NOTES

RATIONALIZING HARD LOOK REVIEW AFTER THE FACT

INTRODUCTION

A fundamental illogic of administrative law is that courts strictly review agencies' determinations of fact and policy but defer to their interpretations of law.[1] Presumably, the opposite should be the case: judges should pay closer attention to their specialty — the law — and less to areas in which they have no particular expertise, such as those with scientific and technical aspects. This is not, however, how judicial review of agency decisionmaking is practiced. Instead of deferring to agencies' expert judgment, courts review agencies' fact and policy determinations under an "arbitrary and capricious" standard that has been frequently criticized as being too demanding and therefore generating delays and ossification.[2]

This Note explores solutions to the ossification problem and argues that the central holding of *SEC v. Chenery Corp.*[3] (*Chenery*) ought to be loosened to allow agencies to provide post hoc rationalizations for challenged regulations. It thus defends the creation of a type of expanded harmless error review for hard look cases, which would preserve the brunt of arbitrariness review while avoiding wasteful situations in which regulations are remanded only to be affirmed after years of additional hearings, litigation, and delay.

The remainder of this Note proceeds as follows. Part I examines the hard look doctrine, tracing its evolution from the New Deal to the present. It then summarizes, in a preliminary fashion, the costs and benefits of such review, concluding that its costs may be so great as to suggest that the doctrine should be reformed or weakened. Part II then presents one possible alternative — revisiting the *Chenery* rule — and argues that courts ought not shy away from supplying missing rationales ex post when doing so can save a worthwhile regulation.

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[1] *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986); Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 772 (2008) ("If we attend to the distinctive competence of agencies and courts, the opposite conclusion might seem hard to resist: questions of law are for judicial resolution, whereas questions of policy and fact should be resolved by agencies."). *Compare* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984), *with* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

[2] For a discussion of the ossification problem, see *infra* section I.B.

[3] 318 U.S. 80 (1943).

I. HARD LOOK REVIEW AND OSSIFICATION

Ossification is best seen as a tradeoff — the price society pays for reducing agencies' errors. Stringent judicial review likely deters agencies from acting rashly or without basis, thus minimizing the risk that they will implement unwise policies. But it does so at great expense: long judicial proceedings both delay and discourage agencies from adopting possibly beneficial regulations, creating a bias in favor of the status quo.[4] This Part examines the origins of the hard look doctrine and the ossification problem. Section A traces the evolution of arbitrariness review, and section B examines the doctrine's costs and benefits.

A. The Arbitrary and Capricious Standard

Judicial review of agency policymaking is governed by the Administrative Procedure Act's[5] (APA) requirement that courts set aside actions found to be "arbitrary, capricious, [or] an abuse of discretion."[6] Neither the text nor the legislative history of the APA, however, does much to clarify the stringency required by this form of review. The APA's text suggests little in the way of a determinate rule. It instead seems to call for analysis along the lines of, as Justice Scalia has written, "that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th'ol' 'totality of the circumstances' test."[7] Its legislative history is no more revealing. Although commentators have described one of the APA's "prime goal[s]" as "strengthen[ing] judicial review of agency deci-

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[4] *See* Breyer, *supra* note 1, at 391 ("The stricter the review and the more clearly and convincingly the agency must explain the need for change, the more reluctant the agency will be to change the status quo.").

[5] 5 U.S.C. §§ 551–559, 701–706 (2006).

[6] *Id.* § 706(2)(A). It is important to note that the APA establishes a different standard of review for on-the-record agency factfinding; such actions must be held unlawful if "unsupported by substantial evidence." *Id.* § 706(2)(E); *see also* Allentown Mack Sales & Serv., Inc v. NLRB, 522 U.S. 359, 366–67 (1998) (describing the "substantial evidence" test); Universal Camera Corp. v. NLRB, 340 U.S. 474, 487–91 (1951) (same). Though seemingly different as a semantic matter, the "arbitrary and capricious" and "substantial evidence" tests have been applied in nearly identical fashions. *See* Bangor Hydro-Elec. Co. v. Fed. Energy Regulatory Comm'n, 78 F.3d 659, 663 n.3 (D.C. Cir. 1996) ("The APA's 'substantial evidence' and 'arbitrary and capricious' standard connotes the same substantive standard of review."); STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 384 (6th ed. 2006) ("[I]t is increasingly thought that the two tests are the same."); Miles & Sunstein, *supra* note 1, at 764 n.25 ("The claim that there is no difference between the substantial evidence test and the arbitrary and capricious standard is supported by the fact that the legislative history of the statute in *State Farm* itself suggested that agency findings must be reviewed under the substantial evidence test. Notwithstanding that fact, the Court used the arbitrary and capricious standard — a decision that would be puzzling if the substantial evidence test were more severe."). This Note therefore uses the phrase "arbitrariness review" as inclusive of both tests.

[7] United States v. Mead Corp., 533 U.S. 218, 241 (2001) (Scalia, J., dissenting).

sions,"[8] they have also noted that the Act's legislative history "explains the arbitrary and capricious standard by reference to Supreme Court decisions under the due process clause reviewing government decisions for 'rationality.'"[9] And because rationality review requires the demonstration of only a minimally plausible connection between a permissible goal and the means chosen to accomplish that objective,[10] the test is certainly not one likely to "strengthen judicial review of agency decisions."[11]

Given this conflicting history, the conclusion "that judicial review . . . was supposed to be highly deferential" is at least plausible,[12] if not required. And given the technocratic sentiment of the era in which the APA was enacted,[13] it should be no surprise that arbitrariness review was initially applied quite leniently. Indeed, "[d]uring the APA's first two decades, the understanding of the administrative state was overwhelmingly influenced by the after-glow of the New Deal,"[14] a period characterized by Dean James Landis's belief in the facility of autonomous, apolitical, and technically expert agencies.[15] "[I]t was rare indeed for a New Deal–appointed judge reviewing the work of a New Deal–staffed agency to find that the agency had acted like a lunatic, that is that it had been, in the words of the APA, 'arbitrary' and 'capricious.'"[16]

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[8] BREYER ET AL., *supra* note 6, at 348; *see also id.* at 250 ("[T]he APA was born in a period of distrust of agency discretion."); Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2081 n.46 (1990) (concluding that the APA's "legislative history emphasizes the need for judicial constraints on administration").

[9] BREYER ET AL., *supra* note 6, at 348.

[10] For a case exemplifying the lenity of constitutional rationality review, but decided after the APA was passed, see *Williamson v. Lee Optical, Inc.*, 348 U.S. 483 (1955), which stated that "the law need not be in every respect logically consistent with its aims to be constitutional," *id.* at 487–88.

[11] BREYER ET AL., *supra* note 6, at 348.

[12] *Id.*

[13] *See* Daniel B. Rodriguez, *Jaffe's Law: An Essay on the Intellectual Underpinnings of Modern Administrative Law Theory*, 72 CHI.-KENT L. REV. 1159, 1164 (1997) ("The main line of thought shared by intellectual architects of the administrative law of the early (read: 1930s and 1940s) period reflected serious doubts about the desirability of strong, trans-substantive judicial review.").

