

# Administrative Constitutionalism

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The U.S. Food and Drug Administration adopts a rule requiring tobacco companies to include graphic images warning of the health risks associated with smoking, defending the rule at length against the claim it violates the First and Fifth Amendments.<sup>1</sup> The Department of Education and the Department of Justice (DOJ) jointly issue guidance explaining how elementary and secondary schools can voluntarily consider race consistently with governing constitutional law.<sup>2</sup> The Office of Legal Counsel (OLC) in DOJ issues a memorandum to the Attorney General concluding that the President had constitutional authority to commit U.S. forces as part of the NATO military campaign in Libya and did not need prior congressional approval.<sup>3</sup>

These are three recent examples of “administrative constitutionalism,” in that they involve actions by federal administrative agencies to interpret and implement the U.S. Constitution.<sup>4</sup> Indeed, despite their contentious subject matter,<sup>5</sup> all three are relatively straightforward instances of administrative constitutionalism: the claims at issue involve well-established constitutional requirements, and the agencies expressly engaged with these requirements, relying heavily on Supreme Court constitutional jurisprudence

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\* Vice Dean and Stanley H. Fuld Professor of Law, Columbia Law School. Special thanks to Jessica Bulman-Pozen, Ariela Dubler, Willy Forbath, Vicki Jackson, Trevor Morrison, David Pozen, my fellow participants in the Constitutional Foundations symposium, and to the *Texas Law Review* for sponsoring it.

1. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,694–702 (June 22, 2011) (codified at 21 C.F.R. pt. 1141).

2. U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC., GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY AND AVOID RACIAL ISOLATION IN ELEMENTARY AND SECONDARY SCHOOLS (2012), <http://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.html>.

3. Authority to Use Military Force in Libya, 35 Op. O.L.C. (Apr. 1, 2011), <http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf>.

4. See Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 801 (2010) (defining administrative constitutionalism as “regulatory agencies’ interpretation and implementation of constitutional law”).

5. The D.C. Circuit recently held that the FDA’s rule violates the First Amendment. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1222 (D.C. Cir. 2012). The use of race in educational contexts has provoked numerous Supreme Court decisions, with yet another case to be decided this term, *Fisher v. University of Texas*, 132 S. Ct. 1536 (2012) (decision granting certiorari). Although dispute over the lawfulness of President Obama’s initiation of the use of force in Libya largely ceased when the Libyan government was overturned, debate over the proper constitutional scope of the President’s Commander in Chief power and Congress’s role with respect to military actions is long lasting and deep. See, e.g., David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 945–50 (2008).

in doing so.<sup>6</sup> Such instances of administrative constitutionalism are a frequent occurrence,<sup>7</sup> reflecting the reality that most governing occurs at the administrative level and thus that is where constitutional issues often arise.

But administrative constitutionalism potentially has a much wider ambit. What about the Department of Housing and Urban Development's (HUD) recent final rule prohibiting both public and private housing practices that have a disparate impact on racial groups or perpetuate segregated housing patterns?<sup>8</sup> HUD based its rule simply on the Fair Housing Act (FHA) and did not discuss any constitutional issues the rule might raise.<sup>9</sup> Yet, plainly, HUD's rule could be seen as part of an effort to pursue the constitutional goal of equal protection by expanding housing opportunities for racial minorities and addressing continuing effects of past housing discrimination.<sup>10</sup> Does the lack of express engagement with these constitutional issues in the rule itself preclude viewing it as a form of administrative constitutionalism? Should it matter if HUD officials were internally debating and considering possible constitutional dimensions of the proposed rule?<sup>11</sup>

Or what about the actions by administrative officials over the years to support and expand Social Security? President Franklin Roosevelt included "the right to adequate protection from the economic fears of old age, sickness, accident, and unemployment" in the Second Bill of Rights he proposed in his 1944 State of the Union address.<sup>12</sup> The very need to include such a right to economic and income security in a Second Bill of Rights

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6. See Authority to Use Military Force in Libya, 35 Op. O.L.C. at 6–9 (defending Obama's decision to intervene in Libya on the basis of past constitutional jurisprudence and statutory guidance); Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. at 36,694–702 (justifying the FDA rule requiring warnings on cigarette packages on the grounds that it is permissible according to the relevant Supreme Court precedents); U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC., *supra* note 2 (discussing the requirements of past precedent, including *Brown v. Board of Education* and *Grutter v. Bollinger*, in the context of using race to achieve diversity in elementary and secondary schools).

7. See Lee, *supra* note 4, at 804 & n.12 (enumerating several examples of administrative constitutionalism and suggesting that the phenomenon is neither new nor infrequent).

8. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,479–80 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100).

9. See, e.g., *id.* at 11,460–61, 11,465–67 (describing reasons for adopting the rule and justifying its interpretation of the FHA as encompassing disparate-effects claims in response to comments).

10. See Olatunde Johnson, *The Last Plank: Rethinking Public and Private Power to Advance Fair Housing*, 13 U. PA. J. CONST. L. 1191, 1193–94 (2011) (describing a range of efforts being pursued to affirmatively further minority access to housing). The federal government's authority to force consideration of racial impact and to apply a disparate-impact standard other than to remedy identified racial discrimination is contested. Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1342–43 (2010).

11. See Lee, *supra* note 4, at 827–44 (discussing the Federal Communications Commission's (FCC) promulgation of rules requiring broadcast licensees and common carriers to adopt equal employment programs as instances of administrative constitutionalism, notwithstanding that these rules were justified on a statutory basis and the FCC did not discuss constitutional equal protection).

12. President Franklin D. Roosevelt, State of the Union Message to Congress (Jan. 11, 1944), available at [http://www.fdrlibrary.marist.edu/archives/pdfs/state\\_union.pdf](http://www.fdrlibrary.marist.edu/archives/pdfs/state_union.pdf).

indicates its exclusion from the first, and the U.S. Constitution is notoriously bare of most affirmative rights.<sup>13</sup> But Social Security has become over time a core pillar of the relationship between the federal government and its citizens.<sup>14</sup> It is now “constitutional” in the sense of being part of “the basic rules of political participation and citizenship, fundamental institutions and frameworks for governance, and foundational normative precepts for state practice as well as private behaviors.”<sup>15</sup> Insofar as administrative processes played a central role in the transformation of Social Security and other statutory regimes into basic features of the nation’s political life, should we understand these processes as instances of administrative constitutionalism notwithstanding that they go beyond the requirements of the Constitution itself?<sup>16</sup>

Finally, what about the statutes and legal requirements that create and govern the modern administrative state? The Constitution identifies institutions at the apex of government—Congress, the President, the Supreme Court—and leaves the task of constructing the rest to the legislative process.<sup>17</sup> As a result, the agencies that make up the federal government we know today, such as the Defense, State, and Treasury Departments or the Environmental Protection Agency and the Food and Drug Administration, owe their existence to statutes.<sup>18</sup> The rules governing how these agencies

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13. See Mark Tushnet, *An Essay on Rights*, 62 TEXAS L. REV. 1363, 1393 (1984) (asserting that “the rights actually recognized in contemporary constitutional law are almost all negative ones” and noting that, in the United States, positive rights are largely recognized through statutes).

14. See William G. Dauster, *Protecting Social Security and Medicare*, 33 HARV. J. ON LEGIS. 461, 468 (1996) (stating that the majority of Americans “consider Social Security to be one of the government’s ‘very most important’ programs”).

15. See WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 83 (2010) (advancing this characterization of what it means for a measure to be constitutional and discussing Social Security’s normative entrenchment); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 412, 424 (2007) (arguing that “[m]any of our most important individual rights” and basic institutions of government “stem from statutes rather than the Constitution” and including Social Security as one example).

16. See ESKRIDGE & FEREJOHN, *supra* note 15, at 2–9, 12–18, 31–34, 171–92 (characterizing the process by which the “small ‘c’” constitution emerges from statutory entrenchment, administrative actions, and public deliberation as “administrative constitutionalism” and describing how this process played out with respect to Social Security).

17. See JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 30 (2012) [hereinafter MASHAW, *CREATING*] (“The American Constitution of 1787 left a hole where administration might have been.”); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 576–77 (1984) (“The Constitution names and ascribes functions only to the Congress, President and Supreme Court, sitting in uneasy relation at the apex of the governmental structure . . .”).

