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## Rationalizing the Administrative Record for Equitable Constitutional Claims

**ABSTRACT.** This Note attempts to resolve the uncertain scope of evidentiary review for constitutional claims against agencies. It examines the conventional rules under the Administrative Procedure Act, concluding that they stem from traditional rules of relevancy for discovery, rather than a statutory mandate. It then traces the divergent approaches of lower courts and proposes that the scope of evidentiary review for constitutional claims against agencies should be determined by the decision rules for a particular claim, consonant with its reading of the principles underlying the scope of review in administrative litigation.

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## INTRODUCTION

The scope of evidentiary review in suits against federal agencies is one of the most confused—and confusing—areas of administrative law. The question of what evidence a reviewing court should consider, despite being fundamental to the effective vindication of the rights of plaintiffs harmed by the federal government, is remarkably unsettled. In particular, federal courts have not articulated clear principles about what evidence plaintiffs may obtain from the government to prove their cases when they assert equitable constitutional claims against agencies.<sup>1</sup>

Saying that this area of the law lacks clear principles is putting it somewhat charitably. This basic question has created a fractured and splintered “morass” of lower-court case law,<sup>2</sup> largely because courts are uncertain about where to locate the right of action that permits plaintiffs to bring constitutional claims against agencies. The Administrative Procedure Act (APA) provides a statutory right of action for constitutional claims in Section 706.<sup>3</sup> But that right of action is not exclusive. Courts recognize a separate right of action—rooted in 28 U.S.C. § 1331, Congress’s grant of equity jurisdiction to the federal courts<sup>4</sup>—for litigants to bring statutory and constitutional claims against the federal government outside the APA’s framework. This is called “nonstatutory review” or, more precisely, review of an “implied equitable right of action.”<sup>5</sup>

For suits under the APA’s statutory right of action, courts have developed a comprehensive and limiting common law of evidence and discovery by building on the APA’s “whole record” provision.<sup>6</sup> This set of principles, known as the “record rule,” dramatically limits discovery against agencies by creating a strong presumption that a court’s review should be limited to the documents the agency submits as the “administrative record” supporting a given agency action. This is

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1. By “equitable constitutional claims,” I refer to claims seeking equitable relief against the government, as opposed to claims seeking damages. The availability of implied constitutional rights of action for damages—*Bivens* cases—is limited. See *infra* notes 260-261 and accompanying text.
  2. See *California v. Ross*, 358 F. Supp. 3d 965, 1047 (N.D. Cal. 2019) (citing competing district-court authorities).
  3. 5 U.S.C. § 706(2)(B) (2018).
  4. 28 U.S.C. § 1331 (2018) (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”). Following the merger of law and equity in 1938, see Rules Enabling Act, ch. 651, § 2, 48 Stat. 1064, 1064 (1934), the term “civil action” in Section 1331 is understood as encompassing “traditional equity jurisdiction,” John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 147 n.173 (1998).
  5. See *infra* notes 241-242 and accompanying text.
  6. 5 U.S.C. § 706 (2018).

a perfectly reasonable result for ordinary judicial review of administrative action under the APA. But if it is applied to certain classes of constitutional claims that require evidence of the *intent* of decision makers within agencies, it can complicate and even serve as an effective judicial-review bar for those claims. Under the conventional way of thinking about the record rule, which treats it as a statutory mandate, this evidentiary restriction would not apply to cases brought through an implied equitable right of action.

For example, suppose that the Department of Homeland Security (DHS) promulgates a rule altering the standards under which noncitizens may be considered for immigrant visas or lawful-permanent-resident status. A plaintiff brings a claim under the Fifth Amendment alleging that the agency did so pretextually: that it used facially neutral reasons to support its policy decision but actually intended to reduce the number of nonwhite persons eligible to become permanent residents. Should the agency action be reviewed solely based on the administrative record (containing only those neutral statements of reason) submitted to the court, as the APA commands, or should the plaintiff be entitled to extra-record discovery to prove their claim?<sup>7</sup> Furthermore, suppose the plaintiff challenges the same agency action as arbitrary and capricious, claiming that the facially neutral language used by the agency is a post hoc rationalization of the initial decision.<sup>8</sup> Should they be entitled to extra-record discovery, meaning the ability to force the agency to produce nonprivileged internal documents not submitted as part of the administrative record, or even depose agency staff on the basis of their parallel constitutional claim? This Note answers these questions and attempts to create a path out of the morass.

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This story begins with the APA, which serves as a general waiver of sovereign immunity for claims against agencies. It confers jurisdiction to a federal court where a party has “suffer[ed] legal wrong because of agency action” and is “seeking relief other than money damages.”<sup>9</sup> This “basic presumption of judicial

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7. See *Cook Cnty. v. Wolf*, 461 F. Supp. 3d. 779, 783-85, 792-93 (N.D. Ill. 2020) (providing the facts for this hypothetical). If the court decides to deny plaintiffs’ requests for discovery, things become much more difficult for them; they must rest their claim on whatever evidence led them to bring the suit in the first place (in addition to whatever they can obtain through the Freedom of Information Act (FOIA)) and successfully move to complete or supplement the administrative record. But depositions of agency officials to inquire into their decision-making processes would generally be unavailable. See *infra* Section II.A.

8. Cf. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (noting that a reviewing court can determine the “propriety” of an agency action “solely by the grounds invoked by the agency”).

9. 5 U.S.C. § 702 (2018).

review”<sup>10</sup> created by the APA for agency action applies so long as Congress has not explicitly made the agency action unreviewable<sup>11</sup> and the agency action is not “committed to agency discretion by law.”<sup>12</sup>

This waiver of sovereign immunity for claims seeking nonmonetary relief applies regardless of whether a plaintiff files suit pursuant to an APA cause of action. This general waiver springs out of the 1976 amendments to Section 702.<sup>13</sup> The D.C. Circuit has “‘repeatedly’ and ‘expressly’ held in the broadest terms that ‘the APA’s waiver of sovereign immunity applies to any suit whether under the APA or not,’”<sup>14</sup> unless “any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.”<sup>15</sup> Other circuit courts that considered the issue have reached the same conclusion, finding that Section 702 operates as a general waiver of sovereign immunity for actions seeking nonmonetary relief against agencies.<sup>16</sup>

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10. See *Abbott Lab’s v. Gardner*, 387 U.S. 136, 140 (1967). The question of when an agency’s action is purely discretionary is typically analyzed using a set of factors, including whether the text and structure of the relevant statutes leave a court with any “meaningful standard against which to judge the agency’s exercise of discretion,” whether the action has traditionally been viewed as committed to agency discretion, whether the action involves questions of agency resource allocation, and whether judicial review would produce disruptive practical consequences. See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 830-32 (1985); *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018); *S. Ry. Co. v. Seaboard Allied Mining Corp.*, 442 U.S. 444, 457 (1979).
  11. 5 U.S.C. § 701(a)(1) (2018).
  12. *Id.* § 701(a)(2).
  13. Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721.
  14. *Perry Cap. LLC v. Mnuchin*, 864 F.3d 591, 620 (D.C. Cir. 2017) (quoting *Trudeau v. FTC*, 456 F.3d 178, 186 (D.C. Cir. 2006)).
  15. 5 U.S.C. § 702 (2018). One such statute, implicated in contract claims against agencies, is the Tucker Act, ch. 359, 24 Stat. 505 (1887) (codified as amended in scattered sections of 28 U.S.C.), which the D.C. Circuit has found to impliedly forbid injunctive relief based on contract claims against administrative agencies. See, e.g., *Albrecht v. Comm. on Emp. Benefits of Fed. Rsrv. Emp. Benefits Sys.*, 357 F.3d 62, 69 (D.C. Cir. 2004) (finding sovereign immunity where a fiduciary breach claim turns “entirely on the terms of a contract” (emphasis omitted)); *Transohio Sav. Bank v. Dir., Off. of Thrift Supervision*, 967 F.2d 598, 609 (D.C. Cir. 1992) (holding that “the Tucker Act impliedly forbids—in APA terms—not only district court awards of money damages, which the Claims Court may grant, but also injunctive relief, which the Claims Court may not”).
  16. See, e.g., *Warin v. Dir., Dep’t of Treasury*, 672 F.2d 590, 591 (6th Cir. 1982); *Jaffee v. United States*, 592 F.2d 712, 719 (3d Cir. 1979); *Beller v. Middendorf*, 632 F.2d 788, 797 (9th Cir. 1980); see also Kathryn E. Kovacs, *Scalia’s Bargain*, 77 OHIO ST. L.J. 1155, 1170-74 & 1174 n.166 (2016) (collecting cases). The pathway to this consensus was not uniform; many circuit courts held that the waiver only applied to APA claims, then reversed themselves. Compare *Estate of Watson v. Blumenthal*, 586 F.2d 925, 932 (2d Cir. 1978) (holding that the 1976 APA amendments did not waive sovereign immunity for implied equitable claims under Section 1331),

For claims brought pursuant to a cause of action within the APA,<sup>17</sup> this waiver is cabined by a statutory finality and exhaustion requirement—that only “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court” can be reviewed by an Article III court<sup>18</sup>—and a judicial ripeness doctrine.<sup>19</sup>

The remedial scope of the APA’s grant of jurisdiction is broad, and includes provisions aimed at enabling judicial review of both agency inaction (Section 706(1)) and action (Section 706(2)). The “legal wrongs” a plaintiff may seek to remedy include (1) delayed or withheld agency action, (2) arbitrary actions, (3) procedural deficiencies in agency action, (4) actions unauthorized by statute,

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*with* B.K. Instrument, Inc. v. United States, 715 F.2d 713, 724 (2d Cir. 1983) (abrogating *Watson*).

Kathryn E. Kovacs has written a line of articles sharply criticizing the separation of the APA’s waiver of sovereign immunity from its statutory rights of action from a textualist perspective. See Kovacs, *supra*, at 1182-87; Kathryn E. Kovacs, *Revealing Redundancy: The Tension Between Federal Sovereign Immunity and Nonstatutory Review*, 54 DRAKE L. REV. 77, 106-18 (2005) [hereinafter Kovacs, *Revealing Redundancy*].

17. See *Perry*, 864 F.3d at 621 (finding that Section 702 waives agency sovereign immunity “regardless [of] whether there is another adequate remedy under § 704,” or a final agency action to review, “because the absence of such a remedy is instead an element of the cause of action created by the APA”); *Viet. Veterans of Am. v. Shinseki*, 599 F.3d 654, 661 (D.C. Cir. 2010) (reviewing prior D.C. Circuit opinions and finding the APA’s finality and exhaustion requirements to not be jurisdictional).
18. 5 U.S.C. § 704 (2018). The statutory finality requirement (“final agency action”) has been interpreted by courts in a “flexible” and “pragmatic” way. See *Abbott Lab’ys v. Gardner*, 387 U.S. 136, 149-51 (1967); *U.S. Army Corps of Eng’rs v. Hawkes*, 578 U.S. 590, 599 (2016). As discussed in Part III, *infra*, so-called “nonstatutory” review can sometimes, but not always, be available to aggrieved plaintiffs who seek to definitively challenge nonfinal agency action.

The statutory exhaustion requirement (“no other adequate remedy in a court”) has somewhat more bite. See *Darby v. Cisneros*, 509 U.S. 137, 145-53 (1993). As the Supreme Court puts it, “When Congress enacted the APA . . . it did not intend that general grant of jurisdiction to duplicate the previously established special statutory procedures [for review] relating to specific agencies.” *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988). The presence of a statutory review scheme thus channels review of all claims, including constitutional claims, through the provisions of those statutes, which may require such claims to be initially raised before agencies and may limit the scope of federal-court review of the agency ruling. See *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994); Section III.A, *infra*. For the purposes of this Note, I will focus on the base case in which a special statutory review scheme is not present—that is, when agency action may be freely challenged under a generic APA right of action.

19. The future of the ripeness doctrine is somewhat unsettled. See *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014) (commenting, in dicta, that the ripeness doctrine is in tension with the principle that “a federal court’s obligation to hear and decide cases within its jurisdiction is virtually unflagging” (quoting *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014))).

and (5) actions in violation of a party's "constitutional right, power, privilege, or immunity."<sup>20</sup>

Equitable constitutional claims, the last bucket of claims considered by the APA, have been a persistent source of conceptual and doctrinal difficulty for courts because of their unclear relationship to the rest of the statute. The statute is silent about how its procedural requirements for litigation against agencies would apply to a constitutional claim. Section 706(2)(B), which provides that "the reviewing court shall . . . interpret constitutional and statutory provisions" and "shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . contrary to constitutional right, power, privilege, or immunity," is not clear about whether it (1) creates a separate cause of action for constitutional claims seeking an APA remedy;<sup>21</sup> (2) channels all equitable constitutional claims seeking a remedy against an agency into the statute, making them subject to its procedural provisions;<sup>22</sup> or (3) simply codifies some potential

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20. 5 U.S.C. § 706 (2018).

21. See, e.g., *Trudeau v. FTC*, 456 F.3d 178, 190 (D.C. Cir. 2006) (concluding that a plaintiff could assert a direct cause of action under the First Amendment, which would fall outside of the APA, but that they could also assert a constitutional cause of action *under* the APA to access its remedies, which would subject that action to the APA's procedural requirements); *Latif v. Holder*, 28 F. Supp. 1134, 1163 (D. Or. 2014) (concluding that a particular claim under Section 706(2)(B) merely "mirrors" an implied equitable constitutional claim of a procedural due-process violation such that "the substitute procedures that Defendants select to remedy the violations of Plaintiff's due process rights, if sufficient, will also remedy the violations of Plaintiff's rights under the APA"); *Ala.-Tombigbee Rivers Coal. v. Norton*, No. CIV.A.CV-01-S-0194-S, 2002 WL 227032, at \*5 (N.D. Ala. Jan. 29, 2002) (acknowledging an implied equitable constitutional claim only when it is based on factual allegations distinct from those asserted in an APA claim).

22. See, e.g., *Webster v. Doe*, 486 U.S. 592, 607 n.\* (1988) (Scalia, J., dissenting) ("While a right to judicial review of agency action may be created by a separate statutory or constitutional provision, once created it becomes subject to the judicial review provisions of the APA unless specifically excluded."); *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 58 F. Supp. 3d 1191, 1237 (D.N.M. 2014) ("[T]here is only one First Amendment retaliation claim [in this action]; it arises under the Constitution, but it is subject to the APA's procedural provisions . . ."); *Harv. Pilgrim Health Care of New England v. Thompson*, 318 F. Supp. 2d 1, 7 (D.R.I. 2004) (concluding, with limited discussion, that "the APA provides the standard for this Court to utilize in reviewing the actions of an administrative agency" regarding an equal-protection and a due-process claim); *Atterbury v. U.S. Marshals Serv.*, 941 F.3d 56, 62 (2d Cir. 2019) (determining that a due-process claim arose under the APA, rather than existing as a "free-standing constitutional claim"); *New Mexico v. McAleenan*, 450 F. Supp. 3d 1130, 1169 (D.N.M. 2020) ("The presence of a constitutional claim does not take a court's review outside of the APA . . ."); *Harkness v. Sec'y of Navy*, 858 F.3d 437, 451 & n.9 (6th Cir. 2017) (holding that a constitutional claim "is properly reviewed on the administrative record" absent a showing of bad faith); *Chiayu Chang v. U.S. Citizenship & Immigr. Servs.*, 254 F. Supp. 3d 160, 161 (D.D.C. 2017) (collecting other cases).

remedies for those implied equitable constitutional claims which already existed in the common law of federal equity practice.<sup>23</sup>

A brief note is warranted about constitutional review's relevance to the broader project of judicial review of federal administration. Purely constitutional cases tend to proceed when all other traditional tools available to judges to control the federal administrative state have failed, due in large part to the canon of constitutional avoidance.<sup>24</sup> While it is increasingly common for well-advised plaintiffs to plead parallel claims under the APA and the Constitution, if applicable, courts generally only reach their constitutional claims if the agency action is upheld under administrative-law doctrines. Over the last few decades, the Supreme Court has primarily focused on *structural* constitutional claims, that is, challenges to the nature and scope of Congress's delegation of authority to agencies and their internal processes for implementing it.<sup>25</sup> These claims are typically divorced from the specifics of any agency action. For example, a structural constitutional challenge to the appointment procedure for or removal protections afforded to a given administrative-adjudicatory body stands separately from the agency action that gives parties standing to sue; the logic behind a given decision of that body is irrelevant to whether it was constituted in a constitutionally sound way.<sup>26</sup>

The questions addressed by this Note are made more urgent by the revival of high-profile due-process, animus, and equal-protection claims under the Fifth and First Amendments over the last decade.<sup>27</sup> These claims are related to

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23. See *Texas v. Biden*, No. 21-CV-067, 2021 WL 4552547, at \*5 (N.D. Tex. July 19, 2021) (arguing, in an opinion by Judge Matthew J. Kacsmaryk, that a plaintiff's constitutional claim is free-standing and "falls squarely within this Court's equitable power to enjoin unconstitutional [agency] action" as "*ultra vires*").
  24. See MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION, at x (1988) (describing the major participation of judges in the policy-generation processes of administration as occurring through statutory review, rather than through constitutional review).
  25. See notes 262-284, *infra*, and accompanying text.
  26. Cf. *United States v. Arthrex, Inc.*, 594 U.S. 1, 23 (2021) ("Only an officer properly appointed to a principal office may issue a final decision binding the Executive Branch in the proceeding before us.").
  27. I discuss several of these cases in Part III, *infra*. See *Dep't of Com. v. New York*, 139 S. Ct. 2551 (2019); *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020); *Trump v. Hawaii*, 585 U.S. 667 (2018). For a few others, see, for example, *La Clínica de la Raza v. Trump*, 477 F. Supp. 3d 951 (N.D. Cal. 2020) (challenging the Trump Administration's public-charge rule); *Stone v. Trump*, 400 F. Supp. 3d 317 (D. Md. 2019). These cases have persisted into the Biden Administration. See, e.g., *Nuizard v. Minority Bus. Dev. Agency*, No. 23-CV-0278 (N.D. Tex. June 5, 2023); *Texas v. Equal Emp. Opportunity Comm'n*, No. 21-CV-194 (N.D. Tex. Oct. 1, 2022).



statutory review under the APA and agency organic and enabling statutes.<sup>28</sup> Due-process and animus claims are also cognizable as procedural deficiencies in agency process; animus claims are closely related to “pretextual” APA claims, which allege the agency acted for reasons other than those stated by it. Equal-protection claims involve a more searching review of the *intent behind* and *impacts of* agency action, in a manner somewhat similar to hard-look review.<sup>29</sup> Taken together, these constitutional claims are firmly rooted in the record created by the agency in support of that action, as opposed to the more theoretical world of structural constitutional cases, which care about the specifics of who did what to whom and why, primarily for preliminary justiciability issues such as standing, mootness, ripeness, and exhaustion.<sup>30</sup>

Courts have sharply split on whether constitutional claims are entitled to extra-record discovery, or even covered by the common law of the APA in the first place. The issue is compounded when constitutional claims are brought alongside another APA cause of action. Should a plaintiff be able to circumvent the common-law record-rule restrictions by bringing a parallel constitutional claim? To date, the federal courts have not arrived at any coherent resolution of this issue. It has also evaded sustained scholarly analysis: Conley K. Hurst has provided the only targeted perspective in an incisive student Comment. He argues that the scope of evidentiary review for equitable constitutional claims is necessarily limited by the text of the APA and the underlying policy preferences it

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28. One important caveat: antidiscrimination claims (particularly disparate-impact claims) have historically been channeled away from the APA and into the private rights of action created by federal antidiscrimination statutes. This occurs through the operation of Section 704 of the APA, which restricts the statute’s right of action to claims for “which there is no other adequate remedy in a court.” 5 U.S.C. § 704 (2018); see Cristina Isabel Ceballos, David Freeman Engstrom & Daniel E. Ho, *Disparate Limbo: How Administrative Law Erased Antidiscrimination*, 131 *YALE L.J.* 370, 411-24 (2021). But “the APA is an increasingly prominent feature of lawsuits against federal-agency discrimination,” particularly in cases which do not involve sub-federal actors or the recipients of federal funds. Ceballos, Engstrom & Ho, *supra*, at 398. As Cristina Isabel Ceballos, David Freeman Engstrom, and Daniel E. Ho argue, these types of cases should be brought under the APA because they are outside the purview of statutes, such as Title VI of the Civil Rights Act, offering other adequate remedies. *Id.* at 397-401.

29. See *infra* notes 303-306 and accompanying text.

30. Cf. Aziz Z. Huq, *Standing for the Structural Constitution*, 99 *VA. L. REV.* 1435, 1437 (2013) (“[S]tructural constitutional principles are rarely conceived in individualized terms. Rather they align more closely with a class of ‘generalized grievance[s]’ shared by a large number of citizens in a substantially equal measure’ that Article III has been crafted to keep at bay.” (quoting *Duke Power Co. v. Carolina Env’t Study Grp.*, 438 U.S. 59, 80 (1978)) (footnote omitted)).

reflects.<sup>31</sup> This Note seeks, in part, to offer a counterpoint to Hurst's perspective while providing the first detailed look at the *characterization* of the right of action allowing plaintiffs to bring constitutional claims against federal agencies and placing the record rule in the context of the ordinary principles of civil litigation. In essence, this Note seeks to de-exceptionalize the evidentiary principles of administrative litigation while providing a framework for the effective adjudication of constitutional claims against agencies.

First, in Part I, the Note unpacks the conflicting judicial and agency interpretations of the APA's "whole record" provision and advances the argument that the provision does not limit the scope of evidentiary review for APA claims. Instead, it argues in Part II that this scope of review should be viewed as an extension of the familiar relevancy standard found in the Federal Rules of Civil Procedure (FRCP) and Federal Rules of Evidence (FRE).<sup>32</sup>

Second, in Part III, the Note canvasses the conflicting doctrine on the characterization of constitutional claims against agencies and the scope of evidentiary review for these claims.

For some, these claims are vestigial, supplanted by the statutory right of action in the APA to the extent it supplies an adequate remedy for improprieties in agency action or inaction.<sup>33</sup> For others, the implied equitable right of action survives, completely unscathed by the enactment of the APA, because that statute does not purport to be the exclusive pathway for relief against agencies.<sup>34</sup> Yet, others still see the landscape as more varied: some claims must proceed using record-rule principles, while others may be maintained, in parallel, through the implied equitable right of action.<sup>35</sup> As a result, the record rule has varying bite for constitutional claims depending on how the reviewing court characterizes those claims.

This Note argues this third view is the right one: that the statutory right of action and the implied equitable right of action coexist. As a result, it argues that

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31. See generally Conley K. Hurst, Comment, *The Scope of Evidentiary Review in Constitutional Challenges to Agency Action*, 88 U. CHI. L. REV. 1511 (2021) (arguing for application of the record rule to constitutional challenges to agency action). Hurst assumes, with limited argument, that the presence of a statutory right of action for equitable constitutional claims in the APA applies the statute's whole-record provision to such claims, regardless of whether they are asserted under the APA's right of action or implied in Section 1331. I disagree with this perspective; as I argue, even if the whole-record provision applies to all such claims, the whole-record provision is better rationalized as a malleable concept given form by the decision rules for a given claim, rather than a stable principle. See *infra* Section II.B.

32. See *infra* Parts I, II.

33. See *infra* Section III.B.1.

34. See *infra* Section III.B.2.

35. See *infra* Section III.B.3.

the scope of evidentiary review for equitable constitutional claims against the government should be resolved through the familiar discovery principles in the FRCP—in particular, whether discovery would produce evidence relevant to the scope of review for a well-pleaded claim. As a functional matter, this position maintains the extremely limited availability of discovery for ordinary arbitrary-and-capricious claims under the APA and the record rule. It also provides a coherent pathway to discovery for those constitutional claims with decision rules that make the application of the record rule inapposite.

## I. THE ADMINISTRATIVE RECORD

Federal courts have interpreted the APA’s judicial-review provisions to cabin what materials they may consider and, therefore, what plaintiffs may discover, when evaluating a claim brought under the APA. In its flush text, Section 706 provides that “the court shall review the whole record or those parts of it cited by a party.”<sup>36</sup> The question of what constitutes the “whole record” considered by the court is fundamental, and can be outcome-determinative for litigants.<sup>37</sup> In ordinary arbitrary-and-capricious litigation under the APA, courts agree on some high-level principles about what constitutes the “whole record.”<sup>38</sup> However, as applied to specific cases, the contents of the administrative record actually before federal courts have been unclear, unstable, and unresolved since the passage of the APA in 1946.<sup>39</sup> In this Part, I review the foundations of the concept of the administrative record and canvass the conflicting judicial and agency interpretations of the scope of evidentiary review for courts reviewing agency action. And I argue that the divergent points of view over the administrative record reflect diverse viewpoints about the proper relationship between federal courts and agencies.

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36. 5 U.S.C. § 706 (2018).

37. See, e.g., Aram A. Gavoor & Steven A. Platt, *Administrative Records and the Courts*, 67 KAN. L. REV. 1, 3 (2018).

38. See 2 KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 10.5, at 1146 (6th ed. 2019) (discussing the relative stability of lower-court jurisprudence on general record-rule principles since the Supreme Court’s landmark decisions in *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985), and *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633 (1990)).

39. See Gavoor & Platt, *supra* note 37, at 3 (discussing the persistent “judicial indeterminacy on what constitutes ‘the whole record’ for purposes of APA administrative record review”); Peter Constable Alter, Note, *A Record of What: The Proper Scope of an Administrative Record for Informal Agency Action*, 10 U.C. IRVINE L. REV. 1045, 1061 (2020) (discussing the recent trend towards “inconsistency” in the application of the record rule).

### A. *Constructing the Administrative Record for Informal Agency Action*

The contents of the administrative record “are defined, to varying degrees of specificity, by statutes, regulations, and case law.”<sup>40</sup> As I will discuss, the APA provides some limited guidance on inputs to the record, but as an omnibus statute, its provisions are necessarily general. It “presumes agencies will generate a record as they adjudicate or make rules, but the statute does not exhaustively define the procedures necessary to generate the record for all types of agency action.”<sup>41</sup> An agency’s organic and enabling statutes can provide substantive rules as to the record it should develop before a particular agency action is finalized.<sup>42</sup> Federal laws and judicial rules governing civil procedure can also provide minimum procedural standards for what an agency must file when a litigant brings suit challenging agency action.<sup>43</sup> Agencies themselves can promulgate

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40. Gavoor & Platt, *supra* note 37, at 11. A “record” is defined in the Federal Records Act, 44 U.S.C. § 3301 (2018), as “includ[ing] all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them,” which is helpful only as an absolute outer boundary of the types of information potentially considered as part of the administrative record.

41. Gavoor & Platt, *supra* note 37, at 11-12.

42. One such statutory record requirement is created by the Clean Air Act, which provides detailed guidance as to the exclusive record for judicial review of rulemakings under the Act. *See* 42 U.S.C. § 7607(d)(7)(A) (2018).

43. The most prominent procedural statute is 28 U.S.C. § 2112 (2018), which grants the Supreme Court the power to promulgate rules of civil procedure governing “the time and manner of filing and the contents of the record” and requiring a record consisting of “the order sought to be reviewed or enforced, the findings or report upon which it is based, and the pleadings, evidence, and proceedings before the agency, board, commission, or officer concerned, or such portions thereof” for direct circuit-court review of agency action. *See also* FED. R. APP. P. 16(a), 17(b) (fleshing out § 2112’s rulemaking mandate and providing procedures through which a party can attempt to supplement the administrative record).

