The Scope of Evidentiary Review in Constitutional Challenges to Agency Action

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When reviewing agency action, the Administrative Procedure Act (APA) instructs courts to "review the whole record or those parts of it cited by a party." The Supreme Court has interpreted this brief statement as a restriction on the evidentiary scope of judicial review under the APA. Courts may consider only the administrative record compiled by the agency, which includes all materials before the decisionmaker at the time he or she made the decision. The Supreme Court has recognized one exception: plaintiffs may supplement the administrative record if they make a strong showing of bad faith or improper behavior on the part of the agency.

Courts consistently apply the record rule to arbitrary and capricious claims. It is less clear whether the rule applies to constitutional claims. This issue crept into two recent, high-profile Supreme Court cases—Department of Commerce v. New York *and* Regents of the University of California v. Department of Homeland Security—*but the Court has yet to definitively resolve the issue. In the meantime, lower courts have developed three alternative approaches. This Comment argues that the record rule, though one with a robust bad faith exception, should apply to all constitutional challenges to agency action. It analyzes the APA's text, legislative history, pre- and post-APA precedent, and policy considerations to argue for a record rule approach.*

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INTRODUCTION

Presidents have increasingly turned to the administrative state to implement their political agendas.[1] For example, one of President Barack Obama's signature accomplishments, the Deferred Action for Childhood Arrivals (DACA) program, was enacted not through legislation but through an agency policy statement.[2] Likewise, President Donald Trump turned to the administrative state to attempt to add a citizenship question to the 2020 Census[3] and to heighten the standards for immigrant admissibility.[4] When presidents enact controversial policies through agency action, lawsuits inevitably follow.

Consider two recent Supreme Court cases. In *Department of Commerce v. New York*,[5] several states and localities challenged the Trump administration's decision to add a citizenship question to the Census.[6] The plaintiffs argued that the Secretary of Commerce's decision to add the question violated the requirements of the Administrative Procedure Act[7] (APA) as well as the Enumeration Clause.[8] The Court held, in a messy and divided opinion, that the Enumeration Clause permitted the Secretary of

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1 *Cf.* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2248 (2001) ("[T]he regulatory activity of the executive branch agencies [is] more and more an extension of the President's own policy and political agenda.").

2 *See* Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Alejandro Mayorkas, & John Morton, (June 15, 2012), https://perma.cc/W432-E7LY (establishing DACA).

3 *See* Memorandum from Wilbur Ross, Sec'y of Commerce, to Karen Dunn Kelly, Under Sec'y for Econ. Affairs, (Mar. 26, 2018), https://perma.cc/PQU6-Q3G5.

4 Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,294–95 (Aug. 14, 2019) (codified at various sections of 8 C.F.R.) (broadening the Immigration and Nationality Act's "public charge" inadmissibility criteria, by which aliens are denied entry because they are "likely at any time to become a public charge," to include potential reliance on an expanded number of government assistance programs).

5 139 S. Ct. 2551 (2019).

6 *See id.* at 2561.

7 Ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

8 *Dep't of Com.*, 139 S. Ct. at 2563.

Commerce to add the question but that the Secretary's stated reasons for doing so were pretextual.[9] Thus, the Court remanded to the agency to provide a better explanation for the decision.[10]

In *Department of Homeland Security v. Regents of the University of California*,[11] several groups challenged the Trump administration's decision to rescind DACA.[12] The plaintiffs argued that the rescission was arbitrary and capricious under the APA and a violation of the Fifth Amendment's equal protection guarantee. A divided Court struck down the Trump administration's decision as arbitrary and capricious, holding that the Secretary of Homeland Security failed to consider important aspects of the issue, including whether the rescission would jeopardize important reliance interests.[13] But the Court rejected the plaintiffs' equal protection claims (by way of the Fifth Amendment's Due Process Clause) because the plaintiffs did not "raise a plausible inference" that invidious discrimination was a motivating factor for the rescission.[14] Lurking in both *Department of Commerce* and *Regents* was a seemingly minor evidentiary issue as of yet unaddressed by the Court.

When reviewing agency action, the APA instructs courts to "review the whole record or those parts of it cited by a party."[15] In *Citizens to Preserve Overton Park, Inc. v. Volpe*,[16] the Supreme Court interpreted this brief statement as a restriction on the evidentiary scope of judicial review under the APA: review is limited to the record compiled by the administrative agency, which properly includes all materials that were before the decisionmaker at the time he or she made the decision.[17] As a result, APA plaintiffs typically cannot introduce evidence that was not actually considered by the agency in the decision-making process. This evidentiary limitation is known as the "record rule."[18] The Supreme Court has recognized one exception: a plaintiff may introduce evidence that was not before the agency at the time of its

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9 *See id.* at 2567, 2575.

10 *Id.* at 2576.

11 140 S. Ct. 1891 (2020).

12 *Id.* at 1903.

13 *Id.* at 1913–15.

14 *Id.* at 1915–16 (plurality opinion).

15 5 U.S.C. § 706.

16 401 U.S. 402 (1971).

17 *Id.* at 420.

18 *See* Aram A. Gavoor & Steven A. Platt, *Administrative Records and the Courts*, 67 U. KAN. L. REV. 1, 19 (2018).

decision only if the plaintiff can make a "strong showing of bad faith or improper behavior" on the part of the agency.[19] The Court has never addressed exactly what qualifies as a "strong showing of bad faith or improper behavior,"[20] but a strong showing that the agency's decision was motivated by factors not discussed in the existing record would likely be enough.[21]

The record rule covers all lawsuits brought under the APA.[22] Section 706 of the APA identifies the primary standards of judicial review for agency action.[23] Formal agency action, including rulemaking and adjudication under the APA's formal procedures, is subject to the "unsupported by substantial evidence" standard.[24] Informal agency action, including rules enacted through the APA's notice and comment procedure, is frequently reviewed under the "arbitrary, capricious, [ ] abuse of discretion, or otherwise not in accordance with law" standard.[25] The arbitrary and capricious standard operates as a catchall standard of review when no other standard is applicable.[26]

The APA also provides for judicial review of agency action that is "contrary to constitutional right."[27] Though the record rule applies to all APA lawsuits, some plaintiffs and courts have questioned whether it applies as strictly to agency action lawsuits brought on *constitutional* grounds.[28] Such constitutional

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19 *See, e.g.*, *Overton Park*, 401 U.S. at 420; *Dep't of Com.*, 139 S. Ct. at 2573–74.

20 *See Dep't of Com.*, 139 S. Ct. at 2579 (Thomas, J., concurring in part and dissenting in part) ("We have never before found *Overton Park*'s exception satisfied."); Gavoor & Platt, *supra* note 18, at 21–25.

21 *See* James D. Cromley & J. Michael Showalter, *Going Beyond: When Can Courts Look Past the Record in APA Review?*, GEO. ENV'T L. REV. ONLINE (Aug. 15, 2019), https://perma.cc/8AYT-KUX3.

22 *See* Gavoor & Platt, *supra* note 18, at 9.

23 5 U.S.C. § 706.

24 5 U.S.C. § 706(2)(E); *Overton Park*, 401 U.S. at 414.

25 5 U.S.C. § 706(2)(A).

26 Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors of the Fed. Rsrv. Sys., 745 F.2d 677, 683 (D.C. Cir. 1984) (Scalia, J.). The other standards of review available under APA § 706 are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; without observance of procedure required by law; . . . [and] unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court." 5 U.S.C. § 706(2)(C)–(D), (F).

27 5 U.S.C. § 706(2)(B).

28 *See, e.g.*, Washington v. U.S. Dep't of Homeland Sec., No. 4:19-CV-5210, 2020 WL 4667543, at *5 (E.D. Wash. Apr. 17, 2020) ("Caselaw is indeterminate concerning whether extra-record discovery is appropriate for constitutional claims asserted in conjunction with APA claims."); Bellion Spirits, LLC v. United States, 335 F. Supp. 3d 32, 41 (D.D.C. 2018) ("The caselaw on a plaintiff's ability to supplement an administrative record to support a constitutional cause of action is sparse and in some tension.").

challenges are less common. But if *Department of Commerce* and *Regents*—the equal protection challenges to controversial Trump administration policies noted above—are any indication, they are becoming more so. The Court's guidance on the record rule has been woefully limited,[29] and it has never definitively answered the question of whether the record rule applies to constitutional challenges.[30] As constitutional challenges to agency action become more common, this evidentiary question will continue to rear its head.

This uncertainty requires resolution. The outcome of administrative law cases can hinge entirely on the admissibility of extra-record evidence.[31] Take *Department of Commerce*. Background principles of administrative law require that agencies provide a "reasoned explanation" of their actions.[32] In considering whether the Trump administration's decision to include a citizenship question on the Census was a product of reasoned judgment, the Court's inquiry focused on the administrative record.[33] The Court's decision to consider extra-record evidence—documents undermining the Secretary's stated motivation for adding the question[34]—was critical. In remanding the decision for further consideration, the Court stated that "the evidence tells a story that does not match the explanation the Secretary gave for his decision."[35] Just how reasonable an explanation seems can depend on the scope of the administrative record.

These questions about the scope of evidence should not be left to the unguided discretion of the trial judge. Rather, they should be addressed through consistent, established means. Moreover, resolution of this question must balance plaintiffs' interest in receiving adequate judicial review and government agencies' interest in avoiding burdensome litigation. Too much weight to government interests, and too little judicial review, could allow agencies to get away with politically charged and constitutionally

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29 *See* 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, 1048, 1065 (2020).

30 *Cf.* Cook County v. Wolf, 461 F. Supp. 3d 779, 792 (N.D. Ill. 2020) ("Neither the Supreme Court nor the Seventh Circuit has articulated the rules governing discovery where . . . a plaintiff brings a substantive constitutional challenge to agency action.").

31 *See* Gavoor & Platt, *supra* note 18, at 3 ("The scope and domain of the administrative record is critical to APA review because the record can have dispositive effects on litigation.").

32 *See, e.g.*, FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009).

33 *Dep't of Com.*, 139 S. Ct. at 2573, 2575–76.

34 *Id.* at 2574–75.

35 *Id.* at 2575.

suspect decision-making. Too much weight to private interests could give activist interest groups a green light to thwart routine regulation by pursuing wide-ranging discovery. A balanced resolution is badly needed.

This Comment explores whether constitutional challenges to agency action should be subject to the same record rule that controls evidence in other APA lawsuits. It analyzes when courts have allowed extra-record evidence in constitutional challenges to agency action and what rules should govern this question. It argues that courts should approach constitutional challenges just as they do other challenges brought under the APA: through the existing record-rule framework. The APA does not distinguish between constitutional challenges and other challenges to agency action, and neither should courts—at least from an evidentiary perspective. While courts should not reflexively allow extra-record evidence in these cases, this Comment argues that they should embrace a broad reading of the *Overton Park* bad faith exception to the record rule in constitutional challenges. The bad faith exception ensures that an insufficient administrative record does not hinder plaintiffs trying to vindicate their constitutional rights.

This Comment will proceed in four Parts. Part I explores the record rule's general legal background, including its practical application and exceptions. Part II discusses the record rule's applicability to constitutional challenges to agency action, the Supreme Court's inconclusive discussion of this area of the law, and the divergent approaches of the lower courts. Part III explains why a record rule approach is preferable for doctrinal reasons. This discussion focuses on the text and legislative history of the APA as well as the Supreme Court's pre- and post-APA jurisprudence. Finally, Part IV explains why a record-rule approach is also preferable for public policy reasons.

I. THE RECORD RULE AND JUDICIAL REVIEW OF AGENCY ACTION

This Part explores the legal background of the record rule. Part I.A provides a brief overview of judicial review under the APA. Part I.B then explains the Supreme Court's textual and theoretical justifications for the record rule. Finally, Part I.C discusses the recognized exceptions to the record rule and their practical application.

