at 809-10 (construing 26 U.S.C. § 9704(b)(2)(A)(i) (2000)).

237. *See id.* at 812; Nat'l Coal Ass'n v. Chater, 81 F.3d 1077, 1081-82 (11th Cir. 1996).

238. *See Holland*, 309 F.3d at 810, 816-18.

239. *See id.* at 816-18.

240. *Id.* at 818 (emphasis added).

would have merited deference, the court still vacated and remanded the agency's decision because it could not discern whether the agency had acted on the basis of those particular grounds.[241] The reasons for the agency's interpretation and the agency's embrace of them are essential to whether the agency will receive *Chevron* deference at Step Two. Under *Chevron*, the *Chenery* principle applies to the agency's justification of its interpretations.

Of course, as noted at the outset, when the agency interprets a statute that it does not administer, such as the APA, *Chenery* does not apply,[242] just as *Chevron* does not.[243] With regard to those statutes, Congress has not delegated power to the "agency alone."[244] Likewise, the *Chenery* principle has no application when the question is whether the statute clearly compels or forecloses a particular course.[245] Those statutory interpretation questions—the province of *Chevron* Step One—likewise are not entrusted to the agency alone and therefore do not prevent the reviewing court from embracing rationales not relied upon by the agency.

C. *Qualifying Conditions for* Chenery *and* Chevron

These two implications regarding the ways in which *Chenery* and *Chevron* are intertwined—that *Chenery* conditions *Chevron* deference and *Chevron* expands the scope of *Chenery*—suggest that it is worth considering the extent to which they share qualifying conditions. The question of the conditions under which the *Chevron* framework applies at all—what has been called *Chevron* Step Zero—as distinct from the question of when an agency is entitled to deference under *Chevron* Step Two, is one of the most contested in contemporary administrative law (and a source of confusion among the lower courts).[246] Still, it is possible to identify circumstances in which both *Chenery*

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241. *See id.* at 818-19.

242. *See supra* text accompanying notes 55-59.

243. Metro. Stevedore Co. v. Rambo, 521 U.S. 121, 137 n.9 (1997) (denying *Chevron* deference to an agency's interpretation of the APA because the agency was not charged with administering that Act); *see also* Stack, *supra* note 175, at 291 n.128 (collecting other decisions denying *Chevron* deference to agencies' interpretations of statutes they do not administer).

244. *Chenery II*, 332 U.S. 194, 196-97 (1947); *Chenery I*, 318 U.S. 80, 88 (1943).

245. *See* Bank of Am. v. FDIC, 244 F.3d 1309, 1319-22 (11th Cir. 2001) (holding that *Chenery*'s prohibition on post hoc rationales has no application in *Chevron* Step One statutory interpretation); *supra* text accompanying notes 60-61.

246. *See* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1457-74 (2005); Sunstein, *supra* note 218, at 219-21.

and *Chevron* clearly apply, as well as circumstances in which they both clearly do not.

The current debate about the qualifying conditions for *Chevron*'s application centers around the Supreme Court's decision in *United States v. Mead Corp.*[247] In *Mead*, the Court held that a tariff classification ruling by the Customs Service did not qualify for evaluation under the *Chevron* framework. *Mead* articulated a two-part test for determining the eligibility of agency action for review under *Chevron*. First, Congress must have delegated authority to the agency to bind with the force of law. Second, the agency action for which *Chevron* review is sought must have been an exercise of that authority.[248] The Court expressly embraced the presumption that Congress "contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."[249]

Although the role of formal procedure in the *Mead* analysis is unclear,[250] it is still possible to identify the core cases of *Chevron*'s overlap with *Chenery*. First, whenever the agency qualifies for *Chevron* deference under *Mead*, *Chenery* also will apply (though of course not to the Step One determination itself). Simply put, under *Mead*, when there is a delegation to bind with the force of law and the agency exercises that authority, the agency qualifies for *Chevron* deference. That delegation also triggers *Chenery*.

Second, when there is no delegation to the agency to bind with the force of law, *Chevron* does not apply, and neither does *Chenery*. *Mead* presumes that a delegation to establish rights and duties is necessary to place the statute under the agency's administration and to provide a basis to assume that Congress intended to delegate interpretive authority. On the nondelegation account of

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247. 533 U.S. 218 (2001).

248. *See id.* at 226-27.

249. *Id.* at 230.

