they have made their determinations. The courts do not take this behavior lightly; an agency that "seeks to invoke its institutional expertise as a license for making unarticulated findings" invites strong criticism. See Tripoli Rocketry Ass'n v. BATFE, 437 F.3d 75, 83 (D.C. Cir. 2006).

To overcome this difficulty, the courts have developed the device of remanding administrative actions to the agency for fuller explanation. See, e.g., Northeast Md. Waste Disposal Auth. v. EPA, 358 F.3d 936 (D.C. Cir. 2004); United States v. Dierckman, 201 F.3d 915 (7th Cir. 2000); Armstrong v. CFTC, 12 F.3d 401 (3d Cir. 1993). The courts often remark that they do not need great detail; the basic requirement is that the agency reveal enough of its reasoning to permit meaningful judicial review. (At times, however, it appears that no amount of explanation would suffice, because the court is using

a remand for "reconsideration" as a diplomatic way of expressing its disapproval of the agency's substantive policy.)

Actually, a focus on the agency's reasoning is inescapable, because it is axiomatic that a discretionary agency action may be upheld *only* on the strength of the agency's own rationale. In the leading case, the Supreme Court remanded an SEC order disapproving a corporate reorganization plan, because the Commission had reasoned from incorrect legal premises. SEC v. Chenery Corp., 318 U.S. 80 (1943) (*Chenery I*). In

doing so, however, the Court indicated that it might uphold the SEC's position if the Commission justified it on a lawful basis; and when the SEC issued a revised opinion, the Court did exactly that. SEC v. Chenery Corp., 332 U.S. 194 (1947) (*Chenery II*). The reason why a reviewing court may not affirm on a basis other than the agency's is that only the agency has authority to make discretionary determinations that Congress has delegated to it.

Several important corollaries follow from the *Chenery* principle. First, "courts may not accept appellate counsel's post hoc rationalizations for agency action," Burlington Truck Lines v. United States, 371 U.S. 156, 168–69 (1962), because discretionary judgments on regulatory policy should be made by agency heads, not the attorneys who defend their decisions in court. Second, if a court finds that an agency's announced rationale for an action is impermissible, it may not uphold the action on the ground that the agency was actually following 110

a different, permissible rationale without saying so. Allentown Mack Sales & Service, Inc. v. NLRB, 522 U.S. 359 (1998). Third, if an agency takes an action that it mistakenly believes to be legally required, the court must remand for further consideration, even if the agency would have had discretion to take the action, because the agency might have chosen differently if it had known that the law permitted it to do so. FCC v.

RCA Communications, Inc., 346 U.S. 86 (1953); Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985).

Although under *Chenery* the courts must carefully scrutinize administrative opinions, they generally will not probe for motives hidden beneath the surface of those opinions. The principle was established in lengthy litigation involving ratesetting by the Secretary of Agriculture. Initially, the Court authorized the district court to investigate allegations that the Secretary had issued his decision without reading the briefs or considering the evidence. After remand, however, the Court reconsidered, declaring that "it was not the function of the court to probe the mental processes of the Secretary in reaching his conclusions if he gave the hearing that the law required." Morgan v. United States, 304 U.S. 1, 18 (1938) (*Morgan II*). The Court stated this point even more forcefully when the *Morgan* controversy came before it for a fourth time several years later. Just as a judge cannot be deposed or cross-examined about his decisions, "so the integrity of the administrative process must be equally respected." United States v. Morgan, 313 U.S. 409, 422 (1941) (*Morgan IV*). Without this

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presumption of regularity, agency officials would constantly be called away from their duties to answer questions about their decisions.

Special problems arise, however, when an agency acts without issuing any explanation at all for its decision. In that situation, said

the Supreme Court in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), the reviewing court could make a factual inquiry into the agency's rationale, either by obtaining affidavits from the officials who made the decision or by calling them into court to testify. Alternatively, the court could remand the action to the agency for the necessary explanation—a solution which the Court now views as "preferred," PBGC v. LTV Corp., 496 U.S. 633 (1990). On the other hand, *Overton Park* made clear—and Camp v. Pitts, 411 U.S. 138 (1973), reaffirmed—that where an agency *does* provide a contemporaneous explanation for its decision, the *Morgan* rule is still good law; the administrative opinion must be taken as a bona fide expression of the agency's reasoning unless the challenger makes a "strong showing of bad faith or improper behavior" (a standard that is seldom met). The net effect of these cases is to give agency decisionmakers a strong incentive to write opinions to accompany their actions, even when procedural law does not compel them to do so.

