

JUDICIAL REVIEW AND THE “HARD LOOK” DOCTRINE

Patrick M. Garry*

INTRODUCTION

Judicial review of administrative agency actions is governed generally by the Administrative Procedure Act (“APA”).¹ The APA states that administrative rules promulgated through the informal rulemaking process are to be reviewed under the arbitrary and capricious test.² This test has generally been interpreted to be quite deferential to administrative agencies, and was so applied throughout the first several decades following the APA’s enactment.³ However, in the 1970s and 1980s, with decisions like *Citizens to Preserve Overton Park v. Volpe* (hereinafter “*Overton Park*”)⁴ and *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.* (hereinafter “*State Farm*”),⁵ the Court seemed to impose a more heightened standard of judicial review than was provided for in the APA. The Court in *Overton Park*, for instance, declared that judicial review of informal agency action should be “searching and careful” – words that seemed to call for more judicial scrutiny than had been traditionally demanded from the arbitrary and capricious

* Associate Professor, University of South Dakota School of Law, J.D., Ph.D., University of Minnesota.

¹ Administrative Procedure Act of 1946, 5 U.S.C. §§ 551-559 (2000 & Supp. II 2002). Congress enacted the APA as a “working compromise, in which broad delegations of discretion were tolerated as long as they were checked by extensive procedural safeguards.” Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1248 (1982).

² See 5 U.S.C. § 706(2)(A) (2000). The APA basically provides for two types of rulemaking: formal and informal. With formal rulemaking, the APA requires more elaborate or trial-type procedures. See 5 U.S.C. §§ 556, 557. Informal rulemaking, on the other hand, is much less regulated by the APA and is governed by a fairly minimal set of procedures. See 5 U.S.C. § 553.

³ Initially, under the APA, the Court “used an extremely deferential scope of review,” asking only “whether the agency’s decision had some hypothetical rational relationship to the agency’s statutory mission.” 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, 410 (1987). Agency decisions were upheld if they were “conceivably” supported by the record. See *Pac. States Box & Basket Co. v. White*, 296 U.S. 176, 182 (1935). This deferential standard was incorporated into the APA, which directed the judiciary to strike down only those agency actions that were “arbitrary and capricious.” 5 U.S.C. § 706(2)(A); see also Richard J. Pierce & Sidney A. Shapiro, *Political and Judicial Review of Agency Action*, 59 TEX. L. REV. 1175, 1192 (1981).

⁴ *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

⁵ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

test.⁶ In addition, *Overton Park* effectively required agencies to create a record in their informal procedures and to base their decision on that record – a requirement that under the APA had applied only to formal rulemaking and adjudication.⁷ Furthermore, in *State Farm*, the Court solidified the “hard look” doctrine, which required courts to take a more scrutinizing look at informal rulemaking than had been taken under earlier applications of the arbitrary and capricious test.⁸

In response to what appeared to be judicial add-ons to the APA, in terms of procedures or standards of review exceeding those required by the APA, the Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council* (hereinafter “*Vermont Yankee*”) held that reviewing courts could not impose on administrative agencies any procedures beyond those laid out in the APA.⁹ Although *Vermont Yankee* was aimed at stemming the perceived shift of power from the agencies to the courts, the persistence of the hard look doctrine and the *Overton Park* on-the-record requirement seems to contradict the spirit of *Vermont Yankee*.¹⁰ Indeed, with the continued vitality of *Overton Park* and *State Farm*, a creeping escalation of judicial scrutiny of agency behavior appears to be taking place. To many scholars and commentators, this is a desirable result.¹¹ A close judicial scrutiny over the administrative state is needed, according to these scholars and commentators, because agencies very often fail to represent or consider the public interest.¹² Thus, by heightening their scrutiny of agency actions, the courts can help correct and monitor those agencies that have become pawns of the powerful private interests they are charged with regulating.

Pursuant to this mode of thinking, the *Overton Park* and *State Farm* rulings are justified by a purpose larger than mere fidelity to the statutory language of the APA. This purpose involves providing a substantive judicial check on agency power, through which the courts become a sort of partner in the policy-making process, guaranteeing that agency decisions serve the public

⁶ In *Overton Park*, the Court departed from the traditionally deferential standard of review when it overturned a decision by the Department of Transportation to route a highway through urban parkland. In doing so, the Court adopted a standard that was “searching and careful.” 401 U.S. at 416. Later, however, the Court seemed to reject this more heightened standard. See *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 525, 549 (1978) (holding that courts may not impose procedural duties on agencies beyond those provided by the APA). Moreover, in *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983), the Court confirmed that courts should be “most deferential” when reviewing agency actions.

⁷ Gordon G. Young, *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”*, 10 ADMIN. L.J. AM. U. 179, 190 (1996). As Professor Young notes, the role of the record in informal rulemaking, as defined by *Overton Park*, “is exactly that which is generally accorded to more formal and identifiable records produced in formal decisions.” *Id.* at 209.

⁸ In *State Farm*, the Court returned to the more heightened standard announced in *Overton Park*. Adopting a reasoned decisionmaking test, the Court stated that agencies must explain the “rational connection” between their decisions and the facts in the record. 463 U.S. at 43.

⁹ *Vermont Yankee*, 435 U.S. at 546-48.

¹⁰ See *infra* notes 27-32, 65 and accompanying text.

¹¹ See *infra* notes 41, 47, 58 and accompanying text.

¹² See *infra* notes 71-79.

interest. Under such an approach, only by a vigorous judicial review can society ensure that administrative agencies act responsibly and democratically. For these reasons, scholars and commentators often cast *Overton Park* and *State Farm* as reflective of an overarching judicial suspicion and distrust of agencies.¹³ Consequently, as a result of this suspicion and mistrust, courts engage in a judicial review that is much more searching and skeptical than that of the traditionally deferential "arbitrary and capricious" review provided for in the APA.

However, this Article takes a different view of the genesis and reasons for the development of the more scrutinizing standards of review reflected by the hard look doctrine. Instead of seeing the heightened parameters placed on judicial review of agency actions as indicating a broader judicial skepticism of administrative agencies, this Article argues that hard look review is simply an inevitable consequence of the increasing occurrence of judicial review. Unlike many prevailing theories of the hard look doctrine, this Article does not argue that the doctrine is part and parcel of a larger judicial mistrust and suspicion of agencies; nor does this Article argue that hard look review is intended to be a corrective device for an administrative state that fails to provide for adequate public participation or sufficient allegiance to congressional commands. To the contrary, this Article posits a much simpler reason for the elevated standards of judicial review articulated in decisions like *Overton Park* and *State Farm*. These standards are not a sign that courts believe the APA to be an inadequate governor of administrative agencies; rather, they are simply the ingredients of what courts have come to deem necessary for a meaningful process of judicial review. The hard look doctrine is not a matter of agency capture or incompetence, but just a matter of how modern courts have come to conduct judicial review – the result of judges' conceptions of what is needed for a proper judicial review of agency decisions. Thus, the heightened standards of judicial review that have descended from decisions like *Overton Park* and *State Farm* stem from a judge's sense of what is needed to do his or her job adequately, not from any profound suspicion of agencies or any affirmative intent to direct the policy decisions of agencies.