[14] Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1056 (1997); *see also id.* ("[T]he political science of the era was optimistic about the nature of the administrative state and the capacity of administrative agencies to serve the public interest."); *id.* at 1048–50; *id.* at 1059 ("[I]t would be easy to collect passages from leading administrative law cases of the era that speak with conviction about the need to resolve policy questions in accordance with 'administrative expertise.'"); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 422 (1987).

[15] For Landis's classic defense of technocratic agency decisionmaking, see JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938).

[16] Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 454 (1986) (quoting 5 U.S.C. § 706(2)(A) (2006)).

Three developments during the 1960s and 1970s, however, changed this conception of arbitrariness review. First, as beliefs in agency "capture" gained traction,[17] academics, policymakers, and courts began to see "the pantheon of New Deal agency heroes — the NLRB, the FCC, the FPC, and virtually all their alphabetic brethren — as stagnant bureaucracies that had failed to generate effective policy in their respective regulatory domains."[18] The New Deal's technocratic enthusiasm accordingly gave way to a "unifying theme of . . . disenchantment with agency performance and urgent demands for reform,"[19] including enhanced judicial review. Second, agencies began using informal notice-and-comment rulemaking with greater frequency, magnifying concerns that agencies would fail to "give adequate consideration to the interests of the beneficiaries of regulation."[20] The expansion of judicial review was therefore seen by scholars such as Professor Richard Stewart as a means of rendering agency decisionmaking more representative and strengthening democratic tethers.[21] Finally, the benefits of the regulatory state began to be seen as rights-like and therefore more deserving of judicial protection.[22] In this sense, arbitrariness review can be seen as a substitute for the failed nondelegation doctrine, the former limiting agencies' discretion in light of the latter's inability to do the same.[23]

The modern hard look doctrine, the culmination of these developments, is best encapsulated in *Motor Vehicle Manufacturers Ass'n v.*

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[17] *See* BREYER ET AL., *supra* note 6, at 348; *see also* Merrill, *supra* note 14, at 1043 ("[T]he courts' assertiveness during the period from roughly 1967 to 1983 can be explained by judicial disenchantment with the idea of policymaking by expert and nonpolitical elites. . . . The principal pathology emphasized during these years was 'capture,' meaning that agencies were regarded as being uniquely susceptible to domination by the industry they were charged with regulating.").

[18] Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 132 (1989). Even Landis, whose highly influential lectures entitled *The Administrative Process* "became the classic defense of the New Deal agencies," Merrill, *supra* note 14, at 1056, became disenchanted with the performance of agencies in the post–New Deal era. In 1960, for example, Landis prepared a highly critical report for President-elect Kennedy arguing that agencies should be brought more closely under presidential control. *Id.* at 1051 n.38. *See generally* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960, at 213–28 (1992) (discussing the role of Landis and Dean Roscoe Pound in the formation of American administrative law).

[19] Merrill, *supra* note 14, at 1060.

[20] *Id.* at 1093.

[21] *Id.* at 1064. *See generally* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

[22] For the classic argument conceptualizing benefits of the administrative state as "rights," see Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964). Traces of the larger idea can also be seen in LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320–94 (1965), which argues that there ought to be a "right" to judicial review of agency action.

[23] *Cf.* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000) (arguing that the nondelegation doctrine, though technically defunct, manifests itself in other ways).

State Farm Mutual Auto Insurance Co.[24] *State Farm* involved a decision by President Reagan's National Highway Traffic Safety Administration (NHTSA) to revoke regulations issued under the Carter administration that would have required vehicles produced after a certain date to include either airbags or automatic seatbelts.[25] Reagan's NHTSA found that, first, manufacturers would choose to comply with the regulation by including seatbelts rather than airbags, and, second, the regulation would not increase seatbelt use enough to justify its costs.[26] The Court, however, explicitly rejected the latter conclusion,[27] criticized the NHTSA for failing to consider an alternative proposal to mandate that automakers include airbags,[28] and concluded that the NHTSA had "failed to present an adequate basis and explanation for rescinding the passive restraint requirement."[29] In so doing, the Court held:

> [A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[30]

With this oft-cited language,[31] the Court embraced both procedural and substantive dimensions of the hard look doctrine.[32] Though

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[24] 463 U.S. 29 (1983). Two early decisions formed the basis for *State Farm*. In the first, *SEC v. Chenery*, 318 U.S. 80 (1943), the Court held that agencies' decisions may be upheld only on the basis of the rationale the agency itself has provided, not on the basis of a legally sufficient rationale that the Court might supply. *See id.* at 87. This rule differentiated hard look review from the type of rationality review one might see in due process cases, thereby creating tension with the APA. *See supra* pp. 1910–11. The second decision is *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). In that case, a citizens' group successfully challenged the Secretary of Transportation's decision to subsidize Tennessee's construction of a portion of Interstate 40 through a municipal park. *See id.* at 405–06. The Court's "notoriously Janus-faced" opinion "both characterized 'the ultimate standard of review [as] a narrow one,' and indicated that review is to be 'thorough, probing, in-depth' and 'searching and careful.' Thus were planted the seeds that became 'hard look' and *State Farm*." Peter L. Strauss, *Overseers or "The Deciders" — The Courts in Administrative Law*, 75 U. CHI. L. REV. 815, 821 (2008) (alteration in original) (footnotes omitted) (quoting *Overton Park*, 401 U.S. at 416, 415, 416).

[25] *State Farm*, 463 U.S. at 34–35.

[26] *Id.* at 38–39, 51–55.

[27] *See id.* at 51–53.

[28] *See id.* at 50–51.

[29] *Id.* at 34.

[30] *Id.* at 43.

[31] As of Mar. 14, 2009, a Westlaw search for "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency" among combined federal courts reveals 536 instances. *State Farm* itself has been cited in 3053 decisions as of the same date.

[32] Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 210.

courts may not require agencies to adopt procedures outside of those prescribed by the APA or other sources of law,[33] *State Farm* has generally been interpreted as requiring that agencies provide detailed explanations of their behavior, consider viable alternatives,[34] explain departures from past practices, and make policy choices that are reasonable on the merits.[35]

B. Ossification, and Problems with the Doctrine

Though hard look review has a number of justifications unrelated to regulatory efficacy (broadly defined),[36] the doctrine's ultimate desirability is perhaps best analyzed by comparing its effect on decision and error costs.[37] As initially envisioned, the doctrine was intended to reduce error costs, or welfare losses associated with bad policy, by forcing agencies to engage in thorough decisionmaking processes. Agencies would produce better policy, proponents claimed, when forced to justify their actions and consider alternatives; under a strict hard look

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[33] *See* Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519 (1978) (holding that courts may not impose procedural requirements on agencies in excess of those in the APA).