1. F. REVIEW ON THE ADMINISTRATIVE RECORD

Most of the scope of review principles discussed in preceding sections were originally developed for [112]

courts to use when an agency acts after formal, trial-type proceedings. For cases in which there is no such formality, including

most rulemaking cases, additional principles must be examined. Since the substantial evidence test normally does not apply, the court could potentially turn to either of two other provisions of § 706 as the basis for reviewing the agency's fact findings: it could review the facts de novo, without any deference to the agency's findings (§ 706(2)(F)); or it could review the agency's findings pursuant to the arbitrariness standard (§ 706(2)(A)).

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), definitively established the relative scope of these two clauses. The Court held that an informal action, such as the Secretary of Transportation's highway funding decision, must be reviewed for abuse of discretion under § 706(2)(A), on the basis of "the full administrative record that was before the Secretary at the time he made his decision." Although the Court asserted that the APA required this approach, scholars agree that the concept of an exclusive "administrative record" for review of informal agency actions was not contemplated by the framers of the APA. Prior to *Overton Park*, any facts that the courts needed in order to review such actions were typically developed through judicial trial.

At the same time, the Court accomplished a drastic narrowing of § 706(2)(F). The *Overton Park* opinion asserted that independent judicial factfinding pursuant to clause (2)(F) is available in only two circumstances: where "the action is adjudicatory in

nature and the agency factfinding procedures are inadequate," or

where "issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action." Scholars have puzzled about what these phrases might mean; but the debate has little practical significance, because judicial decisions finding *either* of the two conditions applicable are virtually nonexistent. De novo review of the facts underlying agency actions has essentially vanished from administrative law, except in the handful of situations in which a statutory or constitutional guarantee outside of the APA requires such treatment. Among statutory requirements, the provision for de novo trial in the Freedom of Information Act is the most significant. Constitutional requirements for de novo review are very narrow. For example, the Court early held that an individual facing deportation has a constitutional right to an independent judicial decision as to whether he is a citizen. Ng Fung Ho v. White, 259 U.S. 276 (1922). Congress has since codified this holding. 8 U.S.C. § 1105a(a)(5). A case from the same era called for de novo review of whether a ratesetting order was confiscatory. Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920). This holding may still be valid, but it is unimportant, because the constitutional limits on ratemaking have become very lenient today. See also p. 29 supra.

The *Overton Park* holding that review would take place on an "administrative record" was soon extended to informal rulemaking cases. Under the prior practice, courts were willing to presume the existence of facts supporting the validity of an [illegible]

administrative rule, unless the challenging party proved at trial that the rule was arbitrary. Pacific States Box & Basket Co. v. White, 296 U.S. 176 (1935). Since any litigation over the factual basis of the rule would occur in court, agency decisionmakers did not take time *during* the rulemaking proceeding to compile a "record" for judicial review. After *Overton Park*, however, both agencies and regulated parties came to realize that they would have to make their case at the administrative level, because the reviewing court would disregard any evidence submitted subsequently. See United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240 (2d Cir. 1977) (in proceeding to enforce FDA rule, courts refused to examine new evidence casting doubt on need for rule). Indeed, courts now generally refuse, at least in preenforcement review cases, to take up issues not raised in rulemaking proceedings first. See p. 400 infra.

In an informal rulemaking proceeding, the administrative record will generally consist of the notice of proposed rulemaking, the final rule and accompanying statement of basis and purpose, the comments filed by the public, and any unprivileged working papers prepared by the agency itself. The rule will pass muster under the arbitrary and capricious test if this record contains evidence that could lead a reasonable person to accept the factual premises of the regulation (taking into account the evidence submitted by opponents of the rule).[3] The

[3] agency's obligation to assemble such evidence has turned modern

rulemaking into a more formalized, adversarial process than the framers of the APA anticipated. However, *Overton Park's* administrative record concept was an essential step in the development of "hard look" review of rulemaking. Intensive scrutiny of an agency's reasoning process would scarcely be meaningful if the agency did not have to defend its exercise of discretion by reference to facts that were actually before it at the time the rule was written.

1. G. REVIEW OF RULES

On a general level, most of the scope of review principles described above are fully applicable to judicial review of rules. Like all other forms of agency action reviewed under the APA, rules must be consistent with the agency's statutory mandate (§ 706(2)(C)), the Constitution (§ 706(2)(B)) and procedural requirements (§ 706(2)(D)). They also must not be "arbitrary and capricious" (§ 706(2)(A)), a standard that is breached if the agency lacked support in the administrative record for its factual assumptions, or otherwise misused its discretion.[6]

However, courts have had to struggle to apply these standards satisfactorily in the rulemaking context. In those situations, many of the central

issues concern policy judgments and "legislative facts," which often are not susceptible of "proof" in the same way as the facts in a typical adjudicative proceeding are. Moreover, the issues involved in the