250. In *Mead*, the Court acknowledged, as it had to, that the lack of procedural formality does not "decide the case." *Id.* at 231. There are numerous well-accepted forms of agency action that are legally binding but that do not emerge out of formal procedure, including rules adopted when there is "good cause" for acting outside notice-and-comment procedures, some rules of agency procedure, and actions relating to the military or foreign affairs. *See* Levin, *supra* note 111, at 793 (listing these examples); Sunstein, *supra* note 218, at 223 (noting the agency rules of procedure and "good cause" exceptions). In a subsequent decision, the Court emphasized that formal procedure is not a prerequisite to receiving *Chevron* deference. *See* Barnhart v. Walton, 535 U.S. 212, 222 (2002). For commentary on the formality of procedure in the Step Zero analysis, see, for example, Bressman, *supra* note 246, at 1475-91; Levin, *supra* note 111, at 793-98; Merrill, *supra* note 219, at 814-17; and Sunstein, *supra* note 218, at 224-28.

Chenery, *Chenery* applies when Congress has delegated to the agency the authority to bind with the force of law. Thus the conferral of that power triggers the underlying nondelegation doctrine, subjects the agency to the *Chenery* rule, and creates the prospect of interpretive deference to the decisions made on the basis of the proffered justifications.

Consider one further permutation. If an agency lacks authority to bind with the force of law, under *Mead*, its position will not qualify for *Chevron* deference, but it may still be granted some weight by the reviewing court under *Skidmore v. Swift & Co.*[251] But if the agency's position qualifies only for *Skidmore* review because the agency lacks authority to bind with the force of law, then *Chenery* will not apply. When the Court applies *Skidmore* review for this reason, it may affirm the agency's position for reasons other than those relied upon by the agency itself.

Initially, this might appear to be an odd implication. Why should the occasion of lesser deference coincide with a lesser demand for agency reason-giving and analysis? The answer is that when *Skidmore* review is occasioned by a lack of delegation to the agency to bind with the force of law, interpretive authority is allocated to the courts. The courts, not the agency, administer the statute; they, not the agency, have authority to bind under the statute, and they, not the agency, have interpretive authority over it. And because interpretive authority is left to the courts, judicial constructions of the statute, even ones that are based on grounds not relied upon by the agency, do not interfere with the agency's delegated powers; the issues are, by definition, not ones over which the agency has been granted authority. As a result, for the court to invoke the *Chenery* principle when *Skidmore* review applies would create an unnecessary formality: it would remand the question to the agency for its views when the Court would ultimately determine what the statute meant.[252] The same core idea explains why appellate courts have not embraced a *Chenery* rule in their review of lower court decisions.

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251. 323 U.S. 134 (1944); *see Mead*, 533 U.S. at 234. *Skidmore* suggested that even when an agency's interpretation is not "controlling," the agency's views "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance," and to which the court should accord as much weight as is due given the carefulness of its consideration, "the validity of its reasoning," the consistency of its judgments, and other "factors which give it power to persuade." *Skidmore*, 323 U.S. at 140.

252. Even though the *Chenery* prohibition does not apply to judicially administered statutes, under *Skidmore* the agency will retain strong incentives to provide a persuasive justification for its position: the court will adopt the agency's position only insofar as it is persuasive. *See Skidmore*, 323 U.S. at 140. One key difference is that under *Skidmore* the Court may end up reaching the same conclusion as the agency, but for reasons other than those the agency relied upon, whereas under *Chenery* that possibility is foreclosed.

In view of their different qualifying conditions, *Chevron* and *Chenery* remain two doctrines, not one. But they are two doctrines with tight points of connection: *Chenery* is a practical and theoretical condition for deference under *Chevron*, and *Chevron* clarifies the scope of agency explanation that falls within *Chenery*'s domain. If the Court were to abandon the second element of the *Mead* test, as some have suggested it should,[253] then *Chenery* and *Chevron* would be left all the closer in application as well as in principle.