Federal judicial districts may also have local rules governing the technical filing of an administrative record, which, in general, govern the timing of its filing and certification and may permit parties to file only the portions of the record on which they will rely. These rules typically do not affect the content of the administrative record. *See, e.g.*, D.D.C. LOC. CIV. R. 7(n)(1) (governing the timing of record certification and permitting partial filing); D. ALASKA LOC. CIV. R. 16.3 (A)-(B) (providing for special filing procedures for large administrative records). *But see infra* note 137 and accompanying text (describing the District of Wyoming’s local rule that requires the production of a privilege log alongside any administrative record).

procedural rules or issue informal guidance as to what ordinarily should be included in the administrative record for classes of rulemaking.<sup>44</sup>

For formal agency proceedings, the APA provides detailed guidance as to what a court should consider as part of the administrative record. For example, the administrative record in formal adjudication – which consists of quasi-judicial proceedings before an administrative law judge (ALJ) – is simply the full hearing record, which the agency will have compiled before making a final decision.<sup>45</sup> These proceedings generate a record “in the familiar courtroom manner”: through documents submitted to the proceeding and through transcripts of arguments and testimony.<sup>46</sup> The determination of what constitutes the administrative record in this context is relatively straightforward because the trial-like records of the proceeding are the only materials that the agency may lawfully rely on to reach its decision.<sup>47</sup>

Next, in the (extremely rare) circumstance in which an agency relies on formal rulemaking,<sup>48</sup> the APA provides a statutory minimum for the contents of the administrative record by requiring that it contain at least the “transcript of testimony and exhibits, together with all papers and requests filed in the proceeding.”<sup>49</sup> The APA has much less to say about inputs to administrative records of informal agency action, and does not have any statutory requirements beyond the “whole record” provision.<sup>50</sup>

44. *E.g.*, 40 C.F.R. § 300.810 (2023) (providing a set of general standards for what should “typically” be included or excluded in administrative records created for the Comprehensive Environmental Response, Compensation, and Liability Act response actions); DEP’T OF THE INTERIOR, STANDARDIZED GUIDANCE ON COMPILING A DECISION FILE AND AN ADMINISTRATIVE RECORD (2006) (providing detailed instructions on assembling an administrative record for litigation).

45. 5 U.S.C. § 556(e) (2018).

46. William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 41 (1975); *see* 5 U.S.C. § 554 (2018) (providing a set of statutory procedures delineating the record for formal adjudications).

47. 5 U.S.C. § 556(e) (2018).

48. *See* Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237, 240, 247–58 (2014) (discussing how formal rulemakings have become “effectively exiled from administrative law” following the Supreme Court’s decision in *United States v. Florida East Coast Railway Co.*, 410 U.S. 224 (1973)).

49. 5 U.S.C. § 556(e) (2018).

50. *See* Alter, *supra* note 39, at 1066–67. Michael Asimow and Yoav Dotan observe that the case for a closed record for review of informal agency action, particularly the wide universe of “policy implementation decisions,” is “uneasy” because the “decision-making process does not generate a structured evidentiary record” and “the process may not give rise to a thoughtful agency statement of reasons and may not furnish an opportunity for private parties to make arguments.” Michael Asimow & Yoav Dotan, *Open and Closed Judicial Review of Agency Action:*

To fill out the APA's sparse text, federal courts have created a rich (and often inconsistent) set of common-law standards for the creation of and content included in the administrative record for informal agency action. Taken together, these standards are what courts and agencies have termed the "record rule." The Supreme Court laid out the foundations of the contemporary record rule in its "seminal and enigmatic"<sup>51</sup> decision in *Citizens to Preserve Overton Park, Inc. v. Volpe*.<sup>52</sup>

At its most basic level, the record rule creates general standards for the inner and outer boundaries of what constitutes the administrative record. On one hand, it confines judicial review of an agency action to consideration of the record amassed by the agency at the time the action at issue was taken. But the necessary corollary of the record rule is that an agency must create "some form of a record so that courts can review [agency] actions" under the standards of review laid out in Section 706.<sup>53</sup> To the *Overton Park* Court, which was evaluating an informal adjudication, this meant that the agency bore the initial burden of establishing the factual basis for its action by submitting to the reviewing court "the full administrative record that was before the Secretary at the time he made his decision."<sup>54</sup> This was a break from the highly deferential standards laid out by prior cases, such as *Pacific States Box & Basket Co. v. White*, under which a plaintiff generally had "the burden of disproving supporting factual premises and rationales for the rule."<sup>55</sup> Under the prior *Pacific States* framework, "[t]he agency had no burden to show, in the first instance, factual support for the rule."<sup>56</sup> The record rule thus serves, on the other hand, as a test of minimum sufficiency for an agency's factual showing to a court, which Congress may augment in a particular organic or enabling statute, or which an agency itself may augment by rule or guidance.

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*The Conflicting U.S. and Israeli Approaches*, 64 AM. J. COMPAR. L. 521, 531 & n.39 (2016) (collecting sources).

51. James N. Saul, Comment, *Overly Restrictive Administrative Records and the Frustration of Judicial Review*, 38 ENV'T L. 1301, 1306 (2008).
52. See *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). For more on the judicial construction of the record rule, see *infra* Section I.B.
53. Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 127 (2003).
54. *Overton Park*, 401 U.S. at 420.
55. JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 8 (5th ed. 2012); *Pac. States Box & Basket Co. v. White*, 296 U.S. 176, 186 (1935) ("But where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches . . . to orders of administrative bodies.").
56. LUBBERS, *supra* note 55, at 288.

Thus, for informal agency actions, the idea that there could be a closed, complete administrative record to which a federal court must limit its review emerges from a gestalt body of law, rather than the text of the APA.<sup>57</sup> The practical effect of this idea of a “closed” record on review is that a court should “reject most attempts to introduce new evidence, new reasons, or new arguments at the judicial review stage”<sup>58</sup> absent “unusual circumstances justifying a departure” from this general principle.<sup>59</sup> The Supreme Court’s framing of this basic idea, in *Camp v. Pitts*, is that “the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.”<sup>60</sup> This idea makes intuitive sense, so long as all agree on the boundaries of such a closed record. In a court’s review of formal agency adjudications, the boundary problem is straightforward: a federal court acts in a familiar appellate mode,<sup>61</sup> reviewing a collection of documents submitted by both parties as part of a discrete agency proceeding before an identifiable decisionmaker.<sup>62</sup> This record ends up looking much like the record created by a trial court. But for informal agency action in its myriad forms, for which there is no standard process by which a record is constructed, the boundaries of this closed administrative record are frequently contested and destabilized by both federal courts and internal agency and executive-branch practice.<sup>63</sup>

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57. The legal-realist critique is that attempts to limit the evidentiary scope of review of agency action to something called an administrative record is “unfruitful . . . for the general custom of judges has been to make no mention in formal opinions of extra-record sources of information” while relying on those sources to reach a particular holding. Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 406 (1942).
58. Asimow & Dotan, *supra* note 50, at 534; see *Home Box Off., Inc. v. FCC*, 567 F.2d 9, 54 (D.C. Cir. 1977) (“Whatever the law may have been in the past, there can now be no doubt that implicit in the decision to treat the promulgation of rules as a ‘final’ event in an ongoing process of administration is an assumption that an act of reasoned judgement has occurred, an assumption which further contemplates the existence of a body of material— documents, comments, transcripts, and statements in various forms declaring agency expertise or policy— with reference to which such judgement was exercised.”), *cert. denied*, 434 U.S. 829 (1977).
59. *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008) (quoting *Tex. Rural Legal Aid, Inc. v. Legal Servs. Corp.*, 940 F.2d 685, 698 (D.C. Cir. 1991)). See *infra* notes 68-80 and accompanying text for a discussion of the “rather nebulous” exceptions to the concept of a closed administrative record. Asimow & Dotan, *supra* note 50, at 533.
60. 411 U.S. 138, 142 (1973) (interpreting *Overton Park*).
61. See Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 941 (2011).
62. See *supra* notes 45-47 and accompanying text.
63. See, e.g., Nicholas R. Parrillo, *Negotiating the Federal Government’s Compliance with Court Orders: An Initial Exploration*, 97 N.C. L. REV. 899, 907 n.19 (2019) (“Exactly what materials the agency should include in the record and forward to the court in the case of informal action—

It is worth pausing to define some terms, as the names used for record-related concepts in this area of administrative law are frequently imprecise. For informal agency action, the administrative record seen by a reviewing court is coextensive with, but not a complete account of, all records generated, received, or consulted by an agency before a given agency action is finalized.<sup>64</sup> In most (but not all) agencies, it is prepared retrospectively, after an agency action has been challenged. It is a subset of all materials directly or indirectly considered by agency personnel with substantive responsibilities for the final agency action in reaching a decision—the internal “decision record.”<sup>65</sup> Agencies have their own individualized procedures for constructing the agency record for a given rule-making or adjudication. In general, they exclude minimally relevant studies, reports, or other records actually viewed by the agency as well as internal and inter-agency email communications, personal notes, and documentations of oral communications that “do not involve the agency decisionmaker or have little meaningful bearing on the ultimate form of the proposed or final rule.”<sup>66</sup> The

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particularly when large numbers of personnel and amounts of material are involved—is a question that is often unclear in the case law, disputed in litigation, and subject to numerous judgement calls that depend on practices that vary by agency and are sometimes quite ad hoc . . .”).

64. See, e.g., *Thompson v. U.S. Dep’t of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (“The whole administrative record, however, ‘is not necessarily those documents that the *agency* has compiled and submitted as “the” administrative record.” (quoting *Exxon Corp. v. Dep’t of Energy*, 91 F.R.D. 26, 32 (N.D. Tex. 1981))); see also *Al Ghanim Combined Grp. Co. Gen. Trad. & Cont. W.L.L. v. United States*, 56 Fed. Cl. 502, 508 (2003) (“[I]t must be remembered that the ‘administrative record is a fiction.’” (quoting *CCL Serv. Corp. v. United States*, 48 Fed. Cl. 113, 118 (2000))).
65. There is no settled name for this class of documents, and agencies themselves use a variety of names. For rulemakings, the preferred Administrative Conference of the United States nomenclature is “rulemaking record.” Within agencies, common ones include the “decision file” or “legal file.” See Working Grp. on Compiling Admin. Recs., *Handbook on Compiling Administrative Records for Informal Rulemaking*, OFF. OF THE CHAIRMAN, ADMIN. CONF. OF THE U.S. 12 (Jan. 2022) [hereinafter *ACUS Administrative Record Handbook*], [https://www.acus.gov/sites/default/files/documents/ACUS\\_Handbook\\_on\\_Compiling\\_Administrative\\_Records.pdf](https://www.acus.gov/sites/default/files/documents/ACUS_Handbook_on_Compiling_Administrative_Records.pdf) [<https://perma.cc/QYN9-UYMD>].
66. *Id.* at 19. One significant category of documents that is typically highly relevant to an agency’s decision but is nevertheless excluded by the record rule, unless required by statute, is documentation of executive oversight of the policymaking process. Many scholars have pointed out the bloodless approach conventional administrative-law doctrines take towards executive influence in administrative policymaking, and “[t]he extent to which agencies can and should acknowledge the political factors that play into their decisions is an ongoing issue of scholarly debate.” Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1363 n.365 (2012) (collecting sources). Outside of informal political pressure, the Office of Management and Budget’s (OMB) review of significant administrative action through its Office of Information and Regulatory Affairs (OIRA) is a highly influential part of the



nomenclature in this area is not settled. Still, for the purposes of this Note, I will term this universe of documents from which the agency constructs its internal decision record the “total agency record” for a given action. This category excludes all external documents, such as research reports or academic articles, which were not actually considered by anyone at the agency during its decision-making process, and are not otherwise in the agency’s possession, but which are substantively relevant to the agency’s final decision. I will call this class of documents “extra-record documents” because they will never fall within any conception of the agency’s internal record. However, under prevailing doctrine, extra-record documents might still be considered part of the administrative record by a reviewing court. Plaintiffs may seek to add them through a process called “supplementation,” which I discuss below.<sup>67</sup> This taxonomy is important for two significant reasons.

First, this taxonomy helps us understand what plaintiffs are seeking to do when they contest the agency’s administrative record when it is submitted to the court. Under the standards set by the record rule, plaintiffs can contest the administrative record submitted by the agency in two ways. Most commonly, plaintiffs pursue additional materials on the grounds that the record submitted by the agency is not actually complete. The material plaintiffs seek through “completion” was actually considered by the agency—and therefore within the

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policymaking process. See, e.g., Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1162-67 (2014); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331-46 (2001). Yet, this “supervision process is largely opaque.” Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1159 (2010). The primary documentary records of OMB influence—so-called “return and review” letters—are infrequently disclosed as part of the administrative record or otherwise. Mendelson, *supra*, at 1149-51. This opacity persists despite Executive Order 12,866’s requirement that return-and-review letters be disclosed after an agency action is finalized, among other disclosure requirements. Exec. Order No. 12,866 § 6(b)(4)(D), 58 Fed. Reg. 51735, 51743 (1994) (“After the regulatory action has been published in the Federal Register or otherwise issued to the public, or after the agency has announced its decision not to publish or issue the regulatory action, OIRA shall make available to the public all documents exchanged between OIRA and the agency during the review by OIRA under this section.”).

On this point, federal courts have disarmed themselves: following the logic laid out in cases such as *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981), reviewing courts generally exclude records of executive oversight from the administrative record. *Id.* at 407-08 (“[A]ny rule issued here with or without White House assistance must have the requisite factual support in the rulemaking record . . . [I]t is always possible that undisclosed Presidential prodding may direct an outcome that is factually based on the record, but different from the outcome that would have obtained in the absence of Presidential involvement. . . . But we do not believe that Congress intended that the courts convert informal rulemaking into a rarified technocratic process, unaffected by political considerations or the presence of Presidential power.” (emphasis omitted)).

67. See *infra* notes 76-80 and accompanying text.

decision record or total agency record—but was withheld from the administrative record filed with the court. To complete the administrative record successfully, a plaintiff generally needs to show that the materials in question were those that the agency “directly or indirectly considered” in its predecisional process.<sup>68</sup> Plaintiffs must overcome a presumption of regularity in agency construction of the record, which is achieved through “clear evidence to the contrary”;<sup>69</sup> they must also then show that the materials in question are not covered by the deliberative process privilege. This qualified privilege aims to “prevent injury to the quality of agency decisions” by shielding deliberative materials within the total agency record from public disclosure.<sup>70</sup> In its modern form,<sup>71</sup> it is a common-law protection for documents which are predecisional, deliberative, not purely factual, and not the “‘working law’ of the agency.”<sup>72</sup> It serves to protect “documents generated during an agency’s deliberations about a policy, as opposed to documents that embody or explain a policy that the agency adopts.”<sup>73</sup> Taken

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68. *WildEarth Guardians v. Salazar*, 670 F. Supp. 2d 1, 4 (D.D.C. 2009) (quoting *Pac. Shores Subdivision Cal. Water Dist. v. U.S. Army Corps of Eng’rs*, 448 F. Supp. 2d 1, 4 (D.D.C. 2006)).
69. *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993); see also *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (outlining the longstanding “presumption of honesty and integrity” underlying deferential court review of agency procedures). The “quantum of proof” required to overcome the presumption that the administrative record was properly designated is “unsettled.” *WildEarth Guardians v. U.S. Forest Serv.*, 713 F. Supp. 2d 1243, 1253–54 (D. Colo. 2010). Compare *Pac. Shores Subdivision*, 448 F. Supp. 2d at 6–7 (requiring a plaintiff to “identify reasonable, nonspeculative grounds for its belief that the documents were considered by the agency” and to identify “when the documents were presented to the agency, to whom, and under what context”), with *Dopico v. Goldschmidt*, 687 F.2d 644, 654 (2d Cir. 1982) (allowing discovery against an agency to complete the administrative record where “fundamental documents” normally in the record were absent), and *Sharks Sports & Ent. LLC v. Fed. Transit Admin.*, No. 18-cv-04060, 2020 WL 511998, at \*2 (N.D. Cal. Jan. 31, 2020) (compiling cases permitting completion where the plaintiff merely “show[ed] that the agency applied the wrong standard in compiling the record”).
70. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149–50 (1975).
71. This privilege has historically been called the “executive privilege.” This nomenclature has been phased out by courts in favor of the more specific “deliberative process privilege” as courts have recognized the existence of other privileges potentially assertible by agencies. See *infra* notes 138–144 and accompanying text. Conceptually, all of these privileges are “executive privileges” in that they are assertible by the executive branch. Cf. *Sears*, 421 U.S. at 149–50 (linking the executive privilege with the deliberative process privilege); *Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 257 (D.C. Cir. 1982) (discussing the “executive ‘deliberative process’ privilege” (quoting *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980))).
72. *Sears*, 421 U.S. at 152–53; *Coastal States*, 617 F.2d at 866–68.
73. *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 783 (2021). This privilege gives the government a qualified defense to the production of deliberative documents. See *FTC v.*

together, these are restrictive requirements. In practice, plaintiffs must either show that the agency accidentally excluded adverse evidence<sup>74</sup> or that the agency produces a record so barren that the court finds it impossible to review it effectively.<sup>75</sup>

Plaintiffs may also seek to supplement the record, seeking to add material that was not before the agency – that is, extra-record documents. Supplementation has a much higher bar, as it is the most destructive to the concept of a coherent “administrative record” as an evidentiary foundation for review. Courts have recognized a variety of circumstances in which supplementation is appropriate – like all things involving the administrative record, supplementation doctrine is “unkempt terrain”<sup>76</sup> – such as if (1) the agency acted in bad faith<sup>77</sup> or otherwise behaved improperly in compiling the record, (2) the agency failed to consider “all relevant factors,”<sup>78</sup> (3) it is necessary to explain technical terms or complex matters to the court,<sup>79</sup> or (4) it is necessary to evaluate the agency’s

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*Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984), which explains that courts must balance “1) the relevance of the evidence; 2) the availability of other evidence; 3) the government’s role in the litigation; and 4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions.” *See also Sears*, 421 U.S. at 150.

74. *See, e.g., Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 198 (D.D.C. 2005). Even an agency completing the record during litigation may “not raise significant questions about the completeness of the record.” *TOMAC v. Norton*, 193 F. Supp. 2d 182, 195 (D.D.C. 2002).
75. *See, e.g., Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419-20 (1971).
76. Gavoort & Platt, *supra* note 37, at 43.
77. There is no consensus standard for bad faith in district courts, but it is clear that a plaintiff must make a “significant showing – variously described as a ‘strong,’ ‘substantial,’ or ‘prima facie’ showing – that it will find material in the agency’s possession indicative of bad faith.” *Amfac Resorts, LLC v. U.S. Dep’t of the Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001); *see, e.g., Leland E. Beck, Agency Practices and Judicial Review of Administrative Records in Informal Rulemaking*, ADMIN. CONF. OF THE U.S. 72 n.408 (May 14, 2013), <https://www.acus.gov/sites/default/files/documents/Agency%20Practices%20and%20Judicial%20Review%20of%20Administrative%20Records%20in%20Informal%20Rulemaking.pdf> [<https://perma.cc/Q7WC-RPST>] (“Mere allegations that it appeared that the agency had a hostile attitude, or unwillingness to correct errors, or severity of action, or had a predetermined agenda, simply do not meet this standard.” (citing *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996))).
78. Gavoort & Platt, *supra* note 37, at 51. *See, e.g., Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996).
79. Gavoort & Platt, *supra* note 37, at 52; Beck, *supra* note 77, at 70; *see, e.g. Sw. Ctr.*, 100 F.3d at 1450.

predictive judgements using information that “c[a]me into existence after the agency acted that demonstrates that the agency’s actions were right or wrong.”<sup>80</sup>

Second, by creating such a minute taxonomy of agency records, I hope to highlight another important point. Jerry L. Mashaw once observed that “a written record,” submitted to a court, “even (or especially) of . . . [great] length, cannot provide a sharp and true picture of the reality of administration.”<sup>81</sup> At each narrowing point—from the total agency record, to the decision record, to the administrative record—the ground-truth of agency processes these records reflect becomes more compressed and distorted as agency staff intentionally select, prune, and discard. And, of course, the atmospheric influence of things such as the diffuse transmission of executive political preferences to agency political appointees and staff<sup>82</sup> and the agency’s institutional expertise and managerial politics on its group decision-making processes are difficult, if not impossible, to reduce to a written record. Contemporary doctrines of judicial review tend to minimize these ghosts in the machinery of administration, preferring to reduce the sprawling, sometimes irrational, complexity of administrative decision-making to something legible to a reviewing court.

This is the essential artifice of the administrative record. It does not spontaneously appear, fully formed, before a court, miraculously springing from the head of the agency administrator. It must be constructed by the agency itself. As I will discuss in Section I.C, agencies construct the administrative record from the agency record in meaningfully different ways. But in general, there is a common set of materials that properly belong in the administrative record for judicial review. For informal rulemakings, this includes “[n]otices related to the rulemaking,” “[c]omments and other public submissions related to the rulemaking,” “ex parte communications” with people outside the agency related to the rulemaking, “[r]eports or recommendations of relevant advisory committees,” internal and external background materials “relied on or cited in notices related to the rulemaking,” and any “[o]ther materials required by statute, executive order, or

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80. Beck, *supra* note 77, at 71; Gavoor & Platt, *supra* note 37, at 52; see, e.g., *Am. Petroleum Inst. v. EPA*, 540 F.2d 1023, 1034 (10th Cir. 1976) (noting that “[a]fter promulgation, events indicating the truth or falsity of agency predictions should not be ignored” and examining “new data” submitted by EPA to “show the validity of the EPA actions”).

81. JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* 7 (1983).

82. See, e.g., Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 *YALE L.J.* 1600, 1625-26 & n.82 (2023) (discussing the wide variety of ways “presidential preferences” are indirectly communicated to agencies, including “[p]residential campaign speeches, Cabinet member speeches, testimony before congressional committees by senior administration officials, [and] conversations with higher-placed appointees with larger policy purviews,” which can generate an informal understanding of an administration’s “policy orientation”).

agency rule.”<sup>83</sup> Common standards for the scope of the administrative record for informal adjudications are much more contested.<sup>84</sup>

The following Sections will cover the major points of disagreement over the sweep of a court’s evidentiary review, highlighting differing viewpoints among courts and agencies’ internal administrative law. In doing so, I hope to make the basic point that the standards of administrative law governing the administrative record are muddled, at least in part because they reflect “fundamental political questions about the capacity and will of courts to intervene in the process of administrative decision making.”<sup>85</sup>

### B. *Inconsistent Judicial Construction of the Administrative Record*

Judges engaged in nonstatutory review bemoan the “morass” of case law producing unclear standards for the scope of their evidentiary review.<sup>86</sup> But even under statutory APA review, courts diverge on what the agency is required to submit as its administrative record. The Supreme Court has provided some general principles, constituting what courts and scholars term the “record rule”: that “a court can engage in judicial review of an agency action based only on consideration of the record amassed at the agency.”<sup>87</sup> This basic principle, expressed in *Florida Power & Light Co. v. Lorion*<sup>88</sup> and *Pension Benefit Guaranty Corp. v. LTV Corp.*,<sup>89</sup> is in practice less of a rule and more of a standard. It has led to the creation of tangled disagreements between and within circuits as courts try (and often fail) to apply it to the wide universe of administrative litigation. As a result, “[t]he contours of ‘the whole record’ depend on the subject matter, the context, and the circuit in which APA review is sought.”<sup>90</sup> Record issues can be dispositive and thus a source of frequent and significant contestation between plaintiffs, agencies, and courts.

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83. *ACUS Administrative Record Handbook*, *supra* note 65, at 36-37.

84. *See, e.g., Alter*, *supra* note 39, at 1069-72.

85. MARTIN SHAPIRO, *THE SUPREME COURT AND ADMINISTRATIVE AGENCIES* 109 (1968).

86. *California v. Ross*, 358 F. Supp. 3d 965, 1047 (N.D. Cal. 2019).

87. 2 HICKMAN & PIERCE, *supra* note 38, at 1146.

88. 470 U.S. 729, 743 (1985) (“[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.” (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973))).

89. 496 U.S. 633, 655 (1990) (relying on *Vt. Yankee v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519 (1978) to hold that review was restricted to the administrative record unless the record submitted was “inadequate to enable the court to fulfill its duties under § 706”).

90. *Gavoor & Platt*, *supra* note 37, at 42.

And despite its importance to practical administrative litigation, the administrative record has received light scholarly attention, particularly in recent decades. Although several other scholars have examined record issues, primarily within the domains of particular substantive statutory review provisions,<sup>91</sup> the most comprehensive treatment of the subject comes from Aram A. Gavoor and Steven A. Platt, in their recent article *Administrative Records and the Courts*.<sup>92</sup>

I will begin by discussing the relatively coherent – if bare-bones – standards for the scope of courts’ evidentiary review as laid out by the Supreme Court. I will then discuss how the interpretation of these standards has become a significant site of contestation in lower courts about the proper relationship between courts and agencies.

### 1. *The Record Rule in the Supreme Court*

The modern Supreme Court’s treatment of the record rule began with *Overton Park*. The Court, in dicta, seemed to endorse allowing reviewing courts to supplement the administrative record in wide classes of cases, whenever parties could assert a “strong showing of bad faith or improper behavior” in the agency’s

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91. See, e.g., Daniel J. Rohlf, *Avoiding the ‘Bare Record’: Safeguarding Meaningful Judicial Review of Federal Agency Actions*, 35 OHIO N.U. L. REV. 575 (2009); Asimow & Dotan, *supra* note 50; Alter, *supra* note 39; Saul, *supra* note 51; Susannah T. French, Comment, *Judicial Review of the Administrative Record in NEPA Litigation*, 81 CALIF. L. REV. 929 (1993) (arguing, in an influential piece of student scholarship, that courts should ignore the record rule when a plaintiff challenges agency compliance with the National Environmental Policy Act); Christine K. Lane, *On-the-Record Review of CDP Determinations: An Examination of Policy Reasons Encouraging Judges to Stick to the Administrative Record*, 6 FLA. ST. U. BUS. L. REV. 149 (2007); Travis O. Brandon, *Reforming the Extra-Record Evidence Rule in Arbitrary and Capricious Review of Informal Agency Actions: A New Procedural Approach*, 21 LEWIS & CLARK L. REV. 981 (2017).

The administrative record received more attention closer in time to *Vermont Yankee* and *Overton Park*, two Supreme Court decisions which set in motion the “bureaucratization” of informal administrative decision-making by reinforcing the importance of creating a closed administrative record for judicial review. JERRY L. MASHAW, RICHARD A. MERRILL, PETER M. SHANE, M. ELIZABETH MAGILL, MARIANO-FLORENTINO CUÉLLAR & NICHOLAS R. PARRILLO, *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 894-95 (8th ed. 2019); see, e.g., F. Kaid Benfield, *The Administrative Record and the Range of Alternatives in National Forest Planning: Applicable Standards and Inconsistent Approaches*, 17 ENV’T L. 371, 373 (1987); Steven Stark & Sarah Wald, *Setting No Records: The Failed Attempts to Limit the Record in Review of Administrative Action*, 36 ADMIN. L. REV. 333, 358-62 (1984); Clark Bye, *Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 HARV. L. REV. 1823, 1827-32 (1978).