A. The APA and Judicial Review of Agency Action

The APA has been called a "superstatute" and even a "sub-constitution."[36] It acts as the "fundamental charter" for the administrative state,[37] delineating basic default rules of agency procedure that are "not lightly to be supplanted or embellished."[38] The APA provides that any "person suffering legal wrong because of agency action . . . is entitled to judicial review thereof,"[39] unless review is precluded by statute or the questioned action is "committed to agency discretion by law."[40] The Supreme Court has interpreted these provisions to enshrine a "basic presumption of judicial review" of agency action.[41]

The APA provides several specific causes of action against agencies, including if agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction . . . ; [and] without observance of procedure required by law."[42] If an aggrieved party brings suit against an administrative agency under the APA, the statute requires that the reviewing court "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[43] Courts are required to "hold unlawful and set aside agency action" found to be in violation of any of the listed standards of review.[44]

B. The Statutory and Theoretical Bases for the Record Rule

The APA is clear on the evidentiary scope of judicial review of agency action: "[T]he court shall review the whole record or those parts of it cited by a party."[45] This simple sentence suggests both a maximum ("the whole record") and a minimum ("those

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36 Antonin Scalia, Vermont Yankee*: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 363 (1978).

37 Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1208 (2015) (quoting Jack M. Beermann & Gary Lawson, *Reprocessing* Vermont Yankee, 75 GEO. WASH. L. REV. 856, 874 (2007)).

38 Scalia, *supra* note 36, at 363.

39 5 U.S.C. § 702.

40 5 U.S.C. § 701(a)(2).

41 Abbott Lab'ys v. Gardner, 387 U.S. 136, 140 (1967).

42 5 U.S.C. § 706(2)(A)–(D).

43 5 U.S.C. § 706.

44 5 U.S.C. § 706(2).

45 5 U.S.C. § 706.

parts of it cited by a party") evidentiary standard for courts reviewing "agency action, findings, and conclusions."[46] This sentence is the basis for the record rule,[47] first explicitly articulated by the Supreme Court in *Overton Park*.[48] There, the Supreme Court considered a challenge, brought by Memphis residents, against the Secretary of Transportation's decision to build a highway through a popular park.[49] The Court affirmed that judicial review of this decision should generally be limited to the "full administrative record that was before the Secretary at the time he made his decision."[50] Two years later, in *Camp v. Pitts*,[51] the Court reaffirmed the record rule, stating 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."[52] Courts generally agree that the administrative record includes not just those materials considered directly by the agency decisionmaker but all materials considered by the agency as a whole in its decision-making process.[53]

The theoretical basis for the record rule is the fundamental notion that executive branch actions enjoy a "presumption of regularity" when reviewed by Article III courts.[54] In other words, courts presume—absent a showing to the contrary—that agency officials have acted in good faith and have not misrepresented the

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46 5 U.S.C. § 706(2); Gavoor & Platt, *supra* note 18, at 19. This phrase might also be interpreted as simply giving courts permission to consider even those parts of the record not cited by the parties. Even under this reading, the phrase suggests that courts should not ordinarily look beyond the record.

47 *See* Gavoor & Platt, *supra* note 18, at 19 ("Section 10(e) of the APA, now codified at 5 U.S.C. § 706, sets the textual lodestar for the record rule.").

48 Alter, *supra* note 29, at 1060.

49 *Overton Park*, 401 U.S. at 406.

50 *Id.* at 420. This statement was not without qualifiers, including the bad faith exception. *See infra* Part I.C. Some scholars have criticized the *Overton Park* opinion as confusing and inconsistent with the APA. *See* Gavoor & Platt, *supra* note 18, at 22 n.38. And though it was not exactly forceful in its articulation of the record rule, the opinion is routinely cited for just that. *See* Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 743–44 (1985); *Dep't of Com.*, 139 S. Ct. at 2573–74. Perhaps *Overton Park* has been interpreted to say something that it did not mean, but that is outside the scope of this Comment.

51 411 U.S. 138 (1973).

52 *Id.* at 142; *see also* Fla. Power & Light Co., 470 U.S. at 743–44 ("The task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the reviewing court." (citation omitted)).

53 *See* Alter, *supra* note 29, at 1061.

54 *See* James N. Saul, Comment, *Overly Restrictive Administrative Records and the Frustration of Judicial Review*, 38 ENV'T L. REV. 1301, 1311–13 (2008). For discussion of the presumption of regularity, see generally Note, *The Presumption of Regularity in Judicial Review of the Executive Branch*, 131 HARV. L. REV. 2431 (2018).

facts.[55] The Supreme Court first explicitly articulated the presumption of regularity in 1926[56] and has reiterated it many times since,[57] though often without much explanation.[58] The presumption of regularity reflects separation of powers concerns: courts should not frustrate congressional directives or executive discretion by "prob[ing] the mental processes" of agency decisionmakers.[59] The presumption also reflects institutional competence concerns: administrative agencies operate in highly specialized spheres of expertise, and their decisions may rest on technical reasoning or analysis.[60] In the administrative-record context, we may question the ability of a generalist judge to second-guess whether a record submitted by an agency sufficiently explains a specialized decision.

C. Exceptions to the Record Rule

The record rule is not without exceptions. After all, the presumption of regularity is a rebuttable presumption.[61] In the administrative-record context, APA plaintiffs can attempt to rebut the presumption by bringing either a "motion to complete" the record or a "motion to supplement" the record.[62] This area of law has been the subject of extraordinary confusion among lower courts, primarily due to inconsistent terminology.[63] Some judges

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55 *See* Note, *supra* note 54, at 2433–34.

56 *See* United States v. Chem. Found., 272 U.S. 1, 14–15 (1926) ("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.").

57 *See, e.g.*, *Overton Park*, 401 U.S. at 415 ("Certainly, the Secretary's decision is entitled to a presumption of regularity."); Withrow v. Larkin, 421 U.S. 35, 47 (1975) (affirming the "presumption of honesty and integrity in those serving as [agency] adjudicators"); U.S. Postal Serv. v. Gregory, 534 U.S. 1, 10 (2001) ("[A] presumption of regularity attaches to the actions of Government agencies.").

58 *Cf.* Note, *supra* note 54, at 2432.

59 United States v. Morgan, 313 U.S. 409, 422 (1941) (quoting United States v. Morgan, 304 U.S. 1, 18 (1938)).

60 Saul, *supra* note 54, at 1312; *see also* Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 103 (1983).

61 *See Chemical Found.*, 272 U.S. at 14–15 ("[I]n the absence of clear evidence to the contrary, courts presume that [public officials] have properly discharged their official duties.").

62 Alter, *supra* note 29, 1057–58 (explaining the difference between record completion and record supplementation).

63 *See, e.g.*, WildEarth Guardians v. Salazar, 670 F. Supp. 2d 1, 5 (D.D.C. 2009) (conflating supplementation with completion); *see also* Alter, *supra* note 29, at 1056–58 (tracing the confusion to inconsistent terminology among lower courts).

have recently added clarity by explaining the distinction between completion and supplementation.[64]

When a plaintiff argues for completion, he is arguing that there are materials that should have been properly included in the administrative record but were excluded by the agency.[65] In other words, the materials in question were actually considered by the agency during the decision-making process but were either unintentionally or intentionally left out of the record submitted to the court. Given the presumption of regularity, courts generally require plaintiffs to show "clear evidence" that the materials in question were actually considered by the agency and, thus, should have been included.[66] Even scholars who are otherwise skeptical of broad exceptions to the record rule are generally supportive of a plaintiff's ability to complete the record if the plaintiff can demonstrate that the agency actually considered other materials in the first place.[67]

Motions to supplement the record are more controversial.[68] When a plaintiff argues for supplementation, he is arguing that there are materials outside the proper scope of the administrative record—materials that the agency itself did *not* consider in making its decision—that courts should nonetheless consider when reviewing the agency action.[69] This category of extra-record evidence includes materials that were not before the agency during the decision-making process as well as internal materials that are only tangentially related to the questioned decision.[70] This could include public statements by a government official,[71] related

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64 *See, e.g.*, Oceana, Inc. v. Ross, 290 F. Supp. 3d 73, 77–78 (D.D.C. 2018) (clarifying the difference between supplementation and completion and noting the "confusion" surrounding the terminology).

65 *See* Alter, *supra* note 29, at 1057.

66 *See id.* at 1057 (quoting Bar MK Ranches v. Yuetter, 994 F.2d 735, 740 (10th Cir. 1993)).

67 *See* Gavoor & Platt, *supra* note 18, at 32.

68 *See, e.g.*, Gavoor & Platt, *supra* note 18, at 42–44 (critiquing supplementation as an "[i]mproper [m]eans" of adding documents to an administrative record).

69 *See Alter*, supra note 29, at 1057–58.

70 I use the term "extra-record evidence" to refer to all kinds of evidence that plaintiffs may seek to add to the record through supplementation. This may or may not include discovery, which is necessarily more invasive. Some commentators define "discovery" in the administrative record context to include both supplementation and traditional discovery. *See* Gavoor & Platt, *supra* note 18, at 25 n.164. My arguments about extra-record evidence apply to all evidence added through record supplementation, regardless of whether traditional discovery is involved.

71 *See, e.g.*, *Regents*, 140 S. Ct. at 1917 (Sotomayor, J., concurring in part, concurring in the judgment in part, and dissenting in part) (endorsing the plaintiffs' argument that the Court should consider President Trump's campaign statements on Mexican immigrants).

emails exchanged by government officials,[72] documents considered by the agency in similar decisions,[73] or documents produced after the agency made the questioned decision.[74] Sometimes, plaintiffs simply ask for "discovery in general."[75]

Plaintiffs seeking record supplementation are generally trying to show that an agency's stated explanation for its decision was not the true motivating factor or that politics or animus improperly influenced the decision-making process. Extra-record evidence can be used to bolster an arbitrary and capricious claim since it can indicate that the agency committed a "clear error of judgment," "relied on factors which Congress has not intended it to consider," or "failed to consider an important aspect of the problem."[76] Scholars continue to debate the virtue of motions to supplement the record as well as the virtues of the record rule more broadly.[77]

When deciding whether a plaintiff may supplement the record, lower courts generally apply the "strong showing of bad faith or improper behavior" standard first articulated by the Supreme

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[72] *See, e.g.*, Cook County v. Wolf, 461 F. Supp. 3d 779, 795 (N.D. Ill. 2020) ("Miller's emails with high-ranking DHS officials show his involvement with the Rule, [but] the administrative record includes no such communications.").

[73] *See* City of Dania Beach v. Fed. Aviation Admin., 628 F.3d 581, 590 (D.C. Cir. 2010) ("The petitioners [seek] to supplement the administrative record with hundreds of pages of documents introduced in prior EIS processes that contemplated the airport expansion.").

[74] *See* Am. Wildlands v. Kempthorne, 530 F.3d 991, 1002 (D.C. Cir. 2008) ("We hold the district court did not abuse its discretion in denying the motion to supplement the record. [The letters that the plaintiffs were seeking to include] were written after the [agency] issued its Reconsidered Finding, and are therefore not part of the administrative record.").

[75] Grill v. Quinn, No. CIV S-10-0757, 2012 WL 174873, at *1 (E.D. Cal. Jan. 20, 2012).

[76] Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quotation marks omitted) (identifying factors that would make an agency action arbitrary and capricious).

