Article

Regulatory History and Judicial Review

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The Administrative Procedure Act (APA) requires federal agencies to simply "incorporate in the rules adopted a concise general statement of their basis and purpose" after they receive comments from the public, and the Supreme Court ruled in Overton Park *that courts are to adjudicate whether rules are arbitrary and capricious based on agencies' contemporaneous rationales. Judge-created doctrines incentivize agencies to rely on these "concise" statements to elucidate their rationales, and, as a result, rulemaking preambles have ballooned in size as agencies seek to insulate themselves from critical courts.*

This Article contends that although the APA's statutory requirement is in tension with this "hard look review" jurisprudence, that need not be the case; the latter can and should accommodate the former. It explains how agencies may supplement their rules' preambles with memoranda, emails, and even affidavits to reveal their contemporaneous rationales to the courts. This Article concludes by arguing that doing so will not only ensure compliance with congressional intent but also satisfy the needs of courts and provide efficiencies for agencies.

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INTRODUCTION

In fall 2023, the Securities and Exchange Commission (SEC) suffered a bruising loss over its share repurchase disclosure modernization rule.[1] Enacted to "provide investors with enhanced information to assess the purposes and effects of [share] repurchases," the rule increased disclosure requirements on issuers of publicly traded securities.[2] In the process of promulgating the rule, the SEC published a 102-page, 12-point font double-spaced proposal (21 pages of proposed Code of Federal Regulation (C.F.R.) changes, 81 pages of justification);[3] a 12-page memorandum analyzing the proposal's expected economic effects;[4] evaluated 183 unique comments;[5] and its commissioners and staff held 20 meetings with members of the public.[6] The SEC then published a 209-page final rule that contained 30 pages of finalized C.F.R. and form changes, and 179 pages of text justifying those changes and responding to comments.[7]

This analysis was insufficient for the U.S. Court of Appeals for the Fifth Circuit. A unanimous panel explained (in a mere twenty-six-page opinion) that "[t]he SEC acted arbitrarily and capriciously, in violation of the APA, when it failed to respond to petitioners' comments and failed to conduct a proper cost-benefit analysis."[8] Among the analytical flaws the panel identified were the SEC's failure to "show that opportunistic or improperly motivated buybacks are a genuine problem,"[9] the internal

1. *See* Share Repurchase Disclosure Modernization, Exchange Act Release No. 34-97424, 88 Fed. Reg. 36002 (June 1, 2023).

2. *Id.* at 36007.

3. *See* Share Repurchase Disclosure Modernization, Exchange Act Release No. 34-97424, 88 Fed. Reg. 36002 (proposed Dec. 15, 2021), https://www.sec.gov/files/rules/proposed/2021/34-93783.pdf [https://perma.cc/2S2H-VNG5].

4. *See* Div. of Econ. & Risk Analysis, Comment Memorandum on Proposed Rule to Amend Share Repurchase Disclosure Modernization (Dec. 7, 2022), https://www.sec.gov/comments/s7-21-21/s72121-20152424-320317.pdf [https://perma.cc/2E9E-EK7B].

5. *See Comments on Share Repurchase Disclosure Modernization*, SEC. & EXCH. COMM'N, (last updated Dec. 18, 2025), https://www.sec.gov/comments/s7-21-21/s72121.htm [https://perma.cc/UX8J-NJY6].

6. *See id.*

7. *See* Share Repurchase Disclosure Modernization, 88 Fed. Reg. at 36002.

8. Chamber of Com. v. Sec. & Exch. Comm'n, 85 F.4th 760, 780 (5th Cir. 2023).

9. *Id.* at 778.

contradiction in the agency's theory,[10] and the SEC's failure "to demonstrate that it considered relevant factors in concluding the rule's additional disclosures would impose 'relatively modest [costs] for most issuers.'"[11]

Rebutting these assertions would have been fairly easy for the SEC if it had been given the opportunity to identify internal documents and communications directly on point. Agencies spend thousands or tens of thousands of man-hours writing regulations over the course of several years—many of those hours documented in work product and in communications.[12] They do not invest, or meticulously chronicle, such time and resources where there is no "genuine problem," where the solutions are "internally contradictory," or where they have failed to truly "consider[] relevant factors."[13] Certainly, SEC staff spent significant time concluding there to be a problem, considering the problem, and crafting a tailored solution to the problem, such that the rule cannot truly be considered arbitrary or capricious.[14]

Yet, the SEC lost this challenge to its rulemaking, as do agencies across the federal government all the time. Previous scholarship by one of the authors[15] and, before him, prominent administrative and environmental law scholars examined these occurrences empirically. Professors Thomas Miles and Cass Sunstein compiled and examined a data set of U.S. Courts of Appeals opinions from 1996 to 2006 involving review of Environmental Protection Agency (EPA) and National Labor Relations Board

10. *Id.*

11. *Id.* (quoting Share Repurchase Disclosure Modernization, 88 Fed. Reg. at 36002, 36040).

12. See Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1406 (1992) ("For important rulemaking efforts, an agency usually employs numerous consultants and devotes one or more person-years of agency staff to [regulatory impact analysis] preparation.").

13. *Id.*

14. *See* Appellee's Brief, *Chamber of Com.*, 85 F.4th 760 (No. 23-60255), at 1 (describing staff efforts to consider issues involving share repurchases).

15. *See generally* Anthony Moffa, *Word Limited: An Empirical Analysis of the Relationship Between the Length, Resiliency, and Impact of Federal Regulations*, 20 NEV. L.J. 733 (2020) [hereinafter Moffa, *Word Limited*]; Anthony Moffa, *Strength in Numbers (of Words): Empirical Analysis of Preambles and Public Comments*, 22 NEV. L.J. 99 (2021) [hereinafter Moffa, *Strength in Numbers*].

(NLRB) decisions.[16] Their study concluded that individual panel judges voted to invalidate agency action challenged as arbitrary at a rate of approximately 36%.[17] Similarly, Professor Jason Czarnezki, analyzing ninety-three appellate cases decided between 2003 and 2005, found an overrule rate of 31% for the EPA's decisions.[18] The author's dataset, based on a subset of challenged EPA rules from 1972 to 2022, found an overall failure rate of approximately 45%.[19] The author's prior work also included an average of the figures reported in the prominent empirical studies up to 2022, which produced an overall reversal rate of 46% and an EPA-specific reversal rate of 32.5%.[20] These statistics are consistent with other commentators' and policymakers' conclusions.[21] Though a majority of rules do still seem to survive arbitrariness review, the results (and the trend they reflect) are still worrisome due to the sheer number of agency rules subject to judicial review every year.[22]

These losses are routine and embody the practical consequence of what has become known as the "ossification" of the rulemaking process.[23] Under the Administrative Procedure Act

16. *See generally* Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 766 (2008) (describing this methodology).

17. *See id.* at 767 ("For EPA and NLRB cases, taken together, the overall rate of votes to validate agency decisions challenged as arbitrary is [sixty-four] percent.").

18. *See* Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the* Chevron *Doctrine in Environmental Law*, 79 U. COLO. L. REV. 767, 801 (2008) (describing this finding in Table 4).

19. *See* Moffa, *Word Limited*, *supra* note 15, at 752.

20. *See id.* at 758 n.108.

21. Stephen M. Johnson, *Ossification's Demise? An Empirical Analysis of EPA Rulemaking from 2001-2005*, 38 ENV'T L. 767, 773 (2008) ("When agencies' rules are challenged in court, most empirical studies have found courts invalidate the rules in [thirty to forty percent] of the cases."); *id.* at 769 ("[C]ommentators frequently reference . . . studies that have found agency rules are invalidated in [thirty to fifty percent] of the cases in which they are challenged.").

22. *But see* Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 U. ILL. L. REV. 1111, 1129–30 (2002) (arguing that the judicial review process is less impactful than generally assumed).

23. Scholars have used this term over the last three decades to describe a perceived decline in regulatory activity. *See* Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1418 n.18 (2012) (reporting that the term "ossification" produced over 1,000 hits in a search of documents in Westlaw's "Journals and Law Reviews" database).

(APA), final rules need only be accompanied by "a concise general statement of [a rule's] basis and purpose."[24] On review, the APA asks courts to ensure that rules are not "arbitrary, capricious, [or] an abuse of discretion"[25] based on the "whole record."[26] Yet, in practice, to evaluate whether agencies have complied with this standard, courts overly or even exclusively rely on rules' preambles to determine the adequacy of agencies' analyses,[27] effectively requiring agencies to respond to all relevant comments and explain their nuanced thinking on all aspects of their rules in that "concise general statement." At least one sitting Supreme Court Justice has recognized this discord, writing while on a lower court that "[c]ourts have incrementally expanded those APA procedural requirements well beyond what the text provides."[28]

The D.C. Circuit has, at times, taken this approach to judicial review, invalidating agency rules based almost entirely on the content (or lack thereof) in regulatory preambles.[29] In upholding tobacco companies' challenge to the Food and Drug Administration's rule concerning graphic warnings on cigarette packaging, the court's citations to "the administrative record" were, in actuality, just references to the preambles to the

24. 5 U.S.C. § 553(c).

25. *Id.* § 706(2)(A).

26. *Id.* § 706(2). Hereinafter, references to "the record," "the administrative record," or "the record on judicial review" are meant to refer to this APA concept. In other words, when we discuss internal documents that should properly be construed as part of the record, we are referring to the record that informs a reviewing-court determination as dictated by the APA.

27. *See* Alec Webley, *Seeing Through a Preamble, Darkly: Administrative Verbosity in an Age of Populism and Fake News*, 70 ADMIN. L. REV. 1, 44 (2018) (demonstrating how "the courts more or less accidentally settled on the preamble as the preferred vehicle for justification of agency action").

28. Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 248 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part); *see id.* ("The judicially created obstacle course can hinder Executive Branch agencies from rapidly and effectively responding to changing or emerging issues . . . . The trend has not been good as a jurisprudential matter, and it continues to have significant practical consequences for the operation of the Federal Government and those affected by federal regulation and deregulation.").

29. *See, e.g.*, *id.*; Am. Clinical Lab'y Ass'n v. Becerra, 40 F.4th 616, 624–25 (D.C. Cir. 2022) (citing only to the regulatory preamble and the petitioner's joint appendix in striking down a Department of Health and Human Services rule).

proposed[30] and final rules.[31] This approach to regulatory review is a hard look into the shallow end of the pool; it ignores the deep end, perhaps for fear of lacking the time or expertise to swim.

As a result, agencies publish reams of analysis for significant rules, including by responding in the *Federal Register* to every comment that a court could possibly find relevant and "detailing every possible consideration that goes into their rules' development."[32] The understandable fear of this so-called hard look review—that leaving out some analysis or response will lead to judicial reversal—has agencies in a spiral of continually devoting more resources to each successive statement of basis and purpose, a one-way ratchet that makes it increasingly difficult for agencies to put forward a robust array of rules annually. Thus, the rulemaking process is ossified, or at least slowed to a snail's pace, in response to judicially constructed, extra-statutory requirements for preambles.

It need not be the case that agencies routinely lose rulemaking cases for failing to adequately respond to comments or explain their thinking in *Federal Register* notices. As one of the authors previously noted, courts could "permit[] agencies to provide . . . documentary evidence or affidavits demonstrating that the agencies considered concerns raised by plaintiffs."[33] In an era where agency staff communicate internally via email and memoranda, these documents can shine a light on agencies' contemporaneous rationales in ways that are far better than

30. *See* R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1218 (D.C. Cir. 2012) ("A review of . . . the administrative record makes clear that the graphic warnings are intended to encourage current smokers to quit and dissuade other consumers from ever buying cigarettes. . . . The *only* explicitly asserted interest in either the Proposed or Final Rule is an interest in reducing smoking rates. The Proposed Rule states in its preamble that the government has a 'substantial interest in reducing the number of Americans, particularly children and adolescents, who use cigarettes and other tobacco products.'" (quoting Required Warnings for Cigarette Packages and Advertisements, 75 Fed. Reg. 69525 (proposed Nov. 12, 2010) (to be codified at 21 C.F.R. pt. 1141))).

31. *See id.* ("And the preamble to the Final Rule reiterates the same interest. Although counsel attempted to disclaim this interest at oral argument, the administrative record shows otherwise: the primary objective of the Rule was 'both to discourage nonsmokers from initiating cigarette use and to encourage current smokers to consider quitting.'" (footnote and internal citation omitted) (quoting Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36630 (June 22, 2011) (to be codified at 21 C.F.R. pt. 1141))).

32. Todd Phillips, *A Change of Policy: Promoting Agency Policymaking by Adjudication*, 73 ADMIN. L. REV. 495, 532 (2021).

33. *Id.*

rulemaking preambles drafted solely to help rules survive judicial review.

Indeed, agencies in prior eras did not draft long rulemaking preambles.[34] For a time, courts were to uphold an agency's discretionary action so long as "any state of facts reasonably can be conceived that would sustain it."[35] Later on, agencies used affidavits to support their decisions before reviewing courts. It was only after the D.C. Circuit explained that agencies must conform "to the realities of judicial scrutiny"—namely, that courts will not, "by a laborious examination of the record, formulate in the first instance the significant issues faced by the agency and articulate the rationale of their resolution"—that agencies began developing longer preambles.[36]

Ultimately, the Supreme Court ruled in *Vermont Yankee* that the APA "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures,"[37] but the damage was done. Lower courts found ways around the Court's holding,[38] and rules' opponents soon learned that they could have rules overturned on pre-enforcement review by filing "lengthy and detailed comments that criticized" proposed rules they disliked, which could be used to "undermine[]" rules' bases.[39] If agencies failed to respond to those comments in their "concise general statement[s]," their rules could be thrown out—with the adequacy of responses being determined by courts after rules are finalized and without opportunity to cure deficiencies or demonstrate that they *actually did* review and consider all

34. *See* Moffa, *Strength in Numbers*, *supra* note 15, at 103 (explaining that since the 1970s, the number of *Federal Register* pages per rule "has steadily increased" from about two pages to ten).

35. Borden's Farm Prods. Co. v. Baldwin, 293 U.S. 194, 209 (1934).

36. Auto. Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968).

37. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524 (1978).

38. *See* Gillian E. Metzger, *The Story of* Vermont Yankee*: A Cautionary Tale of Judicial Review and Nuclear Waste* 2 (Columbia L. Sch. Pub. L. Working Paper, Paper No. 05-92, 2005), https://scholarship.law.columbia.edu/faculty_scholarship/1374 [https://perma.cc/G4WW-ABC7] ("[T]he lower courts . . . avoid[ed] a direct confrontation with *Vermont Yankee* by rooting their procedural demands (however implausibly) in the text of § 553.").

39. Richard J. Pierce, Jr., Response, *Which Institution Should Determine Whether an Agency's Explanation of a Tax Decision Is Adequate?: A Response to Steve Johnson*, 64 DUKE L.J. ONLINE 1, 9 (2014).

comments.[40] Ironically, despite these efforts on the part of agencies to fortify their rules from attack, the increasing length of preambles is not empirically connected to better results on judicial review.[41]

Scholars are unsurprisingly split on the topic of long preambles. Some have called for entirely abandoning judicial review of rulemaking. The late Professor Frank Cross, for example, argued that "eliminating judicial review will recognize the reality of the political nature of rulemaking" and "will halt the illegitimate substantive second-guessing of political actions that is little more than reprocessed Lochnerizing."[42] Others have worked to identify solutions that would shrink rulemaking preambles, such as Professors Sid Shapiro and Chip Murphy, who argue that "courts should allow agencies to defend the rationality of their rules based on post hoc rationales first raised during judicial review," akin to a return to rational basis review.[43] Others still support extensive rulemaking preambles' continued existence. Such scholars include Kevin Stack, who argues that long preambles provide important benefits to society by both "convey[ing] the legal justification for" regulations and advising the public about their rules' "meaning, application, and implementation."[44]

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40. *See* Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture,* 59 DUKE L.J. 1321, 1359 (2010) ("The agency's only responsible course of action when faced with these doctrinal demands is to engage in defensive overkill when developing rules."); *see also* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 402 (D.C. Cir. 1973) (holding that the court can review agency decisions to find whether the agency had exercised reasonable care).

41. *See* Moffa, *Strength in Numbers*, *supra* note 15, at 141 ("Looking specifically at the section of a rulemaking designed to protect it from judicial review—the preamble—this study confirmed the lack of a significant relationship. Neither the raw nor relative length of a rule's preamble demonstrated a significant positive correlation with a rule's ability to withstand judicial review. Thus, one can state, based on empirical evidence, that adding content to a rule's preamble, and thereby lengthening its Federal Register entry, has no conclusive effect on the rule's resilience to challenge in court.").

42. Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1327 (1999); *see* Pierce, Jr., *supra* note 39, at 13–16 (arguing that OIRA, not courts, should review regulations).

43. Sidney A. Shapiro & Richard W. Murphy, *Arbitrariness Review Made Reasonable: Structural and Conceptual Reform of the "Hard Look*,*"* 92 NOTRE DAME L. REV. 331, 362 (2016).

44. Kevin M. Stack, *Preambles as Guidance*, 84 GEO. WASH. L. REV. 1252, 1256 (2016); *see* Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 547 (2002)

This Article engages with this debate by addressing the tension between the APA's requirement of a "concise statement of general basis and purpose" and the jurisprudence of hard look review. In our view, the latter can and should accommodate the former as the requirement that agencies provide a "concise" document that advises the public about its rationales flows directly from Congress, whereas contemporary hard look review is a creation of the judiciary.[45] And, indeed, there are avenues by which courts, at the urging of agency and Department of Justice lawyers, may conduct hard look review according to the dictates of the Supreme Court without relying primarily on *Federal Register* preambles.