18. The War, State, and Treasury Departments were created by the first Congress in 1789, with the Navy Department following soon after in 1798. Act of Sept. 2, 1789, ch. 12, 1 Stat. 65, 65 (establishing the Treasury Department); Act of Sept. 15, 1789, ch. 14, 1 Stat. 68, 68 (establishing the State Department); Act of Aug. 7, 1789, ch. 7, 1 Stat. 49, 49–50 (establishing the War Department); Act of Apr. 30, 1798, ch. 35, 1 Stat. 553, 553 (establishing the Navy Department). The War and Navy Departments were consolidated in 1947, and named the Department of Defense in 1949. See National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495, 499–500; Act of

operate come from several sources, two central ones being the Administrative Procedure Act (APA) and judicial doctrines that substantially amplify its terms.<sup>19</sup> Should this legal apparatus be considered part of administrative constitutionalism, even though it is developed by Congress and judges and framed as nonconstitutional law?<sup>20</sup> Does administrative constitutionalism also extend to our basic normative conceptions about what counts as proper public administration?<sup>21</sup> What about those administrative features, such as procedures providing opportunities for an individualized hearing or internal complaint and remedial mechanisms, that the courts have held satisfy due process and other constitutional demands?<sup>22</sup>

All of these examples have recently been offered as instances of administrative constitutionalism. All represent important dimensions of American constitutional development and reflect the central role that the modern administrative state plays in our constitutional system today. Although administrative constitutionalism could be viewed as including just the application of established constitutional requirements by administrative agencies, I believe such an account would be too narrow. In practice, administrative constitutionalism also encompasses the elaboration of new constitutional understandings by administrative actors, as well as the construction (or “constitution”) of the administrative state through structural and substantive measures.<sup>23</sup>

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Aug. 10, 1949, Pub. L. No. 81-216, ch. 412, sec. 12(a), 63 Stat. 578, 591 (changing the name of the department from the National Military Establishment to the Department of Defense). President Richard Nixon created the Environmental Protection Agency by executive action. Reorganization Plan No. 3 of 1970, 3 C.F.R. 199 (1970), *reprinted in* 5 U.S.C. app. at 643 (2006), *and in* 84 Stat. 2086 (1971). The Food and Drug Administration traces its origins to chemical analyses performed by the Department of Agriculture, but in modern form began with the 1906 Pure Food and Drug Act. *History*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/AboutFDA/WhatWeDo/History/default.htm> (last updated Mar. 1, 2013); Pure Food and Drugs Act, Pub. L. No. 59-384, 34 Stat. 768 (1906).

19. See Gillian E. Metzger, *Foreword: Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1298–302 (2012) [hereinafter Metzger, *Embracing*] (discussing the judicial refinement of a doctrinal framework of administrative law through the APA and case law).

20. See Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 490–97 (2010) [hereinafter Metzger, *Ordinary Administrative Law*] (arguing that constitutional concerns have animated judicial decisionmaking and the development of administrative law doctrines).

21. See ELIZABETH FISHER, *RISK REGULATION AND ADMINISTRATIVE CONSTITUTIONALISM* 27–28, 30 (2007) (defining administrative constitutionalism as a legal culture characterized by two contrasting ideals: the rational–instrumental, guided by the principle of objectivity, and the deliberative–constitutive, which relies on the judgment of individual administrators to maintain the integrity of administrative systems).

22. See Metzger, *Ordinary Administrative Law*, *supra* note 20, at 487–90 (describing the features of administrative law that connect administrative law with constitutional norms through either direct compliance with constitutional mandates or avoidance of violating recognized constitutional provisions).

23. As described in Part I, different scholars have offered different accounts of administrative constitutionalism, with some focusing on agency engagement with established constitutional requirements, others emphasizing broader norm deliberation and creation, and still others including Congress and the courts as part of the administrative constitutionalism process, as well as agencies.

Yet recognizing the divergences among these examples of administrative constitutionalism suggests a need for some exegesis of its different dimensions. Such an exegesis is particularly timely now, as administrative constitutionalism is increasingly becoming a subject of study.<sup>24</sup> This attention to administrative constitutionalism is overdue, as it represents a main mechanism by which constitutional meaning is elaborated and implemented today. Given the dominance of the modern administrative state, a full picture of contemporary constitutionalism in the United States must include administrative constitutionalism—the constitutional understandings and interpretations developed by agencies as well as those that structure the administrative state itself.

Identifying administrative constitutionalism's various forms highlights the central challenges confronting it as a form of constitutional interpretation. Many of these challenges derive from core separation of powers precepts and constitutional principles of democratic accountability. Administrative agencies occupy an ambiguous constitutional space; they are barely mentioned in the Constitution itself and owe their existence to statutory delegations of authority from Congress.<sup>25</sup> They lack direct electoral accountability, with the resultant democratic legitimacy concerns often countered by emphasis on political oversight through the President and Congress and public participation in administrative decisionmaking.<sup>26</sup> What justifies administrative efforts to move the nation beyond recognized constitutional requirements to develop new constitutional understandings, especially if doing so means pushing at the limits of agencies' delegated authority and acting in ways not initiated by political leaders? A similar issue of institutional overstepping arises when administrative constitutionalism takes the form of judicial efforts to address constitutional concerns raised by the modern administrative state through the medium of ordinary administrative law.<sup>27</sup>

My own view is that administrative constitutionalism's virtues outweigh these concerns with unauthorized administrative or judicial action. In fact,

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I mean here to offer a capacious definition that can accommodate the variety of approaches described below.

24. See *infra* subpart I(A).

25. See *infra* text accompanying notes 103–07.

26. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 469–503 (2003) (detailing different political accountability models and critiquing emphasis on presidential accountability); see also Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1550–54 (1992) (emphasizing public participation in bureaucratic decisionmaking as well as review by Congress and the President as responses to the accountability concerns of the administrative state).

27. See, e.g., Seidenfeld, *supra* note 26, at 1543–46 (arguing that the judiciary lacks the capacity to distill common public values and that the courts have no authority to require Congress to change its procedures); see also Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 13–24 (1985) (detailing the separation of powers and federalism problems raised by federal common law).

because of these virtues, administrative constitutionalism can represent a particularly legitimate form of constitutional development. But the accountability challenges it poses are real, particularly given the frequent difficulty involved in identifying instances of administrative constitutionalism in action. Agencies' constitutional engagement is always embedded.<sup>28</sup> It occurs in the context of implementing programs and enforcing statutes, and often agencies do not expressly engage with the constitutional dimensions of their actions—indeed, these dimensions may only become apparent over time. Similarly, courts are rarely open about the constitutional or law-creative aspects of their development of administrative law.<sup>29</sup> Given administrative constitutionalism's attenuated democratic accountability, greater transparency about this method of constitutional development is essential for its legitimacy—even though greater transparency will also likely chill some agency constitutional engagement.

Administrative constitutionalism does not stand alone in crossing the ordinary law–constitutional law divide. Recent constitutional scholarship has highlighted the constitutional role played by ordinary law and the central importance to our constitutional system of political efforts to construct constitutional meaning.<sup>30</sup> Assessing administrative constitutionalism thus may hold implications for the constitutional enterprise writ large. Yet drawing these lessons requires attention to the ways in which agencies differ from other government institutions. As I argue below, one potentially fruitful approach to increasing administrative constitutionalism's transparency is to encourage more overt administrative engagement with constitutional concerns through the mechanisms of ordinary administrative law. Similar exploitation of the ordinary law–constitutional law overlap could occur in other contexts, for example by courts according entrenched statutory norms more of a constitutional status. Doing so has the advantage of linking judicial constitutionalism with its legislative and administrative versions. Yet collapsing the ordinary law–constitutional law divide more would pose much more of a threat to our constitutional system and to the very practices of legislative and administrative constitutionalism it intends to support.

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28. See *infra* text accompanying note 83; see also Metzger, *Ordinary Administrative Law*, *supra* note 20, at 484, 507–08 (describing the linkage and reciprocal relationship between constitutional law and ordinary administrative law).

29. See Metzger, *Ordinary Administrative Law*, *supra* note 20, at 534 (“Not only has the Court not overtly developed ordinary administrative law into a tool for constitutional enforcement, it has largely failed to identify the constitutional concerns underlying its development of ordinary administrative law doctrines.”).

30. For descriptions of constitutional construction, see JACK M. BALKIN, *LIVING ORIGINALISM* 3–6, 69–73 (2011) and Keith E. Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119, 120–25 (2010) [hereinafter Whittington, *Constructing*], and see generally KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWER AND CONSTITUTIONAL MEANING* (1999) [hereinafter WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION*].

## I. The Many Varieties of Administrative Constitutionalism

Administrative constitutionalism is coming into its own. In recent years, a number of scholars have focused on the interplay between administrative actors, and the national administrative state more broadly, and constitutionalism.<sup>31</sup> The attention to administrative constitutionalism is a natural offshoot of current trends in constitutional scholarship—in particular, the emphasis on popular constitutionalism, the historical evolution of constitutional understandings, and the role that measures outside the Constitution play in constructing basic constitutional requirements.<sup>32</sup> Given the post-New Deal dominance of administrative government,<sup>33</sup> the administrative realm is inevitably an important element in these efforts to expand national constitutional horizons. Administrative constitutionalism is equally a logical result of developments in administrative law scholarship, which is increasingly focused on questions of institutional design and internal agency structure.<sup>34</sup> This focus leads to greater attention to what actually goes on in agencies and how internal agency dynamics connect to broader constitutional issues about the shape of the federal government.<sup>35</sup> Politics and real-life events are a third potent factor behind administrative constitutionalism's rise. The birth of the national security state, marked by expanded presidential power and limited congressional or judicial oversight,

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31. See scholarship cited *infra* subpart I(A).