V. THE REASON-GIVING PRESIDENT

This account of the foundations of *Chenery* invites inquiry into its application to the President. If, as the nondelegation account suggests, *Chenery* operates as a default rule of statutory construction triggered by a delegation to bind with the force of law, then there are grounds to consider whether the principle applies to statutes granting such powers to the President.[254]

Indeed, the case of the President provides a critical test for two of the central arguments advanced thus far—that the *Chenery* principle provides a mode of enforcement of the nondelegation doctrine, and that it operates as a condition for *Chevron* deference. First, many of the Supreme Court's nondelegation decisions, including its only two decisions striking down legislation explicitly on nondelegation grounds, involved grants of authority to the President.[255] Delegations to the President, far from being outlying applications of the nondelegation doctrine, have been core instances of the doctrine's application. The nondelegation account of *Chenery* thus should be able to make sense of these central cases.

Second, whether the President has a valid claim of statutory authority plays a critical role in judicial review of the President's actions. Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*[256] cast statutory authorization in this critical light. Under Justice Jackson's three-part analysis, if the Court concludes that the President's actions have statutory authorization,

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253. *See, e.g.*, Levin, *supra* note 111, at 787-98 (critiquing the format doctrine).

254. At least under current law, the same inquiry would not arise if *Chenery* were grounded solely in the APA. The Supreme Court has held that the APA does not apply to the President without an express statement from Congress of such intent, *see* Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992), and so neither would *Chenery*.

255. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 521-22 (1935); Pan. Ref. Co. v. Ryan, 293 U.S. 388, 406 (1935); *see also, e.g.*, J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 401 (1928); Field v. Clark, 143 U.S. 649, 680 (1892); Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382, 383 (1813).

256. 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

then the constitutional deference given to the President's actions is at its height.[257] But neither *Youngstown* nor Justice Jackson articulated a framework for how a court is to judge whether the President's claim of statutory power is valid.[258] However, if *Chevron* were to supply the framework for assessing the validity of a President's assertion of statutory authority, a *Chenery* question would also arise. Specifically, if compliance with *Chenery* is a condition of *Chevron*'s application in the agency context, would that same constraint also apply if *Chevron* were to apply to the President?

A. Chenery *and the President*

The more ambitious of these two questions is whether *Chenery* applies whenever the President exercises statutory power to bind with the force of law. But assessing this question first helps to identify central concerns that carry over into the specific evaluation of the *Chevron* question and critical fault lines for differing conceptions of judicial review of presidential action.

Based on the premise of the nondelegation account of *Chenery*—that the principle is triggered by Congress's grant of authority to bind with legal force—the principle would appear to extend to the President's own exercises of statutory power. A central and difficult question here is whether that conclusion should hold despite the differences in the relative positions of the President and other agency actors.

If the *Chenery* principle were grounded solely in concerns of political accountability, then the basis for its application to the President would be rather thin. Recall that part of the justification for the *Chenery* prohibition in the agency context is that if a court affirmed an agency's action for post hoc reasons, it would undermine the opportunities for monitoring—by politically accountable officers within an agency, by the President, by Congress, and by the public—that occur during the public process of policy formation. *Chenery* pushes the embrace of the grounds for agency action outside of the agency's general counsel's office (or the DOJ) to agency officials, and generally to more senior officials in the agency hierarchy. But the President, it is fair to presume, is closely identified with the position his DOJ lawyers take, at least more publicly than agencies are associated with their lawyers' arguments. If that is right, then the judicial acceptance of post hoc rationalizations on behalf of the

257. *See id.* at 635-37 (stating that if a President's action is taken "pursuant to an Act of Congress," then it is supported by "the strongest of presumptions and the widest latitude of judicial interpretation" as to its constitutional validity).

258. *See id.*; *see also* Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 558 (2005).

President does not pose the risk that arises for agencies of blurring the lines of political accountability. Were the nondelegation account of *Chenery* based solely on these political accountability concerns, its logic would stop short of the President.

But legality and nonarbitariness concerns still apply, and they have particularly strong application in the context of judicial review of delegations to the President. The Supreme Court's decision in *Panama Refining*[259] clearly articulated a principle of parity between the President and agency officials with respect to the constitutional constraints on delegation, and it did so in the very context of embracing the doctrines enforcing the contingency theory of delegation that *Chenery* now implements (or so I contend).