I. JUDICIAL REVIEW OF INFORMAL RULEMAKING

A. *The Rule of Vermont Yankee*

As provided by the APA, the standard of review for informal rulemaking is the arbitrary and capricious test.¹⁴ In the first two decades following enactment of the APA, this test was applied with great deference to administrative agencies.¹⁵ Later, in the early 1970s, as judges began taking a less deferential stance and started imposing additional or "hybrid" procedural requirements on agencies, the Supreme Court intervened and held that courts could not require of administrative agencies anything more than what the APA required. In *Ver-*

¹³ See *infra* notes 75-83.

¹⁴ See 5 U.S.C. § 706(2)(A) (2000).

¹⁵ See Daniel B. Rodriguez, *Jaffe's Law: An Essay on the Intellectual Underpinnings of Modern Administrative Law Theory*, 72 CHI.-KENT L. REV. 1159, 1163 (1997).

mont *Yankee*, the Court held that the APA provided "the maximum procedural requirements which Congress was willing to have the courts impose upon" the informal rulemaking process.¹⁶ In doing so, the Court overruled the growing practice of some courts to place more or greater procedural requirements on informal rulemaking.¹⁷ Opponents of a judicial imposition of "hybrid" procedures argued that such additional requirements undermined the flexibility and efficiency around which informal rulemaking had been designed.¹⁸

Many scholars and commentators argued that *Vermont Yankee's* prohibition of hybrid procedures similarly applied to judicially imposed requirements that an agency explain its decision, examine all objections and relevant factors, and consider any alternatives to its decision.¹⁹ These scholars also argued that, under *Vermont Yankee*, the hard look doctrine was just another procedural obstacle to informal rulemaking.²⁰ According to the Court in *Vermont Yankee*, on judicial review "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."²¹ In overturning the D.C. Circuit's ruling that the agency's procedures were inadequate, Justice Rehnquist's opinion in *Vermont Yankee* chastised the lower court for "fundamentally misconceiv[ing] the nature of the standard for judicial review of an agency rule" and for imposing on the agency "its own notion of which procedures are 'best' or most likely to further some vague, undefined public good."²²

B. *The Evolution of Hard Look Review*

The Court's decision in *Vermont Yankee* occurred amidst a growing judicial tendency to heighten the scrutiny of agency actions. Perhaps the most

¹⁶ 435 U.S. 519, 524 (1978). The Court held that the imposition of more or heightened procedures or standards was beyond the power of the courts. *Id.* at 525, 546.

¹⁷ See, e.g., *Int'l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 649 (D.C. Cir. 1973); Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 352 (1978). "Where agencies follow procedures not required by Section 553, it is often called 'hybrid rulemaking' to distinguish it from both formal rulemaking under sections 556 and 557 of the APA and the more informal procedures in section 553." William Funk, *Rationality Review of State Administrative Rulemaking*, 43 ADMIN. L. REV. 147, 164 (1991).

¹⁸ See, e.g., J. Skelly Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 387-88 (1974).

¹⁹ See, e.g., *Public Sys. v. Fed. Energy Regulatory Comm'n*, 606 F.2d 973, 983-84, 986 (D.C. Cir. 1979).

²⁰ See *Vermont Yankee*, 435 U.S. at 545. The other side of this argument, however, states that the hard look requirement is more substantive than procedural, since it focuses "not on the kind of procedure that an agency must use to generate a record, but rather on the kind of decisionmaking record the agency must produce to survive judicial review." Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 530 (1985). Under this argument, the concern of hard look "is not with the external process by which litigants present their arguments to the agency, but with the internal thought process by which an agency decisionmaker reaches a rational decision." *Id.* Thus, the hard look requirement "can be said to flow not from the APA's procedural dictates, but from its substantive command that agency decisionmaking not be 'arbitrary' or 'capricious.'" *Id.*

²¹ Young, *supra* note 7, at 236.

²² *Vermont Yankee*, 435 U.S. at 547.

noteworthy example of that tendency occurred in *Overton Park*, which has been called the "seminal case to change the meaning of [the] arbitrary and capricious" standard of judicial review of agency action.²³ Contrary to earlier applications of the arbitrary and capricious test, *Overton Park* did not employ a presumption that the agency's decision was supported by the facts; instead, the Court undertook a "searching and careful" inquiry into the factual basis of the decision.²⁴ In addition, *Overton Park* employed a version of the hard look standard of judicial review that was developing in the D.C. Circuit.²⁵ Even though the action at issue was the product of informal adjudication, which had traditionally been accorded great deference under the APA, the Court in *Overton Park* articulated a new standard of judicial review, requiring it to conduct a "substantial inquiry . . . [that does not] shield [the Agency] from a thorough, probing, in-depth review" exploring "whether the decision was based on a consideration of the relevant factors."²⁶

In yet another deviation from the traditional APA treatment of informal agency action, *Overton Park* essentially required agencies to produce the kind of record characteristic of formal proceedings.²⁷ Even though the informal decision in *Overton Park* did not have to be based on the record, and even though no fact findings were required, the Court still ruled that a record was necessary to determine the legality of the agency's action.²⁸ According to the Court, this record should constitute "the full administrative record that was before the Secretary at the time he made his decision."²⁹ While acknowledging that "the APA does not require the agency to create a formal record in informal adjudications," the Court nonetheless insisted that agencies "create some form of a record so that courts can review their actions, and that record must be comprehensive."³⁰

According to Professor Rubin, *Overton Park* illustrates how the courts have effectively imposed additional requirements on the informal processes of the APA.³¹ Although neither a hearing nor a record were required for the sort of decision made in *Overton Park*, the Court in effect required them, based on

²³ Funk, *supra* note 17, at 149. The traditional, and quite deferential, version of the arbitrary and capricious test had been formulated in *Pac. States Box & Basket Co. v. White*, 296 U.S. 176, 186 (1935).

²⁴ *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). Furthermore, the Court tested the agency action by "considering whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.*

²⁵ See, e.g., S. BREYER & R. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY*, 291-309 (1979).

²⁶ *Overton Park*, 401 U.S. at 415-16. This requirement that a reviewing court conduct a thorough, probing, in-depth review contradicts the more deferential standard of review that had previously been used with informal rulemaking. See Young, *supra* note 7, at 190.

²⁷ See Leslie Book, *The Collection Due Process Rights: A Misstep or a Step in the Right Direction?*, 41 *Hous. L. Rev.* 1145, 1172 (2004). As Professor Young notes, an agency's decision "must be adequately supported by the evidentiary record which was before the agency when it acted." Young, *supra* note 7, at 209.

²⁸ *Overton Park*, 401 U.S. at 419-21.

²⁹ *Id.* at 420.

³⁰ Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 *CORNELL L. REV.* 95, 127 (2003).

³¹ *Id.* at 180.

the justification that reviewing courts must have such a record in order to judge the agency's action.³²

Subsequent to *Overton Park*, informal administrative proceedings became much more formalized.³³ Not only did *Overton Park* push the agencies into creating formal-type records, but it also led to a more intense judicial review of informal agency actions.³⁴ Prior to *Overton Park*, the standard of review under the arbitrary and capricious test required only that agency action be supported by a minimal rationality.³⁵ Not surprisingly, under this deferential standard, courts rarely reversed agency decisions.³⁶ But during the 1970s, as reflected in the *Overton Park* decision, a more scrutinizing standard of review began to be used – a standard known as “hard look” review.³⁷

The hard look standard was much more demanding than previous standards and had two principal elements: first, the requirement that agency findings of fact be grounded in the record; and second, the requirement that the agency's ultimate policy choice be reasonable, not just minimally rational.³⁸ Whereas the old minimum rationality test simply required the agency merely to consider the facts and explain its decision, the hard look test demanded that the agencies give “adequate” consideration and “reasoned” explanation.³⁹ The “hard look” standard was also quasi-procedural, encompassing “a set of requirements intended to ensure that the agency itself had taken a hard look at the relevant issues before reaching its decision.”⁴⁰ As Professor Garland describes the development of the hard look doctrine:

As the doctrine developed, the courts demanded increasingly detailed explanations of the agency's rationale; they required specification of the agency's policy premises, its reasoning, and its factual support. In time, a host of other now-familiar elements also became part of the hard look: an agency had to demonstrate that it had responded to significant points made during the public comment period, had examined all relevant factors, and had considered significant alternatives to the course of action ultimately chosen. These requirements of consideration and explanation combined to generate a

³² See *Overton Park*, 401 U.S. at 417, 420.