[77] The scholarly discussion can be divided into two camps. One camp supports a rigid application of the record rule with no, or very little, extra-record supplementation. *See, e.g.*, William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 78–79 (1975) (proposing a record-making procedure that, in today's terms, would not allow any extra-record supplementation); Gavoor & Platt, *supra* note 18, at 26 (arguing for a rigid interpretation of the record rule as consistent with the text of the APA). The other camp has argued that a rigid record rule provides too much cover to agencies, imposes too much of a burden on plaintiffs, and frustrates judicial review. *See, e.g.*, Steven Stark & Sarah Wald, *Setting No Records: The Failed Attempts to Limit the Record in Review of Administrative Action*, 36 ADMIN. L. REV. 333, 359 (1984) (arguing that the record rule "ignore[s] the realities of informal agency decisionmaking"); Alter, *supra* note 29, at 1049 (arguing for an "expansive construction of the record rule"). My approach to the record rule for constitutional challenges, discussed in Parts III and IV, generally aligns with the former.

Court in *Overton Park*.[78] In this 1971 decision, the Court reversed and remanded an APA case after a lower court based its decision on affidavits presented by the Secretary after litigation had already begun.[79] These affidavits, the Court held, were "merely '*post hoc*' rationalizations" and thus "an inadequate basis for review."[80] The Court remanded for the district court to decide the case on the full administrative record.[81] It left open the possibility of requiring agency officials to give testimony explaining their decision but cautioned that such "inquiry into the mental processes of administrative decisionmakers is usually to be avoided."[82] Only after a "strong showing of bad faith or improper behavior" may such an inquiry be made.[83]

Some scholars have criticized the *Overton Park* "bad faith" language as having no basis in the text of the APA and as confusing in application.[84] Indeed, the Court has never fully explained what is required to make a strong showing of bad faith or improper behavior.[85] In his partial concurrence in *Department of Commerce*, Justice Clarence Thomas, joined by Justices Neil Gorsuch and Brett Kavanaugh, questioned the "legitimacy and scope" of the *Overton Park* exception and noted that it "may warrant future consideration."[86] Moreover, lower courts rarely find the *Overton Park* exception satisfied.[87] Nonetheless, a majority of the Court in *Department of Commerce* affirmed the *Overton Park* standard as a "narrow exception" to the rule against supplementing the record.[88] Thus, the *Overton Park* exception still stands, despite the criticism.

Sokaogon Chippewa Community v. Babbitt,[89] a Western District of Wisconsin decision, involves a rare example of a court holding that plaintiffs satisfied the *Overton Park* bad faith

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

79 *See id.* at 406, 409.

80 *Id.* at 419.

81 *Id.* at 420.

82 *Id.*

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

84 *See* Gavoor & Platt, *supra* note 18, at 44 ("[The *Overton Park* exception] has no textual grounding in the APA and was created by the Court, without citation or explanation, to facilitate Article III review.").

85 *See id.* at 22 (quoting *Overton Park*, 401 U.S. at 420).

86 *Dep't of Com.*, 139 S. Ct. at 2579 n.5 (Thomas, J., concurring in part and dissenting in part).

87 Cromley & Showalter, *supra* note 21 ("[T]he overwhelming majority of courts have declined to use *Overton Park*'s exception to look beyond the administrative record.").

88 *Dep't of Com.*, 139 S. Ct. at 2573–74.

89 961 F. Supp. 1276 (W.D. Wis. 1997).

exception. The case involved a group of Chippewa Indians who submitted applications to the Department of the Interior to convert a greyhound racing facility into a casino.[90] The Department denied their application, citing opposition from the surrounding communities.[91] Plaintiffs moved to supplement the administrative record, arguing there was "improper political influence" on the Department's decision.[92] To substantiate this claim of bad faith, and push it over the "strong showing" line required by *Overton Park*, plaintiffs cited several suspicious communications between opposition tribes, legislators, lobbyists, and the Secretary of the Interior's staff, as well as procedural irregularities in the Department's actions.[93] Ultimately, the court granted plaintiffs' motion to supplement the record, finding that the plaintiffs raised a "substantial suspicion" of bad faith or improper behavior.[94] This case indicates that, in order to make a strong showing of bad faith, plaintiffs may be required to offer the court a preview of the evidence with which they hope to supplement the record. If the *Chippewa* court had denied the plaintiffs' motion to supplement, their citations to the suspicious communications would not have been included in the record and, thus, would not have been considered by the court on the merits.

Though it has explicitly endorsed only the *Overton Park* exception, the Supreme Court has also implied that supplementation is appropriate where an agency gives such an inadequate explanation of administrative action that it frustrates judicial review.[95] The exception can be traced back to *Camp v. Pitts*, where the Court vacated a circuit court's order for a trial de novo after a Comptroller offered an inadequate explanation for his denial of a bank charter.[96] The Court explained that if "there was such failure to explain administrative action as to frustrate effective judicial review," the lower court should "obtain from the agency . . . such additional explanation of the reasons for the agency decision as may prove necessary."[97] The Court may have been referring to

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90 *Id.* at 1278.

91 *Id.*

92 *Id.*

93 *Id.* at 1281–84.

94 *Chippewa*, 961 F. Supp. at 1286.

95 *Camp*, 411 U.S. at 142–43.

96 *Id.* at 139–40, 143.

97 *Id.* at 142–43; *cf. Fla. Power & Light*, 470 U.S. at 744:

> [I]f the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course . . . is to remand to the agency

record completion, but some lower courts have interpreted this language in the context of record supplementation.[98] The Court did not mention the "failure to explain" exception in *Department of Commerce*, and some scholars have criticized it as "contrary to the APA."[99] Moreover, an agency actively seeking to frustrate judicial review would necessarily be exhibiting bad faith as well. But the Court has never explicitly foreclosed a "failure to explain" exception to the record rule.

While the *Overton Park* bad faith exception stands as the general rule for extra-record evidence, the circuits have applied the exception in varying and sometimes contradictory ways.[100] The D.C. Circuit, for example, has recognized three "unusual circumstances" that will justify record supplementation:

> (1) the agency deliberately or negligently excluded documents that may have been adverse to its decision; (2) the district court needed to supplement the record with background information in order to determine whether the agency considered all of the relevant factors; or (3) the agency failed to explain administrative action so as to frustrate judicial review.[101]

The Ninth Circuit, on the other hand, has recognized four exceptions that overlap with the D.C. Circuit's three exceptions in varying ways. First, extra-record evidence is permissible if it is "necessary to determine whether the agency has considered all relevant factors and has explained its decision."[102] This overlaps with the D.C. Circuit's second and third exceptions. Second, extra-record evidence is permissible if the agency "relied on documents not in the record."[103] This is properly understood as *completion* of the record, not supplementation, yet another indication of the

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> for additional investigation or explanation. The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.

98 *See, e.g.*, Sierra Club v. Marsh, 976 F.2d 763, 772 (1st Cir. 1992).

99 Gavoor & Platt, *supra* note 18, at 52; *cf.* 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, 1005 (2017) (critiquing the "failure to explain" exception as potentially overinclusive).

100 *See* Brandon, *supra* note 99, at 995.

101 Dist. Hosp. Partners, L.P. v. Burwell, 786 F.3d 46, 55 (D.C. Cir. 2015) (quoting *Kempthorne*, 530 F.3d at 1002 (D.C. Cir. 2008)).

102 Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., 450 F.3d 930, 943 (9th Cir. 2006) (quoting Sw. Ctr. for Biological Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1450 (9th Cir. 1996)) (quotation marks omitted).

103 *Id.* (quoting *Sw. Ctr. for Biological Diversity*, 100 F.3d at 1450) (quotation marks omitted).

confusion that has garbled this area of law. Third, extra-record evidence is permissible if it is "necessary to explain technical terms or complex subject matter,"[104] an exception unique to the Ninth Circuit and with little basis in the *Overton Park* bad faith standard. Finally, extra-record evidence is permissible if the "plaintiffs make a showing of agency bad faith,"[105] a clear homage to *Overton Park*. Despite these varying approaches from the circuits, the Supreme Court's most recent statement is fairly clear: extra-record evidence is allowed only with a strong showing of bad faith or improper behavior.[106]

II. THE RECORD RULE AND CONSTITUTIONAL CHALLENGES TO AGENCY ACTION

This Part introduces the legal question at the heart of this Comment: whether the record rule applies to constitutional challenges to administrative agency action. Part II.A discusses how constitutional claims differ from arbitrary and capricious claims and introduces the evidentiary question raised by constitutional claims. Part II.B traces the Supreme Court's limited treatment of the question, concluding that the Court has never offered a clear answer. Finally, Part II.C discusses the divergent approaches of the lower courts, dividing them into three buckets.

A. Constitutional Challenges and the APA

Courts consistently apply some version of the record rule to arbitrary and capricious challenges to agency action. The specific exceptions vary across circuits, but the general idea is the same: unless plaintiffs make a substantial showing under one of the specified exceptions, they may not supplement the administrative record with new evidence. When a plaintiff challenges an agency action on *constitutional* grounds, the picture becomes more complicated.

I assume, for purposes of this Comment, that the APA provides the statutory vehicle for most constitutional challenges to agency action. After all, the text of the APA treats constitutional

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[104] *Id.* (quoting *Sw. Ctr. for Biological Diversity*, 100 F.3d at 1450) (quotation marks omitted).

[105] *Id.* (quoting *Sw. Ctr. for Biological Diversity*, 100 F.3d at 1450) (quotation marks omitted).

[106] *Dep't of Com.*, 139 S. Ct. at 2574 (quoting *Overton Park*, 401 U.S. at 420).

claims no differently than arbitrary and capricious claims.[107] Moreover, other vehicles for allegations of constitutional violations, like *Bivens* actions, are not applicable in the administrative agency context.[108] There is also a strong case that, unless brought under a separate statutory scheme, constitutional challenges to agency action are necessarily subsumed by the APA's judicial review provisions.

Congress may channel judicial review of constitutional claims through a specific statutory scheme.[109] For example, the Court has affirmed that Congress may limit judicial review of adverse action against federal employees to the Federal Circuit, even for employees who raise constitutional issues.[110] The APA's judicial review provisions should be viewed in the same light. Channeling constitutional claims through the APA does not "deny any judicial forum for a colorable constitutional claim"[111] and thus does not raise the "serious constitutional question" that would arise if Congress sought to "preclude judicial review of constitutional claims."[112] In fact, the APA *guarantees* a forum for constitutional claims[113] but also limits the extent to which courts may meddle in the proper functioning of administrative agencies. Moreover, if constitutional challenges were available outside the APA context, plaintiffs might always opt for a constitutional

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[107] *See* 5 U.S.C. § 706(2)(B) ("The reviewing court shall . . . hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; [or] contrary to constitutional right, power, privilege, or immunity.").

[108] *See* FDIC v. Meyer, 510 U.S. 471, 485–86 (1994) (holding that *Bivens* actions for constitutional violations may not be brought against federal agencies, only against individual federal agents).

[109] Elgin v. Dep't of Treasury, 567 U.S. 1, 8–10 (2012) (indicating that a statute that denies "any judicial forum for a colorable constitutional claim" is subject to heightened judicial scrutiny, but not a statute that "simply channels judicial review of a constitutional claim to a particular court") (quoting Webster v. Doe, 486 U.S. 592, 603 (1988)).

[110] *See id.* at 13–14.

[111] *Webster*, 486 U.S. at 603.

[112] *Id.* (quotation marks omitted). In dissent, Justice Antonin Scalia questioned whether a "serious constitutional question" would arise if plaintiffs were denied a forum in federal court for colorable constitutional claims. *Id.* at 611 (Scalia, J., dissenting) (quoting *id.* at 603) (quotation marks omitted). He noted that "not all constitutional claims require a judicial remedy" and criticized the idea that "every constitutional claim is *ipso facto* more worthy, and every statutory claim less worthy, of judicial review." *Id.* at 614, 619. Thus, perhaps the *Webster* majority's concern for ensuring some judicial forum for all constitutional claims is overstated.