92. Gavoor & Platt, *supra* note 37.

construction of the record.<sup>93</sup> The Court appeared to suggest that the appropriate remedy would be for the district court to oversee fact-finding through normal discovery processes: subpoenas and depositions of agency officials. As scholars have noted, this holding is in some tension with the Court's later decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,<sup>94</sup> which has been interpreted as a general prohibition on the common-law overlay of procedural requirements for agencies beyond what is present in the APA, organic and enabling statutes, and the Due Process Clause.<sup>95</sup>

In a late-1980s couplet of decisions, the Supreme Court issued its final clear statements on the record rule, primarily on the issue of remedies when the submitted administrative record is inadequate for the federal court to review it effectively. In *Florida Power & Light Co. v. Lorion*, the Court reeled back *Overton Park*'s implicit endorsement of federal-court fact-finding; instead, "except in rare circumstances," district courts should remand agency action supported by an inadequate record to the agencies for further development.<sup>96</sup> And in *Pension Benefit Guaranty Corp. v. LTV Corp.*, the Court reconciled *Overton Park* and *Vermont Yankee* by suggesting that the "bad faith or improper behavior" requirement was rooted in the APA's judicial-review provisions, such that lower courts may "mandat[e] that 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."<sup>97</sup>

## 2. Lower Courts Take a Hard Look at the Administrative Record

These general principles for the scope of the administrative record have been inconsistently applied by lower courts across a range of record issues. In this Section, I will briefly cover the most pervasive and important. These splits are representative of much more than fights in the tangled weeds of administrative litigation: I argue that they are a significant site of contestation about the proper

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93. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971); accord *Morgan v. United States (Morgan I)*, 298 U.S. 468, 481-82 (1936) (seeming to endorse factual inquiries into how agency officials considered evidence and constructed the record). While *Overton Park* remains good law, the exception it created in the record rule has been criticized by scholars as inconsistent with the APA and *Vermont Yankee*. See, e.g., 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. L. REV. 721, 767-68 (1975).

94. 435 U.S. 519, 524, 542 (1978).

95. See, e.g., Kathryn E. Kovacs, *Rules About Rulemaking and the Rise of the Unitary Executive*, 70 ADMIN L. REV. 515, 534-38 (2018); Jon A. Mueller, *Counter Revolution in the Federal Courts of Appeal—The Aftermath of Vermont Yankee*, 15 U. RICH. L. REV. 723, 726 (1981).

96. 470 U.S. 729, 744 (1985).

97. 496 U.S. 633, 654 (1990).

role of federal courts<sup>98</sup> and the allocation of power between the judiciary and Executive. The long war started by Judge David L. Bazelon in the 1970s to assert greater judicial oversight over the processes underlying agency practice survived *Vermont Yankee*:<sup>99</sup> rather than crafting procedures for rulemaking, some courts have begun to assert greater oversight over how agencies compile their administrative records and justify their actions to federal courts.

But more concretely, these inconsistencies arise, in my view, because courts are treating a set of general principles about the scope of their evidentiary review as mechanistic rules to be applied to every case challenging agency action. I argue that courts should take a more functional perspective – that they should take seriously the idea that there is not one immutable administrative record for every claim challenging administrative action on which they should base their decision. Instead, courts should ask what evidence is relevant to the decision rules in a given case.<sup>100</sup>

This tension between treating the scope of the record as a rule versus as a standard leads to two rough conceptions of what constitutes the administrative record in the first place. Neither the APA nor the Supreme Court provides meaningful guidance on this issue. This can be seen reflected in the present and historical circuit splits over whether deliberative materials in the decision record or total agency record should be included in the administrative record and withheld as privileged, as is sometimes done in the Second Circuit<sup>101</sup> and Fourth

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98. That is to say, fights over the construction of the administrative record open the broader question of whether federal courts are the right entities to monitor internal agency processes. Cf. Christopher J. Walker, *Administrative Law Without Courts*, 65 UCLA L. REV. 1620, 1639 (2018) (inveighing against a “myopically court-centric theory of administrative law” and arguing that “we must develop a theory of administrative law that incorporates the various actors who can help monitor, constrain, and protect against agency abuse in regulatory activities that are insulated from judicial review”). See *infra* notes 133-143 and accompanying text for a brief discussion of the administrative record’s relationship to internal administrative law, which generally operates beyond judicial review.

99. This is the foundational idea underpinning the debate between Judge David L. Bazelon and Judge Harold Leventhal about the scope of arbitrary-and-capricious review in a series of D.C. Circuit decisions, most notably *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976). The Bazelon/Leventhal debate centered around the degree to which generalist judges should work to craft agency procedures, often in an ad hoc way, “that likely would ensure rational outcomes if observed,” or “consider the merits of an agency’s action, with an eye toward the rationality or plausibility of the decision in light of the record before the agency.” Ronald J. Krotoszynski, Jr., “History Belongs to the Winners”: *The Bazelon-Leventhal Debate and the Continuing Relevance of the Process/Substance Dichotomy in Judicial Review of Agency Action*, 58 ADMIN. L. REV. 995, 996-97, 1002 (2006); see Sidney A. Shapiro & Richard W. Murphy, *Arbitrariness Review Made Reasonable: Structural and Conceptual Reform of the “Hard Look,”* 92 NOTRE DAME L. REV. 331, 357 & n.148 (2016).

100. See *infra* Part III.

101. See *infra* note 125 and accompanying text.



Circuit,<sup>102</sup> or excluded from the administrative record entirely, per the D.C. Circuit's approach.<sup>103</sup> For many years, the Ninth Circuit had an internal split as to whether the deliberative materials should be included in the administrative record; it joined with the D.C. Circuit in 2023.<sup>104</sup>

Other circuits have not produced clear statements about the status of deliberative documents, and so district courts generally choose based on whichever logic they find most compelling. Over the last half decade, a growing number of district courts have begun to reject the D.C. Circuit's approach and conceptualized deliberative documents as part of the record.<sup>105</sup> This is a significant change

102. *Defs. of Wildlife v. U.S. Dep't of the Interior*, No. 18-2090, slip op. at 2 (4th Cir. Feb. 5, 2019).

103. *See, e.g., Oceana, Inc. v. Ross*, 920 F.3d 855, 865 (D.C. Cir. 2019) (holding that absent a showing of bad faith or improper behavior under *Overton Park*, "deliberative documents are not part of the administrative record" (internal quotation marks omitted)).

104. Until the Ninth Circuit joined the D.C. Circuit in *Blue Mountains Biodiversity Project v. Jeffries*, 72 F.4th 991, 996-97 (9th Cir. 2023), district courts in the Ninth Circuit had split as to whether deliberative materials should be included in the administrative record following the Ninth Circuit's cryptic decisions in *Thompson v. U.S. Department of Labor*, where the court held that "[t]he 'whole' administrative record, therefore, consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position," 885 F.2d 551, 555 (9th Cir. 1989) (quoting *Exxon Corp. v. Dep't of Energy*, 91 F.R.D. 26, 33 (N.D. Tex. 1981)), and *In re United States*, where the court upheld a wide-ranging subpoena for deliberative documents and held that the district judge's decision to require a privilege log and evaluate claims of privilege before including deliberative documents in the administrative record was "not clearly erroneous as a matter of law," 875 F.3d 1200, 1210 (9th Cir. 2017). *Compare* *Save the Colo. v. U.S. Dep't of the Interior*, 517 F. Supp. 3d 890, 896-97 (D. Ariz. 2021) (finding that deliberative documents fall outside the administrative record), *with* *Ksanka Kupaqa Xa'lcin v. U.S. Fish & Wildlife Serv.*, No. CV 19-20, 2020 WL 4193110, at \*2 (D. Mont. Mar. 9, 2020) (reading the former standard articulated in *Thompson* as "necessarily includ[ing] deliberative materials").

*Blue Mountains* itself is a terse opinion that primarily serves to align the Ninth Circuit with the D.C. Circuit's approach to the administrative record. *Blue Mountains*, 72 F.4th at 996-97 (agreeing with the D.C. Circuit that "deliberative materials are generally not part of the [administrative record] absent impropriety or bad faith by the agency"). The circuit panel did not provide much by way of reasoning: it based its decision first on the assertion that (1) the APA's "whole record" provision is "ordinarily the record the agency presents," and (2) that courts "assess the lawfulness of agency action based on the reasons offered by the agency," so deliberative documents would "ordinarily" be unhelpful. *Id.* (internal quotation marks omitted).

105. *See, e.g., Save the Colo. v. Spellmon*, No. 18-cv-03258, 2023 WL 2402923, at \*4 (D. Colo. Mar. 7, 2023) (noting the "growing consensus among district courts" that deliberative materials are properly within the record); *Friends of the Clearwater v. Higgins*, 523 F. Supp. 3d 1213, 1222-28 (D. Idaho 2021); *Bartell Ranch LLC v. McCullough*, No. 21-cv-00080, 2022 WL 2093053, at \*4 (D. Nev. June 10, 2022) (arguing that the *Oceana* rule leads to "subpar results with the production of [administrative records]"); *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, No. 19-CV-14243, 2020 WL 2732340, at \*6 (S.D. Fla. May 26, 2020); *Sierra Club v. U.S.*

in practical administrative litigation. It represents a shift away from the appellate-review model – which existed in the years following the passage of the APA and in which fact-finding decision rules were highly deferential – to a trial-court model in which issues of fact finding and discovery dominate. Once deliberative documents are conceptualized as part of the record, agencies will typically seek to withhold them pursuant to the deliberative process privilege; this exposes agencies to extended discovery disputes about the validity and scope of the privilege as it applies to withheld documents.

One's normative position on this development depends on one's position on the scope and continued vitality of so-called hard-look arbitrary-and-capricious review under *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.* and the proper role of federal courts in reviewing agency action.<sup>106</sup> That is because, as I argue, the debate about what to do with deliberative documents, and the recent instability in the record rule, reflects the wider debate about the decision rules for arbitrary-and-capricious review and the allocation of power between the judiciary and administration.

Sensitive to these unsettled questions, I take a position that makes judges more managerial.<sup>107</sup> As I will argue, the record rule, rather than existing as a mechanical statutory mandate emanating from the text of the APA, should be thought of as a set of standards grounded in a relevancy test, like the traditional rules for discovery in civil litigation. This view implies that the “record rule” is

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Army Corps of Eng'rs, No. 20-cv-00396, 2022 WL 2953075, at \*3 (D. Me. July 26, 2022); *Inst. for Fisheries Res. v. Burwell*, No. 16-cv-01574, 2017 WL 89003, at \*1 (N.D. Cal. Jan. 10, 2017); *Ctr. for Food Safety v. Vilsack*, No. 15-cv-01590, 2017 WL 1709318, at \*5 (N.D. Cal. May 3, 2017); *Cal. ex rel. Lockyer v. Dep't of Agric.*, No. C05-03508, 2006 WL 708914, at \*3 (N.D. Cal. Mar. 16, 2006); *United Farm Workers v. EPA*, No. C 07-3950, 2008 WL 3929140, at \*2 (N.D. Cal. Aug. 26, 2008); *Clinch Coal. v. U.S. Forest Serv.*, 597 F. Supp. 3d 916, 922-25 (W.D. Va. 2022); *New York v. U.S. Immigr. & Customs Enf't*, 438 F. Supp. 3d 216, 217 (S.D.N.Y. 2020); *New York v. Wolf*, No. 20-CV-1127, 2020 WL 2049187, at \*2-3 (S.D.N.Y. Apr. 29, 2020) (adopting the reasoning in *New York v. U.S. Immigration and Customs Enforcement*).

The development of this line of reasoning in the Ninth Circuit will likely end with the panel's opinion in *Blue Mountains*, which, in my reading, will sharply curtail the ability of lower courts in the Ninth Circuit to oversee agency construction of the administrative record. That is not to say *Blue Mountains* completely crushed the judicial counterrevolution in the Ninth Circuit's district courts: the panel left open the question of “the precise circumstances under which a district court can order the production of a privilege log.” *Blue Mountains*, 72 F.4th at 997.

106. For the classic Supreme Court formulation of “hard look” arbitrary-and-capricious review, see *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983) (announcing that 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’” (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962))).

107. Cf. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378-79, 391-93 (1982) (discussing the active role of judges in resolving pretrial discovery issues).

really a second-order inquiry, derived from the common-law decision rules for a given case: the question of whether or not a given document should be included in the administrative record is a function of its relevancy to the decision rule for arbitrary-and-capricious review that a court chooses to adopt.<sup>108</sup>

For example, the decision rules for modern arbitrary-and-capricious review generally turn on the reasons for the agency action publicly offered by the agency, rather than any views privately held by agency decision makers.<sup>109</sup> In rulemakings, the decision rules also ask courts to view the agency's proffered reasons for its decision in light of the materials submitted by the public to the agency during the notice-and-comment process, which then become part of the record.<sup>110</sup> Courts using a less deferential, harder-look standard of review might ask to see more information about the agency's internal decision-making processes, making that information relevant to the decision rule used by the court and, therefore, properly part of the administrative record.

To put it more finely, under arbitrary-and-capricious review, we tend to allow agencies to make decisions for all types of unstated reasons – political influence, decision maker and institutional preference, and the like – so long as the agency's stated reason for the decision is reasonable in light of the information it has before it.<sup>111</sup> At the same time, we do not allow agencies to make decisions for impermissible reasons (e.g., bribery),<sup>112</sup> or to pursue improper policy goals (e.g., racial discrimination). But this category of impermissible reasons and goals is not well defined; statutes and the Constitution can provide categorical

108. See Part III, *infra*. The decision rules for arbitrary-and-capricious review remain unstable. Compare, e.g., *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021) (“The APA’s arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained. . . . A court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision.”), with *Texas v. United States*, 40 F.4th 205, 226 (5th Cir. 2022) (arguing that the decision rule in arbitrary-and-capricious cases requires the court to “set aside any action premised on reasoning that fails to account for relevant factors or evinces a clear error of judgment” such that review is “not toothless” and has “serious bite” (first quoting *Univ. of Tex. M.D. Anderson Cancer Ctr. v. U.S. Dep’t of Health & Hum. Servs.*, 985 F.3d. 472, 475 (5th Cir. 2021); then quoting *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1013 (5th Cir. 2019); and then quoting *Wages & White Lion Invs., LLC v. FDA*, 16 F.4th 1130, 1136 (5th Cir. 2021)).

109. “Generally” is doing a lot of work in this sentence. For nuanced explorations of this point, see Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 *YALE L.J.* 1748, 1785-94 (2021), and Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 *DUKE L.J.* 1811, 1817-23 (2012).

110. See 5 U.S.C. § 553(c) (2018).

111. For more on the (contested) place for political influence in agency reason-giving, see sources cited *supra* note 66. I thank Anya Bernstein for helping me clarify my thinking in this section of the piece.

112. See 18 U.S.C. § 201(b)(2) (2018).

examples, but a judge must ultimately draw the line. This indeterminacy creates a persistent boundary problem:<sup>113</sup> what is a court to do when the agency's stated reasons are not plainly insufficient, and yet there is a reason to suspect that the stated reasons hide an improper motivation? The degree of scrutiny a court chooses to place on the agency is reflected in the standard of review it decides to use for the case.

The D.C. Circuit's approach, clarified most recently in its *Oceana, Inc. v. Ross* decision in 2019, can be briefly stated: trust the agency. The D.C. Circuit sees the construction of the administrative record as primarily within the agency's domain of expertise, withholding review of the record unless a plaintiff makes a "substantial showing . . . that the record was incomplete."<sup>114</sup> This requires making a "credible showing that [a redacted document in the administrative record] may have obscured factual information not otherwise in the record."<sup>115</sup>

The *Oceana* court categorically excluded predecisional or deliberative materials from the administrative record. For the decision rules of arbitrary-and-capricious review employed by the D.C. Circuit, "the actual subjective motivation of agency decisionmakers is immaterial as a matter of law."<sup>116</sup> Absent "a showing of bad faith or improper behavior"<sup>117</sup> such that, without discovery, "the administrative record cannot be trusted,"<sup>118</sup> the court should base its decision on the agency's stated reasons. And because deliberative documents are "immaterial" to the court's decision rules for arbitrary-and-capricious review, they are not discoverable by a plaintiff.<sup>119</sup> This approach is aligned with the intellectual currents propelling the retreat from the wide-ranging hard-look review of the late 1960s

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113. See, e.g., Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 30-35; Eidelson, *supra* note 109, at 1789-94; Jack Thorlin, *Can Agencies Lie? A Realist's Guide to Pretext Review*, 80 MD. L. REV. 1021, 1054-61 (2021).

114. *Oceana, Inc. v. Ross*, 920 F.3d 855, 865 (D.C. Cir. 2019) (quotation omitted).

115. *Id.* (quotation omitted).

116. *In re Subpoena Duces Tecum Served on the Off. of the Comptroller of the Currency (Subpoena Duces Tecum II)*, 156 F.3d 1279, 1279 (D.C. Cir. 1998).

117. *Id.* at 1279-80; see, e.g., *Nat'l Ass'n of Chain Drug Stores v. U.S. Dep't of Health & Hum. Servs.*, 631 F. Supp. 2d 23, 27 (D.D.C. 2009) ("As pre-decisional, deliberative documents are immaterial to the court's decision, they are not designated part of the administrative record that forms the basis of the court's decision."). In *Oceana*, the plaintiffs attempted to get around this issue by arguing that the court should use a different decision rule, one which asks whether the agency in question "used the best scientific information available," so that, they argued, predecisional documents bearing on "the agency's consideration of scientific information" would be relevant and should therefore be discoverable. *Oceana*, 920 F.3d at 864 (quotations omitted).

118. *Saratoga Dev. Corp. v. United States*, 21 F.3d 445, 458 (D.C. Cir. 1994).

119. *Oceana*, 920 F.3d at 865 (quoting FED. R. CIV. P. 26(b)(1)).

and 1970s, which envisioned deeper judicial engagement with the substantive policy positions taken by agencies and their political leadership.<sup>120</sup>

The foundational concept which makes the *Oceana* syllogism work—and which leads courts following it to give significant deference to agencies in their construction of the administrative record—is the so-called presumption of regularity. This is the basic idea that “[w]hen a plaintiff alleges that the government skirted procedures or acted on illicit motives, courts will sometimes ‘presume’ that ‘official duties’ have been ‘properly discharged’ until the challenger presents ‘clear evidence to the contrary.’”<sup>121</sup> But as Aram A. Gavoor and Steven A. Platt describe, “The presumption’s scope is amorphous and generally undiscussed by the courts, leading one circuit court to conclude that it is ‘often-invoked, but never satisfactorily explained.’”<sup>122</sup> Ultimately, the presumption of regularity, particularly as applied to the administrative record, is “a deference doctrine: it credits to the executive branch certain facts about what happened and why and, in doing so, narrows judicial scrutiny and widens executive discretion over

120. See, e.g., Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 87–92; Metzger, *supra* note 66, at 1298–1320. For a discussion of the varied perspectives on arbitrary-and-capricious review exhibited by the contemporary Supreme Court, see generally Nikol Oydanich, Note, *Chief Justice Roberts’s Hard Look Review*, 89 *FORDHAM L. REV.* 1635 (2021). For the leading pieces envisioning a much more minimal arbitrary-and-capricious review, see generally Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 *MICH. L. REV.* 1355 (2016), and ADRIAN VERMEULE, *LAW’S ABNEGATION* (2016).

121. Note, *The Presumption of Regularity in Judicial Review of the Executive Branch*, 131 *HARV. L. REV.* 2431, 2431 (2018) [hereinafter *The Presumption of Regularity*] (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926)); see also *Chem. Found.*, 272 U.S. at 14–15 (“The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.”). The presumption of regularity is not a static standard; instead,

[w]hether and to what extent the Court is willing to presume procedural or motivational regularity in a given context depends on the Court’s assessment of the relevant decisionmaking scheme across several dimensions: procedural fairness, accountability, and degree of discretion, as well as complexity (of the decisionmaking scheme and of the substantive choices at stake).

*The Presumption of Regularity*, *supra*, at 2432–33 (footnotes omitted).

122. Aram A. Gavoor & Steven A. Platt, *In Search of the Presumption of Regularity*, 74 *FLA. L. REV.* 729, 733 (2022) (quoting *Tecom, Inc. v. United States*, 66 Fed. Ct. Cl. 736, 757 (2005)); see also *id.* at 743 (“The Supreme Court today perpetuates its long pedigree of discussing the presumption obliquely and without clarity.”); Carissa Byrne Hessick, *A Bit of History on the Presumption of Regularity*, *PRAWFSBLAWG* (Jan. 14, 2019, 7:06 AM), <https://prawfsblawg.blogs.com/prawfsblawg/2019/01/a-bit-of-history-on-the-presumption-of-regularity.html> [<https://perma.cc/6SWJ-N2DT>] (describing the presumption of regularity as “an evidentiary presumption that people act appropriately” and criticizing its modern usage on the basis that it has historically been used to “allocate burdens of proof, not to prevent discovery or to insulate executive action from judicial review”).

decision-making processes and outcomes.”<sup>123</sup> In the administrative-record context, this heightened standard of review—typically a “clear evidence” standard, rather than a preponderance standard—can make it difficult for challengers to effectively rebut the presumption.<sup>124</sup>

In this way, the D.C. Circuit’s approach assumes, by default, that any mistakes made in constructing the administrative record were inadvertent. Under the *Oceana* model, a competent agency acting in bad faith could withhold documents with factual information undercutting the reasoning for their decisions by labeling them as “deliberative.” Absent the sorts of mistakes cataloged in *Oceana*, plaintiffs would have little ability to demonstrate the facts necessary to obtain review over the agency’s construction of the administrative record. As the Second Circuit, seemingly endorsing a much more stringent hard-look review, has recently put it, “[a]llowing the Government to determine which portions of the administrative record the reviewing court may consider would impede the court from conducting the ‘thorough, probing, in-depth review’ of the agency action with which it is tasked.”<sup>125</sup>

This is the foundation of the growing skepticism, at least by some scholars and courts, about the validity of the presumption of regularity enjoyed by agencies when constructing their administrative records for litigation.<sup>126</sup> By

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123. *The Presumption of Regularity*, *supra* note 121, at 2432.

124. See Gavoor & Platt, *supra* note 122, at 753–54. Gavoor and Platt ultimately conclude that, while examples of plaintiffs successfully rebutting the presumption exist, their empirical research “anecdotally suggest[s] that in a sizable number of situations, courts find the presumption intact and unrebutted when they rule on its applicability.” *Id.* at 754.

125. *In re Nielsen*, No. 17-3345, 2017 U.S. App. LEXIS 26821, at \*10 (2d Cir. Dec. 27, 2017) (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971)); see also *Clinch Coal. v. U.S. Forest Serv.*, 597 F. Supp. 3d 916, 923 (W.D. Va. 2022) (arguing that the *Oceana* approach “leads to the strange result wherein the agency may claim documents are relevant for purposes of developing its final rule but irrelevant for purposes of the court’s review of that final rule”).

126. See Laura Boyer, Note, *Expanding the Administrative Record: Using Pretext to Show “Bad Faith or Improper Behavior,”* 92 U. COLO. L. REV. 613, 624, 634–43 (2021). These courts do not explicitly say they are rejecting the presumption of regularity. But they endorse a searching inquiry into agency processes in constructing the record without the clear evidence of bad faith the presumption typically requires, often over the government’s vigorous objections. See *supra* note 105 (collecting cases); see also Order at 2, *Defs. of Wildlife v. U.S. Dep’t of the Interior*, 931 F.3d 339 (4th Cir. Feb. 5, 2019) (No. 18-2090) (ordering the agency to “submit a privilege log in the event the Government withholds any documents under the guise of the deliberative process privilege (or any other privilege)”; *In re Nielsen*, 2017 U.S. App. LEXIS 26821, at \*12–13 (“[W]ithout a privilege log, the District Court would be unable to evaluate the Government’s assertions of privilege.”). But see *San Luis & Delta-Mendota Water Auth. v. Jewell*, No. 15-CV-01290, 2016 WL 3543203, at \*19 (E.D. Cal. June 23, 2016) (denying plaintiffs’ request to require a privilege log because “[t]o require a privilege log as a matter of course in any

reconceptualizing deliberative documents as *relevant but privileged*, rather than *irrelevant* to ordinary arbitrary-and-capricious review, judges sweep a process that is largely unreviewable under the *Oceana* framework into the scope of their review.<sup>127</sup> For example, Judge Rakoff, in an APA suit against the Immigration and Customs Enforcement agency under the Trump Administration, launched a characteristically forceful salvo against the “sole, unreviewable authority” of agencies to decide “which documents properly comprise the administrative record and which do not.”<sup>128</sup> Relying on his view of the “exacting manner” of judicial review “prescribed . . . in *Overton Park* and *State Farm*,” Rakoff’s position would “allow the Court to have some oversight of the agency’s assertions of privilege, the same role it would assume with respect to any other litigant.”<sup>129</sup> Rakoff also made a functional argument: judges are “expert” at determining the validity of a privilege, as opposed to the general-counsel offices of agencies, so they should be in charge of determining what constitutes the “whole record.”<sup>130</sup>

The skepticism towards agencies evinced by Judge Rakoff and other judges endured through the 2020 election and can be seen in judicial review of ordinary administrative actions taken by the Biden Administration.<sup>131</sup> As a result, this

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administrative record case where a privilege appears to have been invoked would undermine the presumption of correctness”).

The Ninth Circuit, for its part, relied on the presumption of regularity in its decision rejecting a privilege log requirement. See *Blue Mountains Biodiversity Project v. Jeffries*, 72 F.4th 991, 997-98 (9th Cir. 2023).

127. These modern courts tend to use reasoning similar to the few scholars writing on the administrative record before *Oceana*. Cf. Saul, *supra* note 51, at 1329 (“Unilateral exclusion of allegedly deliberative documents prevents the reviewing court from examining the whole record, and leaves plaintiffs with the near-impossible task of identifying themselves any withheld documents that were before the agency decision maker. Because of the presumption of regularity and the ordinary deference accorded to agency actions, federal agencies already have the tools they need to avoid intrusive or inappropriate judicial review.”). For recent cases treating deliberative documents as relevant but privileged, see, for example, *Institute for Fisheries Resources v. Burwell*, No. 16-cv-01584, 2017 WL 89003, at \*1 (N.D. Cal. Jan 10, 2017); and *Center for Biological Diversity v. U.S. Fish & Wildlife Service*, No. 19-CV-14243, 2020 WL 2732340, at \*6-8 (S.D. Fla. May 26, 2020).
128. *New York v. U.S. Immigr. & Customs Enf’t*, 438 F. Supp. 3d 216, 217 (S.D.N.Y. 2020).
129. *Id.* at 218, 220. The district courts rejecting *Oceana* largely make arguments along these lines.
130. *Id.* at 218.
131. At the time of this writing, many of the post-2020 decisions compelling the production of a privilege log did so in the context of a Trump Administration decision that the Biden Administration chose to uphold. See, e.g., *Save the Colo. v. Spellmon*, No. 18-CV-03258, 2023 WL 2402923, at \*4 (D. Colo. Mar. 7, 2023). But some ordinary administrative litigation—that is, litigation on the merits of a particular agency action which might see discovery, rather than on an expedited, preliminary-injunction basis—about decisions made in the early days of the Biden Administration has reached evidentiary dispositions. See, e.g., *Silverton Mountain*

shift should not be characterized as a temporary exception to conventional practice driven by objections to procedural errors made by the Trump Administration. Instead, this expansive approach to the administrative record appears to be an enduring judicial reaction to perceived weaknesses in administrative-record doctrine revealed by an exceptional administration.<sup>132</sup> This shift is an attempt to fill in some of the “white space” left by *Vermont Yankee*<sup>133</sup> and bring what would otherwise be governed by so-called “internal” administrative law—the binding set of law-like norms governing many aspects of internal agency operations—into the sweep of a court’s review.<sup>134</sup> It envisions a more empowered, managerial judge overseeing the inner life of an agency.