32. See Lee, *supra* note 4, at 806–10 (situating administrative constitutionalism in the context of popular constitutionalism and departmentalism). The literature on these developments in constitutional scholarship is vast. For a brief discussion and typology of popular constitutionalism, and citations to the literature, see David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2053–64 (2010). For recent leading accounts of constitutional change, see generally BALKIN, *supra* note 30; ESKRIDGE & FEREJOHN, *supra* note 15; DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010); Bruce Ackerman, *2006 Oliver Wendell Holmes Lectures: The Living Constitution*, 120 HARV. L. REV. 1737 (2007); Young, *supra* note 15, at 448–61; and see also Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011 (2012) (reviewing JACK M. BALKIN, *LIVING ORIGINALISM* (2011) and DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010)).

33. See STRAUSS, *supra* note 32, at 122 (stating that “[t]he New Deal is famous for having greatly increased the number of . . . agencies” that combined “executive, legislative, and judicial functions”); Seidenfeld, *supra* note 26, at 1518 (noting that the New Deal encouraged Congress to recognize the expertise of agencies and to turn the “expert agenc[ies] loose to regulate”).

34. See Metzger, *Embracing*, *supra* note 19, at 1363–64 (noting the focus on administrative structure and agency design in recent administrative law scholarship); see generally Jacob E. Gersen, *Designing Agencies*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333, 333–57 (Daniel A. Farber & Anne Joseph O’Connell eds., 2010) (surveying public-choice literature on agency design).

35. See, e.g., Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch From Within*, 115 YALE L.J. 2314, 2316–25 (2006) (describing the need to promote greater internal separation of powers in the face of increasing congressional abdication of policy to the executive branch); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1038–41 (2011) (describing how power is allocated within agencies and the constitutional constraints on that power); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 427–37 (2009) [hereinafter Metzger, *Interdependent*] (describing examples of administrative structures that serve an internal separation of powers function and their constitutional implications).

has highlighted the crucial importance of executive branch constitutionalism.<sup>36</sup> In what follows, after describing several recent accounts of administrative constitutionalism and the interplay of administrative and constitutional law, I underscore a core precept that these diverse approaches all share: a commitment to the constitutional character of ordinary law.

A. *Alternative Accounts of Administrative Constitutionalism*

One prominent analysis of administrative constitutionalism is Sophia Lee's history of the Federal Communication Commission (FCC)'s equal employment rules. Drawing on internal agency records, Lee paints a detailed picture of efforts by FCC attorneys and other administrative officials to use the FCC's licensing and common-carrier oversight as vehicles to further equal protection goals.<sup>37</sup> As Lee describes, these efforts—which included the argument that the FCC was constitutionally required to deny licenses to discriminatory broadcasters and carriers and impose affirmative obligations to develop equal opportunity employment programs on those regulated—went beyond judicial understandings of state action and equal protection.<sup>38</sup> From this history, Lee concludes that administrative constitutionalism often involves “[a]dministrators creatively extend[ing] or narrow[ing] court doctrine in the absence of clear, judicially defined rules” and sometimes selectively ignoring or resisting unfavorable decisions.<sup>39</sup> Of particular note is the way that administrative officials toggled between constitutional and statutory bases for the equal employment rules, ultimately publicly justifying the rules solely on the grounds of the FCC's statutory obligation to regulate in the public interest.<sup>40</sup> Depictions of administrative attention to constitutional issues also surface in scholarship on OLC, which is not surprising given that one of OLC's responsibilities is to assess the

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36. See, e.g., BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 87–95 (2010) (providing a historical account of executive constitutionalism as practiced by the Office of Legal Counsel and the White House Counsel and arguing that these two offices increasingly serve “to give their constitutional imprimatur to presidential power grabs”); Katyal, *supra* note 35, at 2316–19 (acknowledging the expansion of the modern executive branch post 9-11 and proposing a set of modest internal checks on presidential power, particularly in the foreign policy arena); Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1691–93 (2011) [hereinafter Morrison, *Alarmism*] (book review) (responding to Ackerman's “oversimplified account” of executive constitutionalism and suggesting an approach that places greater weight on institutional details and how the executive branch works); Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1403–05, 1408–16 (2012) (book review) (arguing that “an increase in presidential power is not itself an increase in presidential defiance of law or presidential lawlessness” and rejecting an account of law as at odds with politics).

37. Lee, *supra* note 4, at 810–36; see also Sophia Z. Lee, *Hotspots in a Cold War: The NAACP's Postwar Workplace Constitutionalism, 1948–1964*, 26 LAW & HIST. REV. 327, 334–36 (2008) (noting the role that administrative advocacy played in the NAACP's efforts to pursue its civil rights constitutional agenda).

38. *Id.* at 812–16.

39. *Id.* at 801–02.

40. *Id.* at 813–14, 827–36.



constitutionality of proposed Executive branch action.<sup>41</sup> Other scholars have traced the role that administrative practices played in the development of modern constitutional doctrines.<sup>42</sup>

The phenomenon of administrative constitutionalism also lies at the heart of William Eskridge and John Ferejohn's book, *A Republic of Statutes*. They argue that "America enjoys a constitution of statutes supplementing and often supplanting its written Constitution as to the most fundamental features of governance."<sup>43</sup> These statutes not only fill in constitutional gaps, but often transform how the Constitution is understood. A central claim of Eskridge and Ferejohn's account is that the governance structures and norms created by these statutes become entrenched over time through legislative and administrative deliberation.<sup>44</sup> And they identify administrative constitutionalism as the process by which this entrenchment occurs.<sup>45</sup> On their view, administrative constitutionalism includes not just interpreting the Constitution, but also "aggressive agency application of superstatutes to carry out their purposes in a manner that is workable, coherent, and consistent with the nation's other normative commitments."<sup>46</sup>

In Eskridge and Ferejohn's account of administrative constitutionalism, as in Lee's, agency officials are norm entrepreneurs, advancing new

41. See Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1218–19, 1226–32 (2006) [hereinafter Morrison, *Avoidance*] (describing instances of the invocation of the constitutional avoidance canon at OLC); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 682–83, 704–17 (2005) (describing OLC and the Solicitor General's office as "the principal constitutional interpreters for the executive branch" and providing details on constitutional interpretation in both). Lee's account is more unusual in showcasing constitutional reasoning by officials in agencies outside of OLC, a theme that is increasingly emerging in scholarship on executive branch lawyering. See David Fontana, *Executive Branch Legalisms*, 126 HARV. L. REV. F. 21, 22–24 (2012) (expanding the analytical scope of the executive branch's legal operations from OLC and the White House Counsel's office (WHC) to broader "civil service legalism"); Rebecca Ingber, *Interpretation Catalysts and Executive Branch Legal Decisionmaking*, 38 YALE J. INT'L L. (forthcoming 2013) (manuscript at 11–12, 11 n.37) (on file with author) (emphasizing that legal interpretation and the formulation of policy are largely the work of thousands of government agency lawyers who play a significant role alongside other actors such as DOJ, WHC, and OLC).

42. See Anuj C. Desai, *Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy*, 60 STAN. L. REV. 553, 574–77 (2007) (tracing the development of the Fourth Amendment idea of communications privacy to early decisions and practices within the Post Office); Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1, 15–20 (2000) (discussing how judicial views of administrative expertise and administrative censorship underlay development of First Amendment doctrine).

43. ESKRIDGE & FEREJOHN, *supra* note 15, at 12–13.

44. *Id.* at 7–8; see also Glen Staszewski, *Constitutional Dialogue in a Republic of Statutes*, 2010 MICH. ST. L. REV. 837, 867–70 (2010) (modeling Eskridge and Ferejohn's account of administrative constitutionalism).

45. ESKRIDGE & FEREJOHN, *supra* note 15, at 33 ("[A]dministrative constitutionalism is the process by which legislative and executive officials . . . advance new fundamental principles and policies.").

46. *Id.* at 24, 33.

understandings of individual rights and the government's role.<sup>47</sup> Moreover, these new understandings often involve administrative officials offering creative interpretations of existing constitutional law and drawing on statutory and regulatory measures as well as the Constitution. By contrast to judicial constitutionalism, which they view as fundamentally "rule oriented, definitive, and principled," Eskridge and Ferejohn describe administrative constitutionalism as "explicitly policy oriented, experimental, and practical."<sup>48</sup> Indeed, they present the traditional, or "Large 'C'" Constitution as often operating mostly on the sidelines, with much of the focus instead on these political enactments that they describe as the "small 'c'" constitution.<sup>49</sup> Although they emphasize actions by agency officials, their picture of administrative constitutionalism is a capacious one and includes actors outside the agency in a dynamic, interactive, and deliberative process of constitutional development.<sup>50</sup> Thus, social movements and legislative enactments prompt agency actions that in turn "are subject to public critique as well as veto by courts, legislatures, and other Executive Branch officials."<sup>51</sup>

Sometimes, however, the process of deliberation and entrenchment that Eskridge and Ferejohn describe fails to occur. Anjali Dalal contends that such failure is evident in the national surveillance context, where initial administrative efforts to rein in the FBI's intelligence-gathering abuses under Herbert Hoover soon eroded and the current governing guidelines sanction much of the activities that were at first condemned.<sup>52</sup> Dalal argues that the history of national surveillance offers a cautionary tale about the potential negative effects of administrative constitutionalism, contending that the combination of a powerful national security mandate and bureaucratic resistance to oversight led to administrative narrowing of civil rights

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47. *Id.* at 33; *see also* Lee, *supra* note 4, at 800–02 (highlighting the important—and independent—role agency administrators played in interpreting the Constitution to support equal employment rulemaking).

