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Chenery II and the Development of Federal Administrative Law

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CHENERY II AND THE DEVELOPMENT OF FEDERAL ADMINISTRATIVE LAW

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INTRODUCTION

While the Supreme Court's holding in *SEC v. Chenery Corp.* (*Chenery II*)[1]—that agencies have discretion about whether to articulate new policy legislatively or adjudicatively—was not particularly earth shattering, the decision did generate a great deal of scholarly commentary and criticism.[2]

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1. 332 U.S. 194, 201-02 (1947).

2. *See, e.g.*, Arthur E. Bonfield, *The Federal APA and State Administrative Law*, 72 VA. L. REV. 297, 325-34 (1986) (suggesting that states should choose rulemaking over formal adjudication); Cornelius J. Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729, 730 (1961) (criticizing the National Labor Relations Board (NLRB) for not exercising its rulemaking powers enough); Glen O. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 486 (1970) (recognizing broad concern that agencies engage in adjudication at the expense of rulemaking); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 922 (1965) (questioning agencies' choice of weapons in making policy); Peter L. Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's*

Much of this commentary criticized the holding in the case, extolled the virtues of legislative procedures for making rules, and urged courts to encourage administrative agencies to articulate policy legislatively.[3] As a result, *Chenery II* qualifies as our most underrated administrative law decision.

While we do not disagree with those commentators who have argued that agencies generally should strive to articulate policy via rulemaking and avoid creating broadly applicable rules in an adjudication, we believe that *Chenery II* was correctly decided[4] and inevitable. Indeed, adjudicative policymaking is an inherent aspect of an effective regulatory regime. This Article will discuss how a different decision in *Chenery II* would have affected the administrative process both in look and function. In our opinion, a different holding would have impeded the process significantly. First, we will describe *Chenery I* and *Chenery II*. Then, we will explain why the decision was inevitable and why we think the Court arrived at the correct result. These discussions will explain why we regard *Chenery II* as one of the most underrated administrative law decisions.

I. THE PREFERABILITY OF LEGISLATIVE PROCEDURES

Agencies have a "[m]enu of [p]olicymaking [f]orms" available to them,[5] including the authority to promulgate legislative rules, conduct adjudications, and articulate non-legislative policies.[6] Generally, when agencies decide to create broad, prospective rules, legislative procedures are preferable.[7] In some respects, legislative procedures, particularly notice

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Administration of the Mining Law, 74 COLUM. L. REV. 1231, 1233 (1974) (reviewing the Department of Interior's choices between rulemaking and adjudication in implementing the General Mining Law); Russell L. Weaver, Chenery II*: A Forty Year Retrospective*, 40 ADMIN. L. REV. 161, 161 (1988) [hereinafter Weaver, *Retrospective*] (discussing *Chenery II*'s controversial nature and its impact on agencies and courts); J. Skelly Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 376 (1974) (suggesting that agencies must engage in rulemaking and not adjudication when Congress has adopted a regulatory solution). *See generally* KENNETH CULP DAVIS & RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE § 6.7 at 260-62 (3d ed. 1994).

3. *See, e.g.*, Yoav Dotan, *Making Consistency Consistent*, 57 ADMIN. L. REV. 995, 1006-07 (2005) (arguing that *Chenery II* has led to administrative inconsistency); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 30 ADMIN. & REG. L. NEWS 15, 16 (2004) ("Whatever its scope, the *Chenery* principle is a puzzle because it appears to be out of step with judicial review of other agency exercises of discretion."); Colin Diver, *Policy Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 403-04 (1981) ("[T]he typical adjudication is not well suited to serve as a springboard for expansive policymaking.").

4. Russell L. Weaver, *An APA Provision on Nonlegislative Rules?*, 56 ADMIN. L. REV. 1179, 1185 (2004) [hereinafter *Nonlegislative Rules*].

5. M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1386 (2004).

6. *See id.* at 1386-89 (detailing the policymaking instruments available to agencies).