[113] *See* 5 U.S.C. § 702 (entitling any "person suffering legal wrong because of agency action" to "judicial review thereof").

challenge over an arbitrary and capricious challenge to avoid the APA's procedural hurdles, including the record rule.[114]

Though the APA expressly contemplates constitutional challenges to agency action, many courts have found that constitutional claims are too fundamental to be limited by the APA's judicial review provisions. Because constitutional claims necessarily implicate the fundamental rights of individuals, the argument goes, courts should not "abandon their independent vigilance on . . . constitutional matters simply because a federal agency is involved."[115] Thus, constitutional challenges to agency action require an "independent assessment," and judicial review should not be bound by the APA's restrictions.[116] Supreme Court precedent provides some support for the general notion that issues of constitutional rights require a harder look.[117] The open question is whether, in the administrative record context, the special gravity of constitutional claims trumps the APA's procedural requirements.

B. The Supreme Court's Limited Treatment

The Supreme Court has occasionally touched on this topic in dicta but has never confronted it directly. Some lower courts have mistakenly interpreted *Pickering v. Board of Education*[118] to suggest that extra-record evidence should always be allowed in constitutional challenges to agency action.[119] In reviewing a state court record, the Court noted that "where constitutional rights are [at] issue[,] an independent examination of the record will be made in order that the controlling legal principles may be applied to the actual facts of the case."[120] While the sentiment may, as a matter of principle, seem applicable to the present topic—whether constitutional claims deserve a harder look than APA claims—the

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114 Ultimately, the specific question of whether a plaintiff may bring a constitutional challenge to agency action outside of the APA is beyond the scope of this Comment.

115 Porter v. Califano, 592 F.2d 770, 781 n.17 (5th Cir. 1979).

116 *Id.* at 780; *see also* Rydeen v. Quigg, 748 F. Supp. 900, 905 (D.D.C. 1990) ("Independent of any power of review that Congress granted to this Court under the APA, this Court has the authority to examine and rule on any actions of a federal agency that allegedly violate the Constitution." (citing *Porter*, 592 F.2d at 780)).

117 *See, e.g.*, Crowell v. Benson, 285 U.S. 22, 60, 64 (1932) (holding that courts reviewing agency adjudications that involve constitutional issues must engage in an "independent determination of all questions, both of fact and law, necessary to the performance of that supreme function").

118 391 U.S. 563 (1968).

119 *See, e.g.*, *Porter*, 592 F.2d at 781; *Rydeen*, 748 F. Supp. at 906.

120 *Pickering*, 391 U.S. at 578 n.2.

Pickering Court was speaking in the context of a *state court* record, not an *administrative* record.[121] The case has nothing to do with administrative law or the APA and is therefore inapposite.

The Court inched closest to the present question in *Webster v. Doe*.[122] The case involved a former CIA employee who alleged that he had been fired by the CIA because of his sexual orientation.[123] The plaintiff challenged his firing under the APA as an arbitrary and capricious agency decision and as a violation of his constitutional rights to due process and equal protection.[124] The Court's holding was twofold: (1) the National Security Act of 1947 (NSA) commits individual employment decisions to the CIA Director's discretion, thus precluding judicial review of those specific decisions under APA § 701(a),[125] but (2) the NSA *does not* preclude judicial review of "colorable constitutional claims arising out of the actions of the Director" in exercising that discretion.[126] Writing for the Court, Chief Justice William Rehnquist addressed the CIA's concerns that "judicial review [ ] of constitutional claims will entail extensive 'rummaging around' in the Agency's affairs to the detriment of national security."[127] Chief Justice Rehnquist noted that district courts have "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."[128]

Some lower courts have erroneously cited *Webster* for the proposition that extra-record evidence should be allowed in constitutional challenges to agency action.[129] For several reasons,

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121 *See id.* (discussing the deference owed to state court findings).

122 486 U.S. 592 (1988).

123 *Id.* at 595–96.

124 *Id.* at 596.

125 *Id.* at 601.

126 *Id.* at 603–04. At first blush, this holding suggests that the Court is willing to review constitutional challenges to agency action outside of the APA § 706 context, thus calling into question my assumption in Part II.A. However, the *Webster* Court seemed to assume that the APA is the vehicle for the plaintiff's constitutional claims. It cited APA § 701(a) for the proposition that claims are removed from judicial review only if "specifically identified by Congress or committed to agency discretion by law." *Id.* at 603. Thus, the Court assumed that the APA's review procedures still apply to constitutional claims, even though it allowed the constitutional claim to proceed.

127 *Webster*, 486 U.S. at 604 (quoting Transcript of Oral Argument 8–13).

128 *Id.*

129 *See* P.R. Pub. Hous. Admin. v. U.S. Dep't of Hous. & Urban Dev., 59 F. Supp. 2d 310, 328 (D.P.R. 1999) ("The . . . Court has held that a plaintiff who is entitled to judicial

however, *Webster* is less helpful than it may first appear. First, the Court's aside on discovery is dicta. The Court was primarily responding to concerns, raised by the CIA in its briefs, about the scope of judicial review as it relates to the sensitive activities of an intelligence agency—not to concerns about the scope of judicial review for constitutional claims in general.[130] Second, *Webster* is somewhat limited to its facts because it relates to the decisions of the CIA Director—an agency decisionmaker, no doubt, but one insulated by the NSA with broad discretionary authority.[131] Because its facts are so unusual, *Webster* provides little guidance on the present question.

In fact, Justice Antonin Scalia's dissent in *Webster* is more relevant to the present discussion than the majority opinion is. In it, he emphasized that the APA "is an umbrella statute governing judicial review of all federal agency action."[132] In Justice Scalia's view, "[w]hile 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."[133] This accords with the general understanding of the APA as setting the default rules for agency action.[134] Congress and agencies may adopt procedures to supplement or replace the APA's requirements, but if they do not do so clearly, the APA controls. This suggests that some form of the record rule should apply to *all* challenges to agency action, not just arbitrary and capricious challenges.

Two recent Supreme Court cases have involved constitutional challenges to administrative agency action and the scope of review: *Department of Commerce* and *Regents*, both discussed in this Comment's introduction.[135] *Department of Commerce*

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review of its constitutional claims under the APA is entitled to discovery in connection with those claims.").

130 Brief for Petitioner at 37, Webster v. Doe, 486 U.S. 592 (1998) (No. 86-1294), 1987 WL 881344, at *37 (expressing concerns about "litigation that could require the government to disclose secrets potentially damaging to vital national interests").

131 *See, e.g.*, CIA v. Sims, 471 U.S. 159, 168–69 (1985) ("[Through the NSA], Congress vested in the Director of Central Intelligence very broad authority to protect all sources of intelligence information from disclosure.").

132 *Webster*, 486 U.S. at 607 n.* (Scalia, J., dissenting).

133 *Id.* (emphasis in original).

134 *See* Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629, 630 (2017) (describing the APA as setting "the default rules that govern the federal regulatory state").

135 *See supra* notes 5–14 and accompanying text.

analyzed the proposed citizenship question on the 2020 Census. *Regents* struck down President Trump's rescission of DACA.

In *Department of Commerce*, the Court strongly affirmed *Overton Park*'s record-rule doctrine. Noting that "judicial inquiry into 'executive motivation' represents 'a substantial intrusion' into the workings of another branch of Government and should normally be avoided,"[136] the Court affirmed that judges are "ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record."[137] The Court also affirmed the "strong showing of bad faith or improper behavior" exception as the one "narrow exception to the general rule against inquiring into 'the mental processes of administrative decisionmakers.'"[138] The Court found that, because the plaintiffs had not made a strong showing of bad faith, the lower court's extra-record discovery order was technically premature.[139] But the Court went on to find, puzzlingly, that the discovery order was "ultimately justified" because the new materials indicated that some of the Secretary's stated justifications for the new policy were pretextual.[140]

In his partial dissent, Justice Thomas took issue with this reasoning. He argued that, because the plaintiffs did not actually make a strong showing of bad faith or improper behavior, they were not entitled to extra-record discovery.[141] Justice Thomas argued that information revealed from improperly granted extra-record discovery cannot justify record supplementation after the fact.[142]

The Court found that the Secretary's insufficient explanation for the decision warranted remand.[143] Thus, the Court did not reach the plaintiffs' equal protection challenge. The Court therefore did not directly consider whether the same evidentiary standard should apply to a constitutional claim as opposed to an

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136 *Dep't of Com.*, 139 S. Ct. at 2573 (quoting Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 & n.18 (1977)).

137 *Id.*

138 *Id.* at 2572–73 (quoting *Overton Park*, 401 U.S. at 420).

139 *Id.* at 2573.

140 *Id.* at 2573–74; *see also* Aram A. Gavoor & Steven A. Platt, *Administrative Records After* Department of Commerce v. New York, 72 ADMIN. L. REV. 87, 93 (2020) (criticizing the decision for, among other reasons, not explaining "what, precisely, in the completed record met the *Overton Park* standard and thus justified supplementation").

141 *Dep't of Com.*, 139 S. Ct. at 2580 (Thomas, J., concurring in part and dissenting in part).

142 *See id.*

143 *See id.* at 2576.

arbitrary and capricious claim. Nonetheless, a majority of the Court agreed that "bad faith or improper behavior" was one "narrow exception" to the general presumption against extra-record evidence.[144] If the Court means what it says, the presence of constitutional claims should not affect this bright-line rule.

Justice Sonia Sotomayor's partial concurrence in *Regents* took a different approach. In *Regents*, the Court struck down the Trump administration's rescission of DACA as arbitrary and capricious.[145] However, the Court rejected the respondents' equal protection challenge to the rescission because it found their allegations "insufficient."[146] More specifically, the Court held that the respondents failed to "raise a plausible inference that the rescission was motivated by animus."[147] The scope of the record was not at issue in the case, but Justice Sotomayor raised the issue in a separate opinion.[148]

Justice Sotomayor disagreed with the majority's approach to the equal protection issue. Arguing that the respondents plausibly alleged discriminatory animus in the Trump administration's recission of DACA, Justice Sotomayor insisted that the respondents should have been allowed to "develop their equal protection claim on remand."[149] Because the respondents' complaint—which cited President Trump's public statements deriding Mexican immigrants—raised plausible allegations of discriminatory animus, the viability of their equal protection claims "should be determined only after factual development on remand."[150]

Justice Sotomayor implied that extra-record discovery—or at least some review of extra-record evidence—was warranted for the respondents' constitutional claims against the Department of Homeland Security (DHS) without any strong showing of bad faith or improper behavior. Though animus and bad faith are arguably one and the same, Justice Sotomayor indicated that the plaintiffs "*plausibly allege[d]* discriminatory animus," not that they made the *strong showing* of bad faith required by *Overton*

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144 *Id.* at 2573–74 (majority opinion).

145 *Regents*, 140 S. Ct. at 1912.

146 *Id.* at 1915.

147 *Id.* at 1916.

148 *Id.* at 1917 (Sotomayor, J., concurring in part, concurring in the judgment in part, and dissenting in part).

149 *Id.*

150 *Regents*, 140 S. Ct. at 1918 (Sotomayor, J., concurring in part, concurring in the judgment in part, and dissenting in part).

Park.[151] Under Justice Sotomayor's approach, the scope of evidentiary review on constitutional claims would not be bound by the APA record rule as applied in *Overton Park*. Some lower courts have similarly indicated that "equal protection principles, not the APA, supply the governing legal framework for assessing whether [a] plaintiff [making an equal protection challenge] is entitled to discovery."[152] But Justice Sotomayor's argument seems to complicate the Court's strong endorsement of the *Overton Park* bad faith exception in *Department of Commerce* as the only way plaintiffs may introduce evidence beyond the administrative record. Between *Department of Commerce* and Justice Sotomayor's approach in *Regents*, the Court's position is unclear and, in places, contradictory.

