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Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged Demise and Actual Status of Overton Park's Requirement of Judicial Review "On the Record"

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JUDICIAL REVIEW OF INFORMAL AGENCY ACTION ON THE FIFTIETH ANNIVERSARY OF THE APA: THE ALLEGED DEMISE AND ACTUAL STATUS OF *OVERTON PARK*'S REQUIREMENT OF JUDICIAL REVIEW "ON THE RECORD"

GORDON G. YOUNG*

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INTRODUCTION

While all law is highly indeterminate, the difficulties of the law governing federal administrative procedure have proved especially great.¹

1. One concise statement to this effect appears in Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (“Administrative law is not for sissies . . .”). For a clearer, but lengthier recent statement, see Richard J. Pierce, Jr., Comment, *Legislative Reform of Judicial Review of Agency Actions*, 44 DUKE L.J. 1110 (1995) (characterizing aptly the conclusions of Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051 (1995)):

Sidney Shapiro and Richard Levy[’s]. . . study of the history of judicial review of agency action supports their conclusion that many of the legal doctrines applicable to that process are indeterminate to an unusual degree—a court often can write an opinion that reverses a major agency action as easily as it can write an opinion that upholds the same action. We do not see, and would not long tolerate, this degree of indeterminacy with respect to the basic doctrines that govern other fields of law. . . . Imagine, for instance, a world in which the concepts of “offer” and “acceptance”

To old hands, as well as new students, its materials present a shadowy picture, which is the result of ambiguities that blur even its most basic distinctions.²

The persistence of ambiguities as to fundamental issues may seem remarkable in light of the attempt at clarification made fifty years ago with the passage of the Administrative Procedure Act (APA).³ However, the ambiguities persist because they are built upon deep-seated and contradictory impulses which are resistant to any sort of large-scale resolution.

At the center of these opposing impulses are, on the one hand, the desire for broad agency discretion and, on the other, a yearning for vigorous judicial review of agency action in order to preserve the "rule of law" as traditionally understood.⁴ This opposition has led to conflicted and vague doctrinal formulations of the scope of judicial review of agency action.

Section 706 of the APA, which specifies standards of review for a variety of agency determinations, is a disorderly mess of ambiguous and overlapping standards.⁵ Examples of the confusion that resulted after the enactment of the APA can be seen in the various judicial interpretations of section 706's standards. These include the ambiguous rules set out in

are so malleable that parties who attempt to enter into a contract can do no better than to predict that there is a 50% probability that a court eventually will hold that their conduct created an enforceable contractual relationship. If such a legal environment seems both unimaginable and intolerable, you are in a position to empathize with a federal agency that must attempt to issue a major rule that is subject to judicial review through application of the judicial review provisions of the Administrative Procedure Act (APA). If the agency does everything it believes that it must do to issue such a rule, the probability that the rule will be upheld is less than 50%.

See also Thomas M. Susman, *Now More than Ever: Reauthorizing the Administrative Conference, Reforming Regulation, and Reinventing Government*, 8 ADMIN. L.J. AM. U. 677, 682 (1994) ("Administrative procedure is . . . often mundane, occasionally obscure, but extremely complex.").

2. *See infra* notes 4-31 and accompanying text (describing lack of clarity inherent in administrative law).

3. Act of June 11, 1946, ch. 324, 60 Stat. 237 (codified as amended at 5 U.S.C. §§ 551-559, 701-706 (1994)).

4. Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 389 (concluding that liberal tradition, or traditional court-centered rule of law culture, is based on separation of powers and due process considerations and implies meaningful review of agency action, contrasting this tradition with regime of practical necessity, expertise, and efficiency which requires deferential review).

5. *Pierce*, *supra* note 1, at 1113.

*Chevron*⁶ attempting to specify the deference that a reviewing court owes an agency's interpretation of its own enabling act.⁷ They also include the confusing standards, as described in *Citizens to Preserve Overton Park, Inc. v. Volpe*,⁸ governing judicial review of a wide variety of agency decisions concerning fact and policy.⁹

Separate from the issue of which verbal standard of review is appropriate for which sort of agency determination is that of the intensity of review that each standard demands. *Overton Park's* well-known, schizophrenic (if not fully contradictory) statement of the appropriate intensity of arbitrary and capricious review makes the discretion/rule-of-law tensions clear: "Certainly, the Secretary's decision is entitled to a presumption of regularity. But that presumption is not to shield his action from a thorough, probing, in-depth review."¹⁰

The notion of discretion itself appears mysterious and contradictory in the APA. The statute exempts from review matters which are "committed to agency discretion,"¹¹ but provides that there shall be judicial review for abuse of agency discretion in a presumably large category of cases.¹² This apparent contradiction has received a great deal of attention from students of administrative law generating extended and heated debates.¹³ The two

6. *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-45 (1984).

7. *Id.*

8. 401 U.S. 402 (1971).

9. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-17 (1971) (attempting to explain how review to determine if agency has considered relevant factors relates to review for arbitrariness and capriciousness, and how latter relates to review for errors of law determination or factfinding).

10. *Id.* at 415 (citation omitted).

11. 5 U.S.C. § 701(a) (1994). This section provides in part: "This chapter applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." *Id.*

12. *Id.* § 706. Section 706 defines the scope of review as follows:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—(1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

Id.

13. Raoul Berger maintained that all abuse of discretion is correctable by courts at the instance of those with standing under traditional criteria, while Kenneth Culp Davis maintained the existence of a small, but significant, class of exercises of discretion by agencies reviewable only in the political branches. For their exchange—amounting to four attacks and

provisions manage peaceful coexistence only because “discretion” in “committed to agency discretion” has been accorded a meaning different from that of the same word in “abuse of discretion.”¹⁴ Even then, the Court’s development of the notion of agency discretion in each of the two categories has not been particularly satisfactory.¹⁵

Nearly as fundamental as the doctrinal ambiguity generated by the discretion/rule-of-law opposition, is the lack of a clear line separating the categories of adjudication and rulemaking. These categories blur as they are used within each of the somewhat separate schemes of the Constitution and the APA. The constitutional distinction between adjudicative and legislative-style proceedings is fuzzy, although clear at its core.¹⁶ The

four responses over roughly two years, spilling out of the pages of one journal to another, and then to a third—see Raoul Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965); 4 KENNETH C. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 28.16 (Supp. 1965); Raoul Berger, *Administrative Arbitrariness: A Reply to Professor Davis*, 114 U. PA. L. REV. 783 (1966); Kenneth C. Davis, *Administrative Arbitrariness—A Final Word*, 114 U. PA. L. REV. 814 (1966); Raoul Berger, *Administrative Arbitrariness—A Rejoinder to Professor Davis’ ‘Final Word’*, 114 U. PA. L. REV. 816 (1966); Kenneth C. Davis, *Administrative Arbitrariness—A Postscript*, 114 U. PA. L. REV. 823 (1966); Raoul Burger, *Administrative Arbitrariness, A Sequel*, 51 MINN. L. REV. 601 (1967); Kenneth C. Davis, *Administrative Arbitrariness Is Not Always Reviewable*, 51 MINN. L. REV. 643 (1967).

For a discussion of other scholarly views, see Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 694-702 & nn.50-53 (1990).

14. The Supreme Court has distinguished reviewable discretion from that which is in the APA’s technical sense “Committed to Agency Discretion” by concluding that the special hallmark of the latter is that there is no law to apply. *Overton Park*, 401 U.S. at 410; *Heckler v. Chaney*, 470 U.S. 821, 832-35 (1985); *Webster v. Doe*, 486 U.S. 592, 599-600 (1988).

15. See Levin, *supra* note 13, at 702-34 (criticizing the current Supreme Court definition of the “Committed to Agency Discretion” category). For a more nuanced and convincing vision of the content of unreviewable action under the “Committed to Agency Discretion” category, see pages 734-81 of Levin’s article. See also Harvey Saferstein, *Nonreviewability: A Functional Analysis of Committed to Agency Discretion*, 82 HARV. L. REV. 367 (1968).

16. In *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224, 245-46 (1973), the Court explained:

While the line dividing [legislation and adjudication] may not always be a bright one [Supreme Court decisions dealing with the requirements of due process] represent a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other.

* * *

. . . [In this rate making proceeding the Commission’s order was] applicable across the board to all of the common carriers. . . . No effort was made to single out any particular [one] for special consideration based on its own peculiar circumstances.

APA's differentiation appears in definitions which do not clearly distinguish those two categories even though they are intended to have separate fields of application and distinct procedural consequences.¹⁷ The APA's differentiation between adjudicative and legislative action has proved intelligible only by means of reading common sense and constitutional tradition into the statute.¹⁸

Id. at 245-46.

17. Section 551(4) of the APA states in pertinent part:

'[R]ule' means the whole or a part of an agency statement of *general or particular applicability* and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

5 U.S.C. § 551(4) (1994) (emphasis added). Section 551(6) reads, in full, as follows: "'order' means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing" *Id.*

Everything that happens in the world of which applicability can be predicated is either of "general or particular applicability" or some combination of the two. As far as we know everything that happens in the universe has only "future effect." Taken literally, § 551(4) results in every administrative decision producing a rule.

For example, an SEC enforcement action against a particular participant in securities transactions is of particular applicability and future effect. This is most obviously true if the agency issues a coercive order requiring the defendant to refrain from certain practices in the future, but it is also true if the agency orders reparations. The effect of the order is in the future gauged from the time of its issuance. Despite this, any respectable administrative procedure expert could identify such a proceeding as an adjudication, because the language of section 551(4) is not taken seriously in this respect. Instead, it is infused with meaning from common law and constitutional law sources.

18. *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 875-76 n.4 (1st Cir.), *cert. denied*, 439 U.S. 824 (1978):

The determination that the EPA must make under § 316 of the FWPCA is not a rule because it is not "designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4). Rather the EPA must decide a specific factual question already prescribed by statute. Since the determination is not a rule, it is an order. 5 U.S.C. § 551(6). The agency process for formulating an order is an adjudication. 5 U.S.C. § 551(7). Therefore, § 554 rather than § 553 of the APA is the relevant section. The same result is dictated because § 316(a) of the FWPCA is a licensing, 5 U.S.C. § 551(9), since it results in the granting or denial of a form of permission. See 5 U.S.C. § 551(8). A license is an order. 5 U.S.C. § 551(6).

Id. The first sentence of the above-quoted passage is misleading. The determination, which is admittedly an adjudication, certainly *can* be brought to implement, interpret, or prescribe law or policy, for example, see *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), and *NLRB v.*

The APA's distinction between formal and informal proceedings (whether rulemaking or adjudication) is drawn in a reasonably clear way in terms of the procedural attributes of each variety of proceeding.¹⁹ The statute is not at all clear, however, as to how to determine which real world proceedings are entitled to which sort of procedural treatment.²⁰ To

Bell Aerospace Co., 416 U.S. 267 (1974), but only as long as the agency is willing to use the new rule to dispose of the specific case before it, for example, see *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

The language of § 551(4) (as opposed to the general notions of adjudication and legislation normally read into that section) seems to have its greatest impact in presumptively precluding prospective agency adjudication, or use of an adjudication as a vehicle for announcement of a new rule which the court does not apply to the matter at hand but reserves for future cases. Some have seen the announcement of prospective rules in adjudication as opposed to the notion that only rulemaking is "of future effect." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 217 (1988) (Scalia J., concurring).

19. This is certainly true with respect to formal proceedings, whether of the rulemaking or adjudication variety. Sections 556 and 557 of the APA specify the procedures in detail. As to informal proceedings, section 553 spells out, with reasonable clarity, the limited procedures available to interested parties. Some of these are subject, however, to a range of interpretation. For example, the requirement that parties be permitted to participate by comment has been read to make comment the equivalent of a very limited paper cross-examination as to the most crucial basis on which the agency relies in issuing a rule.

20. The APA's provisions for rulemaking and adjudication state that proceedings are formal if the agency's organic act "require[s] [them] to be made on the record after opportunity for agency hearing" 5 U.S.C. §§ 553(c), 554(a), 554(c)(2) (1994). This might naturally seem to require a search, not simply for specific language in an agency's enabling act, but for the "meaning" of the words in the act that require a hearing. The question asked for each agency proceeding would be whether Congress intended sufficient formality to trigger any additional procedures in §§ 556 and 557. Obviously, such an inquiry yields as much uncertainty as any interpretive enterprise.

Whether correct or not, the Supreme Court has imposed clarity on the APA as it pertains to rulemaking. In *Florida East Coast Ry.*, 410 U.S. at 237-38, the Court either reduced, or very nearly reduced, the triggers of §§ 556 and 557 procedures to the presence of the words "on the record" or their synonyms. Rarely, if ever, will the structure of the statute, the importance of its subject, the circumstances surrounding its enactment or other aspects of its legislative history trigger formal procedures in the absence of such words.

The *Florida East Coast* decision has not completely removed the original ambiguity of the statute. Some lower federal courts treat it as inapplicable to administrative adjudications, thus allowing a more wide-range consideration of factors to determine formality. For example, the First Circuit, in *Seacoast Anti-Pollution League*, 572 F.2d at 876, found that:

At the outset we reject the position of intervenor PSCO that the precise words "on the record" must be used to trigger the APA. The Supreme Court has clearly rejected such an extreme reading even in the context of rule making under § 553 of the APA. Rather, we think that the resolution of this issue turns on the substantive nature of the hearing Congress intended to provide.

compound the difficulties, at least for those new to administrative law, at times, courts and commentators use the word “legislative” to indicate that a proceeding is informal,²¹ while more ordinarily it is used to mean a process which makes general rules.²² This strange first usage is highlighted by one of many passages in the Supreme Court’s *Overton Park* opinion: “The Secretary’s decision to allow the expenditure of federal funds to build I-40 through *Overton Park* was plainly *not an exercise of a rulemaking function*. . . . The *hearing* [was] nonadjudicatory, *quasi-legislative* in nature. . . .”²³

Perhaps the most interesting of recent judicial difficulties and scholarly debate stems from the current, nearly contradictory, view of the APA provisions for informal rulemaking.²⁴ These provisions require agencies which promulgate legislative rules to follow informal, but still somewhat onerous, notice and comment procedures. Exempted from such requirements, however, are two varieties of “publication rules”: policy statements and interpretative rules.²⁵

Id. (citations omitted).

21. See *infra* note 23 and accompanying text (explaining *Overton Park*’s use of “quasi-legislative” to describe informal adjudication).

22. For recognition that this is the usual legal usage, see BLACK’S LAW DICTIONARY 899 (6th ed. 1990). For examples of this usage in administrative law cases, see *United States Civil Service Comm’n v. National Ass’n of Letter Carriers*, 413 U.S. 548, 571-72 (1973) (reasoning that “Congress intended to deprive the Civil Service Commission of rulemaking power in the sense of exercising a subordinate legislative role in fashioning a more expansive definition of the kind of conduct that would violate the prohibition against taking an active part in political management or political campaigns.”); *RLC Indus. Co. v. Commissioner*, 58 F.3d 413, 413-17 (9th Cir. 1995) (“Rulemaking, the quasi-legislative power, is intended to add substance to the Acts of Congress, to complete absent but necessary details. . . . Adjudication, the quasi-judicial power, is intended to provide for the enforcement of agency . . . regulations on a case-by-case basis.” (quoting 3 STEIN ET AL., ADMINISTRATIVE LAW § 14.01, at 14-2 (1994))).

23. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414-15 (1971) (emphasis added).

24. See 5 U.S.C. § 553 (1994) (explaining informal rulemaking procedure).

25. Section 553(b) of the APA states that, “Except when notice or hearing is required by statute, this subsection does not apply—(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice;” 5 U.S.C. § 553(b) (1994). See PETER L. STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES 157 (1989) (applying term “publication rules” to interpretative rules and policy statements); see also Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1467 (1992) (describing “publication rulemaking” and its processes).

Courts have never clearly distinguished the two sorts of publication rules from each other.²⁶ At one time, the distinction between these two categories, on the one hand, and legislative rules, on the other, seemed relatively firmly grounded in two features of the former: Publication rules were said to be tentative views of the agency, required to be reconsidered each time the agency applied them to particular circumstances, and were also subject to more intensive scrutiny on judicial review.²⁷

Given the real possibility of *Chevron* deference for publication rules as well as legislative rules,²⁸ the distinction between legislative and publication rules becomes tenuous in many,²⁹ though not all,³⁰ cases because

26. *Community Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (stating that “[t]he distinction between legislative rules and interpretative rules or policy statements has been described at various times as ‘tenuous’” but also drawing no distinction between latter two categories).

27. *Pacific Gas & Elec. Co. v. Federal Power Comm’n*, 506 F.2d 33, 38-39 (D.C. Cir. 1974).

28. *See Reno v. Koray*, 115 S. Ct. 2021, 2026-27 (1995) (suggesting at least some deference under *Chevron* for an interpretive rule); *Health Ins. Ass’n of America v. Shalala*, 23 F.3d 412, 424 n.8 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 1095 (1995) (“We have often applied *Chevron* deference to interpretive rules without comment Because the parties have agreed that *Chevron* deference is appropriate here, we have no need to address the scope of deference to an interpretive rule.”); *Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170, 181-82 (3d Cir. 1995) (accord complete *Chevron* deference to interpretation of statute contained in letter from high agency official). *But see id.* at 185, 188 (Nygaard, J., dissenting) (mustering impressive case law support against *Chevron* deference for nonlegislative rules); *accord, e.g. Robert A. Anthony, Which Interpretations Should Bind the Courts*, 7 YALE J. ON REG. 1, 55-58 (1990) [hereinafter Anthony, *Bind the Courts*]; KENNETH C. DAVIS & RICHARD S. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.3, at 235-36 (3d ed. 1994). This matter is truly unresolved. The Supreme Court in *Reno* seemed to hedge on full *Chevron* deference. 115 S. Ct. at 2026-27. Still earlier Supreme Court cases gave *Chevron* deference to interpretations in an opinion letter and an amicus brief. *See, e.g., Mead v. Tilley*, 490 U.S. 714, 721-22 (1989).

29. *See Community Nutrition Inst.*, 818 F.2d at 945-46, in which the court agreed with characterizations of the distinction between policy statements (and probably interpretative rules) and legislative rules as “tenuous,” “blurred,” “enshrouded in considerable smog,” and “baffling;” but attempted, unsuccessfully, to clarify this by describing legislative rules as binding norms. *See American Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1108-12 (D.C. Cir. 1993) (demonstrating that court in *Community Nutrition Inst.* left law nearly as fuzzy as it was found).

30. Some rules are clearly legislative. As the court in *American Mining* stated: Accordingly, insofar as our cases can be reconciled at all, we think it almost exclusively on the basis of whether the purported interpretive rule has “legal effect”, which in turn is best ascertained by asking (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2)

presumably the differential judicial scrutiny has disappeared or greatly narrowed.³¹ The notion that a reviewing court can effectively require an agency to view its own publication rules as especially tentative seems unlikely from a psychological viewpoint. Given the agency's investment in its decisions, an adopted policy is likely to possess a great deal of inertia, making it resistant—although not immune—to real reconsideration.³² From a legal viewpoint, as long as the agency provides a formal opportunity for reconsideration, it seems difficult for courts to enforce the requirement of actual redeliberation.

It is for these reasons that efforts to draw clearer distinctions between legislative rulemaking and publication rules have floundered—leading to the brink of contradiction. At present, one could argue that as a result of forces described above, many rules which are legislative in effect both are, and are not, required to be promulgated in accordance with the APA's rulemaking procedures.³³

whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule. If the answer to any of these questions is affirmative, we have a legislative, not an interpretive rule.

American Mining Congress, 995 F.2d at 1112.

31. It is possible, however, that even if *Chevron* is applicable to policy statements, the latter would be scrutinized more than legislative rules. Scrutiny under *Chevron*'s second prong reasonableness test could be seen as variable, requiring a stronger agency showing to justify a policy than to defend a comparable legislative rule. *Id.* at 1111-12.