[34] A persistent question is which alternatives agencies must consider. The Court avoided this question in *State Farm*, noting only that the alternative at issue — mandating airbags rather than allowing a choice between the same and automatic seatbelts — was "a technological alternative within the ambit of the existing Standard." *State Farm*, 463 U.S. at 51. The D.C. Circuit has held that an agency has "a duty to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives," but that this duty "extends only to 'significant and viable' alternatives." City of Brookings Mun. Tel. Co. v. FCC, 822 F.2d 1153, 1169 (D.C. Cir. 1987) (quoting Farmers Union Cent. Exch., Inc. v. Fed. Energy Regulatory Comm'n, 734 F.2d 1486, 1511 & n.54 (1984) (footnote omitted)).

[35] *State Farm* and its progeny in the lower courts have therefore tended toward a strict version of hard look review — a conception of the doctrine in line with Judge Leventhal's early and influential concurrence in *Ethyl Corp. v. EPA*, 541 F.2d 1, 68–69 (D.C. Cir. 1976) (en banc) (Leventhal, J., concurring).

[36] Professor Jim Rossi, for example, defends the hard look doctrine on the grounds that it protects "citizen participation and deliberative government." Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts To Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763, 768. Professor Thomas Sargentich also argues that the process of judicial review itself provides "a crucial legitimating function in the modern administrative process." Thomas O. Sargentich, *The Critique of Active Judicial Review of Administrative Agencies: A Reevaluation*, 49 ADMIN. L. REV. 599, 642 (1997). These arguments, however, become much less persuasive when judicial review is subject to political maneuvering by judges, *see infra* p. 1929, and when one considers the possibility that hard look review will produce not deliberative regulation but rather no regulation due to ossification and status quo biases, *see* Breyer, *supra* note 1, at 391.

[37] For a more nuanced discussion and application of this methodology, see generally ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY (2006); and Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 932 (2003).

doctrine, policies motivated by "capture"[38] or ineptitude would be deterred or invalidated.[39]

Error reduction, however, is not without cost. Judicial review generates delay and ossification, forms of decision costs that, when systemic, can handicap regulatory policy.[40] And hard look review might conceivably increase errors if courts invalidate beneficial regulations, or if application of hard look review discourages agencies from adopting beneficial regulations in the first place.

Hard look review thus exists on a continuum, with additional stringency potentially reducing marginal error costs but generating additional decision costs, including ossification. If it were possible to quantify each variable, the optimal amount of hard look review would be decided by a simple optimization function: the stringency of review would increase until the point at which the decision costs it generated overwhelmed the accompanying reductions in error costs. But because of the impossibility of measuring what agencies do *not* do — the costs of ossification — this section proceeds by examining the relevant variables in greater depth.

1. Decision Costs. — Decision costs include the time and resources that judges and litigants must devote in order to prosecute, defend, and decide hard look cases. These costs, though perhaps minimal in comparison to the potentially widespread consequences of unwise regulation (or the lack of wise regulation), are not negligible. Agencies must precede regulation with cumbersome data gathering, analysis, and explanation,[41] and judges must "brave voluminous records and dauntingly difficult technical issues to enforce hard look review,"[42] a process that can prolong the regulatory process for years.[43] A demonstrative example of the effects of these costs is *Scenic Hudson Preser-*

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[38] *See* sources cited *supra* note 17.

[39] For Judge Harold Leventhal's early defense of hard look review, see *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851–52 (D.C. Cir. 1970); and Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 511–12 (1974). For a more contemporary defense of the doctrine in terms of its impact on decisionmaking, see generally Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486 (2002).

[40] *See* Breyer, *supra* note 1, at 391.

[41] *See* Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 557 (1997) ("[E]valuative substantive judicial review can chew up scarce agency resources as the agencies attempt to fill the rulemaking records with studies and to rebut all of the criticisms that blunderbuss attacks produce. This inevitably reduces the agency's capacity to issue rules, and . . . effectively reduces the scope of federal regulation." (footnote omitted)).

[42] BREYER ET AL., *supra* note 6, at 356.

[43] *See* McGarity, *supra* note 41, at 532–36 (describing the burdens of assembling an appropriate record in order to survive hard look review); *see also* Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 310.

vation Conference v. Federal Power Commission,[44] a case in which the Second Circuit found that the Federal Power Commission (FPC) had improperly issued a license to Consolidated Edison to build a hydroelectric plant and remanded for further proceedings to "inquire into and consider all relevant facts."[45] Five years, 100 hearings, 675 exhibits, and 19,000 pages of record later, the court affirmed the original issuance of the license.[46] Only it was then too late: "The five-year delay meant mounting costs, a deterioration in Consolidated Edison's financial position, and changing power needs, with the consequence that the [plant] was never built."[47]

In *Scenic Hudson*, then, arbitrariness review did more than drain resources from the parties and courts; it functioned as a transaction cost that derailed a potentially welfare-enhancing project — Consolidated Edison's hydroelectric plant. Nuclear power has been historically victim to similar delays, as licenses have been held up for years by the D.C. Circuit's application of hard look review.[48] These types of delays are often described as part of the larger problem of ossification, which occurs when processes like hard look review "transform[] the simple, efficient notice and comment process into an extraordinarily lengthy, complicated, and expensive process"[49] in which agencies are unwilling to engage. Two negative consequences generally follow. First, agencies become biased toward the status quo,[50] as even seem-

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[44] 354 F.2d 608 (2d Cir. 1965).

[45] *Id.* at 620.

[46] Scenic Hudson Pres. Conference v. Fed. Power Comm'n, 453 F.2d 463 (2d Cir. 1971).

[47] BREYER ET AL., *supra* note 6, at 351 (emphasis omitted). *But see Scenic Hudson*, 453 F.2d at 481 ("We do not consider that the five years of additional investigation which followed our remand were spent in vain."). For another example of a case where arbitrariness review led to reaffirmation of the original decision after an initial reversal, see *Independent U.S. Tanker Owners Committee v. Dole*, 809 F.2d 847 (D.C. Cir. 1987).

[48] *See* Stephen Breyer, Vermont Yankee *and the Courts' Role in the Nuclear Energy Controversy*, 91 HARV. L. REV. 1833, 1838–39 (1978) ("The licensing process, including court review, would seem at least partly responsible for the long lag between plan and operation . . . . [O]ne suspects that delay in the licensing process would tend to lead a firm to decide in favor of [building a coal plant instead of building a nuclear power plant]."); *see also* Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519 (1978) (rebuking the D.C. Circuit for adding excessive and statutorily unwarranted procedural requirements before approving licenses for nuclear power plants).

[49] Richard J. Pierce, Jr., *Seven Ways To Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 65 (1995). *But see* 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 (2000) (challenging the ossification thesis); Patricia M. Wald, *Judicial Review in the Time of Cholera*, 49 ADMIN. L. REV. 659, 662–63 (1997) (arguing that courts should not lower their standard of review simply because agencies find compliance costly); *but cf.* Robert A. Anthony & David A. Codevilla, *Pro-Ossification: A Harder Look at Agency Policy Statements*, 31 WAKE FOREST L. REV. 667 (1996) (arguing that hard look review should be extended to informal agency statements of policy and guidance).