C. The Divergent Approaches of the Lower Courts

With little direction from the Supreme Court, lower courts have largely been left to their own devices on the question of when extra-record evidence should be considered in constitutional challenges to agency action. Moreover, the circuits have been largely silent.[153] Thus, district court judges have developed the bulk of the caselaw on this topic. Their divergent approaches can be sorted into three buckets.

First, some courts have applied the record-rule framework as it is applied in the standard APA context. In other words, constitutional challenges to agency action should be treated no differently than other challenges to agency action under APA § 706, at least from an evidentiary perspective. I call this the "record-rule approach." Second, some courts have taken a middle-ground approach, arguing that while the record rule should generally govern constitutional challenges to agency action, courts should be open to going beyond the record when a plaintiff's constitutional claim is substantively different from their arbitrary and capricious claim. I call this the "claim-specific approach." Finally, other courts have reasoned that constitutional challenges are completely different from arbitrary and capricious challenges and,

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[151] *Id.* at 1917 (emphasis added).

[152] Mayor & City Council of Balt. v. Trump, 429 F. Supp. 3d 128, 141 (D. Md. 2019).

[153] The lack of circuit-level case law may be because extra-record supplementation rulings are often reviewed for abuse of discretion and, thus, warrant limited discussion at the appellate level. *See, e.g.*, Hill Dermaceuticals, Inc. v. Food & Drug Admin., 709 F.3d 44, 47 (D.C. Cir. 2013) (reviewing the district court's denial of an extra-record supplementation motion for abuse of discretion).

thus, should be completely divorced from the procedural framework of the APA. Under this approach, plaintiffs who bring constitutional challenges to agency action should be able to add extra-record evidence without any record-rule restraints. I call this the "non-record-rule approach." I will discuss each approach in turn.

1. The record-rule approach.

The first approach is the narrowest. It states that extra-record evidence should be permitted in constitutional challenges to agency action only if the plaintiff can argue for extra-record evidence under the existing record-rule exceptions. Because the exceptions vary by circuit, the exact dimensions of this approach also vary. But, following *Department of Commerce*'s affirmation of the *Overton Park* exception, it at least allows plaintiffs to reach extra-record evidence for constitutional challenges if they can make a strong showing of bad faith or improper behavior. Under this approach, constitutional challenges are treated essentially the same as claims brought under the APA's "arbitrary and capricious" clause.[154]

Harvard Pilgrim Health Care v. Thompson,[155] a case from the District of Rhode Island, is instructive. In this case, a health organization—alleging inadequate notice of a change in Medicare policy—brought both an APA claim and a constitutional due process claim against the Department of Health and Human Services.[156] The plaintiff sought extra-record discovery on the constitutional claim, arguing that the "presence of a constitutional claim allows for discovery of matters not included in the administrative record."[157] The plaintiff submitted nineteen interrogatories and nine requests for document production directed to the Department of Health and Human Services, all examining the agency's procedures for reviewing Medicaid policy changes.[158] The court rejected the plaintiff's argument, holding that the mere presence of a constitutional claim does not automatically allow an

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[154] *See* Charlton Mem'l Hosp. v. Sullivan, 816 F. Supp. 50, 51 (D. Mass. 1993) ("[Adding constitutional claims to an APA claim] cannot so transform the case that it ceases to be primarily a case involving judicial review of agency action.").

[155] 318 F. Supp. 2d 1 (D.R.I. 2004).

[156] *Id.* at 5.

[157] *Id.* at 10.

[158] *Id.* at 5.

APA plaintiff to reach extra-record discovery.[159] Judge Ronald Lagueux reasoned that the "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."[160]

A District of New Mexico court took a similar approach in *Jarita Mesa Livestock Grazing Ass'n v. United States Forest Service*.[161] There, a cattle farmers' association challenged the U.S. Forest Service's decision to reduce the number of livestock grazing permits available in a national forest.[162] The farmers brought APA and First Amendment claims and sought discovery on the latter.[163] As in *Harvard Pilgrim Health Care*, the court rejected the plaintiffs' argument, holding that their First Amendment claim "is subject to the APA's procedural provisions."[164] Thus, the plaintiffs could reach extra-record evidence only by making a "compelling factual showing" to meet the bad faith exception to the record rule.[165]

2. The claim-specific approach.

The second bucket includes several different approaches that involve looking to the specific nature of the plaintiff's constitutional claim to resolve evidentiary questions. Courts using this middle-ground approach have most often allowed extra-record evidence when the plaintiff's constitutional claim was fundamentally different from the plaintiff's APA claim or when a constitutional claim challenged the procedure as opposed to the substance of an agency decision.

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159 *Id.* at 10.

160 *Harvard Pilgrim Health Care*, 318 F. Supp. 2d at 10.

161 58 F. Supp. 3d 1191 (D.N.M. 2014).

162 *Id.* at 1205.

163 *Id.*

164 *Id.* at 1237; *see also* N. Arapaho Tribe v. Ashe, 92 F. Supp. 3d 1160, 1174 (D. Wyo. 2015) (holding that the court "must limit its constitutional review of [an agency] adjudication to the administrative record"); Almaklani v. Trump, 444 F. Supp. 3d 425, 434 (E.D.N.Y. 2020) ("[T]he addition of constitutional claims does not alter the sufficiency of the record.").

165 *Jarita Mesa Livestock Grazing Ass'n*, 58 F. Supp. 3d at 1240. The court recognized that the Tenth Circuit only explicitly allows for supplementation in the context of adjudication. *See id.* at 1239 n.13. To facilitate review, the court stated that it would borrow the Ninth Circuit's four exceptions, *see supra* note 102–07 and accompanying text, but noted that the bad faith exception is the "only one in which the Court can reasonably foresee permitting discovery." *Jarita Mesa Livestock Grazing Ass'n*, 58 F. Supp. 3d at 1239–40.

In *J.L. v. Cissna*,[166] for example, a Northern District of California court rejected the plaintiffs' discovery request on a due process claim because it "substantially overlap[ped] with Plaintiffs' APA claims."[167] The court noted that, "[w]hile there is no bright-line rule, extra-record discovery is generally limited to cases where the constitutional claim does not overlap with the APA claim or the substance of an agency decision."[168] The court found that the plaintiffs' due process claim (that the U.S. Citizenship and Immigration Services' failure to evaluate their immigration petitions in accordance with federal law deprived them of liberty and property interests) substantially overlapped with their APA claim (that the agency acted in an arbitrary and capricious manner by not following proper immigration law).[169] The court then turned to the question of whether the plaintiffs could nevertheless reach extra-record discovery through one of the Ninth Circuit's recognized exceptions to the record rule.[170] Because the plaintiffs had not shown that any of the exceptions applied, the court rejected discovery on the plaintiffs' constitutional claims.[171]

Other cases have distinguished between constitutional claims that challenge the substantive of an agency decision and those that challenge the procedure used to reach that decision. In *Bellion Spirits, LLC v. United States*,[172] for example, Judge James Boasberg of the United States District Court for the District of Columbia identified a "common thread" running through the many related lower court cases: "[W]hen a constitutional challenge to agency action requires evaluating the *substance* of an agency's decision made on an administrative record, th[e] challenge must be judged on the record before the agency."[173] On the other hand, when the constitutional challenge requires

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166 No. 18-cv-04914, 2019 WL 2224851 (N.D. Cal. Mar. 8, 2019).

167 *Id.* at *1.

168 *Id.*

169 *Id.*

170 *Id.* at *2. For the Ninth Circuit's exceptions to the record rule, see *supra* notes 102–07 and accompanying text.

171 *J.L.*, 2019 WL 2224851, at *3; *see also* Chiayu Chang v. U.S. Citizenship & Immigr. Servs, 254 F. Supp. 3d 160, 161–62 (D.D.C. 2017) (recognizing other courts' findings that "where a plaintiff's constitutional claims fundamentally overlap with their other APA claims, discovery is neither needed nor appropriate"); California v. U.S. Dep't of Homeland Sec., No. 19-cv-04975, 2020 WL 1557424, at *15–16 (N.D. Cal. Apr. 1, 2020) (granting extra-record discovery because "plaintiffs' APA and constitutional claims . . . do not fundamentally overlap").

172 335 F. Supp. 3d 32 (D.D.C. 2018).

173 *Id.* at 43 (emphasis added).

evaluating "the *procedures* by which the agency reached its conclusion," courts are more willing to allow extra-record evidence.[174] Thus, Judge Boasberg opted for a case-specific inquiry over a "bright line or categorical rule."[175]

Similarly, a District of Connecticut court has ruled that where "a plaintiff challenges an agency's general course of conduct rather than a discrete adjudication, limited discovery outside of the administrative record may be necessary where the administrative record does not contain evidence of the challenged action."[176] An example might be a claim that an agency engaged in discriminatory behavior when issuing a rule. Any evidence of discrimination would likely have been initially excluded from the record. The court noted that discovery should be permitted only where "necessary to effectuate the Court's judicial review,"[177] channeling the Supreme Court's suggestion, in *Camp*, that extra-record discovery may be necessary when there is "such failure to explain administrative action as to frustrate effective judicial review."[178]

3. The non-record-rule approach.

Finally, some district courts have held that extra-record evidence is presumptively allowable when plaintiffs mount constitutional challenges to agency action. Under this approach, constitutional challenges are altogether different from regular APA challenges and, thus, are not limited by the record rule. This reflects the notion, expressed in *Pickering*, that "where constitutional rights are [at] issue an independent examination of the record will be made."[179]

An Eastern District of California court's reasoning in *Grill v. Quinn*[180] is instructive. In *Grill*, the plaintiff sued after the U.S. Forest Service denied his permit to build a bridge across a stream.[181] The plaintiff alleged that the Forest Service's permit review process violated the APA and procedural due process.[182] The court granted the plaintiff's request for discovery on his

174 *Id.* (emphasis added) (citing *Rydeen*, 748 F. Supp. at 906).
175 *Id.*
176 Kennedy v. Speer, No. 16cv2010, slip op. at 3 (D. Conn. Sept. 6, 2019).
177 *Id.*
178 *Camp*, 411 U.S. at 142–43.
179 *Pickering*, 391 U.S. at 578 n.2.
180 No. CIV S-10-0757, 2012 WL 174873 (E.D. Cal. 2012).
181 *See id.* at *3–4.
182 *Id.* at *1.

constitutional claim, asserting, matter-of-factly, that "[a] direct constitutional challenge is reviewed independent of the APA. As such, the court is entitled to look beyond the administrative record in regard to this claim. Therefore, discovery as to the non-APA claim is permissible."[183]

Cook County v. Wolf,[184] a Northern District of Illinois case, offers an emphatic non-record-rule holding. The case involved a challenge brought by Cook County, Illinois, and an immigrants' rights organization against the Department of Homeland Security's decision to add to the number of public benefits that can make an immigrant ineligible for permanent resident status.[185] The plaintiffs brought two claims. They argued that the rule was incompatible with DHS's statutory authority, thus violating the APA, and that the rule violated their equal protection rights.[186] The plaintiffs also sought extra-record discovery to substantiate their constitutional claims.[187] Namely, they sought to supplement the record with emails exchanged by Trump administration officials suggesting that the public charge rule was implemented to disproportionately suppress nonwhite immigration.[188]

The court held that the plaintiffs' equal protection claims were "entitled to discovery . . . regardless of whether [plaintiff] can satisfy the 'strong showing' standard applicable to APA claims."[189] The court reasoned that because the plaintiffs' equal protection claims were grounded in allegations of racial animus, they *required* extra-record discovery: "[I]f a facially neutral agency action is motivated by racial animus, that animus almost certainly will not be 'disclose[d]' in the agency's 'contemporaneous explanation' for that action."[190] Under this approach, the scope of evidentiary review for a challenge to agency action depends not on the APA's procedural requirements but on the legal argument plaintiffs choose to deploy.