³³ See Young, *supra* note 7, at 206. This drift toward formalization, however, was somewhat halted by *Vermont Yankee*. *Id.*

³⁴ *Id.* at 207.

³⁵ See Garland, *supra* note 20, at 525. Under this minimum rationality test, courts gave great deference to agency findings, upholding them as long as they were not completely irrational. See, e.g., *Pac. States Box & Basket Co. v. White*, 296 U.S. 176, 186 (1935); *Superior Oil Co. v. Fed. Power Comm'n*, 322 F.2d 601, 619 (9th Cir. 1963); Wright, *supra* note 18, at 391-92.

³⁶ Garland, *supra* note 20, at 525; see also Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1783 (1975).

³⁷ See, e.g., *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

³⁸ Garland, *supra* note 20, at 533-34.

³⁹ *Id.* at 533. Indeed, a number of courts, applying the hard look standard, have reviewed the factual bases for agency decisions in light of “whether those facts . . . by themselves could lead a reasonable person to make the judgment that the Agency has made.” See *Telocator Network of Am. v. FCC*, 691 F.2d 525, 537 (D.C. Cir. 1982); see also *Wold Commc'ns, Inc. v. FCC*, 735 F.2d 1465, 1476 (D.C. Cir. 1984).

⁴⁰ Garland, *supra* note 20, at 525.

kind of paper hearing in informal rulemaking cases, as well as a paper record of the agency's decisionmaking process that could serve as a basis for judicial review.⁴¹

Although the hard look doctrine had been evolving in the D.C. Circuit since the 1960s, Judge Leventhal provided the first significant explanation of the doctrine in his *Greater Boston Television Corp. v. Federal Communications Commission*⁴² opinion. However, after *Overton Park*, lower courts began using a hard look review of both substantive and procedural agency actions.⁴³ Initially, the courts concentrated their hard look review on the procedures used by agencies, which resulted in the imposition of the kind of "hybrid" rulemaking procedures later struck down by *Vermont Yankee*.⁴⁴ Subsequent to *Vermont Yankee*, courts used a hard look review not to examine the procedures employed by agencies, but to analyze the reasoning or decision-making process of the agency.⁴⁵

The Supreme Court reaffirmed its support of the hard look doctrine in *State Farm*, where it struck down a Department of Transportation order rescinding its previously-promulgated passive-restraint regulation requiring automatic seatbelts and airbags.⁴⁶ According to Professor Garland, this deci-

⁴¹ *Id.* at 526-27. Professor Garland outlines hard look as it exists today:

The hard look first requires the agency to articulate the policies that it purports to be furthering. If the statute actually embodies such policies, the hard look then serves to expose the potential alternative means to achieve them. At this point, substantive review takes over, ensuring both that the findings of fact upon which the agency has predicated its action have support in the rulemaking record and that the agency did not simply invent them to justify a predetermined result. Finally, the hard look demands that the agency show that the course it chose was reasonable in light of the relevant policies, alternatives, and facts.

Id. at 554.

⁴² Matthew Warren, *Active Judging: Judicial Philosophy and the Development of the Hard Look Doctrine in the D.C. Circuit*, 90 GEO. L.J. 2599, 2611(2002); see also *Greater Boston*, 444 F.2d at 852-53. Judge Leventhal has been credited as being the principal author of the hard look doctrine. Patricia M. Wald, *Thirty Years of Administrative Law in the D.C. Circuit*, (July 1, 1997), http://www.dcbar.org/for_lawyers/sections/administrative_law_and_agency_practice/wald.cfm (stating that under the hard look mode of review, "the courts must assure themselves that the agency has taken a hard look at all concerns the statute deemed relevant"); see also Warren, *supra* note 42, at 2616 (stating that "Leventhal has been identified as the author of hard look review by administrative law scholars, and he, in fact, referred to himself as the 'sponsor' of the hard look doctrine").

⁴³ See Shapiro & Levy, *supra* note 3, at 419.

⁴⁴ *Id.*

⁴⁵ *Id.* at 420. This was because in *Vermont Yankee* the Court held that reviewing courts could not require agencies to implement procedures beyond those required by statute or the Constitution. *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 419, 546. However, since substantive hard look was closely associated with the judicial imposition of hybrid rulemaking procedures, some commentators argue that *Vermont Yankee* "might be read broadly as a general discouragement of judicial activism in reviewing agency decisions." Shapiro & Levy, *supra* note 3, at 422.

⁴⁶ It was in this 1983 case that "the Supreme Court finally used the substantive hard look standard to overturn an agency action." Warren, *supra* note 42, at 2631. This "substantive hard look doctrine" is different from the procedural-type of hard look that was overturned in *Vermont Yankee*. See Rubin, *supra* note 30, at 140. The distinction between the holding in *State Farm* with that in *Vermont Yankee* is that the hard look approach employed in the former was used to enforce the arbitrary and capricious standard of review, not to impose more procedures on the agency. *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 41-44 (1983). The hard look approach used in *State Farm* incorporated

sion marked a “ringing endorsement” of the hard look doctrine.⁴⁷ In finding the rescission arbitrary and capricious, the *State Farm* Court held that an agency must “articulate a satisfactory explanation for its action,”⁴⁸ provide a “reasoned analysis” for any change in policy,⁴⁹ consider all “relevant factors,”⁵⁰ and explore any “alternative ways of achieving” its objectives.⁵¹

After employing its hard look review, the Court in *State Farm* concluded that, “given the available alternatives, factual record, and congressional purpose, a reasonable administrator would not have made the choice that DOT did.”⁵² Responding to the agency’s argument that such requirements violated *Vermont Yankee*, the Court stated that the necessity to explain a rule and consider alternatives did not “impose additional procedural requirements upon an agency.”⁵³ Consequently, following the *State Farm* decision, reviewing courts began exercising a much more scrutinizing review of agency actions.⁵⁴ These courts have more or less rejected the APA’s implication that they should treat an agency like a legislature.⁵⁵ This approach differed from that used in *Pacific*

and built upon the approach earlier used in *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962), in which the Court overturned an ICC order because it did not “articulate any rational connection between the facts found and the choice made.” *Id.* at 168. In *State Farm*, arbitrary and capricious was defined in part by incorporating the “rational connection” requirement set forth in *Burlington*. *State Farm*, 463 U.S. at 43.

⁴⁷ Garland, *supra* note 20, at 543.

⁴⁸ *State Farm*, 463 U.S. at 43. According to the Court, the problem was not a total absence of reasons for the agency’s decision, it was that the reasons given were “not sufficient to enable the Court to conclude that the rescission was the product of reasoned decisionmaking.” *Id.* at 52. Thus, the explanation requirement became a way for the Court to engage in a more scrutinizing review of the agency’s decisionmaking process.