Our proposal is this: Agencies should use, and courts should allow the use of, internal agency records, such as memoranda and emails, to demonstrate their contemporaneous rationales. Looking to practice and existing scholarship, we suggest officially classifying this material as "regulatory history," as it mirrors the congressional committee documents and testimony that comprise "legislative history."[46] In other words, just as legislative history can illuminate a Congress's contemporaneous reasons for a particular statute, so too can regulatory history for an agency's contemporaneous rationale for a particular rule.

There are two principal reasons for this proposal. The first is that it adheres to congressional intent about judicial review of informal agency actions. When Congress enacted the APA, the role of the notice-and-comment process was simply intended to assist regulators in developing the best policy; as Professor Ron Levin notes, Congress presumed "that any necessary factual support for a rule would be developed in court during the judicial review proceeding"—similar to cases involving constitutional challenges to statutes.[47]

(arguing that the "current standards of arbitrary and capricious review" discourage agency staff from "careless or improper reliance" on "habitual decision rules and other rules of thumb as shortcuts").

45. *See infra* Part III.A.

46. *See* Lars Noah, *Divining Regulatory Intent: The Place for a "Legislative History" of Agency Rules*, 51 HASTINGS L.J. 255, 306 (2000) (encouraging courts to examine "regulatory histories as guides to an agency's original intent").

47. Ronald M. Levin, *The Evolving APA and the Originalist Challenge*, 97 CHI.-KENT L. REV. 7, 17 (2022); *see* Nathaniel L. Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM.

Beyond the benefits that accrue from complying with congressional intent, utilizing agency records in hard look review benefits agencies.[48] Relying on internal records would allow for more efficient use of staff resources, as staff may no longer need to develop and compile extensive preambles. Moreover, reliance on internal records is likely to allow agencies to be more successful in legal challenges, as they will have more material with which to demonstrate their contemporaneous rationales. Finally, the ability to use internal records will likely disincentivize challenges from the industry, as agencies would not be telegraphing their legal arguments to rules' opponents in the preambles.

In effect, we argue for a middle ground between the likes of Shapiro and Murphy on the one side and Stack on the other. We disagree with Stack about the desirability of long preambles. Not only are they contrary to congressional intent, but they also create inefficiencies for agencies. At the same time, we recognize that a return to post hoc rationalizations, as argued by Shapiro and Murphy, is simply antithetical to current Supreme Court jurisprudence. Our proposal allows for courts to conduct hard look review, much as they always have.[49] Because it is largely consistent with administrative law precedent and faithful to the APA, our approach can be implemented, at least in part, by changes to litigation strategy and practice, rather than sweeping doctrinal shifts. Moreover, allowing courts to determine arbitrariness on the basis of contemporaneous rationales is better for transparency, democratic participation, and decision-making.[50]

This Article proceeds in three parts. Part I explains the history of judicial review of agency rulemakings. It describes the APA's minimal rulemaking requirements and the evolution from rational basis to hard look review and contemporaneous explanation requirements. It also discusses how contemporaneous

L. REV. 721, 755 (1975) (describing notice and comment as "conceived of as instruments for the education of the administrator, especially on questions of policy").

48. *See infra* Part III.B.

49. *See infra* Part II.B.

50. *See* Joshua Ulan Galperin, *The Death of Administrative Democracy*, 82 PITT. L. REV. 1, 60 (2020) ("[P]rocedural rules[,] like the demand for contemporaneous reason-giving[,] serve important values[,] such as public engagement and deliberation. Reason-giving is the groundwork for democratic debate, without honest reasons, just as there is no basis for judicial review, there is no structure for democratic debate.").

explanation requirements create negative incentives for agencies. Part II describes our proposal of using internal agency records to facilitate judicial review. It explains that these records may be used by agencies in defensive litigation, discusses how the APA and judicial opinions permit their use, and illustrates the ways in which agency litigators may use them. Finally, Part III describes the benefits expected if agencies use regulatory history, including compliance with congressional intent, efficiencies for agencies, and the satisfaction of courts.

I. CONTEMPORANEOUS EXPLANATION REQUIREMENTS

Over the course of several decades, federal courts transformed judicial review of agency rulemakings from simply requiring agencies to have rational bases to necessitating substantive changes to agencies' operations. Whereas the APA's rulemaking requirements limit final rules' preambles to "a concise general statement of their basis and purpose,"[51] courts have effectively required agencies to "significantly expand their preambles by detailing every possible consideration that goes into their rules' development to allow courts to more easily review the agencies' rationales."[52] As two scholars explained, "the marvelously simple and speedy rulemaking procedures of 1946, when the APA was adopted, bear about as much resemblance to the rulemaking procedures of [today] as an acorn does to a mighty seventy-year-old oak."[53]

This has been described as the "ossification" of rulemaking, wherein "it takes a long time and an extensive commitment of agency resources to use the notice and comment process."[54] In response to hard look review, agencies publish reams of analysis for significant rules, responding in the *Federal Register* to every comment that a court could possibly find relevant;[55] as Professor

51. 5 U.S.C. § 553(c).

52. Phillips, *supra* note 32, at 532.

53. Shapiro & Murphy, *supra* note 43, at 332–33.

54. Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493, 1493 (2012). *But see* Yackee & Yackee, *supra* note 23, at 1421 ("[E]vidence that ossification is either a serious or widespread problem is mixed and relatively weak.").

55. *See* Phillips, *supra* note 32, at 532 (explaining that with hard look review, "courts effectively mandated that agencies significantly expand their preambles by detailing every possible consideration that goes into their rules' development to allow courts to more easily review the agencies' rationales").

Wagner has noted, agencies' "only responsible course of action when faced with these doctrinal demands is to engage in defensive overkill when developing rules."[56]

In two Sections, this Part describes that transformation and the negative incentives it places on rulemaking agencies. Section A explains how this transformation occurred. It starts by articulating the APA's minimal rulemaking requirements and proceeds to explain how courts ultimately demanded that agencies proffer contemporaneously created justifications that could be used as a record. Second, it explains how these changes led to the modern version of judicial review of agency action—a practice that is, in effect, a "hard look" through the narrowest of windows. Section B lays out the logical responses to the doctrinal developments identified in Section A. Those responses could generally be categorized as negative from the standpoint of agency resource management and correct results (in first instance and on review).

A. THE EVOLUTION OF ARBITRARY AND CAPRICIOUS REVIEW

Although Congress enacted minimal rulemaking requirements in the APA, judicial doctrine evolved—for various reasons—to the point where agencies were tasked with creating contemporaneous explanations of their rulemaking rationales. First, agencies' transition from adjudication to rulemaking as the primary mode of agency policymaking meant there was a demand for pre-enforcement review of agencies' regulations, which requires a record.[57] Second, as demand for new procedural rights expanded in the 1970s, the Supreme Court required courts to review rulemakings based on agencies' contemporaneous rationales, not post hoc rationalizations.[58] Finally, the fact that courts authorized direct review to courts of appeals, who were unaccustomed to creating records in the first instance, meant that judges began requiring agencies to provide contemporaneous explanations of their rulemaking rationales.[59]

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56. Wagner, *supra* note 40, at 1359. *But see* Moffa, *Word Limited*, *supra* note 15, at 757 ("[A]lthough shorter rules tended to enjoy more success when reviewed by courts, the length of a given rule is not a particularly accurate predictor of whether or not it will survive judicial review.").

57. *See infra* Part III.A.1.

58. *See infra* Part III.A.2.

59. *See infra* Part III.A.3.

1. The APA's Minimal Rulemaking Requirements

Compared with adjudication, the procedural requirements Congress imposed on rulemakings are incredibly modest. Formal adjudications required trial-like hearings with an impartial adjudicator and a closed record and authorized the issuing of subpoenas and taking of oral and written testimony under oath.[60] Informal rulemakings required only publication of a "[g]eneral notice . . . in the Federal Register";[61] opportunities for the public "to participate in the rule making through submission of written data, views, or arguments";[62] and publication of final rules with "concise general statement of their basis and purpose."[63] Even then, these requirements were mandated for only some agency rulemakings.[64]

The APA also imposed different standards for judicial review of formal and informal agency actions. All agency actions could be reviewed for a variety of claims, including that decisions were arbitrary and capricious, contrary to statute or the Constitution, or imposed without proper procedure.[65] But formal

60. Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 143 (2019) ("Paradigmatic APA formal adjudication involves an evidentiary hearing held before an administrative law judge (ALJ) where parties are entitled to oral arguments, rebuttal, and cross-examination of witnesses.").

61. Administrative Procedure Act § 4(a), 5 U.S.C. § 553(b). These notices were required to include only "(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule [was] proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved." *Id.* The only change since has been a requirement to include "a summary of not more than 100 words in length of the proposed rule, in plain language" on www.regulations.gov. Providing Accountability Through Transparency Act of 2023, Pub. L. No. 118-9, § 2, 137 Stat. 55 (2023) (codified as amended at 5 U.S.C. § 553).

62. Administrative Procedure Act § 4(b).

63. *Id.*

64. *See id.* § 4 (exempting from all requirements rules related to "military, naval, or foreign affairs function[s]" and "matter[s] relating to agency management or personnel or to public property, loans, grants, benefits, or contracts"); *id.* § 4(a) (exempting from notice-and-comment rules for which "all persons subject thereto are named and either personally served or otherwise have actual notice thereof"; "interpretative rules, general statements of policy, rules of agency organization, procedure, or practice"; and when "the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest").

65. *See id.* § 10(e)(B)(1)–(4).

actions, unlike informal ones, could also be reviewed for if they were "unsupported by substantial evidence."[66]

With the enactment of the notice-and-comment process, Congress intended to require agencies to adhere to the best practices in existence at the time of the APA's enactment. When agencies wrote substantive regulations, they tended to engage in consultations and conferences with industry and other affected parties before finalizing their rules, which the notice-and-comment process was intended to replicate.[67] Because some statutes required agencies to hold formal public hearings, and agencies occasionally held hearings voluntarily, the APA created procedures for rulemaking hearings as well.[68]

Accordingly, the notice-and-comment process was intended to assist policymakers in fully understanding the issue at hand; it was in no way intended to create a record for judicial review.[69] The Attorney General at the time explained that the "concise general statement" requirement was "not intended to require an elaborate analysis of rules or of the detailed considerations upon which they are based but is designed to enable the public to obtain a general idea of the purpose of, and a statement of the basic justification for, the rules," effectively "serv[ing] much the same function as the whereas clauses which are now customarily

66. *Id.* § 10(e)(B)(5).

67. *See* ATT'Y GEN., COMM. ON ADMIN. PROC., S. DOC. NO. 77-8, FINAL REPORT (1941) 103–05 (describing how, early in the twentieth century, agencies such as the SEC regularly consulted with members in the private sector and other affected parties "in connection with their rule-making processes").

68. *See id.* at 105–11 (describing the history of the APA's hearing procedure).

69. *See* Nathanson, *supra* note 47, at 755 (explaining that the process was "conceived of as instruments for the education of the administrator, especially on questions of policy"). Including notice-and-comment requirements in the APA was a compromise. Congressional Democrats initially rejected notice-and-comment rulemaking, as such requirements would "inescapably involve expense and a measure of delay." George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1633 (1996). It was one of the largest critics of Roosevelt's administrative procedure—the American Bar Association's Special Committee on Administrative Law—that initially proposed the notice-and-comment process, *see id.* at 1583 (explaining that the ABA's 1937 Procedural Reform Proposal included a new notice and public hearing requirement and that a "less intrusive variation of the requirement, notice[-]and[-]comment rulemaking," was adopted in the APA), and congressional Republicans originally included it in their legislative text, *see id.* at 1635 (explaining the minority bill's inclusion of the notice-and-comment requirement).

found in the preambles of Executive orders."[70] When rules were adjudicated, Congress's "assumption was that any necessary factual support . . . would be developed in court during the judicial review proceeding, as is the norm in litigation in which the constitutionality of a statute is adjudicated."[71]

2. Pre-Enforcement Review

Although agencies have long been permitted to enact new policies through either rulemaking or adjudication,[72] most agencies conducted policymaking until the 1960s by adjudication, in which agency officials adjudicate cases in the same way as judges, and written opinions dictate agencies' binding interpretations of statutes.[73] When agencies did write regulations, they were largely limited to "rules of practice, [which] related to how adjudicatory cases were to be brought before the agency"; the creation of substantive regulations comprised "only a small percentage of agency resources."[74]

To that end, it was at first not a given that courts would hear pre-enforcement challenges to regulations. Before the APA's enactment, judges would hear cases of administrative action only where there was either some legal injury for which a statute provided a cause of action or where equity demanded.[75] Although some statutes contained provisions for challenging agency orders, "the mainstay for review of federal administrative action

70. S. REP. NO. 79-752, at 39, app. B, § 4(b) (1945) (appendix to the Attorney General's Statement Regarding Revised Committee Print of October 5, 1945).

71. Ronald M. Levin, *The Evolving APA and the Originalist Challenge*, 97 CHI.-KENT L. REV. 7, 17 (2022).

72. *See* Sec. & Exch. Comm'n v. Chenery Corp. (*Chenery II*), 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.").

73. *See* Phillips, *supra* note 32, at 506 ("[A]djudication was the primary and default method by which agencies articulated new policies for decades following the creation of regulatory agencies.").

74. Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1145–46 (2001).

75. *See, e.g.*, CBS v. United States, 316 U.S. 407, 419 (1942) (reviewing what were essentially rules because "the expected conformity to them cause[d] injury cognizable by a court of equity"); Houston v. St. Louis Indep. Packing Co., 249 U.S. 479, 480–81 (1919) (reviewing a rule where the plaintiff filed suit "[i]mmediately after the effective date" to have "the regulation be declared to be unauthorized by law, null and void"). *See generally* Ernest A. Young, *Standing, Equity, and Injury in Fact*, 97 NOTRE DAME L. REV. 1885 (2022) (discussing the evolution of equitable claims into modern standing).

in absence of a special statutory method was the equity injunction."[76]

Even after courts of law and equity were combined and Congress enacted the APA, whether courts would grant equitable injunctions was not formulaic; courts frequently turned cases away and had many justifications for doing so.[77] For example, courts held that, for government actions with "far-reaching import," they may only decide cases where there is some particularized harm with "an adequate and full-bodied record."[78] The Supreme Court explained in one case that "[t]he disagreement must not be nebulous or contingent but must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them."[79] In another, the Court held that a government contractor could not challenge an agency's minimum wage determination affecting the contract bidding process because "neither damage nor loss of income in consequence of the action of Government . . . is in itself a source of legal rights in the absence of constitutional legislation recognizing it as such."[80]

This began to change as agencies began more frequently engaging in notice-and-comment rulemakings. Scholars and judges lauded the use of rulemaking for the speed with which rules

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76. 3 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 23.04, at 307 (Supp. 1958). Absent a statutory cause of action, "courts would survey the relevant sources of law to see whether the challenger to government action had a legally protected interest that had allegedly been disregarded." Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1136 (2009).

77. Some justifications are incorporated into modern standing doctrine that requires finality and concrete harm. *See, e.g.*, Rochester Tel. Corp. v. United States, 307 U.S. 125, 131 (1939) (justifying its refusal to decide cases in part because "Congress has been loath to authorize review of interim steps in a proceeding"); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 154 n.4 (Frankfurter, J., concurring) (deeming actions reviewable "when at no future time will its impact on the petitioner become more conclusive, definite, or substantial"); Int'l Longshoremen's Union, Loc. 37 v. Boyd, 347 U.S. 222, 224 (1954) ("Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function."); United Pub. Workers v. Mitchell, 330 U.S. 75, 90 (1947) ("A hypothetical threat is not enough.").

78. Pub. Affs. Assocs., Inc. v. Rickover, 369 U.S. 111, 113 (1962).

79. Pub. Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 244 (1952).

80. Perkins v. Lukens Steel Co., 310 U.S. 113, 125 (1940).

could be promulgated and their ex ante announcement.[81] The 1960s and '70s saw agencies use rulemakings to such an extent that scholars claimed it "an age of rulemaking"[82] that "changed the whole structure of" the administrative state.[83] Congress gave new rulemaking authorities to old agencies and required newly created agencies to make substantive policies through rulemaking.[84]

Courts expanded what qualified as a statutory cause of action and the requirements for standing,[85] and the Supreme Court soon "adopted an approach to reviewability and ripeness that made pre-enforcement review of rules presumptively available."[86] In *Abbott Laboratories v. Gardner*, drug manufacturers brought pre-enforcement challenges against rules issued by the Food and Drug Administration.[87] The Court made two pronouncements that helped to open the floodgates to pre-enforcement challenges. First, it held that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review," flipping the prior presumption of permitting judicial review only when Congress explicitly intended (or when equity so required).[88] Second, it held that agencies' notice-and-comment rulemakings constitute "final

81. *See, e.g.*, KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969) ("[R]ules make for evenhandedness, because creation of rules usually is relatively unemotional, and because decision-makers seldom err in the direction of excessive rigidity when individualization is needed."); Warren E. Baker, *Policy by Rule or Ad Hoc Approach—Which Should It Be?*, 22 LAW & CONTEMP. PROBS. 658, 662 (1957) ("[I]t is obviously desirable to avoid, if possible, the harsh effect of *retroactive* application of agency policy inherent in the case-by-case method."); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 944–45 (1965) (describing how allowing agencies to formulate rules using the facts of adjudications means those rules are more likely to be upheld when challenged in court).