48. ESKRIDGE & FEREOHNS, *supra* note 15, at 33.

49. *See id.* at 18 ("Without denigrating the importance of the Large 'C' Constitution, which establishes the basic structure of our government and remains a potential path toward entrenched commitments, we maintain that the small 'c' constitution of statutes is a better way to develop and express our foundational institutions and norms.").

50. *See id.* at 1–2, 23 (characterizing small "c" constitutionalism as the result of robust deliberation and public discourse).

51. *Id.* at 33, 58–59. Eskridge and Ferejohn's terminology is a little unclear; at times they appear to use administrative constitutionalism to refer to specifically agency norm development, at others to refer to a broad process including legislative, judicial, and public input. *Compare id.* at 16 (distinguishing "legislative and administrative constitutionalism"), *with id.* at 31 ("[a]s a general matter, administrative constitutionalism is both the primary means by which social movements interact with the state and the primary means by which governmental actors *deliberate* about how to respond to social movement demands or needs."), *and id.* at 33 ("What we are calling administrative constitutionalism is the process by which legislative and executive officials . . . advance new fundamental principles and policies.").

52. Anjali Dalal, Administrative Constitutionalism and the Re-Entrenchment of Surveillance Culture 14 (unpublished manuscript) (on file with author).

protections and entrenchment of these administrative views with little opportunity for public deliberation.<sup>53</sup> Others have cited recent events, such as OLC's initial sanctioning of waterboarding and other forms of so-called "enhanced interrogation" during the George W. Bush Administration or its conclusion, during the Obama Administration, that the President had the unilateral authority to initiate the military operation in Libya, as grounds for skepticism about administrative constitutionalism's ability to serve as a meaningful constraint on governmental power.<sup>54</sup> National security is not unique in this respect. Administrative constitutionalism can involve narrow as well as expansive understandings of constitutional rights, and on many occasions agencies have rejected a norm-entrepreneurial role.<sup>55</sup> The FCC's prohibition on fleeting expletives and the FDA's tobacco packaging rule are two recent administrative measures attacked as insufficiently attentive to constitutional rights,<sup>56</sup> and the full story of federal civil rights enforcement involves many instances in which agencies resisted assuming a more aggressive role.<sup>57</sup>

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53. *Id.* at 27–29 (identifying the current "surveillance culture [as] the product of an FBI motivated by a powerful mandate and protected by the medieval structure of bureaucracy," with path dependency and historical practice serving to entrench the resultant administratively developed norms despite a lack of broader deliberation).

54. See ACKERMAN, *supra* note 36, at 87–116 (discussing presidential claims to greater power under the Constitution, focusing in part on OLC and the "torture memos" episode); Michael J. Glennon, *The Cost of "Empty Words": A Comment on the Justice Department's Libya Opinion*, HARV. NAT'L SEC. J.F. 1, 18 (2011), <http://harvardnsj.org/2011/04/the-cost-of-empty-words-a-comment-on-the-justice-departments-libya-opinion/> (arguing that OLC is not an "impartial, objective, independent arbiter of the Constitution," but rather an advocate for the President and his policies); Peter M. Shane, *Executive Branch Self-Policing in Times of Crisis: The Challenges for Conscientious Legal Analysis*, 5 J. NAT'L SECURITY L. & POL'Y 507, 515 (2012) (observing that the "process of securing legal analysis [from OLC] after September 11 was anything but balanced, dispassionate, and multivocal"). For a more optimistic view, arguing that executive constitutionalism is not so fundamentally compromised as to demand drastic institutional overhaul, see Morrison, *Alarmism*, *supra* note 36, at 1692–93.

55. Eskridge and Ferejohn themselves acknowledge that "administrative constitutionalism often goes off track" and detail several examples. ESKRIDGE & FEREOHNS, *supra* note 15, at 305, 314–15, 350–58 (identifying the development of the U.S. monetary system and antihomosexual constitutionalism as instances of "administrative constitutionalism gone wrong"); see also *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 508–10 (2009) (noting the FCC's narrowing of its protection for the broadcast of expletives); Lee, *supra* note 4, at 855 (describing the Federal Power Commission's lack of interest in advancing broad constitutional arguments for the agency's power to combat discrimination).

56. *Fox Television Stations, Inc.*, 556 U.S. at 553–56 (Breyer, J., dissenting) (contending that the FCC's explanation for the change in its view of the constitutionality of its "fleeting expletive[s]" policy is inadequate in light of First Amendment censorship concerns); *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1219, 1222 (D.C. Cir. 2012) (holding that the FDA failed to meet its burden so as to justify restricting commercial speech by not providing a "shred of evidence" showing why graphic warnings on cigarette packages would advance the FDA's interest in reducing the number of smokers).

57. See, e.g., *Allen v. Wright*, 468 U.S. 737, 739–40 (1984) (dismissing for lack of standing a suit alleging the IRS did not adopt sufficient standards to deny tax-exempt status to private schools that racially discriminated); *Adams v. Richardson*, 356 F. Supp. 92, 95 (D.D.C. 1973) (finding that out of 113 school districts who reneged on their desegregation plans or were otherwise out of

Another notable feature of Eskridge and Ferejohn's account is that administrative constitutionalism involves not simply promulgation of specific constitutional norms, but also construction of the institutional and administrative apparatus within which such constitutional development takes place. Several of their examples of administrative constitutionalism, such as the development of a national monetary constitution that includes an independent central bank and national currency,<sup>58</sup> are stories of institutional development and entrenchment. Indeed, they note that "[t]he biggest change in the Constitutional structure has been the creation of the modern administrative state," with the result that the "framework for understanding most national lawmaking . . . is no longer Article I, Section 7[] of the Constitution, but is instead the Administrative Procedure Act of 1946."<sup>59</sup> Karen Tani's account of the development of rights language within the federal social welfare bureaucracy in the 1930s and 1940s is another example of such state-creating administrative constitutionalism. Tani argues that the New Deal federal welfare administrators used rights language as an administrative tool to influence on-the-ground administration and helped national authority enter spheres previously left for state and local control.<sup>60</sup>

This creation or "constituting" of the administrative state is more centrally the focus of administrative law scholars' accounts of administrative constitutionalism. Jerry Mashaw's recent excavation of early U.S. administrative practice demonstrates how "over time . . . legislation, administrative practice, and judicial precedent" led to "a set of constitutional conventions concerning the place of administration in American government."<sup>61</sup> Although referencing the "administrative constitution" rather than administrative constitutionalism, Mashaw similarly highlights how the constitutional understandings underlying the national administrative state emerged from actions by agency officials and agency-developed structures and practices.<sup>62</sup> The basic doctrines governing judicial review of administrative action are yet another manifestation of administrative constitutionalism, though the main progenitors here are judges rather than agency officials.<sup>63</sup> As I have argued elsewhere, these administrative law doctrines were developed by judges to address constitutional concerns raised by broad administrative delegations and the attendant risk of arbitrary and

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compliance with Title VI in 1970–1971, the Department of Health, Education, and Welfare failed to take enforcement action against 74 of them).

58. ESKRIDGE & FEREJOHN, *supra* note 15, at 313–48.

59. *Id.* at 10–11; *see also* BALKIN, *supra* note 30, at 5 (describing the creation of key federal departments, the Administrative Procedure Act, the Federal Reserve Act, and other measures as "state-building constructions" (internal quotation marks omitted)).

60. Karen M. Tani, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 *YALE L.J.* 314, 320–23 (2012).

61. MASHAW, *CREATING*, *supra* note 17, at 285.

62. *Id.* at 7–10, 309–12.

63. *See* Metzger, *Ordinary Administrative Law*, *supra* note 20, at 484–85.

unaccountable administrative decisionmaking.<sup>64</sup> In turn, this constitutionally inspired administrative law has a profound effect on how agencies operate and frames our understandings of appropriate agency action.<sup>65</sup>

A fourth approach to administrative constitutionalism focuses even more directly on the constitutional significance that courts assign to administrative mechanisms and administrative decisionmaking. Institutional features such as administrative hearings or review procedures are sometimes constitutionally required, or are at least sufficient to satisfy constitutional demands.<sup>66</sup> A prominent recent example is *Boumediene v. Bush*,<sup>67</sup> where the Court suggested that more expansive administrative procedures could serve as an adequate substitute for judicial habeas review.<sup>68</sup> But the potential constitutional significance of administrative details extends more broadly. Eric Berger has recently emphasized the importance of judicial deference to administrative discretion in individual rights cases, arguing that the Supreme Court takes an inconsistent approach in deciding when deference is appropriate.<sup>69</sup> According to Berger, the Court should pay greater heed to the extent to which the administrative action at issue adheres with administrative law norms in assessing the action's constitutionality.<sup>70</sup> On this view, agencies' political accountability, expertise, use of formal procedures, and reasoned deliberations are all factors for courts to consider in deciding whether to accord deference to agency determinations in constitutional as well as administrative challenges.<sup>71</sup>

#### B. *Administrative Constitutionalism's Common Elements*

All of these examples of administrative constitutionalism involve some relationship between administrative decisionmaking and constitutional interpretation. But the nature of this relationship, and even what counts as the Constitution, varies tremendously.