⁴⁹ *Id.* at 57.

⁵⁰ *Id.* at 43. The Court concluded that the agency had failed to consider adequately all the relevant factors raised by the record. For instance, although it had used the factor of human inertia to reject passive seatbelts as not sufficiently cost effective, the agency had not used that same factor when finding that automatic seatbelts were not cost effective. *Id.* at 54, 56. The Court concluded that the agency’s rejection of automatic seatbelts, because of the possibility that people would detach them, rested on a completely different view of human nature than the one used earlier to conclude that human laziness or indifference might work against the buckling of passive seatbelts. According to the Court, the agency had failed to consider that, given their laziness or indifference, people might not go to the trouble to detach the automatic seatbelts. *Id.* at 51-54.

⁵¹ *Id.* at 48.

⁵² Garland, *supra* note 20, at 548.

⁵³ *State Farm*, 463 U.S. at 50. The Court also responded to the argument that the arbitrary and capricious standard required an agency merely to meet the minimum rationality required of a legislature by the due process clause: “We do not view as equivalent the presumption of constitutionality afforded legislation drafted by Congress and the presumption of regularity afforded an agency in fulfilling its statutory mandate.” *Id.* at 43 n.9.

⁵⁴ See, e.g., *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988) (stating that certain circumstances may justify expanding review beyond the record or permitting discovery; for instance, when the agency fails to adequately explain its action, a court may order further discovery of agency officials so as to discover the reasons for the agency decision).

⁵⁵ Rubin, *supra* note 30, at 140. The Court’s ruling in *State Farm* that an agency could not just rescind an existing regulation without clearly explaining the reasons for that rescission, as well as why the rationale underlying the previous regulation not longer applied, is “a different standard from the one imposed on a legislature, which can repeal a statute without

States Box & Basket Co. v. White,⁵⁶ in which the Court equated agency action with legislative action, insofar as both were to be reviewed under the rational basis test, which held that "if any state of facts reasonably can be conceived that would sustain [an order], there is a presumption of the existence of that state of facts."⁵⁷

II. JUSTIFYING HARD LOOK IN LIGHT OF *Vermont Yankee*

A. *Contradictions Between Doctrines*

The Supreme Court's decisions in *Overton Park* and *State Farm* left a legacy of heightened judicial review of agency action. In *Overton Park*, the Court "did not just permit a reviewing court to demand that an agency provide a reviewing court with . . . a record, it required the agency to do so."⁵⁸ This requirement burdens informal proceedings with basically the same kind of record requirement that exists with formal proceedings, despite the APA's fairly explicit intent to the contrary. While *Overton Park* acknowledged that no formal agency findings were statutorily required, the Court's insistence that its review be based strictly on the facts in front of the agency, as well as on the agency's reasoning process in evaluating those facts, puts great pressure on those agencies to compile detailed and comprehensive explanations for their decisions, regardless of whether those explanations were statutorily required.⁵⁹ Thus, the Court imposed on informal agency action the same requirement demanded of formal actions – e.g., that judicial review be confined to an examination of the record.⁶⁰ Furthermore, in contrast to traditional notions that judicial review of agency actions should be deferential, *Overton Park* requires a "thorough, probing, in-depth review."⁶¹

The overall effect of these heightened requirements, as noted by Professor Young, is that if an agency must support its rule "with the type of record produced only after a full adjudicatory hearing, it simply will have no choice but to

explanation, and is regarded as fully justified if it does so on the basis that the majority of the repealing legislature has a different political affiliation from the majority of the enacting one." *Id.*

⁵⁶ *Pac. States Box & Basket Co. v. White*, 296 U.S. 176 (1935).

⁵⁷ *Id.* at 185. By the time of the *State Farm* decision, the Court had moved beyond a minimum rationality test for agency actions. *State Farm*, 463 U.S. at 43 n.9 (rejecting the agency's argument that the arbitrary and capricious test was equivalent to the minimum rationality test for congressional statutes).

⁵⁸ Young, *supra* note 7, at 190. As Professor Young notes, the role of the record in informal rulemaking, as defined by *Overton Park*, "is exactly that which is generally accorded to more formal and identifiable records produced in formal decisions. *Id.* at 209 (stating that *Overton Park* requires that 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").

⁵⁹ See *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990) (stating that *Overton Park* effectively imposes a procedural requirement in its demand that agencies furnish an explanation that can enable a court to judge the adequacy of the agency's reasoned decision-making process).

⁶⁰ See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971); 5 U.S.C. § 556 (e) (2000).

⁶¹ *Overton Park*, 401 U.S. at 415.

conduct a full adjudicatory hearing prior to promulgating every rule.”⁶² For these reasons, the minimalist view that has traditionally justified and necessitated informal proceedings, incorporating as it does a limited or narrow judicial scrutiny of agencies, is said to contrast sharply with *Overton Park*’s command for the courts to engage in careful, probing and in-depth review.⁶³

The contradictions posed by *Overton Park* were reinforced by *State Farm*. In the wake of *State Farm*, according to Professor Garland, “it is undeniable that courts are applying hard look review with increased rigor.”⁶⁴ This practice of applying hard look review appears to contradict the Court’s decision in *Vermont Yankee*, and indeed some scholars argue that the hard look doctrine is as statutorily unsupported as the type of hybrid rulemaking overturned by *Vermont Yankee*.⁶⁵ As the Supreme Court in *Vermont Yankee* warned:

[I]f courts continually review agency proceedings to determine whether the agency employed procedures which were, in the court’s opinion, perfectly tailored to reach what the court perceives to be the “best” or “correct” result, judicial review would be totally unpredictable. And the agencies, operating under this vague injunction to employ the “best” procedures and facing the threat of reversal if they did not, would undoubtedly adopt full adjudicatory procedures in every instance. Not only would this totally disrupt the statutory scheme, . . . but all the inherent advantages of informal rulemaking would be totally lost.⁶⁶

Numerous commentators have argued that the heightened scrutiny of the hard look practice, which basically requires more support for agency decisions, might indirectly force agencies to employ the sort of additional procedures that *Vermont Yankee* prohibits the judiciary from imposing directly.⁶⁷ Other commentators recognize the distinct possibility that judges will use the heightened scrutiny of hard look as simply an excuse to substitute their own policy judg-

⁶² Young, *supra* note 7, at 236 (arguing that these judicial requirements will seriously interfere with the informal rulemaking process as prescribed by Congress).

⁶³ But this requirement of a “thorough, probing, in-depth review” runs counter to the general expectations prevalent when the APA was enacted in 1946. See Craig N. Oren, *Be Careful What You Wish For: Amending the Administrative Procedure Act*, 56 ADMIN. L. REV. 1141, 1143 (2004). Furthermore, this “thorough, probing, in-depth review” requirement has in turn led to the Court’s demand for a reasoned explanation of agency views—“a requirement not found in the APA’s express terms.” *Id.*

⁶⁴ Garland, *supra* note 20, at 540 (stating that “in sharp contrast to the regulatory experience of prior decades, today the agencies are finding a substantial percentage of their deregulatory decisions overturned for failure to pass the ‘arbitrary and capricious’ test”).