7. *See* RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.8, at 368 (4th ed. 2002) (recognizing the "near unanimity" of parties praising the virtues of rulemaking); BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 4.18, at 217 (3d ed. 1991) (opining that

and comment procedures (informal procedures), are superior to adjudicative procedures for rule creation because informal procedures are designed to allow interested individuals and entities the opportunity to join and influence the rulemaking process.[8] Agencies must publish a notice of proposed rulemaking (NOPR) in the Federal Register,[9] must allow interested parties the opportunity to comment on the NOPR,[10] and must consider and explain their response to these comments.[11] Through these processes, informal procedures "force important issues into full public display and in that sense make for more responsible administrative action."[12] Public participation necessarily improves the regulatory process. As Justice Douglas recognized:

> Agencies discover that they are not always repositories of ultimate wisdom; they learn from the suggestions of outsiders and often benefit from that advice.
>
> This is a healthy process that makes a society viable. The multiplication of agencies and their growing power make them more and more remote from the people affected by what they do and make more likely the arbitrary exercise of their powers. Public airing of problems through rule making makes the bureaucracy more responsive to public needs and is an important brake on the growth of absolutism in the regime that now governs all of us.[13]

The adjudicative process, by contrast, lacks the public notice and comment provisions of informal procedures.[14] Policy, therefore, is created during a case where only the parties participate[15] and where little opportunity exists for public discussion, input, and debate. Moreover,

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rulemaking is fairer than case-by-case adjudication).

8. *See* SCHWARTZ, *supra* note 7, at 217 (noting the "informed" nature of comments).

9. 5 U.S.C. § 553(b) (2000).

10. *Id.* § 553(c).

11. *Id.*

12. Justice Douglas argued that:

> The rule-making procedure performs important functions. It gives notice to an entire segment of society of those controls or regimentation that is forthcoming. It gives an opportunity for persons affected to be heard. Recently the proposed Rules of the Federal Highway Administration governing the location and design of freeways were put down for a hearing; and the Governor of every State appeared or sent an emissary. The result was a revision of the Rules before they were promulgated.

NLRB v. Wyman-Gordon, 394 U.S. 759, 777 (1969) (Douglas, J., dissenting) (citations omitted).

13. *Id.* at 777-78 (citations omitted).

14. *See* 5 U.S.C. § 551(6) ("[O]rder means the whole or part of a final disposition . . . other than rule making. . . ."); *id.* § 553(b)-(c) ("General notice of proposed *rule making* shall be published . . . [and] the agency shall give interested persons an opportunity to participate in the *rule making* through submission of written data.") (emphasis added).

15. *Nonlegislative Rules*, *supra* note 4, at 1184. An agency may permit broader participation. *See* Shapiro, *supra* note 2, at 931 (footnotes omitted) ("The device of the brief of amicus curiae, which has become increasingly common in Supreme Court proceedings, has also been used by administrative agencies.").

because a notice of adjudication need not be published in the Federal Register, interested parties may not be aware that an agency is considering a particular issue in an adjudicative proceeding. Thus, at least in theory, informal procedures will lead to better, more informed rules.

II. *CHENERY I & II*: THE DECISIONS

Despite the advantages of informal procedures, *Chenery II* illustrates that legislative procedures are not always preferable or the most effective way to produce rules. In *Chenery I*,[16] a public utility company sought to reorganize and to issue preferred stock to the company's officers and directors. The Securities and Exchange Commission (SEC) had to approve such a reorganization plan. The governing act, the Public Utility Holding Company Act of 1935, only provided that such reorganizations had to be "fair and equitable" to the persons affected thereby.[17] The statute did not indicate whether officers and directors could purchase preferred stock during reorganization. As a result, the SEC had to decide that issue in the context of the application for reorganization. The SEC approved the plan, but required that it be rewritten to require the company to buy back management's preferred stock.[18] The company subsequently appealed this decision. The Court invalidated the agency order because the SEC had not provided a valid, legal reason for its decision.[19] Instead, the SEC had based its decision on an erroneous understanding of common law.[20] In so holding, the Court "explicitly recognized the possibility that the [SEC] might have promulgated a general rule dealing with this problem under its statutory rule-making powers . . . ."[21] The Court remanded the case to give

16. SEC v. Chenery Corp. (*Chenery I*), 318 U.S. 80 (1943).

17. The Act provided, in relevant part, that:

> Section 7 . . . (d) If the requirement of subsections (c) and (g) are satisfied, the Commission shall permit a declaration regarding the issue or sale of a security to become effective unless the Commission finds that . . . (6) the terms and conditions of the issue or sale of the security are detrimental to the public interest or the interest of investors or consumers. (e) If the requirements of subsection (g) of this section are satisfied, the Commission shall permit a declaration to become effective regarding the exercise of a privilege or right to alter the priorities, preferences, voting power, or other rights of the holders of an outstanding security unless the Commission finds that such exercise of such privilege or right will result in an unfair or inequitable distribution of voting power among holders of the securities of the declarant or is otherwise detrimental to the public interest or the interest of investors or consumers.