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64. *Id.* at 491.

65. See Emily S. Bremer, *The Unwritten Administrative Constitution*, FLA. L. REV. (forthcoming 2013) (manuscript at 32–35), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2143161](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2143161)## (highlighting administrative common law's role in defining the function of administrative agencies); Metzger, *Embracing*, *supra* note 19, at 1339 (“Requiring agencies to offer contemporaneous explanations and justifications for their decisions creates internal checks on arbitrary agency action, encouraging agencies to take evidence and expertise into account and fostering internal deliberation.”); Metzger, *Ordinary Administrative Law*, *supra* note 20, at 491–92 (explaining that constitutionally inspired constraints on agency action lead to better documented and more “technocratic” decisionmaking).

66. See Metzger, *Ordinary Administrative Law*, *supra* note 20, at 487–90 (discussing procedural due process, First Amendment licensing, and *Bivens* actions as examples).

67. 553 U.S. 723 (2008).

68. *Id.* at 766–67, 783–87.

69. Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2032–33, 2038–54 (2011).

70. *Id.* at 2036–37.

71. *Id.* at 2058–74.

One central factor concerns who is interpreting the Constitution or developing new constitutional understandings. Here the accounts of administrative constitutionalism fall largely into two camps. In one, administrative agencies or agency officials are the constitutional interpreters, at least in the first instance. In the other, this role is played by the courts, and what brings their decisions within the administrative constitutionalism fold is that the courts either incorporate administrative decisionmaking in their judicial constitutional determinations or construct the doctrinal framework that forms an important part of the world in which agencies operate.<sup>72</sup> A second variable is what counts as constitutional. Some accounts focus on the formal U.S. Constitution, including the familiar tools (text, structure, history, precedent, practical effects, values) used in its interpretation.<sup>73</sup> Others adopt a more capacious account that extends the constitutional label to a wide array of measures—particularly statutes, but also administrative actions and state laws—that, like the Constitution, are entrenched, provide basic rights to individuals, and constitute the government.<sup>74</sup> A third difference is whether administrative constitutionalism serves to develop the meaning of a discrete constitutional provision or requirement that governs an agency's actions, or instead operates to develop the constitutional foundations and structures of the administrative state.

Given this variation, identifying all of these different approaches as versions of administrative constitutionalism might seem to expand the category so far as to denude it of meaning. Each involves a connection between constitutional interpretation and administrative action, but if that is the sole definitional criterion then little may fall outside of administrative constitutionalism's purview. For example, distinguishing administrative constitutionalism from judicial assessment of the constitutionality of the administrative state would become difficult. Similarly, once the field of the constitutional expands to include measures such as statutes or administrative regulations, the line between administrative constitutionalism and ordinary administrative decisions or policymaking begins to collapse.

One response would be to exclude certain of these approaches from the realm of administrative constitutionalism, in particular by defining administrative constitutionalism as simply encompassing instances of

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72. Eskridge and Ferejohn's account often gives primacy of place to legislative actors, which would represent a third category. This category predominates in many accounts of constitutionalism outside the courts. See, e.g., WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 30, at 225. But Eskridge and Ferejohn overwhelmingly treat administrative and legislative constitutionalism in tandem, ESKRIDGE & FERREJOHN, *supra* note 15, at 33–34, and the administrative–judicial contrast is much more pronounced in scholarship on administrative constitutionalism.

73. See PHILIP BOBBITT, CONSTITUTIONAL FATE 7 (1982) (listing modes of constitutional argument).

74. See Young, *supra* note 15, at 412 (describing these three functions as core aspects of a constitution).

interpretation of the U.S. Constitution by agencies and agency officials. These instances of agency constitutional interpretation represent the core of administrative constitutionalism and are easiest to distinguish from judicial constitutionalism on the one hand and ordinary administrative decisionmaking on the other. But limiting the field of administrative constitutionalism in this fashion would achieve greater clarity at the cost of unjustifiably narrowing administrative constitutionalism's scope. Such an approach would exclude not only judicial development of doctrines to govern administrative decisionmaking, but also congressional enactment of statutes that structure administrative governance and transform the relationship of citizen and state. Yet these doctrines and statutes fundamentally affect the form and substance of agency constitutional interpretation. Awareness that their actions will be judicially reviewed affects the decisions agencies make, and do not make, as well as the rationales and justifications they provide in support.<sup>75</sup> Agencies thus engage in their efforts at constitutional development with a close eye to judicial constitutional views and how agencies' efforts are likely to play in the courts.<sup>76</sup> Indeed, this relationship is reciprocal, as administrative schemes also inform judicial understandings of constitutional requirements.<sup>77</sup> Further, as Eskridge and Ferejohn argue, our contemporary constitutional landscape has been transformed by statutes, and the norms embodied in such superstatutes permeate our understanding of even traditional constitutional commitments.<sup>78</sup> Moreover, given agencies' primary roles as statutory implementers, these enactments—and the administrative and interpretive frameworks that develop around them—are similarly central to agencies' constitutional reasoning.

In short, excluding either judicially developed administrative doctrines or entrenched statutory enactments leads to a necessarily partial view of administrative constitutionalism. Equally important, despite all their divergences these different accounts of administrative constitutionalism share one core conceptual precept: an insistence on the potential constitutional character of ordinary law and law implementation. To be sure, differences exist even here. Some accounts preserve a distinction between constitutional and ordinary law and seek primarily to relocate where this constitutional-ordinary law divide is understood to fall—with Eskridge and Ferejohn's development of the idea of the small "c" constitution being a prime example.<sup>79</sup> Others, like Ernest Young, reject the effort to reconceive

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75. The literature on the impact of judicial review on administrative decisionmaking abounds. For a survey, see PETER L. STRAUSS ET AL., *GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS* 1006–13, 1042–47 (11th ed. 2011).

76. See Lee, *supra* note 4, at 801–02, 815–16, 870–72, 875–80 (describing incidents where an administrative agency selectively ignored or resisted unfavorable judicial precedent).

77. Metzger, *Ordinary Administrative Law*, *supra* note 20, at 507.

78. ESKRIDGE & FEREOHNS, *supra* note 15, at 6–9.

79. Eskridge and Ferejohn are more complicated on this question than this description suggests because they differentiate themselves from scholars such as Bruce Ackerman, who argues that some

ordinary law as constitutional law, insisting that “[t]he fact that ordinary laws perform [constitutional] functions . . . does not make them any less ordinary.”<sup>80</sup> Still others, such as myself, acknowledge the distinction between constitutional and ordinary law but resist the notion that constitutional law has firm or identifiable edges, particularly in the administrative sphere.<sup>81</sup>

Nonetheless, this conceptual commitment to seeing constitutional law in ordinary law contexts is what leads administrative constitutionalism scholars to look at some administrative actions or administrative law doctrines in constitutional terms. Nor is this shared commitment accidental. Instead, embeddedness in ordinary law is a necessary attribute of administrative constitutionalism. Given the Constitution’s silence on administration and the fact that agencies only exist and function as a result of ordinary law delegations of authority, agency officials’ constitutional engagement and development necessarily occurs in ordinary law contexts, as they seek to implement a statutory regime or presidential policy.<sup>82</sup>

Administrative constitutionalism’s emphasis on the constitutional dimensions of seemingly ordinary implementation and policymaking, combined with its frequent creative character, is also what links administrative constitutionalism to the wider category of constitutional construction. According to Keith Whittington, “[t]he process of constitutional construction is concerned with fleshing out constitutional principles, practices[,] and rules that are not visible on the face of the constitutional text and that are not readily implicit in the terms of the constitution.”<sup>83</sup> Whereas Whittington describes constitutional interpretation as a more text-based endeavor to discerning constitutional meaning, he

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major political developments represent constitutional moments and serve to alter the Constitution itself. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 266–94 (1991); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 6–31 (1998). By contrast, Eskridge and Ferejohn state that they “do not see the legal cogency or the political wisdom of routinely converting landmark legislation into Constitutional obligation,” and insist that it should remain subject to repeal through ordinary law mechanisms. ESKRIDGE & FEREJOHN, *supra* note 15, at 64. On the other hand, they also suggest that small “c” constitutional measures should get special treatment in other respects, for example by being construed liberally. See *id.* at 465–68; see also Young, *supra* note 15, at 452 (noting this aspect of their approach).

80. Young, *supra* note 15, at 414, 454.

81. Metzger, *Ordinary Administrative Law*, *supra* note 20, at 512–19. Recently, Richard Primus has argued for erasing the constitutional–ordinary divide further, contending that “we should think of [constitutionality] . . . as a bundle of sticks that can be separated from one another, or that can be recombined in varying configurations.” Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. (forthcoming 2013) (manuscript at 3–4), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2220995](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2220995). On his view, “[n]o single attribute of constitutionality characterizes every rule that mainstream American practice calls ‘constitutional’ and ‘no attribute associated with constitutionality . . . is either necessary or sufficient for a rule’s exhibiting any other characteristic of constitutional rules.” *Id.* at 4.