⁶⁵ Paul R. Verkuil, *Judicial Review of Informal Rulemaking: Waiting for Vermont Yankee II*, 55 TUL. L. REV. 418, 419-21 (1981) (arguing that the Court should strike down the practice of hard look review just as it did the practice of demanding additional agency procedures in *Vermont Yankee*). As a law professor, now-Justice Breyer similarly called for such a ruling from the Court. See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 364-65 (1986).

⁶⁶ *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 546-47 (1978).

⁶⁷ See, e.g., Clark Byse, *Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 HARV. L. REV. 1823, 1827 (1978); Alfred S. Neely, IV, *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.: Response and Reaction in the Federal Judiciary*, 14 U. BALT. L. REV. 256, 285 (1985); Stephen F. Williams, “Hybrid Rulemaking” Under the Administrative Procedure Act: A Legal and Empirical Analysis, 42 U. CHI. L. REV. 401, 454-55 (1975).

ments for those of the agency.⁶⁸ Yet despite the somewhat uncertain predictions about the effect of hard look review, it is indisputable that it departs from the traditionally deferential model of judicial review of agency actions. As one scholar notes, "there are numerous decisions that *Vermont Yankee* should have overruled that are still regarded as good law, or that were decided after *Vermont Yankee* and yet are arguably inconsistent with it."⁶⁹

B. Theories of Agency Behavior Underlying the Hard Look Doctrine

To the degree that hard look contradicts the spirit of *Vermont Yankee*, courts and commentators have justified this contradiction in a number of ways. For some courts, the relative lack of judicial constraint on agencies resulting from *Vermont Yankee* is troubling; and this is one reason hard look review continues to thrive, with judges indirectly imposing additional procedural requirements on agencies.⁷⁰ Indeed, the author of the hard look doctrine, Judge Harold Leventhal, saw it as a way in which a supervising court could intervene to correct errant agency behavior.⁷¹ In Leventhal's opinion, there were some instances in which "the minimum requirements of the Administrative Procedure Act may not be sufficient."⁷² Taking this assumption one step further, some scholars argue that without a heightened judicial review, going beyond the deferential approach espoused in *Vermont Yankee*, there is no way to prevent agencies from ignoring the public interest and simply catering to the private interests of those groups and industries they are charged with regulating.⁷³ In other words, the hard look doctrine enables courts to act as "a meaningful check on administrative error and abuse."⁷⁴

At the extreme, the adoption of hard look review reflects a profound judicial mistrust of agencies.⁷⁵ This mistrust is particularly evident in the "capture

⁶⁸ See David M. O'Brien, *Marbury, the APA, and Science-Policy Disputes: The Alluring and Elusive Judicial/Administrative Partnership*, 7 HARV. J.L. & PUB. POL'Y 443, 480 (1984). However, the opposing argument is that under the *State Farm* hard look approach, the focus for review is not the actual agency decision, but rather the reasons given for it. See Shapiro & Levy, *supra* note 3, at 437.

⁶⁹ Rubin, *supra* note 30, at 169 (arguing that the "courts seem to have choked on *Vermont Yankee* because, if taken literally, the decision would leave courts with no means of supervising most rulemaking proceedings").

⁷⁰ See, e.g., *Ober v. EPA*, 84 F.3d 304 (9th Cir. 1996) (overturning EPA decision because it had not allowed certain parties a chance to respond to new information); *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2d Cir. 1977) (overturning FDA rules because the notice of proposed rulemaking did not include certain data).

⁷¹ See *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970).

⁷² *Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 850 (D.C. Cir. 1972) (requiring that the agency provide a more detailed statement of reasons, even though it had met its APA requirement of furnishing a "concise general statement").

⁷³ See, e.g., Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 74-75 (1985); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 226 (1986).

⁷⁴ Shapiro & Levy, *supra* note 3, at 430. As Gary Lawson notes, the conception of administrative agencies under the "capture theory" "viewed the rulemaking process more as a means of checking agency abuses than of facilitating agency expertise. . . ." GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 276 (2004).

⁷⁵ See, e.g., Alfred C. Aman, Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101,

theory” that rose to prominence in the 1970s.⁷⁶ Under this theory, agencies were seen to have been captured by the industries they regulated, thus necessitating the courts to step in as self-appointed guardians of the public interest.⁷⁷ A heightened judicial scrutiny of agencies was seen as a kind of deterrent: judicial reversals or remands, even though relatively rare, would act as a “deterrent to abuse of authority.”⁷⁸ Judge Bazelon, an aggressive advocate of hard look review, saw it as a means of opening up unrepresentational agencies to public scrutiny.⁷⁹ Thus, the way to fix an agency that had been captured by the interests it sought to regulate was to force that agency to open up its deliberations to include representatives of the wider public interest, and then to actually consider that public interest when making a decision. Hard look could accomplish this purpose by making the agency consider all relevant factors and alternatives, hence encouraging the agency to facilitate a wider public participation in its proceedings.⁸⁰

According to Judge Bazelon, courts had to push agencies into providing “genuine opportunities to [the public] to participate in a meaningful way.”⁸¹ In Bazelon’s view, courts should not defer to “the mysteries of administrative expertise.”⁸² Instead, and particularly since modern administrative action involved “fundamental personal interests in life, health, and liberty,” Bazelon believed that the judiciary should exercise “strict judicial scrutiny” so as to protect those fundamental interests from agency abuse.⁸³

1142 (1988); Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1060-61 (1997); Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945-1970*, 53 VAND. L. REV. 1389, 1421 (2000). Some have viewed hard look as a kind of judicial activism in which courts substitute their own substantive policy decisions for those of the agencies. See Scalia, *supra* note 17, at 348, 359.

⁷⁶ See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1681-88 (1975); Merrill, *supra* note 75, at 1067; Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1296 (1986).

⁷⁷ See LAWSON, *supra* note 74, at 257-59.

⁷⁸ Harold Leventhal, *Public Contracts and Administrative Law*, 52 A.B.A. J. 35, 35 (1966). Such judicial scrutiny, as envisioned by the hard look doctrine, would also impose a greater discipline on agencies by forcing them to self-scrutinize their own rationality, motives and thoroughness. See *CBS v. FCC*, 454 F.2d 1018, 1026-27 (D.C. Cir. 1971); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

⁷⁹ See *Ethyl Corp. v. EPA*, 541 F.2d 1, 66, 68 (D.C. Cir. 1976) (Bazelon, J., concurring).

⁸⁰ See Garland, *supra* note 20, at 510.

⁸¹ *Natural Res. Def. Council v. United States Nuclear Regulatory Comm’n*, 547 F.2d 633, 644 (D.C. Cir. 1976), *rev’d*, *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978).

⁸² *Env’tl. Def. Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 597 (D.C. Cir. 1971).

⁸³ *Id.* at 598 (arguing that judicial review should “confine and control the exercise of [agency] discretion”). A less adversarial and suspicious view of administrative agencies held that hard look review was necessary to enforce congressional intent. See *Calvert Cliffs’ Coordinating Comm. v. United States Atomic Energy Comm’n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971).