32. Even if formally subject to reconsideration, policy statements clearly have formidable inertia. See *Panhandle Producers & Royalty Owners Ass'n v. Economic Regulatory Admin.*, 847 F.2d 1168, 1175 (5th Cir. 1988) (requiring agency to consider arguments against application of policy statement, but recognizing that statement could be relied on to shift burden of proof as to entitlement to exemption).

33. Additionally, consider the notion that an agency pays the price of submission to strong scrutiny once—either up-front, by means of public participation in legislative rulemaking, or at the back end of judicial review, by means of greater court scrutiny of interpretative rules or policy statements. E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1491 (1992). If neither the up-front notice and comment scrutiny, nor the rear-end intense judicial review scrutiny is exacted, the distinction between publication rules and legislative rules will be seriously imperiled. *But see American Mining Congress*, 995 F.2d at 1111-12 (D.C. Cir. 1993) (Williams, J.) (contending that *Chevron*'s step two can be adjusted to provide stricter scrutiny for publication rules).

All of this leads to hard questions about whether the coverage of informal, but relatively intense, rulemaking procedures are determined by the agency's choice of a label or by the more limiting, but still often nearly metaphysical, degrees of "binding" effect of the particular pronouncement. Again, contradictory policy preferences are responsible for this ambiguity. On the one hand, courts want to give effect to the APA's clear requirement that rules with legislative force must be made by means of relatively stringent agency

It may seem surprising that, fifty years after Congress enacted the APA, so many fundamental ambiguities remain. On reflection, however, there should be no surprise, given the continuing claims that strong and opposing values still plausibly make in administrative law culture. As a result, large scale solutions are unlikely. Instead, the law of administrative procedure usually reaches compromises between these opposing values in a fine-grained, tentative, and highly-contextualized way—often within the confines of a particular case or narrowly defined set of circumstances. There is almost a Goldilocks quality to the law governing administrative procedure:³⁴ some resolutions of contradictory impulses are adjudged too much of this, or of that, or sometimes just right, but rarely are these conclusions generalized into even relatively firm legal doctrines.

This Article discusses one of the many problems of ambiguity and contradiction under the APA. After *Overton Park*,³⁵ this problem typically has been described as one concerning the nature of the “record” on which a court will review informal agency action.³⁶ On this fiftieth anniversary of the APA, the foundations of federal regulation are under attack.³⁷ As a result, the set of decisions to which the APA applies may soon be greatly reduced and the statutory procedures for those which remain may be changed. Consequently, a discussion limited to one technical feature of the current law of administrative procedure may be equivalent, for a neo-New Dealer, to fiddling while Rome burns or, for a proponent of the “Contract with America,” to fiddling while Rome is scaled back to more harmonious proportions. Still, it is a safe prediction that, when the dust settles on

procedures, a requirement provided as a counterweight to the delegation of legislative power to agencies and the resulting attenuation of political accountability. On the other hand, courts want to encourage agencies to clarify regulatory requirements at the earliest possible stage, even before they are ready to promulgate rules that they are fully prepared to have bind them.

34. See *Sieck v. Russo*, 869 F.2d 131 (2d Cir. 1989).

35. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

36. See *id.* at 420 (“[R]eview is to be based on the full administrative record that was before the Secretary at the time he made his decision.”); *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (“[T]he focal point for judicial review should be the administrative record already in existence . . .”). See also Stephen Stark & Sarah Wald, *Setting No Records: The Failed Attempt to Limit the Record in Review of Administrative Action*, 36 ADMIN. L. REV. 333 (1984) (contending that *Overton Park* requirement of review on administrative record has seriously eroded). See *infra* notes 155-248.

37. For a description and assessment of many proposals for change, see Cass R. Sunstein, *Legislative Foreword: Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247 (1996).

whatever renovation there will be, what remains of the past will be substantial, including many of the familiar problems.

Among these problems will be that of determining the appropriate agency procedures for a variety of agency actions which affect diverse interests in varying ways and the scope of judicial review of these procedures. The focus of this Article—a determination of the appropriate record for judicial review of informal agency action—is an important part of those issues.

The portions of the *Overton Park* opinion which bear on this question brim with contradictions similar to the others discussed above:

[The hearing in before the agency]. . . *is not designed to produce a record that is to be the basis of agency action*—the basic requirement for substantial-evidence review. . . .³⁸

. . . .

Although a regulation requiring formal findings was issued after the Secretary had approved the route, a remand to him is not necessary as *there is an administrative record facilitating full and prompt review of the Secretary's action*. . . .³⁹

. . . .

It is necessary to remand this case to the District Court for plenary review of the Secretary's decision. That *review is to be based on the full administrative record that was before the Secretary at the time he made his decision*.⁴⁰

Pressing the contradiction further, the *Overton Park* Court did not just *permit* a reviewing court to demand that an agency provide a reviewing court with such a record, it *required* the agency to do so.⁴¹ Beyond this, the Court required that judicial review of informal proceedings be *confined* to a scrutiny of that record—precisely the requirement that the APA explicitly imposes on judicial review of agency formal proceedings.⁴²

While judicial scrutiny must be confined to such a record and must be deferential, as the *Overton Park* passage, quoted above, makes clear, the same passage also requires “a thorough, probing, in-depth review.”⁴³ The ambiguity of this standard is not only generated by the contradictory claims of the notions of rule of law and administrative discretion, but it is sufficiently great to permit courts to decide many like cases in contradictory ways.

38. *Overton Park*, 401 U.S. at 415 (emphasis added).

39. *Id.* at 403 (emphasis added).

40. *Id.* at 420 (emphasis added).

41. *Id.*

42. 5 U.S.C. § 556(e) (1994).

43. *Overton Park*, 401 U.S. at 415.

Some matters are clear, however. Not only must a reviewing court understand the material it analyzes in the record, but according to the Court in *Overton Park*, a reviewing court must assure itself that the agency has given adequate consideration to the “relevant factors.”⁴⁴ Will this mandate sometimes conflict with the “On the Record Rule,” pressing a court to look at information which was not before the agency when it made the decision under review? Here, the contradiction seems epistemological. Can a record establish its own completeness? Based on a plausible definition of “relevant factors,” how can a court determine what was not considered by an agency solely by looking to a record of what was? If it cannot do so, how can a court both follow the On the Record Rule and engage in relevant factors analysis?

While the lower federal courts generally have followed the On the Record Rule and its notions of deference, economy and bounded rationality, the apparently contradictory requirements of performing meticulous review while wearing blinders occasionally have caused them to recognize exceptions to the rule going beyond those which *Overton Park* indicated were to be the exclusive ones.⁴⁵ One particularly influential opinion, *Asarco, Inc. v. EPA*,⁴⁶ concluded that occasionally the On the Record Rule, as articulated in the *Overton Park* opinion, must give way to the other demands of that opinion, which require a reviewing court to determine whether an agency has considered the relevant factors:

[I]t is both unrealistic and unwise to “straightjacket” the reviewing court with the administrative record. It will often be impossible, especially when highly technical matters are involved, for the court to determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not. The court cannot adequately discharge its duty to engage in a “substantial inquiry” if it is required to take the agency’s word that it considered all relevant matters.⁴⁷

Allowing a court to take evidence to consider the existence of possible relevant factors not developed in the record and not so clearly relevant as

44. *Id.* at 416.

45. See *infra* notes 204-12 and accompanying text for examples of cases recognizing some exceptions to the On the Record Rule, in addition to those announced by the Supreme Court in *Overton Park* as exclusive exceptions. For claims of great erosion of the On the Record Rule, see Steven Stark & Sarah Wald, *supra* note 36. For arguments that the Stark and Wald claims were and have proved extravagant, see *infra* notes 171-246 and accompanying text.

46. 616 F.2d 1153, 1160 (9th Cir. 1980) (allowing direct court of appeals review of EPA decision).

47. *Id.*

to be judicially noticeable seems a violation of *Overton Park's* requirement that administrative action be sustained or struck down on the record of information actually before the agency at the time of its decision.⁴⁸ This seems especially true when combined with *Vermont Yankee's* vision of informal proceedings as minimalist.⁴⁹ Below, this Article offers a way of harmonizing the two *Overton Park* requirements—review on the record and review for agency consideration of relevant factors—which seems more plausible than that of the *Asarco* court. On this interpretation, the requirement of relevant factor review is seen in a narrower way that, except for matters subject to judicial notice, requires no excursion beyond the administrative record. This view better complies with the Supreme Court's current vision of informal proceedings.⁵⁰ In the Conclusion, however, this Article argues that the Court's current vision is in need of serious reconsideration by the legislature rather than by the Court itself.

Some lower federal court opinions have recognized a second exception, permitting introduction of evidence to explain to the court the technical background against which to judge the rationality of agency action. In the words again of the Ninth Circuit, in *Association of Pacific Fisheries v. EPA*:⁵¹

To a limited extent, therefore, the post-decision studies can be deemed a clarification or an explanation of the original information before the Agency, and for this purpose it is proper for us to consider them *We do not think it is appropriate, however, for either party to use [that information] as a new rationalization either for sustaining or attacking the agency's decision [i]t is inappropriate to rely on the specific conclusions of those studies to show that the [agency's action was] not the product of reasoned decision making*⁵²

48. *Overton Park*, 401 U.S. at 419.

49. See *infra* notes 223-31 and accompanying text.

50. *Id.*

51. *Association of Pacific Fisheries v. EPA*, 615 F.2d 794, 811-12 (9th Cir. 1980). In this case, the extra-record information not allowed to supplement the record was also post-decision information. *Id.*

52. *Id.* at 811-12 (emphasis added). Judicial consideration of studies subsequent to an agency decision may be a double violation of *Overton Park's* requirements that a court should (1) focus on what was available to the agency at the time of its decision, and (2) focus only on what the agency actually considered, a subset of the first requirement. A case such as *Pacific Fisheries* presents the clearest violation of the second requirement. This is for the obvious reason that what was developed after an agency decision obviously was not considered at the time of the decision. In some cases purporting to use relevant factors analysis, it is unclear whether the court is bringing in factors that were not included in the record sent by the agency to the reviewing court, but actually considered by the agency and made part of the record in the *Overton Park* sense. There is no such ambiguity with a post-decision study because it was not part of the agency record in any sense.

On careful examination, the use for which the Ninth Circuit allows introduction of information not originally before the agency contradicts the limits it attempts to place on the use of such information. Background information is apparently legally irrelevant if it is clear, *a priori*, that it cannot make a difference to the outcome of review. But, if such information can make a difference in the determination of arbitrariness, this means that it could turn a decision which would pass arbitrary and capricious review on the original record into one that does not pass on an augmented record, or, conversely, it could convert one which failed into one which passes. This seems a violation of the *Overton Park's* On the Record Rule.

This exception, too, is discussed below. While somewhat strange, an exception for technical background information, when carefully limited, can be harmonized with *Overton Park's* requirements.⁵³ This Article concludes that such information can be introduced into evidence before a reviewing court and be permitted to make a difference in the result, but only if it exerts its influence over a court's decision invisibly, never appearing as an explicit part of the court's opinion.⁵⁴

Claims for erosion of the On the Record Rule have extended well beyond the two summarized above, and are discussed at length below. Based partly on the occasional deviations discussed above, the only piece of general scholarly commentary concerning the On the Record Rule seems to have seriously exaggerated the extent to which that rule has been eroded by the lower federal courts, finding not just the two exceptions discussed above, but six others as well:

[A]n examination of the concept of review on the record in the courts surprisingly reveals that the doctrine no longer exists in any coherent form, although judges and analysts pretend that it is still viable. Faced with the difficulty of defining the record in specific cases, courts have developed so many unwritten exceptions to the doctrine of record review, that industrious advocates now can introduce any evidence they choose in cases reviewing informal administrative action.⁵⁵

This Article criticizes the general thrust of that commentary either as a description of the law when it was written, or as a predictor of what is now current practice. The On the Record Rule of *Overton Park* has not been riddled out of existence by exceptions created by the lower federal courts. Some of the exceptions urged in the commentary are not exceptions at all. Another seems limited to a specific statutory scheme. This Article

53. See *infra* notes 247-54 and accompanying text.

54. *Id.*

55. Stark & Wald, *supra* note 36, at 335-36.

demonstrates that the rule has been largely safe not only from latter day erosion by lower courts, but that it also has been largely safe from the two rather limited exceptions recognized originally by the Supreme Court in *Overton Park* itself. When analyzed, these original exceptions seem to have an interesting, but minuscule potential set of applications.

Finally, in its Conclusion, this Article offers a brief critique of the current regime of judicial review of informal administrative action, offering some suggestions for reform.

I. JUDICIAL REVIEW OF ADMINISTRATIVE ACTION: REVIEW BASED ON A RECORD VERSUS *DE NOVO* REVIEW

A. *Overton Park*: The Supreme Court's Conception of Judicial Review of Agency Action

In *Citizens to Preserve Overton Park, Inc. v. Volpe*,⁵⁶ the Supreme Court endorsed one of a number of possible models of judicial review of informal administrative action, the most common and least procedurally onerous way an agency may take action under the APA.⁵⁷ In many, but not all respects, that conception was a diluted version of the model of judicial review of formal administrative action, a relatively rare, procedurally onerous method of agency decisionmaking.⁵⁸ That formal model, in turn, was based, largely but not entirely, on another: the system for appellate review of judicial trials.⁵⁹

1. *The Model of Review for Formal Administrative Action*

In taking *formal* action, an agency, like a trial court, may consider only evidence properly admitted in the proceeding before it and subject to

56. 401 U.S. 402 (1971).

57. Compare the rigorous civil trial-like requirements of the formal provisions of the APA, 5 U.S.C. §§ 556-557 (1994), with the less onerous requirements for informal rulemaking and the nearly nonexistent procedural requirements for informal adjudication. *Id.* §§ 553, 555. See *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633 (1990) (indicating no APA requirement permitting notice of issues in informal adjudications or of right to participate therein).

58. The APA mandates the procedures to follow for review of formal administrative action. 5 U.S.C. §§ 556-57 (1994). These procedures, triggered by sections 553 and 554 when the enabling statute requires the agency action to be made "on the record," allow a party to present oral or documentary evidence, including rebuttal evidence, as well as oral cross-examination. *Id.* § 556(d).

59. See *infra* notes 60-65.

rebuttal by opposing parties, often by means of cross examination.⁶⁰ In such formal proceedings, an agency is obligated to explain its decision in a manner similar to the way that trial courts are required to explain the results of non-jury trials—by explicitly connecting the facts found with the applicable law.⁶¹

Review of formal agency decisions by the courts in many ways resembles review of a trial court by an appellate court. In appellate review of a trial court's decision, the focus is on the law, the evidentiary record, and, to some extent, on the trial court's explanation or opinion. Evidence not considered by the trial court normally cannot be considered by an appellate court.⁶² If newly discovered evidence or post-trial events warrant a change in a result, it is not the appellate process which initially affects the change. The appellate focus is on the correctness of the trial court's result based on the facts before the court at the time it reached its decision and

60. An agency must explain its formal decisions with a statement of findings of fact and law, which illustrates the basis for its decision. 5 U.S.C. § 557(c) (1994); *see also* Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633, 653-55 (1990).

61. After a non-jury trial, a federal district court must make specific findings of fact and of law to support its final decision. FED. R. CIV. PRO. 52(a); *see* Lora v. Board of Educ., 623 F.2d 248, 251 (2d Cir. 1980); 9A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2579 at 537-48 (2d ed. 1994).

62. Supplementation of the record with information not originally before the lower court ordinarily will not be allowed at the appellate level. FED. R. APP. PRO. 10(e). *See* 9 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE ¶ 210.08 at 10-46, 58 (2d ed. 1995 & 1995-96 Supp.). For one particularly clear, recent statement *see* Dakota Indus., Inc. v. Dakota Sportswear, Inc., 988 F.2d 61, 63 (8th Cir. 1993). "Generally, an appellate court cannot consider evidence that was not contained in the record below." *Id.* *See also* Federal Ins. Co. v. Halprin Supply Co., 12 F.3d 1270, 1284 (3d Cir. 1993) ("This is because: [t]he only proper function of a court of appeals is to review the decision below on the basis of the record that was before the district court.") (quoting Fasset v. Delta Kappa Epsilon, 807 F.2d 1150, 1165 (3d Cir. 1986), *cert. denied*, 481 U.S. 1070 (1987) (alteration in quote)).

Exceptions to these propositions are made in extremely compelling circumstances.

Supplementation of the record has been permitted only when the "interest of justice" require consideration of evidence not in the record. Cases in which supplementation of the record has been permitted generally involve inmates or similarly situated petitioners who claim egregious constitutional violations. Those courts allowing supplementation emphasized the mistaken exclusion of documents from the record and that the party made no conscious decision to omit the documents.

Gardner v. Chrysler Corp., No. 91-1496-PFK, 1995 U.S. Dist. LEXIS 18015 at *22-*23 (D. Kan. Nov. 1, 1995) (citations omitted) (quoting *Miller v. Benson*, 51 F.3d 166, 168 (8th Cir. 1995) (quoting *Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 988 F.2d 61, 63 (8th Cir. 1993)).

on the law.⁶³ To undo the result of a trial based on new evidence requires an extraordinary showing on a motion to reopen made in the trial court.⁶⁴ Thus, judicial review of *formal* administrative proceedings resembles the standard judicial review model by its focus on the correctness of the agency's decision at the time it was rendered—looking only to evidence in the record to undercut or support the agency decision reviewed.

It differs, however, in one particularly important way. An appellate court can disagree with a trial court's legal justification for the result that it reached on the factual record, but affirm nonetheless, by substituting other acceptable legal reasoning, as long as the factual premises of that reasoning find adequate factual support in the record before the court below.⁶⁵

As stated with great clarity in the *Chenery II*⁶⁶ case, review of formal administrative action is almost always different from appellate review of a trial court in this respect: the agency's decision must be sustainable based *solely* upon the reasoning it employed at the time of its decision.⁶⁷

63. As for limitation to facts properly before the lower court, see *supra* note 62. As to the law, however, matters are different. All courts, including appellate courts, must apply the law existing at the time the court disposes of the matter before it. *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801). For a discussion of this point, see Gordon G. Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes: United States v. Klein Revisited*, 1981 WIS. L. REV. 1189, 1240 & n.238.

64. Additional evidence for a jury trial may only be heard on a grant of a motion for a new trial, while additional evidence for a court trial may be heard on either a motion to reopen or a motion for a new trial. FED. R. CIR. PRO. 59(a). The granting of such motions is discretionary but typically requires a substantial showing to justify the measure. FED. R. CIR. PRO. 60(b)(2). *AG Pro., Inc. v. Sakraida*, 512 F.2d 141, 143 (5th Cir. 1975); *In re Tuchello*, 43 B.R. 93, 96 (Bankr. W.D.N.Y. 1984); see also FLEMING JAMES, JR. & GEOFFREY C. HAZARD, *CIVIL PROCEDURE* § 12.14 at 676-80 (3d ed. 1985); 11 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2859 at 301-10 (2d ed. 1995).

65. *NLRB v. PIE Nationwide, Inc.*, 923 F.2d 506, 517-18 (7th Cir. 1991) (contrasting, in dicta, power of court reviewing lower court's judgment with lack of power in *PIE* to reach decision on grounds not employed by agency whose decision is reviewed).