15 U.S.C. § 79g (1946). Section 11 contained similar provisions. *See id.* § 79k (stipulating that the Commission must ensure that voting power is fairly and equitably distributed among the holders of securities).

18. *Chenery I*, 318 U.S. at 85.

19. *Id.* at 95.

20. *Id.* at 88-90.

21. SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194, 201 (1947).

the agency an opportunity to better explain its decision. According to the Court, "We must know what a decision means before the duty becomes ours to say whether it is right or wrong."[22]

On remand, the SEC provided a different rationale, but reached the same result,[23] and the utility company again appealed. Relying on the Court's prior statements suggesting that the SEC might have acted legislatively, the company argued that the agency's rule had to be prospective and without retroactive effect.[24] As a result, the company argued that the SEC must approve the company's reorganization plan and, if the SEC wanted to prohibit management from benefiting from such reorganizations, then the agency needed to craft such a rule via its legislative powers.

In *Chenery II,* the Court disagreed. Writing for the majority, Justice Murphy[25] rejected the argument that the agency had to approve the proposed transaction and prohibit all future actions of that kind via legislative rulemaking.[26] The Court stated:

> It is true that our prior decision explicitly recognized the possibility that the Commission might have promulgated a general rule dealing with this problem under its statutory rule-making powers . . . . But we did not mean to imply thereby that the failure of the Commission to anticipate this problem and to promulgate a general rule withdrew all power from that agency to perform its statutory duty in this case. . . .[27]

Such a holding would "stultify the administrative process" and "exalt form over necessity."[28] In so holding, however, *Chenery II* recognized that informal procedures are generally preferable to adjudicative procedures for creating rules[29] and suggested[30] that agencies should prefer them to adjudicative procedures.[31] In the Court's view, the gaps in the Act should be filled, as much as possible, through this kind of prospective quasi-legislative rule promulgation process.[32] But the Court also recognized that it would be impossible for a rational administrative process to function

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22. *Id.* at 197.
23. *Id.* at 196.
24. *Id.* at 200.
25. Justice Murphy had joined the dissent in *Chenery I.* The dissent would have upheld the SEC's order as a valid exercise of the powers delegated to it. *Chenery I,* 318 U.S. at 99-100 (Black, J., dissenting) (arguing that the Act conferred wide powers to evolve policy standards, which potentially may be accomplished on a case-by-case basis).
26. *See Chenery II,* 332 U.S. at 202 (suggesting that to hold otherwise would render the administrative process inflexible).
27. *Id.* at 201-02 (citations omitted).
28. *Id.* at 202.
29. *Id.*
30. NLRB v. Majestic Weaving Co., 355 F.2d 854, 860 (2d Cir. 1966) (characterizing the Court's holding in *Chenery II* as a "rather pointed hint").
31. *Chenery II,* 332 U.S. at 201.
32. *Id.* at 202.

without adjudicative rules.[33] Such a rigid requirement would make the administrative process inflexible and unable to address specialized problems as they arose.[34]

Chenery II's facts demonstrate why adjudicative rules are necessary. The Court considered whether the SEC should have approved the reorganization simply because it had not previously promulgated a rule prohibiting the preferred stock transfer. One of the dissenters in *Chenery II* made that argument.[35] But how the SEC could have approved the reorganization without a prior authorizing rule is unclear. Differently stated, it is unclear why "authorization" would have been permissible while "rejection" was impermissible.[36] Could authorization be justified on the basis that no one would be aggrieved by an "authorization," while the company's officers and directors would be adversely affected by a rejection?[37] The difficulty is that, if in fact the reorganization were "unfair and inequitable," then existing shareholders would be harmed if the SEC approved it.[38] Thus, the plain meaning of the statute obligated the SEC to reject the reorganization after finding that the shareholders would be hurt in this situation.[39]

Perhaps, in the absence of a prior rule, the SEC could have refused to act at all—to neither approve nor disapprove the plan. But what would have happened then? Would the company have been free to reorganize, or would it have had to sue to force the agency to act? What about the rights of existing shareholders? Would they have been ignored? Ultimately, the dispute probably would have ended up in court. "When a court is confronted by an ambiguous regulatory scheme and searches for an answer

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33. *Id.* at 201-02; *see also* Boesche v. Udall, 303 F.2d 204, 206 (D.C. Cir. 1962), *aff'd*, 373 U.S. 472 (1963).