C. *The Argument That Hard Look Does Not Reflect Judicial Adversity Toward Agencies*

There are scholars who claim that hard look is not contradictory to the spirit of *Vermont Yankee*. According to this argument, when hard look review results in the overturning of an agency decision, it is not because of the quality of the decision but because of the quality of the decisionmaking process.⁸⁴ As one commentator notes, *Overton Park* and the hard look doctrine do not necessarily increase the formality of agency proceedings, since even the traditional form of deferential review "presume[s] the existence of a record of the rulemaking which forms the basis for the judicial review."⁸⁵ Moreover, a judicial requirement that the agency show a process of reasoned decisionmaking may not actually impose on the agency any new procedures to be employed during the rulemaking process.⁸⁶ The agency's explanation of its decision is completely different from the compilation of its evidentiary record; a heightened scrutiny of the former does not necessarily lead to more procedural requirements for the latter.⁸⁷

Even if hard look is inconsistent with *Vermont Yankee*, the rationale behind the hard look doctrine may not be the kind of judicial mistrust of agencies that is incorporated in the "capture theory." If, for instance, such mistrust was the motivating factor behind hard look, it would be expected that courts would use it to rectify perceived agency mistakes or abuses by substituting the courts' own policy decisions for those of the agency. Certainly, according to this train of logic, the courts would not just ask the mistrusted agency to simply try again. But in fact, that often appears to be the case. Instead of ordering agencies to adopt some judicially-mandated action or remedy, the courts have often sent the matter back to the agencies with the instruction to further explain or reconsider their decision.⁸⁸ As Professor Garland argues, when faced with an arbitrary and capricious challenge to agency action, courts "normally

⁸⁴ See Garland, *supra* note 20, at 570.

⁸⁵ Funk, *supra* note 17, at 166.

⁸⁶ See LAWSON, *supra* note 74, at 275. As Lawson explains:

Recall that an informal rulemaking has three major components: (1) the issuance of a notice of proposed rulemaking, (2) the conduct of the rulemaking itself, during which the agency receives comments and formulates its views, and (3) the issuance (or not) of a final rule, along with a statement of basis and purpose for any rule adopted. The holding of *Vermont Yankee*—that federal courts cannot require agencies to use specific procedures during a rulemaking proceeding simply because the courts consider them a good idea—concerns only phase (2) of the informal rulemaking process and is solidly a part of American administrative law. *Vermont Yankee*'s language was certainly broad enough to suggest that courts should stick to the original understanding of the APA with respect to phases (1) and (3) as well. Courts, however, including the Supreme Court, have not read *Vermont Yankee* as broadly as its language permits.

Id.

⁸⁷ See Young, *supra* note 21, at 223. One research study indicates that most of the agency reversals in the D.C. Circuit are due to the agency's failure to give an adequate explanation for its decision, not for a lack of evidence supporting its findings. See Patricia M. Wald, *Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?*, 67 S. CAL. L. REV. 621, 636-38 (1994); Patricia M. Wald, *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 TULSA L.J. 221, 232 n.66 (1996).

⁸⁸ See, e.g., *Natural Res. Def. Council, Inc. v. Train*, 510 F.2d 692, 711 (D.C. Cir. 1975); *Nat'l Org. for Reform of Marijuana Laws v. Ingersoll*, 497 F.2d 654, 660 (D.C. Cir. 1974).

vacate[] the decision and remand[] the matter to the agency for further proceedings.”⁸⁹ Garland claims that this judicial reticence and passivity results from concerns about judicial activism and institutional competence, as well as because the “logical remedy for a failure to satisfy the hard look’s ‘consider and explain’ requirements is merely to remand for further consideration and explanation.”⁹⁰

As evidence of this judicial resistance to intrude “too much” into agency decisions, Professor Richard Pierce has documented the courts’ growing use of remand without vacation.⁹¹ Remand without vacation is a “mechanism by which courts remand back to an agency a decision in circumstances in which the court believes the agency rationale is flawed, yet declines to vacate the agency decision.”⁹² It is often ordered when a court finds, after a hard look review, that the agency’s explanation of its decision is inadequate.⁹³ During the remand period, the agency decision remains in force while the agency gives a second try at articulating an explanation for the decision that will withstand judicial scrutiny.⁹⁴

Remand without vacation is often seen as an in-between remedy: it allows the courts to exercise a heightened scrutiny of the agencies, while at the same time allowing the agencies some freedom to act.⁹⁵ Consequently, its use might suggest that courts, while feeling bound to review an agency decision under a hard look standard, do not necessarily want to intrude too much into the agency process or decision-making. As Professor Levin notes:

One would expect the stereotypical “judicial activist” to be eager to set aside an administrative action that he or she has just found to be unlawful. In contrast,

⁸⁹ Garland, *supra* note 20, at 568 (stating that ordinarily “the court neither precludes the agency from reinstating the same result on remand, nor requires the agency to implement a modified policy or promulgate an alternative”) (citing *Baton Rouge Marine Contractors v. Fed. Mar. Comm’n*, 655 F.2d 1210, 1217 (D.C. Cir. 1981)).

⁹⁰ Garland, *supra* note 20, at 569.

⁹¹ See Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 76-78 (1995).

⁹² Daniel B. Rodriguez, *Of Gift Horses and Great Expectations: Remands Without Vacatur in Administrative Law*, 36 ARIZ. ST. L.J. 599, 600 (2004). For cases invoking remand without vacation on the grounds that the agency’s action is too poorly explained, see *Norinsberg v. USDA*, 162 F.3d 1194, 1199 (D.C. Cir. 1998); *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1492 (D.C. Cir. 1995); *Checkosky v. SEC*, 23 F.3d 452, 462 (D.C. Cir. 1994). The use of remand without vacation seeks to minimize regulatory disruption by leaving the agency’s decision intact during the period when the agency reformulates its explanation and rationale. See, e.g., *La. Fed. Land Bank Ass’n v. Farm Credit Admin.*, 336 F.3d 1075, 1085 (D.C. Cir. 2003); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1047-49 (D.C. Cir. 2002). In addition to avoiding disruption, remand without vacation seeks to avoid creating an “obvious hardship” to the agency. See *Am. Med. Ass’n v. Reno*, 57 F.3d 1129, 1135-36 (D.C. Cir. 1995) (remanding the decision so that the agency can correct its own mistake). As Professor Rodriguez notes, this “error-correction function of remand without vacatur appears prominently in several D.C. Circuit cases over the past decade.” Rodriguez, *supra* note 92, at 616.

⁹³ See Ronald M. Levin, “Vacation” at Sea: *Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 302 (2003).

⁹⁴ See Rodriguez, *supra* note 92, at 616.

⁹⁵ See *id.* at 611-12 (describing the D.C. Circuit’s judge-made device of remand without vacation as an “intermediate device between the ordinary decision to vacate and remand an agency action and the decision to uphold the agency action”).

remand without vacation is at bottom a means of mitigating relief that, in the court's view, might otherwise be overbroad. In that sense, it is an expression of judicial humility.⁹⁶

Under this rationale, hard look review is easier to accept since a heightened judicial review is mitigated by the remand without vacation remedy. Thus, according to its supporters, remand without vacation encourages agency flexibility and freedom, while at the same time providing for judicial scrutiny of the agency decisionmaking process.⁹⁷

However, Professor Rodriguez sees it differently. To him, the device of remand without vacation enables a court to be unduly intrusive into agency decisions, since it provides an essentially cost-free way of overturning the agency.⁹⁸ According to Professor Rodriguez:

The fundamental flaw in the remand without vacatur device is that it creates a remedy that presupposes an activist level of judicial review. . . . Even more problematically, it reinforces this [presupposition] by encouraging the courts to review agency decisions and offer a remedial middle-ground where the agency may be better off with a ground not in the middle, but closer to their preferred place, a place where the agency decision is discretionary and, therefore, not reviewable at all.⁹⁹

Thus, if courts wish to limit the impact of a heightened judicial scrutiny of agency actions, they should do so by limiting the reach of the hard look doctrine, not by relying on a device like remand without vacation which operates only after-the-fact. Alternatively, if there are as many agency failures as indicated by hard look review, then perhaps there is no valid reason for letting agencies off the hook through remand without vacation.