The Court in *Panama Refining* not only concluded that section 9(c) of the NIRA did not provide a sufficient standard to guide the President's action, but also found constitutional infirmity because the President did not state the predicate grounds for his orders under the section.[260] It emphasized that an express statement by the executive officers under the Act—as to why the contingency or standard was met—was required for the action to have validity, not only under the statute, but also under general constitutional principles.[261]

Over Justice Cardozo's dissent, the Court denied any distinction between agency officials and the President with regard to the application of these principles. After reciting the findings requirements of *Wichita Railroad* and *Mahler*, the Court concluded that "[w]e cannot regard the President as immune from the application of these constitutional principles."[262] The Court went on to state that when the President is vested with legislative powers, "he necessarily acts under the constitutional restriction applicable to such a delegation."[263] Even though the NIRA did not expressly require the President to state the basis upon which he invoked its powers, the Court demanded that the President make such a finding.[264] The President failed to provide such a statement, and that failure of articulation, like the failure of an agency to do the

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259. 293 U.S. 388.

260. *See id.* at 418 ("The President was not required to ascertain and proclaim the conditions prevailing in the industry which made the prohibition necessary."); *id.* at 431 ("The Executive Order contains no finding, no statement of the grounds of the President's action in enacting the prohibition.").

261. *See id.* at 433; *see also supra* text accompanying notes 123-130.

262. *Pan. Ref.*, 293 U.S. at 433.

263. *Id.*; *see also supra* note 152.

264. *See Pan. Ref.*, 293 U.S. at 431-33.

same, rendered the President's executive order "without constitutional authority."[265]

This premise of parity between the President and agency officials with regard to their respective duties to make express statements, even in the absence of an express statutory findings requirement, has implications for *Chenery*'s scope. The *Chenery* principle, I have contended, operates to enforce the contingency theory of delegation reflected in *Panama Refining*, *Mahler*, and *Wichita Railroad*—principally, its requirement of an express statement—by stating a default rule of construction that an agency action will be upheld only upon grounds stated by the agency, thereby avoiding the constitutional difficulty that would arise if the courts interpreted such statutes as including no such requirements. If *Chenery* enforces this aspect of the nondelegation doctrine, then the principle of parity between the President and agency officials with respect to those very nondelegation requirements embraced in *Panama Refining* would suggest that the President's own assertions of statutory authority fall within *Chenery*'s scope.[266]

B. The President Under Chevron

Suppose, as I and others have argued elsewhere, that even under *Mead*, the President should be eligible for *Chevron* deference,[267] but only with regard to

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265. *Id.* at 433.

266. The suggestion is not merely theoretical. For instance, in *National Federation of Federal Employees, Local 1622 v. Brown*, 645 F.2d 1017, 1019, 1022 (D.C. Cir. 1981), the Secretary of Defense had issued a salary cap order pursuant to a presidential directive. The D.C. Circuit declined to consider a statutory argument for the order that neither the Secretary nor the presidential directive had invoked, and it reversed and remanded the case, citing *Chenery*. *See id.* at 1024 & n.21, 1025-26. It is unclear what effect *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), has on this suggestion. In *Hamdan*, the Supreme Court assumed arguendo that the President's determination under Article 36(a) of the Uniform Code of Military Justice was relevant to assessing the legality of the President's action under Article 36(b), under which the President had not acted. *See id.* at 2791-92. That assumption is at least in tension with the application of *Chenery* to the President's assertions of statutory power. But the Court also rejected Justice Thomas's suggestion, *see id.* at 2842-43 (Thomas, J., dissenting), that press statements of the Secretary of Defense were relevant to determining the legality of the President's action: "We have not heretofore, in evaluating the legality of Executive action, deferred to comments by such officials to the media." *Id.* at 2792 n.52 (majority opinion). This reluctance suggests that something more than press statements by others, even cabinet members, would be required to provide a basis for deferring to the President.

267. *See* Stack, *supra* note 258, at 588-89 (arguing that the President should qualify for *Chevron* deference under *Mead*); *see also* Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power To Say What the Law Is*, 115 YALE L.J. 2580, 2603-04 (2006) (arguing for reading *Mead* to allow the President to qualify for *Chevron* deference). For an early argument in favor of viewing

statutes that grant power to the President by name.[268] If compliance with *Chenery* is a condition for *Chevron*'s application to agencies, does that same condition apply to review of the President's assertion of statutory authority under *Chevron*?