34. *Chenery II*, 332 U.S. at 202.

35. Justice Jackson, who had joined the majority opinion in *Chenery I*, argued in *Chenery II* that the SEC had no legal basis for its action. *Chenery II*, 332 U.S. at 212-13 (Jackson, J., dissenting).

36. *See* Weaver, *Retrospective*, *supra* note 2, at 170 (providing some of the arguments relied upon in this section).

37. *Id.*

38. The SEC found reason for concern, and articulated the same in *Chenery II*. In its view,

> [T]he amended plan would involve the issuance of securities on terms 'detrimental to the public interest or the interest of investors' contrary to §§ 7(d)(6) and 7(e), and would result in an 'unfair or inequitable distribution of voting power' among the Federal security holders within the meaning of § 7(e). It was led to this result "not by proof that the intervenors [Federal's management] committed acts of conscious wrongdoing but by the character of the conflicting interests created by the intervenors" program of stock purchases carried out while plans for reorganization were under consideration.

Chenery II, 332 U.S. at 204.

39. *Id.* at 201-02 ("[I]f the Commission rightly felt that the proposed amendment was inconsistent with those standards, an order giving effect to the amendment merely because there was no general rule or regulation covering the matter would be unjustified.").

to an interpretive problem, it is quite natural for the court to seek guidance from the responsible administrative agency."[40] Were the SEC to provide guidance about the issue, whether by legislative rule or nonlegislative rule, a court likely would defer to this guidance.[41] Thus, courts could not have decided the issue absent agency input. At some point, then, the agency had to develop policy. In this case, the adjudicative context was the best place to develop such a fact-specific policy.

Justice Jackson argued in his dissent that there was no legal basis for the SEC's action and that the agency had effectively and impermissibly created a new rule that applied only to the facts of this case.[42] Although Justice Jackson was correct in his belief that the SEC had created a new "rule" that applied only in this case, he was incorrect in arguing that the SEC had no legal basis for its action. In fact, the legal basis for the SEC's ruling was the Public Utility Holding Company Act,[43] which specifically prohibited "unfair and inequitable reorganizations." Of course, the Act was not as detailed as it might have been, and more specific rules, whether from Congress or from the agency, would have been helpful. Nevertheless, the SEC did have a legal basis for its action. Therefore, the company had notice, via the statute, that what it contemplated might violate the act.

Despite extensive scholarly commentary[44] and *Chenery II*'s dicta[45] extolling the virtues of the legislative procedures over adjudicative procedures for the development of rules, the Court has consistently allowed[46] agencies to choose whether to articulate "rules" legislatively or

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40. Weaver, *Nonlegislative Rules*, *supra* note 4, at 1186.

41. The appropriate level of deference, *Skidmore* or *Chevron*, is not relevant to this analysis. In any event, we are not convinced that there is a clear distinction. *Id.*

42. *See Chenery II*, 332 U.S at 215 (emphasis added) (suggesting that the agency overstepped its boundaries).

43. *See supra* note 17 (quoting relevant portions of the Act).

44. *See, e.g.*, Schwartz, *supra* note 7, § 4.18, at 216-17; Pierce, *supra* note 7, § 6.8, at 368.

45. In *Chenery II*, the Supreme Court stated that:

> Since the Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason to rely upon ad hoc adjudication to formulate new standards of conduct within the framework of the Holding Company Act. The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future.

332 U.S. at 202.

46. In one case, the Court did require an agency to use its rulemaking authority. In *Morton v. Ruiz*, the Supreme Court held that the Bureau of Indian Affairs' attempt to create a new rule adjudicatively was invalid.

> The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. In the area of Indian affairs, the Executive has long been empowered to promulgate rules and policies, and the power has been given explicitly to the Secretary and his delegates at the BIA. This agency power to make rules that affect substantial individual rights and obligations carries with it the responsibility not only to remain consistent with the

adjudicatively.[47]