[50] *See* Breyer, *supra* note 1, at 391.

ingly attractive and simple initiatives "grind along at such a deliberate pace that they are often consigned to regulatory purgatory, never to be resurrected again."[51] With the scales tipped in favor of inaction, agencies become less effective regulators, presumably resulting in a net loss of social welfare. Second, agencies gain incentives to make policy through interpretive rules, policy statements, and other informal mechanisms, which "diminish[] public input and accountability, transparency, and fair notice."[52] The shift away from rulemaking and formal adjudication can produce various perverse consequences as well. Professors Jerry Mashaw and David Harfst, for example, have argued that hard look review caused the government to switch from rulemaking to recalls when regulating automobiles, a process which may have decreased motor vehicle safety.[53]

2. Error Costs. — Administrative expenses might be justified if hard look review sufficiently reduced the frequency of unwise or undesirable regulation. It is questionable, however, whether courts can accomplish this function with much efficacy given their limited competency in scientific and technical matters. In *Sierra Club v. Costle*,[54] for example, Judge Wald noted that judges "are not engineers, computer modelers, economists or statisticians, although many of the documents in [the case] require such expertise — and more."[55] Judge Bazelon, in *Ethyl Corp. v. EPA*,[56] took this argument a step further, contending that courts have little to contribute "to improving the quality of the difficult decisions which must be made in highly technical areas,"[57] and that "substantive review of mathematical and scientific evidence by technically illiterate judges is dangerously unreliable."[58] Moreover,

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[51] Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1388 (1992); *see also id.* at 1390 (arguing that agencies will decline to modify or improve regulations because "[o]nce the legal and political dust has settled, an agency is inclined to let sleeping dogs lie"). Ossification has various other downsides as well. For example, it reduces experimentation, *id.* at 1392, and it can cause unintended side effects, as exemplified by then-Professor Breyer's argument that nuclear power, which was at the time being held up by the courts, might have positive environmental effects, *see* Breyer, *supra* note 48, at 1835–38.

[52] BREYER ET AL., *supra* note 6, at 569; *see also* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like — Should Federal Agencies Use Them To Bind the Public?*, 41 DUKE L.J. 1311, 1319 (1992) (noting that informal rulemaking allows agencies to operate with less visibility). It is, however, "extremely difficult to quantify the frequency with which agencies resort to informal instruments such as interpretive rules and policy statements." Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 10 n.21 (1997).

[53] *See* JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 95, 168 (1990).

[54] 657 F.2d 298 (D.C. Cir. 1981).

[55] *Id.* at 410.

[56] 541 F.2d 1 (D.C. Cir. 1976) (en banc).

[57] *Id.* at 66 (Bazelon, C.J., concurring).

[58] *Id.*

a recent study by Professors Thomas Miles and Cass Sunstein suggests that the outcome of hard look cases is highly influenced by judges' politics.[59] This should not be surprising, as judges, overwhelmed with the sophistication of the materials and questions before them, may be consciously or unconsciously influenced by their own values and beliefs. To some extent, then, this effect may be inevitable and characteristic of any form of judicial review. But it raises the question of why — if both are political — courts ought to be making regulatory decisions rather than agencies.[60]

Because of their lack of familiarity with the content of the modern regulatory state, courts may often commit type I errors by mistakenly rejecting beneficial regulations, or commit type II errors by affirming unwise policies.[61] Proponents of stringent arbitrariness review might argue that although such review may result in more type I errors, it presumably would mitigate the cost and frequency of type II errors. However, this decrease in type II errors might not necessarily follow from stringent arbitrariness review. Consider, for example, when the distinction between action and inaction is blurred. When an agency chooses inaction over regulation — a situation encouraged by ossification — courts are generally unlikely to review, *Massachusetts v. EPA*[62] notwithstanding.[63] As a result, hard look review may encourage agencies to adopt misguided policies (inaction) while leaving intended beneficiaries with no remedy.

II. SOLUTIONS TO THE OSSIFICATION PROBLEM: POST HOC RATIONALIZATION

Courts and scholars have devised various solutions to the ossification problem, such as "softening" hard look review by applying its requirements on a pass-fail basis;[64] referring major rules to Congress for

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[59] *See* Miles & Sunstein, *supra* note 1, at 767–68; *id.* at 810 ("Our own findings demonstrate that judicial commitments are playing a significant role — and suggest the strong possibility that in many cases, judges are voting to invalidate agency decisions as arbitrary when they would not do so if their own predilections were otherwise.").

[60] This is especially true given that agencies are more politically accountable than courts due to their relationship to the President. *See infra* p. 1929.

[61] A type I error is one in which a "correct" hypothesis is falsely rejected, and a type II error is one which a "false" hypothesis is accepted. This example would assume that the "hypothesis" is that the regulation at issue is desirable — the agency's contention.

[62] 127 S. Ct. 1438 (2007).

[63] For a discussion of judicial review of agency inaction, see, for example, *Heckler v. Chaney*, 470 U.S. 821, 832 (1985), which held that "an agency's decision not to take enforcement action should be presumed immune from judicial review," *id.*; and Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657 (2004).

[64] *See* McGarity, *supra* note 51, at 1453. Professor Thomas McGarity's proposal is predicated on the inability of courts to synthesize efficaciously complicated scientific and technical material — the same problem outlined by Judges Wald and Bazelon. *See* cases cited *supra* notes

adoption through legislation;[65] and eliminating litigants' ability to challenge rules immediately upon their adoption, thereby pressuring regulated entities to compromise with agencies rather than resort to litigation.[66] This Note presents an alternative to these proposals, arguing that courts ought to abandon one aspect of hard look review — the rule attributed to *Chenery* — and allow post hoc rationalization when an agency's original explanation for a particular regulation is found inadequate. Section A discusses *Chenery*'s explanation requirement, section B discusses the proposal and situates it within the previous discussion of decision and error costs, and section C responds to possible counterarguments.

A. Revising the Chenery *Rule: Mechanics*

The prohibition of post hoc rationalization can be attributed to *Chenery*, a case that predates the APA. The plaintiffs in that case, a group of officers and controlling shareholders in a company undergoing reorganization, requested that the SEC allow them to exchange their holdings, which would be extinguished upon reorganization, for a different type of shares that would persist in the new entity.[67] The Commission refused, finding that although there was no fraud or inadequate disclosure, the plaintiffs "were fiduciaries and were under a duty not to trade in the securities of that company" while plans for its reorganization were before the Commission.[68] As a result, the SEC refused to issue new shares, and the plaintiffs brought suit.[69] The Court, however, found that the aforementioned rationale — that the plaintiffs, as fiduciaries in the company, were obliged not to trade in its securities — was inadequate, and although the SEC provided an alternate explanation for their action while litigating the case,[70] the Court

54–58. He argues that courts ought to act as if they were engaging in the same "evaluative function . . . [as a] 'pass-fail prof' who must determine whether a research paper on a topic with which he is vaguely familiar meets the minimum standards for passable work." McGarity, *supra* note 51, at 1453. Abstention from fine-grained, nuanced judgment in these areas, according to Professor McGarity, is a necessary concession to the fact that judges are simply ill-suited to perform such tasks. *See id.* at 1452.