These questions about the judicial role are also reflected in the persistent split over whether to require a privilege log for withheld materials, regardless of whether deliberative materials are properly within the record. The D.C. Circuit, in keeping with its generally restrictive view of the administrative record, also does not require agencies to produce a privilege log listing which documents were withheld as deliberative.<sup>135</sup> The lower courts rejecting *Oceana* largely

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Guides LLC v. U.S. Forest Serv., No. 22-cv-0048, 2022 WL 16553223, at \*9 (D. Alaska Oct. 31, 2022); Leigh v. Raby, No. 22-cv-0034, 2023 WL 2717327, at \*2 (D. Nev. Mar. 30, 2023); Oceana, Inc. v. Raimondo, No. 21-cv-05407, 2022 WL 17178301, at \*11 (N.D. Cal. Nov. 23, 2022); Bartell Ranch LLC v. McCullough, 21-cv-00080, 2021 WL 6118738, at \*8 (D. Nev. Dec. 27, 2021); Davis v. Mayorkas, No. 21-cv-615, 2022 WL 14656793, at \*1 (S.D. Ohio Oct. 25, 2022).

132. Cf. David L. Noll, *Administrative Sabotage*, 120 MICH. L. REV. 753, 758-60 (2022) (making this basic point when considering avenues of and doctrines for judicial review of Trump Administration actions to “affirmatively attack programs [agencies] administer”).
133. See Emily S. Bremmer & Sharon B. Jacobs, *Agency Innovation in Vermont Yankee’s White Space*, 32 J. LAND USE & ENVT’L L., 522, 523-24 (2017); Christopher J. Walker & Rebecca Turnbull, *Operationalizing Internal Administrative Law*, 71 HASTINGS L.J. 1225, 1229, 1232-34 (2020) (“Internal law influences the everyday decisions agencies make. And these decisions matter because they collectively add up to the various ways agencies impose additional procedures on themselves beyond the bare minimum required by the APA and the agencies’ organic statutes . . .”).
134. Internal administrative law, as laid out by Gillian Metzger and Kevin Stack in their seminal article, deals with “measures governing agency functioning that are created within the agency or the executive branch and that speak primarily to government personnel.” Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1251 (2017); see also MASHAW, *supra* note 81, at 1-16 (discussing “[t]he [q]uest for an [i]nternal [a]dministrative [l]aw”). As Metzger and Stack lay out, one common aspect of our internal administrative law is the creation of “paradigmatic features of legal norms, even if they lack the element of enforcement through independent courts.” Metzger & Stack, *supra*, at 1245. This shift towards increasing oversight of the construction of the administrative record aligns with their observation that “courts have gradually occluded the APA’s openings for internal administrative law and transformed internal measures into externally enforced constraints.” *Id.*
135. See *Oceana, Inc. v. Ross*, 920 F.3d, 855, 865 (D.C. Cir. 2019) (“[S]ince predecisional documents are irrelevant and therefore not ‘otherwise discoverable,’ they are not required to be placed on a privilege log.” (citing FED. R. CIV. P. 26(B)(5))).



require the production of such a log as the focal point for their review of deliberative documents. The Second, Fourth, and Ninth Circuits have arguably endorsed the practice in recent unpublished opinions rejecting writs of mandamus following district court orders for the production of a log.<sup>136</sup> And one federal judicial district—the District of Wyoming—requires a privilege log alongside the submission of any administrative record under its local rules.<sup>137</sup>

Those courts ordering the production of a log generally reason that (1) the “whole record” includes anything indirectly considered by the agency, including documents seen as deliberative;<sup>138</sup> (2) the relevance of a particular document is often a fact-specific inquiry relative to the standard of review, and thus some deliberative documents can be relevant;<sup>139</sup> (3) the deliberative process privilege is qualified, rather than absolute,<sup>140</sup> and so some otherwise-privileged documents may be so relevant as to have their privilege striped by a reviewing court;

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136. See *In re Nielsen*, No. 17-3345, 2017 U.S. App. LEXIS 26821, at \*12-13 (2d Cir. Dec. 27, 2017); *Order, Defs. of Wildlife v. Dep’t of Interior*, 931 F.3d 339 (4th Cir. Feb. 5, 2019) (No. 18-2090); *In re United States*, 875 F.3d 1200, 1210 (9th Cir. 2017), *rev’d on other grounds*, 138 S. Ct. 443 (2017). It is unlikely that the Ninth Circuit will continue to do so given its holding in *Blue Mountains Biodiversity Project v. Jeffries*, 72 F.4th 991 (9th Cir. 2023).

137. There are ninety-four federal judicial districts. In my review of their local rules, I found only one that requires an agency to produce a privilege log. See D. WYO. LOCAL CIV. R. 83.6(b)(2) (“To the extent practicable, the [administrative] record shall be provided to the Court in text searchable format and the agency shall provide a log describing any document(s) withheld under a claim of privilege, including a claim that the document(s) reflect the deliberative process of the agency.”). Wyoming’s Local Rule 83.6 is also unique among federal judicial districts in that it explicitly provides for short, fourteen-day timelines for motions for completion and supplementation after an administrative record is filed. See D. WYO. LOCAL CIV. R. 83.6(b)(3).

138. See, e.g., *Ctr. for Food Safety v. Vilsack*, No. 15-cv-01590-HSG, 2017 WL 1709318, at \*6 (N.D. Cal. May 3, 2017) (“[C]ourts in this district have uniformly concluded that internal agency communications and drafts are part of the administrative record.”).

139. See, e.g., *Clinch Coal. v. U.S. Forest Serv.*, 597 F. Supp. 3d 916, 922-25 (W.D. Va. 2022) (noting that, for “certain cases,” the “arbitrary-and-capricious standard” may lead courts to find “materials not contained in an agency’s stated reasons” to be “relevant”).

140. The Ninth Circuit, in *FTC v. Warner*, provides a clear articulation of the privilege’s qualified nature:

A litigant may obtain deliberative materials if his or her need for the materials and the need for accurate fact-finding override the government’s interest in non-disclosure. Among the factors to be considered in this determination are: 1) the relevance of the evidence; 2) the availability of other evidence; 3) the government’s role in the litigation; and 4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions.

742 F.2d 1156, 1161 (9th Cir. 1984) (citations omitted).

and (4) agencies should have the burden of establishing whether a particular document is privileged to prevent the unreviewable assertion of privilege.<sup>141</sup>

One common counterargument for the production of privilege logs is a functional one: the total agency record for a given agency action can encompass millions of documents, and so the staff time required to review and catalog all documents in a privilege log is a significant burden.<sup>142</sup> But, of course, agencies should be doing so *anyway* when they are constructing the administrative record and withholding particular documents as deliberative. Requiring agencies to show their work to a reviewing court is consistent with the statutory “whole record” mandate and allows the adjudication process to function effectively.<sup>143</sup>

### C. *Inconsistent Agency Construction of the Administrative Record*

The blunt application of the record rule – without consideration of the *reasons* for which it should be applied – has led to limited judicial guidance for what agencies themselves should submit to courts in the first instance. This leads to an even more pernicious problem: courts have, in general, vested total discretion in agencies to assemble their administrative records, but agencies have sharply divergent internal standards for doing so. Some agencies follow the standard set by the courts rejecting *Oceana* and include all documents relevant to the decision rule in a given case. Others construct their records defensively, seeking to exclude as many documents as possible to avoid litigating privilege issues. This discretion is the basis of the fear, held by several scholars and courts, that agencies may be affirmatively manipulating their creation of the administrative record to exclude unfavorable documents.<sup>144</sup> But it is also an example of how agencies’

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141. See, e.g., *Sierra Club v. U.S. Army Corps of Eng’rs*, No. 20-cv-00396, 2022 WL 2953075, at \*3 (D. Me. July 26, 2022).

142. See, e.g., Defendant’s Letter, *New York v. Dep’t of Com.*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019), ECF No. 194 (arguing that a privilege log requirement would “pose substantial burdens on agencies, requiring them to collect and catalogue the privileged materials”).

143. Cf. *Portland Audubon Soc’y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993) (“If the record is not complete, then the requirement that the agency decision be supported by ‘the record’ becomes almost meaningless.”).

144. For some, this fear stems from perceived agency misuse of the deliberative process privilege to frustrate review. See, e.g., Saul, *supra* note 51, at 1326 (arguing that agencies are “misusing the deliberative process privilege by failing to properly assert and justify the privilege,” particularly in environmental litigation); Michael Ray Harris, *Standing in the Way of Judicial Review: Assertion of the Deliberative Process Privilege in APA Cases*, 53 ST. LOUIS U. L.J. 349, 353, 386 (2009) (worrying that vigorous agency assertion of the privilege will stymie judicial review). Others fear that agencies will act too defensively and create internal norms which overly narrow the administrative record. See, e.g., Rohlf, *supra* note 91, at 576 (commenting on the Bush

internal administrative law defines the contours of the administrative record and their eventual litigation posture on record issues before a reviewing court.

Inadvertent record management issues within agencies before litigation is threatened may also give reviewing courts and the public the impression that agencies are engaging in this kind of bad-faith conduct. Internal recordkeeping systems within agencies are not perfect; many agencies' internal record management procedures fall short of the standards set by the Federal Records Act and its amendments and implementing regulations.<sup>145</sup> For example, in a recent Government Accountability Office (GAO) review of seventeen small agencies, three agencies did not have a formal record management program; of the remaining fourteen agencies, "many did not have policies and procedures to fully incorporate recordkeeping functionalities into electronic systems, establish controls and preservation considerations for systems, and issue instructions on email requirements."<sup>146</sup> Internal record-management issues such as these might be one factor contributing to the agency mistakes occasionally seen in the case law, such as the inadvertent loss of relevant documents which should have been produced.<sup>147</sup>

The neutral explanation is that agency standards for construction of their administrative records are frequently driven by their own idiosyncratic internal structures, missions, and staff capacity. But this sharp divergence in internal processes across agencies is another reason why judges, particularly those following

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Administration's trend towards agencies "that had previously followed an 'everything-but-the-kitchen-sink' approach to compiling records for judicial review" instead developing norms and written policies calling for a "narrow[] interpre[tation of] what constituted the records documenting their decisions"). And it can be difficult to disentangle inadvertent incompetence from bad faith. *See, e.g., Am. Farm Bureau Fed'n v. EPA*, No. 11-CV-0067, 2011 WL 6826539, at \*12 (M.D. Pa. Dec. 28, 2011) (ordering the completion of the administrative record with publicly released EPA deliberative emails which the agency had excluded from the record as irrelevant after the agency admitted it had inadvertently excluded other relevant documents from the record); Parrillo, *supra* note 63, at 919-24 (discussing the difficulties faced by agency lawyers in maintaining an appearance of good faith before a reviewing court in the face of inadvertent organizational failures).

145. *See* Federal Records Act, Pub. L. No. 81-754, 64 Stat. 578 (1950) (codified as amended in scattered sections of 44 U.S.C.). The National Archives and Records Administration has promulgated a number of implementing regulations for the Federal Records Act, which it continues to update. *See* 36 C.F.R. §§ 1220-1239 (2023); *see, e.g.,* Federal Records Management: Managing Electronic Records, Including Electronic Messages, 87 Fed. Reg. 75930 (Jan. 11, 2023) (to be codified at 36 C.F.R. pts. 1220, 1222). Taken together, these create a coherent set of baseline record-management standards for administrative agencies.
146. U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-59, SELECTED AGENCIES NEED TO FULLY ADDRESS FEDERAL ELECTRONIC RECORDKEEPING REQUIREMENTS (2020), <https://www.gao.gov/assets/gao-20-59.pdf> [<https://perma.cc/6393-VJ3S>].
147. *See, e.g.,* *Banner Health v. Sebelius*, 945 F. Supp. 2d 1, 20 (D.D.C. 2013); *Dowd v. IRS*, 776 F.2d 1083, 1084 (2d Cir. 1985); *Seattle Audubon Soc. v. Lyons*, 871 F. Supp. 1291 (W.D. Wash. 1994).

*Oceana*, should be clear about the principles behind the construction of the administrative record. So long as agencies are vested with the discretion to construct their own records without judicial oversight, a clear standard would help agencies align with reviewing courts about the sweep of the record they are expected to produce.

There is no statutory or judicial requirement that agencies publicize the methods they use to construct the administrative record. To date, at least three agencies have published informal guidance documents for regulated parties laying out the process they use to construct the administrative record from the agency record: the Department of the Interior (DOI) in 2006, the Environmental Protection Agency (EPA) in 2011, and the National Oceanic and Atmospheric Administration (NOAA) in 2012.<sup>148</sup> These guidance documents—which have not been extensively analyzed in scholarly literature other than Administrative Conference of the United States (ACUS) reports<sup>149</sup>—reflect the judicial confusion around the proper scope of the administrative record; they take varying positions on the expansiveness of the record and vary most sharply on their treatment of privileged materials.

Despite these sharp differences, the basic workflow for the creation of the administrative record is similar across these three agencies, with relatively minor procedural differences. But the *substance* of what they consider to be the “administrative record” sharply differs. First, an agency staff member—the “administrative record coordinator”—is designated to compile the administrative record following a legal challenge, often in close consultation with the agency’s Office of General Counsel and the Department of Justice.<sup>150</sup> This can formally happen

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148. See U.S. DEP’T OF THE INTERIOR, DEPARTMENT OF THE INTERIOR STANDARDIZED GUIDANCE ON COMPILING A DECISION FILE AND AN ADMINISTRATIVE RECORD (Jun. 27, 2006) [hereinafter DOI GUIDANCE], <https://npgallery.nps.gov/WSR/GetAsset/b3865d2e-e69f-4cc3-84bb-412de653a3ef/original?> [<https://perma.cc/EZ8A-B3SF>]; EPA’s *Action Development Process: Administrative Records Guidance*, ENV’T PROT. AGENCY (Sept. 2011) [hereinafter EPA GUIDANCE], <https://www3.epa.gov/ogc/adminrecordsguidance09-00-11.pdf> [<https://perma.cc/8JT8-CH5A>]; OFF. OF THE GEN. COUNS., NAT’L OCEANIC & ATMOSPHERIC ADMIN., U.S. DEP’T OF COM., NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION GUIDELINES FOR AGENCY ADMINISTRATIVE RECORDS (Dec. 21, 2012) [hereinafter NOAA GUIDANCE], <https://media.fisheries.noaa.gov/dam-migration/b9-ar-guidlines-12-21-12.pdf> [<https://perma.cc/6RDU-RUZH>] (superseding previously published guidance).

149. See generally *ACUS Administrative Record Handbook*, *supra* note 65 (discussing the guidelines by the Department of the Interior (DOI), Environmental Protection Agency (EPA), and National Oceanic and Atmospheric Administration (NOAA) in providing recommendations to assist agencies in their creation of guidelines surrounding administrative recordkeeping).

150. The specific manner in which the designated employee (called the “Administrative Record Coordinator” or the “Custodian”) collaborates with other intra- or interagency staff varies by agency. For example, DOI only requires that the Coordinator consult with their Office of the

when the agency action is challenged, but some subdivisions within agencies may choose to do so when the agency action is finalized if they anticipate a legal challenge.<sup>151</sup>

The scope of the documents actually included in the administrative record is subject to both temporal and substantive limitations. First, the agencies apply a general relevancy standard: that is, potential documents for inclusion are all those documents the agency “is aware of that [are] relevant to the decision and [were] considered directly or indirectly by the decision-maker” such that the final administrative record “fairly represent[s] all relevant factual information and contrary views provided to the Agency.”<sup>152</sup> DOI provides a somewhat more detailed and expansive standard for inclusion: (1) “primary documents,” that is, the final rule or decision; and (2) “[a]ll relevant, supporting documents . . . that bear a logical connection to the matter considered and that contain information related to the agency decision at issue” – regardless of whether they “were before or available to the decision-maker at the time the decision was made.”<sup>153</sup> The agency must also decide the proper starting point in time for the search. NOAA, for example, considers the *agency record* to begin once the agency “begins to consider a concrete proposal for action.”<sup>154</sup> In the rulemaking context, this would likely be some point in time before the publication of an Advanced Notice of Proposed Rulemaking, although there are no consistent standards across agencies.<sup>155</sup>

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Solicitor and DOJ on the scope of the administrative record and assertions of privilege. See DOI GUIDANCE, *supra* note 148, at 5-6, 8-11, 13. NOAA, by contrast, assigns one employee from their Office of General Counsel to assist the designated employee with all matters related to the Administrative Record. See NOAA GUIDANCE, *supra* note 148, at 5. The designated employee might also work with the agency’s specialized document-management staff if the administrative record is likely to be particularly voluminous or complex. See DOI GUIDANCE, *supra* note 148, at 5. Finally, at EPA, in certain regional offices, there may be a central record coordinator who handles the construction of the administrative record for *all* challenged agency action. EPA GUIDANCE, *supra* note 148, at 11.

151. Compare NOAA GUIDANCE, *supra* note 148, at 2 (noting that an administrative record is to be created once an agency action is challenged) with EPA GUIDANCE, *supra* note 148, at 11 n.8 (“As a matter of efficiency, some offices choose to compile the record at the time of decision . . .”).
152. EPA GUIDANCE, *supra* note 148, at 5.
153. DOI GUIDANCE, *supra* note 148, at 6.
154. NOAA GUIDANCE, *supra* note 148, at 11; see also DOI GUIDANCE, *supra* note 148, at 4 (“A Decision File should be created once consideration of a decision begins, which will vary based on the situation.”). EPA does not offer a perspective on when the agency record should begin, instead noting that agency officials should “focus on the record throughout the entire decision-making process.” EPA GUIDANCE, *supra* note 148, at 11.
155. Beck, *supra* note 77, at 41.

A significant portion of the agency record generated during a proceeding is subject to a common-law or statutory privilege. Agencies primarily assert the deliberative process privilege, although, depending on the circumstance,<sup>156</sup> they may be able to assert the attorney-client privilege,<sup>157</sup> the attorney work-product privilege,<sup>158</sup> or the confidential business information/trade secret privilege.<sup>159</sup> There is disagreement among the three agencies with public guidance on this point regarding whether privileged documents should be included in the administrative record and withheld as privileged, or excluded from the administrative record entirely.

The confidential business information (CBI) privilege implicates statutory restrictions on disclosure. However, the other privileges an agency might seek to assert when assembling an administrative record are “qualified, common-law . . . privileges,” which are subject to a set of judge-made conditions.<sup>160</sup> Agency determination of whether a particular document is privileged in the first instance is a fact-bound legal inquiry that consumes a significant amount of agency lawyers’ time. For example, NOAA and DOI have internal consultative processes through which the administrative record coordinator works with the agency general counsel’s office to determine which documents may be subject to a privilege.<sup>161</sup>

These three agencies take two distinct approaches to the assertion of privileges in compiling the administrative record. DOI and NOAA take privileged materials and include them in the record but withhold them from production. They then choose to create a privilege log to be provided to the opposing party, providing an identification of the type and nature of the document withheld and

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156. See DOI GUIDANCE, *supra* note 148, at 11.

157. See, e.g., *Mead Data Cent. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977) (recognizing a governmental attorney-client privilege); *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980) (“[I]t is clear that an agency can be a ‘client’ and agency lawyers can function as ‘attorneys’ within the relationship contemplated by the privilege.”).

158. See, e.g., *Tax Analysts v. IRS*, 117 F.3d 607, 620 (D.C. Cir. 1997); *Martin v. Off. of Special Couns., Merit Sys. Prot. Bd.*, 819 F.2d 1181, 1187 (D.C. Cir. 1987).

159. The specific standards governing the disclosure of confidential business information (CBI) in an administrative record are complex and governed by, among other sources of law, the Trade Secrets Act, 18 U.S.C. § 1905 (2018), the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(4) (2018), and agency regulations. Litigation over disclosure frequently happens in the so-called “reverse FOIA” context, in which a regulated party seeks to prevent agency disclosure of CBI. See, e.g., *Canadian Com. Corp. v. Dep’t of the Air Force*, 514 F.3d 37, 38 (D.C. Cir. 2008); *McDonnell Douglass Corp. v. NASA*, 180 F.3d 303, 304 (D.C. Cir. 1999).

160. See *Landry v. Fed. Deposit Ins. Corp.*, 204 F.3d 1125, 1135 (D.C. Cir. 2000).

161. See NOAA GUIDANCE, *supra* note 148, at 13-14; DOI GUIDANCE, *supra* note 148, at 5-6, 11 (contemplating an additional consultation with the Department of Justice).

an identification of the type of privilege asserted.<sup>162</sup> Because they are included in the administrative record and the privilege log is provided to the opposing party, plaintiffs are aware of the existence of the document and may seek a court order to pierce the asserted privilege and compel production.

EPA takes a different approach. The agency categorically excludes from the administrative record all documents it determines to be “deliberative,” which it defines as a category more inclusive of all documents for which it may assert a privilege.<sup>163</sup> It also bases this exclusion on relevance; as it puts it in its external guidance, “[b]ecause the actual subjective motivation of Agency decision-makers is immaterial as a matter of law under *Overton Park*, documentation of the deliberations is also immaterial.”<sup>164</sup> In order to achieve this formal exclusion from the administrative record, the agency takes care to ensure that deliberative materials are not referred to or relied on in its decision documents (i.e., final rules or decisions).<sup>165</sup>

The agency’s guidance lays out in some detail standards under which documents might be deemed “deliberative.” In general, the agency categorically excludes documents which are (1) internal<sup>166</sup> or (2) predecisional, and (3) those with deliberative content. This is one major area in which these three agencies’ treatment of the administrative record is inconsistent. For example, deliberative material, such as substantive drafts of proposed rules or decisions or agency emails commenting on those drafts, would likely be included as part of the administrative record by NOAA or DOI but withheld as privileged, whereas EPA would not include them in the administrative record at all.

In a sense, this means that litigants are shooting in the dark if they seek to challenge EPA’s decision to exclude a document from the administrative record. *Yellowstone to Uintas Connection v. Bolling* is one example of a typical discovery dispute against EPA under Ninth Circuit case law, which, as discussed in Section I.B.2, is unclear on whether deliberative documents should be included in the administrative record.<sup>167</sup> In that case, regarding a dispute about a pipeline

162. See NOAA GUIDANCE, *supra* note 148, at 8.

163. EPA GUIDANCE, *supra* note 148, at 5 n.4.

164. EPA GUIDANCE, *supra* note 148, at 6.

165. *Id.*

166. This includes documents shared with other federal agencies during deliberations over the agency decision (but not formal memos or comments from another agency). *Cf.* Reps. Comm. for Freedom of the Press v. FBI, 3 F.4th 350, 365-67 (D.C. Cir. 2021) (holding that factual interagency comments cannot be withheld under the deliberative process privilege). It also includes documents generated by contractors or shared with coregulators such as states “acting solely as a consultant for EPA’s decision-making.” EPA GUIDANCE, *supra* note 148, at 7.

167. No. 4:20-cv-00192-DCN, 2021 WL 5702158, at \*1 (D. Idaho Dec. 1, 2021).

approval, defendants sought to compel the release of a privilege log for materials withheld from the administrative record so that they could bring a motion to supplement the record before the reviewing court.<sup>168</sup> The court denied their request for a privilege log, deciding to follow D.C. Circuit precedent that deliberative materials are not part of the administrative record to begin with.<sup>169</sup> The court then also declined defendants' request for further discovery for materials with which to supplement the record because they could not point to any documents improperly excluded from the administrative record.<sup>170</sup>

EPA's position on this issue—and the inconsistency among agencies in the first instance on whether deliberative documents are properly part of the record—has, at least anecdotally, created issues for the agency in front of reviewing courts. In a response collected by Leland E. Beck as part of an ACUS research project on agency rulemaking practices, the agency noted that “[i]t is difficult to explain to opposing parties and a reviewing Court why the same document (e.g., an internal email) would be treated differently by different federal agencies (e.g., one agency excludes the document from the record, another includes the document in the record, and a third puts the document in a ‘confidential’ part of the record or privilege log).”<sup>171</sup>

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Examining the practices of these three agencies illuminates two potential postures towards reviewing courts. One is to internally adopt an expansive view of the administrative record, presumably under the theory that it is easier to cut the agency record to fit the position taken by a reviewing court than add to it once an action is challenged. For example, NOAA and DOI appear to accede to the expansive conception of the administrative record held by the minority of courts rejecting the *Oceana* line of cases: their policy is to always include deliberative documents and create privilege logs. On this view, judicial ambiguity about the scope of evidentiary review looks more like a race to the bottom: agencies implementing nationwide programs will internally acquiesce to the most expansive definition of the record taken by a district court that might review them.

An agency might also take advantage of the ambiguity to act defensively. Given the unclear scope of the administrative record, an agency may decide to engage in a form of nonacquiescence: refusing to “follow the case law of a court of appeals that has rejected its position,” even when it is possible that a program

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168. *Id.*

169. *Id.* at \*9.

170. *Id.* at \*8-9; see also *Gen. Elec. Co. v. Jackson*, 595 F. Supp. 2d 8, 18-19 (D.D.C. 2009) (rejecting a facial challenge to EPA's practice of excluding irrelevant and predecisional documents from the administrative record).

171. Beck, *supra* note 77, at 3 n.14.



may be challenged in that circuit.<sup>172</sup> (This posture may actually be more normatively preferable; as Samuel Estreicher and Richard L. Revesz argue, “[t]o compel an agency to follow the adverse ruling of a particular court of appeals would be to give that court undue influence in the intercourt dialogue by diminishing the opportunity for other courts of proper venue to consider, and possibly sustain, the agency’s position.”)<sup>173</sup> Thus, EPA chooses to follow the majority of courts accepting the *Oceana* line of cases by excluding deliberative documents from the record and not producing a privilege log, even though their programs could be challenged in a court holding the minority view.

## II. THE RECORD RULE AS AN EXTENSION OF GENERAL DISCOVERY PRINCIPLES

By now, I hope to have captured a sense of the general confusion around the administrative record in practice. One major driver of this confusion is that the record rule is treated by courts (and, by extension, agencies), as just that – a definite rule – when in reality, I argue, it is more a collection of loose standards. In this Part, I provide more detail about the prudential and structural-constitutional foundations of administrative-record jurisprudence, and argue that, at its core, the record rule is built on a general relevancy standard rooted in the standard of review for a given right of action. In my view, this standard provides a way to harmonize the treatment of the administrative record for arbitrary-and-capricious and constitutional claims.

In general, courts and agencies tend to locate the record rule as a statutory mandate emanating from the APA’s “whole record” provision in the flush text of Section 706. As discussed, the actual statutory text is notably empty of any content to help courts flesh out the appropriate scope of evidentiary review. And parsing the legislative history of the APA is a notoriously difficult enterprise. This is because it was enacted as part of a bitter compromise between supporters and opponents of the New Deal,<sup>174</sup> and because it was never intended to – nor could it – be a comprehensive manual for judicial review of the administrative state. Over the course of its history, scholars and commentators have concluded

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172. Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 687 (1989).

173. *Id.* at 764.

174. See, e.g., *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40 (1950) (“[The APA] represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest.”); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1560 (1996) (describing the APA’s enactment as a “a pitched political battle for the life of the New Deal”).

that the APA is something exceptional: a superstatute,<sup>175</sup> a constitution for the administrative state,<sup>176</sup> a bill of rights,<sup>177</sup> or a “cease-fire armistice agreement” between Republicans and Southern Democrats hostile to the New Deal and the Roosevelt Democrats who championed it.<sup>178</sup>

As a result of this contentious legislative history, it can be exceptionally challenging to construct a coherent view of what Congress intended a particular APA provision to mean, or how courts should operationalize its provisions. Our modern administrative law has emerged, and continues to emerge, from the ocean of the APA’s open text. With some notable exceptions, this has been a slow, Burkean process in which narrow concepts wash ashore after years of intercircuit debate, only for the intellectual tides to shift and swallow them whole again. But many aspects of the statute remain submerged and uncertain. For example, there is an entrenched academic debate about even the preliminary question of whether, and to what extent, courts can supplement or gap-fill its provisions with federal common law.<sup>179</sup> This is true across many controversies over Congress’s original intent when enacting the APA: it is quite easy to, within reason, locate evidence for or against a particular interpretation and seek to discredit the particular sources relied on by the opposing side. This is not a problem unique to the statute, of course, but it is particularly difficult given the limited legislative history and the fierce compromise that led to its passage.<sup>180</sup>

In this Note, my aim is not to add to the overwhelming bulk of scholarly work canvassing the APA’s legislative history and recovering a singular conclusion about a particular clause’s meaning from the seafloor.<sup>181</sup> Instead, I will take

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175. See Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1209 (2015); Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 363.