Indeed, in *NLRB v. Wyman-Gordon Co.*,[48] the Court faced the question of whether an agency could develop a "rule" with only *prospective* effect via adjudication. The case involved the so-called *Excelsior* rule,[49] which the National Labor Relations Board (NLRB) had developed in an earlier adjudication.[50] At the time the rule was crafted, the agency indicated that the rule would apply only to "elections . . . subsequent to 30 days from the date of this Decision."[51] A majority of the Supreme Court (the plurality plus the dissenters) concluded that the rule was invalid.[52] These justices expressed concern that "[t]he Board did not even apply the rule it made [in *Excelsior*] to the parties in that adjudicatory proceeding."[53] However, on closer analysis, this concern makes little sense because there are arguments against discouraging agencies from applying adjudicatory policy only prospectively. In many instances, "prospectivity performs a useful function. One asserted deficiency of adjudicative rules is that they can be applied retroactively, to the detriment of those who have legitimate, contrary expectations."[54] If an agency applied a "rule" prospectively, this

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> governing legislation, but also to employ procedures that conform to the law. No matter how rational or consistent with congressional intent a particular decision might be, the determination of eligibility cannot be made on an ad hoc basis by the dispenser of funds.

415 U.S. at 231-32 (1974) (footnotes and citations omitted).

47. *See* NLRB v. Bell Aerospace Co., 416 U.S. 267, 292-95 (1974) (leaving the agency to decide whether to proceed legislatively or by "ad hoc" adjudication).

48. 394 U.S. 759, 762 (1969).

49. *Excelsior Underwear Inc.*, 156 N.L.R.B. 1236 (1966). The rule from this adjudication required employers, whenever a consent election or a directed election was to be held, to file an "election eligibility list" containing the names and addresses of all eligible voters.

50. *Id.*

51. *Id.* at 1240 n.5.

52. Justice Fortas, writing for the plurality, argued that the NLRB had used improper procedures when it originally created the rule. *Wyman-Gordon, Co.*, 394 U.S. at 764-65. The two dissenting justices agreed. *Id.* at 779 (Douglas, J., dissenting). Justice Harlan, however, argued that prospectivity derogates the agency's informal rulemaking function. *Id.* at 781 (Harlan, J., dissenting). He further argued that an agency chooses to apply a rule prospectively when "it represents such a departure from preexisting understandings that it would be unfair to impose the rule upon the parties in pending matters," and it "is precisely in these situations, in which established patterns of conduct are revolutionized, that rulemaking procedures perform . . . their vital functions. . . ." *Id.* He therefore would have struck down the original *Excelsior* rule as well as its application in *Wyman-Gordon*. *Id.* at 783.

53. *Id.* at 765

54. Weaver, *Retrospective*, *supra* note 2, at 181-82. One commentator stated that:

> One of the most serious adverse effects of using the adjudicatory process for agency law making is the retroactive effect upon parties who legitimately relied upon the prior state of the law, or had no advance notice of the new law suddenly declared by the agency as a basis for its decision in their cases. Of course, courts make retroactive policy changes in the course of adjudications. However, unlike agencies, courts have no optional substantive rulemaking powers.

Bonfield, *supra* note 2, at 330 (footnotes omitted).

problem might be overcome such that regulated entities subject to the "rule" in the future would receive fair warning before the "rule" was applied. Courts have used prospectivity for years[55]—beginning with the Supreme Court's holding in *Great Northern Railway Co. v. Sunburst Oil & Refinery Co.*[56]—to counter the adverse effects of retroactivity.[57] Whether there is a principled reason preventing agencies from doing the same remains to be seen.

In any event, although a majority of the justices would have invalidated the rule, the Court ultimately required Wyman-Gordon to comply with the NLRB's order. This unusual result occurred because the plurality concluded that even though the rule was invalid, the NLRB had directed Wyman-Gordon to comply as part of the adjudicatory proceeding.[58]

Wyman-Gordon's teachings are opaque, at best, because it did not establish the primacy of legislative rulemaking. The holding also placed few, if any, restraints on an agency's authority to create "rules" adjudicatively. On the contrary, the result encouraged agencies to view legislative and adjudicative procedures simply as alternative methods.[59] At

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55. Francis X. Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557, 1612 (1975).

56. 287 U.S. 358, 363-65 (1932).