82. See ESKRIDGE & FEREJOHN, *supra* note 15, at 17–18, 24, 166–67 (describing administrators as engaged in a process of developing and entrenching new constitutional understandings).

83. Whittington, *Constructing*, *supra* note 30, at 120.



portrays constitutional construction as involving an appeal to “[s]omething external to the text—whether political principle, social interest, or partisan considerations,” and occurring primarily in political contexts.<sup>84</sup> Jack Balkin similarly contrasts constitutional construction, which he defines as “implementing and applying the Constitution” to “build out the American state over time,” with more narrow efforts at ascertaining linguistic meaning.<sup>85</sup> Although identifying “acts . . . by executive officials and legislatures, both at national and local levels,” as the prime source of this state-building process, Balkin underscores that constitutional construction is an activity engaged in by courts as well.<sup>86</sup> “All three branches of government build institutions and create laws and doctrines that serve constitutional purposes, that perform constitutional functions, or that reconfigure the relationships among the branches of the federal government, the states, and civil society.”<sup>87</sup> Scholars of popular constitutionalism similarly have underscored that it transforms “many things we are used to thinking of as questions of ordinary law or policy . . . [into] constitutional questions.”<sup>88</sup>

Much constitutional construction thus occurs, like administrative constitutionalism, outside the traditionally identified confines of constitutional law. It involves enactments like statutes and regulations, or the development of new institutional practices and norms, frequently through political struggles.<sup>89</sup> Even constitutional construction’s judicial manifestations often venture into less identifiably constitutional lands, with courts implementing the Constitution through rules of statutory interpretation, the details of governmental procedures, and other judicially created requirements.<sup>90</sup> Whether constitutional construction and constitutional interpreta-

84. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 30, at 6.

85. BALKIN, *supra* note 30, at 4–5. See Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 100–08 (2010), for a clear and more precise discussion of the difference between interpretation and construction.

86. BALKIN, *supra* note 30, at 17.

87. *Id.* at 5.

88. David L. Franklin, *Popular Constitutionalism as Presidential Constitutionalism?*, 81 CHI.-KENT L. REV. 1069, 1074 (2006); see also Pozen, *supra* note 32, at 2059 (“Presidential rhetoric about the proper role of judges, newspaper editorials blasting the latest Supreme Court decision, street protests about social conditions—each of these acts may be of constitutional dimension.”).

89. See generally WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 30 (analyzing the impeachments of President Andrew Johnson and Associate Justice Samuel Chase, the nullification crisis, and the Watergate crisis as instances of constitutional construction).

90. See RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 5–7, 37–41 (2001) (citing examples of overenforcement—the requirement of *Miranda* warnings—and underenforcement—the “some evidence” standard of due process—of the Constitution’s meaning as proper implementations of the Constitution); Mitchell N. Berman, *Constitutional Decisional Rules*, 90 VA. L. REV. 1, 9, 88–100 (2004) (discussing the legitimacy of “constitutional decision rules” and what criteria should be used in creating them); Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2–3, 19–23 (1975) (“[A] surprising amount of what passes as authoritative constitutional ‘interpretation’ is best understood as something of a quite different order—a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional

tion are truly distinct enterprises is a matter of debate,<sup>91</sup> but the more important point is recognition of the creative and ordinary law character of some efforts to develop constitutional meaning: “The political branches build out the Constitution through everyday politics. . . . This means that in practice it is useless to try to draw clear boundaries between activities that in hindsight we would label constitutional construction and ordinary political activity.”<sup>92</sup> Administrative constitutionalism represents a similar effort, and indeed stands as a prime example of constitutional construction.

A second motif that runs through many of these accounts of administrative constitutionalism is lack of transparency. In some instances, the constitutional dimensions of agency decisionmaking are clearly apparent—as, for example, in the recent tobacco rule, DOJ’s educational guidance, or OLC’s Libya Memorandum.<sup>93</sup> Often, however, public acknowledgement of these constitutional aspects is limited, with the agency presenting its action in less contentious statutory or regulatory terms. As Lee notes, “the Constitution’s influence often occurred behind the scenes in inter-agency comments and intra-agency memoranda.”<sup>94</sup> Constitutional justifications and arguments raised during internal executive branch discussion were often omitted from publicly released documents.<sup>95</sup> A similar lack of transparency is evident in the judicial doctrines and decisions that contribute to administrative constitutionalism, which rarely acknowledge—and sometimes expressly deny—their constitutional underpinnings.<sup>96</sup>

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provisions . . .”). Also see Metzger, *Ordinary Administrative Law*, *supra* note 20, at 505–12, for another example—administrative law—which I have argued is a form of judicially created constitutional common law.

91. Compare WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 30, at 5–9 (describing constitutional interpretation and construction as distinct activities), and Solum, *supra* note 85, at 95 (arguing that “[t]he interpretation-construction distinction. . . is both real and fundamental”), with BALKIN, *supra* note 30, at 4–5 (distinguishing ascertainment of the meaning of constitutional language and constitutional construction as two different forms of constitutional interpretation), and FALLON, *supra* note 90, at 5–7 (describing specification of constitutional meaning and crafting of constitutional doctrine as linked aspects of constitutional implementation). My own view, which will have to await further elaboration elsewhere, is that in contexts of actual constitutional challenges, determining the linguistic meaning of constitutional text often involves consideration of factors frequently identified with construction, such as norms, existing doctrine, and practical implications. Put somewhat differently, on constitutional questions that matter and are the subject of debate, interpretation and construction are rarely easily distinguishable. Cf. Andrew B. Coan, *The Irrelevance of Writtenness in Constitutional Interpretation*, 158 U. PA. L. REV. 1025, 1029–30, 1071–83 (2010) (arguing that identifying “interpretation” as a distinct activity keyed to the constitutional text represents an effort to push originalism by definition).

92. BALKIN, *supra* note 30, at 298.

93. See *supra* notes 1–3 and accompanying text.

94. Lee, *supra* note 4, at 883.

95. See, e.g., *id.* at 824–33 (discussing constitutional arguments to adopt equal employment policies made in an FCC 1963 memo that were omitted in its 1968 order and proposed rulemaking).

96. See Berger, *supra* note 69, at 2038–47 (referencing multiple cases with constitutional underpinnings where the Supreme Court deferred to administrative agencies and other governmental actors); Metzger, *Embracing*, *supra* note 19, at 1316–17 (discussing the reluctance of the courts to recognize their reliance on administrative common law); Metzger, *Ordinary*

Eskridge and Ferejohn at first appear an exception here, given their emphasis on public deliberation as critical for entrenchment and the process of administrative constitutionalism.<sup>97</sup> But the public engagement they detail often appears centered on statutory implementation and policy questions, rather than being framed in expressly constitutional terms. In fact, more explicit constitutional engagement may be especially difficult under their approach because the small “c” constitutional aspect of administrative actions does not become apparent until after the fact, once the new understandings the agency helped create become entrenched.<sup>98</sup> Balkin makes this point expressly about constitutional construction writ large: “Potentially almost all political and governmental activity could be constitutional construction. Often we may only know what counts later on when institutions become settled and practices and precedents become established.”<sup>99</sup>

## II. Administrative Constitutionalism’s Legitimacy

The growing scholarship on administrative constitutionalism thus offers a rich and varied account of it as a core component of our nation’s constitutional practice. Rarer is sustained engagement with administrative constitutionalism’s normative dimensions.<sup>100</sup> To some extent, this may reflect the view that administrative constitutionalism is inevitable.<sup>101</sup> From this perspective, validating administrative constitutionalism as legitimate seems perhaps beside the point, with the prime challenge being instead the descriptive task of demonstrating administrative constitutionalism’s ubiquity. This descriptive task seems all the more important given the surprising absence of administrative constitutionalism from most prior writing on constitutionalism outside the courts, in particular popular constitutionalism and departmentalism.<sup>102</sup> Another contributing factor may be the diverse

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*Administrative Law*, *supra* note 20, at 506 (“[T]he Court rarely discusses the constitutional underpinnings of ordinary administrative law doctrines in any detail, and today often makes no reference whatsoever to the constitutional dimensions of its administrative law decisions.”).

97. ESKRIDGE & FEREJOHN, *supra* note 15, at 7, 16–17, 23.

98. *See id.* at 7, 33, 107–11 (arguing that “entrenching deliberation occurs over a long period of time, and the norm does not stick in our public culture until former opponents agree that the norm is a good one”).

99. BALKIN, *supra* note 30, at 298–99; *see also* WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 30, at 15 (“Few political movements achieve ‘overnight success,’ and a low-level conflict over constitutional meaning may persist for years before culminating in a decisive construction.”).

100. *See* Lee, *supra* note 4, at 886 (acknowledging the dearth of knowledge with respect to the “principles and forces” that guide administrative constitutionalism).

101. ESKRIDGE & FEREJOHN, *supra* note 15, at 303; *see also* Lee, *supra* note 4, at 804 (“[A]dministrative constitutionalism is likely a recurring aspect of the modern American state.”).