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183 *Id.* at *2 (citations omitted); *see also Mayor & City Council of Balt.*, 429 F. Supp. 3d at 141 (holding that, on an equal protection claim against agency action, "equal protection principles, not the APA, supply the governing legal framework for assessing whether plaintiff is entitled to discovery").

184 461 F. Supp. 3d 779 (N.D. Ill. 2020).

185 *Id.* at 782–84.

186 *Id.* at 782.

187 *Id.*

188 *Id.* at 795–96.

189 *Wolf*, 461 F. Supp. 3d at 795.

190 *Id.* at 794–95 (second alteration in original) (quoting *Dep't of Com.*, 139 S. Ct. at 2573).

III. THE LEGAL CASE FOR A RECORD-RULE APPROACH

This Comment argues that the record-rule approach[191] is preferable for doctrinal and policy reasons. The APA record rule, as articulated in *Overton Park* and recently reaffirmed in *Department of Commerce*, should apply to constitutional challenges to agency action just as it applies to all other lawsuits brought under APA § 706. In other words, courts should not allow extra-record evidence in constitutional challenges as a matter of course. Their review must be limited, in most cases, to the administrative record submitted by the agency. To go beyond the record, plaintiffs must make a strong showing of agency bad faith or improper behavior.

While courts should apply the record rule to constitutional challenges to agency action, they also should read the record rule to include a robust bad faith exception, particularly as applied to constitutional claims. Thus, this Comment diverges from scholars who have both argued for a rigid application of the record rule and criticized the *Overton Park* bad faith exception.[192] A robust bad faith exception should encompass an exception for a bare record that unduly frustrates judicial review. While the Supreme Court has never made clear that a bare record or a frustration of judicial review would trigger the bad faith exception, it contemplated as much in *Overton Park* and *Camp*. Any approach to extra-record evidence in constitutional challenges must balance the competing interests of agencies and individual plaintiffs. The proper standard must protect agencies against burdensome discovery and litigation while ensuring that plaintiffs receive thorough review of their constitutional claims. A robust bad faith exception—one which encompasses an exception for a bare record—balances these competing interests.

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191 *See supra* Part II.C.1.

192 *See* Gavoor & Platt, *supra* note 18, at 44. Though I agree with Professor Aram Gavoor and Steven Platt's reading of the APA's "whole record" language to strictly limit judicial review of agency action to the administrative record, I disagree with their assessment of the *Overton Park* bad faith exception. They argue that the *Overton Park* exception "has no textual grounding in the APA and was created by the Court, without citation or explanation, to facilitate Article III review." *Id.* For reasons discussed in Part III.D, I argue that a robust bad faith exception is consistent with the APA's direction for courts to engage in thorough judicial review of agency action. Gavoor and Platt also suggest that plaintiffs may be able to circumvent the record rule by bringing "constitutional or non-APA claims challenging agency action and claim those arguments exempt them from the record rule." *Id.* at 42. They do not discuss the application of the record rule to constitutional challenges any further. Perhaps they were simply mentioning the argument because many plaintiffs have raised it in court filings, not because they wanted to weigh in on the question.

In this Part, I will consider the text and legislative history of the APA, Supreme Court precedent predating the APA, and the Supreme Court's interpretation of the APA to argue for a record-rule approach.

A. APA Text

The APA provides a cause of action for aggrieved parties to sue governmental agencies[193] and delineates the full scope of judicial review of agency action.[194] If an aggrieved party brings suit against an administrative agency under the APA, the statute requires that the reviewing court "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[195]

In addition to the oft-cited "arbitrary [and] capricious" standard,[196] as well as the "unsupported by substantial evidence" standard used for formal rulemaking and adjudication,[197] the APA also directs courts to set aside agency action that is "contrary to constitutional right, power, privilege, or immunity."[198] Thus, the APA explicitly contemplates constitutional challenges to agency action and includes these claims in its procedural framework. In the same section, the APA prescribes the boundaries of this review: "In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."[199] This is the source of the record-rule evidentiary limitation, first articulated in *Overton Park*. It is an essential aspect of judicial review of agency action, and the plain text of the APA does not limit its application only to certain claims. Rather, all judicial review of agency action, regardless of the specific § 706 cause of action, is subject to the same procedure by the plain text of the APA. Thus, all challenges to agency action brought under the APA are subject to the "whole record" limitation.[200]

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193 5 U.S.C. § 702.

194 *See* 5 U.S.C. § 706.

195 5 U.S.C. § 706.

196 5 U.S.C. § 706(2)(A).

197 5 U.S.C. § 706(2)(E).

198 5 U.S.C. § 706(2)(B).

199 5 U.S.C. § 706.

200 One could argue that the "whole record" language merely establishes an evidentiary floor, not a ceiling. *See supra* note 46. In other words, courts must review the record, but they also may review material beyond the record if need be. However, following the rule of *expressio unius est exclusio alterius*, the express inclusion of a clear direction to

B. APA Legislative History

The legislative history of the APA lends support to a restrictive interpretation of this "whole record" limitation and its applicability to every type of judicial review of agency action. Some may object to the use of APA legislative history as an interpretive aid, given that the statute emerged as a painstaking compromise between liberals and conservatives after years of post–New Deal political strife.[201] However, APA legislative history may still be a useful, albeit blunt, interpretive tool. It may not provide much help in interpreting specific textual provisions, as these may have been obsessively tinkered with in the drafting process, but it can give us a sense of the general motivation behind the judicial review procedures, as seen below. Thus, we should not expect legislative history to provide a convincing definition of "whole record" and how it should apply to constitutional challenges.[202] However, we can discern two general themes from the contentious debate over the APA's passage.

First, the APA was intended to solidify the procedure governing judicial review of every legal wrong stemming from agency action. Envisioning the APA as dealing with "the very important problem of the relation of the courts to administrative agencies,"[203] the drafters sought to enshrine a comprehensive framework for this relationship through the APA's judicial review procedures. As Representative Francis Walter, chairman of the House Subcommittee on Administrative Law, stated:

> [The judicial review section] is a comprehensive statement of the right, mechanics, and scope of judicial review. . . . It is a means of enforcing all forms of law and all types of legal limitations. Every form of statutory right or limitation would

review the "whole record or those parts of it cited by the parties" suggests the exclusion of other potential evidentiary sources.

201 *See generally* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996).

202 Indeed, the drafters provided little direct discussion of the "whole record" provision. The Senate Committee on the Judiciary did note that the "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." S. COMM. ON THE JUDICIARY, ADMINISTRATIVE PROCEDURE ACT, S. REP. No. 79-752, at 28 (1945). This comment seems to be motivated by a concern that judges, when reviewing agency action, might unfairly prejudice either the plaintiff or the defendant agency by reviewing only *parts* of the record instead of the *whole* record.

203 92 CONG. REC. S2148 (daily ed. Mar. 12, 1946) (statement of Sen. Smith).

> thus be subject to judicial review under the bill. It would not be limited to constitutional rights or limitations alone.[204]

In other words, the APA is "a simplified statement of judicial review designed to afford a remedy for every legal wrong."[205] Moreover, the drafters seemed to assume that questions of constitutional rights or limitations would be included in the APA's scope. The modern assumption underlying the non-record-rule approach—that constitutional claims are somehow immune from the APA's judicial review provisions—would have been foreign to the APA's drafters.

Second, the APA was not intended to broaden the scope of judicial review of agency action beyond the boundaries already developed by courts in pre-APA cases. Pursuant to this understanding, I discuss some of these pre-APA cases in the following section. At the time, many scholars and practitioners were concerned that the "on the whole record" language would broaden courts' review powers well beyond the pre-APA norm.[206] The drafters thus sought to reassure opponents that the judicial review procedures did not "expand the scope of judicial review, nor reduce it directly by implication."[207] Instead, the drafters were simply trying to codify existing judicial review procedure: "The provisions of this section are technical but involve no departure from the usual and well understood rules of procedure in this field."[208] This included the widely accepted notion that questions of fact should be left to the agency while "questions of law are for courts rather than agencies to decide in the last analysis."[209] It also included some version of the record rule that the Supreme Court had developed in its pre-APA precedent, as I discuss in the following Section.[210]

These two themes suggest a minimalist approach to extra-record evidence questions. Courts should view the APA as

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[204] 92 CONG. REC. H5654 (daily ed. May 24, 1946) (statement of Rep. Walter).

[205] 92 CONG. REC. S2151 (daily ed. Mar. 12, 1946) (statement of Sen. McCarran).

[206] Roni A. Elias, *The Legislative History of the Administrative Procedure Act*, 27 FORDHAM ENV'T L. REV. 207, 222 (2016).

[207] 92 CONG. REC. S2163 (daily ed. Mar. 12, 1946) (quoting Allen Moore, *The Proposed Administrative Procedure Act*, 22 DICTA 1, 14–15 (1945)); *see also* Elias, *supra* note 206, at 222 ("Responsive testimony made it unequivocally clear that the purpose of the phrase ['on the whole record'] was not to broaden the review powers of the court . . . to any extent." (quotation marks omitted)).

[208] 92 CONG. REC. H5654 (daily ed. May 24, 1946) (statement of Rep. Walter).

[209] S. REP. No. 752, at 28 (1945).

[210] *See supra* notes 206–10.

intended—a complete statement of judicial review of agency action.[211] The Supreme Court has echoed this sentiment, noting, in a different context, that the APA "sets forth the full extent of judicial authority to review executive agency action for procedural correctness."[212] If it truly offers the full framework for judicial review of agency action, then courts should apply the APA's judicial review provisions to every claim that arises under its auspices, including claims that agency action was "contrary to constitutional right."[213] A plain reading of the text of the APA, informed by legislative history, suggests that constitutional challenges to agency action cannot be separated from the APA's procedural structure. Rather, constitutional claims and arbitrary and capricious claims should be treated as procedurally synonymous.

C. Pre-APA Precedent

Administrative law did not begin with the APA.[214] Indeed, as discussed above, the drafters of the APA sought to complement the recognized norms of judicial review of agency action.[215] Thus, a thoughtful application of the APA should consider and seek to incorporate those contemporary norms.

By the time of the APA's passage in 1946, the Supreme Court had developed a robust administrative law jurisprudence, much of it involving now-defunct (but once incredibly powerful) federal

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211 This argument aligns with the notion of "APA originalism," the idea that the text of the APA—not judge-made common law—should be the foundation and focus of administrative law. *See generally* Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807 (2018). *See also* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 119 (1998) (arguing that the text of the APA, not administrative common law, should assume "the dominant position" in "just about all cases reviewing federal administrative action").

212 FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513 (2009) (discussing the proper standard for arbitrary and capricious review when an agency changes existing policy); *cf.* Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, 435 U.S. 519, 549 (1978) ("[Courts] should . . . not stray beyond the judicial province . . . to impose upon the agency its own notion of which procedures are best or most likely to further some vague, undefined public good." (quotation marks omitted)).

213 5 U.S.C. § 706(2)(B).

214 *See generally* Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (2016) (tracing the history of federal regulation and the courts before the passage of the APA).

215 *See* Elias, *supra* note 206, at 222 ("The legislative history shows that Congress intended the APA's form of judicial review to supplement, not replace, those established forms."). *But see* Bernick, *supra* note 211, at 815 ("In the final analysis, the APA was designed both to codify *and* transform. It enshrined the broad contours of judicial review doctrine and agency practice that had developed in preceding years, but it also altered those contours in subtle but important ways." (emphasis in original)).

agencies like the Interstate Commerce Commission (ICC). I will not attempt a full review of this history, but I will highlight some relevant themes. First, pre-APA courts often referenced some notion of a presumption of regularity for administrative action. Second, pre-APA courts often stressed what is now known as the record rule for all judicial review of agency action. Finally, while there was much uncertainty on the proper scope of evidence for constitutional challenges to agency action, several early opinions suggest that one consistent evidentiary standard should be applied to all judicial review of agency action.