57. *See Leedom v. International Bhd. of Elec. Workers*, 278 F.2d 237, 241 (D.C. Cir. 1960) ("[A]s a matter of equitable discretion, courts will apply a judgment overruling a prior decision only prospectively in order to avoid 'gross injustice.'"); *NLRB v. Guy F. Atkinson Co.*, 195 F.2d 141, 148-49 (9th Cir. 1952) ("Courts, in making ad hoc adjudications, regularly apply rules and doctrines not previously announced, to prior conduct of the parties. On occasions they have chosen to exercise an inherent power to give their pronouncements prospective operation only, but they are not required by any constitutional limitation to do so. . . .") (footnotes omitted); United States *ex rel.* Almeida v. Rundle, 255 F. Supp. 936, 949-50 & n.7 (E.D. Pa. 1966), *aff'd*, 383 F.2d 421 (3d Cir. 1967), *cert. denied*, 393 U.S. 863 (1968), *cert. denied*, 394 U.S. 1012 (1969); *see also* Weaver, *Retrospective*, *supra* note 2, at 181-82 & n.78 (citing *NLRB v. Beech-Nut Life Savers, Inc.*, 406 F.2d 253 (2d Cir. 1968)) ("[T]here is nothing anomalous about a prospective change in a legal rule occurring in an adjudicatory setting. In all fairness sufficient time may be required to permit persons to change systems and modes of dealing with one another.").

58. The plurality argued that:

> In the present case, however, the respondent itself was specifically directed by the Board to submit a list of the names and addresses of its employees for use by the unions in connection with the election. This direction, which was part of the order directing that an election be held, is unquestionably valid. Even though the direction to furnish the list was followed by citation to "*Excelsior Underwear, Inc.*, 156 N.L.R.B. No. 111," it is an order in the present case that the respondent was required to obey. Absent this direction by the Board, the respondent was under no compulsion to furnish the list because no statute and no validly adopted rule required it to do so.

Wyman-Gordon, 394 U.S. at 766 (citation and footnotes omitted).

59. Justice Black, concurring in *Wyman-Gordon*, argued that adjudicatory procedures are an alternate method of creating rules and that an agency is free to use whichever method it chooses.

> [S]o long as the matter involved can be dealt with in a way satisfying the definition of either "rulemaking" or "adjudication" under the Administrative Procedure Act, that Act . . . should be read as conferring upon the Board the authority to decide,

least in theory, agencies should not create generally applicable rules in an adjudication if the rules do not apply in the cases in which they are created. But *Wyman-Gordon* allowed the NLRB to do exactly that. After *Wyman-Gordon*, even if a "rule" is prospectively announced in an adjudicative decision, it appears that there is nothing to prevent the agency from applying that "rule" in future cases.

III. THE CORRECTNESS AND INEVITABILITY OF THE *CHENERY II* DECISION

Whether the *Wyman-Gordon* holding was correct is not the focus of this paper. The short answer to the question of whether the Court in *Chenery II* could have or should have held that agencies are only allowed to articulate policy legislatively and not adjudicatively is "No." "[C]ourts are poorly situated to distinguish between circumstances appropriate for rulemaking and circumstances appropriate for [adjudication]."[60] Moreover, requiring agencies to articulate policy only via legislative procedures would be both impractical and unworkable. Such a holding would cripple the regulatory process. If the Court had adopted that requirement in *Chenery II*, there would have been unexpected consequences including futility and administrative inflexibility.

First, such a requirement would promote futility. Agencies can neither conceive of every possible rule in advance, nor draft all regulations to ensure that they are not overbroad, vague, or ambiguous. Language is inherently imprecise.[61] As with any code, inevitably there will be gaps and

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> within its informed discretion, whether to proceed by rulemaking or adjudication. . . . "[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."

394 U.S. at 772 (footnotes omitted) (quoting SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194, 203 (1947)). At least one commentator agreed:

> It would have been much wiser to recognize, as did Mr. Justice Black, that the definitional scheme in the APA provides no more than a general description of agency process. "Rulemaking" embraces a proceeding which is "open ended in form, specifying only the class of persons or practices that will come within its scope." "Adjudication" encompasses proceedings "directed at least in part at determining the legal status of persons who are named as parties, or the acts or practices of those persons." While the differing procedural requisites of each reflect their tendency to serve different functions, both are integral parts of the regulatory process, hedged in either case with considerable safeguards appropriate to the mode of proceeding. So long as the agency does not abuse either process, the traditional importance of administrative flexibility suggests that the agency should be allowed to proceed in the mode most appropriate to the problem.

Frank I. Michelman, *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 225-26 (1969).