176. See Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253, 253 (1986).

177. See *Diebold v. United States*, 947 F.2d 787, 795 (6th Cir. 1991) (quoting S. DOC. NO. 79-248, at 298 (1946)).

178. Shepherd, *supra* note 174, at 1560-61.

179. See Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807, 815-24 (2018) (collecting sources and summarizing the debate).

180. For the definitive and exhaustive account of the conflicting legislative history of the APA, see generally Shepherd, *supra* note 174. Cf. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 85 (1977) (arguing that the modern approach to federal-question adjudication is centered around “the idea that federal statutes generate a common law penumbra of their own: gaps are to be filled in by a process of extrapolation from whatever the court conceives the basic policy of the statute to be”).

181. See generally Christopher J. Walker & Scott T. MacGuidwin, *Interpreting the Administrative Procedure Act: A Literature Review*, 98 NOTRE DAME L. REV. 1963 (2023) (cataloguing four distinct methodologies for interpreting the APA and collecting sources).

the legislative history's indeterminacy as a given when discussing the scope of evidentiary review, particularly because the legislative history is nearly silent on the meaning of the "whole record" or the decision to include constitutional claims in Section 706.<sup>182</sup> Indeed, the only mention of the whole record is in the Senate Committee on the Judiciary's comments on the draft bill, which note that "[t]he requirement of review upon 'the whole record' means that courts may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case."<sup>183</sup> Not particularly helpful. And with an open text and opaque legislative history, courts must look to other sources to find principles with which to operationalize this clause of the statute.<sup>184</sup>

Thus, despite having a textual hook in the APA, I think it is appropriate to characterize the record rule – as used by courts in practice – as similar to, if not a specific application of, the general federal common law of evidence and discovery, as grounded in the FRCP and the Federal Rules of Appellate Procedure (FRAP). Of course, both of these sources of procedural rules overlap with and govern the conduct of the reviewing court in most other aspects of the proceeding. But I think it is more logical to view the record rule as a specialized application of these rules of procedure guided by prudential concerns derived primarily from the decision rules of arbitrary-and-capricious review and, vaguely, from broader separation-of-powers principles.

The observation that the mechanics of judicial review of agency action are "an elaboration of the implications of the appellate review model" the APA creates is not a new one.<sup>185</sup> However, the literature – at least regarding the scope of evidentiary review – tends to view federal adjudication of agency action as fundamentally distinct from the ordinary operation of federal district and appellate courts, as if the APA creates a unique mode of proceeding that supplants the operation of the Federal Rules.<sup>186</sup> But the thin text of the statute struggles to bear

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182. See Gavoor & Platt, *supra* note 37, at 19-20 (discussing the lack of legislative history on the whole record provision and noting that it provides "little help" in its interpretation); Beck, *supra* note 77, at 2 n.11.

183. S. REP. NO. 79-752, at 28 (1945).

184. Cf. Walker & MacGuidwin, *supra* note 181, at 1969 ("Although the administrative record requirement seems to depart from the plain text, it certainly reinforces pragmatic and rule-of-law values in administrative law.").

185. See, e.g., Merrill, *supra* note 61, at 941.

186. See, e.g., Merrill, *supra* note 61, at 979-980; Jeffrey C. Dobbins, *New Evidence on Appeal*, 96 MINN. L. REV. 2016, 2026-29 (2012) (contrasting appellate review of federal district-court decisions with judicial review of agency action). For one area in which the FRCP and substantive APA review conflict, consider the long-entrenched circuit split over whether agency decisions to decline to respond to nonparty subpoenas of government records – that is, discovery of agency materials *collateral* to the challenged agency action – should be reviewed

the weight of the common-law record rule piled on it. Instead, we see from the judicial elaboration of the record rule the kind of balancing test traditionally applied to discovery motions, modified to reflect the unique structural constitutional concerns inherent in judicial review of agency action. I will begin the following Section by discussing those constitutional concerns, then discuss how they should inform our understanding of discovery against agencies.

A. *The Structural Constitutional Foundations of the Record Rule*

While the FRCP provide a helpful framework, discovery against agencies, particularly agency leadership, implicates serious structural and prudential concerns that are not present in suits between two private litigants. As I have argued, both the categorical exclusion of deliberative documents from the administrative record and the deference doctrine created by the presumption of regularity reflects a particular view of the proper allocation of power between the Executive and the courts, as well as the sources of political accountability for administrative decision-making. In my reading, the *Oceana* approach tracks the thin principal-agent account of political accountability in the administrative state, which undergirds much of the contemporary Supreme Court's structural-constitutional administrative law.<sup>187</sup> In this view, which is informed by unitary executive theory, the Executive ultimately controls the policymaking apparatus of administration, and is therefore the wellspring of political accountability, while the role of courts is to adopt a minimal, process-theory approach to their review.<sup>188</sup>

Hurst, in his comment on the scope of evidentiary review for constitutional claims, also reads the case law around the presumption of agency regularity in

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under APA arbitrary-and-capricious standards or FRCP 45. See generally Ben Covington, *Closing the Touhy Gap: The APA, The FRCP, and Nonparty Discovery Against Federal Administrative Agencies*, 121 COLUM. L. REV. 369 (2021) (discussing the effect of the APA/FRCP split on non-party discovery outcomes).

187. See, e.g., Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 YALE L.J. 1769, 1796-97 (2023) (explaining and critiquing this conventional approach to accountability); Bernstein & Rodríguez, *supra* note 82, at 1648-50 (same).

188. See, e.g., Eidelson, *supra* note 109, at 1752-58 ("Under the emerging model [of judicial review], ensuring robust political accountability is *itself* a central concern of arbitrariness review, alongside (or perhaps ahead of) ensuring the substantive soundness or political neutrality of agency decisions."); see also *San Luis Obispo Mothers for Peace v. Nuclear Regul. Comm'n*, 751 F.2d 1287, 1325-26 (D.C. Cir. 1984) ("Were courts cavalierly to supplement the record, they would be tempted to second-guess agency decisions in the belief that they were better informed than the administrators empowered by Congress and appointed by the President.").

constructing the record to reflect separation-of-powers concerns.<sup>189</sup> For example, he highlights how excessive “probing” of agency decision-making processes could frustrate the agency’s ability to operate normally.<sup>190</sup> This concern is particularly acute for agency officials at the upper levels of agency management, who oversee significant portions of the agency’s policymaking portfolio.<sup>191</sup>

But there are competing Article III interests at play. At times when the Court has viewed its core domain of Article III power most expansively and has been most hostile to administration—for example, in *Crowell v. Benson*, in the waning days of the *Lochner* Court—it has vigorously asserted the right of the federal courts to review *de novo* “all questions, both of fact and law” in “cases brought to enforce constitutional rights.”<sup>192</sup> This reflects an “underlying constitutional

189. Hurst, *supra* note 31, at 1519; accord French, *supra* note 91, at 965-66; see, e.g., *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 389 (2004) (discussing how discovery against the Executive Branch “pushes to the fore difficult questions of separation of powers and checks and balances”); *Ramos v. Wolf*, 975 F.3d 872, 900 (9th Cir. 2020) (Nelson, J., concurring) (“[The APA’s] record-review requirement is not just a meaningless procedural hurdle to overcome, but a fundamental constitutional protection to agency action.”).

190. Hurst, *supra* note 31, at 1519 (quoting *United States v. Morgan (Morgan IV)*, 313 U.S. 409, 422 (1941)). As Nicholas R. Parrillo notes in his study of the negotiations between agencies and the federal judiciary around compliance with court orders, “Any high official is busy, and having to testify is disruptive because of the time necessary to attend the deposition or court proceeding, to travel . . . and, most importantly, to prepare—the official almost certainly knows nothing about the case except short briefings . . .” Parrillo, *supra* note 63, at 925.

191. Parrillo, *supra* note 63, at 925-26 (“The prudential concern is obvious: such demands for testimony, if multiplied, could rapidly take up huge amounts of high officials’ time, crippling agency management.”) (citing *In re United States*, 624 F.3d 1368, 1373-74 (11th Cir. 2010)). It is primarily for the prudential reason Parrillo highlights—along with the simple fact that high officials might not be the best source of information within an agency about a particular federal program or decision, particularly for matters of lesser importance to political leadership—that courts are much more hesitant to force high officials to testify than lower-level agency staff. See Parrillo, *supra* note 63, at 926; see, e.g., *In re Cheney*, 544 F.3d 311, 314 (D.C. Cir. 2008); *Cnty. Fed. Sav. & Loan Ass’n v. Fed. Home Loan Bank Bd.*, 96 F.R.D. 619, 621-22 (D.D.C. 1983) (denying a request to depose senior agency officials because they lacked “unique personal knowledge” about the underlying facts of the case). Lower-level officials, who are more intimately involved in a smaller number of federal programs, implicate this prudential concern about burdening agency staff time to a lesser degree.

192. *Crowell v. Benson*, 285 U.S. 22, 60 (1932). Of course, in later cases, Justice Hughes would chip away at his own sweeping pronouncement through the imposition of deference standards for agency fact-finding, even in constitutional cases. Compare *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 52 (1936) (“But to say that [agency] findings of fact may be made conclusive where constitutional rights of liberty and property are involved . . . is to place those rights at the mercy of administrative officials . . .”), with *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 53 (1936) (“[J]udicial scrutiny must of necessity take into account . . . [agency] reasoning and findings . . .”). DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940*, at 51-77 (2014) (discussing the

conception . . . that wielders of government power must be subject to the limits of law, and that the applicable limits should be determined, not by those institutions whose authority is in question, but by an impartial judiciary.”<sup>193</sup> And the availability of review itself can serve as an important constraint on agencies by “increas[ing] the likelihood of fidelity to substantive and procedural norms.”<sup>194</sup>

These structural concerns are one reason why courts are particularly sensitive to the idea of discovery in litigation challenging agency action under the APA, as opposed to other statutes. Not all suits against the government are subject to such tightly drawn rules bounding the scope of discovery and evidentiary review. For example, as Richard McMillan, Jr. and Todd D. Peterson note, “when private litigants [suing under the Tucker Acts] seek discovery concerning whether government agencies have violated procurement regulations in awarding government contracts, courts grant discovery on a virtually routine basis, frequently without any discussion of whether discovery should be permitted.”<sup>195</sup> The same is generally true for tort claims brought pursuant to the Federal Tort Claims Act (FTCA).<sup>196</sup>

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retreat of *Crowell*'s strong-form “constitutional facts” doctrine). See generally Mark Tushnet, *The Story of Crowell: Grounding the Administrative State*, in FEDERAL COURTS STORIES 329 (Vicki C. Jackson & Judith Resnik, eds., 2010) (same). This marked the beginning of the “bloodless revolution” in administrative common law: “[t]he history of administrative law from the thirties to sixties is the history of the judicial development of technical defenses that prevented private plaintiffs from reaching the merits of their claims against government officials.” MASHAW, *supra* note 81, at 2. And it goes without saying that *Crowell*, at least on this issue, has been overwritten by record-rule jurisprudence and primarily survives as good law for the proposition that courts “may entertain new evidence or remand to the agency, whichever action better serves the convenience of the parties and of the court, and the making of a sound finding.” Louis L. Jaffe, *Judicial Review: Constitutional and Jurisdictional Fact*, 70 HARV. L. REV. 953, 985 (1957).

193. Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 938 (1988); see also Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 463-69 (1987) (discussing the need for a “firm hand” wielded by an “independent [Article III] arbiter” to protect separation-of-powers principles).
194. Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 656 (1985).
195. Richard McMillan, Jr. & Todd D. Peterson, *The Permissible Scope of Hearings, Discovery, and Additional Fact-Finding During Judicial Review of Informal Agency Action*, 1982 DUKE L.J. 333, 372.
196. Courts reviewing claims under the Federal Tort Claims Act (FTCA) acknowledge that the scope of discovery should be governed by Federal Rule of Civil Procedure 26. See, e.g., *Tri-State Hosp. Supply Corp. v. United States*, 226 F.R.D. 118, 126 (D.D.C. 2005). But under the FTCA, discovery is usually bifurcated because of the discretionary-function exemption, which “preserves sovereign immunity and insulates the government from liability ‘for the exercise or performance [of] a discretionary function or duty.’” *Seaside Farm, Inc. v. United States*, 842 F.3d 853, 857 (4th Cir. 2016) (quoting 28 U.S.C. § 2680(a) (2018)). Courts hearing well-

The resolution of these separation-of-powers concerns is better captured by the deliberative process privilege, which directly shields deliberative materials from the kinds of probing which might chill agency deliberation and give rise to concerns about judicial overreach. Because this privilege exists, we are less concerned about the substantive burdens imposed on agencies, at least in the high-minded realm of structural constitutional law. But the assertion of the privilege is conditional, balancing the relevancy of the evidence against these separation-of-powers concerns. Courts following *Oceana* tend to avoid this flexible test by imposing a bright-line exclusionary rule, effectively creating a superprivilege that litigants are unable to contest in the instant litigation.

But this creates a somewhat awkward tension with other methods for accessing nonpublic material within the total agency record. For example, a litigant could, in parallel with or before litigation, submit a request under FOIA for the same documents they are attempting to discover in their litigation; when an agency withholds them as privileged, they could contest the assertion of privilege directly in a separate district court action.<sup>197</sup> (Although the source of the agency's right to withhold documents under FOIA is statutory, rather than a common-law privilege, courts typically see these privileges as at least coextensive with the statutory exemptions in FOIA.)<sup>198</sup> FOIA has its problems,<sup>199</sup> and is an

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plead FTCA cases will first authorize limited discovery to ensure the discretionary-function exemption does not strip them of jurisdiction, then authorize discovery to resolve factual disputes relating to liability. And in the D.C. Circuit, for example, the “standard for permitting jurisdictional discovery [against the government] is quite liberal,” *Davis v. United States*, 196 F. Supp. 3d 106, 121 (D.D.C. 2016), because “where facts are necessary to establish jurisdiction, plaintiffs must be afforded the opportunity for discovery.” *Id.* (quoting *Loughlin v. United States*, 393 F.3d 155, 167 (D.C. Cir. 2004)). Even this limited jurisdictional discovery can take a form that would be anathema to record-rule principles. *See, e.g., De Baca v. United States*, 403 F. Supp. 3d 1098, 1108 (D.N.M. 2019) (noting that plaintiffs received “over 6,000 pages of documents” and took “seven depositions” during jurisdictional discovery).

197. *See* 5 U.S.C. § 552(a)(4)(B) (2018) (providing a right of action through a grant of jurisdiction to federal district courts to “enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant” after the production of documents pursuant to a FOIA request).
198. *See, e.g., Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001) (discussing how FOIA Exemption 5 incorporates “civil discovery privileges,” including the attorney-work-product and deliberative process privileges); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 148 (1975) (“[FOIA] Exemption 5 withholds from a member of the public documents which a private party could not discover in litigation with the agency.”).
199. For the definitive account of the troubled state of FOIA compliance systems in various agencies, see generally MARGARET B. KWOKA, *SAVING THE FREEDOM OF INFORMATION ACT* (2021). It is also somewhat noteworthy that courts have not arrived at a definitive idea about which “records” may be requested from agencies pursuant to FOIA. *See* Ryan P. Mulvey & James Valvo, III, *Towards a Definition of a FOIA “Record”: The D.C. Circuit’s Decision in Cause*

imperfect substitute for ordinary discovery<sup>200</sup>—for example, one cannot take depositions pursuant to the Act—but as a functional matter, it makes little sense to erect a bar to district-court discovery of these materials through the record rule and force litigants to litigate privilege issues under FOIA as a workaround. At best, the FOIA backstop creates significant delay for the vindication of meritorious claims; at worst, it serves to turn the qualified deliberative process privilege into an absolute one.

### B. *The Essential Role of Relevancy*

My argument in this Section is grounded in the modern analysis that courts—primarily the D.C. Circuit—have used to develop the record rule. It is easiest to see this throughline in the sets of cases seeking to probe the decision-making processes of agency staff and political leadership. Supreme Court decisions before the APA’s passage, such as the *Morgan* line of cases,<sup>201</sup> which considered requests by litigants to depose high-ranking agency officials and compel them to testify at trial, justified their rejection of those requests as a matter of judicial comity.<sup>202</sup> Federal courts, in this early telling, should not sanction an inquiry into the decision-making processes of those presiding over agency adjudications in order to respect the independence of what seemed something like a coequal court.<sup>203</sup> Such an examination of a judge, the reasoning went, would be

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of Action Institute v. Department of Justice, YALE J. ON REGUL.: NOTICE & COMMENT (June 3, 2021), <https://www.yalejreg.com/nc/towards-a-definition-of-a-foia-record-the-d-c-circuits-decision-in-cause-of-action-institute-v-department-of-justice-by-ryan-p-mulvey-james-valvo-iii> [<https://perma.cc/UB9U-PXVS>].

200. See George A. Bermann, *Federal Tort Claims at the Agency Level: The FTCA Administrative Process*, 35 CASE W. RESV. L. REV. 509, 614 (1985) (“[F]ull disclosure under the FOIA is less generous to claimants than discovery in litigation, for the FOIA neither compels agencies to assemble information nor to prepare documents not already in existence.”).
201. *United States v. Morgan (Morgan I)*, 298 U.S. 468 (1936); *Morgan v. United States (Morgan II)*, 304 U.S. 1 (1938); *United States v. Morgan (Morgan III)*, 307 U.S. 183 (1939); *United States v. Morgan (Morgan IV)*, 313 U.S. 409, 422 (1941).
202. *Morgan IV*, 313 U.S. at 422; see *Morgan III*, 307 U.S. at 191. In *Morgan IV*, Justice Frankfurter addressed a somewhat extreme, ad hoc procedure endorsed by the trial court: the Secretary of Agriculture, accused of bias in a rate-setting adjudication, was deposed and questioned at length at trial about “the process by which he reached the conclusions of his order, including the manner and extent of his study of the record and his consultation with subordinates.” *Morgan IV*, 313 U.S. at 422; see *Morgan II*, 304 U.S. at 17-18.
203. *Morgan III*, 307 U.S. at 191 (“Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be constructed so as to attain that end through coordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition



“destructive of judicial responsibility. . . [A]lthough the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other.”<sup>204</sup>

However, over time, the rationale used to reject this sort of probing began to also be grounded in the (unstable) decision rules for arbitrary-and-capricious review.<sup>205</sup> Following the *Overton Park* decision, which seemed to leave open the possibility that, in certain circumstances, deliberative documents could provide helpful inputs to arbitrary-and-capricious review, circuit courts seemed at least open to the idea that these documents, if not privileged, could be within the scope of review.<sup>206</sup> Many court decisions focused on whether or not deposition or discovery requests for deliberative documents would be permissible under the *Overton Park* framework.<sup>207</sup> But the most notable clear statement of this decision-rule-based approach came with the D.C. Circuit’s terse opinion on rehearing in *In re Subpoena Duces Tecum II*, which interpreted *Morgan IV*, *Camp v. Pitts*,<sup>208</sup> and *Overton Park* to hold that “[a]gency deliberations not part of the

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as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim.” (footnote omitted)). The Court repeatedly equated the role of decisionmakers in administrative adjudication with that of a judge. *See, e.g., Morgan II*, 304 U.S. at 22; *Morgan I*, 298 U.S. at 480–81. And the *Morgan* line of cases remains important for their articulation “of some of the requirements of a judicial model of decision-making” within agencies. Daniel J. Gifford, *The Morgan Cases: A Retrospective Review*, 30 ADMIN. L. REV. 237, 237–38 (1978); *see, e.g., Zen Magnets, LLC v. Consumer Prod. Safety Comm’n*, 968 F.3d 1156, 1168, 1175–76 (10th Cir. 2020) (quoting *Morgan IV*, 313 U.S. at 421).

204. *Morgan IV*, 313 U.S. at 422.

205. However, the logic animating the *Morgan* line of cases still surfaces in the approach taken by judges to record-rule issues. *See, e.g., Ramos v. Wolf*, 975 F.3d 872 (9th Cir. 2020) (Nelson, J., concurring) (quoting *Morgan IV* and arguing that “[j]ust as we would not probe the mental processes of a judge, we cannot probe further into agency action without first assessing whether the law would allow such probing”); *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2579–80 (2019) (Thomas, J., concurring in part and dissenting in part) (“This presumption [of regularity] reflects respect for a coordinate branch of government . . .” (citing *Morgan IV*, 313 U.S. at 422)).

206. *See, e.g., Nat’l Nutritional Foods Ass’n v. Mathews*, 557 F.2d 325, 333 (2d Cir. 1977) (“Moreover, we cannot say, after our own review of the [internal, deliberative] memoranda, that the district court abused its discretion or otherwise committed error in refusing to compel the [agency] to disclose . . . . The district court reviewed these documents in camera and determined that they were within the scope of the Government’s deliberative privilege and not subject to disclosure under the circumstances of this case.”).

207. *See, e.g., Cmty. for Creative Non-Violence v. Lujan*, 908 F.2d 992, 997–98 (D.C. Cir. 1990); *Saratoga Dev. Corp. v. United States*, 21 F.3d 445, 457–58 (D.C. Cir. 1994).

208. 411 U.S. 138 (1973).

record are deemed immaterial.”<sup>209</sup> To the panel, this was the logical result of their view of the decision rules for arbitrary-and-capricious review: since “the reasonableness of the agency’s action is judged in accordance with its stated reasons,” the “actual subjective motivation of agency decisionmakers is immaterial as a matter of law – unless there is a showing of bad faith or improper behavior.”<sup>210</sup> Later courts have relied on this conceptual move to define the contours of the record rule.<sup>211</sup> And, in the D.C. Circuit’s *Oceana* decision in 2019, it explicitly linked the immateriality of deliberative documents to the discovery standards in the FRCP.<sup>212</sup>

In *Oceana*, the D.C. Circuit’s key conceptual move was to declare deliberative documents as not relevant to the “customary” decision rules for arbitrary-and-capricious review, thereby excluding deliberative documents from the administrative record.<sup>213</sup> As I have discussed, there is not uniform consensus among judges on this point.<sup>214</sup> But in other cases, the D.C. Circuit has implicitly recognized that deliberative documents may fall within the scope of review for other rights of action.

For example, in *In re Subpoena Duces Tecum I*,<sup>215</sup> the court considered the scope of the deliberative process privilege as asserted by the Federal Reserve Board and the Comptroller of the Currency. The Trustee in Bankruptcy (TIB) for the estate of the Bank of New England Corporation sought a third-party subpoena for the Comptroller and the Board to discover evidence about alleged pressure from the regulators to transfer assets from the Corporation to a

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209. *Subpoena Duces Tecum II*, 156 F.3d 1279, 1279 (D.C. Cir. 1998).

210. *Id.* at 1279-80.

211. See, e.g., Nat’l Ass’n of Chain Drug Stores v. U.S. Dep’t of Health & Hum. Servs., 631 F. Supp. 2d 23, 27 (D.D.C. 2009) (“As pre-decisional, deliberative documents are immaterial to the court’s decision, they are not designated part of the administrative record that forms the basis of the court’s decision.”); Order at \*1, Greater Yellowstone Coal. v. Kempthorne, Nos. 07-2111 & 07-2112, 2008 WL 11398098 (D.D.C. May 23, 2008) (“Any evidence of the [agency’s] internal deliberative work is irrelevant, as it is the agency’s stated reasons for the final rule that the Court must consider when conducting arbitrary and capricious review.”).

212. *Oceana, Inc., v. Ross*, 920 F.3d 855, 865 (D.C. Cir. 2019) (“Because predecisional documents are ‘immaterial,’ they are not ‘discoverable[.]’ . . . and since predecisional documents are irrelevant and therefore not ‘otherwise discoverable,’ they are not required to be placed on a privilege log.” (first quoting FED. R. CIV. P. 26(b)(1); and then quoting FED. R. CIV. P. 26(b)(5))).

213. *Id.* at 864-65.

214. See *supra* Section I.B.

215. *In re Subpoena Duces Tecum Served on the Off. of the Comptroller of the Currency (Subpoena Duces Tecum I)*, 145 F.3d 1422, 1424 (D.C. Cir. 1998). The D.C. Circuit’s holding that agency deliberations were immaterial as a matter of law for arbitrary and capricious review came out of the government’s petition for rehearing in this case. See *Subpoena Duces Tecum II*, 156 F.3d at 1279-80.

subsidiary bank, which was nearing insolvency, and delayed putting the bank into receivership until those transfers were made.<sup>216</sup> The TIB alleged that the Board and Comptroller intended to do so to minimize losses incurred by the FDIC when the bank eventually went into receivership, and sought to claw back those transfers from the FDIC under the fraudulent transfer provisions of the Bankruptcy Code.<sup>217</sup> The statutory right of action required that they show that the regulators had the requisite intent; the regulators attempted to assert the deliberative process privilege over relevant internal documents.<sup>218</sup>

The court held that the regulators must produce the internal documents. As Judge Silberman explained,

The privilege was fashioned in cases where the governmental decisionmaking process is collateral to the plaintiff's suit. If the plaintiff's cause of action is directed at the government's intent, however, it makes no sense to permit the government to use the privilege as a shield. . . . [I]f either the Constitution or a statute makes the nature of governmental officials' deliberations the issue, the privilege is a nonsequitur. The central purpose of the privilege is to foster government decisionmaking by protecting it from the chill of potential disclosure. If Congress creates a cause of action that deliberately exposes government decisionmaking to the light, the privilege's *raison d'être* evaporates.<sup>219</sup>

*Subpoena Duces Tecum I*, as compared to *Oceana*, thus stands at the opposite end of relevancy's sliding scale. Unlike the arbitrary-and-capricious decision rules, the intent of government decision makers was a key component of the decision rules for fraudulent transfer actions under the Code. Because the court hearing the fraudulent transfer case required evidence of intent to adjudicate the plaintiff's claim, the regulators' internal deliberative documents were relevant, and thus discoverable.

In some ways, *Subpoena Duces Tecum I* went too far. The transfers at issue in *Subpoena Duces Tecum I* at least nominally advanced a statutory policy goal: "to resolve failing banks with the least possible cost to the bank insurance fund—

216. *Subpoena Duces Tecum I*, 145 F.3d at 1423.

217. *Id.*; see 11 U.S.C. §§ 548(a), 550(a)(1) (2018). Congress explicitly waived the federal government's sovereign immunity for suits under the Bankruptcy Code in the Bankruptcy Reform Act of 1994. 11 U.S.C. § 106 (2018); see S. Elizabeth Gibson, *Congressional Response to Hoffman and Nordic Village: Amended Section 106 and Sovereign Immunity*, 69 AM. BANKR. L.J. 311, 325-27 (1995).

218. *Subpoena Duces Tecum I*, 145 F.3d at 1423.