III. UNCOVERING THE REASON FOR HARD LOOK REVIEW

A. *The Inherent Needs of Judicial Review*

The debate continues about the contradiction between hard look review and the spirit of *Vermont Yankee*. It is a debate this Article does not seek to resolve. Nor, for purposes of exploring the basic underlying rationale for the hard look doctrine, does this Article need to formulate a theory of agency behavior, such as the capture theory. Undoubtedly, judges harbor various theories or outlooks regarding the role or shortcomings of administrative agencies in a democratic society, but as will be argued below, these theories do not explain the continued use and prevalence of hard look review. Indeed, an array of models or theories of agency behavior has occupied the courts' attentions over the past several decades, and yet hard look review persists basically

⁹⁶ Levin, *supra* note 93, at 361.

⁹⁷ For these arguments, see Rodriguez, *supra* note 92, at 601.

⁹⁸ See *id.* at 629 (resisting "the notion that the middle-ground device exists to preserve agency flexibility in a world in which searching judicial review of agency reasoning is inevitable") (original emphasis omitted). The problem with seeing remand without vacation as an optimal intermediate device "is that it is in tension with the underlying theory behind hard look review, a theory that is designed to force agencies to engage in more elaborate and synoptic agency decisionmaking." *Id.* at 620.

⁹⁹ *Id.* at 635 (original emphasis omitted).

unchanged. And it is practiced by a range of judges and courts who undoubtedly adhere to a range of theories about agency conduct and competence.

As this Article argues, the reason for the existence of hard look review lies in the very nature of judicial review. It results not necessarily from a heightened suspicion of agencies, but from the inherent needs of reviewing courts. Judge Leventhal, the author of the hard look doctrine, explained that courts were compelled to engage in hard look review simply "because they [were] there."¹⁰⁰

The hard look doctrine essentially states that "an agency must engage in whatever procedure is necessary to enable a reviewing court to carry out its judicial review responsibilities."¹⁰¹ As the *Overton Park* Court explained, a sufficiently reasoned agency "explanation is necessary to facilitate judicial review."¹⁰² The opinion further stated that a "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."¹⁰³ Thus, in the Court's view, the *Overton Park* on-the-record requirement "helps ensure that agency practices when initially considering a matter are sufficient so that courts can adequately review their determinations."¹⁰⁴

In one of the early cases paving the way for the *Overton Park*–*State Farm* hard look doctrine, the Court ordered the agency to provide a more sufficient explanation of its decision, stating that without such an explanation it could not carry out its duty of judicial review.¹⁰⁵ In a later case, which further buttressed the case for hard look, the Supreme Court stated that "courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review" and that "the process of review requires that the grounds upon which the administrative agency acted by clearly disclosed and

¹⁰⁰ Harold Leventhal, *Remarks*, 7 NAT. RESOURCES LAW. 351, 352 (1974) (arguing that Congress commanded the courts to ensure that agency decisions satisfy "the requirement of reasoned decisionmaking").

¹⁰¹ Oren, *supra* note 63, at 1143; *see also* Pension Benefits Guar. Corp. v. LTV Corp., 496 U.S. 633, 654 (1990).

¹⁰² Young, *supra* note 7, at 210. *See also* Pension Benefit Guar. Corp., 496 U.S. at 654 (basing the *Overton Park* requirements in the needs for effective judicial review). According to Professor Young, "[w]hen *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." Young, *supra* note 7, at 214.

¹⁰³ *Id.* at 230.

¹⁰⁴ Book, *supra* note 27, at 1173. The on-the-record requirement is necessary if "a reviewing court is to stay true to its task of genuinely reviewing informal abuse of discretion matters according to *Overton Park's* standards." *Id.* at 1198 (noting that such a requirement is necessary to facilitate judicial review). *See also* Shapiro & Levy, *supra* note 3, at 412 (arguing that through the hard look approach the Court "seeks to put administrative agencies in the same framework that legal process scholars once thought applicable only to courts"); Rubin, *supra* note 30 at 142 (stating that "the courts, in attempting to impose procedural requirements on rulemaking, have turned to the judicial model"). And yet, "imposing this essentially adjudicatory concept on the rulemaking process formalizes it to the point of paralysis." *Id.* at 172.

¹⁰⁵ *See* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197 (1941).

adequately sustained."¹⁰⁶ These cases, along with the legacy of *Overton Park* and *State Farm*, have since led other courts to recognize the hard look doctrine as a vital ingredient in the process of judicial review.¹⁰⁷ Thus, as Professor Peter Strauss observes:

If one could capture in a formula the level and object of judicial scrutiny that would arm the forces of reason within the agencies without encouraging defensive excess, that would be our goal. It is, as it always has been, a matter of the judges being aware of their own limits at the same time as they set limits for others.¹⁰⁸

In explaining the result of *Overton Park*, Gary Lawson states that prior to 1970 the informal agency process produced "virtually nothing that [could] be used as a basis for judicial review."¹⁰⁹ Moreover, since any judicial review of agency action goes directly to a court of appeals, there has been no previous trial-type "adversary proceeding, in the traditional sense, in which the agency's reasoning and assumptions were tested."¹¹⁰ According to Lawson, and as recognized by *Overton Park*, the record created by informal agency action "is wholly unsuited to any form of substantive judicial review."¹¹¹

The hard look doctrine examines what courts need to do to carry out their judicial review, whereas *Vermont Yankee* examines what agencies have to do to carry out their informal rulemaking function. While the latter asks what is sufficient under the APA for agency rulemaking procedures, the former asks what is necessary to conduct the judicial review provided for in the APA. The focus in the hard look doctrine is on the judicial process, not the agency process.

Perhaps it is not surprising that the hard look doctrine developed when and as it did. Indeed, hard look review took hold just as the number of administrative law cases coming to the courts was exploding. And when the courts are called time and again to review agency actions, they will inevitably grow more scrutinizing in their review of those actions. Consequently, the heightened scrutiny of hard look may not be a symptom of some overriding judicial mistrust or suspicion of administrative agencies, it may simply be the result of a judiciary increasingly called upon to review the alleged mistakes of agencies.

B. The Consequences of An Increasing Caseload

The flood of administrative law cases that began coming to the courts in the 1960s and 1970s contrasted sharply with earlier decades. Throughout the 1940s and 1950s, in the wake of the New Deal and the enactment of the APA, judges and scholars "advocated broad deference to administrative agencies and their expertise."¹¹² Indeed, such deference did in fact characterize the judicial

¹⁰⁶ SEC v. Chenery Corp., 318 U.S. 80, 94 (1943).

¹⁰⁷ See, e.g., Sierra Club v. United States Army Corps of Eng'rs, 771 F.2d 409, 413 (8th Cir. 1985) (recognizing that the confused state of the administrative record "makes meaningful review . . . impossible").

¹⁰⁸ Peter L. Strauss, *Considering Political Alternatives to "Hard Look" Review*, 1989 DUKE L.J. 538, 550 (1989).

¹⁰⁹ LAWSON, *supra* note 74, at 276.