60. PIERCE, *supra* note 7, § 6.8, at 267.

61. As Justice Felix Frankfurter recognized:

> Anything that is written may present a problem of meaning, and that is the essence of the business of judges in construing legislation. The problem derives from the very nature of words. They are symbols of meaning. But unlike mathematical symbols, the phrasing of a document, especially a complicated enactment, seldom

omissions. Courts and agencies must fill those gaps. At times, the only way those gaps will become apparent is in the context of an adjudication, and the way those gaps may best be addressed is with the benefit of a full factual record. Fundamentally, regulatory drafters are not prescient,[62] and they cannot always anticipate and address all potential ensuing possibilities.[63]

A different holding in *Chenery II* might also have resulted in less desirable rules. A holding requiring agencies to create advance rules might have forced agencies to commit themselves to specific rules with particular courses of action without knowing all the facts in advance.[64] As a result, agencies would be forced to produce extremely detailed regulations anticipating and addressing every potential situation that might arise. If agencies were to overlook any potential problem, they would be precluded from addressing the problem adjudicatively.[65]

Third, requiring agencies to develop all rules legislatively would deprive the agency of the ability to make tailored decisions in incremental fashion. Adjudication allows agency officials to "extend policy no further than needed to dispose of the issues at hand."[66] If agencies could only issue rules legislatively, then they would always have to craft rules in a factual vacuum.[67]

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attains more than approximate precision. If individual words are inexact symbols, with shifting variables, their configuration can hardly achieve invariant meaning or assured definiteness.

Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528 (1947).

62. *See* Russell L. Weaver, *Judicial Interpretation of Administrative Regulations: An Overview*, 53 U. CIN. L. REV. 681, 693 (1984).

63. *See* Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 400 (1950); *see also* J.A. Corry, *Administrative Law and the Interpretation of Statutes*, 1 U. TORONTO L.J. 286, 289-90 (1936); Frankfurter, *supra* note 61, at 539-40; Frank E. Horack, Jr., *In the Name of Legislative Intention*, 38 W. VA. L. REV. 119, 121 (1932); Quintin Johnstone, *An Evaluation of the Rules of Statutory Interpretation*, 3 U. KAN. L. REV. 1, 14-15 (1954); James Landis, *A Note On "Statutory Interpretation,"* 43 HARV. L. REV. 886, 888 (1930); Warren Lehman, *How To Interpret a Difficult Statute*, 1979 WIS. L. REV. 489, 500 (1979); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870-71 (1930).

64. *See Chenery II*, 332 U.S. at 202 (suggesting that administrative agencies should have the flexibility to act either through adjudication or through legislation).

65. Weaver, *Retrospective*, *supra* note 2, at 171.

66. Diver, *supra* note 3, at 403.

67. The Court in *Chenery II* recognized all of these concerns:

> [P]roblems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective.

332 U.S. at 202-03.

Additional concerns would arise in a non-*Chenery II* world. When existing statutes or regulations fail to address a problem adequately, agency personnel must do so. When there is time, they can do so by informal rule. But there is not always enough time, and informal procedures are not cheap. Notice and comment rulemaking has become both a time-consuming and expensive process.[68] If an interpretive problem arises in a case, it may be impossible or impractical to use informal processes. Moreover, adjudicative "rules," unlike legislative rules, can be applied retroactively,[69] so that a new rule can be applied in the case under consideration. In spite of these arguments, "Courts and commentators have accepted adjudicative policymaking despite these persuasive arguments because they recognize the operational sensitivity and individualizing impact of interstitial adjudicative policy development and the dynamic force adjudications add to the administrative policy arsenal."[70]

Requiring a prior rule as a predicate to agency action may negatively impact the interaction between agencies and regulated agencies. At present, if regulated entities are uncertain about regulatory requirements, they are expected to go to the agency and request clarification.[71] This process helps inform the agency that there is a problem. If a prior rule were required, these entities would have no incentive to seek clarification. Rather, they would have a disincentive because the agency might respond to their request by creating an undesirable rule, with which the regulated entity would then be forced to comply. Instead, if the entity did nothing,

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68. Some argue that the extensiveness of the requirements has led to ossification. *See generally* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1385-87 (1992). In some cases, Congress has required additional procedures to legislative rulemaking, adding expense and time-consuming processes. DAVIS & PIERCE, *supra* note 2, § 7.11, at 363.

69. *See Chenery II*, 332 U.S. at 203 (holding both that the application of an adjudicatory rule may have "a retroactive effect" that is not "fatal to its validity" under the Due Process Clause and that each case of "first impression" has some retroactive effect regardless of whether an administrative agency or a court "announces the new principle"); Sewell Coal Co. v. Federal Mine Safety & Health Review Comm'n, 686 F.2d 1066, 1070 (4th Cir. 1982) ("[R]etroactive application of a novel principle expounded in an adjudicatory proceeding does not infringe the rights secured by the due process clause.").