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

67. *Id.* at 196. This requirement antedates *Chenery*. See *National Broadcasting Co. v. United States*, 319 U.S. 190, 227 (1943); *Tagg Bros. v. United States*, 280 U.S. 420, 444-45 (1930). The material required to support the agency's original rationale implicitly defined in *National Broadcasting Co.* was later adopted by the Court in *Chenery*. Compare *National Broadcasting Co.*, 319 U.S. at 190-97 with *Chenery*, 333 U.S. at 207. For a clear discussion of the development of this rule before enactment of the APA, see Susannah T. French, *Judicial Review of the Administrative Record in NEPA Cases*, 81 CAL. L. REV. 929, 933-36 (1993). The requirement of decision only on the record made before the agency was adopted clearly by the APA with respect to formal Proceedings. 5 U.S.C. § 556(e) (1994) (making "[t]he transcript of testimony and exhibits, together with all papers and requests

If the agency's decision is not sustainable on the agency's original record based on its rationale at the time of decision, the reviewing court may not sustain the action on other reasoning it finds acceptable even though that reasoning seems well-supported by facts in the administrative record. Instead, it must strike down the agency action and remand for further consideration.⁶⁸

The reasons for this follow from the prevailing assumptions of administrative law. An agency is created and staffed to exercise expert discretion in assessing evidence, making predictions, and formulating policy.⁶⁹ Judicial deference has long extended, to some degree, even to

filed in the proceeding . . . the exclusive record for decision").

68. *Chenery*, 332 U.S. at 196-97. See also *Florida Power & Light Co. v Lorian*, 470 U.S. 729, 745 (1985) (describing propositions in question as fundamental principles of judicial review of agency action).

69. In *Chenery*, 332 U.S. at 196, the Court stated:

When the case was first here, we emphasized a simple but fundamental rule of administrative law. That rule is to the effect 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. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.

Id.

The first *Chenery* case, *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) [hereinafter *Chenery II*] is also instructive on this point:

The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based. In confining our review to a judgment upon the validity of the grounds upon which the Commission itself based its action, we do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct although the lower court relied upon a wrong ground or gave a wrong reason. . . 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. 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.

an agency's interpretation of its enabling act.⁷⁰ A court that tells an agency its decision was wrong based on the latter's legal reasoning from the record, but right based on other available legal reasoning, cannot be certain that the agency would have read the law or chosen to exercise its authority in that way.⁷¹

Id. at 87-88.

70. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-45 (1984). While the usual view is that *Chevron* signals a significant increase in deference, some have suggested that it simply restates the law without intensifying it. Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Marshall Papers*, 23 ENVTL. L. REP. 10,606, 10,613 (1993). *Chevron* itself suggests that any change it contemplated was not large scale:

We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations "has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations."

Chevron, 467 U.S. at 844 (citations omitted).

To lend weight to its view, the *Chevron* Court cited *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). In *Chenery*, the Court concluded that the agency, while acting under the statutory "fair and equitable" standard, had developed a new principle of fairness: that corporate insiders often should not be permitted to reap all benefits of trading in their own companies' stock during a reorganization. *Id.* at 204-09. The Court's view of the standard of judicial review for agency lawmaking under an enabling act is as follows:

The scope of our review of an administrative order wherein a new principle is announced and applied is no different from that which pertains to ordinary administrative action

* * *

The Commission's conclusion here rests squarely in that area where administrative judgments are entitled to the greatest amount of weight by appellate courts. It is the product of administrative experience, appreciation of the complexities of the problem, realization of statutory policies . . . It is the type of judgment which administrative agencies are best equipped to make and which justifies use of the administrative process. Whether we agree or disagree with the result reached, it is an allowable judgment which we cannot disturb.

Id. (citation omitted).

71. All of this explains why a reviewing court cannot rationally explain the result of an agency proceeding as it can with the result of an inferior court, but it does not explain why the focus is on the set of reasons that the agency found decisive *at the time it reached its decision*. Why limit the expert agency to reasons actually decisive? Why not allow it to substitute, during the course of judicial review, a satisfactory post-decision rationale for the true contemporaneous, but possibly defective, initial rationale? While practically speaking, this limitation rarely may make a positive difference, it seems an attempt to provide incentive for an agency to conduct its original deliberations with care. How often such

These principles for formal proceedings are derived from a federal common law of administrative procedure recognized and applied by the courts well before the Administrative Procedure Act of 1946.⁷² While *Overton Park* makes clear that this law is viable today, it does not make clear whether it is seen as existing along side the APA or as implicitly incorporated in that statute's provisions for judicial review.⁷³

2. *Overton Park's Formalization of Informal Proceedings*

a. *Some Background Concerning Informal Proceedings Under the APA*

Some background is necessary in order to understand the shifting nature of informal proceedings under the APA and to understand *Overton Park's* role in increasing their formality. The Administrative Procedure Act's recognition of a category of informal administrative action can be understood in a variety of ways. First, from a public choice perspective, the APA might be seen as a compromise of a myriad of interests asserted by diverse groups who influenced the legislative process.⁷⁴ Some of these groups would be helped and others injured by intensifying procedural rights and judicial review in a wide variety of agency contexts.⁷⁵ Second, the APA could be understood as based on public values, specifically as an attempt to provide only those protections whose economic and social costs are justified by the benefits they provide.

From this second perspective, informal proceedings are a set of proceedings by a wide variety of agencies on widely differing subjects, but possessing a common characteristic. That characteristic is the conclusion

incentive is decisive, however, is a matter of conjecture.

72. See *supra* note 68.

73. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419-20 (1970) (citing *Chenery*) (not permitting agency to offer new justifications—described as “*post hoc*” rationales—but rather requiring agency to provide either contemporaneous or later explanation of agency's original reasons).

74. In *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978), the Court reflected on the Act's significance:

In 1946, Congress enacted the Administrative Procedure Act, which as we have noted elsewhere was not only “a new, basic and comprehensive regulation of procedures in many agencies,” but was also a legislative enactment which settled “long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest.”

Id. at 523 (citation omitted) (quoting *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40 (1950)).

75. *Id.*

that all of these are matters as to which more formal procedures and exacting judicial review are not cost-justified. On this view, if agency proceedings are thoughtfully aligned to the formal or the informal set, then informal proceedings presumably would be either matters in which little was at stake, or matters in which additional procedures would yield little extra fairness, or both. This presumption follows the familiar and analogously apt procedural due process balancing calculus.⁷⁶

Circumstances at the time of the APA's drafting made a division between the formal and informal categories on fairness grounds seem more natural than it does today. Given the shape of the regulatory landscape at that time, it was much easier to sort proceedings into two groups in terms of the importance of the interests at stake: (1) matters touching upon private rights protected to some degree by due process,⁷⁷ and (2) other interests

76. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), offers the Supreme Court's most recent general formulation of the balancing calculus:

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the [g]overnment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

Mathews is not the first case to recognize the appropriateness of a balancing in the procedural due process context. Due process, particularly in its application to adjudicatory procedure, has long been recognized to involve balancing to compromise public interests with private rights. See *North American Cold Storage Co. v. Chicago*, 211 U.S. 306, 319-20 (1908) (considering competing claims of owners of private property summarily destroyed and public interest in eliminating probable danger, and concluding no hearing was necessary before destruction). In *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 163 (1951), Justice Frankfurter explained:

The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.

Id. at 163 (Frankfurter, J., concurring).

Because the APA is not clear as to which proceedings are entitled to formal procedures, the most rational form of allocation would involve balancing the benefits of formality against the costs.

77. The Court has described the APA as a response in large part to the "[m]ultiplication of federal administrative agencies and expansion of their functions to include adjudications which have serious impact on private rights" *Wong Yang Sung*, 339 U.S. at 36-37;

in fidelity to law, short of recognized rights. The former largely covered the interests of business, although a smaller set of matters involving individual liberty was also included.⁷⁸ While substantive due process no longer provided business interests meaningful protection from regulation itself,⁷⁹ procedural fairness in the making and application of regulations remained an important value.⁸⁰

Procedural due process, as augmented by provisions of the APA, provided certain protections in these cases where property, and, less frequently, liberty, were at stake. These protections ensured that agency action which reduced the value of business operations was authorized by statute and that the agency acted only on a defensible view of the facts, in the determination of which the business had meaningful input.

Most other interests, however, went largely unprotected, or, rather, the agency was seen as the adequate and sole protector of a generalized public interest, including those particular segments of the public with very strong interests in an agency's performance of its statutory duties.⁸¹ For the most

see also *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872 (1st Cir.), *cert. denied*, 439 U.S. 824 (1978) (extending presumption of formality beyond adjudications affecting classical liberty and property rights to all significant and non-routine agency adjudications, thus implicitly balancing, at some level of generality, what is at stake to private interests and value of additional procedures against their cost to public interest).

78. Some agencies, particularly those dealing with immigration and military authorities, had enormous powers to make decisions affecting liberty interests. Although these decisions were often subject to judicial review, the reviewing courts were required to give great deference to many crucial agency determinations. *See United States v. Ju Toy*, 198 U.S. 253 (1905) (refusing to allow *de novo* review of agency decision excluding alien who claimed citizenship); *Estep v. United States*, 327 U.S. 114 (1946) (stating in dicta that review of draft board decision underlying military induction notice was unavailable except for claims that agency acted without jurisdiction).

79. *Compare Lochner v. New York*, 198 U.S. 45 (1905) (striking state maximum hour law as depriving workers and employers of liberty without due process of law) *with West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding state minimum wage law whose substance was challenged under due process) *and United States v. Carolene Products Co.*, 304 U.S. 144 (1938) (upholding federal law barring sale of certain products whose substance was challenged under due process). In *Carolene Products*, the Court seemed to abjure the power to strike down ordinary economic legislation as a violation of due process (or equal protection) unless wildly and obviously irrational on the face of the legislation. For a general discussion of this shift, *see* GEOFFRY R. STONE ET AL., *CONSTITUTIONAL LAW* 786-811 (2d ed. 1991).

80. *See Wong Yang Sung*, 339 U.S. at 36-40 (describing concerns about administrative fairness which, along with other concerns, led to APA's passage).

81. This proposition is best illustrated by shifts in the law of standing starting in the 1940's but gaining real momentum in the 1970's. The primary criterion for standing was a classical legal interest of the sort also protected by procedural due process. For example,

part, even these specially interested segments of the public were accorded no meaningful procedural rights before an agency and were likely to lack standing to challenge final agency action in court.⁸²

Competitor B, though actually injured, would not have had standing to challenge the government's grant of a license or other competitive advantage to his Competitor A, although arguably granted in violation of a statute governing the circumstances in which such grant would be appropriate. Denial of standing was based on the premises that (1) no one has a right to have government protection absent some particular constitutional or legal source, and (2) that the limits in the statute granted no private rights but were there to protect the public interest—an interest with which the agency could be trusted. Consequently, Competitor B was viewed as no more a serious candidate for standing than some otherwise uninterested person who abstractly wanted agencies to obey statutory limits. See Cass Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1436 n.18 (1988) (concluding that such person would have been treated as “bystander” instead of player).

This slowly began to change with cases such as *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942), and *Associated Indus. v. Ickes*, 134 F.2d 694 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943). Each of these cases awarded someone in Competitor B's position standing to challenge an advantage granted by the government to Competitor A. These cases were based on a reading of each statute in issue as granting competitors standing as “private Attorney Generals.” *Ickes*, 134 F.2d at 704. It was not until *Association of Data Processing Service Orgs. v. Camp*, 397 U.S. 150 (1970), that the APA, 5 U.S.C. § 702 (1994), was read as presuming that anyone whose interest was arguably among the zone of interests specially protected by a statute would have standing to sue. The new view was based on a number of elements, including (1) a belief that interests other than traditional property interests—such as an interest in observance of environmental laws—were entitled to some protection; (2) a less worshipful view of agency expertise; and (3) a general distrust of government based on the fear, in particular, that agencies often were controlled by the very businesses they were created to regulate. These views made it more crucial that interested non-agency actors could challenge agency action to assure regulation in the public interest. See PETER L. STRAUSS ET AL., *GELLHORN AND BYSE'S ADMINISTRATIVE LAW* 464-65, 1133-38 (9th ed. 1995); Sunstein, *supra* at 1434-45. This phenomenon manifested itself not only in a liberalization of standing before courts, but also of “standing” to participate in agency proceedings to various degrees. STRAUSS ET AL., *supra* at 464-77.

These changing expectations also manifested themselves in increasingly activist judicial review of agency action, often at the request of those who were newly granted standing. This took two forms. First, heightened review of informal agency action was sanctioned by *Overton Park* itself. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1970). See *infra* notes 108-25. Second, courts required agencies to use procedures beyond the minimum required by the APA in order to develop a better record on which a court might assess the rationality of agency action. This second development was halted by the court in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 548 (1978).

82. See *supra* note 81 (discussing criteria for standing to participate in judicial review of agency action).

It was proceedings involving these lesser interests, in which the agency was seen as an appropriate sole representative of the public interest, which defined the original set of informal administrative action. Indeed, this accounts for the confusing fact that such action—whether rulemaking or adjudicative—historically has been called “legislative” in a secondary sense of that word.

One reason for this strange usage of “legislative” was that, when neither liberty nor property rights were at stake, the agency was permitted to gather information to ground its action in virtually any way it wished—a freedom reminiscent of that which is enjoyed by a legislature or one of its committees. Because there were no formal proceedings into which evidence had to be admitted, there was no restriction on *ex parte* contacts. Consequently, commissioners could consult with industry representatives without hearing the opposing views or even notifying the opposing interests.⁸³ Such action also resembled legislation in another respect. On judicial review of issues resolved by the agency, other than issues of law, courts subjected the agency’s decision to an “arbitrary and capricious” scrutiny which resembled the toothless rational basis test applied to

⁸³. In *The Flying Tiger Line, Inc. v. Boyd*, 244 F. Supp. 889 (D.D.C. 1965), the court stated that:

The final contention advanced in behalf of the plaintiff is that the record of the hearings before the Board does not sustain the validity of the regulation or the need therefor. This contention seems to be based on a misconception of the nature of a rule-making proceeding. Rule-making is a legislative process. It is neither judicial, administrative, nor quasi-judicial. An agency performing a legislative function need not proceed on evidence formally presented at hearings. It may act on the basis of data contained in its own files, on information informally gained by members of the body, on its own expertise, or on its own views or opinions. It is not necessary for the regulatory agency to cause to be submitted at hearings evidence that would support its rule-making decisions. The regulation ultimately promulgated need not be sustained by evidence. The purposes of rule-making hearings are to give an opportunity to interested parties to submit data and facts, and to present their views. Consequently, the Court does not review a record of such hearings as it does records in judicial or quasi-judicial proceedings. Such hearings are analogous to hearings conducted by [c]ongressional [c]ommittees. An Act of Congress need not be supported by formal evidence introduced at hearings. *Id.* at 892. This view changed in the D.C. Circuit between *Overton Park* and *Vermont Yankee*. See *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 51-57 (D.C. Cir. 1977) (*per curiam*), *cert. denied*, 434 U.S. 829 (1978) (finding *ex parte* contacts improper in informal rulemaking); see also Nathaniel L. Nathanson, *Report to the Select Committee on Ex Parte Communications in Informal Rulemaking Proceedings*, 30 ADMIN. L. REV., 377, 379, 380 n.8 (1978) (discussing whether *Home Box Office* survived *Vermont Yankee*).

determine the rationality of ordinary legislation challenged as violating substantive due process.⁸⁴

Passage of the APA in 1946 provided some new, but still relatively limited, procedural protections for parties interested in informal agency rulemaking.⁸⁵ In such proceedings, an agency was required to propose rules publicly, and to receive and consider comments from all interested persons.⁸⁶ The effect of this requirement was limited in four ways. First, courts treated the requirement that the agency consider comments as hortatory.⁸⁷ Second, in deciding to issue a rule, an agency could rely on material never exposed to the comment process.⁸⁸ Third, certain rules, including interpretive rules and policy statements, were exempted even from the requirements of notice and comment.⁸⁹ Fourth, agencies possessed an almost unlimited latitude to avoid the APA's rulemaking

84. See *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 185-86 (1935) (holding that agency did not need to make specific findings to support promulgated rule, much like legislature need not make such findings, and finding reasons for special deference to agency conclusions not fully explained). The passage of the APA requirement of a "concise general statement," 5 U.S.C. § 553(c) (1994), did not significantly affect the *Pacific States Box & Basket* rule because the APA provision was not read to compel specific findings to justify a rulemaking. ATTORNEY GEN., MANUAL ON THE APA 32 (1947). Case law before *Overton Park* suggests that if a court finds the basis and purpose of a rule obvious, a supporting statement is not required. *Hoving Corp. v. FTC*, 290 F.2d 803 (2d Cir. 1961). *Overton Park* was the first step in Supreme Court case law toward searching review of agency action. By 1983, in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983), the Court expressly rejected any similarity between the rational basis review applied to legislative action and the arbitrary and capricious standard of review for agency action. The Court strongly suggested that it would be less deferential to an agency's actions taken to fulfill its statutory mandate. *Id.* at 43 n.9.

85. 5 U.S.C. § 553 (1994).

86. *Id.*

87. Before *Overton Park*'s requirements of (1) review on the agency record; (2) offer of an explanation of a rational connection between an agency's statutory authority, the record, and its decision; and (3) thorough review of those materials, it was impractical to require serious consideration. See *supra* notes 81-84 and accompanying text. This requirement gained further momentum after *Overton Park* when the D.C. Circuit required that the record or an agency's explanation respond to any significant comments apparently undercutting the rationality of its decision. *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393-94 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

88. See *supra* note 83 and accompanying text (discussing agency's ability to gather information through *ex parte* contacts).

89. 5 U.S.C. § 553(b)(A) (1994).

requirements by using specific adjudications as vehicles for announcing general rules.⁹⁰

Stripped down as they were, rulemaking proceedings, as described above, were still more procedurally exacting than informal adjudication. For the latter, the APA provided few, if any, procedural protections.⁹¹

Thus, in both informal rulemaking and informal adjudications, an agency operated more like a legislature or a legislative committee than a court. This limited restrictions model—limited both in terms of agency procedure and intensity of judicial review—was the model of informal agency action employed by the courts during the early years of the APA.⁹²

Over the years, the prevailing conception of informal action edged away from the limited restrictions end of the continuum. This change was driven by new varieties of regulation which affected, in important ways, interests of citizens not traditionally recognized by the legal system, typified by environmental protection legislation.⁹³ It was also characterized by a general reappraisal of the desirability of allowing an agency to be the sole champion of the public interest in nonconstitutional cases, concerned with the integrity of government, particularly the executive branch and agencies captured by regulated interests.⁹⁴ It was driven in some respect by an emerging skepticism about the existence of an intelligible public interest having some meaning other than the desires of the victors in interest group warfare. As new important, but nonproprietary, interests appeared, and as confidence in agencies waned, the requirements for informal action moved somewhat toward those required for formal proceedings, affording more procedural protections in actions before the agency and more intensive judicial review.

Even at the time of greatest movement toward formalizing informal proceedings, in the early to mid 1970's, differences between the two types

90. *SEC v. Chenery, Corp.*, 323 U.S. 194, 202-03 (1947) (indicating that agency's choice of rulemaking or adjudication as vehicle for making policy lies primarily in agency's discretion).

91. 5 U.S.C. § 554(a) (1994).

92. See Bernard Schwartz, *Administrative Law Cases During 1971*, 24 ADMIN. L. REV. 299, 306 (1972) (describing *Overton Park* as delineating new procedure between formal proceedings and no procedure at all). For a fuller version of the Schwartz quotation see text accompanying *infra* note 108.

93. Sunstein, *supra* note 81, at 1441-42 (commenting on judicial enlargement of standing in variety of new regulatory settings); Schwartz, *supra* note 92, at 306 (commenting on judicial enlargement of procedures required in variety of new regulatory settings).

94. STRAUSS ET AL., *supra* note 81, at 464-65; Sunstein, *supra* note 81, at 1443-44.

of proceedings remained striking.⁹⁵ Moreover, since that time, there has been some movement back toward less formality.⁹⁶

The time of greatest formalization of informal proceedings was the period between the decision of *Overton Park*⁹⁷ and the decision in *Vermont Yankee Nuclear Power Corp. v. NRDC*, a case which severely limited, but did not entirely roll back, the process of formalization.⁹⁸ During this period, informal proceedings and court review followed somewhat formalized features, some stemming from *Overton Park* and some even antedating it slightly.⁹⁹

During those years, the notion of participation by comments in rulemaking was expanded to require an agency to make available for public comment any factual material on which it would significantly rely in justifying its rule.¹⁰⁰ This is, essentially, a diluted, non-oral form of cross

95. Compare the requirements of formal proceedings under 5 U.S.C. §§ 556-57, which resemble those for civil trials in courts, with the even more demanding requirements for informal action devised between *Overton Park* and *Vermont Yankee*, described *infra* notes 100-04.