One critical factor in answering this question is the justification for applying *Chevron* to the President's exercises of statutory authority. Consider two possibilities. First, the basis for according deference to the President's own statutory assertions might stem from the President's exceptional constitutional status. A recent article by Professors Jack Goldsmith and John Manning advanced this view.[269] They argued that the President has residual constitutional authority to fill in the details of a legislative scheme, subject to congressional correction.[270] In this light, they proposed that *Chevron* might best be understood as reflecting the idea that "executive branch officials are endowed with presumptive constitutional authority, grounded in Article II, to complete an ambiguous statutory scheme unless Congress specifies otherwise."[271] Goldsmith and Manning did not expressly discuss the application of *Chevron* to the President's own assertions of statutory authority, but because the Article II powers they invoked to justify this view are the President's own,[272] on their theory, application of *Chevron* to the President would appear to be *Chevron*'s central case.[273]

If *Chevron* were to apply to the President by virtue of his residual constitutional authority to complete legislative schemes, as Goldsmith and Manning's arguments would suggest, then it is not clear why the *Chenery* condition on *Chevron*'s application would carry over to the President (or indeed, have any application to the President at all). On this view, the very exceptionalism that justifies applying *Chevron* to the President would call into question the basis for importing a constraint from the agency context. This is

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the President's exercise of statutory powers under the *Chevron* framework, at least in the foreign affairs context, see Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000).

268. *See* Stack, *supra* note 175, at 307.

269. Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280 (2006).

270. *See id.* at 2282.

271. *Id.* at 2301.

272. *See id.* at 2303-07.

273. For defense of a similar position, though grounded somewhat differently, see Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 GEO. L.J. 217, 334 n.406 (1994).

not to suggest that the *Chenery* constraint is incompatible with this view—only that one arguing for its compatibility would face a heavy burden.

A second possibility is that *Chevron* applies to the President as an expression of a principle of parity between the President and agency officials when the President exercises statutory powers. Based on this principle of parity, the President, like an agency official, should not be able to claim statutory authority unless he can point to a particular statute that grants him that authority.[274] And likewise, when a President implements a statute that is committed to his administration, the President should qualify for no less deference than would be accorded to a subordinate exercising his own delegated authority.[275] Because agency officials may qualify for *Chevron* deference, the President may also qualify under statutes committed by name to his administration. On this view, if the President falls within *Chevron*'s scope on the basis of his exercise of congressionally delegated authority, then we have at least a prima facie reason to hold that the administrative law constraints of *Chenery* should carry over to the President as well.

In order words, viewing *Chenery* as a condition of the President's receipt of *Chevron* deference is a corollary of *Panama Refining*'s insistence that the President is not immune from the constitutional principles that govern an agency's exercise of delegated power. If the President must suffer under the constraints of parity, he should qualify for the same generous deference that courts grant agencies (e.g., *Chevron*) but also be subject to the same constraints on that deference (e.g., *Chenery*).

It would take us too far afield at this point to assess the extent to which a parity principle or presidential exceptionalism best characterizes the legal landscape or is otherwise justified. That question was contested in 1935,[276] as it is today. But it is worth noting one aspect of the institutional dynamics generated by the suggestion that the President has a constitutional completion

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274. *See* Stack, *supra* note 258, at 570-84 (arguing that the administrative law demand that an agency's action should be upheld only if a court can identify its source of statutory authorization should also apply to the President). *But see* Goldsmith & Manning, *supra* note 269, at 2288-91 (arguing that the completion power often authorizes the President to act in the foreign affairs arena without specifying the specific statute that authorizes the action).

275. *See* Acree v. Republic of Iraq, 370 F.3d 41, 64 n.2 (D.C. Cir. 2004) (Roberts, J., concurring) ("It is puzzling why the case [of *Chevron*'s application] should be so much harder when the authority is given to the Secretary's boss."); Stack, *supra* note 258, at 542, 585-99 (defending *Chevron*'s application to the President's assertions of statutory authority based on the President's parity with other agency actors when he exercises statutory authority).

276. *See, e.g.*, Pan. Ref. Co. v. Ryan, 293 U.S. 388, 444-48 (1935) (Cardozo, J., dissenting) (arguing against courts' treating the President on par with the "humblest officer in the government, acting upon the most narrow and special authority").

power, even one subject to constitutional override, as Goldsmith and Manning proposed. Goldsmith and Manning suggested that the source of this completion power, whether constitutional or statutory, is not of great moment because in their conception it is defeasible by Congress.[277]