70. Charles H. Koch, Jr., *Policymaking by the Administrative Judiciary*, 29 ADMIN. & REG. L. NEWS 2 (2004), available at http://www.abanet.org/adminlaw/news/adlaw_spring2004.pdf.

71. *See* Heckler v. Cmty. Health Servs. of Crawford County, Inc., 467 U.S. 51, 64 (1984) ("As a participant in the Medicare program, respondent had a duty to familiarize itself with the legal requirements for cost reimbursement."); Emery Mining Corp. v. Sec'y of Labor, 744 F.2d 1411, 1416 (10th Cir. 1984) ("Particularly where mandatory safety standards are concerned, a mine operator must be charged with knowledge of the Act's provisions and has a duty to comply with those provisions."); Diebold, Inc. v. Marshall, 585 F.2d 1327, 1337 (6th Cir. 1978); Saint Francis Mem. Hosp. v. United States, 648 F.2d 1305, 1311 (Ct. Cl. 1981) ("Plaintiff should, at the least, have made an inquiry to its intermediary or the Secretary, seeking clarification or amplification of the statute and regulations.").

the agency would not be able to prohibit the entity from doing as it wished, at least until the agency discovered the problem, because there would be no rule prohibiting the conduct.[72]

CONCLUSION

In arguing that *Chenery II* was inevitable, we do not mean to suggest that it is generally preferable for administrative agencies to articulate rules by adjudicative means. On the contrary, for the reasons suggested earlier, we recognize that informal procedures are preferable to adjudicative procedures for the formulation and announcement of generally applicable, prospective rules. Agencies are not the repositories of all wisdom; they can learn from the input of regulated individuals and entities.[73]

And although courts extol the virtues of informal procedures, they routinely hold that agencies have broad discretion regarding the procedures at their disposal. After *Chenery II* and *Wyman-Gordon*, legislative and adjudicative procedures essentially are alternative methods of creating policy because neither commands judicial preference or mandate.[74] Despite extensive scholarly criticism and commentary, the decision in *Chenery II* was correct. Even if administrative officials wanted to articulate all policy legislatively, it would be impossible for them to do so. Some case-by-case development is a necessary and inevitable part of administrative policymaking. By recognizing this fact, and giving agencies discretion over whether to articulate policy legislatively or adjudicatively, *Chenery II* had a major impact on the development of the administrative process.

In short, a world in which agencies could not create policy adjudicatively would look much different. Agencies would be less able to do their jobs. They would be unable to address the situation before them efficiently, effectively, or appropriately. Moreover, the Code of Federal Regulations would balloon in size and complexity as agencies tried to anticipate and

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72. Weaver, *Retrospective*, *supra* note 2, at 171-72.

73. *Wyman-Gordon*, 394 U.S. at 778-79 (Douglas, J., dissenting).

74. *See* R.L. Inv. Ltd. Partners v. INS, 86 F. Supp. 2d 1014, 1026 (D. Hi. 2000) (holding that the INS's requirements amount to a new rule, which it could have initiated through adjudication), *aff'd*, 273 F.3d 874 (9th Cir. 2001); NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974) (stating that the "views expressed in *Chenery II* and *Wyman-Gordon*" showed that the Board was not prevented from announcing a new rule in an adjudicative proceeding, and that the choice between legislation and adjudication belonged to the Board); Jay Norris, Inc. v. FTC, 598 F.2d 1244, 1251 (2d Cir. 1979), *cert. denied*, 444 U.S. 980 (1979); American Mach. Corp. v. NLRB, 424 F.2d 1321, 1330 (5th Cir. 1970) ("[W]hen an administrative agency makes law as a legislature would, it must follow the rulemaking procedure . . . and when it makes law as a court would, it must follow the adjudicative procedure . . . whether to use one method of law making or the other is a question of judgment, not of power." (quoting NLRB v. A.P.W. Prods. Co., 316 F.2d 899, 905 (2d Cir. 1963)).

address every possible contingency. Additionally, regulated entities might have a disincentive to work cooperatively with the agency to ensure that the best rule is adopted. Thus, agencies would be overburdened and ineffective. A contrary decision would have, as the Court recognized in *Chenery II*, "stultified" the administrative process.