96. Except for some small set of truly exceptional cases, *Vermont Yankee* ended the lower federal courts' practice of occasionally requiring agencies to conduct their informal proceedings with more safeguards than the minimum required by the Constitution, the APA, or more specific statutes. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524, 543 (1978). However, *Pension Benefit Guar. Corp. v. The LTV Corp.*, 496 U.S. 633 (1990), seemed to protect *Overton Park*'s apparent innovations, including (1) review on a record, (2) meaningful agency explanation of its decision, and (3) careful rationality review, as explications of the APA's judicial review requirements. *Id.* at 654.

97. See Schwartz, *supra* note 92, at 306 (describing *Overton Park* as delineating new procedure that works in between formal proceedings and no procedure at all).

98. 435 U.S. 519, 524, 543 (1978) (prohibiting courts, except in most compelling circumstances, from requiring agencies to provide procedures going beyond minimum required by Constitution, APA, or more specific statute).

99. While *Overton Park* was, at the highest level, an endorsement, extension and clarification of the trend toward formalization, the trend had its origins slightly earlier in the United States Courts of Appeals. See *Automotive Parts and Accessories v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968) (requiring that agency's explanation of its action be reasonably detailed, although this partially may have been result of special requirements of enabling act). See PETER L. STRAUSS ET AL., *GELLHORN AND BYSE'S ADMINISTRATIVE LAW* 478-79 (8th ed. 1986), including *Automotive Parts* in the vanguard of the "hard look" movement toward intensification of judicial scrutiny of informal agency action.

100. *Portland Cement Assoc. v. Ruchelshaus*, 486 F.2d 375, 393-94 (D.C. Cir. 1973); *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 251 (2d Cir. 1977). See also Neil D. McFeeley, *Judicial Review of Informal Administrative Rulemaking*, 1984 DUKE L.J. 347, 353 nn.47-48 (1984).

examination. Some courts did require oral cross-examination.¹⁰¹ Some courts imposed a ban on *ex parte* contacts, thereby making it likely that all information considered by the agency, whether deemed significant or not, would be available to the parties.¹⁰² Such information would be available, if not for an additional round of comments, then at least for consideration on judicial review.¹⁰³ Additionally, the largely unenforceable requirement that agencies consider comments was translated into the real requirement that an agency, in explaining its decision, respond to any significant comment which challenged its rationality.¹⁰⁴

Both rulemaking and adjudication were subjected to the requirement that an agency explain its decision in some reasonable fashion, and that the explanation rationally connect the decision with the record.¹⁰⁵ In an informal proceeding, the record was the material before the agency when it reached its decision.¹⁰⁶ Finally, as to the intensity of judicial review, the Supreme Court began to require serious scrutiny of informal agency action.¹⁰⁷

b. Overton Park's Role in Formalization

While the lower federal courts already had begun to suggest an intensifying of procedures in informal proceedings, it was the Supreme Court itself which most dramatically signaled real change. As Bernard Schwartz said in his commentary shortly after the case was decided:

101. The Court in *Vermont Yankee* read the opinion of the court below as ordering cross examination in an informal rulemaking and reversed on grounds that courts should not, on their own authority, augment the procedural requirements of the APA. *Vermont Yankee*, 435 U.S. at 524, 541-43. See also *International Harvester Corp. v. Rucklehaus*, 478 F.2d 615, 630-31 (D.C. Cir. 1973) (affirming power to order cross-examination in informal rulemaking but declining to do so in instant case).

102. *United States Lines, Inc. v. Federal Maritime Comm'n*, 584 F.2d 519, 536-43 (D.C. Cir. 1978); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 51-59 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977).

103. This flows from *Overton Park's* and *Camp v. Pitts's* definition of record for judicial review as everything that the agency considered in reaching its decision. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1970); *Camp v. Pitts*, 411 U.S. 138 (1973).

104. *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252 ("It is not in keeping with the rational process to leave vital questions, raised by comments which are of cogent materiality, completely unanswered."); *Portland Cement*, 486 F.2d at 392-94.

105. *Overton Park*, 401 U.S. at 417-20.

106. *Id.* at 420.

107. See *infra* note 125 and accompanying text (quoting portions of *Overton Park* describing judicial review as "probing" and "in-depth").

Citizens to Preserve Overton Park v. Volpe is the first Supreme Court decision to deal with a new type of administrative procedure that is halfway between the traditional, formal regulatory procedure and no procedure at all. The technique referred to has developed as the focus of concern in our administrative law and has begun to shift from the older areas of regulatory administration (covered by the formal APA requirements) to newer areas which reflect the assumption of new functions of government.¹⁰⁸

It is important to note precisely how *Overton Park* did and did not endorse a more formal model for informal proceedings. Commentators often note that informal proceedings are distinguished from formal proceedings precisely by virtue of the fact that the latter are decided "on the record" and the former are not.¹⁰⁹ The Supreme Court has mandated that, at least in rulemaking proceedings, the presence or absence in an enabling act of the words on the record, is normally a dispositive indicator of whether the APA's formal trial-type provisions are triggered.¹¹⁰

One of *Overton Park's* formalizing innovations is to make clear that, in informal proceedings which are not on the record in the technical sense of the APA, there is, nevertheless, a record in another sense.¹¹¹ Certainly, by definition, there is no precisely defined procedural record comprising all evidence admitted and subject to cross examination.¹¹² According to *Overton Park* itself, the record in an informal proceeding is all the material that the agency considered in reaching its decision.¹¹³ Commentators have criticized this notion as making it hard to determine exactly what the record is.¹¹⁴ For present purposes, the argument is not concerned with the wisdom of basing review on such an informal record. Rather, the key point is that this was the *Overton Park* view of informal records and it continues to be the Supreme Court's view.¹¹⁵

108. Schwartz, *supra* note 92, at 306.

109. See 5 U.S.C. §§ 553(c), 554(a), (c)(2); see also *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224, 234 (1973).

110. *Id.* at 234-38.

111. See *Overton Park*, 401 U.S. at 418-19; WALTER GELLHORN ET AL., ADMINISTRATIVE LAW 824 (7th ed. 1979); J. Skelly Wright, Commentary: *Rulemaking and Judicial Review*, 30 ADMIN. L. REV. 461, 464 (1978).

112. 401 U.S. at 420.

113. *Id.*

114. William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 59 (1975).

115. See *Overton Park*, 401 U.S. at 420 (stating simply that "review is to be based on the full administrative record that was before the Secretary at the time he made his decision"). The Court never specifically defines the term "record." Contrast this vague account with the notion of record in formal proceedings described in 5 U.S.C. §§ 556-57

The significance that the Court accorded this different sort of record, once identified, is exactly that which is generally accorded to more formal and identifiable records produced in formal decisions. Any specific factfinding, crucial to an agency's decision, must be adequately supported by the evidentiary record which was before the agency when it acted.¹¹⁶ If the purely legal reasoning is adequate ("the statute permits us to ban dangerous products"), then the decision stands or falls depending on whether the factual record adequately supports the factual portion ("this is a dangerous product")¹¹⁷ of the agency's actual reasoning to its conclusion ("therefore it is banned"). If the court decides that the statute and record supports a second reason for banning the drug (ineffectiveness, for example), it nevertheless cannot uphold the ban on a basis not relied on by the agency to support its decision. Rather, it would have to remand to allow for initial agency consideration of this possible alternative ground.¹¹⁸

(1994). See also *Camp v. Pitts*, 411 U.S. 138, 139-42 (1973) (noting that "[t]he entire administrative record was placed before the court The focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." This statement made it reasonably clear that what is placed before court by agency is not necessarily administrative record for review in *Overton Park* sense).

At one point in its opinion in *Florida Power & Light Co. v. Lorian*, 470 U.S. 729 (1985), the Court casually refers to the record for review as "*the record the agency presents to the reviewing court.*" *Id.* at 744 (emphasis added). In another portion of its opinion, the *Lorian* Court calls for remand if "*the record before the agency does not support the agency action.*" *Id.* (emphasis added). This clearly is the *Overton Park* view and remains so today. It is not in keeping with the remainder of the *Overton Park* opinion or with subsequent Supreme Court and lower court opinions to believe that an agency can withhold important information which it considered but which undercuts its decision from a reviewing court.

116. See *supra* note 69 (quoting from *Chenery*). Compare this treatment with *Overton Park*, 401 U.S. at 419-20.

117. Of course, this usage of "factual" is to cover predictions and many other hard to classify judgments about the world as opposed to judgments about the meaning of legal texts and traditions.

118. In *Camp*, the Court stated:

[I]n the present case there was contemporaneous explanation of the agency decision. The explanation may have been correct, but it surely indicated the determinative reason for the final action taken: the finding that a new bank was an uneconomic venture in light of the banking needs and the banking services already available in the surrounding community. The validity of the Comptroller's action must, therefore, stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review. If that finding is not sustainable on the administrative record made, then the Comptroller's decision must be vacated and the matter remanded to him for further consideration.

Overton Park also formalizes informal proceedings in another way. It requires that an agency adequately explain its decision, even though the court did not explain the meaning of "adequate."¹¹⁹ There are several provisions of the APA which might be viewed as requiring that some greatly stripped-down version of a judicial opinion accompany informal agency decisions, in order to provide an explanation.¹²⁰ The *Overton Park* Court cites none of these provisions, but rather indicates that an explanation is necessary to facilitate judicial review.¹²¹ The Court makes clear that if such an explanation is not supplied along with the decision, or provided shortly thereafter, the actual reasoning of the agency can be made a subject of inquiry in the judicial review proceedings.¹²² Note however, that the Court here applies the formal model to informal proceedings. The issue is not how an agency can most convincingly rationalize its decision during judicial review, but whether its actual reasons for acting at the time it decided the matter can withstand scrutiny.¹²³

Finally, rounding out the picture of how *Overton Park* formalized informal proceedings, it legitimated and perhaps intensified a trend toward increased judicial scrutiny of agency action, particularly informal agency action, under the arbitrary and capricious standard. The standard was a

Id. at 143. Furthermore, in *Florida Power & Light Co. v Lorian*, 470 U.S. 729 (1985), the Court found:

If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. The reviewing court is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.

Id. at 744.

119. The only guidance the Court does provide to this question is that "post hoc" rationalizations of agency actions are "an inadequate basis for review." *Overton Park*, 401 U.S. at 419.

120. For example, the APA provides that an agency denial of a party's request must include a "brief statement of the grounds for denial." 5 U.S.C. § 555(e) (1994). Furthermore, after promulgating new rules, an agency must "adopt a concise general statement of their basis and purpose." *Id.* § 553(c).

121. 401 U.S. at 420. *See also* *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633 (1990) (grounding *Overton Park's* rules in the requirements for effective judicial review implicit in APA, 5 U.S.C. § 706).

122. The Court states that "it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves." *Overton Park*, 401 U.S. at 420.

123. Presumably this is reflected in the Court's rejection of post hoc rationalizations. *Overton Park*, 401 U.S. at 419.

weak one, calling for scrutiny resembling that applied to ordinary economic acts of Congress challenged for violating substantive due process.¹²⁴ *Overton Park* moved beyond this earlier view to require real scrutiny:

Even though there is no *de novo* review in this case and the Secretary's [decision] does not have ultimately to meet the substantial-evidence test, the generally applicable standards of § 706 require the reviewing court to engage in a substantial inquiry. Certainly, the Secretary's decision is entitled to a presumption of regularity. But that presumption is not to shield his action from a thorough, probing, in-depth review.¹²⁵

II. THE TWO EXCEPTIONS *OVERTON PARK* RECOGNIZED TO ITS OWN "ON THE RECORD RULE"

While *Overton Park* generally required that judicial review be confined to scrutiny of the administrative record, it recognized exceptions.¹²⁶ In these two circumstances, the Court permitted some form of *de novo* judicial review, meaning that the validity of an order or regulation would be determined based upon a record at least partially made before the reviewing court.¹²⁷ The Court described these exceptions as follows: "First, such *de novo* review is authorized when the action is adjudicatory in nature and the agency factfinding procedures are inadequate [Second,] there may be independent factfinding when issues that were not before the agency are raised in a proceeding to enforce non-adjudicatory agency action"¹²⁸

The Court cited no caselaw as authority for this proposition, but rather referred to a House of Representatives Report¹²⁹ accompanying the APA and to Louis Jaffee's treatise.¹³⁰ The Committee Report certainly supports such a suggestion, however, it is more easily read as suggesting that all informal administrative action should be reviewed not on the record before the agency, but *de novo*, on a record made in the reviewing court's proceedings:

124. PETER L. STRAUSS ET AL, *supra* note 81, at 602-03 (citing *Pacific States Box and Basket Co. v. White*, 296 U.S. 176 (1935), as example of old standards of arbitrary and capricious review resembling toothless rational basis standard applied to most economic legislation to determine if their substance comports with due process).

125. 401 U.S. at 415 (citations omitted).

126. *Id.*

127. *Id.*

128. *Id.*

129. H.R. REP. NO. 1980, 79th Cong., 2d Sess. (1946).

130. LOUIS JAFFEE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 359 (1965).

In short, where a rule or order is not required by statute to be made after opportunity for agency hearing and to be reviewed only on the [formal] record thereof, the facts pertinent to any relevant questions of law must be tried and determined *de novo* by the reviewing court respecting either the validity or application of such rule or order—because facts necessary to the determination of any relevant question of law must be determined of record somewhere and, if Congress has not provided that an agency shall do so, then the record must be made in court.¹³¹

This clearly supports Nathaniel Nathanson's claim that all informal agency action was meant to be reviewed *de novo*.¹³² But across-the-board *de novo* review of informal agency action is antithetical to the On the Record Rule of *Overton Park*, and to the spirit of other contemporaneous Supreme Court cases.¹³³ It is difficult to tell whether *Overton Park* rests on a true judicial mistake about the original intention underlying the APA or upon a dynamic statutory interpretation aimed at modernizing the statute.¹³⁴ What is clear after *Overton Park* is that, currently, we have a system in which the On the Record Rule is the rule and *de novo* review is the exception.

If the Supreme Court has, in effect, stood the original meaning of the APA on its head in this respect, does the legislative history provide any help in understanding why? Perhaps it does, by making clear the sorts of cases in which the legislature thought that this sort of *de novo* review would operate. Examined closely, the legislative history reveals that the emphasis was on the small set of cases in which informal administrative action could harm constitutional rights.

The focus of the legislative history was on due process. In cases not involving liberty or property, the absence of a record posed fewer difficulties for two reasons stemming from the nature of informal proceedings at that time, as discussed above. First, aside from those few

131. H.R. REP. NO. 1980, 79th Cong., 2nd Sess. 45 (1946); S. REP. NO. 752, 79th Cong., 1st Sess. 28 (1945).

132. Nathaniel L. Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedures Act and Other Federal Statutes*, 75 COLUM. L. REV. 721, 763-65 n.8 (1975). See also Stephen F. Williams, "Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal and Empirical Analysis, 42 U. CHI. L. REV. 401, 419-20 n.76 (1975) (advocating *de novo* review when substantive validity of agency rule turned upon resolution of factual claim).

133. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978); United States v. Florida East Coast Ry. Co., 410 U.S. 224 (1973).

134. See William N. Eskridge, Jr. DYNAMIC STATUTORY INTERPRETATION (1994) (arguing throughout that statutory interpretation ought to consider post enactment events and values).

whose classical property or liberty rights were impinged by informal action, the remainder of affected persons were much less likely to possess standing under the more rigid standing requirements prevailing at the time.¹³⁵ Second, the nearly totally deferential standard of review of informal proceedings which prevailed before *Overton Park*¹³⁶ suggested that production of a record normally would be a waste of time, because a reviewing court was almost certain to uphold the challenged agency despite what the record revealed.¹³⁷

A change in the regulatory landscape since 1946 has caused the APA to be reinterpreted. Attempts have been made to apply its provisions to a set of problems for which the APA was not designed.¹³⁸ The older style regulatory pattern pitted the agency as sole representative of the public interest against individual property and liberty interests.¹³⁹ SEC and immigration orders provide an example of each of these, respectively. As newer forms of regulation, such as environmental regulation, were devised, a middle ground of interests was recognized in which a party had administrative and judicial standing even without a Fifth Amendment liberty or property interest.¹⁴⁰ With both the side effects of regulation or non-regulation raising the stakes for broad spectrums of the citizenry, and “agency-capture theory” suggesting that agencies alone could not be trusted with the public interest, courts began to recognize public interest group and even individual standing.¹⁴¹

Real judicial scrutiny of agency action, at the request of those affected, seemed in order, where the stakes were as serious as, for example, safe nuclear waste disposal or the disruption of a public park (as in *Overton Park*).¹⁴² In *Florida East Coast Railway*, however, the Court rejected an interpretation of the APA which would have viewed many of these proceedings as formal and subject to the APA’s trial-like provisions.¹⁴³

135. See Sunstein, *supra* note 81, at 1434-45 (discussing narrow view of standing as tied only to classical legal concept, invaded by regulation and not by beneficiaries of regulatory statutes claiming under-enforcement by agencies).

136. See *supra* note 84 and accompanying text.

137. *Id.*

138. Schwartz, *supra* note 92, at 306 (considering procedure required of agencies and requirements for judicial review in new regulatory landscape); Sunstein, *supra* note 81, at 1443-45 (dealing with enlargement of standing to seek judicial review of issues posed under newer regulatory provisions).

139. Sunstein, *supra* note 81, at 1436-37.

140. *Id.* at 1442.

141. See *supra* note 81.

142. Schwartz, *supra* note 92, at 306.

143. *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224, 238-48 (1973).

When *Florida East Coast Railway's* informal classification of most agency proceedings was combined with *Overton Park's* limitation of judicial review to the record of actual agency deliberations, the pressure became even greater to formalize informal proceedings in order to assure fuller agency consideration and a richer record for review. When *Vermont Yankee* later limited procedures in informal proceedings to those required by the APA, some lower courts and some commentators reacted by attempting to find ways around the On the Record Rule so that what they saw as appropriately informed judicial review could continue.

Despite this, *Overton Park*, *Florida East Coast Railway* and the later *Vermont Yankee* decision all seem aimed at homogenized, and relatively lax, administrative procedures and judicial review for nearly all cases. The level of intensity is pegged somewhere between the requirements of formal proceedings under sections 556 and 557, and the nearly negligible intensity of informal procedures as interpreted in the early days under the APA.¹⁴⁴ As presaged in *Overton Park* and revealed most clearly in *Vermont Yankee*, the procedures and review would move slightly away from the negligible end of the spectrum. Even if the APA had intended *de novo* review for most informal cases, such review would no longer be applicable. This is illustrated in the very narrow circumstances in which *Overton Park* recognized that *de novo* review of agency action was warranted. This can be demonstrated more dramatically by the Court's failure to use even the exceptions that it recognized in *Overton Park*.

There are almost no federal cases in which courts used either of the "exceptions" recognized in *Overton Park* to justify a reviewing agency action on an evidentiary record made or augmented in a judicial proceeding.¹⁴⁵ It should not be surprising that these exceptions were *ipsit dixit* on the part of the *Overton Park* Court, and remain so today. They run completely contrary to the *Overton Park* Court's own model of administrative law, however different that may be from the world of the APA framers.

144. Schwartz, *supra* note 92, at 306.

145. But see *Porter v. Califano*, 592 F.2d 770, 782-84 (5th Cir. 1979), which allowed a federal district to hold hearings that an agency should have held in a proper way and finally dispose of the propriety of the sanction imposed by the agency against the plaintiff. *Porter* has been described as the only one to use an *Overton Park* exception. Levin, *Scope of Review Doctrine Restated: An Administrative Law Section Report*, 38 ADMIN. L. REV. 239, 273-74 (1986). See also ALFRED C. AMAN JR. AND WILLIAM T. MAYTON, ADMINISTRATIVE LAW 459 n.7 (1993).