219. *Id.* at 1424 (citations omitted).

and thus to the American taxpayer.”<sup>220</sup> Judge Silberman attempted to draw a fine distinction between causes of action which present a “collateral attack” on government decision-making, which I read as cases implicating the *process* of policy formation, and those directed at “the government’s intent.”<sup>221</sup> But Silberman’s distinction does not grapple with the separation-of-powers concerns inherent in any court-ordered discovery into policymakers’ decision-making. And, of course, it left open the question of whether arbitrary-and-capricious review was a “collateral” or “direct” attack on governmental decision-making. (In response to a panicked government petition for rehearing, Silberman cleaned this up by holding that internal agency deliberations are generally immaterial as a matter of law for arbitrary-and-capricious review).<sup>222</sup>

So, what does all this mean in practice? In general, both the FRCP and the FRAP apply to the review of agency action.<sup>223</sup> For review of agency adjudications, the FRAP explicitly contemplate that the “record on review . . . consists of: (1) the order involved; (2) any findings or report on which it is based; and (3) the pleadings, evidence, and other parts of the proceedings before the agency.”<sup>224</sup> As the comments to the Rules make clear, “There is no distinction between the record compiled in the agency proceeding and the record on review; they are one and the same. The record in agency cases is thus the same as that in appeals from the district court . . .”<sup>225</sup> This is somewhat helpful, in that these items will be easily discernable from formal adjudications; however, for informal adjudications and rulemaking, the proper scope of the “parts of the proceedings before the agency” will be much less clearly defined than a trial court record.

This indeterminacy implies that the “whole record,” in practice, should mean different things for the various foundations for review in Section 706. That is, the agency materials relevant for the Section 706(2)(C) right of action, which is a claim that the agency exceeded its statutory authority, are much more limited than those relevant to arbitrary-and-capricious review. This implies the existence of a fluid principle behind the construction of the record. If we read this provision together with the common view of Section 702 that Congress fairly intended to create a broad right of judicial review for all persons “suffering legal wrong because of agency action,” that view would be thwarted by any conception

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220. *Id.*

221. *Id.*

222. See *Subpoena Duces Tecum II*, 156 F.3d 1279, 1279 (D.C. Cir. 1998).

223. *But see* FED. R. CIV. P. 81(a)(6) (exempting review of certain types of agency action, including adjudications by the Department of Agriculture and the Department of the Interior, based on the terms of their statutory review frameworks).

224. FED. R. APP. P. 16(a).

225. FED. R. APP. P. 16(a) advisory committee’s note (1967).

of the “whole record” which categorically removed pieces of evidence which are relevant to either the plaintiff’s right of action or the agency’s defenses.<sup>226</sup> Under this conception of the record, review would necessarily be crabbed or incomplete. Instead, so long as the right of review is not taken away through the operation of Section 701(a),<sup>227</sup> the “whole record” provision should be read in such a way to enable effective judicial review of a particular right of action. In my view, that means asking the agency to produce all evidence in its possession relevant to a plaintiff’s claim (a request against which the agency would be able to assert any applicable privileges).

Once a record is filed, and a court considers the prudence of completing the record or allowing supplementation, they are in a fact-finding modality most commonly governed by Federal Rule of Civil Procedure 26, which provides the general principles governing discovery. Rule 26(b) articulates the general principle that parties may obtain discovery “regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.”<sup>228</sup> This is generally balanced with “the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.”<sup>229</sup>

To operationalize this, courts might also consider the source of the right of action: whether it is statutory or common law. *In re Subpoena Duces Tecum I* made much of the idea that Congress had created a right of action for private plaintiffs which hinged on the defendant’s intent, against the background principle that, in bankruptcy proceedings, Congress intended government entities to be treated the same as similarly situated private defendants.<sup>230</sup> This created, in the court’s

226. This Note does not attempt to conduct a full statutory interpretation of the “whole record” provision. But this manner of reading the statute is based on what has been termed an “operational-structural” interpretation. Cf. Russell C. Bogue, Note, *Statutory Structure*, 132 *YALE L.J.* 1528, 1534-36, 1544, 1563-71 (2023) (creating a taxonomy of structural statutory interpretation and defining operational structuralism as a modality of structural argument in statutory interpretation which “infers meaning from the way the statute actually operates, given all its moving parts”).

227. That is, where there is law for a reviewing court to apply or Congress has not otherwise precluded review of the agency action through another statute. See 5 U.S.C. § 701(a) (2018); *Webster v. Doe*, 486 U.S. 592, 599 (1988) (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)).

228. FED. R. CIV. P. 26(b). This relevancy standard relates back to the FRE, which, in a famously amorphous provision, defines relevancy as “any tendency to make a fact more or less probable” that is “of consequence in determining the action.” FED. R. EVID. 401.

229. FED. R. CIV. P. 26(b).

230. See Gibson, *supra* note 217, at 325.

view, an explicit congressional waiver of the deliberative process privilege, leading it to treat the banking regulators the same as any other private defendant.<sup>231</sup> A court evaluating a case brought under an implied common-law cause of action dealing with intent likely should not find the same waiver of privilege absent a clear statement from Congress.

This focus on relevancy allows us to trace a throughline in the development of the record rule and its exceptions. For one, and most obviously, decision rules for challenges to formal adjudication (in which a trial-like record is prepared by agencies) simply do not look beyond the formal record compiled. Any further discovery would be necessarily irrelevant. But when we enter the murky world of administrative records for informal agency action, referring back to the Federal Rules helps us understand the baseline principles courts should be applying to define what would otherwise seem to be a hard unitary concept: the “whole record.”<sup>232</sup> But when courts do so without much discussion of the sources of their normative principles, the reconciliation of their approaches becomes more difficult. In particular, courts can get into trouble when they lose sight of this principle underlying the record rule. In my view, this is the basis of the extant scholarly critique of many court opinions considering the supplementation of the administrative record. Gavoor and Platt attack supplementation doctrine, in my reading, because it disconnects the construction of the administrative record from the decision rules for arbitrary-and-capricious review.<sup>233</sup>

### III. INTO THE MORASS: THE UNCERTAIN APPLICATION OF THE RECORD RULE TO CONSTITUTIONAL CLAIMS

This Note has focused on the scope of evidentiary review for arbitrary-and-capricious review under the APA. But arbitrary-and-capricious review is not the only kind of review available under the APA, and the APA is not the exclusive means through which a plaintiff may challenge agency action. So-called “non-statutory” review of government action has existed since shortly after the

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231. *Subpoena Duces Tecum I*, 145 F.3d 1422, 1424 (D.C. Cir. 1998).

232. Besides *Oceana*, few courts have explicitly linked the record rule directly to the FRCP. For one recent example weighing the standards for “civil litigation” against “review under the APA,” see *Washington v. United States Department of Homeland Security*, No. 19-CV-5210, 2020 WL 4667543 at \*5 (E.D. Wa. Apr. 17, 2020).

233. Gavoor & Platt, *supra* note 37, at 47 (“If an agency acts in bad faith or behaves improperly, and the improper conduct is reflected in the record already, then supplementing the record is unnecessary . . . . If the agency acts in bad faith or behaves improperly, and the improper conduct is *not* in the record presented [and the agency relied on those improper motivations,] . . . that material is properly part of the record . . . [because] [m]aking a decision based solely on improper reasons is the very definition of capricious.”).

creation of the federal courts,<sup>234</sup> and persists—albeit in a hazy and uncertain form—today.<sup>235</sup> It is a shorthand for all forms of judicial review of agency action that are not obtained pursuant to a statutory right of action.<sup>236</sup> This review is

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234. Other scholars have provided a more fulsome account of the development of the implied equitable action and its relationship to sovereign immunity. See, e.g., Johnathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612 (1997); Alexandra Nickerson, Note, *Ultra-APA Ultra Vires Review: Implied Equitable Actions for Statutory Violations by Federal Officials*, 121 COLUM. L. REV. 2521 (2021); James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex Parte Young*, 72 STAN. L. REV. 1269 (2020); Thomas W. Merrill, *Marbury v. Madison as the First Great Administrative Law Decision*, 37 J. MARSHALL L. REV. 481 (2004); Kovacs, *Revealing Redundancy*, *supra* note 16; Clark Bye, *Proposed Reforms in Federal “Nonstatutory” Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479 (1962); Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 MICH. L. REV. 867 (1970).

The modern form of implied equitable actions against agencies and their officers was, as these scholars have noted, unknown to courts in the early Republic, and would not emerge in its current form until the early 1900s. Shortly after the start of the nineteenth century, courts began to permit suits against administrative agencies in equitable actions at state law, rather than in a specific writ or legal claim. This practice has its doctrinal roots in *Osborn v. Bank of the United States*, in which the Supreme Court threw off the formalistic shackles tying the hands of the lower courts through the narrow grounds for prerogative writs and recognized a claim for equitable injunctive relief against the principal officers of a federal agency under a state-law action for trespass. 22 U.S. (9 Wheat.) 738, 843, 868 (1824).

By the early twentieth century, the *Osborn* doctrine had blossomed into a robust practice of reviewing administrative action through federal court actions in equity, without an explicit statutory or state-common-law right of action. See *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 98, 103-08 (1902) (recognizing a general equitable power for courts to enjoin officer action exceeding their statutory authority); see also Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1411 (2010) (noting that *McAnnulty*’s “sweeping language” marked a significant shift in equity jurisprudence, seeming to “reject virtually the whole of the mandamus and injunction jurisprudence of the nineteenth century” by expressly disclaiming the need to identify a specific right of action, whether through a prerogative writ or state-law claim); Duffy, *supra* note 4, at 124 (“To the *McAnnulty* Court, the . . . right to relief flowed simply from an application of the traditional principles of equity.”). This approach would soon be ratified by Justice Peckham in suits against state officers in *Ex Parte Young*, where the court affirmed *McAnnulty* and proceeded on an implied equitable right of action. 209 U.S. 123 (1908).

235. See, e.g., William Powell, *Policing Executive Teamwork: Rescuing the APA from Presidential Administration*, 85 MO. L. REV. 71, 91 (2020) (discussing Justice Kagan’s approach to nonstatutory review).

236. See, e.g., Bret C. Birdsong, *Justice Scalia’s Footprints on the Public Lands*, 83 DENV. U. L. REV. 259, 267 (2005) (“Nonstatutory review refers to judicial review of administrative action that is not obtained under a specific statutory provision creating a right to judicial review.”); Roger C. Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 387, 395 (1970) (“Nonstatutory review of federal administrative action rests on the

rooted in an implied equitable right of action, which itself is derived from the general power of federal courts to fashion equitable remedies.<sup>237</sup> It generally comes in three flavors, about two-and-a-half of which have a parallel statutory cause of action in the APA: claims that an agency acted in excess of its statutory authority (so-called *ultra vires* review),<sup>238</sup> claims that an agency acted contrary to the Constitution,<sup>239</sup> and claims under the prerogative writs.<sup>240</sup>

“Nonstatutory” review is itself something of a misnomer, in that it is authorized in the first instance by Congress’s grant of federal-question jurisdiction.<sup>241</sup>

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premise . . . that courts can make a useful contribution to administration by testing the legality of official action which adversely affects private persons.” (citation omitted)).

237. See Duffy, *supra* note 4, at 123-24 (arguing that “[t]he right to relief,” in nonstatutory review, is “cut from the fabric of equity . . . . The Court did not require any statutory authorization for the remedy [it provided] other than the statutory grant of equity jurisdiction because a traditional equity court would not have thought such additional authorization necessary”); see also Siegel, *supra* note 234, at 1622-23 (“Exactly why the government should enjoy a general immunity from suit has never been made entirely clear, either by the Supreme Court or by any consensus among scholars. Some claim that immunity is an inherent characteristic of sovereigns; 50 others point to the ‘logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends’; sometimes immunity is said to follow from reasons of public policy, reasons that often are not clearly articulated; some have suggested that it is an importation, possibly including a mistranslation, from English law; and sometimes its application in this country is called ‘one of the mysteries of legal evolution.’” (footnotes omitted)); Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1115-16 (2009) (“Nonstatutory review is a rather vague doctrine, by no means squarely endorsed by the current Court, that enables judicial review of executive and even presidential action even where no waiver of sovereign immunity applies (and such review itself draws on statutory grants of jurisdiction, remedies, and forms of relief, so ‘nonstatutory review’ is something of a misnomer). As such, nonstatutory review stands in severe tension with the background principle of sovereign immunity, which the Court has repeatedly endorsed. And as some recent cases suggest, the D.C. Circuit’s case law is considerably more hospitable to nonstatutory review than is the Court’s own caselaw.” (footnote omitted)).
238. *Cf.* 5 U.S.C. § 706(2)(C) (2018) (providing a right of action to contest agency action “in excess of statutory jurisdiction, authority, or limitations”).
239. *Cf. id.* § 706(2)(B) (providing a right of action to contest agency action “contrary to constitutional right, power, privilege, or immunity”).
240. The two most important prerogative writs that survive in this area today are mandamus and habeas corpus. Mandamus has a parallel in the APA. *Cf. id.* § 706(2)(C) (providing a right of action to contest agency action “short of statutory right”). Habeas corpus does not. The writs of certiorari and prohibition, although central to challenges to early administrative bodies, have been made inaccessible to most plaintiffs today through the operation of common law and statute. However, these writs “bore significant resemblance to injunctions, in that they ordered a defendant to take or not to take specified action . . . [and] were sometimes thought to disable an illicit course of government action as a general matter, thereby conferring benefits on similarly situated nonparties.” Pfander & Wentzel, *supra* note 234, at 1278.
241. 28 U.S.C. § 1331 (2018); Duffy, *supra* note 4, at 147 n.173 (1998) (noting that the term “civil action” in Section 1331 encompasses “traditional equity jurisdiction.”).



Some modern scholars tend to call it the “implied equitable right of action,” insofar as it is implied in the general statutory grant of equity jurisdiction to federal courts.<sup>242</sup> To avoid semantic confusion, I will use the latter terminology in this Note. But whatever one calls it, a version of the implied equitable action has been available since shortly after the Founding,<sup>243</sup> although it has shifted and developed as its doctrinal and statutory foundations have changed.<sup>244</sup>

Today, the implied statutory cause of action is most frequently invoked when avenues for judicial review under the APA are foreclosed, typically through the operation of substantive statutes that restrict the availability of judicial review or when litigants seek review of actions by government actors not considered to be “agencies” within the meaning of the APA.<sup>245</sup> Review in these cases typically hinges on whether the government actor’s action exceeded their statutory authority; as a result, the decision rule is determined by the level of discretion provided to the actor by statute, a bar generally higher than ordinary arbitrary-and-

242. See Nickerson, *supra* note 234, at 2524 & n.17.

243. See *supra* note 234 and accompanying text.

244. This history is important primarily because of what Samuel L. Bray has termed the Supreme Court’s “new equity” jurisprudence, which Owen W. Gallogly describes as the “wholesale relocation of [federal courts’] equity powers from Article III to federal statutes.” Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1000, 1010 (2015); Owen W. Gallogly, *Equity’s Constitutional Source*, 132 YALE L.J. 1213, 1279 (2023). These sets of cases tend to restrict the remedies available to courts operating under general statutory grants of equity to those known to courts at the Founding. Bray, *supra*, at 1010 (describing recent Supreme Court equity jurisprudence as “seeking an equity that seemed almost frozen in time: [limited to] the remedies that could have been given, or that were analogous to the remedies that could have been given, by the [English] chancellor in 1789”). But despite the Supreme Court’s general skepticism of innovations in equity in other areas of law, equitable remedies against agencies and officers, not authorized by a specific statute, continue to be issued by district courts and ratified by the Supreme Court today.

245. The most significant line of cases in this area – and those which have attracted the most scholarly attention – involve review of actions taken by the President, who is not considered to be an agency within the meaning of the APA. See, e.g., *Dalton v. Specter*, 511 U.S. 462 (1994). For a comprehensive summary of the Supreme Court and D.C. Circuit’s jurisprudence in these types of suits, see generally Siegel, *supra* note 234.

For one example of record issues in this context, consider *Trump v. Hawaii*, 585 U.S. 667 (2018). In that case, the Supreme Court evaluated a set of constitutional challenges to President Trump’s executive order establishing entry restrictions on foreign nationals from certain countries. The Justices seemed to agree that the record in the case included statements from then-candidate Donald Trump about the motivation for the order before he took office; the major dispute in the case was over the standard of review, and thus the relevancy of those statements to the Court’s decision. *Id.* at 704 (“For our purposes today, we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review.”). Compare *id.* at 706-10 (centering review on the text of the executive order) with *id.* at 739-50 (Sotomayor, J., dissenting) (centering review on the “entire record,” including the President’s prior statements).

capricious review under the APA, which enables review of the substantive reasoning behind agency action.<sup>246</sup>

Implied constitutional claims against the federal government arise in a wide variety of contexts and provide an alternative pathway to *substantive* review of agency action, at least to a degree greater than the *ultra vires* review of the implied statutory cause of action. Two broad classes of claims can be fairly made out from the case law.<sup>247</sup> The first entails constitutional review of *agency action or inaction*, of the type contemplated by the statutory cause of action in the APA, to vindicate individual rights. In the adjudication and rulemaking context, for example, this can involve constitutional challenges to things like the procedure of the action or the impact of the agency action on individual constitutional rights, privileges, or immunities. The second class arises out of structural constitutional claims, typically challenging how agencies are structured by Congress or how they allocate decision-making authority within the discretionary limits created by their organic or enabling statutes. Federal courts have entertained a significant number of these structural constitutional claims over the last two decades, and they have used their equitable authority to massively restructure internal agency procedures, primarily through injunctions.<sup>248</sup>

Consider *Jarkesy v. SEC*, one of the most significant lower-court decisions considering a structural constitutional claim as of this writing.<sup>249</sup> The Fifth Circuit panel held that a SEC ALJ's adjudication of a civil enforcement action violated Jarkesy's Seventh Amendment right to a civil jury trial, and that the multi-layered statutory removal restrictions on SEC ALJs violated the Take Care Clause, "deviat[ing] from over eighty years of settled precedent."<sup>250</sup> The decision

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246. See Vermeule, *supra* note 237, at 1117; see also *Leedom v. Kyne*, 358 U.S. 184, 188 (1958) (holding that a court must find agency action to be "contrary to a specific [statutory] prohibition" that is "clear and mandatory" or otherwise "in excess of its delegated powers" to issue an injunction); *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 690-91 (1949) (centering review on "the officer's lack of delegated power" rather than the "claim of error in the exercise of that power," the traditional province of arbitrary-and-capricious review under the APA).

247. See Huq, *supra* note 30, at 1441-42. Aziz Z. Huq writes in opposition to a body of scholarship that "seeks to assimilate rights and structure as substitutable strategies for securing the identical end of limiting government and providing space for individual liberty." *Id.* at 1441 & n.21 (collecting sources). I agree with Huq that there is a meaningful distinction between how courts cognize harm to individual rights and structural values: "each operates with different mechanisms, along divergent channels, and with distinct effects." *Id.* at 1442; see *infra* Section III.A.

248. For a discussion of three recent Supreme Court cases, see *infra* notes 263-268 and accompanying text.

249. 34 F.4th 446 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (mem.) (June 30, 2023) (No. 22-859).

250. *Id.* at 450; *Jarkesy v. SEC*, 51 F.4th 644, 647 (5th Cir. 2022) (Haynes, J., dissenting from denial of rehearing en banc).

effectively ended the SEC's ability to try cases before its ALJs. And after a grant of certiorari, and a decision from the Supreme Court expected this Term, commentators have noted the potential for the Fifth Circuit's logic, at least on the removal point, to reshape the current form of internal administrative adjudication at many other agencies.<sup>251</sup> This is the sweep and power of the equitable remedies fashioned by federal courts for structural constitutional causes of action.

Implied constitutional causes of action, such as those at issue in *Jarkesy*, import the decision rules created in federal courts' constitutional common law. Because these rules vary widely based on the particular implied right of action used by parties, it can be difficult to generalize. But they can be conceptually quite distinct from the decision rules used under arbitrary-and-capricious review. The latter is primarily concerned with the procedural and reason-giving aspects of agency action—that is, whether agencies have adequately “explain[ed] their choices, in light of the facts”<sup>252</sup>—while implied ultra vires and constitutional review is generally focused on locating agency action or structure against a background legal superstructure of grants of authority to agencies by Congress; individual constitutional rights, privileges, or immunities; or structural constitutional concerns. This is in part because arbitrary-and-capricious review itself has its roots in the early-twentieth-century Court's procedural-due-process jurisprudence.<sup>253</sup> (Since arbitrary-and-capricious review's instantiation as a statutory right of action in the APA, its common-law decisional rules have diverged

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251. See, e.g., Robert B. Stebbins & Ariel Blask, *The Future of Administrative Proceedings*, WILLKIE FARR & GALLAGHER LLP 3 (Nov. 9, 2023), <https://www.willkie.com/publications/2023/11/the-future-of-administrative-proceedings> [<https://perma.cc/6739-VAHU>] (“[T]he multi-layered statutory removal protections that protect the SEC ALJs also apply to all of the ALJs in the Executive Branch, including those at the [Federal Trade Commission], the Federal Energy Regulatory Commission, the Department of Health and Human Services, and the Social Security Administration.”); Judge Stephen A. Glazer, *The ALJ Fiasco—A Coda?*, 16 GOV'T L. REV. 158, 172 (2023) (“We ALJs now ask, ‘Are we at *Götterdämmerung*?’”).

252. Gersen & Vermeule, *supra* note 120, at 1384; see also Short, *supra* note 109, at 1817–23 (discussing the central position of the “reason-giving requirement” in modern administrative law). See generally Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387 (tracing the development of the reason-giving requirement and explaining its relationship to separation-of-powers principles).

253. See, e.g., *Pac. States Box & Basket Co. v. White*, 296 U.S. 176, 180–82 (1935) (reviewing an implied Due Process Clause claim against a state administrative agency's regulation standardizing containers for raspberries and strawberries by centering the standard of review on whether “it is arbitrary or capricious,” rather than “the wisdom of such a regulation”).

from the implied constitutional right of action in both the rulemaking and adjudication context.)<sup>254</sup>

That's not to say that there are no procedural restrictions on implied equitable rights of action under the Constitution. In the next Section, I briefly cover the most relevant limitations.

#### A. *Implied Equitable Rights of Action for Structural and Substantive Constitutional Claims*

The first gateway issue faced by courts contemplating constitutional claims against agencies is the nature of the right of action invoked by plaintiffs. After the general grant of federal-question jurisdiction by Congress in 1875, the inclusion of general equity authority unleashed a “flood of litigation” bringing equitable suits against the government.<sup>255</sup> In *American School of Magnetic Healing v. McAnnulty*, which ratified this course of action, the Court clearly recognized that these suits could be maintained without a statutory cause of action.<sup>256</sup> The *McAnnulty* court held that federal courts “needed only a grant of jurisdiction, not a statutory cause of action, in order to exercise the powers of a court of equity in ruling on a request to enjoin agency action,” endorsing implied equitable causes of action arising directly from the Constitution.<sup>257</sup>

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254. *Cf., e.g.,* *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 n.9 (1983) (rejecting, in the rulemaking context, the government's argument that arbitrary-and-capricious review “requires no more than the minimum rationality a statute must bear in order to withstand analysis under the Due Process Clause”); *Sierra Club v. Costle*, 657 F.2d 298, 392 n.462 (D.C. Cir. 1981) (“As a general rule, due process probably imposes no constraints on informal rulemaking beyond those imposed by statute.”). *See generally* SHAPIRO, *supra* note 24, at 56-58 (describing the shift from the initial practice of courts exercising arbitrary-and-capricious review for rulemakings under a deferential “lunacy test,” to hard-look review under which the agency “had to produce the best possible rule given all the values, alternatives and facts involved”).

255. Henry Paul Monaghan, *A Cause of Action, Anyone?: Federal Equity and the Preemption of State Law*, 91 NOTRE DAME L. REV. 1807, 1825 n.122 (2016). Injunctions against administrative agencies were first recognized by the Supreme Court in *Noble v. Union River Logging Railroad Co.*, 147 U.S. 165 (1893). Following the Court's decisions in *Noble* and *Degge v. Hitchcock*, 229 U.S. 162 (1913), holding that the writ of certiorari could not be used to review administrative action, “injunction became the main weapon in the arsenal for attacking federal administrative action.” 4 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 23:6, at 149 (2d ed. 1983).

256. 187 U.S. 94, 108 (1902) (“[I]n case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief.”).

257. Merrill, *supra* note 61, at 949; *see also* LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 193 (1965) (describing injunctions as the “catchall” method of judicial review of agency action); Marsha S. Berzon, *Securing Fragile Foundations: Affirmative Constitutional*

This view would seem radical to close followers of the modern Supreme Court, although it still has vitality in suits in equity against the states. Beginning in the 1960s, federal courts, in suits against state administrative agencies and their officials alleging constitutional harms—the *Ex parte Young* mode of review—found the required statutory hook in 42 U.S.C. § 1983.<sup>258</sup> Thus, the proliferation of litigation in federal court to restructure state and local administrative agencies to ensure compliance with constitutional principles has occurred under the ambit of a clear statutory cause of action, at least as to those constitutional rights which have been specifically identified by the Supreme Court.<sup>259</sup>

But for implied constitutional suits against the federal government, which lack a parallel statute, the going has been rougher. Rights of action *at law* for constitutional violations—*Bivens* cases—are largely dead in the water, confined to the facts of the series of cases finding implied legal rights of action under the Constitution during the high Warren Court.<sup>260</sup> Freestanding *equitable* claims,

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*Adjudication in Federal Court*, 84 N.Y.U. L. REV. 681, 689 (2009) (noting that courts in the *McAnnulty* era considering constitutional cases “applied the traditional rules of equity without difficulty: So long as the court had jurisdiction, the litigant demonstrated a risk of irreparable injury, and there was no adequate remedy available to him at law, the courts were able to fashion an appropriate equitable remedy”).

258. In Section 1983, Congress provided a statutory right of action at both law and equity to those harmed by the official acts of state officers. 42 U.S.C. § 1983 (2018); see, e.g., *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989) (reiterating that Section 1983 provides a right of action and authorizing equitable remedies for the “deprivation of any rights, privileges and immunities secured by the Constitution” and federal laws). The Court has not been particularly clear about whether Section 1983’s statutory right of action is actually required for private litigants to enjoin unconstitutional actions by state officials, or whether litigants may fall back on an implied equitable cause of action under the Supremacy Clause. See, e.g., Stephen I. Vladeck, *Douglas and the Fate of Ex Parte Young*, 122 YALE L.J. ONLINE 13, 16 (2012) (“So construed, *Young* is part of a jurisprudential imperative recognizing the ability of litigants to enjoin *any* unconstitutional state action without a distinct statutory right to do so—because the Constitution itself may in some cases require such a remedy.”); *Green v. Mansour*, 474 U.S. 64, 68 (1985) (“[T]he availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause.”).
259. See William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 635 (1982).
260. See James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 126 (2009); see, e.g., *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) (describing implied constitutional-damages actions as “a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be ‘implied’ by the mere existence of a statutory or constitutional prohibition”).

however, continued to be entertained by the Supreme Court and affirmed in dicta in *Bivens* cases proceeding under implied legal rights of action.<sup>261</sup>

More modern cases tend to locate an implied equitable right of action in *structural* constitutional challenges to the agencies themselves, rather than claims that a particular final agency action violated an individual constitutional right afforded to a plaintiff.<sup>262</sup> There have been numerous challenges of this type in recent years, primarily centered around constitutional deficiencies in the structure of administrative entities engaged in investigation or formal or informal adjudication, which demonstrate the continued vitality of this mode of proceeding under common-law equitable principles. In general, these cases could not have been brought under the APA because there was no “final agency action” at issue. Nevertheless, the Court has entertained these structural claims without precisely identifying the plaintiff’s right of action.

In *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, for example, Beckstead and Watts, a Nevada accounting firm, challenged the propriety of a formal Public Company Accounting Oversight Board (PCAOB) investigation into its accounting practices.<sup>263</sup> Rather than waiting for a final agency action to plead a cause of action under Section 706, the firm launched a facial constitutional challenge to the structure of the Board itself, relying on an implied equitable cause of action under the Take Care Clause and seeking an injunction preventing the Board from continuing its investigation.<sup>264</sup> The Supreme Court held that Beckstead need not wait for any final agency action—here, likely the imposition of a fine or other sanction by PCAOB—to bring a constitutional claim against otherwise-unreviewable investigatory action, and instead proceeded directly to the merits of the implied constitutional claim.<sup>265</sup> Likewise, in *Seila Law LLC v. Consumer Financial Protection Bureau*, the Court assessed a structural Take Care Clause challenge in response to a civil investigatory demand by the Consumer Financial Protection Bureau, seemingly locating its ability to do so in the

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261. See, e.g., *Bell v. Hood*, 327 U.S. 678, 684 (1946) (“[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution.”); *Malesko*, 534 U.S. at 74 (“[I]njunctive relief has long been recognized as the proper means for preventing [administrative] entities from acting unconstitutionally.”).