82. J. Skelly Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 375 (1974).

83. William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 38–39 (1975).

84. *See* Schiller, *supra* note 74, at 1147–49 (2001) (describing how Congress in the late 1960s and early '70s gave new and traditional agencies rulemaking functions).

85. *See* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 179–92 (1992) (discussing the evolution of standing during this era).

86. Shapiro & Murphy, *supra* note 43, at 339.

87. 387 U.S. 136 (1967).

88. *Id.* at 141 (quoting Rusk v. Cort, 369 U.S. 367, 379–80 (1962)).

agency action" and are therefore subject to challenge under the APA.[89] The rulemaking in *Abbott Laboratories* posed a "purely legal" issue for which courts needed not wait for the development of facts applicable to individual parties,[90] and it expected regulated entities "to make significant changes in their everyday business practices," lest they be "quite clearly exposed to the imposition of strong sanctions."[91] No enforcement action was necessary to make the agency processes "final." Accordingly, after *Abbott Laboratories*,

> Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct . . . with serious penalties attached to noncompliance, access to the courts . . . must be permitted, absent a statutory bar or some other unusual circumstance.[92]

The ultimate result of the *Abbott Laboratories* conclusion—that regulations can be subject to pre-enforcement review—is that there must be *some* record for courts to review, be it one created by the agencies or by courts in the first instance.

3. Review of Contemporaneous Rationales

From the rise of the administrative state into the 1970s, courts—when they *did* hear such cases—frequently upheld agency regulations unless they were "inconsistent with the statutes or . . . unreasonable or inappropriate."[93] Prior to the APA's enactment, agencies were required to comply with organic statutes' promulgation requirements and nothing more,[94] and

89. *Id.* at 151; *see* 5 U.S.C. § 704 ("[F]inal agency action for which there is no other adequate remedy in a court [is] subject to judicial review.").

90. *Abbott Laboratories*, 387 U.S. at 149. The question was "whether the statute was properly construed by the Commissioner to require the established name of the drug to be used every time the proprietary name is employed." *Id.*

91. *Id.* at 154.

92. *Id.* at 153.

93. United States v. Morehead, 243 U.S. 607, 614, (1917); *see* United States v. Smull, 236 U.S. 405, 409 (1915) ("[T]he Land Department has authority to make regulations which are not inconsistent with law, and are appropriate to the performance of its duties."); Yakus v. United States, 321 U.S. 414, 425 (1944) (indicating that when reviewing regulations, "the only concern of courts is to ascertain whether the will of Congress has been obeyed"); United States v. Bailey, 34 U.S. 238, 255 (1835) ("It is a general principle of law, in the construction of [regulatory] powers of this sort, that where the end is required, the *appropriate* means are given." (emphasis added)).

94. *See, e.g.*, Pac. Sts. Box & Basket Co. v. White, 296 U.S. 176, 186, (1935) ("It is contended that the order is void because the administrative body made no special findings of fact. But the statute did not require special findings.").

judges upheld rules if "any state of facts reasonably can be conceived that would sustain" them; as the Supreme Court stated, "one who assails the [rule] must carry the burden of showing by a resort to common knowledge or other matters . . . that the action is arbitrary."[95] Even after the APA was signed into law, many courts continued this "rational basis" review to agency rulemakings.[96] In one representative case, for example, the D.C. Circuit explained that "[i]t is 'not the function of the court to probe the mental processes' of administrative officers" and that "when administrative officials purport to decide weighty issues within their domain, [it is presumed that] they have conscientiously considered the issues."[97] As one professor more recently noted, rational basis "demands virtually nothing of an agency except a lawyer with enough creativity to identify a plausible justification for a rule based on a plausible pattern of facts."[98] Moreover, that justification could be provided ex post, during litigation.

Courts reviewed formal adjudications under a higher standard. In the 1943 case *SEC v. Chenery Corp.*, known as *Chenery I*, the Supreme Court refused to uphold the agency's order on the grounds that "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."[99] Arising out of an SEC adjudication made "on the basis of [the agency's] adherence to principles of equity derived from judicial decisions," the Court refused to uphold the SEC's order, finding that it failed to conduct a proper analysis required pursuant to those legal principles.[100] The opinion, therefore, made clear that "the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted by [sic] clearly disclosed and adequately sustained"; holding otherwise

95. Borden's Farm Prods. Co. v. Baldwin, 293 U.S. 194, 209 (1934).

96. *See* Paul R. Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 206–10 (1974) (discussing the scope of review of informal rulemakings prior to 1974).

97. Braniff Airways, Inc. v. Civ. Aeronautics Bd., 379 F.2d 453, 460 (D.C. Cir. 1967) (internal citations omitted).

98. 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 7.4 (5th ed. Supp. 2010).

99. Sec. & Exch. Comm'n v. Chenery Corp. (*Chenery I*), 318 U.S. 80, 95 (1943).

100. *Id.* at 88.

would permit courts to usurp agencies' policymaking authority delegated by Congress.[101]

This principle may certainly be appropriate in formal adjudications, which are "the type of proceeding most obviously suited to application of [*Chenery I*'s] contemporaneous rationale principle."[102] It became even more appropriate in such situations following the APA's enactment three years later, which made clear that formal agency actions are reviewed by courts based on a closed record, consisting of "[t]he transcript of testimony and exhibits, together with all papers and requests filed in the proceeding."[103]

The 1970s and '80s saw courts expand the *Chenery I* principle beyond formal adjudications: first to informal adjudications,[104] then to rulemakings.[105] Although lower courts had been applying *Chenery I*'s contemporaneous rationale requirement in an ad hoc manner,[106] the Supreme Court blessed its application in *Citizens to Preserve Overton Park v. Volpe*.[107] At issue was a Transportation Department adjudication made without formal hearings or factual findings. The Sixth Circuit ruled for the Secretary on the grounds that there is "a presumption of regularity afforded the acts of an administrator" that the plaintiffs did not meet.[108] Rebutting the plaintiffs' claim that statutorily required determinations were not made, the court explained that opposing parties "must do more than merely assert that the

101. *Id.* at 94; *see* Shapiro & Murphy, *supra* note 43, at 343 ("The *Chenery* Court supported this principle . . . with the somewhat counterintuitive argument that it blocks courts from usurping agency authority. The theory here is that, after learning from a court that its rationale for an action was legally defective, an agency might wish, after mature consideration, to take some different action. A court therefore does not actually 'help out' an agency, as it were, when it supplies an acceptable, legal rationale for an agency action after the agency's own rationale fails.").

102. Shapiro & Murphy, *supra* note 43, at 343.

103. 5 U.S.C. § 556(e).

104. *See, e.g.*, Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971).

105. *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. St. Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43–50 (1983).

106. *See* Verkuil, *supra* note 96, at 207–10 (discussing cases in which the courts elected to pursue a "more active standard of review" than rational basis).

107. 401 U.S. 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.").

108. Citizens to Pres. Overton Park, Inc. v. Volpe, 432 F.2d 1307, 1310–11 (6th Cir. 1970), *rev'd*, 401 U.S. 402 (1971).

administrator's actions were unlawful. [They] must be able to show by affidavit, or other evidence, that there is at least a possibility that he will be able to overcome the presumption of regularity."[109] The panel held that the Secretary was not required by law to make written findings, and affidavits from agency officials were deemed sufficient to demonstrate that the law was followed.[110]

The Supreme Court disagreed, holding that "we do not believe that in this case judicial review based solely on litigation affidavits was adequate."[111] Those affidavits "were merely 'post hoc' rationalizations," which could be contrived to match the plaintiffs' litigation claims and "do not constitute the 'whole record'" upon which judicial review must be based.[112] The Court remanded the case to the district court for review "based on the full administrative record that was before the Secretary *at the time he made his decision*" to ensure that the Secretary's contemporaneous rationale was not arbitrary and capricious.[113] Nevertheless, the Court permitted the district court to "require the administrative officials who participated in the decision to give testimony explaining their action," though noting that "such inquiry into the mental processes of administrative decisionmakers is usually to be avoided."[114]

Following the Court's decision in *Overton Park* that contemporaneous rationales are required for informal adjudications, lower courts and scholars debated whether its holding should be applied to informal rulemakings.[115] The Supreme Court

109. *Id.* at 1310.

110. *See id.* at 1311 ("There is no requirement in the statute that the Secretary articulate his findings. Nor are we free to impose such a requirement on him."); *id.* at 1313 ("The affidavit makes it clear that the Secretary was fully aware of the alternative designs and chose the one now in effect.").

111. *Overton Park*, 401 U.S. at 409.

112. *Id.* at 419 (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168–69 (1962)); *see* 5 U.S.C. § 706 ("In [reviewing agency actions], the court shall review the whole record or those parts of it cited by a party.").

113. *Overton Park*, 401 U.S. at 420 (emphasis added).

114. *Id.* (citing United States v. Morgan, 313 U.S. 409, 422 (1941)).

115. *See, e.g.*, Verkuil, *supra* note 96, at 231–32 ("[T]he '*Chenery* test' states principles broad enough that they may be applied to informal rulemaking."); Pedersen, *supra* note 83, at 73 ("A requirement that an agency be judged on a single, comprehensive, detailed justification for its decision, prepared at the time when it promulgates a rule, would have several potentially beneficial effects. . . . Unfortunately, these benefits cannot be completely realized under the

ultimately extended the *Chenery I* principle to those actions in *Motor Vehicle Manufacturers Ass'n v. State Farm* a decade later.[116] At issue was whether the rationale given by the National Highway Traffic Safety Administration for rescinding certain automobile safety standards was arbitrary and capricious.[117] When insurers predictably sued, the Court held that the agency violated the APA when it identified significant gaps in the agency's logic as "[i]t is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself."[118] Importantly, the Court also noted that a "reviewing court should not attempt itself to make up for such deficiencies, . . . [by] supply[ing] a reasoned basis for the agency's action that the agency itself has not given."[119] Instead, courts must look to rulemaking records and evaluate agencies' contemporaneous rationales.[120]

State Farm crystallized what has become known as "hard look review," so named because courts are to ensure that agencies have "really taken a 'hard look' at the salient problems" and "genuinely engaged in reasoned decision-making."[121] As the Court explained, a "rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it

present system of historical records and ad hoc judicial review."); *see also* Karen A. Notaro, *Judicial Imposition of Rulemaking Procedures on Administrative Agencies: The Impact of* Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, Inc., 28 DEPAUL L. REV. 171, 176–79 (1978) (explaining rationales for implementing hybrid procedures); Preenforcement Judicial Review of Rules of General Applicability, 39 Fed. Reg. 23044 (June 26, 1974) ("[C]onceptual and practical difficulties have arisen from the use by Congress and the courts of phrases . . . traditionally associated with review of orders entered after a formal evidentiary hearing, in the new and different context of preenforcement review of agency rules adopted informally.").

116. 463 U.S. 29 (1983).

117. *Id.* at 46.

118. *Id.* at 50 (citations omitted).

119. *Id.* at 43 (citing *Chenery II*, 332 U.S. 194, 196 (1947)).

120. *See id.* at 43–44 ("[I]t is also relevant that Congress required a record of the rulemaking proceedings to be compiled and submitted to a reviewing court . . . .").

121. Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970) (quoting WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969)).

could not be ascribed to a difference in view or the product of agency expertise."[122]

4. Immediate Review by Courts of Appeals

It need not follow from the requirement that courts evaluate agencies' contemporaneous *rationales* that agencies must contemporaneously articulate their *explanations*. As the Supreme Court noted in *Chenery I*, in evaluating the agency's rationale, it was "not suggesting that the Commission must justify its exercise of administrative discretion in any particular manner or with artistic refinement."[123] Similarly, the Supreme Court, for a time, frequently remanded cases to lower courts with the instructions to obtain affidavits or testimony from agency officials, rather than simply declaring actions arbitrary and capricious.[124] Lower courts similarly evaluated agencies' records to determine whether their actions were arbitrary and capricious.[125] Indeed, a requirement that agencies provide explanations for their decisions would run counter to the Supreme Court's holding in *Vermont Yankee* that the APA "established the maximum procedural requirements which Congress was willing to have the

122. *St. Farm*, 463 U.S. at 43; *see id.* (providing that courts "must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment'" (quoting Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc., 419 U.S. 281, 285 (1974))).

123. *Chenery I*, 318 U.S. 80, 95 (1943); *see* United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 754 (1972) (evaluating whether the record before the agency—not its formal findings—provided a rational basis for its decision).

124. *See, e.g.*, Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971) (allowing the lower court to "require the administrative officials who participated in the decision to give testimony explaining their action"); Camp v. Pitts, 411 U.S. 138, 143 (1973) (allowing the lower court "to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision" if the contemporaneous explanation was unsatisfactory).

125. *See* Consumers Union of U.S., Inc. v. Consumer Prod. Safety Comm'n, 491 F.2d 810, 812 (2d Cir. 1974) ("[R]egulations [may] be supported by evidence in the Commission's files."); Indus. Union Dep't v. Hodgson, 499 F.2d 467, 488 (D.C. Cir. 1974) (searching for "adequate assurance in the record" when reviewing the Secretary's written explanation); Ethyl Corp. v. EPA, 541 F.2d 1, 35 (D.C. Cir. 1976) (explaining that *Overton Park* and its progeny "have made clear . . . that the reviewing court must defer if the agency has a rational basis for its decision"); Texas v. EPA, 499 F.2d 289, 297 (5th Cir. 1974) (explaining that "[o]nly by our own study of the record can we resolve the factual disputes between the parties, much less hope to 'engage in a substantial inquiry' into the agency's action" and the court can "accord counsel for the parties a post-submission opportunity to supply us with relevant citations" for consideration).

courts impose upon agencies in conducting rulemaking procedures."[126]

One more change was required for courts to impose the contemporaneous explanation requirement: Rulemakings began being reviewed by courts of appeals in the first instance, rather than by district courts more accustomed to discovery and review of sprawling records.

Recall that rulemakings were largely not subject to pre-enforcement judicial review prior to the 1967 *Abbott Laboratories* decision.[127] Prior to that decision, Congress had made the decision that appeals of agencies' *adjudications* would generally be made to federal courts of appeals. Before the APA's enactment in 1946, some statutes directed appeals of agencies' "orders" to courts of appeals, while others directed them to district courts or three-judge panels.[128] Four years after the APA's enactment, with sufficient time to understand its practical implications, the Hobbs Act effectively set a government policy of allowing direct appeals of "all final orders" to the courts of appeals.[129]

The rationale for allowing appeals of agency orders to bypass district courts was that, pursuant to the formal hearing provision of the APA, the agencies served the role of trial courts. As the Hobbs Act's committee report explained, "the submission of the cases upon the records made before the administrative agencies will avoid the making of two records, one before the agency and one before the court, and thus going over the same ground twice."[130] As such, simply submitting agencies' records to courts

126. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524 (1978).

127. *See supra* Part I.A.2.

128. David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 5 (1975) ("The Federal Trade Commission Act of 1914 set a pattern for many subsequent federal statutes in providing for both review and enforcement of Commission 'orders' not in the trial courts but in the several courts of appeals."). *But see* 42 U.S.C. § 405(g) (directing appeals of Social Security determinations to district courts).

129. *See* Hobbs Administrative Orders Review Act of 1950, Pub. L. No. 81-901, § 4, 64 Stat. 1129 (1950) (codified as amended at 28 U.S.C. §§ 2341–2351) ("Any party aggrieved by a final order reviewable under this Act may . . . file in the court of appeals, . . . a petition to review of such order."); *see also* H.R. REP. NO. 81-2122, at 4 (1950) (declaring this "the more modern method . . . generally considered to be the best method for the review of orders of administrative agencies").

130. H.R. REP. NO. 81-2122, at 4.

of appeals "would secure the collaboration of three judges at the stage where it is useful, namely, in the decision . . . ."[131]

This logic does not extend to rulemakings or informal adjudications. When courts review formal adjudications, they review the records to ensure that agencies complied with authorizing legislation and the APA.[132] But where no record exists, they cannot perform that role. As the D.C. Circuit explained in the prototypical case *United Gas*, "an appellate court has no intelligible basis for decision unless a subordinate tribunal has made a record fully encompassing the issues."[133]

For roughly two decades, courts rejected litigants' efforts to use the Hobbs Act and other statutory provisions to challenge regulations in courts of appeals, explaining that they were not the appropriate venue for the initial review of agency rulemakings.[134] The *United Gas* Court explained that the litigants could instead ask the agency for an exception, file in district court for an injunction, or "raise the invalidity of the [rule] as a defense to an enforcement proceeding . . . ."[135] In another case, the Sixth Circuit transferred the case to a district court judge "for the purpose of hearing evidence and making findings of fact," rather than dismissing the case entirely.[136]

But in the late 1960s and early '70s, courts of appeals began changing tune, deciding there to be "no reason to inject another tribunal into the process" by forcing challengers to refile their

131. *Id.*

132. *See* 5 U.S.C. § 706(2) (requiring courts to "review the whole record or those parts of it cited by a party" to evaluate whether to set aside agency actions "not in accordance with law").