102. *See* ESKRIDGE & FEREJOHN, *supra* note 15, at 34 (criticizing popular constitutionalism for omitting administrative agencies from its theories); Lee, *supra* note 4, at 807–09 (remarking that both popular constitutionalists and departmentalists have failed to consider administrative constitutional interpretation).

character of the forms of constitutional interpretation placed within administrative constitutionalism's tent, which may make global normative assessments seem of doubtful value.

Documenting the phenomenon of administrative constitutionalism is extremely important, in particular careful empirical study of the mechanisms by which administrative constitutionalism occurs and its effects on constitutional understandings. But so too is grappling with its normative dimensions. Indeed, these two tasks are linked, in that one reason for the dearth of attention to administrative efforts at constitutional development is likely unease about the legitimacy of the endeavor. Moreover, recognizing the inevitability of administrative constitutionalism leaves open the central questions of how government and society should respond. Should other parts of government—Congress, the President, and the courts, as well as state and local governments—embrace and encourage administrative constitutional engagement? Or should they instead adopt a resistant stance, one that does not deny administrative constitutionalism's occurrence but seeks to limit its ambit and effect? The very breadth of administrative constitutionalism forestalls easy answers but also allows for a more comprehensive assessment. As I argue below, such an assessment reveals that administrative constitutionalism offers important benefits to the project of constitutional interpretation and implementation, and thus the proper response should be encouragement rather than resistance.

#### A. *The Normative Challenge of Administrative Constitutionalism*

A central normative challenge posed by administrative constitutionalism derives from a core precept of our administrative order: the principle that an administrative agency has no inherent or independent authority to act, but instead can exercise only the authority delegated to it by Congress.<sup>103</sup> This principle follows from the Constitution's vesting of legislative authority in Congress: "The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes."<sup>104</sup> On the same logic, it also follows that an agency can exercise authority delegated to it by the President, provided the authority involved is one that the

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103. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."). For a discussion of this basic precept, see generally Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097 (2004). For criticism of administrative law's emphasis on delegation as essential to legitimacy, see William H. Simon, *Democracy and Organization: The Further Reformation of American Administrative Law* 7–11 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 12-322, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2175121](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2175121).

104. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979).

Constitution vests in the President—a point made clear by *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>105</sup> the famous *Steel Seizure* case, in which the Supreme Court considered whether the Secretary of Commerce’s seizure of the nation’s steel mills based on President Truman’s executive order was justified either by an act of Congress or “[t]he President’s power . . . from the Constitution itself.”<sup>106</sup> But it is understood that agencies enjoy no authority separate from that delegated to them.<sup>107</sup>

From this principle, it follows that agencies are bound to implement and enforce congressional will, and a court will set aside an agency decision as outside of statutory authority and arbitrary and capricious “if the agency has relied on factors which Congress has not intended it to consider.”<sup>108</sup> To be sure, Congress lacks power to authorize agencies to violate the Constitution, and thus, the fact that Congress has instructed an agency to act in an unconstitutional way does not allow it to do so. But instances in which Congress directs agencies to act in unconstitutional ways are rare.<sup>109</sup> More common is the situation in which an agency has a choice of approaches, one or more of which might appear constitutionally troubling or at odds with important constitutional values.<sup>110</sup> The question is thus whether an agency itself can assert a constitutional prohibition as grounds for failing to adhere to congressional wishes or instead should leave enforcing constitutional requirements to the courts.

The concern is that administrative constitutionalism inverts the proper constitutional relationship between agencies and Congress, in the process granting agencies powers they cannot constitutionally possess. As Jerry Mashaw has put it, agencies are constitutionally required to be “‘faithful agents’ of the legislature . . . . Obviously, administrators who fail to pursue implementation any time a constitutional issue looms on their horizon could not possibly carry out their legislative mandates effectively.”<sup>111</sup> Even if an agency instead simply takes constitutional concerns into account in determining how to act (as opposed to whether), doing so “may change the

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105. 343 U.S. 579 (1952).

106. *Id.* at 582, 585.

107. Debates surrounding the scope of agency authority center on discerning the extent of an agency’s delegated authority and the proper scope of *Chevron* deference, not on assessing whether agencies possess any inherent power. *See, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (tying applicability of *Chevron* deference to whether Congress delegated authority to issue rules with the force of law to the agency).

108. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (requiring the court to determine that an agency decision was “based on a consideration of the relevant factors”).

109. *See Metzger, Ordinary Administrative Law*, *supra* note 20, at 523.

110. *See id.* (arguing that the more usual context will be those where agency regulation may be less effective because of constitutional considerations).

111. Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 505, 508 (2005) [hereinafter Mashaw, *Norms*].

shape of federal regulation and perhaps make it somewhat less effective in achieving congressional regulatory goals.”<sup>112</sup> Or, as Lee recounts, administrative constitutionalism may lead an agency to assert constitutional demands that go beyond what the courts have required or Congress has sanctioned.<sup>113</sup> The net effect, in these instances, is that the agency “would set itself up operationally as the arbiter of the constitutionality of congressional action. . . . Constitutionally timid administration . . . compromises faithful agency . . . .”<sup>114</sup> In some cases, the courts have emphasized the impropriety of having agencies consider constitutional challenges in excusing plaintiffs from the requirement that they exhaust administrative remedies before filing suit.<sup>115</sup> Yet as even Mashaw acknowledges, an agency’s obligation to follow congressional mandates does not mean that it can ignore constitutional norms. Instead, it also needs to be a “constitutionally ‘sensitive’ faithful agent, interpreting statutes within the overall context of the legal order.”<sup>116</sup>

Two additional criticisms of administrative constitutionalism are that it encourages agency self-aggrandizement and “potentially usurps the role of the judiciary in harmonizing congressional power and constitutional command.”<sup>117</sup> The self-aggrandizement argument rests on the claim that agencies will read constitutional constraints on their actions narrowly, to preserve their own flexibility and power.<sup>118</sup> Thus, some argue that agency constitutional assertions are particularly troubling when the assertion is that Congress has violated separation of powers by trenching on the President’s Article II prerogatives, given the executive branch’s self-interest in making such a claim.<sup>119</sup> But the claim is also made more broadly, as casting doubt on

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112. Metzger, *Ordinary Administrative Law*, *supra* note 20, at 523.

113. See Lee, *supra* note 4, at 816 (describing “FCC attorneys’ constitutional theories” that “creatively expanded Supreme Court doctrine” by ignoring limiting language and by “relying on loosely relevant precedent”).

114. Mashaw, *Norms*, *supra* note 111, at 508.

115. See *McCarthy v. Madigan*, 503 U.S. 140, 147–48 (1992) (noting the constitutionality exception to exhaustion); see also 2 RICHARD J. PIERCE, *ADMINISTRATIVE LAW TREATISE* § 15.5 (5th ed. 2010) (discussing inconsistent case law on whether presence of a constitutional claim precludes exhaustion requirements). California has gone further, adopting a constitutional provision that prohibits state agencies from refusing to enforce a statute on the grounds that the statute is unconstitutional absent a determination to that effect by an appellate court. CAL. CONST. art. III, § 3.5; see also *Lockyer v. City & Cnty. of S.F.*, 95 P.3d 459, 473–74 (Cal. 2004) (applying the same rule to local public officials).

116. Mashaw, *Norms*, *supra* note 111, at 508.

117. *Id.*; see Pillard, *supra* note 41, at 717 (noting the aggrandizement concern).

118. This claim represents an instance of what Daryl Levinson has called empire-building arguments. See Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 917 (2005) (describing “empire-building” as “government behavior . . . driven by self-aggrandizing motives”).

119. Compare H. Jefferson Powell, *The Executive and the Avoidance Canon*, 81 IND. L.J. 1313, 1317 (2006) (criticizing the executive branch assertion of the constitutional avoidance canon on Article II grounds as an instance of “loaded dice”), with Morrison, *Avoidance*, *supra* note 41, at 1229–37 (denying that self-protective executive branch assertions of the canon are inherently problematic, yet acknowledging they should trigger “special scrutiny”), and Presidential Authority

agencies' reliability as fair discerners of constitutional limits even when the scope of executive power is not specifically in play.<sup>120</sup> The concern that administrative constitutionalism will usurp the role of the courts is closely related to the concern with constitutional evasion. But the concern here is also one of constitutional overenforcement and judicial displacement: that agencies will pretermitt the courts from ruling that a putative constitutional claim lacks merit by choosing a course of action that avoids the potential constitutional concern.<sup>121</sup> To some extent, this criticism again reflects the possibility that agencies will illegitimately invoke constitutional arguments to deviate from congressional instructions. But it also embodies the belief that determinations of constitutional meaning are a particular responsibility of the courts.<sup>122</sup>

These challenges to administrative constitutionalism might appear less pressing in the small "c" constitutional contexts that Eskridge and Ferejohn elaborate, where agencies' constitutional role stems from their aggressive application and implementation of statutory measures. After all, here agencies seem to be simply carrying out the responsibilities Congress has entrusted to them, rather than compromising these responsibilities by considering external factors. Yet the same issue of agencies deviating from their delegated authority arises here, insofar as administrative officials push their statutory mandates beyond the lines that Congress intended. Even Eskridge and Ferejohn acknowledge some of the potential pitfalls of administrative constitutionalism, noting that "administrators may be easily derailed from their statutory mission by agency capture . . . [by] vigorously enforc[ing] a regulatory regime's least productive or its seriously mistaken directives. . . . [or by] tunnel vision."<sup>123</sup> Although they emphasize the availability of the courts as a check on such abuses,<sup>124</sup> the deference that typifies many administrative law doctrines under which agency policymaking and implementation is reviewed, as opposed to the independent scrutiny generally applied to constitutional claims, may limit the effectiveness of this judicial constraint.