65 *See* Paul R. Verkuil, *Comment: Rulemaking Ossification — A Modest Proposal*, 47 ADMIN. L. REV. 453 (1995).

66 *See* Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, LAW & CONTEMP. PROBS., Spring 1994, at 185. For a description of these proposals and others, see BREYER ET AL., *supra* note 6, at 569–70; Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703 (1999); and Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals To Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483 (1997).

67 *See* SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194, 197–99 (1947).

68 *Id.* at 197.

69 *Id.* at 199.

70 *See* SEC v. Chenery Corp., 318 U.S. 80, 90 (1943) ("[T]he Commission urges here that the order should nevertheless be sustained because 'the effect of trading by management is not meas-

held 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."[71]

Chenery continues to be cited and applied by the courts,[72] though with differing frequency and effect. The Supreme Court in *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*[73] espoused a weak form of the rule, holding that while courts "may not supply a reasoned basis for the agency's action that the agency itself has not given, [they] will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."[74] But despite *Bowman*'s allowance of reasonably discernable explanations, the *Chenery* requirement, now intermingled with the hard look doctrine, remains formalized and rigorous. Writing eleven years after *Bowman*, then-partner, now-Judge Merrick Garland noted that *Chenery*'s explanation requirement was "[i]nitially . . . not particularly rigorous [and] demanded only enough explanation to permit the reviewing court to discern the agency's rationale."[75] But "[a]s the doctrine developed, the

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ured by the fairness of individual transactions between buyer and seller, but by its relation to the timing and dynamics of the reorganization which the management itself initiates and so largely controls.'"); *id.* at 92 ("But the difficulty remains that the considerations urged here in support of the Commission's order were not those upon which its action was based.").

[71] *Id.* at 95; *see also Chenery II*, 332 U.S. at 196 (describing the holding as 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").

[72] The *Chenery* principle has been called a "foundation of administrative law, frequently serving as a basis for agency reversal." Jim Rossi, *Antitrust Process and Vertical Deference: Judicial Review of State Regulatory Inaction*, 93 IOWA L. REV. 185, 225 (2007). Examples of cases applying the rule are common. *See, e.g.*, FEC v. Akins, 524 U.S. 11, 25 (1998); Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 374 (1998); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983) ("It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself."); Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation, 426 F.3d 1082, 1091 (9th Cir. 2005) ("It is a basic principle of administrative law that the agency must articulate the reason or reasons for its decision."); Deukmejian v. Nuclear Regulatory Comm'n, 751 F.2d 1287, 1326 n.244 (D.C. Cir. 1984) ("Courts disregard post hoc rationalizations of an agency's position on preexisting records." (emphasis omitted)).

[73] 419 U.S. 281 (1974).

[74] *Id.* at 285–86 (citation omitted); *see also* Casino Airlines, Inc. v. Nat'l Transp. Safety Bd., 439 F.3d 715, 717 (D.C. Cir. 2006) (noting that "the contested decision need not be a model of clarity"); Chritton v. Nat'l Transp. Safety Bd., 888 F.2d 854, 862 (D.C. Cir. 1989) (upholding an agency opinion despite its last sentence being "less than crystal clear"). Other courts have argued that judges may accept post hoc explanations that "merely illuminate reasons obscured but implicit in the administrative record." Consumer Fed'n of Am. v. U.S. Dep't of Health & Human Servs., 83 F.3d 1497, 1507 (D.C. Cir. 1996) (quoting Clifford v. Pena, 77 F.3d 1414, 1418 (D.C. Cir. 1996)) (internal quotation marks omitted). "However, if the subsequent explanation provides an 'entirely new theory' to support the agency's decision and does not simply provide 'additional background information about the agency's basic rationale,' courts will reject it." Rossi, *supra* note 72, at 224 (quoting *Consumer Fed'n*, 83 F.3d at 1507).

[75] Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 526 (1985).

courts demanded increasingly detailed explanations of the agency's rationale; they required specification of the agency's policy premises, its reasoning, and its factual support."[76] Moreover, while courts may, post-*Bowman*, be lenient when evaluating existing agency rationales, they uniformly reject an agency's ability to provide alternate explanations during litigation.[77]

This Note defends something akin to the initial "not particularly rigorous" conception of *Chenery* — a rule that courts ought to allow agencies to provide alternative rationales during litigation. Allowing post hoc rationalization contra *Chenery* would soften substantive hard look review by allowing judges to credit "rational connection[s] between the facts found and the choice made" by the agency even if those connections were not stated at the time of the agency's decision.[78] Simply put, judges ought not be "powerless to affirm . . . action[s] by substituting . . . a more adequate or proper basis."[79] Instead, they should uphold decisions when it is possible to construe the available evidence so as to render the regulation reasonable on the merits ex post. This shift in the test would not alter other aspects of hard look review; it takes no position as to whether agencies must consider alternatives or available evidence. It similarly does not challenge the *Citizens To Preserve Overton Park, Inc. v. Volpe*[80] rule that agencies should not be allowed to consider statutorily irrelevant factors.[81] It defends only the more limited position that courts ought not invalidate regulations when agencies proffer a legitimate rationale after the time of the agency decision itself.[82]

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[76] *Id.* Though a survey of the case law is beyond the scope of this Note, a number of lower court cases have struck down agency actions on *Chenery* grounds in recent years despite the *Bowman* modification. *See, e.g.*, Air Transp. Ass'n of Can. v. FAA, 254 F.3d 271, 279 (D.C. Cir. 2001) ("Because the FAA has failed to articulate the basis for its conclusion . . . [we] remand to the FAA for further proceedings consistent with this opinion."); AT&T Corp. v. FCC, 236 F.3d 729, 737 (D.C. Cir. 2001) (remanding an FCC order "so that the Commission may 'examine the relevant data and articulate a satisfactory explanation for its action'" (quoting *State Farm*, 463 U.S. at 43)); Muwekma Ohlone Tribe v. Kempthorne, 452 F. Supp. 2d 105, 125 (D.D.C. 2006).

[77] *See* Fed. Power Comm'n v. Texaco Inc., 417 U.S. 380, 397 (1974) ("[W]e cannot 'accept appellate counsel's *post hoc* rationalizations for agency action'; for an agency's order must be upheld, if at all, 'on the same basis articulated in the order by the agency itself.'" (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168–69 (1962))); Arrington v. Daniels, 516 F.3d 1106, 1113 (9th Cir. 2008) ("*Post hoc* explanations of agency action by appellate counsel cannot substitute for the agency's own articulation of the basis for its decision.").

[78] *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines*, 371 U.S. at 168) (internal quotation marks omitted).