133. United Gas Pipe Line Co. v. Fed. Power Comm'n, 181 F.2d 796, 799 (D.C. Cir. 1950).

134. *See, e.g.*, Amerada Petroleum Corp. v. Fed. Power Comm'n, 231 F.2d 461, 463 (10th Cir. 1956) (refusing to review a rule for lack of jurisdiction); PBW Stock Exch., Inc. v. Sec. & Exch. Comm'n, 485 F.2d 718, 733 (3d Cir. 1973) ("Congress intended to insulate rules or regulations promulgated . . . from direct appellate review in this court . . . ."); *see also* Carl A. Auerbach, *Informal Rule Making: A Proposed Relationship between Administrative Procedures and Judicial Review*, 72 NW. U. L. REV. 15, 29 (1977) ("For a time, some courts of appeals . . . refused direct review of informal rules not covered by the Hobbs Act on the ground that they were not 'orders' within the meaning of special jurisdictional statutes providing for review of 'orders' in courts of appeals.").

135. *United Gas*, 181 F.2d at 799–800.

136. Lake Carriers' Ass'n v. United States, 414 F.2d 567, 568 (6th Cir. 1969).

cases in district courts.[137] In one case, the D.C. Circuit explained that the agency had compiled a rulemaking record that "consists of the submissions made in response to the invitations issued for written comments" and that, if the record were insufficient, the court could "remand it to the agency for the receipt of further expressions of views and related information."[138] Although courts of appeals *could* serve as trial courts and oversee discovery, they were unaccustomed to doing so and decided instead to remand actions back to agencies to create new records when the initial records were insufficient to permit judicial review.

Not only was the decision to allow judicial review on the basis of the informal rulemaking record contrary to Congress's intention that courts create records de novo,[139] but it, when combined with the requirement that agency actions be reviewed for contemporaneous rationales, caused judges to place increasing demands on agencies in terms of organizing those sprawling records such that they are easily accessible to appellate court judges. In one case, the court described rulemaking records as "a sump in which the parties have deposited a sundry mass of materials that have neither passed through the filter of rules of evidence nor undergone the refining fire of adversarial presentation" and thus provide "a less than fertile ground for judicial

137. Env't Def. Fund, Inc. v. Hardin, 428 F.2d 1093, 1099 & n.27 (D.C. Cir. 1970); *see* Shapiro & Murphy, *supra* note 43, at 349 ("Imposing the contemporaneous rationale principle on a closed rulemaking record enables courts to review agency action using a familiar appellate model that is, at least from the courts' point of view, efficient.").

138. Auto. Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 336 (D.C. Cir. 1968); *see* Deutsche Lufthansa Aktiengesellschaft v. Civ. Aeronautics Bd., 479 F.2d 912, 915–16 (D.C. Cir. 1973) (explaining that *United Gas* "has not been followed in situations where evidence has been assembled before the agency and is not challenged, and where the issues presented are legal and not factual"); Inv. Co. Inst. v. Bd. of Governors of Fed. Rsrv. Sys., 551 F.2d 1270, 1280 n.9 (D.C. Cir. 1977) ("Rather than denying jurisdiction, the court of appeals can remand the case to the agency for further factual development.").

139. *See* H.R. REP. NO. 79-1980, at 45–46 (1946) (explaining that where the APA does not require an agency to create a formal record, "the facts pertinent to any relevant question 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"); *see also* 79 CONG. REC. 370 (1946) (statement of Rep. Francis Walter) ("Where there is no statutory administrative hearing to which review is confined, the facts pertinent to any relevant question of law must of course be tried and determined de novo by the reviewing court.").

review."[140] In another, the court explained that agencies must conform "to the realities of judicial scrutiny, which do not contemplate that the court itself will, by a laborious examination of the record, formulate in the first instance the significant issues faced by the agency and articulate the rationale of their resolution."[141]

Accordingly, it was the circuit courts' decisions to review rulemaking cases without the desire to oversee discovery that created the contemporaneous explanation requirement. Courts have interpreted the APA's requirement that agencies provide "a concise general statement of [a rule's] basis and purpose" as serving to ensure "that the reviewing court is not faced with the task of 'rummaging' through the record to elicit a rationale on its own."[142] To demonstrate that agencies' rationales were not arbitrary and capricious, courts demanded that agencies respond to public comments in a way that allows judges "to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did."[143] As Shapiro and Murphy have explained, courts began requiring agencies to, in their preambles, "provide an adequate foundation for a serious adversarial critique of an agency's information, analysis, methods, and plans[,]" notwithstanding any legal requirement that they do so and contrary to Congress's intention with the notice-and-comment process.[144]

B. CONTEMPORANEOUS EXPLANATIONS CREATE NEGATIVE INCENTIVES FOR AGENCIES

In building out longer, more detailed, more complicated regulatory preambles, agencies have subconsciously signaled to litigators, courts, and the public at large that these texts have outsized, if not exclusive, importance. Because the information and argumentation in preambles are now routinely so extensive, government litigators do not feel the need to cite or use other parts

140. Nat. Res. Def. Council, Inc. v. Sec. & Exch. Comm'n, 606 F.2d 1031, 1052 (D.C. Cir. 1979).

141. *Boyd*, 407 F.2d at 338.

142. Conn. Light & Power Co. v. Nuclear Regul. Comm'n, 673 F.2d 525, 534–35 (D.C. Cir. 1982) (first quoting 5 U.S.C. § 553(c); and then quoting United States *ex rel.* Checkman v. Laird, 469 F.2d 773, 783 (2d Cir. 1972)).

143. *Boyd*, 407 F.2d at 338 (emphasizing "caution against an overly literal reading of the statutory terms 'concise' and 'general'").

144. Shapiro & Murphy, *supra* note 43, at 340.

of the record to provide evidence of what agencies were thinking when they crafted the rule being reviewed. There is simply no perceived need to dig deeper into the record. Courts, in turn, have also come to expect and respect record citations to the *Federal Register* entries for proposed rules. As a result, the continued inflation in size and importance of regulatory preambles has become a self-fulfilling prophecy.

On judicial review under the APA's arbitrary and capricious standard, courts are limited to examination of the record before the agency at the time of a decision.[145] Because of the phenomenon discussed here, courts frequently review only agencies' *Federal Register* notices to understand their contemporaneous rationales.[146] And because many regulations are now reviewed by courts of appeals and not district judges who expect to review extensive and unorganized records, discovery is considered wholly inappropriate and undesirable.

Although agencies do not want traditional discovery,[147] they *should* want complete record review. Record review, in its authentic conception in the APA, allows courts to consider all of the evidence before the agency at the time of a decision, regardless of where that evidence is documented or maintained.[148] Yet, agencies and the attorneys who advise them are risk-averse for a variety of valid reasons.[149] Most importantly, for government to function properly, agencies must operate with some degree of confidence that their decisions will go into effect and actually affect the behaviors of regulated communities. Each rule that is

145. *See* 5 U.S.C. § 706 (providing that, when reviewing agency actions under, inter alia, the arbitrary and capricious standard, "the court shall review the whole record or those parts of it cited by a party").

146. *See* Nat'l Lime Ass'n v. EPA, 627 F.2d 416, 451 n.126 (D.C. Cir. 1980) (explaining that "the diffidence of judges in the face of highly technical regulatory schemes prompted the courts to require the agencies to develop a more complete record and a more clearly articulated rationale to facilitate review for arbitrariness and caprice").

147. *See, e.g.*, *In re* McCarthy, 636 Fed. App'x 142, 144–45 (4th Cir. 2015) (granting a writ of mandamus precluding the deposition of the EPA Administrator because the citizens did not demonstrate a need for the Administrator's testimony, particularly since the district court had authorized the citizens to take a Federal Rule of Civil Procedure 30(b)(6) deposition of the agency).

148. *See infra* Part II.B.1.

149. *See* Mark Neal, *Risk Aversion: The Rise of an Ideology*, *in* SAFE ENOUGH: MANAGING RISK AND REGULATION 21 (Laura Jones ed., 2000) (describing how "there is an incentive for regulators to 'play safe'" and providing reasons).

overturned on judicial review can erode that confidence and thus affect future agency behavior.

In the context of regulatory preambles, what that essentially boils down to is that once courts started paying more attention to preambles, agencies did too, repeating other parts of the record and including complex legal arguments to make sure the court considered them.[150] Put another way, any incentive for agencies to rebuff courts' and lawyers' demands to rely heavily on preambles is overwhelmed by agencies' incentive to not have their actions undone. One administrative law practitioner and scholar has called this development the "Show Your Working" doctrine; courts focus their attention on whether the preamble lays out "*the entire* 'basis and purpose' of the rule" and thus agencies feel compelled to put more information and argumentation in preambles.[151]

The result has been a death spiral for the succinct *Federal Register* entry; agencies have just put more and more material—both in quantity and type—in these documents over time.[152] One of our prior works has documented empirically both that overall rule text has been getting longer over time and that the amount of preambular text strongly correlates with that trend.[153] Further analysis suggested that differences in the length of preambles account for almost all of the differences in overall rule entry length.[154] This trend cannot sustainably continue, especially if the federal agency workforce decreases and/or turns over with each new political administration.[155]

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150. *See* Shapiro & Murphy, *supra* note 43, at 350–51 (describing how agencies' response to changes in judicial review was to make their preambles "massive lines of defense that agencies construct to protect their rules from judicial challenges").

151. Webley, *supra* note 27, at 16 (citation omitted); *see id.* at 18 (collecting a line of cases that "are representative of the view, now almost universally held among the U.S. Courts of Appeals, that preambles exist to serve the needs of judicial review in general and the requirement of reasoned explanation for agency action in particular").

152. *See generally* Moffa, *Strength in Numbers*, *supra* note 15 (examining the increase of preamble length over time).

153. *Id.* at 118–19, 121–25.

154. *See id.* at 119 ("[T]he regression model results indicate that the number of preambular words accounts for [ninety percent] of the variation in overall word count between Final Register entries.").

155. *See* Donald Devine et al., *Central Personnel Agencies: Managing the Bureaucracy*, *in* MANDATE FOR LEADERSHIP 69, 78–80 (Paul Dans & Steven

The sections of rule preambles devoted to legal argumentation are of particular interest from a judicial review perspective and are microcosms of the larger trend. Comparing the statements of legal authority in the preambles of similar EPA rulemakings from different eras illustrates the problem's salience. The agency first promulgated a rule to limit the interstate transport of air pollution in 2011 called the Cross-State Air Pollution Rule (CSAPR),[156] and since that time, the EPA has periodically issued new rulemaking to update and explain the limits, most recently finalizing a revised rule in 2021.[157] The legal authority section in the *Federal Register* entry proposing the initial CSAPR rule in 2010 consisted of approximately 900 words.[158] In 2020, when the EPA proposed the Revised CSAPR, the legal authority section in the *Federal Register* entry ballooned to approximately 2,500 words.[159] Just this one section of the preamble for a set of rules promulgated by the same agency, pursuant to the same statutory authority, has increased in length by more than 2.5 times in a decade. What's worse is that this particular decade is a very recent one (as opposed to the developments discussed in the prior section, which date all the way back to the 1970s).[160] This anecdotal conclusion is alarming: The trend has continued well past some of the doctrinal developments discussed above.

One might rightly point out that the CSAPR revision has engendered much policy and legal debate,[161] and it thus

Groves eds., 2023) (arguing in favor of "[r]educing the number of federal employees" and making policymaking positions at will).

156. Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone, 75 Fed. Reg. 45210 (proposed Aug. 2, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 72, 78, 97).

157. Revised Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 86 Fed. Reg. 23054 (Apr. 30, 2021) (to be codified at 40 C.F.R. pts. 51, 52, 78, 97).

158. Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone, 75 Fed. Reg. at 45218–19.

159. Revised Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 85 Fed. Reg. 68964, 68971–73 (Oct. 30, 2020) (to be codified at 40 C.F.R. pts. 52, 78, 97).

160. *See supra* Part I.A.

161. *See, e.g.*, Jacob Gerrish, *Fair Winds: Enforcement of the Good Neighbor Provision After* Wisconsin v. EPA, 47 ECOLOGY L.Q. 693, 694–700 (describing how "States, environmental groups, and industry groups" all had issues with the rule and laying out some of their arguments on judicial review); Brandon Dittman, *How to Be a Good Neighbor: The Failure of CAIR and CSAPR, Uncertainty, and the Way Forward*, 25 COLO. NAT. RES., ENERGY, & ENV'T L. REV. 199, 204 (2014).

represents an anomaly not reflected in more mundane rulemaking proceedings. Notwithstanding empirical evidence to the contrary previously published by one of the authors,[162] examples in routine rulemaking also exist. The EPA promulgates many rules establishing National Emission Standards for Hazardous Air Pollutants (NESHAP) for specific source categories, of which there are over a hundred.[163] The standard for lime manufacturing plants is indicative. In 2002, the EPA proposed emission standards for these facilities and included a short discussion of the legal source of authority for the rule in the preamble.[164] That subsection accounted for only about eighty words.[165] In 2024, the EPA proposed revisions to already proposed emission standards for lime manufacturing facilities.[166] The *Federal Register* entry again included a discussion of the legal source of authority for the rulemaking—this time, coming in at almost 200 words.[167] These two rulemakings, two decades apart, accomplish the relatively routine task of setting hazardous air pollution limits for specific pollutants for specific facilities. Nonetheless, the more recent rulemaking proposal includes a preambular legal authority section that is more than twice the length of the earlier rule. The sections are noticeably shorter for the routine NESHAP rule than the more complicated and contentious CSAPR, but both reflect the concerning trend at the heart of this article.

Deeper digging into the actual text of the NESHAP rulemaking proposals reveals the incentive problem we are attempting to address. The 2004 proposal describes the relevant legal authority with two succinct references—one statutory and one regulatory.[168] It includes only one further sentence explaining

162. *See* Moffa, *Word Limited*, *supra* note 15, at 753–62 (demonstrating that, over the last four decades, rule length has increased while the number of rulemakings has decreased).

163. *See* 40 C.F.R. § 63 (2025) (listing subparts A through HHHHHHH).

164. National Emission Standards for Hazardous Air Pollutants for Lime Manufacturing Plants, 67 Fed. Reg. 78046, 78048 (proposed Dec. 20, 2002) (to be codified at 40 C.F.R. pt. 63).

165. *See id.*

166. National Emission Standards for Hazardous Air Pollutants: Lime Manufacturing Plants Amendments, 89 Fed. Reg. 9088 (proposed Feb. 9, 2024) (to be codified at 40 C.F.R. pt. 63).

167. *Id.* at 9090.

168. *See* National Emission Standards for Hazardous Air Pollutants for Lime Manufacturing Plants, 67 Fed. Reg. at 78048 ("Section 112 of the CAA requires us to list categories and subcategories of major sources and area

the statutory definition cited and includes no case citation or argumentation. In contrast, the 2024 proposal refers to a D.C. Circuit opinion and explains the EPA's understanding of the holding therein and why this rulemaking complies with it.[169] This approach provides an example—albeit a relatively innocuous one—of the importation of legal argumentation into regulatory preambles. Because of the courts' dependence on rulemaking preambles and their tendency to dismiss as post hoc justifications anything not found in them, agency attorneys have been incentivized to put legal arguments, rather than just citations to statutory and regulatory authority and factual determinations, in rule preambles. The trend presents more prominently, and problematically, in longer, more complex, and more politically fraught rules where judicial review is all but guaranteed.[170]

The EPA's so-called Clean Power Plan, a rule to address greenhouse gas emissions from existing power plants, provides perhaps the best example of the bad incentives run amok.[171] The legal authority discussion in the final rule's preamble goes on for fourteen pages in the *Federal Register*, includes more than sixty footnotes, and cites more than twenty cases.[172] It reads like a brief arguing in support of the rule on judicial review.[173] Indeed, that seems to be the tenor (and content) of many statements of basis and purpose nowadays. That approach, incentivized by the

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sources of HAP and to establish NESHAP for the listed source categories and subcategories. The Lime Manufacturing category of major sources covered by today's proposed NESHAP was listed on July 16, 1992 (57 F[ed.]R[eg.] 31576).").

169. *See* National Emission Standards for Hazardous Air Pollutants: Lime Manufacturing Plants Amendments, 89 Fed. Reg. at 9090 ("In *Louisiana Environmental Action Network v. EPA* (*LEAN*), 955 F.3d 1088 (D.C. Cir. 2020)[,] the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) held that the EPA has an obligation to address unregulated emissions from a source category in the [eight]-year review. To meet this obligation, the EPA issued the January 5, 2023, proposed rule to address unregulated emissions of HAP from the lime manufacturing source category.").

170. *See* Webley, *supra* note 27, at 45 ("Courts are attempting to use the preamble to see into the administrative process underlying that preamble even though the preamble has essentially been transformed into a legal brief written without a word limit.").

171. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

172. *See id.* at 64710–23.

173. *See id.*

court as well as the agency action and reaction described above, imposes at least two significant costs on agencies.

Firstly, and most obviously, it means that agencies need to have more full-time equivalents (FTEs) devoted to rulemaking's *Federal Register* entries. Many of these will be attorney advisors, working to hone the brief-like arguments just described. Still others will be scientific and technical experts, pulled away from new substantive work to summarize work that they have already done (and documented) so it can fit in a preamble. In a world of limited resources, which the federal government certainly exemplifies, this means fewer FTEs for scientific and technical analysis of new problems—one of the primary justifications for delegating decisions to these entities in the first place.[174] Secondly, the inclusion of full legal argumentation that mirrors court briefing provides would-be challengers a strategic advantage in the eventual litigation.[175] Federal Rules of Civil Procedure as well as courts' own briefing schedules and deadlines for response intentionally and equally limit parties' time to deal with opposing arguments. Agencies have adopted a practice that essentially gives the opposition significantly more time, and they are getting nothing in exchange. No litigator would agree to share drafts of briefs with opposing counsel before they were filed with the court, yet agencies are incentivized to do something so strategically detrimental.