The Supreme Court referenced the presumption of regularity well before the APA's passage. In *United States v. Chemical Foundation*,[216] the Supreme Court declared that 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."[217] In *United States v. Morgan*,[218] the Court took issue with a district court's decision to authorize livestock companies to interview and depose the Secretary of Agriculture in connection with a rate limitation order dispute.[219] Rather, courts must respect "the integrity of the administrative process" and refrain from "prob[ing] the mental processes of the Secretary."[220] These principles have undergirded post-APA jurisprudence on judicial review of agency action.

The record rule also did not begin with the APA. Some early precedent cast doubt on the idea of courts restricting their review of evidence to the administrative record in challenges to agency action. In an 1896 case involving a railroad's dispute with the ICC over allegedly unfair rail rates, the Court rejected the notion that "either party . . . is to be restricted to the evidence that was before the Commission."[221] By 1918, however, the Court had changed its tune. In another challenge brought by a railway company against the ICC for allegedly ultra vires action, the Court held that extra-record evidence was "clearly inadmissible . . . because, on the issues presented, the validity of the order must be determined upon the evidence introduced before the Commission."[222] Justice Louis Brandeis reiterated this point in a later case involving allegedly

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216 272 U.S. 1 (1926).
217 *Id.* at 14–15.
218 313 U.S. 409 (1941).
219 *See id.* at 413–14.
220 *Id.* at 422 (quotation marks omitted).
221 Cincinnati, N.O. & T.P. Ry. v. Interstate Com. Comm'n, 162 U.S. 184, 196 (1896).
222 Louisville & Nashville Ry. v. United States, 245 U.S. 463, 466 (1918).

confiscatory water rates.[223] He reasoned that once an agency established a record of all evidence consulted during its decision-making process, "[n]o additional evidence may be introduced" in the reviewing court.[224] Thus, by the time the APA was drafted, judges and practitioners likely recognized something akin to the modern-day record rule governing judicial review of agency action.

Finally, pre-APA courts occasionally dealt with constitutional challenges to agency action, but their treatment of these cases, at least with respect to the record rule question, was inconsistent. In *Tagg Bros. & Morehead v. United States*,[225] the Supreme Court suggested that there might be a different evidentiary standard for constitutional challenges to agency action. The case involved a challenge to the validity of an order from the Secretary of Agriculture fixing tariff rates.[226] The Court dismissed all claims and held that the lower court should not have allowed evidence beyond the record submitted by the Secretary.[227] In its ruling, the Court reiterated the record rule but offered a caveat:

> The validity of an order of the Secretary, like that of an order of the Interstate Commerce Commission, must be determined upon the record of the proceedings before him[ ]—save as there may be an exception of issues presenting claims of constitutional right, a matter which need not be considered or decided now.[228]

This passing comment is arguably dicta. But the unresolved suggestion is puzzling. At the very least, it suggests that constitutional challenges to agency action are fundamentally different from other challenges because they implicate constitutional rights and, therefore, require some greater evidentiary leeway than a strict application of the record rule.

In *Ohio Valley Water Co. v. Borough of Ben Avon*,[229] a 1920 case involving a due process challenge to allegedly confiscatory agency action, the Court insisted that courts should always engage in an "independent judgment as to both law and facts" when such claims

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223 Ohio Valley Water Co. v. Borough of Ben Avon, 253 U.S. 287, 290 (1920).

224 *Id.* at 293 (Brandeis, J., dissenting); *see also* Liscio v. Campbell, 34 F.2d 646, 647 (2d Cir. 1929) ("[T]he final hearing upon the bill must in any case be limited to the proceedings before the administrator.").

225 280 U.S. 420 (1930).

226 *Id.* at 431.

227 *See id.* at 443.

228 *Id.*

229 253 U.S. 287 (1920).

are presented.[230] It is unclear exactly what the Court meant here. Perhaps "independent judgment" means that plaintiffs should be allowed to freely supplement the administrative record. On the other hand, it may simply indicate that appellate courts reviewing lower court decisions should engage in a de novo review of the factual record submitted, giving no deference to the lower court's interpretation of the record. After *Ohio Valley Water*, some lower courts interpreted the "independent judgment" language as a directive to hear evidence outside of the record presented when a plaintiff challenges agency action on constitutional grounds.[231] Other lower courts disagreed, arguing that constitutional challenges should still be limited to the administrative record.[232]

In later cases, the Supreme Court applied the record rule even in constitutional challenges to agency action, suggesting that the approach in *Ohio Valley Water* and *Tagg Bros.* was more the exception than the rule. For example, in *Federal Power Commission v. Natural Gas Pipeline Co. of America*,[233] the Court considered a due process challenge to a rate scheduling order issued by the Federal Power Commission.[234] In reviewing the constitutional questions posed, the Court saw no need to go beyond the record submitted by the Commission. As the Court explained:

> Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's

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[230] *Id.* at 289.

[231] *See, e.g.*, Denver Union Stock Yard Co. v. United States, 57 F.2d 735, 739 (D. Colo. 1932):

> Where the attack [against an administrative order] is made upon constitutional grounds, a court is required to exercise its independent judgment as to both law and facts.
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> . . .
>
> We are compelled, therefore, to hear [petitioner's] evidence and to decide for ourselves whether the order of the Secretary deprives petitioner of its property without due process of law.

[232] *See, e.g.*, St. Joseph Stock Yards Co. v. United States, 11 F. Supp. 322, 327 (W.D. Mo. 1935) ("If in a judicial review of an order of the Secretary his findings supported by substantial evidence are conclusive upon the reviewing court in every case where a constitutional issue is not involved, why are they not conclusive when a constitutional issue is involved?").

[233] 315 U.S. 575 (1942).

[234] *See id.* at 578, 581.

> order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end.[235]

This standard, reiterated a year later in a challenge to a Federal Communications Commission regulation,[236] essentially applies the record rule to constitutional challenges to agency action. The Court announced that, to assess the due process issue, it would consider only the Commission's order in light of "the facts before it"—what today we would call the administrative record. Thus, the Court recognized that, even when a plaintiff raises constitutional questions, courts should generally limit their inquiry to the record before the decisionmaker at the time they made their decision. These rulings, issued as the early versions of the APA were being debated, no doubt would have been on the minds of the drafters. A faithful interpretation of the APA's procedural dimensions must hew close to them.

D. Post-APA Precedent

Supreme Court precedent on the scope of judicial review under the APA also supports a record-rule approach to constitutional challenges. Contrary to the approach of some lower courts, the Court's APA precedent has never suggested that the availability of extra-record evidence depends on the type of claim alone. Rather, *Overton Park* states that supplementation of extra-record evidence is solely dependent upon whether the plaintiff can make a "*strong showing* of bad faith or improper behavior."[237] Thus, while the reviewing court may be the master of law, the agency is the master of facts. As described in *Florida Power & Light Co. v. Lorion*,[238] "[t]he task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the reviewing court."[239] In other words, the standard of review changes according to the legal claim, but the evidentiary "focal point" is the same: "[T]he administrative record already in existence, not some new record made initially in the reviewing court."[240]

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[235] *Id.* at 586.

[236] *See* Nat'l Broad. Co. v. United States, 319 U.S. 190, 227 (1943) (holding that the lower court correctly limited its inquiry "to review of the evidence before the [Federal Communications] Commission" when assessing plaintiffs' constitutional claims).

[237] *Overton Park*, 401 U.S. at 420 (emphasis added).

[238] 470 U.S. 729 (1985).

[239] *Id.* at 743–44 (citation omitted).

[240] *Camp*, 411 U.S. at 142.

This boundary between questions of law and questions of fact in APA review stems from the Court's longstanding principle of judicial deference to agency decision-making. Executive agencies are a separate branch of the same government. They are authorized by Congress to make decisions on highly specialized matters. As noted in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[241] the "Court has recognized, ever since *Fletcher v. Peck*,[242] that judicial inquiries into . . . executive motivation represent a substantial intrusion into the workings of other branches of government."[243] Thus, the rules of judicial review must carefully avoid such substantial intrusions. The underlying assumption is that generalist judges are ill-suited to substitute their own judgment for the reasoned judgment of an agency decisionmaker.

Furthermore, introducing extra-record evidence often requires extra-record discovery. And judge-sanctioned discovery has the potential to amount to a particularly substantial intrusion into the workings of the Executive Branch. Burdensome discovery—such as deposing government officials, answering interrogatories, gathering documents for production lists—costs the government time and money and has the potential to disrupt the ongoing business of administrative governance. This is why, as stated in *Arlington Heights*, "[p]lacing a decisionmaker on the stand is [ ] usually to be avoided."[244] Thus, courts attach a "presumption of regularity" to the "actions of Government agencies," including the submission of an administrative record for judicial review.[245] Applying the APA record rule to constitutional challenges to agency action is in keeping with this longstanding Supreme Court jurisprudence on the limits of judicial review of agency action. Within this framework, the record rule plays an important role in limiting judicial intrusion into agency decision-making, ensuring speedy resolution of plaintiffs' legitimate claims against agencies, and limiting frivolous fishing expeditions that waste government funds.

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241 429 U.S. 252 (1977).

242 10 U.S. (6 Cranch) 87 (1810).

243 *Arlington Heights*, 429 U.S. at 268 n.18 (quotation marks omitted).

244 *Id.* (quotation marks omitted); *see also* Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985) ("The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.").

245 U.S. Postal Serv. v. Gregory, 534 U.S. 1, 10 (2001).

However, the APA does not demand complete judicial abstention. It requires reviewing courts to "set aside"[246] unlawful or unconstitutional agency actions after reviewing "the whole record."[247] In other words, the APA provides a presumption of thorough judicial review of questioned agency action. Moreover, while the "whole record" requirement prohibits courts from probing the "mental processes of administrative decisionmakers,"[248] it also requires that courts engage in something more than a cursory review of agency action. Indeed, the Court has indicated that the APA "imposes a general 'procedural' requirement of sorts by mandating 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."[249]

A robust bad faith exception to the record rule ensures that courts can engage in a thorough review of agency action, particularly in constitutional challenges. Specifically, courts should interpret the strong showing of bad faith and improper behavior standard broadly. The bad faith standard should encompass *Overton Park*'s suggestion that a "bare record" that does "not disclose the factors that were considered" may necessitate extra-record evidence to "determine if the [decisionmaker] acted within the scope of his authority."[250] After all, a bare record may be a strong indicator of bad faith. The standard should also encompass the similar statement, in *Camp*, that extra-record evidence may be necessary when there is "such failure to explain administrative action as to frustrate effective judicial review."[251] Courts should interpret failures to explain agency action as presumptive evidence of bad faith. When agencies fail or refuse to adequately explain their decisions, the burden should be on them to "provide an explanation,"[252] in the Court's words, that will allow thorough judicial review.

One strong counterargument against a robust bad faith exception stems from the Supreme Court's admonition in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*[253] that courts cannot impose additional procedural

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246 5 U.S.C. § 706(2).
247 5 U.S.C. § 706.
248 *Overton Park*, 401 U.S. at 420.
249 Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 654 (1990).
250 *Overton Park*, 401 U.S. at 420.
251 *Camp*, 411 U.S. at 142–43.
252 *Pension Benefit Guar. Corp.*, 496 U.S. at 654.
253 435 U.S. 519 (1978).

requirements on agencies beyond those specified in the APA.[254] Theoretically speaking, the record rule is a procedural requirement derived from the text of the APA.[255] Following the reasoning of *Vermont Yankee*, a court that allows plaintiffs to supplement the record in a constitutional challenge to agency action may be "impos[ing] . . . its own notion of which procedures are . . . most likely to further some vague, undefined public good."[256] After all, forcing an agency to comply with discovery requests imposes a kind of procedural hurdle.