262. From a functional perspective, some contemporary scholars see these decisions as embracing a resurgent unitary-executive theory to “strengthen presidential control over agency adjudication at the expense of the decisional independence of agency adjudicators.” Aaron L. Nielson, Christopher J. Walker & Melissa F. Wasserman, *Saving Agency Adjudication*, 103 TEX. L. REV. (forthcoming) (manuscript at 24-33), <https://ssrn.com/abstract=4563879> [<https://perma.cc/24GE-W5Y8>]; see Cox & Kaufman, *supra* note 187, at 1796-97.

263. 561 U.S. 477 (2010).

264. *Id.* at 477-78.

265. *Id.* at 490.

general equity powers of federal courts.<sup>266</sup> And in *United States v. Arthrex, Inc.*, an implied constitutional case under the Appointments Clause, the Court reviewed a final order by the Patent Trial and Appeal Board under inter partes review.<sup>267</sup> Although not discussed in the Court’s opinion, this precludes ordinary APA review of the decision’s substance. Without any jurisdictional discussion, the Court proceeded directly to the merits of the constitutional claim.<sup>268</sup>

Of course, that does not mean that litigants may freely bring implied constitutional claims in district court. For many agencies, Congress has created so-called “statutory review schemes” which strip federal courts of jurisdiction over certain challenges to agency action under the APA—typically for formal adjudications and informal rulemaking.<sup>269</sup> For example, the Securities Exchange Act provides that “[a] person aggrieved by [an SEC] final order . . . may obtain review of the order” by petitioning a court of appeals; it has a similar provision for challenges to SEC rules.<sup>270</sup> Despite the Supreme Court’s articulation of the general principle that federal-question jurisdiction under Section 1331 should “hold firm against ‘mere implication flowing from subsequent legislation,’”<sup>271</sup> it has viewed the presence of these schemes as congressional intent to preclude other avenues of equitable and legal review.<sup>272</sup> The operative principle in these cases, as applied to constitutional claims, is that “Congress cannot bar all remedies for enforcing federal constitutional rights.”<sup>273</sup> So long as it provides *some* forum, even on appellate review from an agency adjudication, Congress avoids the

266. 140 S. Ct. 2183, 2196 (2020) (“When such a [removal protection] provision violates the separation of powers it inflicts a ‘here-and-now’ injury on affected third parties that can be remedied by a court.” (quoting *Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986))).

267. 594 U.S. 1 (2021). Inter partes review is an administrative procedure through which the Patent Trial and Appeal Board can “take a second look at patents previously issued by the [Patent and Trademark Office].” *Id.* at 8. The decision to commence an inter partes review proceeding is committed to the director’s discretion by law. *Id.* at 8-9. And Congress has made the Board’s decision to revoke a patent unreviewable in federal courts. *Id.* at 30 (Gorsuch, J., concurring in part and dissenting in part); see 35 U.S.C. §§ 6(c), 318(b) (2018).

268. *Arthrex*, 594 U.S. at 6 (majority opinion).

269. The precise hook for this interaction is located in Section 703 of the APA, which specifies that agency action is subject to the statute’s judicial review provisions “[e]xcept to the extent that prior, adequate, and *exclusive* opportunity for judicial review is provided by law.” 5 U.S.C. § 703 (2018) (emphasis added).

270. 15 U.S.C. § 78y(a)(1), (c)(1) (2018).

271. *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 383 (2012) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 808 (1976)).

272. See, e.g., *Elgin v. Dep’t of the Treasury*, 567 U.S. 1, 2 (2012).

273. *Bowen v. Mich. Acad. Fam. Physicians*, 476 U.S. 667, 681 n.12 (1986) (quoting Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 921 n.113 (1984)).

“serious constitutional question” of whether it can strip the federal courts of jurisdiction over constitutional claims entirely.<sup>274</sup>

Thus, in a series of cases, most notably *Thunder Basin Coal Co. v. Reich* and *Axon Enterprise v. FTC*, the Supreme Court limited the availability of district courts to hear certain types of APA and implied equitable claims where they would be coextensive with the types of claims to be channeled through these statutory review provisions.<sup>275</sup> *Thunder Basin* created a three-factor balancing test aimed at helping courts understand when Congress had precluded review of a particular claim through a statutory review scheme: (1) whether precluding district court jurisdiction “foreclose[s] all meaningful judicial review,”<sup>276</sup> (2) whether the claim is “wholly ‘collateral’” to the review provisions, and (3) whether the claim is “outside the agency’s expertise.”<sup>277</sup> When the answer to all three questions is yes, a court should accept jurisdiction over the claim. When the answers are mixed, the result is unclear.<sup>278</sup>

These factors attempt to chart the blurry boundary between structural and substantive constitutional claims, as well as reveal the contemporary Court’s somewhat prudential orientation towards this issue. In *Axon*, the Court privileged certain structural constitutional claims by seemingly exempting them entirely from any extra-APA statutory review schemes created by Congress, at least for those claims which present what the Court terms a “here-and-now injury,” such as being subjected to an unconstitutionally structured decision-making process. It took pains to identify these types of injuries as being unrelated to any substantive policy decision taken by the agency and distinct from the matters typically within the agency’s expertise. Building on its analysis in *Free Enterprise*

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274. *Weinberger v. Salfi*, 422 U.S. 749, 762 (1975).

275. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994); *Axon Enter., Inc. v. FTC*, 598 U.S. 175 (2023).

276. *Thunder Basin*, 510 U.S. at 212-13.

277. *Id.* at 212. *Thunder Basin* can, in my view, be fairly criticized for providing limited guidance in ambiguous cases. Indeed, courts of appeals construing the same statute often come out different ways. *Compare* *Feds for Med. Freedom v. Biden*, 63 F.4th 366, 378 (5th Cir. 2023) (holding that the Civil Service Reform Act (CSRA) did not displace a district court’s jurisdiction over a constitutional challenge to the Biden Administration’s workforce vaccine mandate), *with* *Payne v. Biden*, 62 F.4th 598, 607 (D.C. Cir. 2023) (holding that the CSRA’s review scheme provided the exclusive avenue for review of such a claim).

278. *Axon*, 598 U.S. at 207 (Gorsuch, J., concurring in judgment) (“But what happens when the [*Thunder Basin*] factors point in different directions . . . ? No one knows. You get to *guess*.”). Chief Judge Srinivasan has a reading more charitable to the *Thunder Basin* Court: “We do not understand those considerations to form three distinct inputs into a strict mathematical formula. Rather, the considerations are general guideposts useful for channeling the inquiry into whether the particular claims at issue fall outside an overarching congressional design.” *Jarkey v. SEC*, 803 F.3d 9, 17 (D.C. Cir. 2015).



*Fund*,<sup>279</sup> it held that where structural claims are presented, such an injury permits parties to their constitutional claims in district court. They need not wait for final agency action or exhaust their remedies under any statutory review process mandated by Congress, including the APA.<sup>280</sup>

*Axon* reiterates the special solicitude the modern Court has shown towards structural constitutional claims. These claims arise not from an injury inflicted by the substance of “this or that ruling but from subjection to all agency authority.”<sup>281</sup> For this kind of harm, the Court has repeatedly worked to sweep away procedural hurdles that might prevent or delay litigants pressing their claims in federal courts.<sup>282</sup> This solicitude is founded on a prudential recognition that the kinds of rights asserted in a structural proceeding may be lost completely unless the Court clears the path to the federal courthouse door.<sup>283</sup> But it also provides a somewhat surprising, yet inchoate, perspective that, at least for some constitutional claims bearing on individual rights, the federal courts might benefit from an agency’s expertise when these claims are entwined with policy preferences implemented by agency programs.<sup>284</sup>

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279. *Axon*, 598 U.S. at 189 (“The challenges here, as in *Free Enterprise Fund*, are not to any specific substantive decision . . . Nor are they to the commonplace procedures agencies use to make such a decision. They are instead challenges, again as in *Free Enterprise Fund*, to the structure or very existence of an agency . . .”).

280. *Id.* at 190-96.

281. *Id.* at 195.

282. See *supra* notes 263-268 and accompanying text (detailing some of the major structural constitutional cases from the last decade or so).

283. *Axon*, 598 U.S. at 191 (describing how the harm created by being subjected to an “illegitimate proceeding” cannot be remedied post hoc because “[a] proceeding that has already happened cannot be undone” and “[j]udicial review of *Axon*’s . . . claims would come too late to be meaningful”); see also *Carr v. Saul*, 593 U.S. 83, 93 (2021) (“[T]his court has consistently recognized a futility exception to exhaustion requirements. It makes little sense to require litigants to present claims to adjudicators who are powerless to grant the relief requested.” (citation omitted)).

284. *Axon*, 598 U.S. at 195. Sophia Z. Lee, building on work by Gillian E. Metzger, has coined this interplay “regulatory expertise” in administrative constitutionalism. Sophia Z. Lee, *From the History to the Theory of Administrative Constitutionalism*, in *ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW* 109, 120 (Nicholas R. Parrillo ed., 2017); Gillian E. Metzger, *Administrative Constitutionalism*, 91 *TEX. L. REV.* 1897, 1922-23 (2013) (arguing that, because of their expertise, agencies “are likely to be better [than other actors] at integrating constitutional concerns with the least disruption to” the “statutory schemes they implement and the areas they regulate”). *Axon*’s tentative embrace of regulatory expertise is surprising because it cuts against decades of judicial hostility to the relevancy of agency expertise to constitutional adjudication. See Bertrall L. Ross II, *Embracing Administrative Constitutionalism*, 95 *B.U. L. REV.* 519, 530-35 (2015); cf. Metzger, *supra* note 284, at 1920-21 (collecting sources challenging the relevance of agency expertise to

However, *Thunder Basin* and *Axon* do not stand for the proposition that all nonstructural constitutional claims—that is, claims directly related to “actions taken in [an] agency proceeding” rather than the agency’s “power to proceed at all”—are barred in the presence of a statutory review scheme or an express provision stripping district courts’ jurisdiction.<sup>285</sup> Under *Axon*, “standard” questions of “administrative and constitutional law” clearly are not channeled into special statutory review schemes; but where constitutional claims are “intertwined with or embedded in matters on which the [agency is] expert,” it is likely that those claims must proceed through the special statutory framework Congress has created.<sup>286</sup> But the general operative principle that Congress must provide *some* forum, at *some* time, for all constitutional claims has been reaffirmed in Supreme Court cases handed down after the passage of the APA, primarily in cases which could not have been brought under the statute.<sup>287</sup>

The remainder of this Part focuses on what courts should do when the APA is *not* displaced by a more comprehensive statutory scheme. That question turns on whether the APA’s enactment displaced parallel implied equitable actions

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constitutional questions). For structural constitutional claims, the Court has made clear that the agency’s perspective is largely irrelevant. See *Carr*, 593 U.S. at 92 (“[A]gency adjudications are generally ill suited to address structural constitutional challenges, which usually fall outside the adjudicators’ areas of technical expertise.”).

285. *Axon*, 598 U.S. at 192. For example, consider the Immigration and Nationality Act, which limits courts’ ability to review immigration status-adjustment proceedings outside of the Act’s statutory review scheme. See 8 U.S.C. § 1160(e)(1). In *McNary v. Haitian Refugee Center, Inc.*, the Supreme Court held that this statute would bar judicial review of equitable constitutional claims arising out of individual status-determination hearings, but would permit such claims in the context of reviewing an agency’s pattern or practice across multiple adjudications absent a clear statement from Congress that it intended to foreclose “all forms of judicial review.” 498 U.S. 479, 496 (1991); see *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349, 351 (1984); see also *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 670 (1986) (applying a similar principle for implied statutory causes of action). The *Thunder Basin* Court seemed to cabin *McNary*’s holding to cases dealing with statutory review schemes in which such “generic” pattern-or-practice claims would fall outside of the agency’s expertise. See *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 214–15 (1994).

286. *Axon*, 598 U.S. at 195.

287. The first such case, *Leedom v. Kyne*, reaffirmed the vitality of *implied statutory* equitable causes of action, at least for plaintiffs who could not plead a cause of action under the APA, whose fate remained a much more difficult and contested question following the statute’s passage. 358 U.S. 184, 189 (1958). Other cases reaffirmed the availability of implied equitable constitutional claims when APA review would be unavailable. See, e.g., *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992); *Trump v. Hawaii*, 585 U.S. 667, 697–700 (2018); see also *Nickerson*, *supra* note 234, at 2532–39 (discussing the continued vitality of implied statutory equitable causes of action alleging ultra vires agency action post-APA in the Supreme Court and courts of appeal).

under the Constitution.<sup>288</sup> In the following Section, I will argue that it did not do so in any meaningful way, with the implication that constitutional cases in equity against agencies should, in general, build on the tailored relevancy standard discussed in Part II.<sup>289</sup>

*B. The Scope of the APA's Application to Equitable Constitutional Claims*

The Supreme Court has not given lower courts clear answers about either the scope of the record rule's application to constitutional claims or those claims' relationship to the procedural provisions of the APA more generally. After a twenty-seven-year quiet period,<sup>290</sup> two recent Supreme Court decisions (*Department of Commerce v. New York* and *In re United States*) implicating the scope of evidentiary review grew out of constitutional challenges to signature Trump Administration policies.<sup>291</sup>

Although these cases have been widely studied for their effect on other substantive areas of administrative law, the opinions in these cases also provide two distinct views of the status of constitutional claims against agencies: (1) that they must be channeled through the APA's procedural provisions, thereby applying the record rule to all constitutional claims, and (2) that they never should be subject to the APA's procedural provisions, and should therefore be considered without reference to record-rule principles. In my view, this is an incorrect way to frame the question. Many of these cases assume that if a constitutional claim is brought pursuant to Section 706 of the APA, the record rule, as developed for arbitrary-and-capricious review, must apply. But, as I have argued, the principles underlying the record rule lead to the conclusion that the scope of evidentiary review should be tailored to the decision rules for a given claim. Thus, neither view is the right one. Instead, courts should use the background principles animating the record rule to base their construction of the administrative record on relevancy.

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288. Cf. John F. Pries, *In Defense of Implied Injunctive Relief in Constitutional Cases*, 22 WM. & MARY BILL RTS. J. 1, 49-50 (2013) ("The key question in discerning the effect of a statute on the implied equitable action is whether Congress, by providing one cause of action, intended to rescind all others.").

289. See *supra* Section II.B.

290. Before the Trump Administration cases, the record rule's last trip to the Court was in *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 653-56 (1990).

291. *Dep't of Com. v. New York*, 139 S. Ct. 2551 (2019); *In re United States*, 583 U.S. 29 (2017).

### 1. Article II Primacy

The first, and perhaps most common, view held by courts is that constitutional challenges to the substance of agency action are reviewed “under the framework set forth in the APA.”<sup>292</sup> The logic behind this view was most clearly set forth in Justice Scalia’s oft-cited dissent in *Webster v. Doe*, a case in which an employee fired by the CIA because of his sexuality sued to challenge his termination.<sup>293</sup> Scalia argued that, for entities covered by the APA, “if review is not available under the APA it is not available at all” because it is an “umbrella statute governing judicial review of all federal agency action.”<sup>294</sup> Once a right of action is created, “it becomes subject to the judicial review provisions of the APA unless specifically excluded.”<sup>295</sup>

Under this view, which I term “Article II primacy,”<sup>296</sup> constitutional claims could *only* be brought through the Section 706(2)(B) right of action,<sup>297</sup> which

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292. See *Robbins v. U.S. Bureau of Land Mgmt.*, 438 F.3d 1074, 1085 (10th Cir. 2006).

293. 486 U.S. 592, 595 (1988). *Webster* is perhaps most famous for its holding that the CIA Director’s decision to terminate the employee was committed to the agency’s discretion and therefore unreviewable. It is also notable for the majority’s dicta, which suggested that, upon remand, “the District Court has the latitude to control any discovery process which may be instituted so as to balance respondent’s need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission.” *Id.* at 604.

294. *Id.* at 607 n.\* (Scalia, J., dissenting).

295. *Id.* This position is somewhat surprising, given Justice Scalia’s earlier writings on implied equitable review in public-lands cases in which he suggested that the APA’s enactment against the existing backdrop of equitable practice “surely . . . at least prevents [courts] from raising those new obstacles which are based . . . solely upon the presumed absence of legislative consent.” Scalia, *supra* note 234, at 917.

296. I use this term in part to highlight the structural constitutional issues at play in this debate—that is, the conflict between a reading of the APA’s procedural provisions as a way for Congress to control judicial review of agency action, and the view that the APA was merely a “restatement” of the existing federal common law of equity practice such that it left the judiciary “largely in control of review.” See Duffy, *supra* note 4, at 133-35. (Although the constitutional provisions empowering Congress to control the jurisdiction of the federal courts are in Article III, I use “Article II primacy” to emphasize this view’s focus on congressional power.) See U.S. CONST. art. III, §§ 1-2; Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1030-31 (1982).

297. Or, potentially, whatever right of action is created by a more specific statutory review scheme. *Webster* was decided before the *Thunder Basin* line of cases had solidified into a coherent doctrine, and in any event, the APA’s default procedures applied to the plaintiff’s claim, so there was little discussion of claim displacement in the opinion. Alexandra Nickerson considers and rejects such a “hypertextualist” reading of the APA, which would similarly foreclose the existence of the implied equitable right of action. Nickerson, *supra* note 234, at 2557-58. As she

would incorporate all of the other statutory restrictions on that right inside the APA. The practical result of this incorporation would be to bar district courts from hearing the successful structural challenges to agency action at the Supreme Court, such as *Free Enterprise Fund* and *Axon*, because those suits involved challenges to nonfinal agency action, which is explicitly carved out from the APA's statutory right of action.<sup>298</sup>

Justice Scalia's view is the logical, if extreme, extension of the line of cases discussing statutory review schemes. In the APA, Congress has provided a more specific statutory review scheme than the background grant of federal-question jurisdiction in Section 1331. Because that statute, under this view, governs challenges to all agency action, there is no escaping it. It is APA review or nothing at all. This seems to imply that the APA's procedural provisions would apply to all claims against covered agencies, meaning that there would be no effective judicial review of, say, agency actions committed to discretion by law, even if those discretionary actions would result in constitutionally problematic outcomes. But given other Supreme Court precedent, it is unlikely that the APA is so totalizing: in *Free Enterprise Fund* and many other structural constitutional cases, the Supreme Court has been more than willing to endorse the use of the implied equitable right of action in constitutional cases when, for example, the APA's statutory finality provision would foreclose a constitutional claim.<sup>299</sup>

*Department of Commerce v. New York*, the second recent Supreme Court case, is emblematic of Article II primacy in that it envisions Congress as intentionally cabinning the scope of review of all equitable constitutional claims against agencies through the APA. The case involved a set of implied equitable actions under the Constitution and the Census Act, as well as an action under the APA, challenging then-Secretary Wilbur Ross's decision to include a question about

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notes, such a reading would cut off many other "remnant administrative common law doctrines," such as the zone-of-interests test for statutory standing and *Chevron* and *Auer* deference. *Id.*

298. This background statutory finality requirement was no jurisdictional barrier in a case like *Free Enterprise Fund*, for example, where the plaintiff sued during an ongoing disciplinary investigation, before any final agency action was taken. Cf. 5 U.S.C. § 704 (2018) (restricting the APA's right of action to "agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court"); *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 18 (D.C. Cir. 2006) ("Whether there has been 'agency action' or 'final agency action' within the meaning of the APA are threshold questions; if these requirements are not met, the action is not reviewable.").
299. See *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 n.2 (2015) (acknowledging that implied equitable rights of action for constitutional claims against agencies exist as a "general matter"); see also *id.* (noting how "equitable relief 'has long been recognized as the proper means for preventing [government] entities from acting unconstitutionally'" (citing and quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001))).

immigration status on the 2020 Census.<sup>300</sup> The Court treated the petitioner’s implied constitutional claims under the Enumeration Clause as analytically distinct from their APA claims, disposing of the former before even reaching the issue of whether Secretary Ross’s actions were reviewable under the APA.<sup>301</sup> But the section of the Court’s opinion reviewing the plaintiff’s APA claims – that the Secretary’s determination was pretextual and therefore arbitrary and capricious – seemed to endorse a rigid application of the record rule to all of the claims in the case, although its language is somewhat enigmatic.<sup>302</sup>

Notably, in the trial court, the plaintiffs had alleged an additional equal-protection claim, asserting that Secretary Ross had “act[ed] with discriminatory intent towards Latinos, Asian Americans, Arab Americans and immigrant communities of color generally in adding the citizenship question to the Decennial Census.”<sup>303</sup> Under conventional doctrine, cognizable equal-protection claims are evaluated under strict-scrutiny review, which can be conceptualized for our purposes as a more searching form of arbitrary-and-capricious review.<sup>304</sup> That court viewed this constitutional claim as analytically distinct from the plaintiff’s APA claims, noting that the equal-protection doctrine “charges courts to ‘smoke out’ unconstitutional government purposes that may be more hidden.”<sup>305</sup> As a result, the court permitted discovery against the agency and held that it should be able

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300. 139 S. Ct. 2551 (2019).

301. *Id.* at 2566 (proceeding to an analysis of the constitutional claims following a finding that the plaintiffs had plausibly alleged Article III standing, but before determining whether the Secretary’s action was reviewable under the APA).

302. *See id.* at 2573-76. This section of the opinion – Part V – is somewhat imprecise, in that it speaks in terms of general “judicial review” of “agency action” when articulating the basic record-rule standards, which might seem to sweep in all types of claims against agencies. *Id.* at 2573. But at the same time, it seems to equate judicial review with review under the APA. *See id.* at 2575-76 (“The reasoned explanation requirement of administrative law . . . is meant to ensure that agencies offer genuine justifications for important decisions . . . Reasoned decisionmaking under the Administrative Procedure Act calls for an explanation of agency action.”); *cf.* Eidelson, *supra* note 109, at 1786-90 (connecting this seemingly “freestanding” reasoned-explanation requirement back to arbitrary-and-capricious review under the APA).

303. *New York v. U.S. Dep’t of Com.*, 351 F. Supp. 3d 502, 664-65 (S.D.N.Y. 2019), *rev’d in part*, 139 S. Ct. 2551 (2019).

304. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 339-40 (2003) (holding that the Equal Protection Clause requires the government to engage in “serious, good faith consideration of workable race-neutral alternatives”); *see also* *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986) (noting that the “narrowly tailored” aspect of strict scrutiny may “require consideration of whether lawful alternative and less restrictive means could have been used”).

305. *New York*, 351 F. Supp. 3d at 667 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)).

to “consider evidence outside the Administrative Record . . . when evaluating Plaintiff’s equal protection claim.”<sup>306</sup>

This decision illustrates a central challenge for equal-protection claims against agencies: “the very doctrine contemplates a wide-ranging and penetrating inquiry capable of uncovering hidden forms of discrimination.”<sup>307</sup> Limiting review to solely the administrative record submitted by the agency would necessarily prevent courts from conducting the types of intent-based analysis so essential to successfully litigating equal-protection claims.<sup>308</sup>

Article II primacy has limited support in the scholarly literature. Hurst, in his Comment, echoes Justice Scalia, arguing that constitutional claims are subsumed by the APA’s administrative-review provisions. He relies on the notion, articulated in *Elgin v. Department of Treasury*, that Congress may channel constitutional claims to particular forums—in Elgin’s case, administrative adjudication followed by the Federal Circuit after exhausting his administrative remedies.<sup>309</sup> John F. Duffy has articulated a softer version of this basic point in his otherwise excellent piece on administrative common law. He proposes recentering nonstatutory review as only available when litigants have “no other adequate remedy at law,” a traditional guidepost for equity jurisdiction.<sup>310</sup> As a result, plaintiffs should only be able to go outside the APA when they supply “convincing reasons to justify supplementing congressionally mandated remedies,” or otherwise show that statutory remedies are inadequate.<sup>311</sup> The major problem with Duffy’s view, however, is that the APA does not generally authorize *legal* relief against agencies.<sup>312</sup> Duffy’s proposal seems to exhibit some conceptual slippage between

306. *Id.* at 668.

307. *Id.*

308. See, e.g., *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (holding that courts evaluating equal-protection claims must conduct a “sensitive inquiry into such circumstantial and direct evidence of intent as may be available”).

309. Hurst, *supra* note 31, at 1525–26 (citing *Elgin v. Dep’t of Treasury*, 567 U.S. 1, 8–10 (2012)). Hurst is primarily concerned with the proper scope of discovery in constitutional cases, rather than the characterization of their right of action. He relies on the APA’s text and legislative history and pre- and post-APA precedent to construct his argument.

310. Duffy, *supra* note 4, at 151–52.

311. *Id.* at 152.

312. Except for the provision authorizing money damages as a remedy for violations of the APA’s personal records provisions, see 5 U.S.C. § 552a(g)(1)(A) (2018), the APA contemplates equitable, rather than legal, relief, see 5 U.S.C. §§ 703, 706 (2018) (authorizing declaratory and injunctive relief).

remedies *authorized by law* (in the form of statutes) and remedies *at law* (in the form of money damages).<sup>313</sup>

Districts adopting this view tend to take the hard position articulated by Justice Scalia, although without extensive discussion. For example, in *Harvard Pilgrim Healthcare v. Thompson*,<sup>314</sup> the plaintiff brought parallel APA, due-process, and equal-protection claims against the Department of Health and Human Services (HHS) on the basis of inadequate notice of a change in Medicare policy and asked the court to order extra-record discovery on the constitutional claims. The district court affirmed Magistrate Judge Lovegreen's conclusion that no discovery was required regarding plaintiff's due-process and equal-protection claims. The district court applied record-rule principles to the claims, stating that the APA provided the "requisite standard of review" for the constitutional claim under Section 706(2)(B) and that "the presence of a constitutional claim does not alter the requirements that . . . federal courts confine their review to the record of [agency] proceedings."<sup>315</sup> This reasoning was largely consequentialist, in that "[t]he APA's restriction of judicial review to the administrative record would be meaningless if any party seeking review based on . . . constitutional deficiencies was entitled to broad-ranging discovery."<sup>316</sup> Lovegreen's preferred remedy was to remand the case back to HHS for further factual development, following the standard articulated in *Lorion*.<sup>317</sup>

This reasoning is similar to *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Service*, where Judge Browning held that a First Amendment retaliation claim against the Forest Service fell within the APA in part because "for the Court to hold otherwise – and allow fresh discovery, submission of new evidence and legal arguments, or de novo review – would be to incentivize every unsuccessful party to agency action to allege bad faith, retaliatory animus, and constitutional violations to trade in the APA's restrictive procedures for the more even-handed

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313. *Cf. Ala. Pub. Serv. Comm'n v. S. Ry.*, 341 U.S. 341, 359 (1951) (Frankfurter, J., concurring) ("An 'adequate remedy at law,' as a bar to equitable relief in the federal courts, refers to a remedy on the law side of federal courts."). Duffy's motivating case for this view is *Ticor Title Insurance v. FTC*, 814 F.2d 731 (D.C. Cir. 1987), a case in which the litigants sought *equitable* relief through a permanent injunction against all future prosecutions by the FTC against the litigants. In a split decision, the case was ultimately resolved through the application of common-law doctrines of ripeness and exhaustion, the common-law extension of the finality doctrine of constitutional claims, and a jurisdictional question over whether district courts may hear the claim given that the statutory review scheme provided for appellate-court review of agency adjudications.