A. *The First Exception: "When the Action Is Adjudicatory in Nature and the Agency Factfinding Procedures Are Inadequate"*

The normal protocol for any defect in an agency decision is remand, for the reasons of expertise and presumed congressional intent.¹⁴⁶ This is true whether the defect lies in the procedural rules themselves or in the application of those rules to specific problems. On the one hand, if an agency has procedures which, on paper, are adequate under the APA and other relevant law, but misapplies them, the courts remand for an appropriate hearing before the agency.¹⁴⁷ On the other hand, if an agency's written procedures violate relevant law, a Court presumably would strike them down and remand the case, requiring the agency to formulate new procedures to use on remand.¹⁴⁸

Under these circumstances, why would a court hear evidence going to the substantive merits of the agency decision? If in *Chenery II* the SEC had applied a procedural rule requiring facts to be found with a ouija board, there can be no doubt that the Court would have struck down that rule and remanded for more conventional agency factfinding. If agency procedure is sufficiently flawed to permit the court to set aside the agency action, what is the point in developing substantive material not considered by the agency? Presumably substantive review should occur once the agency reaches a procedurally correct decision.

146. In *Florida Power & Light Co. v. Lorian*, 470 U.S. 729 (1985), the Court stated: If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. The reviewing court is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.

Id. at 744. See *SEC v. Chenery Corp.*, 332 U.S. 194 (1947); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *Camp v. Pitts*, 411 U.S. 138 (1973).

147. See *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707 (8th Cir. 1979) (permitting remand where agency fails to follow correct procedure); *United States v. Heffner*, 420 F.2d 809 (4th Cir. 1969) (deciding to strike agency action when agency deviates from its own procedures); *Bunyard v. Hotel*, 702 F. Supp. 820 (D. Nev. 1988) (finding that agency failed to interpret and apply CFR regulations correctly in remand); *Eastman Kodak Co. v. E.I. DuPont de Nemours Co.*, 284 F. Supp. 389 (E.D. Tenn. 1968) (allowing court power to remand where agency erroneously excluded evidence).

148. See *National Distillers & Chem. Corp. v. United States Dep't of Energy*, 498 F. Supp. 707 (D. Del. 1980), *aff'd*, 662 F.2d 754 (Temp. Emerg. Ct. App. 1981) (finding that agency must follow procedures within constraints of due process).

Even in the unusual case in which the agency is so incompetent that it cannot function appropriately, the solution is not for the court to become the agency, but for the court to disable the agency from making decisions until the political branches force the agency into sufficient compliance with the law.

Potentially, there may be a very small set of cases, bordering on the null set, within the first *Overton Park* exception. These might include truly exceptional cases in which a court needs to hear evidence going to the substantive merits of the agency decision, so that the court could take on the function of the agency during an emergency while the agency is disabled. This would occur only in those rare instances in which a court concluded that either the Constitution or the agency's enabling act itself required the court to so act in the interim. There are some scenarios in which this might occur;¹⁴⁹ it is doubtful, however, that it ever will.

149. Assume that a statutory entitlement program administered by an agency creates a *right* to receipt of immediate benefits. If so, depending on the urgency, it might make sense for courts to adjudicate entitlement under the program, where they find an agency has demonstrated an inability to do so on its own. If the program vests receipt of benefits forthwith upon the demonstration of certain facts, then an argument can be made that there is constitutional compulsion for the courts to adjudicate claims until the agency can do so in a satisfactory way.

What about cases in which an individual does not seek a direct benefit, but is a defendant in an agency enforcement proceeding seeking to avoid liability? Normally, in such enforcement cases, disabling a hopelessly dysfunctional agency, by constantly striking down its enforcement decisions, adequately protects private rights. Thus, there is no need for the court to temporarily function as the agency by replacing it. In the ouija board hypothetical above, if a court forbids the SEC from bringing an action for a penalty until it adopts sensible and lawful factfinding procedures, the defendant is protected.

It is possible to imagine a case in which an agency so seriously neglects its duties to protect the public interest that courts ought to read judicial adjudication of violations into the statutory authorization until the agency regains reasonable legitimacy. These cases would be situations in which immediate, large-scale harm could result, well before the political processes could correct things: one might imagine, agencies which were empowered to deal with serious epidemics or with serious problems of national security. This Article, however, is not endorsing the view that a court should take over adjudications in these circumstances by either augmenting the record made before an agency, or completely changing the record by hearing matters originally. In only a limited subset of cases is *Overton Park*'s first exception warranted, given the model of judicial review adopted by that case.

B. The Second Exception: When Issues that Were Not Before the Agency Are Raised in a Proceeding to Enforce Non-Adjudicatory Agency Action

As defined under the APA, non-adjudicatory action means only one thing: rulemaking.¹⁵⁰ Hence this exception deals with a challenge to an agency rule by someone against whom it has been enforced in an agency proceeding. As with the first exception, this one seems either completely unwarranted or at least overly broad. *Overton Park* requires review only on the informational record which was before the agency at the time of its decision.¹⁵¹

In a direct challenge to a rule brought by a regulated party, *Overton Park* implies that the rule stands or falls based on the agency's actual reasons for promulgation and any support for those reasons found in the record, for example, the supporting materials actually considered by the agency.¹⁵² A rule may be unwise, but if an agency has followed the minimally proper requirements of section 553, it is a valid rule as long as it was appropriately based on statutory authority, on the comments, and on any other materials the agency actually considered.

This is not to say that those injured by a rule are without a remedy when facts change or new evidence of earlier conditions calls the rule into question. The usual remedy, in such cases, is a petition for a new rulemaking in which either a new rule can be made or an existing one can be modified or repealed.¹⁵³ A denial of such a petition is most likely judicially reviewable,¹⁵⁴ and reversible, when clearly arbitrary and capricious.¹⁵⁵ Moreover, when there has been review of an agency decision not to hold a proceeding to repeal or modify a rule, judicial review

150. The APA formally defines "adjudication" as "an agency process for the formulation of an order." 5 U.S.C. § 551(7) (1994). In turn, an "order" is the result of an agency matter "other than rule making." *Id.* § 551(6). Implicitly, then, an action that is not adjudicatory is rulemaking.

151. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

152. *Id.* at 419-20.

153. 5 U.S.C. § 553(e) (1994).

154. *American Horse Protection Ass'n v. Lyng*, 812 F.2d 1, 4-5 (D.C. Cir. 1987); see also *WWHT*, 656 F.2d at 817 (indicating that intensity of judicial scrutiny in review for arbitrary and capricious agency action varies from context to context and that review of agency's decision not to undertake rulemaking is close to minimal end of spectrum of scrutiny).

155. *WWHT*, 656 F.2d at 818-19 (surveying those few cases in which agency decision to decline to undertake rulemaking was struck down).

has been "on the record" within the meaning of *Overton Park*.¹⁵⁶ Of course, it is impossible to have review on the record of a new rulemaking proceeding which did not yet occur. The review will be on the record of the "proceeding" which did occur—the 553(e) proceeding in which a new rulemaking proceeding was proposed and rejected by the agency.¹⁵⁷

It is possible to imagine cases which may call for exceptional procedures. There may even be extraordinary cases, involving changes in circumstances or information in which it would be an abuse of discretion for an agency not to initiate a proceeding to modify a rule. In such cases, it would be an abuse of discretion for an agency not to take immediate steps to rescind a rule. One might even argue further that in *very* clear cases, courts should view a rule as having become invalid without agency action to repeal it, and excuse non-compliance.¹⁵⁸ There is a temporal dimension as well. It might be possible to argue that such a view applies only to direct challenges to rules made by regulated persons shortly after promulgation, but that *de novo* review on an augmented record is appropriate when a rule is challenged in an enforcement proceeding. In most cases, this seems unjustifiable. If one is going to depart from the review-on-the-record model, the most propitious time to do so is immediately on direct review so that the rule's validity is more likely to be settled at an early time, rather than to encourage an endless series of cases, each claiming that an agency failed to consider some evidence available at the time of decision.¹⁵⁹ Again there may be a small subset of enforcement proceedings in which it may make principled sense to allow challenge to a rule on an augmented record. These seem reducible to the exceptional circumstances discussed above, which would amount to gross abuse of discretion in not suspending a rule based on dramatic new facts or newly discovered facts.¹⁶⁰

156. See *infra* note 159 and accompanying text.

157. *American Horse*, 812 F.2d at 5 (treating papers submitted in support of petition for rulemaking as part of record for purposes of reviewing denial of that petition).

158. In such cases, it may be consistent with standard administrative procedure to permit a regulated person to violate a rule even though (1) the agency followed minimal section 553 procedures in compiling the record, and (2) on the basis of that record and the agency's actual contemporaneous reasons for promulgating it, the rule was neither arbitrary and capricious nor in violation of law.

159. See WALTER GELLHORN ET AL., *ADMINISTRATIVE LAW* 450 (8th ed. 1986).

160. To accomplish this result, the court would have to proceed *de novo* and consider evidence bearing on the rule's new illegitimacy because there was no proceeding below—not even a proceeding to consider whether or not to have a proceeding.

All of this is speculation, as opposed to the overwhelming reality of the On the Record Rule. The Supreme Court has not invalidated a rule based on extra-record evidence

Only occasionally have courts looked at post-decision events to help them sustain decisions resting on predictions which seemed to have come true. In one case, a court suggested, in dicta, that sufficient post-decision events might be used to undercut an agency's decision if they showed the underlying predictions to be "wholly fictional."¹⁶¹

In light of the fact that *Overton Park's* exceptions are not used and in light of the fact that, in most circumstances, such exceptions are inconsistent with the Court's own general model of administrative law, this Article turns skeptically to claims that the courts have nearly destroyed the On the Record Rule by allowing exceptions going beyond those announced in *Overton Park*.

III. THE ALLEGED DEMISE OF THE *OVERTON PARK* "ON THE RECORD RULE"

A. Introduction: The Stark and Wald Article

In 1984, Steven Stark and Sarah Wald published *Setting No Records: The Failed Attempt to Limit the Record in Review of Administrative Action*.¹⁶² Their article has been cited in several cases¹⁶³ and was substantially excerpted, without criticism, in a fine and formative administrative law casebook.¹⁶⁴ While the real world existence of even the excep-

of dramatic subsequent events.

161. See *infra* note 197 and accompanying text. Even in an instance in which such treatment might be appropriate, it is doubtful that the Court would be willing to allow a departure from the usual requirements that a rule must be followed unless: (1) subsequent events are dramatic enough to deprive a rule of the slim rational basis required by due process, (2) it is struck down on the original record, (3) it is repealed, or (4) in unusual circumstances where a section 553(e) petition for a new rule has been denied, it is clear that any course of action but repeal is arbitrary and capricious.

162. 36 ADMIN. L. REV. 333 (1984).

163. *Esch v. Yeutter*, 876 F.2d 976, 991 n.166 (D.C. Cir. 1989); *American Mining Congress v. Thomas*, 772 F.2d 617, 626 (10th Cir. 1985); *Rose Acre Farms, Inc. v. Madigan*, No. NA 90-175-C LEXIS 8691 (S.D. Ind. June 5, 1991), *rev'd*, 956 F.2d 670, (7th Cir.), *reh'g denied*, LEXIS 2650 (7th Cir. Feb. 26, 1992), *cert. denied*, 506 U.S. 820 (1992).

164. GELLHORN ET AL., *supra* note 159, at 452-54. As this Article went to press, a new edition of the Gellhorn Casebook (PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW (9th ed. 1995)) was published without inclusion of, or reference to, the Stark and Wald article, or for that matter Court of Appeals cases such as *Asarco, Inc. v. EPA*, 616 F.2d 1153 (9th Cir. 1980), or *Bunker Hill Co. v. EPA*, 572 F.2d 1286 (9th Cir. 1977), which had recognized exceptions to the On the Record Rule not recognized in *Overton Park*, exceptions to determine, for example, whether an agency considered relevant factors or to provide a court with the technical background necessary to make an assessment

tions identified in *Overton Park* seems doubtful, Stark and Wald conclude that the lower courts have widely ignored the On the Record Rule, riddling it with new exceptions. In short, they conclude that the "on the record" model, to some significant extent, is a merely a paper model:

[A]n examination of the concept of review on the record in the courts surprisingly reveals that the doctrine no longer exists in any coherent form, although judges and analysts pretend that it is still viable. Faced with the difficulty of defining the record in specific cases, courts have developed so many unwritten exceptions to the doctrine of record review, that industrious advocates now can introduce any evidence they choose in cases reviewing informal administrative action.¹⁶⁵

Stark and Wald cast their conclusion in the form of a list of developing exceptions to review on the record ranging far beyond the two exceptions recognized in *Overton Park*. The exceptional situations they identify apply to the following situations: (A) "when agency action is not adequately explained in the record before the court"; (B) "when the agency failed to consider factors which are relevant to its final decision"; (C) "when an agency considered evidence which it failed to include in the record"; (D) "when a case is so complex that a court needs more evidence to enable it to understand the issues clearly"; (E) "in cases where evidence arising after the agency action shows whether the decision was correct or not"; (F) "in cases where agencies are sued for a failure to take action"; (G) "in cases arising under the National Environmental Policy Act"; and (H) "in cases where relief is at issue, especially at the preliminary injunction stage".¹⁶⁶

It is important to stress one point. Anyone who argues that lower federal courts have ignored a clear Supreme Court doctrinal pronouncement, forcefully reiterated by the Court within two years of its original statement,¹⁶⁷ needs at least some relatively clear and robust lower court decisions to support the claim. Claims made in 1984 for the existence of these categories rest either on assertions supported by slender authority or on mistaken notions about the meaning of *Overton Park's* On the Record Rule, particularly as to the notion of "record" incorporated in it. Also, the cases decided since that article was published largely fail to support claims that the Rule has eroded.¹⁶⁸

of rationality of an agency decision.

165. Stark & Wald, *supra* note 36, at 335-36.

166. *Id.* at 344-45. These propositions are labeled exceptions 1 to 8 by Stark and Wald.

167. *Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("The focal point for judicial review should be the administrative record already in existence.").

168. In *Florida Power & Light Co. v. Lorian*, 470 U.S. 729, 743-744 (1985), the Court indicated that review of agency action is to be on the record of the agency proceeding

Two of the claimed exceptions have strong surface appeal and seem to owe their existence to contradictions inherent in administrative law—indeed to contradictions in *Overton Park* itself. These do find some limited in the case law, often in dicta. They are extremely difficult to harmonize with the Supreme Court's general scheme for judicial review of informal administrative action. Parts IIIB and IV of this Article deal with the categories one by one, in each examining evidence available in 1984 and then developments since that time.

B. Evidence for and Discussion of Exceptions from 1971 to Present

In the case of several of their proposed exceptions, Stark and Wald correctly conclude that lower federal courts have held evidentiary hearings. As to several such exceptions, however, Stark and Wald are wrong in concluding that this practice is inconsistent with the On the Record Rule as prescribed in *Overton Park*. Characterizing practices consistent with *Overton Park* as departures helps make a case that the On the Record Rule is crumbling, possibly from general unworkability. A rule which the lower courts have poked full of holes is likely to be a rule whose basic vision is unsound. Below, the Article deals separately with each of the Stark and Wald exceptions.

*1. When an Agency Considered Evidence that It Failed to Include in the Record*¹⁶⁹

This exception to the On the Record Rule turns out to be self-contradictory. Under *Overton Park*, the record in an informal proceeding includes everything that an agency considered in reaching its decision, as well as anything that it was required to consider, such as comments in rulemaking proceedings.¹⁷⁰ Hence, nothing that was considered by an agency can be considered outside of the "record" in an *Overton Park* sense. It may be true that what the agency *presents* as the record is not actually comprehensive.¹⁷¹ When a court allows augmentation of the record, submitted by

"except in rare circumstances." The last proviso seems more plausibly to refer to *Overton Park*'s original exceptions than to endorse the subsequent ones described by Stark and Wald.

169. This is the third on the Stark and Wald list of exceptions. Stark and Wald, *supra* note 36, at 347-48.

170. *Overton Park*, 401 U.S. at 420 (stating that "[r]eview is to be based on the full administrative record that was before the Secretary at the time he made his decision"); *Camp*, 411 U.S. at 142 ("[T]he focal point for judicial review should be the administrative record already in existence.").

171. See cases cited *infra* notes 175-76.

an agency, to include material actually considered, but not initially presented, to the reviewing court by the agency, it is attempting to ensure review on the record in the *Overton Park* sense. In other words, it is following *Overton Park's* dictates.

Cases decided post-Stark and Wald make clear that the record in an *Overton Park* sense is what was before the agency at the time of its decision and not simply what the agency chooses to proffer as supporting its decision.¹⁷² One particularly clear statement is that of the D.C. Circuit in a case decided shortly after the publication of the Stark and Wald article:

If a court is to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision. The Supreme Court's formulation in *Overton Park* cautions against both under- and over-inclusiveness in the administrative record before the reviewing court. "[R]eview is to be based on the *full* administrative record before the Secretary at the time he made his decision." [citing *Overton Park*] To review less than the full administrative record might allow a party to withhold evidence unfavorable to its case¹⁷³

Since then, when courts clearly address the issue, they generally recognize that materials before the agency at the time of decision are not extra-record materials and that the "record submitted by the agency may be supplemented on judicial review to reflect the full record in the *Overton Park* sense."¹⁷⁴

172. *Id.*

173. *Walter O. Boswell Memorial Hosp. v. Heckler*, 749 F.2d 788 (D.C. Cir. 1984). This case was decided in the same year the Stark and Wald article was published; however, it was not decided until November, 1984. Most likely, the case was decided too late in the year to have been available to those authors.

174. In *Thompson v. United States Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989), the Ninth Circuit proposed: "The whole administrative record, however, 'is not necessarily those documents that the *agency* has compiled and submitted as 'the' administrative record The 'whole' administrative record . . . consists of all documents and materials directly or *indirectly* considered by agency decision-makers and includes evidence contrary to the agency's position.'" *Id.* (citations omitted) (quoting *Exxon Corp. v. United States Dep't of Energy*, 91 F.R.D. 26, 32 (N.D. Tex. 1981). See also *Citizens for Env'tl. Quality v. United States*, 731 F. Supp. 970, 982 (D. Colo. 1989) (finding that court may "supplement" record submitted by agency to reflect "whole record"); *National Wildlife Fed'n v. Burford*, 677 F. Supp. 1445, 1457 (D. Mont. 1985) ("An agency may not submit an administrative record to the court which contains only documents favoring the agency's decision and omits documents present in the agency's file which bear upon matters before the court.").

Some opinions do continue to describe discovery of material not supplied by the agency but before it at the time of the decision as an extra-record inquiry, but none of them suggests a belief that such an inquiry is an exception to *Overton Park's* "On the Record

2. *When Agency Action Is Not Adequately Explained in the Record Before the Court*¹⁷⁵

This exception, as well, rests on a misunderstanding. Stark and Wald cite two cases, *Overton Park* itself and a decision of a lower federal court which did not permit the hearing of extra record evidence.¹⁷⁶ The lower federal court case apparently is cited to reiterate *Overton Park's* statements that, if an agency fails to explain its decision adequately, a reviewing court can require testimony of administrative officials as to the reasons for reaching the decision.¹⁷⁷

One could view the explanation as part of the record, and in an expanded sense of the word it is. However, it is not what the *Overton Park* Court had in mind when it announced its requirement of review on the record that was before the agency. The Court separated the record from the explanation, when it stressed that the explanation was to be one revealing the agency's actual reasoning and that it must be supported by a separate set of materials—the record before the agency.¹⁷⁸ In short, the record is an evidentiary record. The explanation is different: it attempts to justify the

Rule.” In these cases, the court seems to be using the word “record” in a secondary non-*Overton Park* sense to mean what the agency provides to the court. *Animal Defense Counsel v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988). *Hodel* was later clarified by *Thompson*, 885 F.2d at 555. One Supreme Court majority opinion describes the record *Overton Park* refers to as “the record the agency presents to the court.” *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). In that case, however, there is no indication that the Court had in mind a situation in which such a record did not reflect the full record. These words seem more a loose and inaccurate paraphrase of *Overton Park* than a readjustment of its notion of record regarding a situation not before the court.