Finally, at least one prominent scholar has pointed out that the doctrinal developments described above, particularly *Chenery I* and the cases following it, have essentially converted preambles into authoritative guidance.[176] Guidance refers to two categories of agency documents not subject to the APA's notice-and-comment requirements: interpretive rules and general statements of policy.[177] Both types of guidance have become important tools of administrative governance over the past five

174. *See* Cross, *supra* note 42, at 1279 (summarizing the common argument that regulatory decisions should be delegated to agencies because a concentration of scientific and technical expertise gives these organizations a "comparative advantage" in achieving the objectives of statutes).

175. Circular A-4 may also be interpreted as requiring agencies to provide legal arguments. *See Circular A-4*, OFF. OF MGMT. & BUDGET, (Sept. 17, 2003), https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4 [https://perma.cc/5DEP-R3KX] (encouraging agencies to "discuss the statutory requirements that affect the selection of regulatory approaches").

176. *See* Stack, *supra* note 44, at 1262.

177. 5 U.S.C. § 553.

decades or more. As Professor Stack points out, "as a result [of the *Chenery I* doctrine], the regulated entities and the public . . . have reason to treat [preambular] explanations and justifications as authoritative commentary on the rule."[178] In other words, the preamble functions as a separate interpretive rule.

Preambles usurping the role of interpretive rules create incentives counter to agency best practices by encouraging agencies to abandon interpretive rulemaking as a separate endeavor. Standalone interpretive rules have distinct advantages over preambles in that they can be issued after rulemakings, informed by the experiences of regulated communities and the regulator with regard to the operation of the rule.[179] Preambles, on the other hand, are issued along with the rule, without the benefit of any real-world trial. As guidance, interpretive rules need not go through the notice-and-comment process. Preambles, as part of the substantive rulemaking, do.[180] How a rule is meant to work, what its words mean, should be the province of the agency authoring it, without the potential distortion of commenters and with the ability to adapt as the rule is implemented. Agencies need to be able to nimbly issue succinct interpretations to the regulated community. If those interpretations reside in preambles, they become part of notice-and-comment processes and, therefore, practically bind agencies until another notice-and-comment process can be completed, even when no longer appropriate.[181] The better practice is to use the tool the APA gave for this precise purpose: the interpretive rule. The incentives

178. *See* Stack, *supra* note 44, at 1262 ("By virtue of the rule in *Chenery*, the preamble becomes the agency's chance to explain its rule to the courts. Closely related, *Chenery* tells the regulated entities and the public that when an agency rule is reviewed, the agency will be limited to the explanations and justifications for the rule provided in the statement of basis and purpose.").

179. 5 U.S.C. § 553(b)(3)(A) (exempting "interpretive rules" from notice-and-comment rulemaking).

180. *Id.* § 553(c) (requiring agencies to, in notice-and-comment rulemaking, "incorporate in the rules adopted a concise general statement of their basis and purpose").

181. Such preambular interpretations are not definitively legally binding; however, a reviewing court will not credit an agency's alternative interpretation offered only in litigation. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2417 (2019) (quoting Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012)). Therefore, an agency would have to use some process, likely another rulemaking, to articulate an interpretation that departs from the one offered in the original preamble.

currently push in the other direction, towards debated and litigated interpretations offered in preambles.

II. REGULATORY HISTORY

In our personal experience, agencies spend significant time and money getting regulations right. Policymakers and staff think through the thorny issues and give due consideration to comments from the public; it is the rare rulemaking that is truly arbitrary or capricious. Nevertheless, agencies may have their rules overturned for reasons that they could not have predicted and may consider arbitrary. For example, the EPA recently saw a regulation stayed for failing to consider whether courts may declare it inapplicable to certain states,[182] and the SEC saw a rule overturned for articulating a "theory [that] is internally contradictory" and failing to sufficiently articulate "a genuine problem" its rule was meant to address.[183]

Such a trend counsels for a change in how agencies promulgate their regulations and defend those rules against charges of arbitrariness. Agencies need a path forward that makes rulemaking faster and, if at all possible, limits court losses. The strategies needed in this subarea of administrative litigation are subtle but impactful. They do not require doctrinal upheaval of our system of judicial review.

We propose that, rather than relying solely on contemporaneous written explanations crafted as rules are promulgated, agency litigators should supplement those explanations with a regulatory history comprised of internal documents that demonstrate their contemporaneous rationales. Where an opposing party claims that an agency failed to consider a particular relevant factor, a certain aspect of the problem, a reasonable alternative, or any other dictate of reasoned decision-making and the agency has indeed done so, the agency's litigators should rely on internal agency memoranda, meeting notes, affidavits, or other evidence that certain factors were considered by agency staff and simply did not make it into the rule's preamble.

In three Sections, this Part discusses how and why agencies should use regulatory history to justify their informal rulemakings when challenged. Section A encourages agencies to use regulatory history when defending their rulemakings on the

182. *See* Ohio v. EPA, 144 S. Ct. 2040, 2058 (2024).

183. *See supra* Introduction and accompanying notes.

grounds that doing so will help them meet statutory requirements.[184] Next, Section B explains that the APA and judicial precedents permit agencies to use internal records in this way.[185] Finally, Section C explains how using regulatory history is consistent with the goals behind hard look review.[186]

We make two notes at the outset. First, some scholars argue that documents reflecting agencies' deliberative processes are outside the scope of "the whole record" required for review under the APA.[187] They may certainly be correct, and courts today are split as to "whether deliberative process materials belong in the APA record and must be logged as privileged."[188] But because courts review rulemakings by evaluating agencies' contemporaneous rationales, and because inquiry into agencies' deliberative processes may explicate those rationales, we believe that agencies should be permitted to rely on such information if they choose.

Second, reviewers of early drafts of this Article shared concerns regarding the distinction between the agency officials/decisionmakers who legally promulgate rules (e.g., the EPA Administrator, the five SEC commissioners) and the subordinates who create the rulemaking documents (e.g., attorney advisors, policy analysts), such that the rationales of subordinates cannot necessarily be imputed to the decisionmakers. A comparison may be made to the distinction between judges and their clerks in the production of judicial opinions.

Although courts have compared agency decisionmakers to judges,[189] rule preambles are wholly unlike judicial or agency adjudication opinions—in both their length (i.e., potentially spanning hundreds of pages) and their role (i.e., as documents prepared for defensive litigation). There is little chance that agency heads have read every word in preambles, let alone

184. *See infra* Part II.A.

185. *See infra* Part II.B.

186. *See infra* Part II.C.

187. *See, e.g.*, Aram A. Gavoor & Steven A. Platt, *Administrative Records and the Courts*, 67 U. KAN. L. REV. 1, 35–36 (2018) ("[T]he agency's deliberative process does not fall within scope of 'the whole record.'").

188. *Id.* at 37.

189. *See, e.g.*, United States v. Morgan, 313 U.S. 409, 422 (1941) (explaining that the Secretary of Agriculture cannot be ordered to testify at trial because "[s]uch an examination of a judge would be destructive of judicial responsibility").

considered every argument made in response to comment letters. To that end, it is the contemporaneous rationales of subordinates, acting on behalf of their superiors to ensure that rules survive judicial review, that should truly matter. Moreover, to the extent that organic statutes authorize rules to be issued by an individual or body, case law supports the position that agency records include "all documents and materials directly or indirectly considered by" the decisionmaker.[190] To the extent that statutes authorize rulemaking by an agency, knowledge of subordinate employees should be imputed to their agencies.[191] Outside of the government context, this is a well-established foundation of corporate principal-agent law.[192]

A. AGENCIES SHOULD USE REGULATORY HISTORY IN DEFENSIVE LITIGATION

Agencies already rely on information outside of rulemaking preambles in litigation, using agency reports and other materials made publicly available in advance or around the time of

190. Bar MK Ranches v. Yuetter, 994 F.2d 735, 739 (10th Cir. 1993); *accord* Thompson v. Dep't of Lab., 885 F.2d 551, 555 (9th Cir. 1989) ("Generally, judicial review of agency action is limited to review of the record on which the administrative decision was based."); *see* Tenneco Oil Co. v. Dep't of Energy, 475 F. Supp. 299, 317 (D. Del. 1979) (concluding that a record was incomplete because "[i]t strains the Court's imagination to assume that the administrative decision-makers reached their conclusions without reference to a variety of internal memoranda, guidelines, directives, and manuals").

191. *See* Martin v. Consultants & Adm'rs, Inc., 966 F.2d 1078, 1096 (7th Cir. 1992) ("[K]nowledge in the possession of a government agent with a duty to disclose is imputed to the government."); *In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 796 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987) ("Under principles of agency law, knowledge in the possession of an agent—here a government employee—who has a duty to transmit or receive the information is knowledge in the possession of the principal—here the United States or an appropriate agency.").

192. *See* Curtis, Collins & Holbrook Co. v. United States, 262 U.S. 215, 222 (1923) ("The general rule is that a principal is charged with the knowledge of the agent acquired by the agent in the course of the principal's business."); Am. Sur. Co. v. Pauly, 170 U.S. 133, 150 (1898) ("Ordinarily a corporation, like any other principal, is chargeable with the knowledge of any facts which are known to its agents."); *In re* Distilled Spirits, 78 U.S. 356, 357 (1871) ("The rule that notice to the agent is notice to the principal applies not only to knowledge acquired by the agent in the particular transaction, but to knowledge acquired by him in a prior transaction and present to his mind at the time he is acting as such agent, provided it be of such a character as he may communicate to his principal without breach of professional confidence.").

their rulemakings.[193] We encourage agencies to go further. Every rulemaking is conducted by agency staff working in concert to bring it to fruition.[194] For every issue a challenger raises in litigation that could result in the rule being deemed arbitrary and capricious, staff has likely created some memorandum discussing its costs, benefits, or feasibility; has discussed it over email; or has discussed it over the phone or in person with other staff or officials.[195] Only the most irrelevant issues will lack discussion—a fact that itself should serve to demonstrate to courts that such issues should not be considered "relevant" or "significant."[196]

We identify three ways for agencies to use regulatory history in litigation over rulemakings, though there may certainly be others. These reforms might require, or at least would be enhanced by, changes to the Federal Rules of Appellate Procedure (FRAP), both to facilitate their execution and to ensure that they do not open regulatory review proceedings to traditional discovery. Neither agencies nor appellate courts would prefer a traditional discovery regime to the version of record review currently practiced, even with its problematic emphasis on preamble text.[197] As such, we propose reforms that meet the need for including regulatory history while avoiding the unintended and

193. *See, e.g.*, Carbon Pollution Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) (noting the public availability of "[a] number of documents relevant to this rulemaking, including technical support documents (TSDs), a legal memorandum, and the regulatory impact analysis (RIA)"); Grand Canyon Air Tour Coal. v. Fed. Aviation Admin., 154 F.3d 455, 469 (D.C. Cir. 1998) (holding that "the Park Service did offer an adequate and reasonable justification for the definitions it chose" in a separate report that was then "elaborated on" in final rule).

194. *See* Todd Phillips, *Commission Chairs*, 40 YALE J. ON REGUL. 277, 287–88 (2023) (explaining how agency staff are needed for "pre-regulatory activities," including rulemakings).

195. Indeed, we expect that agencies could rely primarily on internal agency records to explain their contemporaneous rationales if given the opportunity. Yet, as described in Part I.A.4, we recognize the reticence of courts of appeals to oversee discovery to evaluate whether the agency took a "hard look" at the problem.

196. *See* Ohio v. EPA, 603 U.S. 279, 317–18 (2024) (Barrett, J., dissenting) (noting that the "EPA received hundreds of comments and its response numbered nearly 1,100 pages" and that issues excluded from that response "may not be 'relevant' and 'significant'").

197. *See supra* Part I.A.4 (discussing appellate courts' lack of appetite for and experience with discovery); *supra* Part I.B (discussing agency pushback to permit discovery, even in district court).

unwanted consequences of a full discovery process in an appellate forum.

The first and easiest avenue for agencies to use regulatory history is for litigators to supplement the record when confronting claims that issues in rulemakings have been inadequately considered; attorneys would explain in subsequent briefing how the agency *did* consider those issues and provide evidence.[198] Under Rules 16 and 17 of FRAP, which define and provide for the submission of administrative records, courts have the power to allow supplementation of the record in this way.[199] Moreover, because agencies are frequently required to submit the rulemaking record to the court before plaintiffs are required to fully explain their legal theories, it makes sense to allow agencies to provide this information after learning what specific claims opponents are making.[200] An option to provide additional internal records as of right, rather than at the discretion of the court or the whims of opponents,[201] would better align with the text of the APA and the jurisprudential concerns with post hoc rationalizations (i.e., the need to identify the agency's contemporaneous consideration of the issue raised).[202]

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198. Under current practice, petitioners challenging rules are more likely to attempt to supplement the record with internal documents than agencies. *See, e.g.*, New Era Grp., Inc. v. EPA, No. 14-1054, 2014 BL 428955, at *1 (D.C. Cir. Oct. 3, 2014) ("Parties are not allowed 'to supplement the record unless they can demonstrate unusual circumstances' that justify doing so." (quoting City of Dania Beach v. Fed. Aviation Admin., 628 F.3d 581, 590 (D.C. Cir. 2010))).

199. *See* Dep't of Com. v. New York 139 S. Ct. 2551, 2563–64 (2019) (allowing the Department of Commerce's administrative record to be supplemented with "the materials that Secretary Ross considered in making his decision"); *see also* FED. R. APP. P. 16(b) ("The parties may at any time, by stipulation, supply any omission from the record or correct a misstatement, or the court may so direct. If necessary, the court may direct that a supplemental record be prepared and filed.").

200. *See, e.g.*, Appeal Briefing Schedule, Iowa v. Sec. & Exch. Comm'n, No. 24-1522 (8th Cir. Mar. 12, 2024) (requiring the agency's administrative record to be submitted prior to the petitioners' opening brief). *Compare* FED. R. APP. P. 17 ("The agency must file the record with the circuit clerk within 40 days after being served with a petition for review."), *with* FED. R. APP. P. 31(a)(1) ("The appellant must serve and file a brief within 40 days after the record is filed.").

201. *See* FED. R. APP. P. 16 ("The parties may at any time, *by stipulation*, supply any omission from the record or correct a misstatement, or the court may so direct. If necessary, the *court may direct* that a supplemental record be prepared and filed." (emphasis added)).

202. *See infra* Part II.C.

At the other extreme, agencies could reform their record-keeping behaviors by building more robust public records that include any related internal documents. Then, litigators simply file all internal agency records about a given rulemaking as part of the record at the beginning of litigation or provide a certified list describing those records, pursuant to FRAP 17.[203] The advantage of this solution lies in the lack of a need for accommodating changes to the Federal Rules. Rule 17 currently leaves significant discretion to the agency to designate the documents constituting the record on judicial review. On the other hand, collecting all records would be significantly more work for agency litigators than simply collecting records related to plaintiffs' claims. Although this would be a waste of agency resources compared to the prior alternative, it would be a much *better* use of agency resources than having rulemakings be overturned for failure to do such work. To mitigate the resource intensity of this option, agencies might consider adopting it on an opt-in basis, deciding to engage in broad document sweeps only for important or controversial rulemakings. Alternatively, the Office of Management and Budget might consider developing technology-based solutions that would automate the task of designating record documents for agencies government-wide.

An intermediate solution would utilize a burden-shifting mechanism. When a rulemaking faces judicial challenge, a court would first examine the *Federal Register* entry, as it does now. However, the review would not end there. If nothing in the preamble adequately addressed the challenger's concern, and the court deemed that concern material, the agency would have a chance to respond. The burden would shift to the agency to produce internal documents that demonstrate contemporaneous consideration of the relevant issue. If such evidence were produced, then the burden would shift back to the challenger to demonstrate the inadequacy of the provided record. This process would be permissible under Rule 17 as currently constituted[204] but would require a newly developed jurisprudence to establish

203. *See* FED. R. APP. P. 17 ("(1) The agency must file: (A) the original or a certified copy of the entire record or parts designated by the parties; or (B) a certified list adequately describing all documents, transcripts of testimony, exhibits, and other material constituting the record, or describing those parts designated by the parties.").

204. *See* FED. R. APP. P. 17(a) ("The court may shorten or extend the time to file the record.").

it as the regular practice. The Second Circuit in the census case has already taken an approach very similar to this one.[205]

B. USING REGULATORY HISTORY IS LEGALLY PERMISSIBLE

To some, the thought of using internal agency records to comply with hard look review may seem heretical. Generations of lawyers have learned that *Overton Park* prohibits agencies from using affidavits to provide "'post hoc' rationalizations";[206] that *State Farm* requires courts to uphold rules only "on the basis articulated by the agency itself";[207] and that hard look review requires contemporaneous, written explanations.[208] Yet such a narrow view is contrary to the Supreme Court's rationale for those holdings and the statutory basis of and rules governing record review.

1. Under Rules Governing Record Review

As explained previously, Congress did not require agencies to create a record when engaging in notice-and-comment rulemaking and appears to have intended for courts to create a record de novo.[209] But as courts have adopted record review to evaluate informal agency actions—including rulemakings—for arbitrary and capricious agency activity, what constitutes the record has been debated.[210] Nevertheless, the evaluation of internal agency documents is permissible.

Appellate courts have largely turned the role of deciding what constitutes the administrative record over to agencies while providing limited guidance as to what should be

205. *In re* U.S. Dep't of Com., No. 18-2856, 2018 WL 6006885, at *1 (2d Cir. Oct. 9, 2018) ("[T]he District Court did not clearly abuse its discretion in authorizing extra-record discovery based on a preliminary showing of 'bad faith or improper behavior.'").

206. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 419 (1971).

207. Motor Vehicle Mfrs. Ass'n v. St. Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983).

208. *See* Shapiro & Murphy, *supra* note 43, at 333 (summarizing the general modern understanding of "hard look review" jurisprudence).

209. *See supra* note 139 and accompanying text.

210. *See* Peter Constable Alter, *A Record of What? The Proper Scope of an Administrative Record for Informal Agency Action*, 10 U.C. IRVINE L. REV. 1045, 1048 (2020) (noting agreement between courts and commentators that "the APA's text and legislative history shed[] minimal light on the record rule as it should apply to informal agency action").

included.[211] FRAP only broadly describe what constitutes the record of a particular rulemaking, while indicating that the agency has control over its contents and the responsibility for compiling it.[212] According to Rule 17, the agency "must file" the record and include "a certified list adequately describing all documents, transcripts of testimony, exhibits, and other material constituting the record."[213] The Committee Notes do not further elaborate on the situation where the scope of the entire record is in question; rather, they demonstrate that the focus of the drafters was trained on situations where the parties wanted to submit "less than the entire record."[214] The Rule is permissive in such circumstances, which, at the least, indicates that records should generally be understood to be expansive. To the extent case law is binding, it indicates that the 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."[215]

This has left agencies with broad discretion to decide what to include or exclude when filing their administrative records with the courts, and agencies have tended to consider the rulemaking record as the materials it considered, not the materials necessary for a court to determine whether the agency's decision was arbitrary and capricious.[216] The Department of Justice's view is that "agency deliberative documents are *not* properly considered part of the administrative record and therefore

211. *See id.* at 1062 ("[S]ome agency guidance for compiling an administrative record . . . excludes most materials (such as emails, notes, drafts, and other informal materials) outside of formalized final agency documents.").

212. *See* FED. R. APP. P. 16 (broadly defining the composition of the record as including the order involved, "any findings or report on which it is based," and pleadings, evidence, and proceedings before the agency).

213. FED. R. APP. P. 17(b).

214. *See* H.R. DOC. NO. 105-269, at 160–61 (1997).

215. Thompson v. U.S. Dep't of Lab., 885 F.2d 551, 555 (9th Cir. 1989) (emphasis added) (quoting Exxon Corp. v. Dep't of Energy, 91 F.R.D. 26, 32 (N.D. Tex. 1981)); *accord* Bar MK Ranches v. Yuetter, 994 F.2d 735, 739 (10th Cir. 1993) ("The complete administrative record consists of all documents and materials directly or indirectly considered by the agency.").

216. *See* Leland E. Beck, *Agency Practices and Judicial Review of Administrative Records in Informal Rulemaking*, ADMIN. CONF. OF THE U.S. 30 (2013), https://www.acus.gov/sites/default/files/documents/Agency%20Practices%20and%20Judicial%20Review%20of%20Administrative%20Records%20in%20Informal%20Rulemaking.pdf [https://perma.cc/4FAP-6SPV] (identifying various materials different agencies include in their records).

generally should not be produced as part of the record filed with the court."[217] The National Oceanic and Atmospheric Administration and the EPA largely concur.[218] In 2013, the Administrative Conference of the United States (ACUS) adopted a recommendation providing that the record includes, "in addition to materials required by law to be included in the rulemaking record, as well as all comments and materials submitted to the agency during comment periods, any material that the agency considered should be included as part of that record."[219] ACUS's recommendation notably excluded any deliberative materials, including rules' preambles, which were considered part of the record in a related 1974 recommendation.[220]

Yet, record review need not be limited to simply the documents considered by agency officials. In reviewing other informal actions, some district courts have ordered agencies to provide "[a] complete administrative record," including "internal comments, draft reports, inter- or intra-agency emails, revisions, memoranda, or meeting notes [that] inform an agency's final decision."[221] Although these documents are not part of the record

217. Memorandum from Jeffrey H. Wood, Acting Assistant Att'y Gen., U.S. Dep't of Just., to the Selected Agency Couns. (Oct. 20, 2017) (on file with authors).

218. NAT'L OCEANIC & ATMOSPHERIC ADMIN., GUIDELINES FOR COMPILING AN AGENCY ADMINISTRATIVE RECORD 8 (2012), https://www.gc.noaa.gov/documents/2012/AR_Guidelines_122112-Final.pdf [https://perma.cc/RJ2R-726G] (indicating that documents such as "personal notes and working drafts" are "excluded from the Administrative Record," but others, such as "drafts and internal briefing materials," are "identified for inclusion . . . but flagged for potential listing on a 'Privilege Log'"); *EPA's Action Development Process: Administrative Records Guidance*, ENV'T PROT. AGENCY 5 (2011), https://www3.epa.gov/ogc/adminrecordsguidance09-00-11.pdf [https://perma.cc/8JJJ-3XYS] ("The administrative record does not include materials that solely reflect the internal deliberative processes of decision-making within EPA or within the Executive Branch of the federal government.").

219. The Administrative Record in Informal Rulemaking, 78 Fed. Reg. 41358, 41359 (June 14, 2013).

220. *Compare id.* at 41360 n.17 ("Absent a showing of bad faith or improper behavior, the agency practice of excluding pre-decisional materials from the administrative record on judicial review enjoys substantial judicial support."), *with* Preenforcement Judicial Review of Rules of General Applicability (Recommendation No. 74-4), 39 Fed. Reg. 23044, (June 26, 1974) (providing that "the agency's concise general statement or final order and any documents referred to therein" is one of six categories of documents included in the rulemaking record).

221. Inst. for Fisheries Res. v. Burwell, No. 16-cv-01574-VC, 2017 WL 89003, at *1 (N.D. Cal. Jan. 10, 2017). In this case, the court authorized disclosures of

upon which agencies decide their rulemakings, they are a part of the record as to whether the agency complied with the APA.[222]

To that end, the Freedom of Information Act (FOIA) provides helpful guidance on the broader question of compliance with rulemaking procedures as it describes the agency's record-keeping obligations in all situations, including in rulemaking proceedings that later face judicial challenge.[223] The statute defines the term "record" broadly, equating it to "any other term used . . . in this section in reference to information."[224] Among the items considered records that must be maintained by agencies are "statements of policy and interpretations which have been adopted by the agency and *are not published* in the Federal Register."[225] It also stipulates that such records can be in "any format, including an electronic format," such that it includes emails and digital-only documents.[226]

Department of Justice guidance for FOIA compliance directs agencies to the definition of "record" in the Privacy Act.[227] Drawing from that definition, the Department of Justice counsels that "each 'item, collection, or grouping of information' on [a topic] can be considered a distinct 'record.'"[228] As it relates specifically to internal email communications, the guidance indicates that

documents via privilege logs. *Id.*; *see* Alter, *supra* note 210, at 1049 n.16 (identifying additional cases in which courts have defined the administrative record "to include any materials considered by agency personnel involved in the decision-making process").

222. *See* Alter, *supra* note 210, at 1050 ("[A]lthough informal agency actions are (by definition) exempt from the APA's formal procedural provisions, they are nevertheless subject to a minimum procedural requirement under its judicial review provisions, which requires that even informal agency action must be the product of an agency's 'reasoned decisionmaking.'").

223. *See* 5 U.S.C. § 552(a)(2) (identifying the records that agencies "shall make available for public inspection in an electronic format").

224. *Id.* § 552(f)(2).

225. *Id.* § 552(a)(2)(B) (emphasis added).

226. *Id.* § 552(f)(2)(A).

227. *See Defining a "Record" Under the FOIA*, U.S. DEP'T OF JUST. OFF. OF INFO. L. & POL'Y (July 23, 2021), https://www.justice.gov/oip/oip-guidance/defining_a_record_under_the_foia [https://perma.cc/LSW2-DNXL]; 5 U.S.C. § 552a(a)(4) ("[T]he term 'record' means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.").

228. *Defining a "Record" Under the FOIA*, *supra* note 227.

"an entire string of emails, a single email within a string of emails, or a paragraph within a single email" all might be subject to FOIA as a record.[229]

These statutory and regulatory administrative law authorities taken together suggest that, properly construed, the record of an agency rulemaking for the purpose of arbitrary-and-capricious review includes a variety of contemporaneously created agency documents and communications beyond the information considered during the rulemaking process.

Agencies may be concerned that such a broad conception of the record could require agencies to disclose information otherwise subject to various privileges, but this need not be the case. As an initial matter, FOIA has statutory exemptions that allow agencies to withhold certain documents—including privileged communications that reflect internal agency deliberations that are "predecisional"—that are coterminous with those privileges offered to agencies in litigation.[230] That is, the public already has access to the same internal agency records they could obtain through litigating rulemakings; under both FOIA and rulemaking litigation, privileged documents (e.g., deliberative emails and memoranda) count as records but do not become public as a matter of course. Agencies can waive their privileges if they believe it would help make their case[231]—and, given that judicial review of rulemaking cannot occur prior to a final rule,[232] they may wish to do so, as the dangers associated with releasing deliberative information in that context will generally be lower. Even if an agency chooses not to waive its privileges to the plaintiff in a

229. *Id.*

230. *See* 5 U.S.C. § 552(b)(5) (providing that FOIA "does not apply to matters that are . . . intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created [twenty-five] years or more before the date on which the records were requested").

231. *See FOIA Exemptions*, OFF. OF INSPECTOR GEN., stateoig.gov/foia-exemptions [https://perma.cc/7WWC-39K8] ("[A]gencies may use their discretion to release information when there is no foreseeable harm in doing so and disclosure is not otherwise prohibited by law.").

232. *See* 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.").

given case, the agency can waive them for the court,[233] or the court can order the documents unsealed or to be reviewed *in camera*.

2. Under the Supreme Court's APA Jurisprudence

The role of courts in the rulemaking process is to ensure that agencies comply with statutory requirements, including the APA's requirement to "engage in 'reasoned decisionmaking.'"[234] To meet this requirement, "the process by which [an agency] reaches [its] result must be logical and rational,"[235] and an agency must "examine the relevant data and articulate a satisfactory explanation for its action[,] including a 'rational connection between the facts found and the choice made.'"[236] Courts "may not supply a reasoned basis for the agency's action that the agency itself has not given"[237] and "may uphold agency action only on the grounds that the agency invoked when it took the action."[238] To that end, "the role of courts in reviewing arbitrary and capricious challenges is to 'simply ensur[e] that the agency has acted within a zone of reasonableness.'"[239] Nevertheless,

233. *See Waiver & Discretionary Disclosure*, U.S. DEP'T OF JUST. 20 (2024), https://www.justice.gov/oip/page/file/1198006/dl [https://perma.cc/5C2J-C6FA] ("[A]gencies may make 'discretionary disclosures' of exempt information, as a matter of administrative discretion, where they are not otherwise prohibited by law from doing so.").

234. Michigan v. EPA, 576 U.S. 743, 750 (2015) (*quoting* Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 374 (1998)).

235. *Allentown*, 522 U.S. at 374.

236. Motor Vehicle Mfrs. Ass'n v. St. Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

237. *Id.* at 43 (citing *Chenery II*, 332 U.S. 194, 196 (1947)); *see id.* ("[A] court is not to substitute its judgment for that of the agency.").

238. Michigan v. EPA, 576 U.S. at 758 (citing *Chenery I*, 318 U.S. 80, 87 (1943)); *see* Bowen v. Geo. Univ. Hosp., 488 U.S. 204, 212 (1988) ("Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands." (quoting Inv. Co. Inst. v. Camp, 401 U.S. 617, 628 (1971))).

239. Biden v. Missouri, 142 S. Ct. 647, 654 (2022) (quoting FCC v. Prometheus Radio Project, 592 U. S. 414, 423 (2021)); *see* Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 105 (1983) ("Our only task is to determine whether the Commission has considered the relevant factors and articulated a rational connection between the facts found and the choice made." (citations omitted)).

courts will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."[240]

Lower courts have long imposed on agencies a contemporaneous explanation requirement by deeming as arbitrary and capricious the failure to articulate publicly and in writing rationales (sometimes faultless rationales) for their rulemakings in *Federal Register* preambles or in other contemporaneously published documents.[241] The Supreme Court has traditionally rejected such holdings, declaring that "an agency must 'disclose the basis' of its action" so as "to permit meaningful judicial review"[242] and that the APA simply requires an "agency take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency's rationale at the time of decision."[243] It was only this decade that the Supreme Court wrote that "[o]ur precedents require *final rules* to 'articulate a satisfactory explanation for [the] action including a rational connection between the facts found and the choice made.'"[244] This framing was perhaps accidental and has not been reiterated by the Court since.

Providing contemporaneous explanations is, of course, a sound way for agencies to demonstrate reasoned decision-making, as courts have routinely decided cases on agencies' rulemaking preambles.[245] And, admittedly, the Court has, at times,

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240. *St. Farm*, 463 U.S. at 43 (quoting Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc., 419 U.S. 281, 286 (1974)).

241. *See, e.g.*, Schurz Commc'ns, Inc. v. FCC, 982 F.2d 1043, 1049 (7th Cir. 1992) ("It is not enough that a rule might be rational; the statement accompanying its promulgation must show that it is rational . . . ."); *see also* Cooley R. Howarth, Jr., *Informal Agency Rulemaking and the Courts: A Theory for Procedural Review*, 61 WASH. U. L.Q. 891, 892 (1984) ("[A]n examination of lower court opinions reveals that many reviewing courts have simply ignored the spirit, if not the letter, of *Vermont Yankee*."); *supra* Part I.A.4.

242. Dep't of Com. v. New York, 139 S. Ct. 2551, 2573 (2019) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167–69 (1962) (internal quotation marks omitted)).

243. Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 654 (1990).

244. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2384 (2020) (emphasis added) (quoting *St. Farm*, 463 U.S. at 43).

245. *See, e.g.*, Michigan v. EPA, 576 U.S. 743, 756–57 (2015) (using the agency's statement of basis and purpose to judge the rationales upon which the agency relied for the purposes of review); *St. Farm*, 463 U.S. at 50 (invoking same principle); *see also* Richard Murphy, Chenery *Unmasked: Reasonable Limits on the Duty to Give Reasons*, 80 U. CIN. L. REV. 817, 840 (2012) (noting

referenced "contemporaneous explanations" when describing the benefits of contemporaneous rationales, perhaps leading to the conclusion that courts require public, written explanations.[246]

But what matters is an agency's contemporaneous rationale, regardless of how a court identifies it. The Supreme Court has "repeatedly stated that the text of the APA provides the 'maximum procedural requirements' that an agency must follow in order to promulgate a rule,"[247] that "courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA,"[248] and that courts are to "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."[249]

Indeed, there is a long and storied history of courts relying on sources of agency rationales other than contemporaneous explanations to evaluate reasoned decision-making. Prior to the APA's enactment, the Supreme Court held that a "court may require the administrative officials who participated in the decision to give testimony explaining their action."[250] In *Overton Park*, the Court explained that "we do not believe that in this case judicial review based *solely* on litigation affidavits was adequate"[251] and permitted the lower court to "require the administrative officials who participated in the decision to give

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that courts began to require an agency's statement of basis and purpose "to respond to all significant objections leveled at the rule during the comment process").

246. *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1909 (2020) ("Considering only contemporaneous explanations for agency action also instills confidence that the reasons given are not simply 'convenient litigating position[s].'" (quoting Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012))).

247. *Little Sisters*, 140 S. Ct. at 2385 (quoting Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 100 (2015)); *see* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513 (2009) ("The [APA] . . . sets forth the full extent of judicial authority to review executive agency action for procedural correctness." (citing Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 545–49 (1978))).

248. *Pension Benefit Guar. Corp.*, 496 U.S. at 654 (citing *Vt. Yankee*, 435 U.S. at 524).

249. *St. Farm*, 463 U.S. at 43 (quoting Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc., 419 U.S. 281, 286 (1974)).

250. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971) (summarizing the holding of *United States v. Morgan* which was decided prior to the enactment of the APA); *see* United States v. Morgan, 313 U.S. 409, 422 (1941) ("The Secretary [of Agriculture] . . . was questioned at length regarding the process by which he reached the conclusions of his order . . . .").

251. *Overton Park*, 401 U.S. at 409 (1971) (emphasis added).

testimony explaining their action" so as to evaluate compliance with the APA.[252] Two years later, in *Camp v. Pitts*, the Court explained that courts may "obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary" for "effective judicial review."[253] Lower courts have similarly permitted review of extra-record information that is "for the limited purposes of ascertaining whether the agency considered all the relevant factors or fully explicated its course of conduct or grounds of decision."[254]

Although not a rulemaking case, the Court most recently approved of using internal agency records outside the formal record in *Department of Commerce v. New York*, a case turning, in part, on whether the Trump administration's decision to ask a decennial census question concerning citizenship status was arbitrary and capricious.[255] In that case, the Court upheld the district court's order for the Department to produce "more than 12,000 pages of additional materials" that were not included in the original record, including "emails and other records," as well as a deposition of an Acting Assistant Attorney General.[256] With this information, the Court determined that the reason given for the decision was pretextual and warranted remand for failure to engage in reasoned decision-making.[257]

Judges may be reticent to ask for and rely on internal agency records to help elucidate agency thinking, thanks to Supreme Court statements that are artifacts of another time. Although the Supreme Court asserted in *Overton Park* that "inquiry into the mental processes of administrative decisionmakers is

252. *Id.* at 420.