But the costs of this defeasibility are quite high. Whenever a court upholds a sitting President's claim of statutory authority, as when it upholds the action of an executive agency in the President's administration, that decision will likely require Congress to assemble a veto-proof majority to override it. A court decision rejecting a President's claim of statutory authority, however, does not pit the President against Congress in any attempt to override the decision.[278] When a court upholds a President's claim of statutory authority premised in part on the idea of a presidential completion power, it upholds the President's claim of statutory power at the very moment at which that claim's statutory grounding is strained (otherwise the completion power need not be invoked), and it still puts Congress in the position of needing to assemble a supermajority if it seeks to correct the court's decision. Thus, although the completion authority is defeasible, in practice a judicial decision sustaining a sitting President's actions on that basis may lock the President's construction of the statute into the law, despite the fact that the construction extends beyond the parameters of the powers contemplated by the statute.[279]

This dynamic is of particular concern given the incentives that presidents have to claim statutory authority for their actions. The Constitution grants the President relatively few independent powers. Courts traditionally have been reluctant to sustain assertions of presidential power on the basis of a constitutional power alone.[280] Yet presidents are held politically accountable

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277. *See* Goldsmith & Manning, *supra* note 269, at 2308.

278. The political dynamic following *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), nicely illustrates this. If the Court had sustained the President's claim of statutory power, Congress would in all likelihood have had to assemble a veto-proof supermajority if it sought to correct the Court's determination. In contrast, because the Court rejected the President's claim of statutory authority, the President did not have that same incentive to veto Congress's legislation granting him the powers he sought. And Congress passed a bill, now the Military Commissions Act of 2006, Pub. L. No. 109-366, 2006 U.S.C.C.A.N. (120 Stat.) 2600 (to be codified in scattered sections of 10, 18, and 28 U.S.C.), that granted most of what the President wanted.

279. *See* Stack, *supra* note 258, at 577.

280. *See* Samuel Issacharoff & Richard H. Pildes, *Emergency Contexts Without Emergency Powers: The United States' Constitutional Approach to Rights During Wartime*, 2 INT'L J. CONST. L. 296 (2004). *Hamdan* provides powerful confirmation of this reluctance. The Court rejected the President's claim that his autonomous constitutional powers authorized his creation of military commissions in defiance of a federal statute. *See Hamdan*, 126 S. Ct. at 2773-75.

for how the government as a whole functions.[281] These factors give presidents strong incentives to achieve their agenda through "whatever-laws-happen-to-be-on-the-books."[282] Applying *Chenery* would increase the cost to the President of a claim of statutory power, as well as force public articulation of the grounds for the action, putting those grounds on the table of political debate. Extending *Chenery* in this fashion also would emphasize that *Chevron* deference does not come without constraints on the President. To the extent that such institutional considerations have a place in determining the structure of judicial review, there may be special reasons to believe that the President's own actions must comply with *Chenery* to receive *Chevron* deference. This conclusion would also affirm that even the President's political accountability and constitutional status are not a complete substitute for reasoned explanation.[283]

CONCLUSION

Something more than distrust of agency lawyers is at work in the settled prohibition on courts' upholding an agency action upon different grounds than the agency itself relied upon when it acted. This Article argues that the *Chenery* prohibition on post hoc rationalization—a prohibition that does not generally apply in judicial review of other types of government action—helps to constrain the scope of power that Congress may delegate. The *Chenery* principle does not enforce the nondelegation doctrine by directly regulating the substantive scope of discretion Congress can grant, which is the concern of the conventional intelligible principle formulation of the nondelegation doctrine. *Chenery* rather enforces a presumption that when Congress vests authority to bind with the force of law in another institution, Congress does not thereby delegate to the agency or official its prerogative to have reviewing courts supply or substitute validating grounds for the action. That presumption implements an aspect of the nondelegation doctrine that required Congress to condition the grant of authority to an agency on the agency's expressly stating its grounds for acting. While this express statement requirement has slipped from the constitutional doctrine of nondelegation, it remains actively enforced through *Chenery*. This express statement constraint, moreover, serves to check the

281. *See* DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN 4, 24-27 (2003) (noting that presidents are held accountable for "the success or failure of the entire government" and for their performance as managers of the federal bureaucracy).

282. Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 712 (2000).

283. *Cf., e.g.*, Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 463-64, 503-15 (2003); Strauss, *supra* note 175 at 10, 36-39.

political accountability and regularity of agency action. It provides an assurance that the object of the court's review is the product of a body or official to whom Congress delegated authority. That constraint in turn polices the conditions for judicial deference to agency action.