[79] SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194, 196 (1947).

[80] 401 U.S. 402 (1971).

[81] *See id.* at 411–12.

[82] Because *Chenery* is not a constitutional decision, Congress would be able to override the decision by passing legislation requiring courts to uphold agencies' policy decisions so long as a reasonable rationale for the action might be discerned from evidence available in the record. *But see* Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952 (2007).

Two analogies help explain the mechanics of this proposal. First, the proposed explanation requirement would in many senses be analogous to a simple harmless error standard:[83] if a judge could predict that an agency might easily supply an acceptable rationale where its original attempt had failed, or if a judge could conceive of ways based on evidence derived from the record in which an agency might reject an alternative that it had improperly failed to consider, he or she would uphold the regulation rather than remanding it for further proceedings. In this sense, post hoc rationalization might be based on § 706 of the APA, which states that "due account shall be taken of the rule of prejudicial error."[84] The desirability of such a rule seems clear at first glance: though it may increase decision costs by forcing judges to distinguish between harmless and harmful errors (or, here, between explainable and nonexplainable regulations), the rule avoids delays and ossification caused by avoidable litigation.

Of course, whether a harmless error rule is desirable in this context is a debatable position. Critics of harmless error rules in criminal law, for example, have often argued that such rules incentivize intentional errors.[85] And just as a prosecutor might try to introduce unallowable

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[83] "The harmless error rule, probably the most cited rule in modern criminal appeals, provides that an error committed at trial, if judged harmless in the sense of its being unlikely to have altered the outcome of the trial, is not a reversible error." William M. Landes & Richard A. Posner, *Harmless Error*, 30 J. LEGAL STUD. 161, 161 (2001). Although various courts have occasionally applied the harmless error doctrine to allow a regulation to pass arbitrariness review, *see, e.g.*, Nat'l Ass'n of Homebuilders v. Defenders of Wildlife, 127 S. Ct. 2518, 2530 (2007); PDK Labs., Inc. v. DEA, 362 F.3d 786, 799 (D.C. Cir. 2004) ("In administrative law, as in federal civil and criminal litigation, there is a harmless error rule."); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970) (Leventhal, J.) ("Nor will the court upset a decision because of errors that are not material, there being room for the doctrine of harmless error."), these applications of the harmless error doctrine all occur with *Chenery* in the background. Accordingly, the reviewing court — though able as always to find that an error is not material — is still prohibited from supplying missing rationales for agency action.

[84] 5 U.S.C. § 706 (2006). This portion of § 706 has been largely ignored. The Attorney General's Manual indicates only that the provision "appears to restate existing law," U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 110 (1947), and the leading case at the time the APA was passed has only about a paragraph of relevant discussion, *see* Mkt. St. Ry. Co. v. R.R. Comm'n, 324 U.S. 548, 561–62 (1945). But the provision nevertheless indicates that some sort of harmless error standard was intended to exist, and it might therefore provide a platform for weakening *Chenery*.

[85] *See, e.g.*, Francis A. Allen, *A Serendipitous Trek Through the Advance-Sheet Jungle: Criminal Justice in the Courts of Review*, 70 IOWA L. REV. 311, 332 (1985); Charles F. Campbell, Jr., *An Economic View of Developments in the Harmless Error and Exclusionary Rules*, 42 BAYLOR L. REV. 499, 511 (1990); Harry T. Edwards, *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1169, 1195 (1995); Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421, 437–38 (1980); Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 59 (2002); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2548 (1996); Vilija Bilaisis, Comment, *Harmless Error: Abettor of Courtroom Misconduct*, 74 J. CRIM. L. & CRIMINOLOGY 457 (1983).

evidence if he or she thinks doing so will be found "harmless,"[86] an agency might, for political reasons or simply to cut corners in the decisionmaking process, provide an inadequate explanation for a regulation if it believes that proactive courts will concoct some rationalization ex post. These are indeed possibilities, though they are ones that other areas of the law have resolved in favor of the harmless error approach. Assuming that a court was effective at differentiating between plausible and implausible explanations for regulation — a presumption that traditional proponents of hard look review must also defend[87] — one would imagine that judicial review would be sufficiently precise to minimize misconduct.

The second analogy is to appellate review. Appellate courts will affirm a lower court's decision if it arrives at the appropriate outcome even if it does so through misguided reasoning. Because an appellate court's choice of rationales is not limited to what the parties briefed, it is actually a more expansive practice than that proposed in this Note (under which courts would be limited to the litigation positions). The *Chenery* Court admitted:

> The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate.[88]

Chenery attempted to differentiate the rule it articulated and appellate review by arguing that judicial review of administrative orders is more akin to review of a jury's factual determinations than a lower court's legal conclusions.[89] But this distinction lacks substance. Juries, after all, are not required to disclose the reasoning behind verdicts or factual conclusions.[90] Nor are legislatures required to provide the correct explanation for the constitutionality of their enactments.[91] And while

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[86] *See generally* Landes & Posner, *supra* note 83, at 176–80.

[87] Granted, there are means by which hard look review might encourage better regulatory policy regardless of judicial capacity. For a discussion, see *infra* pp. 1926–27.

[88] SEC v. Chenery Corp., 318 U.S. 80, 88 (1943).

[89] *Id.* ("But it is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a 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. Like considerations govern review of administrative orders. 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.").

[90] *See, e.g.*, United States v. Va. Erection Corp., 335 F.2d 868, 872 (4th Cir. 1964) (referencing the "cardinal principle that the deliberations of the jury shall remain private and secret in every case").

[91] *See, e.g.*, David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639, 678 (2008) ("Legislators need not address questions about the constitutionality of a piece of proposed legislation, much less explain their reasoning on the matter . . . .").

the situation with respect to the legislature might be differentiated by reference to the legislature's inherent accountability and responsiveness to checks and balances, there are a number of reasons to believe that agencies are similarly accountable in light of their relationship to the President.[92]

B. The Normative Case for Post Hoc Rationalization

Revision of the *Chenery* rule would significantly reduce decision costs, in particular delay and ossification, while having relatively little effect on the introduction of erroneous rules. In other words, it would mitigate many of the downsides of hard look review while leaving its beneficial attributes substantially intact.

1. Decision Costs. — The *Chenery* rule can be justified in some respects as a mechanism for reducing courts' decision costs and increasing the ease with which they can dispose of cases. With post hoc justifications for regulation rendered legally inapplicable, courts have less of a need to go through the record with a fine-toothed comb; they need only examine the agency's initial rationale.[93] This gain in judicial economy, however, is limited: it only delays rather than limits costs. Remanded cases often eventually return to courts, forcing courts to revisit the issue and again clogging their dockets.