However, *Vermont Yankee* is not fatal to a robust bad faith exception. First, the APA *requires* courts to "set aside agency action" that is arbitrary and capricious, "contrary to constitutional right," or otherwise unlawful.[257] The APA would not at once require courts to set aside unlawful agency action and hamstring them from doing just that by proscribing any supplementation of inadequate records. Second, allowing extra-record evidence in some constitutional challenges to agency action is far less burdensome than the additional procedures the Court was reviewing in *Vermont Yankee*. There, the Court sought primarily to reiterate the "very basic tenet of administrative law" that "[a]bsent constitutional constraints or extremely compelling circumstances . . . agencies should be free to fashion their own rules of procedure."[258] Allowing courts to demand extra-record evidence in limited situations is less burdensome than the court-imposed rulemaking procedures reviewed in *Vermont Yankee*, procedures that went well beyond the APA's default rules. Moreover, a strong showing of bad faith may be just the "extremely compelling circumstance[ ]"[259] that the *Vermont Yankee* Court thought would justify courts imposing extraneous procedure. Finally, the fact that the Court recently reaffirmed some version of the bad faith exception suggests that the exception is consistent with *Vermont Yankee*.

IV. THE PUBLIC POLICY CASE FOR A RECORD-RULE APPROACH

This Part explores several policy arguments in favor of a record-rule approach. Ultimately, two important interests are at stake in disputes over extra-record evidence on constitutional

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254 *Id.* at 524.
255 *See* 5 U.S.C. § 706; Gavoor & Platt, *supra* note 18, at 19.
256 *Vermont Yankee*, 435 U.S. at 549.
257 5 U.S.C. § 706–(2)(B).
258 *Vermont Yankee*, 435 U.S. at 543–44 (quotation marks omitted).
259 Id. at 543.

claims. First is the plaintiff's interest in receiving adequate judicial review.[260] After all, the APA instructs courts to "set aside" agency action that infringes upon claims of constitutional right.[261] Second is the administrative agency's interest in avoiding burdensome litigation. Agencies, empowered by congressional statute and directed by the executive, are engaged in important and specialized work, often in obscure and technical subject areas. Courts rightfully defer to their judgment on technical issues, including the development of administrative records. Courts should impede the independent work of agencies only when they have a good reason to do so. The APA recognizes this, having set specific boundaries on judicial review. Any evidentiary framework for judicial review of agency action must balance the competing interests of private plaintiffs and of agencies themselves.

One of the central policy arguments against a non-record-rule approach is that it may undermine the APA's "whole record" limitation on judicial review of agency action, thereby potentially imposing significant burdens on agency policymaking. By allowing extra-record evidence as a matter of course for all constitutional challenges to agency action, a non-record-rule approach would create a problematic loophole. It would give unsuccessful APA plaintiffs a fail-safe backup plan that allows them to evade the APA's evidentiary limitations.[262] Smart APA plaintiffs might simply add a constitutional claim to their complaint to evade the record rule in the first instance. On the other hand, plaintiffs who try but fail to meet the *Overton Park* "substantial showing" standard could potentially amend their complaint to include a constitutional claim, thereby sidestepping *Overton Park* altogether.[263]

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[260] *See* Saul, *supra* note 54, at 1309 (arguing that, by urging more restrictive record rule standards, administrative agencies have frustrated adequate judicial review of APA claims).

[261] 5 U.S.C. § 706(2).

[262] *Cf. Harvard Pilgrim Health Care*, 318 F. Supp. 2d at 10 ("The APA's restriction of judicial review to the administrative record would be meaningless if any party seeking review based on statutory or constitutional deficiencies was entitled to broad-ranging discovery.").

[263] *Cf. Jarita Mesa Livestock Grazing Ass'n*, 58 F. Supp. 3d at 1238:

> [T]o hold [that constitutional claims are not subject to the APA's procedural provisions] 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 ones of the Federal Rules of Civil Procedure.

Thus, agencies could face more discovery requests, prolonged litigation, and higher compliance costs.[264]

The claim-specific approach is also unconvincing. Cases that use this approach tend to create difficult line-drawing problems. Some claim-specific cases attempt to distinguish between constitutional claims that challenge the substance of agency decision-making and those that challenge the procedures used to reach a decision.[265] Others try to distinguish between constitutional claims that overlap with plaintiffs' nonconstitutional claims and those that are fundamentally different.[266] As a practical evidentiary standard, both distinctions are probably unworkable. What if the questioned procedure directly affected the substance of the decision? How much overlap is too much for extra-record evidence? These line-drawing problems would grant the trial judge considerable discretion. A plaintiff-friendly judge could find unique questions raised by any constitutional challenge to agency action, thus necessitating extra-record evidence. An agency-friendly judge could find some overlap between every constitutional and nonconstitutional challenge. The record rule approach no doubt also creates difficult line-drawing problems in applying the bad faith standard. But at least it imposes a burden of production on the plaintiff to show, as an evidentiary matter, why extra-record evidence is appropriate. The claim-specific approach, on the other hand, involves a judge-driven analysis of legal arguments. In an area of law where confusion reigns, clarity of application is a valuable commodity.

A record-rule approach is superior for two main reasons. First, a record-rule approach has the potential to be more predictable and consistent in application. Under this approach, the specific type of legal argument deployed would have no effect on the record supplementation standard used by the court. While the bad faith exception could hardly be considered well-developed,

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[264] This point parallels Justice Thomas's criticism of the Court's endorsement of pretext-based challenges to administrative agency action in *Department of Commerce*. He argued that by invalidating an agency action as "pretextual," the Court "opened a Pandora's box." *Dep't of Com.*, 139 S. Ct. at 2583 (Thomas, J., concurring in part and dissenting in part). Any "significant agency action is vulnerable to the kinds of allegations the Court credits today. . . . Opponents of future executive actions can be expected to make full use of the Court's new approach." *Id.* Likewise, the non-record-rule approach to extra-record discovery in constitutional challenges would provide a powerful tool to the political enemies of any presidential administration to burden the executive branch with endless discovery motions.

[265] *See supra* notes 172–78 and accompanying text.

[266] *See supra* notes 166–73 and accompanying text.

focusing all extra-record-evidence questions around this one exception would further its development as a workable standard. Second, applying the record rule to constitutional challenges to agency action ensures that plaintiffs cannot sidestep the APA's evidentiary restrictions through artful pleading. Why challenge an agency action under the "arbitrary and capricious" standard when you can challenge the action on constitutional grounds and, ipso facto, receive more favorable evidentiary rules? The record-rule approach thus provides clarity and symmetry in application.

The primary argument against the record-rule approach is that it is simply too restrictive. After all, constitutional claims involve critical rights that may trump agency interests in avoiding burdensome litigation and the general deference owed agencies on technical judgments. The record rule, as applied to constitutional claims, may also raise separation of powers concerns. In *Crowell v. Benson*,[267] for example, the Court cautioned, in the context of judicial review of Article I fact-finding, that "the enforcement of constitutional rights" requires federal courts to make an independent judgment free from significant agency interference.[268] Too much deference to agencies on constitutional issues would undermine "the essential independence of the exercise of the judicial power of the United States."[269] To safeguard Article III power, critics may argue, courts *require* an independent assessment on questions of law and fact when constitutional issues are raised.

These critiques come up short. First, many constitutional issues can be resolved on the record as submitted. After all, the record properly includes all materials before the agency at the time it made its decision. If any such materials were not included, the plaintiff can move for record completion without having to make a strong showing of bad faith. Only in those exceptional circumstances when a constitutional issue rears its head *and the record is silent* does the record supplementation question arise. When an agency has committed a constitutional violation and the record does not speak to the violation, extra-record evidence would likely be warranted even under a strict reading of the bad faith exception to the record rule. Second, the record rule deals only with the scope of evidence, not with the standard of review or the availability of review generally. Thus, while the record rule limits the

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[267] 285 U.S. 22 (1932).

[268] *Id.* at 64.

[269] *Id.*

judiciary's ability to make a wholly independent judgment on constitutional issues, it does not deny that independent judgment altogether. For the reasons stated above, this channeling of judicial review is appropriate given the importance of respecting agency spheres of expertise and avoiding burdensome litigation.

A robust bad faith exception that incorporates the "bare record" and "frustration of judicial review" standards also alleviates some of these concerns.[270] In situations where an agency provides such a hollow record that it undermines judicial review, allegations of constitutional violation might be more plausible. Consider recent lawsuits alleging "discriminatory animus" in agency rulemaking. In *Wolf*, for example, the court granted the plaintiffs' motion for extra-record discovery on their equal protection claim, reasoning that, "because evidence of racial animus (if any) will reside outside the administrative record, presumptively limiting discovery to the record can allow the racial motivations underlying racially motivated policymaking to remain concealed."[271] However, under the record rule, a mere allegation of racial animus should not be enough to reach extra-record evidence. To satisfy the *Overton Park* bad faith standard, the administrative record as submitted must be so inadequate as to prevent a court from assessing the agency's stated reasons for a decision.[272] If the agency has not provided a sufficient explanation of its decision-making, it is likely that questionable motivations were at play. This kind of scenario would be the most likely trigger for extra-record discovery on a constitutional claim. In other words, the insufficiency of the record itself may be evidence enough to allow extra-record evidence.[273]

A final policy consideration stems from the recent presidential transition. As the Biden administration takes command of the executive branch, it inherits a deeply divided political landscape. Congress seems hopelessly ineffectual. President Biden, like his

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[270] *See supra* notes 250–53.

[271] *Wolf*, 461 F. Supp. 3d at 795.

[272] *Department of Commerce* has now become the prime example of a bad faith showing. The Court found bad faith because "the evidence tells a story that does not match the explanation the Secretary gave for his decision." *Dep't of Com.*, 139 S. Ct. at 2575. In other words, the record indicated that the Secretary's explanation was pretextual. Thus, if a plaintiff can indicate that the agency has given "contrived reasons" for their decision then they have met the bad faith standard and may add extra-record evidence. *Id.* at 2576.

[273] *Cf. Grill*, 2012 WL 174873, at *4 ("The record, as we know it, . . . does supply a reasonable inference to support some behind-the-scenes decision making, i.e., that not all the reasons for the decision are in the record.").

predecessors, will likely turn to the administrative state to enact critical aspects of his policy agenda. This will, no doubt, lead to lawsuits, with many likely including constitutional challenges. A non-record-rule approach to discovery in these suits would frustrate the ability of the Biden administration to enact its policies. One's view on whether this is essentially good or bad depends, of course, on political preference. But with divided government becoming increasingly commonplace, Republicans and Democrats would likely agree, behind a veil of ignorance, that burdening future administrations with discovery requests and costly litigation could present a serious threat to effective governance.

As then-Professor Elena Kagan declared two decades ago, we live in an age of "presidential administration."[274] Presidents routinely "legislate" through executive branch action, enacting controversial policy initiatives through the arcane procedures of administrative law. I reserve judgment on whether this is essentially good or essentially bad. But the virtues of this system should be decided on the merits, the separation of powers issues addressed head-on. Gumming up the regulatory process through burdensome discovery requests is the wrong way to rein in an administrative state run amok.

CONCLUSION

This Comment has argued that constitutional challenges to administrative agency action should generally be subject to the procedural framework for judicial review imposed by the APA, namely the rule against extra-record evidence. In particular, I argue for a record rule approach to the issue. Courts should limit their review of constitutional challenges to the administrative record submitted by the agency. Only with a "strong showing of bad faith or improper behavior" may plaintiffs supplement this record with extraneous evidence. However, I argue for a broad reading of the bad faith exception to guard against the frustration of judicial review. This approach balances the interests of agencies in avoiding burdensome discovery with the interests of plaintiffs in receiving thorough judicial resolution of their constitutional claims. If adopted, the record-rule approach would add considerable stability to an area of administrative law where it is badly needed.

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[274] Kagan, *supra* note 1, at 2254.