253. Camp v. Pitts, 411 U.S. 138, 142–43 (1973).

254. Asarco, Inc. v. EPA, 616 F.2d 1153, 1160 (9th Cir. 1980); *see* MediNatura, Inc. v. FDA, 998 F.3d 931, 942 (D.C. Cir. 2021) (finding that the agency's response to a rulemaking petition "c[ould] be appropriately categorized as the rationale" for the guidance); Gatewood v. Outlaw, 560 F.3d 843, 847 (8th Cir. 2009) (finding that, where an agency "has consistently sought to implement the same substantive policy in the face of continued judicial resistance . . . it is appropriate to discern the reasons for the agency's final rule from the various prior interim rules, Program Statements, and litigation positions reflecting that consistent policy").

255. 139 S. Ct. 2551 (2019).

256. *Id.* at 2564.

257. *Id.* at 2576 ("Reasoned decisionmaking under the Administrative Procedure Act calls for an explanation for agency action. What was provided here was more of a distraction.").

usually to be avoided," the Court used that language in recognition that agencies presumptively act in compliance with the law.[258] Indeed, the Court cited, in support of the proposition that agencies are "entitled to a presumption of regularity," two cases holding only that "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."[259]

Moreover, before the Court's decision in *Overton Park*, it was unclear whether informal agency actions would be reviewed under a rational basis standard or for agencies' contemporaneous explanations.[260] With the Court opting for the latter, it recognized that the lower court needed *some* basis to understand agencies' thought processes. Because the Department of Transportation created no record and made no findings in this case,[261] as was legally permitted, the Court explained that the reviewing court should review agency affidavits, while making clear that only when there is "a strong showing of bad faith or improper behavior" should courts "examin[e] the decisionmakers themselves."[262]

In other words, that courts should avoid examining decisionmakers' thought processes was intended as a courtesy to a coequal branch of government, not because the principles of judicial review require that outcome. There are, of course, times when agencies would *prefer* to provide internal records and affidavits or have officials be deposed, rather than have their rules

258. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971); *see* United States v. Morgan, 313 U.S. 409, 422 (1941) ("Such an examination of a judge would be destructive of judicial responsibility. We have explicitly held . . . that it was not the function of the court to probe the mental processes of the Secretary. Just as a judge cannot be subjected to such a scrutiny . . . so the integrity of the administrative process must be equally respected." (internal quotation and citations omitted)).

259. United States v. Chem. Found., 272 U.S. 1, 14–15 (1926); *see* Pac. Sts. Box & Basket Co. v. White, 296 U.S. 176, 185 (1935) ("When such legislative action 'is called in question, if any state of facts reasonably can be conceived that would sustain it . . . one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary.'" (quoting Borden's Farm Prods. Co. v. Baldwin, 293 U.S. 194, 209 (1934))).

260. *See* Verkuil, *supra* note 96, at 206–10 (discussing the scope of review of informal rulemakings prior to 1974).

261. *Overton Park*, 401 U.S. at 408, 415.

262. *Id.* at 420.

be overturned. In such instances, courts may give them the opportunity.

C. USING REGULATORY HISTORY FULFILLS HARD LOOK REVIEW'S GOALS

Courts' hard look review requirements can be described as imposing a variety of dictates on agencies. Although the way that courts articulate these requirements may, at times, appear to require agencies' rationales to be provided in contemporaneous explanations alone,[263] agencies' use of regulatory history helps effectuate the values that hard look review aims to uphold.

Hard look review first requires an agency to "'disclose the basis' of its action"[264] so that courts may conduct "meaningful judicial review."[265] This requirement, born out of pre-APA judicial efficiency principles[266] and the APA's requirements for formal agency actions,[267] has been adapted to informal rulemakings in ways that practically require agencies to draft extensive preambles.[268] Yet courts are to "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."[269] Supplementing preambles with regulatory history may help agencies illuminate their paths for judges, in case their *Federal Register* notices cannot.[270]

Hard look review also requires that the bases for agencies' actions be rational. Agencies frequently make missteps at this stage by offering "inaccurate or unreasoned justifications for a decision";[271] providing "[c]onclusory explanations for matters

263. *See infra* Part II.C.

264. Dep't of Com. v. New York, 139 S. Ct. 2551, 2559 (2019) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167–69 (1962)).

265. *Id.*

266. *See* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197 (1941) (explaining that disclosing the basis of the agency's action "will avoid needless litigation and make for effective and expeditious enforcement").

267. *See Burlington Truck Lines*, 371 U.S. at 167 (explaining that the "[APA] will not permit us to accept such adjudicatory practice" where an agency provides "no findings and no analysis here to justify the choice made, [and] no indication of the basis on which the Commission exercised its expert discretion").

268. *See supra* note 245 and accompanying text.

269. Motor Vehicle Mfrs. Ass'n v. St. Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc., 419 U.S. 281, 286 (1974)).

270. *See, e.g.*, Yale-New Haven Hosp. v. Leavitt, 470 F.3d 71, 83 (2d Cir. 2006) (explaining that "[w]e cannot clearly discern" the agency's rationale).

271. Env't Def. Fund v. EPA, 922 F.3d 446, 454 (D.C. Cir. 2019).

involving a central factual dispute";[272] misanalyzing the relevant data;[273] not connecting "the facts found [to] the choice made";[274] failing to "show that there are good reasons for the new policy";[275] and even failing to consider whether a rule should still be promulgated if courts rule they cannot be applied to certain entities.[276] The use of a full regulatory history may help agencies address these missteps by proving to judges that the agencies' actions were reasoned and rational, even if those justifications did not make their way into the *Federal Register*—if, of course, agency staff had such justifications before their rules were promulgated.

Similarly, hard look review requires agencies to consider "the relevant factors"[277]—which include "statutorily mandated factor[s]"[278] and any others that amount to "important aspect[s] of the problem"[279]—and to exclude from consideration factors Congress instructed it not to consider.[280] Internal agency records, such as memoranda and emails, can be used by agencies to elucidate the factors they did consider, regardless of whether those factors were discussed in rules' preambles, and can be used by rules' opponents to demonstrate that agencies considered

272. AT&T Wireless Servs., Inc. v. FCC, 270 F.3d 959, 968 (D.C. Cir. 2001).

273. *See* St. James Hosp. v. Heckler, 760 F.2d 1460, 1467 n.5 (7th Cir. 1985) ("[I]t is an agency's duty to establish the statistical validity of the evidence prior to reaching conclusions based on the evidence."); Humana of Aurora, Inc. v. Heckler, 753 F.2d 1579, 1583 (10th Cir. 1985) ("When an agency adopts a regulation based on a study not designed for the purpose and which is limited and criticized by its authors on points essential to the use sought to be made of it, the administrative action is arbitrary and capricious and a clear error in judgment." (citing Almay, Inc. v. Califano, 569 F.2d 674 (D.C. Cir. 1977))).

274. *St. Farm*, 463 U.S. at 43.

275. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009).

276. *See* Ohio v. EPA, 144 S. Ct. 2040, 2053–56 (2024) (explaining that the EPA "failed to address the concern adequately" after receiving "notice of objection").

277. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

278. United Parcel Serv., Inc. v. Postal Regul. Comm'n, 955 F.3d 1038, 1050–51 (D.C. Cir. 2020) ("A 'statutorily mandated factor, by definition, is an important aspect of any issue before an administrative agency . . . .'" (quoting Mozilla Corp. v. FCC, 950 F.3d 1, 60 (D.C. Cir. 2019) (per curiam))); *see St. Farm*, 463 U.S. at 55 (explaining how the relevant statute makes "safety" the "pre-eminent factor").

279. *St. Farm*, 463 U.S. at 43.

280. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 471 n.4 (2001) (explaining that the statute forbade the EPA from considering costs in setting national ambient air quality standards).

precluded factors, even if those factors were not discussed in *Federal Register* notices.

Under hard look review, courts also examine whether agencies have considered alternatives to the selected policy. Agencies need not "consider all policy alternatives"[281] or "every alternative device and thought conceivable by the mind of man,"[282] but they must consider "'significant and viable' and 'obvious' alternatives."[283] Because the universe of such alternatives is only limited to those that courts believe to be "obvious," it may be the case that agency staff *have* considered an alternative but did not explain their thinking, as it was not raised by commenters. Take, for example, the case of *Chamber of Commerce v. SEC*, wherein the D.C. Circuit overturned a rulemaking in part on the grounds that the agency did not respond to an alternative "endorsed by the two dissenting Commissioners" in their statements on the rule.[284] In this case, there is little doubt that the agency *did* consider the alternative and had reasons for rejecting it, even if those reasons were not articulated in the *Federal Register* preamble.[285] Accordingly, using agency records or affidavits to demonstrate this point could be useful.

Finally, hard look review requires agencies to "respond to 'relevant' and 'significant' public comments" received during the notice-and-comment process.[286] Courts have held that agencies must "respond to comments 'that can be thought to challenge a fundamental premise' underlying the proposed agency

281. *St. Farm*, 463 U.S. at 51.

282. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 551 (1978).

283. Nat'l Shooting Sports Found., Inc. v. Jones, 716 F.3d 200, 215 (D.C. Cir. 2013) (quoting City of Brookings Mun. Tel. Co. v. FCC, 822 F.2d 1153, 1169 (D.C. Cir. 1987)).

284. Chamber of Com. v. Sec. & Exch. Comm'n, 412 F.3d 133, 144 (D.C. Cir. 2005).

285. *See id.* (explaining that the SEC purported to have rejected the alternative on the grounds that Congress had rejected a similar approach).

286. Lilliputian Sys., Inc. v. Pipeline & Hazardous Materials Safety Admin., 741 F.3d 1309, 1312 (D.C. Cir. 2014) (quoting Pub. Citizen, Inc. v. Fed. Aviation Admin., 988 F.2d 186, 197 (D.C. Cir. 1993)); *see* Int'l Fabricare Inst. v. EPA, 972 F.2d 384, 389 (D.C. Cir. 1992) ("[The Court] will therefore overturn a rulemaking as arbitrary and capricious where the [agency] has failed to respond to specific challenges that are sufficiently central to its decision.").

decision"[287] or that "raise significant problems."[288] But just as agencies and courts may disagree about when an alternative is "obvious," agencies may not consider a comment to be "relevant" or "significant"—and, therefore, do not provide a response—when a court deems otherwise. In her *Ohio v. EPA* dissent, Justice Barrett made this exact point—noting that the agency "received hundreds of comments, and its response numbered nearly 1,100 pages," so the EPA's failure to respond to a given comment means that it "might not be 'relevant' and 'significant,'" where the Court's majority found the opposite.[289]

We note that agencies can, of course, be arbitrary when responding to comments.[290] But for that reason, it is imperative that courts have access to the agency's full analysis, not just its CliffsNotes version found in the *Federal Register*. Agencies can rely on regulatory history to address such situations. Though the case law requires agencies to "respond" to comments, this requirement's purpose is to "enable the courts 'to see what major issues of policy were ventilated . . . and why the agency reacted to them as it did.'"[291] To that end, an agency's "failure to respond to comments is significant only insofar as it demonstrates that the agency's decision was not 'based on a consideration of the relevant factors.'"[292] Failing to respond to a comment should be considered a presumption that the agency did not consider it, rebuttable by evidence indicating that the agency did.

III. BENEFITS OF LITIGATING WITH REGULATORY HISTORY

The statutorily created concept of "record review" must be reconciled with the judicially created rule that requires finding a contemporaneous explanation. The divergence that has emerged, and that has led to the ballooning length and

287. Carlson v. Postal Regul. Comm'n, 938 F.3d 337, 344 (D.C. Cir. 2019) (quoting MCI WorldCom, Inc. v. FCC, 209 F.3d 760, 765 (D.C. Cir. 2000)).

288. City of Waukesha v. EPA, 320 F.3d 228, 257 (D.C. Cir. 2003) (quoting Reytblatt v. Nuclear Regul. Comm'n, 105 F.3d 715, 722 (D.C. Cir. 1997)).

289. Ohio v. EPA, 144 S. Ct. 2040, 2067–68 (2024) (Barrett, J., dissenting).

290. *See, e.g.*, N. Spotted Owl v. Hodel, 716 F. Supp. 479, 483 (W.D. Wash. 1988) (finding the agency action arbitrary and capricious when it "merely asserted its expertise in support of its conclusions").

291. *Carlson*, 938 F.3d at 344 (quoting Del. Dep't of Nat. Res. & Env't Control v. EPA, 785 F.3d 1, 17 (D.C. Cir. 2015)).

292. Thompson v. Clark, 741 F.2d 401, 409 (D.C. Cir. 1984) (quoting Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971)).

importance of preambles, has largely come from the judicial developments discussed in Part I. Federal courts have, in many cases, simply gone too far in excluding materials and now look too narrowly. In other words, what we have now is not real record review. A broader view of what constitutes the record that a court can consider is both more consistent with the statute *and* more effective.

A. ADHERENCE TO CONGRESSIONAL INTENT

As described above, the narrow focus on preambular text by reviewing courts cannot fairly be attributed to some textual requirement in the APA.[293] This current version of hard look review is a creature of judicial construction. Indeed, as one scholar has observed, "the courts seem to operate on the implicit assumption that literal compliance with the procedural dictates of the APA simply is not adequate to insure [sic] legitimate agency rulemaking."[294] In doing so, courts have moved away from both the text and, importantly, the intent of the APA.[295] The text of the APA is not particularly helpful in isolation; fortunately, the legislative history sheds light on the designed function of a rule's preambular text.[296] Congress's intent in requiring agencies to include statements of basis and purpose along with rules was not to consolidate the entire record for the purpose of judicial review, but to provide information to the public.[297] The Senate Report from the consideration of the initial incarnation of the APA in 1945 states:

> [I]n requiring the publication of a concise general statement of the basis and purpose of rules made without formal hearing, [the APA] is not intended to require an elaborate analysis of rules or of the detailed considerations upon which they are based but is designed to enable the

293. *See supra* Part I.A.

294. Howarth, Jr., *supra* note 241, at 927.

295. *See* United States v. Am. Trucking Ass'ns, 310 U.S. 534, 542 (1940) ("In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress.").

296. *See* Roni Elias, *The Legislative History of the Administrative Procedure Act*, 27 FORDHAM ENV'T L. REV. 207, 220 (2016) (contending that "[a]lthough the statutory text does not elaborate on what kind of statement should be included, the legislative history materials" explain the intended purpose of the statement).

297. S. REP. NO. 79-752, at 39, app. B, § 4(b) (1945) (appendix to Attorney General's Statement Regarding Revised Committee Print of October 5, 1945).

> public to obtain a general idea of the purpose of, and a statement of the basic justification for, the rules.[298]

The House Report from the same Congress confirms that legislators intended that the record, subject to judicial review, encompass not just the statement of basis and purpose, but also "supporting procedures, findings, conclusions, [and] statements of reasons or basis for the action or inaction."[299] Both reports explain that although the statement of basis and purpose should "relate to the data" presented in the full record and explain the decision with "reasonable fullness" so that the public can understand it, that is different from constituting the rulemaking's "record."[300] Testimony before the House Judiciary Committee also elaborated on record review, describing reviewing courts' scrutiny as encompassing "the whole record in the sense that any part of the record can be called upon," rather than only a rulemaking's preamble;[301] and the prevailing interpretation of the (proposed) APA's judicial review provisions was that it encapsulated the contemporary practice.[302] Together, this legislative history supports the conclusion that Congress intended a rule's preambular text to serve public communication and transparency purposes, rather than as a definitive record for judicial review. In the decades since this early legislative history, decades marked by increasing litigation challenging agency action (including pre-enforcement review of final rules),[303] Congress has not amended the APA or otherwise indicated that preambular text serves a primary function for judicial review.

Congressional intent is further elucidated by the fact that Congress could have required long preambles in the APA but chose not to. Instead, the statute uses terminology that directs

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298. *Id.*

299. H.R. REP. NO. 79-1980, at 21 (1946).

300. S. REP. NO. 79-752, at 15; H.R. REP. NO. 79-1980, at 25.

301. *Federal Administrative Procedure: Hearing on H.R. 184, H.R. 339, H.R. 1117, H.R. 1203, H.R. 1206, and H.R. 2602 Before the H. Comm. on the Judiciary*, 79th Cong. 40 (1945) (statement of Carl McFarland, Chairman, Am. Bar Ass'n Comm. on Admin. Proc.).

302. *See* Elias, *supra* note 296, at 222–23 (describing senators', representatives', and the Attorney General's stated views on the APA's judicial review provisions).

303. *See* Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 996–99 (1990) ("Of all the changes in the landscape of administrative law over the past two decades, perhaps the most dramatic is the growing caseload.").

agencies to do the opposite and keep preambles "concise."[304] Nowhere in the APA does it indicate that Congress intended for this concise statement to serve as the "record" for review. Moreover, the APA only mandates the provision of a concise statement of basis and purpose in the *Federal Register* entry for the final rule, a document published at the *end* of the rulemaking process.[305] It stands to reason that the record of the agency's decision would include documents, testimony, and other evidence gathered throughout the process, not just a statement written at the end. The statement at the end is better understood as Congress calling for a summary of all that other work and documentation. It is a distortion of congressional intent to treat that summary as the conclusive record on judicial review.