175. This is the first exception on the Stark and Wald list. Stark and Wald, *supra* note 36, at 344-46.

176. *Madison County Bldg. & Loan Ass'n v. Federal Home Loan Bank Bd.*, 622 F.2d 393 (8th Cir. 1980).

177. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

178. *Id.* at 419-20 (finding “post hoc rationalization” by agency of its previous inadequate reasoning and citing *Chenery*, which required agency decision to be justified by its actual reasons at time of its decision). The Court's solution was either for the agency to prepare a contemporaneous explanation of its reasoning or to submit to examination in court as to the reasoning under which it acted. *Id.* The Court's rejection of “post hoc rationalizations” makes this especially clear. *Id.* The Court, however, does realize that giving the agency an opportunity to reconstruct its reasoning in court has its post hoc perils, presumably because such reconstruction may be influenced by post-decision events in ways difficult to winnow out. *Id.*

agency decision by rationally connecting the evidentiary record with applicable law and policy.

If an agency's explanation of its decision is inadequate because it is insufficiently detailed, *Overton Park* says that the agency is permitted to more fully explain why it reached its decision on the evidentiary record before it.¹⁷⁹ The latter deficiency, however, does not permit a trial court to hear evidence that goes beyond the evidence the agency had before it when reaching its decision.¹⁸⁰ The cases dealing with explanations have nothing to do with augmenting the factual record the agency had before it when it reasoned its conclusion. These cases turn, instead, on whether the explanation is both internally logical, sufficiently detailed, and supported by material in the record. In the narrower sense, the explanation must encompass the factual material considered by the agency.

Once this "exception" is understood to permit nothing more than a court's consideration of "evidence" of an agency's actual reasons for a decision (as opposed to new evidence about the world external to the agency's decision process), it is no exception at all. It is not an alteration to, but a reiteration of, the *Overton Park* doctrine.

3. *In Cases Where Agencies Are Sued for a Failure to Take Action*¹⁸¹

If there has been no proceeding—no rulemaking or adjudication—there can be no record of such non-existent proceeding on which to base review. To the extent, however, that an agency's refusal to hold such a proceeding is reviewable, there is a record on which the agency based its decision not to commence such a proceeding. Analogously to *Overton Park*, the record is everything the agency actually considered or was required to consider in deciding not to start an adjudication or rulemaking.¹⁸²

179. *Overton Park*, 401 U.S. at 420.

180. In *Camp v. Pitts*, 411 U.S. 138 (1973), the Court stated:

The proceeding in the District Court was obviously not brought to enforce the Comptroller's decision, and the only deficiency suggested in agency action or proceedings is that the Comptroller inadequately explained his decision. As *Overton Park* demonstrates, however, that failure, if it occurred in this case, is not a deficiency in factfinding procedures such as to warrant the de novo hearing ordered in this case

Id. at 142.

181. This is the sixth exception on the Stark and Wald list. Stark and Wald, *supra* note 36, at 350-51.

182. See *supra* note 157 (describing record for review of agency refusal to grant rulemaking petition).

Despite *Heckler v. Chaney*'s¹⁸³ holding that most agency decisions not to bring enforcement proceedings are not judicially reviewable, refusals to institute rulemaking proceedings, including those to repeal or amend a rule, seem to continue to be subject to judicial review.¹⁸⁴ Presumably, an extremely weak version of arbitrary and capricious review applies.¹⁸⁵ This most likely means that the agency must consider a petition requesting agency action and supporting materials, but that only an outrageously bad decision will be overturned. The agency may exercise less care and the reviewing court should be more forgiving of a decision undercut by such a record.

No one, least of all any of the Justices who decided *Overton Park*, would have been surprised that, if judicial review were to occur in such cases, the reviewing court's scrutiny would not be confined to the record of a proceeding that did not exist. As with *Overton Park*, the relevant record is made up of the materials underlying the actual decision challenged, or, as in this case, the materials supporting the agency decision not to hold a proceeding.¹⁸⁶

4. *Suits Seeking Preliminary Relief*¹⁸⁷

Stark and Wald assert that courts allow extra-record evidence in cases in which injunctive relief is sought against agency action. One of the two cases they cite to in their article looks at prior agency opinions to determine consistency,¹⁸⁸ which is not an excursion into factual material not before the agency at the time it reached its decision. The other cited case involves a petition for preliminary equitable relief.¹⁸⁹

Certainly, when parties seek a temporary restraining order or a temporary injunction against agency action, for example, against enforcement of a rule alleged to be arbitrary and capricious, courts will need to develop a record

183. *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

184. *American Horse Protection Ass'n v. Lyng*, 812 F.2d 1, 4-5 (D.C. Cir. 1987); *WWHT, Inc. v. FCC*, 656 F.2d 807 (D.C. Cir. 1981).

185. *WWHT*, 656 F.2d at 817-18.

186. *See supra* note 157 (discussing record for review of denials to grant petition for rulemaking).

187. This is the eighth exception, "H", on the Stark and Wald list. Stark and Wald, *supra* note 36, at 353-54.

188. Stark and Wald, *supra* note 36, at 354 n.4 (citing *Phillips Petroleum Co. v. United States Dep't of Energy*, 449 F. Supp. 760 (D. Del. 1978), *aff'd sub nom. Standard Oil Co. v. United States Dep't of Energy*, 596 F.2d 1029 (Temp. Emer. Ct. App. 1978)).

189. *GTE Sylvania, Inc. v. Consumer Prod. Safety Comm'n*, 404 F. Supp. 352 (D. Del. 1975).

to answer factual questions made relevant by the judicially created, equitable standards for granting such relief. One such question is the probable magnitude of needless harm, if any, suffered, *pendente lite*, by a challenger, on the assumption *arguendo* that the agency's rule or order proves invalid. To resolve this issue, the District Court may need all sorts of evidence about the plaintiff's circumstances and about the agency actions' effect on him during this limited period. This sort of evidence will never have been fully developed in the agency record. The agency's weighing of costs and benefits to regulated parties is likely to be more general in nature and certainly will not have focused on a period defined by pendency of litigation. Evidence of harm *pendente lite*, however, is not used to challenge the substance of the agency decision, but rather to resolve a preliminary issue unique to the lawsuit.

As to the harm to the public if a rule or order is suspended pending review, the agency record will not always provide an answer. If the court temporarily suspends a valid rule or order, it may need to determine how much harm a suspension will impose on the public. This inquiry overlaps the inquiry involved in reviewing the agency's decision, but it seeks to determine probable harm, not over the life of the rule or order, but for the much shorter period defined by the pendency of the litigation. It is, therefore, beyond the scope of the On the Record Rule and, consequently, is not an exception to it.

Finally, in assessing another factor relevant to preliminary relief—the probability of success on the merits—the court should assess the probable validity of the rule the same way it would on full consideration. This means a cursory look at the record in the *Overton Park* sense. If the court were to look at extra-record evidence to assess this factor, then it would recognize a true exception. Courts do not seem to do this. A court might find such an extra-record inquiry especially compelling if immediate relief is needed and the administrative record has not yet been assembled. Even if a court were to look at extra-record evidence for this purpose, with a commitment to decide the ultimate merits on the record once assembled, it seems fair to describe what the court has done as less than extra-record review. Such a court would have made the best guess it could on materials available to it. The court will not have completely invalidated agency action based on such extra-record material, although it may have suspended it temporarily.

5. *Suits Under NEPA*¹⁹⁰

Stark and Wald view cases under the National Environmental Policy Act (NEPA)¹⁹¹ as falling within a blanket exception to the On the Record Rule.¹⁹² It is true that a great many of the cases allowing extra-record evidence are NEPA cases.¹⁹³ This view, if correct, can best be explained on the ground that NEPA is inconsistent with the APA's requirements as described in *Overton Park* and, therefore, NEPA overrides those requirements.¹⁹⁴ On this view, the values underlying NEPA, for example, requiring that those undertaking projects with significant impact on the environment consider the various environmental costs of those impacts, require that a court compare what an agency actually considered with what it could have considered.¹⁹⁵

Certainly, one might attempt to extend this view beyond NEPA, arguing that courts, in determining the arbitrariness and capriciousness of agency action in general, must determine whether the agency considered relevant factors. The failure of an agency to do so could be determined only by comparing what is in an administrative record with what is not. From a normative perspective, this Article is sympathetic to both this view and the more general exception that Stark and Wald and a number of courts have recognized to accommodate it. From a descriptive point of view, however, the Supreme Court's general model for arbitrary and capricious review is more constraining than the model for review permitted under NEPA.

190. This is the seventh exception on the Stark and Wald list. Stark and Wald, *supra* note 36, at 351-53.

191. Pub. L. No. 91-190, 83 Stat. 852 (1970), 42 U.S.C. §§ 4321-4370b (1994).

192. See French, *supra* note 67, at 945-76 (discussing On the Record Rule in NEPA cases).

193. See, for example, cases discussed in French, *supra* note 67, at 948-49.

194. French, *supra* note 67, at 989-90, seems to take this view, as do some of the cases. See, e.g., *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 466 (5th Cir. 1973) (tying permissibility of excursions beyond administrative record in NEPA cases to specific statutory intent and not to more general exception for all cases). Some courts, however, do allow extra-record evidence in NEPA cases on more generally applicable exceptions, such as to determine whether an agency has considered relevant factors, or to allow a court background for assessing a technically complex case. French, *supra* note 67, at 951-52. These exceptions are listed separately by Stark and Wald and addressed at length in the next PART IV.

195. French, *supra* note 67, at 989-90.

6. *In Cases Where Evidence Arising After the Agency Action Shows Whether the Decision Was Correct or Not*¹⁹⁶

This alleged exception is so flatly at odds with *Overton Park* that, if it exists, it renders the On the Record Rule meaningless. The issue is either whether an agency decision was correct when issued, or whether it would be correct now in light of the new information. Because *Overton Park* clearly chose the historical approach over one which would require judicial reassessment of a decision based on new evidence, there is almost no caselaw supporting this exception.

Great harm may be inflicted by a decision which turns out to be wrong, although it was reasonable when rendered. This problem is likely to be most acute in rulemaking. There are compelling reasons, however, why courts are not given revisory power. First, where a rule or a coercive order in an adjudication proves wrong and harmful, after all the factors are balanced, an agency can be expected to behave responsibly. A motion to reopen an adjudication, a petition to reconsider a failure to bring an enforcement proceeding, and a petition to repeal or amend a rule are appropriate ways to deal with new evidence under an *Overton Park* model. At least in the case of agency failure to make or amend a rule, courts are likely available to grant relief in unconscionable cases.

Stark and Wald cite two cases for this exception for post-decision developments.¹⁹⁷ Cases decided since 1984 clearly state that post-decision information is not to be used to undercut an agency's decision.¹⁹⁸

196. This is the fifth exception on the Stark and Wald list. Stark and Wald, *supra* note 36, at 349-50.

197. *Amoco Oil v. EPA*, 501 F.2d 722, 731 (D.C. Cir. 1974) (noting that new data supplied by EPA helped court reach conclusion that EPA's original predictions had rational basis); *American Petroleum Inst. v. EPA*, 540 F.2d 1023, 1034 (10th Cir. 1976) (stating same as above), *cert. denied*, 430 U.S. 922 (1977). One might view these cases as not suggesting that post decisional studies could be admitted to undercut an agency's predictions, but rather as simply allowing a court in a close case to conclude that agency predictions were not unreasonable. *But see Association of Pac. Fisheries v. EPA*, 615 F.2d 794, 811-12 (9th Cir. 1980) ("If the post decisional studies showed that the Agency proceeded upon assumptions that were entirely fictional or utterly without scientific support, then post-decisional data might be utilized by the party challenging the regulation.").

198. *Rybachek v. EPA*, 904 F.2d 1276, 1296 (9th Cir. 1990); *Rutherford v. United States*, 806 F.2d 1455, 1461 (10th Cir. 1986). *But see Conservation Law Found. v. Clark*, 590 F. Supp. 1467, 1475 (D. Mass. 1984) (allowing supplementation of record to show factors agency should have considered, but did not).

7. *The Last Two Exceptions*

The last two exceptions asserted by Stark and Wald apply to the following situations: "When the agency failed to consider factors which are relevant to its final decision, and when a case is so complex that a court needs more evidence to enable it to understand the issues clearly."¹⁹⁹ A substantial number of courts have found these exceptions necessary—while arguably inconsistent with *Overton Park's* On the Record Rule—to comply sufficiently with other requirements of that case, including the requirement that the court conduct a "thorough, probing, in-depth review." This ensures that a court has considered all the relevant factors.

If an agency has not considered a factor that it should have considered, how can that possibly appear in the administrative record, defined by *Overton Park* as the set of materials considered by the agency? How could the *Overton Park* Court expect that probing review could occur if it were confined to a record, when no record can contain all of the information to test whether it rationally supports a decision? The next section of this Article deals with these questions in detail.

IV. THE "ON THE RECORD RULE" AND ARBITRARY AND CAPRICIOUS RATIONALITY ANALYSIS

A. *The Exceptions for Material Bearing on Relevant Factor Analysis and Technical Background Material*

One would imagine that the thirteen years under *Overton Park's* "hard look" regime would have amply exposed the tensions between requirements for intense review and requirements that such review be limited to the record before the agency. Despite this, Stark and Wald were able to offer relatively few cases in which the pressures for careful review resulted in recognition of new exceptions to the On the Record Rule.²⁰⁰ Stark and Wald claimed that, among other exceptions created by lower federal courts to destroy "any coherent form" of the On the Record Rule, are the

199. These are exceptions "B" and "D" on the Stark and Wald list. Stark and Wald, *supra* note 36, at 346-47, 348-49.

200. For examples of the relevant factors exception, Stark and Wald cite: *Asarco, Inc. v. EPA*, 616 F.2d 1153 (9th Cir. 1980); *Hyatt Grain & Feed, Inc. v. Bergland*, 446 F. Supp. 457, 467 (D. Kan. 1978), *aff'd*, 602 F.2d 929 (10th Cir. 1979), *cert. denied*, 449 U.S. 1073 (1980); and *Conservation Law Found. v. Watt*, No. 83-0506, slip op. (D. Mass. Apr. 25, 1984). Stark and Wald, *supra* note 36, at 346-47.

exceptions dealing with the following situations: "When the agency failed to consider factors which are relevant to its final decision, and when a case is so complex that a court needs more evidence to enable it to understand the issues clearly."²⁰¹

For both the period antedating and that following the Stark and Wald article, it is extremely difficult to determine the number of cases in which a court has either acted on, or at least recognized in dicta, either of these exceptions to the On the Record Rule. In many cases where material is added to the physical record in court, and either or both of these exceptions are cited, courts may have simply allowed an agency to explain its decision, as permitted by *Overton Park*, without adducing factual material which was not before the agency at the time it decided. In many cases, it is especially difficult to separate dicta from the holding. Sometimes it is not clear from the opinions whether an "exception," as understood by a particular court is truly an exception, inconsistent with the On the Record Rule.²⁰²

There are, however, some courts which do go beyond the On the Record Rule in order to perform "relevant factor analysis" as they understand it.²⁰³ One clear example of a case recognizing a true "relevant factors" exception is *Conservation Law Foundation of New England v. Clark*.²⁰⁴ In that case, the court allowed production of affidavits of experts and other material not before the agency at the time of its decision, so that it could determine whether the agency had performed an adequate analysis of relevant factors:

It will often be impossible, especially when highly technical matters are involved, for the court to determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not. The court cannot adequately discharge its duty to engage in a "substantial inquiry" if it is required to take the agency's word that it considered all relevant matters. In the instant case, it is arguable that

201. These are exceptions "B" and "D" on the Stark and Wald list. Stark and Wald, *supra* note 36, at 346-47, 348-49.

202. See, e.g., *AT&T Information Systems, Inc. v. General Services Admin.*, 810 F.2d 1233, 1236 (D.C. Cir. 1987): "Although the record may be supplemented to provide, for example, background information or evidence of whether all relevant factors were examined by an agency. . . we have made clear that the new material should be merely explanatory of the original record." What does "explanatory of the original record" mean?: (1) explanatory of its true contents, or (2) explanatory of how the agency rationalized its decision based on the record. Neither such explanation would be a true exception, inconsistent with *Overton Park's* On the Record Rule.

203. See *infra* notes 204-07 and accompanying text.

204. 590 F. Supp. 1467, 1474-75 & n.5 (D. Mass. 1984), *aff'd sub nom.*, *Conservation Law Found. v. Secretary of Interior*, 864 F.2d 954 (1st Cir. 1989).

the Park Service failed to consider adequately whether extensive ORV use of the Seashore, even if ecologically compatible, was an "appropriate public use" as mandated by the Seashore Act. *Therefore, the court will admit documentary evidence that bears on this issue, including professional articles, expert affidavits, and figures on Cape Cod beach visitation.*²⁰⁵

There are other cases which seem to hold in favor of a true exception for relevant factors purposes²⁰⁶ and still others which may endorse such an exception in dicta.²⁰⁷

205. *Id.* at 1475 (citation omitted) (emphasis added).

206. Listed below are cases in which the court's opinion leaves some reason to believe that evidence was admitted under a relevant factors exception to *Overton Park's* On the Record Rule. Many cases in this list, however, may be explained on other grounds. For example, they may turn on the availability of another exception, such as NEPA's arguably more generous view of the appropriate record for review. These cases include the following: *Love v. Thomas*, 838 F.2d 1059 (9th Cir. 1988) (specifically approving augmentation under relevant factor exception), *aff'g in part and rev'g in part on other grounds*, 668 F. Supp. 1443, 1448-51 (D. Or. 1987) (allowing augmentation of record to evaluate whether agency took into account all relevant factors, looked at data readily available to, but not considered by agency, and described what agency *would* have found if agency had conducted a minimal investigation); *Arkla Exploration Co. v. Texas Oil & Gas Corp.*, 734 F.2d 347, 357 (8th Cir. 1984) (upholding district court's supplementation of record, among other reasons, to determine whether all relevant factors were considered), *cert. denied*, 469 U.S. 1158 (1985); *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160-62 (9th Cir. 1980) (asserting that district court "went too far in consideration of evidence outside the administrative record," but finding extra record material admissible); *Conservation Law Found. v. Clark*, 590 F. Supp. 1467, 1474-75 & n.5 (D. Mass. 1984) (allowing augmentation of record to show factors agency should have considered but did not, including affidavits from professional article experts and figures on Cape Cod beach visitation), *aff'd sub nom.*, *Conservation Law Found. v. Secretary of Interior*, 864 F.2d 954 (1st Cir. 1989); *Hough v. Marsh*, 557 F. Supp. 74, 84 n.12, 86 n.17 (D. Mass. 1982) (finding it necessary to go beyond record to consider material bearing on whether agency sufficiently considered all relevant factors); *Hiatt Grain & Feed, Inc. v. Bergland*, 446 F. Supp. 457, 467 (D. Kan. 1978), *aff'd*, 602 F.2d 929 (10th Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980).