More importantly, remanding in this fashion generates substantial welfare losses from delay and ossification. The loss of the hydroelectric plant in *Scenic Hudson* is illustrative: mounting costs and uncertainty attributable to the litigation hijacked a potentially welfare-enhancing project.[94] And delays like the one in *Scenic Hudson* are common. In *National Coalition Against the Misuse of Pesticides v. Thomas*,[95] for example, the EPA had set a zero tolerance level for a particular pesticide in imported mangoes. It later increased the level, fearing that a complete ban would damage the economies of mango-producing countries.[96] The court, however, held this justification inadequate on the basis that it was statutorily irrelevant.[97] The EPA responded by keeping the tolerance level the same but providing a new explanation, arguing that ensuring cooperation with various food-

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[92] *See* Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 338 (1999).

[93] Some courts have phrased this concern as one of feasibility. *See* Am. Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 539 n.73 (1981) ("[T]he courts will not be expected to scrutinize the record to uncover and formulate a rationale explaining an action, when the agency in the first instance has failed to articulate such rationale.").

[94] *See supra* pp. 1915–16.

[95] 828 F.2d 42 (D.C. Cir. 1987).

[96] *See id.* at 43; Nat'l Coal. Against the Misuse of Pesticides v. Thomas, 809 F.2d 875, 877 (D.C. Cir. 1987).

[97] *See Misuse of Pesticides*, 828 F.2d at 43.

exporting nations was necessary to ensure that food safety laws would be effectively enforced abroad, and the court approved this new justification on remand.[98] Such protracted litigation significantly impedes and delays an agency's ability to implement policy without any countervailing improvement in judicial efficiency.

In some instances, courts have even remanded a case while admitting that the record is capable of supporting the agency's post hoc rationale. In *American Textile Manufacturers Institute, Inc. v. Donovan*,[99] for example, the Court heard several challenges to cotton dust regulations enacted by the Occupational Safety and Health Administration (OSHA). One aspect of the regulations required employers to reassign employees who could not wear exposure-reducing respirators without reducing their pay or benefits.[100] When the regulations initially were passed, OSHA failed to provide a detailed rationale for the wage guarantee,[101] but its lawyers provided an intuitive rationale during the litigation: employees, fearful of being discharged, might refuse to report their inability to use respirators.[102] The Court admitted that "[t]here is evidence in the record that might support such a determination,"[103] but it nevertheless invalidated the provision: "Whether these arguments have merit, and they very well may, the *post hoc* rationalizations of the agency or the parties to this litigation cannot serve as a sufficient predicate for agency action."[104]

A new literature has emerged attempting to quantify these delays and examine how agencies fare on remand. Professor William Jordan, for example, finds that "agencies . . . successfully implemented their policies in approximately 80% of the instances in which courts have originally remanded rules as arbitrary and capricious,"[105] and that the average delay between remand and recovery is roughly two years.[106] While Professor Jordan concludes that "[i]t hardly seems excessive to impose delays in these ranges in a relatively small number of cases,"[107]

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[98] *Id.* at 44.

[99] 452 U.S. 490 (1981).

[100] *See id.* at 536–37.

[101] *Id.* at 537–38.

[102] *Id.* at 539.

[103] *Id.* at 539 n.73.

[104] *Id.* at 539 (footnote omitted).

[105] Jordan, *supra* note 49, at 440.

[106] *Id.* ("On the average, agencies recovered within two years of the remand, and in just over half of the cases, recovery took less than a year. These averages hold true for both major and minor rule remands.").

[107] *Id.* at 440–41. A number of other empirical studies have similarly concluded that the harms of ossification may not be as great as initially predicted. *See, e.g.*, Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 U. ILL. L. REV. 1111, 1127 ("[E]mpirical evidence for a retreat from rulemaking in the face of stringent judicial review is not nearly as clear as has been

he concedes that minor procedural tweaks can nevertheless be welfare-maximizing and avoid losses from unnecessary delays,[108] not to mention losses from policies that, due to the perceived or real threat of review, were never proposed or enacted. And while there might be some value to invalidating the 20% of regulations that do not recover from a remand, the rules that would be affected by a weakened explanation requirement — that is, those rules that can be saved by an ex post litigating position — would likely be those that would have survived regardless, but only after significant delays and extended litigation.

Revising the *Chenery* requirement would by no means be a complete solution to the ossification problem, but it might ameliorate some of its symptoms. As a result of revision, unnecessary delays could be avoided; in cases like *Misuse of Pesticides* and *American Textile*, the court would ask whether the existing record was sufficient to support any explanation provided by the agency rather than immediately remanding. Moreover, knowing that courts are unlikely to invalidate regulations on technicalities, agencies might become less subject to status quo biases and more willing to push new regulations that would have otherwise fallen victim to desires to avoid the hassles of hard look review.[109] Either way, the result is that ossification and incentives to shift to undesirable forms of regulation, such as regulation by recall instead of rulemaking,[110] might be avoided.

2. Error Costs. — The strict *Chenery* principle as it operates in hard look review is best defended as a means of reducing welfare losses from ill-conceived regulation. There are two ways in which it might do this: first, ex ante explanation requirements might discipline agencies, producing better policymaking; second, strict explanation requirements might discipline judges, preventing politicized decisions. Each of these mechanisms, however, has a number of weaknesses.

(a) Regulatory Efficacy. — There is at least an argument that agencies might be less likely to implement misguided policies when they are required to explain such policies publicly.[111] Public debate

generally supposed."); *see also* Stephen M. Johnson, *Ossification's Demise? An Empirical Analysis of EPA Rulemaking from 2001–2005*, 38 ENVTL. L. 767 (2008).

[108] *See* Jordan, *supra* note 49, at 442–43.

[109] *See supra* section I.B.1, pp. 1915–17.

[110] *See supra* p. 1917.

[111] A related criticism is that, to the extent that agency decisions are politicized, *see infra* p. 1929, failing to require ex ante (and hence more highly publicized) explanations for regulations might create additional opportunities for politics to seep into supposedly neutral decisionmaking. *But cf. infra* p. 1929 (quoting Justice Black). Although this may be the case, other measures might be adopted to reduce or eliminate this problem. One concerned about the politicization of administrative law, for example, might opt to both reverse *Chenery* as prescribed and also adopt Professors Miles and Sunstein's suggestions that appellate judges be made aware of ideological voting in arbitrariness review, *see* Miles & Sunstein, *supra* note 1, at 812 ("If appellate judges are made aware that the evidence suggests a degree of ideological voting in arbitrariness review, perhaps

over public agency explanations might, for example, render agency decisionmaking less error-prone and more accountable; as Justice Brandeis famously wrote, "[s]unlight is said to be the best of disinfectants."[112] Judge Friendly, an early proponent of *Chenery*, enunciated a variation of this claim, arguing that the explanation requirement would improve agency decisionmaking by forcing agencies to rethink — though perhaps not actually withdraw — questionable regulations.[113] And even if judges lack the sophistication to evaluate an agency's explanation for its action, the quality of the explanation itself might nevertheless retain some informational value. As Professor Matthew Stephenson has argued, judicially required explanations can function as signaling devices, the superficial quality of which allows courts to evaluate effectively the desirability of regulations despite judges' lack of technical expertise, and that therefore help screen out un- or less-desirable regulations.[114]

These error-reducing mechanisms cannot be ignored, and, to some extent the question is an empirical one: whether the marginal reduction in decision costs from weakening *Chenery* is greater than the corresponding increase (if an increase would occur) in error costs. There are at least some reasons, analytically speaking, to believe that the increase in error costs exceeds the decrease in decision costs.