¹¹⁰ *Id.* (noting that because judicial review of agency actions bypass the district court level, "[t]here has been trial at which facts and evidence were developed").

¹¹¹ *Id.*

¹¹² Warren, *supra* note 42, at 2601; see also Rodriguez, *supra* note 15, at 1163. The advocates of such deference were primarily political liberals, who believed in the administrative

review of agency decisions throughout these decades.¹¹³ But then, in the 1970s, the dike of deference broke and a flood of administrative law cases hit the courts.¹¹⁴ From 1968 to 1978, Congress enacted more regulatory statutes than had been enacted in the entire previous history of the United States.¹¹⁵ These laws, in turn, led to administrative regulations, which in turn were challenged by a host of consumer, environmental, industry and public interest groups, which in turn led to a flood of administrative litigation in the courts.

During the 1970s, administrative law cases came to dominate the D.C. Circuit's docket.¹¹⁶ In the ten-year period from 1969 to 1979, the number of administrative law cases filed in the D.C. Circuit increased four-fold.¹¹⁷ This increase continued in the 1980s, as court challenges were brought against the deregulation campaign of the Reagan administration. Indeed, one court described the surge in administrative appeals as a "tidal wave" in 1983.¹¹⁸

Of course, this explosion in cases occurred simultaneously with a growing suspicion of agencies. Judges and scholars, particularly liberal judges and scholars, began to see agencies as obstacles to the public interest, and as having been "captured" or seduced by the groups and industries they were charged with regulating.¹¹⁹ However, even though the influence of this "capture theory" has subsided, hard look review continues. Indeed, a logical conclusion might be that the hard look doctrine results not from a pervasive judicial suspicion of agencies, but from the increased caseload and increasing exercise of judicial review over agency actions.

As Professor Garland notes, the theory of agency behavior that reached such ascendancy during the early 1970s is now "on the wane."¹²⁰ This capture

state spawned by the New Deal and who distrusted a conservative judiciary that, early on in the New Deal, tried to thwart the growth of the administrative state. See *id.* at 1164.

¹¹³ See Warren, *supra* note 42, at 2600; Rodriguez, *supra* note 15, at 1175; Schiller, *supra* note 75, at 1421. It was within this climate of deference to administrative agencies that the APA was enacted.

¹¹⁴ In large part, this flood was due to new laws passed by Congress. Between 1966 and 1981, Congress passed 182 administrative statutes and created 24 new regulatory agencies. Wald, *supra* note 42. In comparison, between 1946 and 1965, only 58 new statutes and 8 new agencies had been created. Wald, *Judicial Review*, *supra* note 87, at 225.

¹¹⁵ See Patricia M. Wald et al., *The Contribution of the D.C. Circuit to Administrative Law*, 40 ADMIN. L. REV. 507, 510 (1988).

¹¹⁶ In 1969, for instance, administrative law cases made up only fifteen percent of the D.C. Circuit's docket. See ANNUAL REPORT OF THE DIVISION OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS 184 (1969).

¹¹⁷ See ANNUAL REPORT OF THE DIVISION OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS 199 (1979). In 1979, administrative appeals made up almost half of the entire caseload of the D.C. Circuit. See Warren, *supra* note 42, at 2606.

¹¹⁸ Office of Comm'n of United Church of Christ v. FCC, 707 F.2d 1413, 1443 (D.C. Cir. 1983). Compare this with what the same court had written in 1978 about the number of administrative appeals as constituting a "rising tide." Office of Comm'n of United Church of Christ v. FCC, 590 F.2d 1062, 1069 (D.C. Cir. 1978).

¹¹⁹ See Richard B. Steward, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1681-86 (1975); Frederick B. Davis, *Administrative Law: Today and Tomorrow*, 22 J. PUB. L. 335, 344 (1973); Merrill, *supra* note 75, at 1064. According to Ralph Nader, agencies were cloaked "in secrecy, steeped in bureaucratic labyrinths and surrounded by special interest lobbyists." CENTER FOR STUDY OF RESPONSIVE LAW, WORKING ON THE SYSTEM: A COMPREHENSIVE MANUAL FOR CITIZEN ACCESS TO FEDERAL AGENCIES xiii (1974).

¹²⁰ Garland, *supra* note 20, at 581.

theory, striving as it did to open up agencies to a broader public participation (similar to that which characterizes the legislative arena), led to the judicially-imposed hybrid rulemaking that was eventually prohibited by the Supreme Court in *Vermont Yankee*.¹²¹ Outlasting this hybrid rulemaking, however, has been the hard look doctrine, which requires agency actions to meet the reasoned decision-making test. Because of the hard look approach, agency actions are scrutinized much more than legislative actions; for instance, agency fact-findings can be examined, as can agency policy choices and motives.¹²² Consequently, "and in sharp contrast to past experience, judicial invalidation of informal agency action is no longer a rare event."¹²³ But this may not be because of any overt conflict between agencies and courts. Since the 1960s, judicial review of agency actions has become much more common; indeed, it has become almost institutionalized. And because of this institutionalization, courts are applying judicial models to agencies, since those are the models courts are most accustomed to using – models pertaining to the judicial review of lower court decisions. Within such models, the kind of judicial review that occurs is the kind represented by the hard look doctrine.

Facing the flood of administrative law cases in the late 1960s and early 1970s, the courts did not know exactly how to respond. Traditionally, they had used a legislative model of judicial review, extending great leeway to agency actions. And this leeway occurred because courts were not that accustomed to evaluating the decision-making processes of legislative bodies. But by the 1970s, agencies were no longer seen as akin to legislatures, for obvious reasons. Consequently, in place of the legislative model came the judicial model. Under this model, with agency action cast more in a trial-type setting, courts naturally exerted a more adversarial, scrutinizing review.

CONCLUSION

Prior to, and during the two decades following, passage of the Administrative Procedure Act, judicial review of agency action was quite deferential. This changed in the early 1970s, when judicial review became more scrutinizing. With *Overton Park* and *State Farm*, courts began employing a "hard look" review that examined agency decision-making under a more heightened standard. A number of theories have been offered for this type of review, most of which involve judicial attitudes about proper agency behavior in a democratic society. However, this Article offers a more simple explanation for the heightened scrutiny of hard look review.

The hard look doctrine has evolved from the very nature of judicial review. Facing increasing numbers of administrative law cases, the courts in turn have become less deferential and less of a rubber stamp on agency deci-

¹²¹ *Id.*

¹²² *Id.* at 581; see also *Ctr. for Sci. in the Pub. Interest v. Dep't of the Treasury*, 573 F. Supp. 1168, 1174-75 (D.D.C. 1983); *Bldg. and Constr. Trades Dep't. v. Donovan*, 543 F. Supp. 1282, 1288, 1290 (D.D.C. 1982).

¹²³ *Garland, supra* note 20, at 581-82; see also *Brae Corp. v. United States*, 740 F.2d 1023, 1036, 1050 (D.C. Cir. 1984); *Action on Smoking and Health v. Civil Aeronautics Bd.*, 699 F.2d 1209, 1216-18 (D.C. Cir. 1983).

sions. And so, even though the hard look standards arguably violate the spirit of *Vermont Yankee*, it has nonetheless been used as a necessary ingredient of “meaningful” judicial review. Hard look can thus be seen as inherent in the very process of judicial review. In a way, hard look represents an internal duty owed by the courts to the constitutional function of judicial review, rather than an external duty of the type imposed by the APA on the relationship between the courts and administrative agencies.