207. *Sierra Club v. United States Dep't of Transp.*, 695 F. Supp. 460, 463-64 (N.D. Cal. 1988) (recognizing relevant factor exception in dicta while using background information exception), *rev'd on other grounds*, 948 F.2d 568 (9th Cir. 1991); *AT&T Information Systems v. GSA*, 810 F.2d 1233, 1235-36 (D.C. Cir. 1981) (recognizing, in dicta, exception to enable court to determine whether agency considered all relevant factors—but not using such exception); *Environmental Defense Fund v. Costle*, 657 F.2d 275, 285-86 (D.C. Cir. 1981) (recognizing exception to exclusivity of administrative record where necessary to determine if agency considered relevant factors); *American Legion v. Derwinski*, 827 F. Supp. 805, 811-12 (D.D.C. 1993) (recognizing relevant factor exception in dicta, but admitting extra-record material as explanation of decision), *aff'd*, 54 F.3d 789, 811 (D.C. Cir. 1995), *petition for cert. filed*, (Aug. 11, 1995); *Southern Utah Wilderness Alliance v. Thompson*, 811 F. Supp. 635, 642 n.4 (D. Utah 1993) (reviewing exceptions to On the Record Rule, including information relevant to whether agency failed to consider "relevant

Likewise the "technical background exception" is not always mistakenly invoked to justify nothing more than a court's assembling the record as required by *Overton Park*. Sometimes new material, not considered by the agency, is considered on judicial review of the agency's decision.²⁰⁸ One clear example is *Arkla Exploration Co. v. Texas Oil & Gas Corporation*.²⁰⁹ Although, in that case, some evidence was admitted simply to complete the record in the *Overton Park* sense, other information, not considered by the agency, was admitted to provide the court with a feel for the issues:

The district court's admission of explanatory evidence served to help the court understand the complex nature of petroleum geology. It also served the related and equally important purpose of educating the court as to the kinds of scientific, technical, and economic data that are relevant to a legally correct [agency] determination.²¹⁰

There are other cases which seem to hold that courts may go beyond the record to provide a court with background information due to the "highly

evidence," but not allowing supplementation); *Saint James Hosp. v. Heckler*, 579 F. Supp. 757, 762 (N.D. Ill. 1984) (discussing plaintiff's arguments and applicable law which argues for admission of litigation affidavits based *inter alia* on need to determine consideration of relevant factors, but refusing to admit them because record was sufficient to decide case), *aff'd*, 760 F.2d 1460 (7th Cir.), *cert. denied*, 474 U.S. 902 (1985); *Abington Memorial Hosp. v. Heckler*, 576 F. Supp. 1081, 1087 n.3 (E.D. Pa. 1983), *aff'd*, 750 F.2d 242 (3d Cir. 1984), *cert. denied*, 474 U.S. 863 (1985) (acknowledging *Asarco* exceptions for background information or information bearing on consideration of relevant factors, but refusing to consider plaintiff's affidavit which went to merits of agency's decision); *No Oilport! v. Carter*, 520 F. Supp. 334, 345-37 (W.D. Wash. 1981) (recognizing relevant factors exception but actually justifying admission based on special nature of NEPA and on need for agency to explain its decision as in *Overton Park*; allowing affidavits to establish adequacy of Environmental Impact Statement and to assist in explication of agency's decision in NEPA case).

208. See *infra* notes 209-12 and accompanying text.

209. 734 F.2d 347, 357-60 (8th Cir. 1984).

210. *Id.*

technical nature of the subject matter,²¹¹ and others which seem to endorse such a true exception in dicta.²¹²

211. Likewise, some cases possibly go beyond the record due to the "highly technical nature of the subject matter." *Love v. Thomas*, 858 F.2d 1347, 1356 (9th Cir. 1988) (specifically approving augmentation under technical background information exception), *aff'g in part and rev'g in part on other grounds*, 668 F. Supp. 1443, 1448-51 (D. Or. 1987) (allowing augmentation of record in order, among other reasons, to provide technical background necessary to evaluate record); *Norwich Eaton Pharmaceuticals, Inc. v. Bowen*, 808 F.2d 486, 489 (6th Cir. 1987) (apparently approving district court's consideration of evidence outside administrative record order to determine whether administrative record was adequate, citing need to assess consideration of relevant factors in highly technical case; arguably dicta because court finds that district court did not use extra-record evidence it admitted and hence any error would have been non-prejudicial), *cert. denied*, 484 U.S. 816 (1987); *Arkla Exploration Co. v. Texas Oil & Gas Corp.*, 734 F.2d 347, 357 (8th Cir. 1984) (upholding district court's supplementation of record to explain record, among other reasons, to explain complex nature of petroleum geology, to educate court as to kinds of scientific, technical, and economic data which were relevant to decision, and ultimately to determine whether all relevant factors were considered, but not to substitute court's judgment on merits), *cert. denied*, 469 U.S. 1158 (1985); *Association of Pac. Fisheries v. EPA*, 615 F.2d 794, 811-12 (9th Cir. 1980) (opinion by Anthony Kennedy, C.J.) (allowing direct court of appeals review of EPA decision, admitting into evidence studies done after agency decision as illuminating original decision); *Sierra Club v. U.S. Dep't of Transp.*, 695 F. Supp. 460, 463-64 (N.D. Cal. 1988) (considering plaintiff's declarations outside record for purposes of background information, but not on merits), *rev'd on other grounds*, 948 F.2d 568 (9th Cir. 1991); *Conservation Law Found. v. Clark*, 590 F. Supp. 1467, 1474-75 & n.5 (D. Mass. 1984), *aff'd sub nom.*, *Conservation Law Found. v. Secretary of Interior*, 864 F.2d 954 (1st Cir. 1989) (allowing augmentation of record to provide technical clarification); *MGPC, Inc. v. Duncan*, 581 F. Supp. 1047, 1059 (D. Wyo. 1984) (allowing introduction of plaintiff's affidavits and endorsing extra-record review for purposes of (1) aiding court in understanding issues, (2) giving court a background with which to better understand record, and (3) helping court to determine adequacy of record), *rev'd on other grounds*, 763 F.2d 422 (Temp. Emer. Ct. App.), *cert. denied sub nom.*, *MGPC, Inc. v. United States Dep't of Energy*, 474 U.S. 823 (1985); *Hiatt Grain & Feed, Inc. v. Bergland*, 446 F. Supp. 457, 467 (D. Kan. 1976), *aff'd*, 602 F.2d 929 (10th Cir. 1979), *cert. denied*, 449 U.S. 1073 (1980).

212. *Franklin Savings Ass'n v. Director, Office of Thrift Supervision*, 934 F.2d 1127, 1137-38 (10th Cir. 1991) (discussing exceptions to On the Record Rule, but limiting review to record which was adequate to allow effective review); *Environmental Defense Fund v. Costle*, 657 F.2d 275, 285-86 (D.C. Cir. 1981) (recognizing exception to exclusivity of administrative record where necessary to provide technical background necessary to understand agency's decision); *American Legion v. Derwinski*, 827 F. Supp. 805, 811-12 (D.D.C. 1993) (recognizing technical background exception in dicta but apparently admitting material only to explain what actually occurred in agency below), *aff'd*, 54 F.3d 789, (D.C. Cir. 1995), *cert. denied*, *American Legion v. Brown*, 116 S. Ct. 697 (1996); *Southern Utah Wilderness Alliance v. Thompson*, 811 F. Supp. 638, 642 n.4 (D. Utah 1993) (reviewing exceptions to On the Record Rule, to include material which explains "technical information in the record," but not allowing supplementation); *Abington Memorial Hosp. v. Heckler*, 576

What is convincing about Stark and Wald's thesis is that the record of an administrative proceeding cannot be the only material that a court considers when it reviews an agency decision for basic rationality under the arbitrary and capricious test. By analogy to Goedel's theorem, it seems that no system, including an administrative record, can determine its own validity.²¹³ The validity of any system must be independently defined by another system whose own validity is either appraised in terms of yet another such system or is a postulate, or, for example, taken on faith.

The requirement that the government act rationally is one such postulate of our legal system, although the courts' vigor in enforcing it varies from context to context.²¹⁴ When action by the legislature is measured against constitutional (substantive due process and equal protection) requirements of rationality, the courts generously presume that such requirements have been satisfied.²¹⁵ The current interpretation of the non-constitutional arbitrary and capricious standard reflects a judgment that agencies should be held to a higher standard than the legislature itself.²¹⁶

At a minimum, a judge must apply techniques of rationality analysis to the material in the record. Some of these, such as ordinary logic and mathematics, are likely to be seen in precisely the same way by all judges. For example, all would concede the irrationality of an agency's action based on a huge mistake in mathematical multiplication or of its reasoning

F. Supp. 1081, 1087 n.3 (E.D. Pa. 1983) (acknowledging *Asarco* exceptions for background information or information bearing on consideration of relevant factors, but refusing to consider plaintiff's affidavit which goes to merits of agency's decision), *aff'd*, 750 F.2d 242 (3d Cir. 1984), *cert. denied*, 474 U.S. 863 (1985); *Saint James Hosp. v. Heckler*, 579 F. Supp. 757, 762 (N.D. Ill. 1984) (discussing plaintiff's arguments and applicable law which argues for admission of litigation affidavits to clarify original information before agency, but refusing to admit them because record was sufficient to decide case), *aff'd*, 760 F.2d 1460 (7th Cir.), *cert. denied*, 474 U.S. 902 (1985); *No Oilport! v. Carter*, 520 F. Supp. 334, 345-37 (W.D. Wash. 1981) (recognizing technical background information exception but actually justifying admission based on special nature of NEPA and on need for agency to explain its decision as required by *Overton Park*).

213. DOUGLAS HOFSTADTER, GOEDEL, ESCHER, BACH: AN ETERNAL GOLDEN BRAID (1988).

214. JOHN E. NOWAK AND RONALD D. ROTUNDA, CONSTITUTIONAL LAW 387-93 (1995) (summarizing rational basis due process and equal protection scrutiny since 1937 and indicating that, except in special cases such as those involving suspect classes or fundamental rights, the constitutional requirements of minimum rationality are easily satisfied).

215. *Id.*; *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981); *Williamson v. Lee Optical*, 348 U.S. 483 (1955); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938).

216. *Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 n.9 (1983).

“if x then y; x but not y.” They might disagree as to the appropriate use of game theory,²¹⁷ probability theory,²¹⁸ or the psychology of bias²¹⁹ in decisionmaking. Still, all of these theories are relevant in analyzing the rationality of an agency decision and all are external to the record. These techniques, particularly their common sense core, are part of the analytical reasoning that each judge may bring to the record. It is, however, implausible to assume that arbitrary and capricious relevant factor analysis is limited to these sorts of considerations. Precisely because they necessarily constitute the mind of the analyst, the use of techniques of rationality in judicial review are so fundamental as to be assumed compatible with the On the Record Rule, without consciousness of that assumption.

The more difficult question is when material about specific states of the world can be considered by reviewing judges, even though such material was not in the administrative record (was not considered by the agency in reaching its decision). Stark and Wald,²²⁰ a few lower court holdings²²¹ and much dicta²²² all suggest that such material is allowed (1) to demonstrate the existence of relevant factors that the agency did not consider, or (2) to provide technical background against which the rationality of the agency’s decision can be assessed.

1. *Relevant Factors*

For a variety of reasons, as Stark and Wald and many cases suggest, the regime of *Overton Park* does not contemplate that the need to pursue relevant factor analysis can trump the On the Record Rule. A principal reason is the clarity of the Rule as articulated in *Overton Park* and the narrowness of the exceptions explicitly recognized.

This conclusion seems particularly potent in light of the Supreme Court’s current view of informal proceedings defined precisely as those involving

217. For a general discussion of this subject, see THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* (1981); see also DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* (1994).

218. LEONARD J. SAVAGE, *THE FOUNDATIONS OF STATISTICS* (1st ed. 1954).

219. For a general discussion of this subject, see *JUDGMENT UNDER UNCERTAINTY AND HEURISTICS* (Daniel Kahneman et al. eds., 1982).

220. See *supra* note 199 and accompanying text.

221. See *supra* note 206 and accompanying text.

222. See *supra* note 207 and accompanying text.

tightly bounded rationality, rather than a more extensive search for the right answer.²²³

An administrative decision is reversible on procedural grounds if the record was not compiled by giving interested parties the minimum notice and input required by the APA.²²⁴ Allowing a court to take evidence to consider the existence of possible relevant factors not developed in the record and not so well known and clearly relevant as to be judicially noticeable seems a violation of *Overton Park's* requirement that administrative action be sustained or struck down on the record of information actually before the agency at the time of its decision.²²⁵ This seems an especially forceful conclusion when combined with *Vermont Yankee's*²²⁶ vision of informal proceedings as minimalist, or not going beyond the limited requirements imposed by the APA.²²⁷ Particularly significant are *Vermont Yankee's* views of appropriate agency procedure in defining appropriate judicial review of informal agency action. Specifically *Vermont Yankee's* view that, on judicial review of informal agency action, the adequacy of the agency record to support its decision should not be judged by comparing that record with the court's guess about the sort of record which would have been generated by procedures more intensive than those required for informal rulemaking:

The court below uncritically assumed that additional procedures will automatically result in a more adequate record because it will give interested parties more of an opportunity to participate in and contribute to the proceedings. But informal rulemaking need not be based solely on the transcript of a hearing held before an agency. Indeed, the agency need not even hold a formal hearing. Thus, the adequacy of the record in this type of proceeding is not correlated directly to the type of procedural devices employed, but rather turns on whether the agency has followed the statutory mandate of the Administrative Procedure Act or other relevant statutes. If the agency is compelled to support the rule which it ultimately adopts with the type of record produced only after a full adjudicatory hearing, it simply will have no choice but to conduct a full adjudicatory hearing prior to promulgating every rule. In sum, this sort of unwarranted judicial examination of

223. If informality has any legitimate province at all it involves those decisions in which the expense of requiring the agency to look closely at all arguably relevant material is not worth the expense of doing so, based on the presumed trustworthiness of the agency in light of what is at stake.

224. 5 U.S.C. § 706 (1994).

225. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971).

226. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 546-48 (1978).

227. *Id.*

perceived procedural shortcomings of a rulemaking proceeding can do nothing but seriously interfere with that process prescribed by Congress.²²⁸

Additionally, *Pension Benefit Guaranty Corp. v. LTV Corp.*,²²⁹ is indicative of the Court's view of the degree of freedom that agencies possess in deciding some matters without help in developing the information. In that case, the Court noted that there is no APA requirement permitting notice of the issues or a right to participate in informal adjudications.²³⁰ To permit *de novo* review to determine if an agency has considered relevant factors guts both *Vermont Yankee* and *Pension Benefits*, by permitting an agency to adopt informal procedures, but for the price of surrender of the protection of the on the record rule. Nothing in those two Supreme Court cases, or any others, suggests such a modification of *Overton Park*.

If the Court did want to make more information available to a reviewing court, presumably it would adjust *Vermont Yankee* and not the On the Record Rule. Relaxing the On the Record Rule to permit consideration of new matter on judicial review would make every agency proceeding a potential nullity from the beginning, even though an agency has considered all of the materials the APA requires it to consider and even though the agency has reasoned impeccably from those materials to its decision. Thus, from any realistic perspective, relaxing the On the Record Rule undoes *Vermont Yankee* by requiring an agency to do more than the APA requires if it wants to avoid having its decision overturned. Most plausibly, then, both the On the Record Rule and *Vermont Yankee* continue to coexist, defining a system of minimal record development, with review for rationality confined to that record.

In short, judicial review of an agency's failure to consider a relevant factor not mentioned in the agency's explanation can occur if (1) there is a failure to consider adequately a matter required to be considered by the agency's statute, (2) a factor is well known and relevant enough to be judicially noticeable as requiring consideration, or (3) if the explanation or the record made by the appropriate agency procedures raises issues irrationally neglected by the agency.²³¹

Review for failure to consider factors is still meaningful even if it is confined to a consideration of the agency's explanation and the record.²³²

228. *Id.* at 547.

229. 496 U.S. 633 (1990).

230. *Id.* at 656.

231. *Id.*

232. This is particularly true given the fact that (1) in an informal rulemaking interested persons—almost anyone—can add to the record material seriously undercutting the agencies

The record may raise a factor not adequately analyzed by the agency in its explanation. This seems more likely in rulemaking where the APA guarantees a right to comment which, in effect, accords all interested persons a right to add to the administrative record material that undercuts an agency's decision.

Inadequately treated relevant factors may appear in an agency's explanation of its decision, or in other parts of the record, submitted to a reviewing court by an agency, even though the factors are not extensively analyzed. An agency's failure to consider the factors raised by the record may be a justification for overturning the decision as arbitrary and capricious, on the grounds that the relevant factors were not explored adequately.

A portion of the famous air bags case, *Motor Vehicle Manufacturers Assoc. v. State Farm Mutual Auto Insurance Company*,²³³ provides an example of an instance in which the Supreme Court overturned administrative action based on an agency's arbitrary and capricious failure to consider adequately factors raised by the record that was before it at the time of the decision.²³⁴

In *State Farm*, the record itself revealed a factor that the Court thought any solid reasoner working under the statute would examine more carefully, although the agency made no attempt to do so.²³⁵ The Court noted that the agency had considered human "inertia" in rejecting passive seatbelts as not sufficiently cost effective,²³⁶ but did not consider that same factor when it concluded that automatic seatbelts were not cost effective to a sufficiently clear and great degree.²³⁷

In an earlier, related proceeding, the agency concluded that lethargy or lack of concern might cause people to fail to make the effort to buckle passive seat belts, making them cost ineffective. In *State Farm*, the Court found the agency's rejection of automatic seat belts—based on the possibility that people would detach them—arbitrary and capricious.²³⁸

and, in the absence of successful participation up front, see 5 U.S.C. § 553(c), (2) can successfully petition to have any grotesquely unsupported rule modified, see 5 U.S.C. § 553(e) and cases cited *supra* note 154, and (3) for fully informal adjudications, the Court views Congress as having determined that the stakes are so low that no one is entitled to notice of the issues before the agency or any right to present views.

233. 463 U.S. 29 (1983).

234. *Id.* at 46, 51-54.

235. *Id.* at 56.

236. *Id.* at 54.

237. *Id.*

238. 463 U.S. 29, 51-54 (1983).

The Court noted that, in this context, it would appear that inertia might well operate, but this time in favor of the effectiveness of the proposed device.²³⁹ Many people might not take the trouble to detach such belts. What was arbitrary and capricious was the agency's failure to explore this factor, already recognized by the agency, which seemed to work against its conclusion.

It is worth noting that the Court did not allow the challenger to explore the inertia issue by augmenting the administrative record during judicial review. Rather, it held that the agency's decision could not stand until the agency satisfactorily explored such issues in a new proceeding.²⁴⁰ This, of course, is the *Overton Park* model. Instead of fixing a defective agency proceeding, the reviewing court struck it down, requiring the agency to act lawfully, or not at all.

This indicates that relevant factor analysis has some real range of operation, even if it is confined to issues raised, in some way, by materials in the administrative record. There is a second way that relevant factor analysis might operate without seriously violating the On the Record Rule. Here, courts could go beyond the record, but only in the standard way they can in on-the-record judicial proceedings: by means of judicial notice.²⁴¹ There may be factors, not discussed in the record submitted to the court by an agency, whose relevance is so powerful and clear that a court may take judicial notice of them as factors not analyzed. The standard is very demanding. For a court to take judicial notice of a fact, it must find that fact "not subject to reasonable dispute."²⁴² The "fact," in relevant factor analysis, would be of a second order, not the correctness of some proposition, but its nearly indisputable surface relevance—making it demand some sort of consideration from any rational decisionmaker. For this sort of relevant factor analysis to be reasonably limited, the "factor" would have to appear relevant to the court on the surface of things, not only after considering technical arguments.

Where such an obviously huge gaffe has occurred, it may well be possible to avoid speaking of an exception to the On the Record Rule. Under such circumstances, it is more likely that the agency actually considered such a major and salient factor, but concluded that it was not worth more detailed consideration. Such consideration means that the factor

239. *Id.*

240. *Id.* at 56-57.

241. For a good discussion of judicial notice, see CHRISTOPHER B. MILLER & LAIRD KIRKPATRICK, EVIDENCE § 210 (1995).

242. FED. R. EVID. 201(b).

is on the record in the *Overton Park* sense, and its rejection should have been described in the materials submitted to the court.