First, the *Chenery* requirement may actually increase error costs to the extent that it discourages, through ossification and delay, beneficial regulations. When deciding whether to pursue various policies, agencies can be expected to internalize costs stemming from litigation and remands. When these costs become sufficiently high relative to the anticipated benefits of a regulation, or when the agency fears that it will become entangled in litigation and lose its ability to pursue other regulations, inaction will presumably become the preferred course of action.[115] If the ossification thesis is accepted, there is reason to believe

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that very awareness can operate as a kind of corrective or inoculation."), or that panels be mixed rather than unified, *see id*.

[112] LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (Augustus M. Kelley 1986) (1914).

[113] *See* Henry J. Friendly, Chenery *Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L.J. 199, 207–08 ("[T]he rule serves an additional, and sometimes quite useful, purpose in that it permits a court in effect to say to an agency, 'Do you really mean it?' . . . Conceivably, the [agency] will take the hint and re-think the bases of its decision; if not, the court will at least have the benefit of an explicated decision.").

[114] *See* Matthew C. Stephenson, *A Costly Signaling Theory of "Hard Look" Judicial Review*, 58 ADMIN. L. REV. 753, 755 (2006) [hereinafter Stephenson, *A Costly Signaling Theory*]. For additional discussion of how law may strategically raise the costs of potentially undesirable policymaking, see Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2 (2008).

[115] *See* Breyer, *supra* note 1, at 391; sources cited *supra* note 49.

that the bigger problem is not unwise regulations but rather too little regulation.

Second, a number of factors mitigate the need for strict explanation requirements. Even in the absence of such requirements, agencies would be required to provide a rational explanation for regulations based on the evidence already available in the record; the only difference would be in the timing of that explanation. Moreover, given that remanded regulations are often quite likely to pass judicial scrutiny the second time around when the only basis for the original remand was the lack of an adequate explanation,[116] the claim that forcing agencies to provide an explanation disciplines their behavior is suspect.

Additionally, it is unclear exactly how much informational (and thus error-reducing) value actually is conveyed by elaborate agency rationales for regulation.[117] Some scholars, for example, have argued that the explanation requirement encourages "agencies to produce the sort of analysis that courts understand, even though such analysis is ill-suited to the types of technical and scientific problems that agencies actually confront."[118] And if courts are generally incapable of discerning much meaning from records in administrative law cases due to such cases' complexity and technical sophistication, then the

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[116] One study (in an attempt to refute the ossification hypothesis) found that, in cases involving "major rules," agencies were generally able to resurrect a remanded rule when they desired to do so. *See* Jordan, *supra* note 49, at 431 ("In most cases, the agency was able to continue implementing its regulatory program essentially intact during the recovery period. . . . In general, the agencies essentially recovered through the rulemaking process.").

[117] It is important to note that the aforementioned accountability and signaling mechanisms of avoiding errors do not rely on judges' technical or scientific expertise, or on the informational value of explanations. However, the more basic argument that judges will catch mistaken agency policies does. Whether judges have the capacity to catch mistaken agency policies is unclear and has been subject to much debate. In *Ethyl Corp. v. EPA*, Judge Bazelon was quick to express fears of "technically illiterate judges." 541 F.2d 1, 67 (D.C. Cir. 1976) (en banc) (Bazelon, C.J., concurring). Judge Leventhal took the opposite position, noting that judges can "acquire whatever technical knowledge is necessary," and if for some reason they are systematically unable to do so, "Congress may push to establish specialized courts." *Id.* at 68 (Leventhal, J., concurring). Other procedural mechanisms, such as the appointment of special masters who can effectively tutor judges, can also help accommodate the complexity of scientific evidence. *See, e.g.*, Crystal Semiconductor Corp. v. Tritech Microelectronics Int'l, Inc., 246 F.3d 1336, 1344 (Fed. Cir. 2001) (consulting a special master regarding technical issues); Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., 234 F.3d 558, 584 (Fed. Cir. 2000) (same). In this sense, the type of role that judges would play with or without *Chenery* is not unique — *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), for example, requires trial judges to act as "gatekeepers" and evaluate the reliability of scientific testimony.

[118] Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1779 (2007) (collecting sources). Professor Stephenson's argument that explanation requirements function as a signaling device, of course, would subsume this argument; under Professor Stephenson's view, whether courts can effectively analyze the record in hard look cases is less relevant. *See* Stephenson, *A Costly Signaling Theory*, *supra* note 114, at 755.

basic argument that *Chenery* helps courts "catch" erroneous cases is unconvincing.

(b) Judicial Discretion. — A related argument is that allowing judges to adopt agency litigating positions in order to save regulations might undesirably increase judicial discretion. With additional leeway, the argument would go, judges might be more inclined to uphold regulations for political or other reasons, thereby increasing the chance of error.

Increased discretion may, however, still be preferable to the alternative. As noted by Justice Black in his *Chenery* dissent, the explanation requirement itself can open up space for political maneuvering by judges not unlike the type found by Professors Miles and Sunstein.[119] According to Justice Black, "[h]ypercritical exactions as to findings can provide a handy but an almost invisible glideway enabling courts to pass 'from the narrow confines of law into the more spacious domain of policy.'"[120] Whether an agency's stated rationale relates sufficiently to each aspect of a regulation is a question that can be influenced by judges' political beliefs. A more lenient standard, lessening the potential for judges to invalidate policies for political reasons, would therefore be desirable. And even if such a standard allows agencies greater leeway to act in a political fashion, the entity influenced by politics is at least the more politically accountable of the two; as some commentators have acknowledged, "agencies are themselves politically accountable through their relationship to the President."[121] Accordingly, a more limited conception of judicial review might be seen not as overly docile, but instead as reflecting deference to and respect for the democratic process.

CONCLUSION

Though hard look review may be effective in deterring or invalidating unwise regulations, it does so at great cost. It risks large administrative costs, inefficiencies, delays, and ossification of informal rulemaking. From a brief examination, the benefits of stringent hard look review do not appear to be justified. Accordingly, courts ought to consider the possibility of loosening *Chenery* and allowing the provision of missing rationales for administrative policy ex post. Though

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[119] *See supra* p. 1918.

[120] SEC v. Chenery Corp., 318 U.S. 80, 99 (1943) (Black, J., dissenting) (quoting Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941)). Justice Black also argued that "[a] judicial requirement of circumstantially detailed findings as the price of court approval can bog the administrative power in a quagmire of minutiae." *Id.*

[121] Sunstein, *supra* note 92, at 338; *see also* JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE 152–57 (1997).

only a modest step, this proposal would effectively soften aspects of the hard look doctrine while leaving the bulk of the doctrine in place.