314. 318 F. Supp. 2d 1 (D.R.I. 2004).

315. *Id.* at 10.

316. *Id.* at 7-11.

317. *See supra* note 96 and accompanying text; *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).



ones of the FRCP.”<sup>318</sup> Extensively quoting Justice Scalia’s *Webster* dissent, Browning saw the First Amendment claims as coextensive with the APA in part because they arose out of the same set of operative facts as the plaintiff’s arbitrary-and-capricious claim, notwithstanding the court’s acknowledgement that retaliation claims generally require consideration of “indirect evidence” which would be unavailable were the scope of evidentiary review limited to the administrative record.<sup>319</sup>

*Jarita Mesa* is most notable for demonstrating the uneasy fit between many types of constitutional claims and the record rule. First Amendment retaliation claims, much like equal-protection claims, often require courts to peer into the subjective mindset of decision makers, using information largely unavailable in the administrative record. Although the parallel constitutional and arbitrary-and-capricious claims arose out of the same “agency action,” the standards of review for the two claims are quite different. One can easily be accomplished through a review of the agency record, while the other definitionally cannot. Unless the agency is extraordinarily careless, retaliatory animus will not be present in the bare administrative record; it may not be present in *any* record held by the agency accessible through standard completion procedures. In order to bring evidence within the scope of review and succeed on their claim, plaintiffs will have to either supplement the record with documents they have obtained on their own or take depositions of agency decision makers.

## 2. Article III Primacy

Other lower courts have construed Section 706(2)(B) as simply reiterating the ability of federal courts to review constitutional claims under the implied equitable action, bringing those claims outside of the APA’s procedural provisions entirely. Rather than viewing the APA and implied constitutional rights of action as overlapping rights of action, they assert that judicial review for constitutional claims cannot be “constrain[ed]” by the procedures of the APA.<sup>320</sup> This reasoning is somewhat unsatisfying, in that it fails to grapple with the *Elgin* and *Thunder Basin* line of cases, the problem of locating the precise right of action for a given constitutional claim, and Congress’s ability to place jurisdictional constraints on federal courts.<sup>321</sup> But it is notable for resuscitating the expansive view of core Article III authority articulated in *Crowell v. Benson*, before the

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<sup>318</sup>. 58 F. Supp. 3d 1191, 1238 (D.N.M. 2014).

<sup>319</sup>. *Id.* at 1235, 1237.

<sup>320</sup>. See, e.g., *Saget v. Trump*, 375 F. Supp. 3d 280, 368 (E.D.N.Y. 2019).

<sup>321</sup>. See sources cited *supra* note 296.

passage of the APA and the political settlements which legitimated the New Deal.<sup>322</sup> For this reason, I term this perspective “Article III primacy.”

Justice Sotomayor took this basic approach in her concurrence in *In re United States*, the second recent high-court case to implicate the administrative record.<sup>323</sup> *In re United States* came to the Court on a collateral appeal from a case in the Northern District of California challenging the rescission of Deferred Action for Childhood Arrivals (DACA), which was ultimately collected and disposed of in *Department of Homeland Security v. Regents of the University of California*.<sup>324</sup> The plaintiffs raised APA and constitutional challenges to DACA’s rescission; the district court granted their request for discovery and record supplementation pursuant to a finding under the record rule that the agency head had indirectly considered documents not filed as part of the administrative record.<sup>325</sup> The Supreme Court parried and avoided addressing the merits of the issue, staying the discovery order until the district court disposed of a set of threshold jurisdictional arguments made by the Government.<sup>326</sup>

On the case’s return trip to the Court, with the discovery dispute firmly in the rearview mirror, Chief Justice Roberts wrote the majority opinion in favor of the plaintiffs on APA grounds, resting his analysis on procedural inadequacies in the Acting Secretary’s memorandum terminating the program – in essence, making the discovery fight irrelevant to the instant case.<sup>327</sup> In passing, Roberts argued that the plaintiffs had inadequately pleaded their constitutional claim that the Acting Secretary’s decision was motivated by racial animus and was, therefore, an Equal Protection Clause violation.<sup>328</sup> Justice Sotomayor, writing in concurrence, would have preserved the constitutional claim on remand to the lower

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322. *Crowell v. Benson*, 285 U.S. 22, 60 (1932); see *supra* note 174 and accompanying text.

323. 583 U.S. 29 (2017).

324. 140 S. Ct. 1891 (2020).

325. *Regents of the Univ. of Calif. v. U.S. Dep’t of Homeland Sec.*, Nos. C 17-05211, C 17-05235, C 17-05329, C 17-05380, 2017 WL 4642324, at \*2-3 (N.D. Cal. Oct. 17, 2017).

326. *In re United States*, 583 U.S. at 32. These were a subset of the threshold arguments typically made by government attorneys – namely, that the Acting DHS Secretary’s determination to rescind DACA was committed to agency discretion and therefore unreviewable, and that the Immigration and Nationality Act stripped the district court of its jurisdiction to consider the plaintiffs’ claims. *Id.*

327. *Regents*, 140 S. Ct. at 1913-15.

328. *Id.* at 1915. Plaintiffs’ theory rested primarily on three factors: (1) a facial disparate-impact claim of the rescission’s effect on Latinos, (2) the “unusual history” of the rescission, namely the speed of the Trump Administration’s policy change, and (3) pre- and post-election statements by President Trump. *Id.*

courts to allow the plaintiffs further “factual development” of their equal-protection claim.<sup>329</sup>

The scope of this proposed factual development was left unclear in Justice Sotomayor’s opinion, but it would seem to imply that discovery would be available to all litigants “plausibly alleg[ing]” discriminatory animus.<sup>330</sup> As Hurst notes in his Comment, “discriminatory animus” and “bad faith” are essentially one and the same in the administrative context.<sup>331</sup> Sotomayor thus seems to be endorsing a standard much lower than the “strong showing of bad faith” under the conventional *Overton Park* construction of the record rule.<sup>332</sup> Although she does not work through the formal legal logic in her concurrence, Sotomayor appears to be approaching the constitutional claim through the lens of Article III primacy—that is, that the procedural requirements of the APA simply do not apply to implied equitable constitutional claims against agencies, notwithstanding their inclusion in the text of the APA in Section 706(2)(B). Instead, this viewpoint treats *all* constitutional challenges to agency action as arising from federal courts’ Article III equitable powers, unencumbered by Congress’s procedural restrictions.<sup>333</sup>

This modern viewpoint is similar to that of scholars writing just after the dust settled on the compromise that produced the APA. Louis L. Jaffe and Kenneth Culp Davis, perhaps the two most prominent administrative-law scholars in this period, treated much of administrative-law practice under the APA as an extension of the federal common law of equity practice. That is to say, the enactment of the APA had merely codified existing agency practices and relationships between the federal courts and administrative agencies.<sup>334</sup> For Jaffe,

329. *Id.* at 1918 (Sotomayor, J., concurring in part, concurring in the judgment in part, and dissenting in part).

330. *Id.* at 1917.

331. Hurst, *supra* note 31, at 1531-32.

332. *Id.*

333. While the debates captured in the Supreme Court’s “new equity” jurisprudence have focused on issues of statutory interpretation and historical English Chancery practice, see, for example, *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993), and *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), Article III primacy aligns with recent scholarship focused on recovering Article III and its incorporation of the precedent-based system of rules used by the English Court of Chancery as the wellspring of federal courts’ equitable powers. See Gallogly, *supra* note 244, at 1310-15.

334. See, e.g., Kenneth Culp Davis, *Administrative Common Law and the Vermont Yankee Opinion*, 1980 UTAH L. REV. 3, 3-4 (“American administrative law is mostly judge-made. The APA is the big exception, but even it is largely a codification of law previously made by judges.”); JAFFE, *supra* note 257, at 329, 376; see also SHAPIRO, *supra* note 24, at 39-40 (discussing the “incomplete and residual” nature of the APA, which Shapiro views as simply “writ[ing] existing practices into law”).

administrative law had developed its own “common law of review” based on a “whole congeries of judicial theories and practices;” he viewed the distinction between cases reviewed under the APA and the implied equitable right of action to be “meaningless and useless.”<sup>335</sup> It was common law all the way down.

Many of the lower-court cases adopting this approach cite to dicta in *Porter v. Califano*, a 1979 Fifth Circuit case, in support of the idea that the APA does not limit the record courts may review for any constitutional claim.<sup>336</sup> In that case, Ella Porter, a clerk-typist at the Social Security Administration office in Birmingham, Alabama, was suspended for writing and distributing a letter critical of her supervisors, accusing them of corruption.<sup>337</sup> After exhausting her administrative appeals within the Social Security Administration, which denied her an evidentiary hearing and discovery, she filed a district-court action alleging that the Administration’s actions violated her Fifth Amendment right to due process and her First Amendment speech rights. The trial court found for the defendants on summary judgment.<sup>338</sup>

On appeal, the Fifth Circuit reinstated her First Amendment claim, remanded to the district court for a hearing, and ordered discovery against the agency. The court noted that

Porter would of course have a right to sue directly under the [C]onstitution to enjoin her supervisors . . . from violating her constitutional rights. . . . In that case there would be no statutory reason for the court to defer to agency findings or rulings. Whether Porter sues directly under the [C]onstitution to enjoin agency action, or instead asks a federal court to “set aside” the agency’s actions as “contrary to [her] constitutional rights,” under § 706(2)(B), the role of the district court is the same.<sup>339</sup>

But rather than grounding this discovery order in the *nature* of Porter’s claim — that is, one arising out of a federal court’s equitable power — the court did so under the familiar record-rule exception that the agency’s fact-finding was “inadequate.”<sup>340</sup> Its chief concern was that the officials Porter had accused of corruption conducted the initial fact-finding interview and influenced the follow-on administrative proceedings.<sup>341</sup> Had this inappropriate influence been cured by an

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335. JAFFE, *supra* note 257, at 329, 376.

336. 592 F.2d 770 (5th Cir. 1979).

337. *Id.* at 771.

338. *Id.*

339. *Id.* at 781 (citation omitted).

340. *Id.* at 782.

341. *Id.*

“impartial and full review in the agency,” discovery and cross-examination in lower court proceedings likely would not have been warranted.<sup>342</sup>

Regardless of the disposition in *Porter*, some other lower courts have used it as authority to simply ignore the APA.<sup>343</sup> In *Texas v. Biden*, for example, Judge Kacsmayk considered a challenge by Texas and Missouri to the Biden Administration’s suspension of the Migrant Protection Protocols, a discretionary policy under which the Department of Homeland Security required certain individuals to stay in Mexico while their immigration claims were adjudicated.<sup>344</sup> The plaintiff states sued President Biden, the directors of the various immigration agencies, the agencies themselves, and the United States, and challenged the policy change as, inter alia, arbitrary and capricious under the APA and a violation of the Take Care Clause.<sup>345</sup> The plaintiffs moved to supplement the administrative record. In turn, the defendant agencies argued that the record rule should apply to the constitutional claim. Kacsmayk held that the constitutional claim was not bound by the APA’s procedural provisions because he saw *Porter* as standing for the proposition that the record rule does not apply to constitutional claims where the agency “must make ‘an independent assessment of a citizen’s claim of constitutional right.’”<sup>346</sup> As a result, the court allowed the free supplementation of the administrative record with extrinsic evidence.

Likewise, in *Saget v. Trump*, Judge Kuntz reviewed a collection of APA and constitutional claims regarding then-Acting Secretary of Homeland Security Elaine Duke’s decision to terminate the Temporary Protected Status of Haitian nationals living inside the United States. Presaging Justice Sotomayor’s approach in *Regents*, Kuntz did not grapple with the question of whether and to what degree the APA applied to the plaintiff’s equal-protection claim, simply stating that “[i]f this case were limited to the administrative record, as the

342. *Id.* at 783.

343. See, e.g., *Kovac v. Wray*, No. 18-CV-0010-X, 2020 WL 6545913, at \*3 (N.D. Tex. Nov. 6, 2020) (“[T]he Administrative Procedure Act claims and the constitutional claims are isolated, independent claims.”); *Rueda Vidal v. U.S. Dep’t of Homeland Sec.*, 536 F. Supp. 3d 604, 612 (C.D. Cal. 2021) (“Where ‘plaintiffs have a constitutional claim that exists outside of the APA, then the APA’s administrative record requirement does not govern the availability of discovery,’ and, by extension, to consideration of other extra-record evidence.” (quoting *California v. U.S. Dep’t of Homeland Sec.*, 612 F. Supp. 3d 875, 895 (N.D. Cal. 2020))).

344. *Texas v. Biden*, No. 21-CV-067-Z, 2021 WL 4552547 (N.D. Tex. July 19, 2021); Complaint at 2, *Texas*, 2021 WL 4552547 (No. 21-CV-067-Z).

345. Complaint at 33-39, *Texas*, 2021 WL 4552547 (No. 21-CV-067-Z).

346. *Texas*, 2021 WL 4552547, at \*3-4 (quoting *Porter*, 592 F.2d at 780). This dicta echoes the expansive view of Article III power articulated in *Crowell*. Cf. *Crowell v. Benson*, 285 U.S. 22, 60 (1932) (“In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function.”).

Government suggests, it would be impossible to conduct the full and thorough analysis of direct and circumstantial evidence *Arlington Heights* demands.”<sup>347</sup> (Again, in *Texas* and *Saget*, we see relevancy’s primacy in the construction of the administrative record, particularly as a justification for departing from the record rule.)

While these courts generally seem to understand, at some level, that constitutional claims might require the expansion of the scope of evidentiary review beyond the administrative record submitted to the court, their means-ends reasoning is somewhat unsatisfying. The conventional APA record-rule approach has pathways to allow plaintiffs to go beyond the administrative record. Indeed, Judge Kuntz conducted an extensive analysis of the traditional extra-record supplementation rules in the context of the plaintiff’s APA claims, ultimately concluding that such supplementation was warranted because the plaintiffs had proffered “significant evidence based on hard facts the Government’s decision was pretextual.”<sup>348</sup> But these courts often do not have a precise grasp on the particular right of action being invoked by a given plaintiff, or its relationship to the APA. Their reasoning as to why the scope of evidentiary review is analyzed differently for claims arising from the same nexus of facts is therefore not particularly clear.

### 3. *The Dual-Claim Approach*

Jaffe’s work provides much of the theoretical basis for the dual-claim approach which, in essence, views the APA as expanding federal district courts’ federal-question jurisdiction without supplanting it. Writing in 1965, he saw the APA’s major impact on lower-court practice as stripping away the then-extant amount-in-controversy requirement for federal-question jurisdiction under Section 1331. In a well-known passage, Jaffe asks, “To what extent has the APA affected the federal system of remedies [against agencies]? Possibly a little though even this is not clear.”<sup>349</sup> In this vision of the world, the APA created an additional right of action, which may be invoked by plaintiffs, beyond the equitable review already available under Section 1331. The two exist together, and to some extent, plaintiffs can choose which right of action they would like to invoke.

This is the approach taken by the Ninth Circuit in *Sierra Club v. Trump*, a case challenging actions taken by President Trump and certain cabinet members to redirect funds from the Department of Defense to the Department of Homeland Security to build border barriers. In assessing the plaintiffs’ claim, the court

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347. *Saget v. Trump*, 375 F. Supp. 3d 280, 368 (E.D.N.Y. 2019).

348. *Id.* at 341-43.

349. JAFFE, *supra* note 257, at 164.

reaffirmed that they either had “an equitable cause of action to enjoin a constitutional violation, or they can proceed on their constitutional claims under the Administrative Procedure Act, or both.”<sup>350</sup> The court found the plaintiff’s constitutional claims cognizable both under Section 706 and as an implied equitable claim.<sup>351</sup>

The court’s reasoning is instructive as to why the statutory right of action under Section 706 and the implied equitable action are not coextensive: the statutory right of action has more limited applicability. For one, it only provides review for final agency action not committed to agency discretion, and for another, it exempts classes of government actors not considered “agencies.” This line of reasoning has been endorsed in several other cases.<sup>352</sup> But, if one endorses the idea of two parallel causes of action, the open question remains about what claims, if any, must be channeled into the APA. This is the notion of a “hybrid claim,” a question on which courts adopting this approach are split. In the Note’s final Section, I will argue that, even if one takes a narrow view of the “whole record,” the most logical resolution of this issue is to find the APA not preclusive of anything and to let discovery rules for constitutional claims be governed by the ordinary FRCP.

### C. *Hybrid Claims and the Relevancy Approach*

Once courts acknowledge the existence of two parallel rights of action, they are forced to consider an exceptionally difficult question: are there any constitutional challenges that *must* proceed through the APA? While circuit courts have recognized the existence of this issue, no circuit court adopting the dual-claim perspective has produced a definite answer.<sup>353</sup> In the discovery context, district

350. *Sierra Club v. Trump*, 929 F.3d 670, 676-77 (9th Cir. 2019).

351. In doing so, the court commented on, but did not resolve, an interesting puzzle: if implied constitutional claims are available, would they provide a sufficient “adequate remedy” to negate the application of the APA under Section 704? For one argument that they do not, see generally Sarah L. Brinton, *Not Another “Adequate Remedy”: The Constitution and Judicial Review Under the APA* (July 1, 2009) (unpublished manuscript), <https://ssrn.com/abstract=1694287> [<https://perma.cc/4LVG-QNDZ>].

352. See, e.g., *Juliana v. United States*, 947 F.3d 1159, 1167-68 (9th Cir. 2020) (surveying cases and holding that “[n]othing in the APA evinces . . . an intent” to “forc[e] all constitutional claims to follow its strictures”); *Cowels v. FBI*, 327 F. Supp. 3d 242, 250 (D. Mass. 2018) (“The APA does not explicitly preclude bringing such claims; in fact, plaintiffs’ equitable claims under the Fifth and Sixth Amendments would appear to fall within Section 702’s explicit waiver of sovereign immunity . . .”).

353. See *Juliana*, 947 F.3d at 1167 (“But, even if some constitutional challenges to agency action must proceed through the APA, forcing all constitutional claims to follow its strictures would

courts appear to have coalesced around a common standard: “when a constitutional challenge to agency action requires evaluating the substance of an agency’s decision made on an administrative record, that challenge must be judged on the record before the agency.”<sup>354</sup> This view, articulated by Judge Boasberg in *Bellion Spirits, LLC v. United States*, has some intuitive appeal, although it does not help us define what, exactly, that record should contain. There, Bellion Spirits sued the Alcohol and Tobacco Tax and Trade Bureau (TTB) and other government entities, seeking review of the agency’s determination that several health claims they sought to append to the label of Bellion Vodka—that a particular supplement helped reduce the negative effects of alcohol consumption—were unsupported by scientific or medical evidence. Bellion brought parallel APA and constitutional claims, alleging commercial-speech claims under the First Amendment and due-process claims under the Fifth Amendment. The gravamen of the First Amendment claim was that the agency’s denial of the health claims was unsupported by any “factual basis other than agency whim or caprice;”<sup>355</sup> Bellion moved to supplement the administrative record with additional studies and witness testimony, which the district court denied.<sup>356</sup>

In large part, Judge Boasberg’s reasoning was prudential: Bellion’s First Amendment claim would require the court to “analyze the substance of an agency’s decision that is, in turn, based on an evaluation of that record”<sup>357</sup>—that is to say, the evidence Bellion sought to introduce against the TTB was simply *irrelevant* to the scope of review for a particular constitutional claim. *Bellion*’s holding illustrates one end of the sliding scale used by courts: where a constitutional claim would require *the same evidence* as an APA claim, there is no need to supplement the record. Although Boasberg did not explain the source of these principles, we can see this sliding scale approach as an expression of the relevancy idea discussed in Section II.B. The evidence proffered for the constitutional claims in *Bellion* could have been excluded on relevance grounds, rather than the common-law supplementation rules for APA actions.

Relocating the evidentiary rules for constitutional claims back to a general relevancy standard is a much more comfortable fit than squinting one’s eyes at a given claim and deciding whether it is “really” an APA claim and should therefore be governed by the general principles of the record rule. Moreover, this

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bar plaintiffs from challenging violations of constitutional rights in the absence of a discrete agency action that caused the violation.”).

354. *Bellion Spirits, LLC v. United States*, 335 F. Supp. 3d 32, 43 (D.D.C. 2018), *aff’d*, 7 F.4th 1201 (D.C. Cir. 2021).

355. Plaintiff’s Motion for Summary Judgement at 26, *Bellion Spirits*, 335 F. Supp. 3d 32 (No. 17-CV-2538).

356. *Bellion Spirits*, 335 F. Supp. 3d at 45.

357. *Id.* at 43-44.



approach provides courts with some guidance about what to do when they decide that a constitutional claim is distinguishable from an APA claim. *Bellion* is an easy case; other cases are less clear. The other advantage of a relevancy approach, of course, allows us to somewhat sidestep the classification issue: if one believes that the record rule itself is a relevancy principle, one can take whatever common-law principles from pure APA suits are relevant in constructing the record for a constitutional claim.

This approach also may better comport with a descriptive account of what courts are actually *doing* when they decide whether or not a plaintiff's constitutional claim "fundamentally overlap[s]" with an APA claim, and centers the analysis on what evidence is actually necessary for the court to effectively provide judicial review.<sup>358</sup> Some courts, as in *Alabama-Tombigbee Rivers Coalition v. Norton*, have identified the relevant factor as whether or not factual allegations are "identical to those asserted in support of their APA . . . claim[]." <sup>359</sup> But, in my view, rather than focusing on the facts alleged – which, before discovery, may be limited to the administrative record – courts should focus on what facts are *relevant* to a particular substantive doctrine of constitutional law. In *Rivers Coalition*, for example, the plaintiffs brought a parallel procedural-due-process and APA claim against the Fish and Wildlife Service (FWS) contesting the listing of the Alabama Sturgeon under the Endangered Species Act, arguing that the listing had been prejudged before the close of the comment period for the rule and that FWS appointees had improperly influenced the work of an agency staff scientist. The court found that the extra-record evidence in support of this claim fell "woefully short of showing" any improper behavior and declined to allow extra-record discovery of materials in the agency record.<sup>360</sup> The alternative reading of this case is that the court, balancing the interests of the parties, found little evidence that further discovery would be useful – or that it would find much of anything that wasn't already in the administrative record – given the general presumption against discovery against the government.

The few scholars arguing for a strict application of the record rule in constitutional cases – or even discussing the matter at all – are primarily concerned with the burden of discovery on agencies. Hurst argues that a non-record-rule approach might allow greater discovery to impose "significant burdens on agency policymaking" and open up "a problematic loophole" to evade the APA's

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358. See *Chiayu Chang v. U.S. Citizenship & Immigr. Servs.*, 254 F. Supp. 3d 160, 162 (D.D.C. 2017).

359. *Alabama-Tombigbee Rivers Coal. v. Norton*, No. CIV.A.CV-01-S-0194-S, 2002 WL 227032, at \*6 (N.D. Ala. Jan. 29, 2002).

360. *Id.* at \*4.

evidentiary limitations.<sup>361</sup> But there is no reason why a relevancy standard would blow the agency doors open to plaintiffs' lawyers hunting down agency staff in the hallways to drag them into deposition rooms. Rejecting a rigid record rule for constitutional claims would simply provide judges and litigants with more flexibility to tailor discovery to the facts alleged and the relevant scope of review. This policy would thus serve the same basic goal as the exceptions to the record rule: "the assessment that 'resort to extra-record information [is necessary] to enable judicial review to become effective.'"<sup>362</sup>

Courts also deal with the issue of tailoring discovery against (state) officials in the Section 1983 context and do so under the general principles articulated in Rule 26, as modified by federal common law. For example, one common preliminary issue in suits against personnel is the presence of the qualified-immunity defense. Courts have developed a set of common-law rules governing discovery: once a plaintiff has pled specific facts allowing a judge to draw a reasonable inference of liability and which would defeat a qualified-immunity defense, a court may issue a narrowly tailored discovery order if it finds itself "unable to rule on the immunity defense without further clarification of the facts."<sup>363</sup> Courts do so while balancing competing policy interests – including the burden on government caused by the discovery process – without significantly impeding the operations of state government.

Relocating the standards of agency production into the FRCP also helps combat the inconsistent agency construction of the administrative record discussed in Part I. Employing a uniform discovery standard across agencies for constitutional claims might also help to resolve some of the persistent issues surrounding the proper characterization of deliberative documents. Those documents might be relevant when parties bring a constitutional claim contemplating a review of decision makers' mental states, such as an animus claim; they would not be relevant for something like a procedural-due-process claim in which courts are applying statutory standards for the process due to facts already in the administrative record. Thus, privilege logs would be produced for things like animus claims – to which predecisional documents covered by privileges would likely be relevant – and would not need to be produced for ordinary due-process claims.

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361. Hurst, *supra* note 31, at 1550.

362. Nat'l Mining Ass'n v. Jackson, 856 F. Supp. 2d 150, 157 (D.D.C. 2012) (quoting Calloway v. Harvey, 590 F. Supp. 2d 29, 38 (D.D.C. 2008)).

363. Backe v. LeBlanc, 691 F.3d 645, 648 (5th Cir. 2012) (quoting Lion Boulos v. Wilson, 834 F.2d 504, 507-08 (5th Cir. 1987)). See generally Crawford-El v. Britton, 523 U.S. 574 (1998) (explaining how trial courts may prevent officials from being "subjected to unnecessary and burdensome discovery or trial proceedings").

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This Part canvassed three distinct approaches to the problem of defining the scope of evidentiary review for constitutional claims against agencies: (1) Article II primacy, which applies the evidentiary common law of arbitrary-and-capricious claims under the APA to all constitutional claims; (2) Article III primacy, which treats all constitutional claims as freestanding and severable from the evidentiary common law of the APA; and (3) a relevancy approach, which builds on the evidentiary common law of the APA to produce a flexible standard for constitutional claims against agencies. My case that the relevancy approach is the correct one applies the principles underlying the record rule, as developed in Parts I and II, to solve the persistent categorization problem created by the unclear right of action for equitable constitutional claims.

These divergent approaches reflect broader debates about the posture of federal courts towards administration. Article II primacy takes a minimal approach. It preserves the appellate-review model core to conventional administrative law<sup>364</sup> by eschewing further factual development in federal court, even when this development might be essential to the effective adjudication of a plaintiff's claim. Article III primacy discards the appellate review model altogether in favor of one most similar to a trial court. It envisions an active, managerial judge guiding free-ranging factual development for constitutional claims against agencies, even when doing so would conflict with the structural-constitutional principles discussed in Section II.A. The relevancy approach takes a normative account of the principles underlying the record rule for arbitrary-and-capricious litigation under the APA and applies it to constitutional claims. Thus, when the decision rules for a constitutional claim are similar to those for an arbitrary-and-capricious claim, courts should apply the principles developed for those claims to define the scope of their evidentiary review. By the same token, where the decision rules for a constitutional claim diverge from arbitrary-and-capricious review, courts should balance the need for additional discovery to effectively adjudicate those claims against the structural constitutional concerns inherent in doing so.

## CONCLUSION

This Note makes the case that the scope of evidentiary review should not be the same for all suits against agencies. The “whole record” means different things depending on the decision rule for the particular claim being brought. This basic insight provides a pathway to rationalize the use of the common-law record rule in constitutional cases. By recognizing that administrative litigation is not exceptional – that is, that the scope of evidentiary review for claims under

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364. See *supra* notes 57–63 and accompanying text.

the APA is rooted in the decision rules for those cases, rather than the text of the statute itself—this Note illuminates the principle that the scope of evidentiary review for cases against agencies should be based on what is *relevant* to the effective adjudication of those claims.