Indeed, there is a respectable case to be made that the agency's failure to consider adopting a rule mandating the use of airbags as a sole method of passive protection—a second failure found arbitrary and capricious in *State Farm*—involved this sort of judicial notice of the powerful surface case for airbags: a case so obvious that the court could take judicial notice of the powerful relevance of the unconsidered factor.

A closer examination of *State Farm*, however, suggests a better explanation, and also suggests how rare such judicial notice may be, if it is allowed at all. In *State Farm*, the Court seems at pains to limit the opinion's significance by stressing that the powerful relevance of an airbag standard was raised by the cumulative record of the agency rulemaking and its precursors:

Nor do we broadly require an agency to consider all policy alternatives in reaching decision. It is true that rulemaking "cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man . . . regardless of how uncommon or unknown that alternative may have been" But the airbag is more than a policy alternative to the passive restraint standard; it is a technological alternative *within the ambit of the existing standard*. We hold only that *given the judgment made in 1977* that airbags are an effective and cost-beneficial life-saving technology, the mandatory passive restraint rule may not be abandoned without any consideration whatsoever of an airbags-only requirement.²⁴³

The emphasized portions of the quotation are designed to stress that the Court is not straying beyond the record in finding a failure to consider relevant factors.

The minimalist view of informal proceedings outlined above, matched with limitation of judicial scrutiny to the administrative record, often will be frustrating for a court required by *Overton Park* to engage in careful, probing review. There is a strong reason for such a limitation, at least based on the assumptions which currently undergird the Court's general philosophy of informal proceedings and judicial review. First, practical rationality (as opposed to rationality as a model or ideal) is always what is known as bounded rationality, or rationality acting on less information than would be available after an infinite inquiry or even an inquiry using all available resources. As Robert Nozick says:

. . . rationality does not require the most extensive sifting of evidence, computational exertion, and so on. That process itself has its costs, and some (*rough*)

243. *State Farm*, 463 U.S. at 48-51.

decision would be made about the amount of time and energy to be put into any particular decision or formation of belief.²⁴⁴

Rough seems the important word for present purposes. For any decision, someone must structure a finite and not an unlimited inquiry. The modern paradigm of administrative law leaves no doubt that agencies' decisions about where to stop the inquiry are largely final.²⁴⁵ The bounded, if extensive and hard to define, administrative record is a metaphor for bounded rationality. Unless courts are to play the role of agencies, the latter must often act on hunches about what to consider, while the former must not disturb them except for fairly serious mistakes.

One could require an agency to give a reason, R1, for no further study of a matter. For example, statistical material showing that drilling a test well in the terrain in question is likely to be unyielding. But must it also give a reason, R2, for believing R1 (an appraisal of the statistical material) and, if so, must it give an R3 as an explanation of R2, then R4 of R3? What is a reasonable place to allow the agency's unarticulated (and perhaps unarticulable) "feel" to break the chain of reasons? Can one give a reason for choosing that place? Even if so, does it make sense to require an explanation?

The above analysis applies to relevant factors which could have been considered at the time of agency decision, but were not sufficiently considered. Suppose, however, that one wishes to attack an agency decision based entirely on material which became available after the agency's decision: for example, a scientific study completed after the agency's decision. On the actual record, the decision passes muster, but on the record as augmented by the report, it would not. The wages of the *Overton Park* appellate review-style model, re-endorsed strongly in *Vermont Yankee*, is that the decision stands.

But what of truly egregious cases in which new material becomes available after the decision. Suppose such material proves that an agency decision is clearly erroneous. Is it conceivable that a court is limited to the record? Certainly it is. By analogy to pure judicial practice, a remedy for

244. ROBERT NOZICK, *THE NATURE OF RATIONALITY* 125 (1993).

245. This tendency makes itself apparent in many facets of the law of administrative procedure. For example, agencies have very broad authority to bypass rulemaking procedures by announcing a new rule in an adjudication (*SEC v. Chenery, Corp.*, 323 U.S. 202-03 (1947)); their decisions not to bring enforcement proceedings are in most instances not judicially reviewable (*Heckler v. Chaney*, 470 U.S. 821, 832 (1985)) and their decisions not to commence a rulemaking proceeding, if reviewable, are subject to extremely forgiving judicial review (*American Horse Protection Ass'n v. Lyng*, 812 F.2d 1, 4-5 (D.C. Cir. 1987)).

such rare cases is to ask for a rehearing of an adjudication, or the repeal or amendment of a rule. The agency's refusal is likely to be judicially reviewable in cases presenting the greatest injustices, or the strongest evidence of inequities.²⁴⁶

2. *Extra-Record "Technical" Factors*

In a number of cases, the lower federal courts have stated that a court, perplexed by the technical nature of an agency's decision, can develop extra-record evidence, but only as background to help it determine the adequacy of the original record.²⁴⁷ Often it is hard to determine from these courts' opinions exactly what is meant by this. In some cases, the technical information seems not to be new factual material, but simply further agency explanation of the materials it considered and how it used the materials to reason its result.²⁴⁸ As analyzed above, this is completely consistent with *Overton Park* and does not involve an excursion beyond the record within the meaning of the Court's On the Record Rule.²⁴⁹

The language used by these courts, however, is often consistent with approval of excursions beyond the record to develop factual material that supports or undercuts an agency's explanation of its decision. In some cases, such excursions have actually been approved:²⁵⁰

To a limited extent, therefore, the post-decision studies can be deemed a clarification or an explanation of the original information before the Agency, and for this purpose it is proper for us to consider them *We do not think it is appropriate, however, for either party to use [such material] as a new rationalization for sustaining or attacking the agencies decision. . . it is inappropriate to rely on the specific conclusions of these studies to show that the [agency's action was] not the product of reasoned decision making.*²⁵¹

246. *American Horse*, 812 F.2d at 4-5 (holding that agency decisions not to commence rulemaking are judicially reviewable unlike most decisions not to commence enforcement proceeding); *WWHT, Inc. v. FCC*, 656 F.2d 807, 817 (D.C. Cir. 1981) (indicating that intensity of judicial scrutiny in review for arbitrary and capricious agency action varies from context to context and that review of agency's decision not to undertake rulemaking is close to minimal end of spectrum of scrutiny).

247. See *supra* notes 210-12 and accompanying text.

248. See *supra* note 210 and accompanying text.

249. See *supra* notes 169-74 and accompanying text.

250. *Association of Pac. Fisheries v. EPA*, 615 F.2d 794, 811-12 (9th Cir. 1980). In this case, the extra-record information not allowed to supplement the record was also post-decision information. *Id.*

251. *Id.*

Is this position coherent? What does it, or could it, possibly mean for a court, in determining the self-sufficiency of a closed record to rationally support a decision, to be helped by extra-record materials? First, if such extra-record materials turn out to make a difference in a court's appraisal of a record's adequacy to support an agency's explanation of its decision, how can it be said that the decision stood or fell based on what was before the agency at the time of its decision? Second, if they can make no difference, they are legally irrelevant. Because there seems to be no third possibility, it appears that there is no justification for their admission in a proceeding for judicial review on the ground that they are just background which will somehow help facilitate a decision wholly based on other materials.

Consider a case in which an agency rule is attacked based upon an argument that the agency decisionmakers misunderstood the meaning of technical words found in studies they relied upon, which significantly supported their rule or order. If the agency concedes its mistake, there should be no difficulty. The court must then assess its significance. If not, perhaps judicial notice will work if the error is glaring on the surface and the agency refuses to confess.

If not, then, conventionally, what remains is a decision which is not obviously arbitrary or unreasonable given the factual record considered by the agency and the agency's interpretation of the statutory goals. One response, as some materials outside of administrative law suggest, might be to allow the reviewing judge to consider the new materials. If this approach is taken, it is important to note what has happened. Data not before the agency has been added to the record with the potential of changing what was a supportable decision to an unsupportable decision or vice versa.

There is only one plausible way to harmonize the On the Record Rule with the use of background information not appearing in the record that originally considered by the agency. This is to recognize that it is inevitable that courts, called on to make judgments of reasonableness or of rationality, bring to the task myriad bits of information which could not possibly be reflected on the record. Some of these bits of information define the techniques of rationality, and some are information about the world to which those techniques apply.

Just as sophisticated students of judicial and jury notice recognize that the reasoning a judge or juror applies to the record in a conventional case

cannot and should not be a *tabula rasa*, this also applies to administrative review for insufficient rationality.²⁵²

A judge's web of beliefs about how the world works is part of the reasoning she brings to judicial review. This operates "inconspicuously and interstitially in the elementary process of judicial reasoning."²⁵³ Some examples are:

. . . fire burns . . . freeways can be crowded with fast moving cars. . . deprivation of oxygen causes death . . . gravity causes things to fall . . . sexual intercourse causes pregnancy . . . threats induce fear . . . love or hate or jealousy can influence behavior²⁵⁴

"Interstitially" and "inconspicuously" are good words to use to describe the process of judgment where the power of syllogisms runs out. To the extent that we simply have a rule of law which posits "if fact A then legal result X," and, if the court articulates that fact A has been established, then there is nothing interstitial and inconspicuous about the process of decision. But the existence of fact A, itself, may involve many hidden, smaller-scale judgments. For example, if fact A is that someone acted with a particular intent, there is no precise algorithm dealing with how to establish it. Myriad factors are relevant. A judge can make some of them conspicuous by citing them in an opinion. But some of which the judge is aware will go unstated, and she may be unaware of others. There is a necessary gap between the articulated premises (which point toward, but do not syllogistically determine, the judge's conclusion) and the judgment that a person had, or did not have, a particular intent.

The decision is shaped by the structure exposed in the opinion to the judgment, but the precise result is not determined exclusively by that structure. By analogy, imagine dropping a paper airplane from a high tower. The position of the tower—like the exposed syllogistic structure of the opinion—puts limits on where the airplane or the decision can go. But, in the gaps between structure and result, what determines the landing place is influenced by too many factors to be clear from inspection, or, perhaps ever to be articulable. It is a combination of thoughts too detailed and fragmentary to describe in an opinion, and, in some cases, present to the conscious mind of the judge only as an inclination to decide in one way or another. To make a judge articulate all conscious assumptions would make a legal opinion an expensive exercise in introspection resembling James

252. MILLER & KIRKPATRICK, *supra* note 232, § 210, at 102.

253. *Id.* § 210, at 104.

254. *Id.* at 103.

Joyce's *Ulysses*. To make a judge unearth all unconscious influences would require something like a psychoanalysis for each leap of judgment.

The more educated and informed they are about the world, the more successful judges are in leaping from the articulated structures to results. Judgments of rationality in judicial review of administrative action can never fully take the form of a syllogism. They combine a judge's peculiar sense of the techniques of rationality with many more facts about the world (evaluative facts) than can appear in an opinion.

This analysis permits a better reading of the exception for technical background information. Such information is material that a judge can amass and allow to influence her in the gaps, but not as an explicit part of her opinion. By definition, this is a part of the mind of a judge that we could not, and would not want to, fully probe. A judge who is also a trained chemist may jump the gap from the articulated premises of her opinion to a conclusion as to the reasonableness of an agency's conclusion—a conclusion quite different from that of a colleague who is not so trained. Not only can we not put an end to this, but we would not want to. Beyond this we could not stop the untrained judge from intensively reading up on chemistry in order to make better guesses in the gaps. What neither the trained chemist judge nor her colleague could do is to use a proposition of chemistry as an articulated premise in her opinion, unless it was part of the record or indisputable and included as judicially noticed.

Permitting a judge to enrich the understanding she will bring to the inevitable, unarticulated parts of conclusions, makes some sense of the technical background exception. Still, it seems somewhat problematic to allow the adversary process to be used for gathering information which, by hypothesis, does not bear directly on the issues which have and will have crystallized in articulate form for explicit resolution. Such issues define relevancy and, thus, normally serve to limit the scope of factfinding at trial. Such an exception makes one wonder what the limits are on a trial as a process of judicial education undefined by specific articulated limits.

CONCLUSION

This Article has offered a view of the Supreme Court's current minimalist vision of (1) the agency procedures required for informal action, (2) the real, but still comparatively slight, level of judicial review appropriate for such informal proceedings, and particularly (3) the status and place of the On the Record Rule in such a system. Although it has been claimed that the On the Record Rule has been riddled with exceptions

created by lower court cases, only two general²⁵⁵ exceptions seem to have a real following among those courts. The exception allowing a reviewing court to consider extra-record evidence in order to determine that an agency has appropriately considered relevant factors is an aberration and is rarely used, though more often recited. The Supreme Court's vision of administrative law, at least since *Overton Park*, has been incompatible with such an exception. More legitimate, if properly limited, is the exception permitting consideration of extra-record materials to provide a reviewing court with the background necessary to assess a highly technical record of agency proceedings. Such extra-record inquiries seem almost inevitable, given the problems of generalist courts attempting to assess the rationality of a great many agency decisions on various technical subjects. The use of such material must, however, be extremely limited. It cannot appear in a reviewing court's opinion as part of the explicit reasoning. Rather, once admitted, it may simply be used only to give a court a feel for the issues.

Why is it so clear that the Supreme Court's view of judicial review of agency action does not permit a court to augment an agency's record with new factual information used explicitly to evaluate the rationality of the agency's decision? In understanding what the Supreme Court currently requires, it seems implausible that *Vermont Yankee* would exempt agencies from more stringent requirements for development of relevant factual material,²⁵⁶ only to permit reviewing courts, *de novo*, to develop the material that an agency missed by using less formal procedures. This implausible view would see *Vermont Yankee* as implicitly repealing *Overton Park's* On the Record Rule in significant ways. The notion would be that, if a court cannot force an agency to use intensive procedures in making its decision, the court can make up for the loss of information in the agency's record by developing the lost information *de novo* in the review proceeding.

There are two reasons why this seems plainly wrong as a description of the current system. First, neither in *Vermont Yankee* nor in any other case has the Court indicated that it is abandoning or even loosening the On the Record Rule. Second, if the Court did want to make more information available to a reviewing court, presumably it would adjust *Vermont Yankee*

255. I exclude the exception for the National Environmental Policy Act cases because it seems understood to be the product of requirements in a specific regulatory act and not a general amendment to the *Overton Park* vision of review. See *supra* note 194 and accompanying text.

256. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978) (prohibiting courts from requiring agencies to use more procedure than required by APA absent compelling circumstances).

and no the On the Record Rule. Relaxing the On the Record Rule to permit consideration of new matter on judicial review would make every agency proceeding a potential nullity from the beginning, even though an agency has considered all of the materials the APA requires it to consider and even though the agency has reasoned impeccably from those materials to its decision. Thus, from any realistic perspective, relaxing the On the Record Rule undoes *Vermont Yankee* by requiring an agency to do more than the APA requires if it wants to avoid having its decision overturned. Most plausibly, then, both the On the Record Rule and *Vermont Yankee* continue to coexist, defining a system of minimal record development, with review for rationality confined to that record.

To describe the current Supreme Court's vision of informal proceedings is, of course, not to agree with it. Compelling reasons of legitimacy require that some responsible Congress legislate to align various agency actions on various subjects with appropriate procedures.²⁵⁷ Far too attenuated is any connection between the original "meaning" of the half-century-old APA and the current regulatory world, which may not be adequately dealt with by the APA's original procedural categories. This is particularly true because the appropriate design of administrative procedure is largely a question for the political process.²⁵⁸ The issue is the optimum balance of agency freedom versus external controls in a wide variety of proceedings involving differing regulatory subjects and differing public and private interests.²⁵⁹

Florida East Coast Railway makes nearly all rulemaking proceedings informal under the APA, regardless of their subjects or the issues involved.²⁶⁰ *Vermont Yankee* generally forbids a court's requiring more procedure than does the APA.²⁶¹ While there are plausible arguments that all rulemaking should be subject to minimalist procedures of no greater intensity than that required by the *Florida East Coast-Vermont Yankee* regime, the diversity of rulemaking activity warrants at least some skepticism that the choice must be between fully formal proceedings under APA sections 556 and 557 and informal proceedings as currently constitut-

257. Unfortunately, I doubt whether the current Congress is capable of mature, deliberative politics on any large scale.

258. See Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit and the Supreme Court*, 1978 SUP. CT. REV. 345, 405-09.

259. *Id.*

260. *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224, 235-38 (1973). It also, strangely, affects the interpretation of individual agency enabling acts so that, unless they are explicit, they are likely to be read as requiring no more procedure than does the APA. *Id.* at 236-42.

261. *Vermont Yankee*, 435 U.S. at 524.

ed under section 553. Perhaps some should be fully formal, some slightly less so, some still less so but as rigorous as section 553 now requires, and some largely or entirely exempt even from the rigors of section 553 as now construed.²⁶²

Adjudications pose similar problems, although they are somewhat ameliorated because due process will sometimes mandate procedures more deftly attuned to the conflicting public and private interests. Although the Supreme Court has not spoken as to informal adjudications, the D.C. Circuit's approach, if it ultimately becomes the national one, renders most such proceedings informal at an agency's option.²⁶³ As to the procedures required under the APA in such an informal agency adjudication, there are almost none. The Supreme Court has spoken in *Pension Benefit Guaranty Corp.*: there is no right to submit arguments or evidence or even to have notice of the issues.²⁶⁴ In review of informal adjudications, as well, *Vermont Yankee* stops a court from requiring more of an agency, regardless of what is at stake, short of due process protected interests.

The regime of *Florida East Coast Railway* and *Vermont Yankee* in applying the 1946 APA to the current world resembles an attempt to stretch a child's old clothes to fit her as an adult. Even with the best effort, new clothes would be preferable. The issues surveyed here—what procedures an agency must follow; what is the appropriate intensity of judicial review; and what materials should a court consult in determining the adequacy of an agency's inquiry and reasoning—would seem to have different answers for different proceedings, answers not always to be found in the original four procedural packages of the APA. For example as to agency proceedings, Justice (then Professor) Scalia proposed an APA that would offer many more discrete packages of procedures than the APA currently provides:

. . . I would settle for an APA that contains not merely three but ten or fifteen basic procedural formats—an inventory large enough to provide the basis for a whole spectrum of legislative compromises without the necessity for shopping elsewhere.²⁶⁵

262. For an earlier similar view, see Scalia, *supra* note 258 and *infra* note 265 and accompanying text.

263. *Chemical Waste Management, Inc. v. EPA*, 873 F.2d 1477, 1479-83 (1989) (according *Chevron* deference to agency's reading of phrases in its enabling act that determine whether it triggers APA's formal set of procedures or its informal set).

264. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 655-56 (1990).

265. Scalia, *supra* note 258, at 408. The reference to three sorts of procedures may seem confusing in light of the existence of four sorts of procedures under the APA: informal adjudication and rulemaking and formal adjudication and rulemaking. However, the APA

This problem of an ill-fitting APA created the pressures that courts felt before *Vermont Yankee* to intensify agency procedure, not only to improve agency functioning, but also to facilitate meaningful judicial review.²⁶⁶ Since these pressures have been pushed back by *Vermont Yankee*, occasionally they have bulged out in a different form in lower court opinions that create exceptions to the On the Record Rule. This pressure is worth acknowledging and, indeed, taking very seriously. It must be difficult for a well-educated, public-spirited federal judge to put her stamp of approval (or disapproval) on agency decisions of important public policy, while feeling terribly uncertain of exactly what she is doing. In a moment of excess, one might even ask if this is an appropriate task for Article III judges. More realistically and much less dramatically, it seems fair to observe that, if federal judges are to be forced to do such precarious guess work, it would help for a reasonably contemporaneous Congress to tell them with more precision how much guess work is required in a variety of regulatory contexts.

nowhere defines a set of procedures for informal rulemaking. 5 U.S.C. § 554 (1994). See *Pension Benefit Guar. Corp.*, 496 U.S. at 655-56 (stating that in informal adjudications, there is no right to submit arguments or evidence or even to have notice of issues).

266. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 541-42 (1978).