Statutes enacted subsequent to the APA and governing the activity of specific agencies clarify Congress's intention with the former law. For example, the Clean Air Act's description of what is needed for the judicial review process makes a clear distinction between the statement of basis and purpose and the (more inclusive) rulemaking docket.[306] Section 307 of the Clean Air Act requires the EPA's "statement of basis and purpose" to "include a *summary* of (A) the factual data on which the proposed rule is based; (B) the methodology used in obtaining the data and in analyzing the data; and (C) the major legal interpretations and policy considerations underlying the proposed rule,"[307] as well as to "summarize and provide a reference to" other findings and comments.[308] To that end, the Act acknowledges that the rulemaking record is more comprehensive than these "summaries," providing that "[a]ll data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule."[309]

304. 5 U.S.C. § 553(c); *see* Webley, *supra* note 27, at 5–6 (arguing that regulatory preambles are "unlawfully" verbose, citing the APA's enforceable requirement of "concise" and "general" statements).

305. *See* 5 U.S.C. § 553(c) ("After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.").

306. 42 U.S.C. § 7607(d)(3).

307. *Id.* (emphasis added).

308. *Id.*

309. *Id.*

The Clean Air Act's more specific requirements for the "statement of basis and purpose" than that required by the APA should be treated as a reflection that Congress expected the latter's requirements to be more general. Even so, the Clean Air Act's distinction between the "statement of basis and purpose" and the rulemaking record is more appropriate for contemporary hard look review than the view that the APA's "statement of basis and purpose" serve as a catch-all for everything the agency wishes a reviewing court to evaluate. The contemporary interpretation of the APA must give way, either to Congress's understanding in 1946 or to what the Clean Air Act requires. Either way, the exercise of judicial review should encourage, rather than discourage, agencies to offer and courts to accept regulatory history when reviewing rulemakings.

B. BENEFITS FOR AGENCY FUNCTIONS

The functioning of the administrative state depends on agencies managing resources effectively and having sound, evidence-based decisions upheld when reviewed in the courts. On both of those dimensions, there are real potential benefits to using regulatory history records in judicial review. Crucial for the current politicized environment, these benefits are not co-dependent. Thus, if the current anti-administrativist trend[310] continues and courts overturn more rules (even after reviewing internal records), efficiency benefits accrue to agencies if they do not feel legally compelled to craft long, complex, and legalistic preambles.[311]

Because the litigation-related benefits of the doctrinal correction we propose are more tenuous, we begin there. Agencies confront judicial review with an alarming amount of frequency in the modern era,[312] and lawyers counseling them still operate under the assumption that such review will be carried out

310. *See* Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 6 (2017) (describing a trend of anti-administrativism and forecasting a "significant erosion of administrative power").

311. This is not to suggest that agencies should truncate their deliberations or analyses, but rather change the way they document them.

312. *See supra* Introduction and accompanying notes; *see also* Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 1 (2020) ("Administrative law today is marked by the legal equivalent of mortal combat.").

scrupulously. As such, the way agencies prepare for and strategize through litigation depends, in large part, on doctrinal pronouncements like, for instance, the requirement that preambles must "enable [courts] to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did."[313] If courts are willing to review more than just what is included in preambles, such as supporting documentation and relevant internal communications left undiscussed, agencies will be more likely to cite to specific pieces of that record to demonstrate compliance with statutory mandates and counter accusations of arbitrariness. Will they always succeed in convincing a reviewing court that the record supports a particular decision? Of course not. And nor should they. However, a more inclusive understanding of the record would prevent the overturning of at least some agency actions when the preamble alone cannot adequately capture the scope of evidence considered by the agency.

Furthermore, the knowledge that agencies can cite data, communications, and other evidence beyond their preambles will disincentivize knee-jerk litigation on the part of regulated industries. It is common today to see rules challenged in court mere hours after they are finalized, with litigants simply searching *Federal Register* notices for mistakes.[314] Challenging agency action will require more investigation than simply reading the preamble and trying to poke holes in it, as agencies may have supporting records that are not automatically made publicly available when rules are finalized and may not be subject to disclosure under FOIA.[315] To that end, relying on regulatory history may improve agency efficiencies in the long run by limiting the number of lawsuits that are filed. It will also increase transparency for rules that are challenged, as administrative records made public in litigation will necessarily include more than their rules' preambles.

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313. Auto. Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968).

314. *See, e.g.*, Kate Berry, *Banks Sue CFPB for Capping Overdraft Fees at $5*, AM. BANKER (Dec. 12, 2024), https://www.americanbanker.com/news/cfpb-caps-overdraft-fees-at-5-without-apr-disclosure [https://perma.cc/7Q7C-XMX9] (describing how trade associations sued an agency over a regulation the day the rule was announced).

315. *See supra* notes 227–31 and accompanying text (discussing the application of FOIA to rulemaking documents).

Lastly, free to author shorter preambles, agencies will feel less legally compelled to fully flesh out legal argumentation in Federal Register entries. That argumentation will be saved for its proper place: in *responsive* appellate briefing. Agency *defendants* will no longer be forced to telegraph the arguments they intend to use in court, and challengers will have to anticipate counterarguments, like offensive litigants in all other fields of law.[316] Consequently, even if the legal environment makes it impossible for administrative agencies to improve their win rates, they will at least be competing on level playing fields with their challengers.

A legal realist would rightly critique the above-described benefits as having little to no utility if courts find ways to overturn agencies regardless of how the record is defined. And that may be so. But the benefits of a doctrine that welcomes a full review of the administrative record go beyond the courtroom walls. The halls of the agency, and the people who walk them, will see benefits as well in the form of efficiency improvements. Making the massive administrative state more efficient has long been the project of reformers within and adjacent to the legal academy,[317] and has now garnered renewed attention for the current presidential administration and its allies.[318] A judicial review doctrine that demands less of rule preambles would align with these efforts to improve efficiency.[319] It would eliminate

316. *See* FED. R. CIV. P. 8.

317. *See, e.g.*, Henry J. Friendly, *A Look at the Federal Administrative Agencies*, 60 COLUM. L. REV. 429, 446 (1960) ("The administrative agencies are here to stay. They are essential to the working of our private enterprise system. We cannot cure their ills by major revamping of the structure—there are no panaceas in the medicine chest. We can restore their prestige and efficiency by a determined, nonpartisan effort . . . .").

318. Elon Musk and Vivek Ramaswamy headed up a new Department of Government Efficiency (DOGE), which attempted to eliminate waste and fraud, as well as implement technology to reduce costs. *See* Luke Garrett, *Elon Musk and Vivek Ramaswamy Take Their DOGE Government Efficiency Pitch to the Hill*, NPR (Dec. 5, 2024), https://www.npr.org/2024/12/04/nx-s1-5205354/musk-ramaswamy-doge-congress [https://perma.cc/D4FT-FZ9F].

319. As Alec Webley has suggested, shorter preambles would also better serve the APA's public engagement purpose and make the administrative state more democratically accountable, at least to the average layperson. He argues for a truly concise general statement, which he calls a "popular preamble," that would "enable citizens to read, in an efficient fashion, accessible and trustworthy statements of the government's actions, straight from the government itself." Webley, *supra* note 27, at 37–38. Our proposed reforms to record review

redundant work and reduce the resources necessary to publish a final rule. Agency employees currently, at the behest of risk-averse lawyers very much aware of the doctrinal developments we describe above, tend to overflow the preamble text with information that simply paraphrases the full record.[320] Other texts attempt to summarize complex legal arguments that are more appropriately made in court. All of that would become superfluous if the full record were definitively the subject of any forthcoming judicial review. In that doctrinal environment, agencies could shrink rule preambles, eliminating pages that simply repeat, incompletely, other parts of the record. Countless hours of staff time could be freed up to devote to new, substantive matters, rather than to retreading already completed deliberations.

This efficiency is even more important in the face of what else newly empowered reformers have pledged to do in the name of efficiency—chiefly, fire federal employees.[321] While the scale of these new proposals is unprecedented, efforts to shrink the federal workforce have already succeeded in reducing its size from a peak in 1990.[322] Agencies thus strive to meet the same mandates—such as clean air and water, safe workplaces, and healthy food—with fewer resources, sometimes outsourcing the process of writing rulemaking preambles to contractors.[323] Providing government lawyers with the doctrinal clarity to counsel agencies that they can devote fewer personnel to *Federal Register* entry writing would produce real benefits.

Finally, it is worth noting that the review process and efficiency benefits are consistent with the professed role of agencies in the Supreme Court's recent administrative law decisions. Those decisions, particularly *Loper Bright*, counsel against

would work in concert with the implementation of his "popular preamble" approach to Federal Register entries.

320. *See* notes 149–150 and accompanying text.

321. *See* Garrett, *supra* note 318 ("In social media posts, podcasts, op-eds, books and speeches, Musk and Ramaswamy have sketched out what they have in mind: a [seventy-five percent] reduction in the federal workforce . . . .").

322. *How Many People Work for the Federal Government?*, USA FACTS (Dec. 19, 2024), https://usafacts.org/articles/how-many-people-work-for-the-federal-government [https://perma.cc/Y25R-U3L3] ("Federal employment numbers peaked at 3.4 million in 1990[,] and the most recent low was in 2014, with 2.7 million.").

323. *See* Bridget C.E. Dooling & Rachel Augustine Potter, *Rulemaking by Contract*, 74 ADMIN. L. REV. 703, 732 (2022) (explaining that contractors may "write language for the preamble . . . after which the agency staff would review the contractor's work").

deference to agency interpretations of the law, as opposed to agency expertise on substantive matters (which these decisions say less about).[324] This recent trend against deference counsels for a return to, at least, less legal explanation of the bases of authority in preambles and for a fuller examination of the factual record when substantive review of agency rules arises. Put more cynically, if federal courts are not going to credit agency legal arguments about statutory interpretation and instead decide those issues based on their own preferences (and, in theory, briefing and oral argument), agencies should not expend resources to articulate statutory interpretation in preambles. At least for legal argumentation, one could make a case that the doctrine has already shifted in such a way that statements of basis and purpose need not legally explain much at all, and it strategically does not help to do so.

C. SATISFY GOOD-FAITH REVIEWING COURTS

The federal courts reviewing agency action are increasingly confronted with difficult questions of interpretation and complex substantive issues. The quite natural response to that trend (in practice, if not in outright prescription) was to confine record review to preambles, which can function as a shortcut for understanding and evaluating an otherwise overwhelming analytical morass.[325] Put another way, one need not take a cynical view of the doctrinal developments we criticize herein; judges are simply doing the best they can with the hand they have been dealt. If courts could be convinced of the statutory consistency and practical benefits of more expansive record review, we posit that the majority of courts would conduct that review faithfully.

Commentators rightfully question the premise that courts will exercise the good faith we assume.[326] Those skeptics may

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324. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024) ("The deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA.").

325. *See supra* Part I.A.4 (describing this response).

326. *See, e.g.*, Daniel E. Walters, *Symmetry's Mandate: Constraining the Politicization of American Administrative Law*, 119 MICH. L. REV. 455, 459 (2020) ("What happens, though, when courts begin to see the minimization of interpretive errors as quintessentially a judicial task, or when they begin to see the entire concept of delegation as suspect, and under either theory begin to reconsider the propriety of deference to agency interpretations of law? As many will note, that is increasingly the world that we live in."); Sidney A. Shapiro &

very well be proven true by some courts. However, some recent prominent cases suggest otherwise. In the case challenging the Department of Commerce's decision to include a citizenship question on the 2020 Census, for example, the district court permitted not only the expansion of the initially submitted record, but it also authorized limited discovery.[327] The Supreme Court endorsed that approach in its consideration of the case.[328] Both the district court and the Supreme Court seriously considered that record information in reaching their decisions, and the Supreme Court ultimately upheld the decision remanding the rule to the Department on the basis of that evidence.[329] Importantly, that conclusion ran counter to the direction partisan politics pointed.[330]

If courts truly do aim to come to the "correct" result as to whether an agency acted arbitrarily and capriciously, then doing so requires them to review the full regulatory history, just as courts often review legislative history when a statute is challenged. Return, for example, to the Fifth Circuit's review of the SEC rule updating the share repurchase disclosure

Richard Murphy, *Politicized Judicial Review in Administrative Law: Three Improbable Responses*, 19 GEO. MASON L. REV. 319, 322 (2012) ("Administrative law is highly indeterminate; ergo, we should expect judicial review of agency action to be politicized. This degree of politicization cannot be pinned down with utter precision. Notwithstanding this inexactitude, the evidence that politicization occurs is strong enough to justify considering what might be done to counter it.").

327. *See* Dep't of Com. v. New York, 139 S. Ct. 2551, 2563–65 (2019) (describing the process at the district court).

328. *See id.*

329. *See id.* at 2577 ("We are presented, in other words, with an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process. It is rare to review a record as extensive as the one before us when evaluating informal agency action—and it should be. But having done so for the sufficient reasons we have explained, we cannot ignore the disconnect between the decision made and the explanation given.").

330. *See* Joan Biskupic, *Exclusive: How John Roberts Killed the Census Citizenship Question*, CNN (Sept. 12, 2019), https://www.cnn.com/2019/09/12/politics/john-roberts-census-citizenship-supreme-court/index.html [https://perma.cc/Y4BN-FWRM] ("Chief Justice John Roberts cast the deciding vote against President Donald Trump's attempt to add a citizenship question to the 2020 census, but only after changing his position behind the scenes, sources familiar with the private Supreme Court deliberations tell CNN. The case was fraught with political consequences. Democrats and civil rights advocates claimed the query would discourage responses to the decennial questionnaire from new immigrants and minorities and affect the balance of power nationwide.").

requirements.[331] The court explained that "[t]he SEC . . . failed to respond to petitioners' comments and failed to conduct a proper cost-benefit analysis."[332] If the SEC had provided the court with internal records as we propose, the judges likely would have seen agency staff evaluate and consider the comments and wrestle with the costs and benefits the court stated were inadequately substantiated,[333] and the court may have felt compelled to uphold the rule. That outcome would not only improve the performance of the administrative and judicial roles in this scenario, but it would also better conform to the APA's text, congressional intent, and the early doctrine. And other courts might follow suit.

Of course, getting litigators and courts to accept the reform of the type we suggest is easier said than done. Agency reformers will need to test whether courts view as lawful, or even prudent, the inclusion of agency records in litigation that were not discussed in rulemaking preambles. Yet agencies may be reluctant to write shorter preambles and utilize internal documents during judicial review without assurances that their regulations will not be overturned *pro forma*. These are notoriously risk-averse institutions; indeed, their risk aversion is part of what brought us to this place of ever-expanding preambles.[334]

As a result of agency reluctance to test the limits of what courts will accept, one might expect to find us stuck with little hope for effective reform. That state of affairs may have been true just a few years ago. However, the Supreme Court's decision in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System* has opened up the possibility for a test case without an agency having to go out on a limb and buck the trend of long preambles.

In *Corner Post*, the Supreme Court held that a claim brought under the APA "accrues" for purposes of the general

331. Chamber of Com. v. Sec. & Exch. Comm'n, 85 F.4th 760, 780 (5th Cir. 2023).

332. *Id.*

333. The court provides no evidence to support its assertion that "[t]he SEC admits it never considered any of petitioners' suggestions," *id.* at 775, other than to say that "[o]ral argument was the first time the SEC attempted to engage with the substance of petitioners' suggestions." *Id.* at 775 n.17. Similarly, the court explains that "[t]he SEC failed adequately to substantiate [in the *Federal Register*] the rule's benefits and costs," but internal records can be used for such substantiation. *Id.* at 777.

334. *See supra* note 149.

statute of limitations[335] for suits against the United States "when the plaintiff is injured by final agency action."[336] This holding has opened up decades-old rulemakings to judicial review, as some scholars have warned.[337] The silver lining of that problematic result—at least for the purposes of potentially deemphasizing the preamble in judicial review—is that a rule written under prior conventions will face judicial scrutiny under modern doctrine. As detailed above, those earlier conventions more closely conformed to the APA's vision of "concise" statements of basis and purpose, which means the question of whether other internal agency documents should properly be considered part of the record will likely be important to the case.[338] When that case inevitably gets decided, we may have the beginning of a movement towards doctrinal reform, or we may have marching orders for drafters of legislative and regulatory solutions.

CONCLUSION

The rulemaking process is ossified. To comply with judicially constructed, extra-statutory requirements, agencies seek to fill rulemaking notices with practically all analytical information necessary to defend their actions in court, rather than provide only the "concise general statement[s] of their basis and purpose" that the APA requires.[339] But this need not be the case, and the jurisprudence of hard look review can be made to accommodate Congress's statutory mandate. Rather than relying solely on the text of their *Federal Register* notices to demonstrate compliance with the APA and fulfill the goals of hard look

335. *See* 28 U.S.C. § 2401(a) (explaining that the default statute of limitations for suits against the United States requires "the complaint [to be] filed within six years after the right of action first accrues").

336. Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 144 S. Ct. 2440, 2447–48 (2024).

337. *See Evaluating the Supreme Court: Harvard Law Faculty Weigh in on 2023–2024 SCOTUS Term*, HARV. L. TODAY (July 2, 2024), https://hls.harvard.edu/today/evaluating-the-supreme-court-harvard-law-faculty-weigh-in-on-2023-scotus-term [https://perma.cc/L5SY-EVBX] ("[I]n *Corner Post v. Federal Reserve Board*, [the Supreme Court] rendered even long-since promulgated regulations vulnerable to attack without any meaningful time limitation, delivering a one-two punch to expert agencies." (quoting Laurence Tribe)); *id.* ("*Corner Post* means that this new dynamic may apply to regulations whose validity we thought was [sic] long settled." (quoting Sharon Block)).

338. *See supra* Part III.A.

339. 5 U.S.C. § 553(c).

review, agencies should rely on regulatory history to elucidate their contemporaneous rationales. Doing so adheres to congressional intent, creates efficiencies within agencies, and satisfies good-faith courts.