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to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 200–01 (1994), <http://www.justice.gov/olc/nonexecut.htm> (arguing that the President should construe statutes to be constitutional and "has enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional powers of the Presidency").

120. See Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 755–57 (2008) [hereinafter Merrill, *Institutional Choice*] (arguing that agencies are often focused on specific federal regulatory schemes, lack knowledge of constitutional federalism principles, and may be biased in favor of exclusive federal regulation).

121. Mashaw, *Norms*, *supra* note 111, at 508.

122. Morrison, *Avoidance*, *supra* note 41, at 1223. For a more sustained defense of the importance of judicial resolution of constitutional questions and judicial supremacy, see generally Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).

123. ESKRIDGE & FEREJOHN, *supra* note 15, at 305–06 (emphasis omitted).

124. *Id.* at 307–08.

In short, the concern is that agencies' role as norm entrepreneurs fits uneasily with a constitutional system that vests legislative power in Congress and judicial power in the courts.<sup>125</sup> Nor is this concern addressed by the Constitution's grant of executive power to the President and agencies' location within the executive branch. Leaving aside whether independent norm generation falls within the President's duty to "take Care that the Laws be faithfully executed,"<sup>126</sup> agencies are not the President, and presidential oversight of specific agency decisions is often limited.<sup>127</sup> The challenge to administrative constitutionalism's legitimacy thus bears a close connection to the charge that the modern administrative state as a whole is at odds with basic features of the Constitution. Those raising this claim note in particular that the Constitution vests the legislative power in Congress, a democratically accountable branch, whereas the modern administrative state is premised on broad delegations of authority that are legislative in all but name and are exercised by unelected administrative officials subject to, at best, quite attenuated accountability.<sup>128</sup> The resultant conflict with constitutional structure appears only more acute if administrative officials are engaged in a process of building out the nation's foundational commitments in ways not foreseen or required by the constitutional branches of government.

In addition to these constitutional criticisms based on separation of powers and constitutional democratic accountability principles, administrative constitutionalism is open to attack on pragmatic grounds. Administrative officials are not selected for their competency with constitutional doctrine or their awareness of constitutional principle.<sup>129</sup> No reason exists, therefore, to assume that they will be particularly sensitive to

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125. Dalal criticizes administrative constitutionalism on different but related grounds, contending that agencies are too insular and unaccountable to serve as primary norm entrepreneurs absent congressional oversight, judicial review, or substantial internal checks, which in the national security context are often lacking. See Dalal, *supra* note 52, at 29–40.

126. U.S. CONST. art. II, § 3.

127. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2272–74, 2306–09 (2001) (describing obstacles to close presidential control and detailing expansion of oversight as well as continuing limits under President Clinton).

128. See DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 155–58 (1993) (arguing that delegation in the modern administrative state goes against the structure of the Constitution and the intent of the Framers because it involves transferring legislative authority to an entity other than Congress); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1237–41 (1994) (detailing the demise of the nondelegation doctrine and the Court's willingness to allow broad delegation to administrative agencies due to the complexity of the modern state).

129. See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1172–75 (2008) (contrasting agencies' expertise in statutory schemes and industry knowledge with agencies' imperfect understanding of constitutional law, which often leads to a disregard of constitutional principles); Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 779–87 (2004) (emphasizing agencies' general lack of expertise and competency on constitutional questions).



the constitutional aspects of their decisions.<sup>130</sup> Indeed, given that individuals are often drawn to working at federal agencies because of a shared commitment to their underlying missions, agency officials might be thought particularly likely to privilege programmatic needs over constitutional concerns.<sup>131</sup> This criticism of administrative constitutionalism is geared primarily at its traditional, or what Eskridge and Ferejohn would call Large “C,” variant, where agency officials assess the Constitution’s import for their activities.<sup>132</sup> It is less relevant to small “c” situations where the constitutional basis of administrative actions comes from the statutes and policy choices they are charged with implementing, and with respect to which they are presumed to have great expertise. But such implementation decisions and policy choices are also the contexts in which agencies are most likely to receive deference from courts, thus raising again the concern that agencies exercise broad and unchecked power that allows them to set the terms of their own authority.<sup>133</sup>

Finally, administrative constitutionalism in its judicial guise is also subject to criticism. On the one hand, judicial development of administrative law doctrines represents a form of federal common law, one largely untethered from statutory text and not constitutionally required, albeit responsive to underlying constitutional values.<sup>134</sup> It therefore runs into criticism as unauthorized judicial lawmaking, criticism lodged at federal common law generally.<sup>135</sup> A similar complaint could be raised against judicial use of ordinary administrative law to encourage greater administrative constitutional engagement, on the grounds that doing so represents an unwarranted intrusion on the executive branch. Yet such judicial encouragement of administrative constitutionalism could also be attacked from the opposite angle, on the grounds that the courts are foregoing

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130. See Merrill, *Institutional Choice*, *supra* note 120, at 755–56 (noting “[o]n constitutional variables . . . agencies clearly fall short” and “know little about constitutional law”); see also Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558, 571–77 (2003) (describing and critiquing this argument as a defense of DOJ control of federal government litigation). I have argued that administrative officials may be more sensitive to federalism and state interests than is generally assumed, given their frequent dependence on, and connection to, state regulators. See Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2072–76 (2008) [hereinafter Metzger, *New Federalism*].

131. See Michael Herz, *Purposivism and Institutional Competence in Statutory Interpretation*, 2009 MICH. ST. L. REV. 89, 104–05 (2009) (explaining that “[a]n agency has a specialized mission” that the agency staff is committed to and that this creates “a significant concern about agencies going too far in pursuit of statutory goals”).

132. See ESKRIDGE & FEREJOHN, *supra* note 15, at 8–9 (describing administrative reliance on the Large “C” Constitution).

133. *City of Arlington, Tex. v. FCC*, Nos. 11–1545 & 11–1547, slip op. at 16–17 (May 20, 2013) (holding that a court must defer to an agency’s interpretation of an ambiguous statutory provision concerning the scope of the agency’s authority).

134. Metzger, *Embracing*, *supra* note 19, at 1295.

135. *Id.* at 1342–43.

their institutional responsibility to establish and enforce constitutional limits on government.<sup>136</sup>

*B. Administrative Constitutionalism's Virtues*

Such is the central normative critique of administrative constitutionalism. But is it persuasive? My own view is that administrative constitutionalism is more likely to advance congressional purposes than undercut them, and the same is true about its effect on constitutional structure and values. In the end, this question of administrative constitutionalism's effects is an empirical one, which is why the increasing study of specific instances of administrative constitutionalism is particularly valuable. My focus here, however, is on offering a defense of administrative constitutionalism largely based on its hypothetical effects, as well as its concordance with constitutional principle and structure.

One initial point worth emphasizing is that agencies' virtues and vices as constitutional interpreters need to be assessed in comparative perspective, more specifically, in comparison to courts. The real question is not simply whether agencies will pursue constitutional concerns at the expense of statutory goals or congressional constitutional choices, but rather whether agencies will do so more than courts will. Equally important, agencies' performance should not be assessed in isolation because agencies do not act in isolation; instead, they operate in a web of "control relationships"<sup>137</sup> that includes oversight by Congress, the President, and the courts. Courts also do not operate alone, being subject both to political and agency input in specific cases<sup>138</sup> and political and popular influence more indirectly. But these relationships are more attenuated, and courts act more autonomously compared to agencies. At a systemic level, therefore, the question is what overall mix of administrative, judicial, and other forms of constitutionalism is the right one.<sup>139</sup>

Framed in comparative perspective, administrative agencies have several advantages. To begin with, agencies approach constitutional questions and normative issues from a background of expertise in the statutory schemes they implement and the areas they regulate.<sup>140</sup> As a result, they are likely to be better at integrating constitutional concerns with the

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136. See Mashaw, *Norms*, *supra* note 111, at 508 (arguing that when agencies avoid constitutional questions, it prevents courts from exercising their constitutional duty to adjudicate those questions).

137. Strauss, *supra* note 17, at 579.

138. See, e.g., *Chevron*, 467 U.S. at 844 (stating that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency").

139. I thank David Pozen for this point.

140. See, e.g., *Chevron*, 467 U.S. at 865–66 (noting that "[j]udges are not experts in the field," whereas agencies are, and that agencies are in a better position to balance conflicting policy interests).

least disruption to these schemes and regulatory priorities. As I have noted elsewhere, “[c]ourts may have greater understanding and appreciation of constitutional values and principles in general, but they are less competent [at] balancing constitutional and policy concerns at a more granular level.”<sup>141</sup> Moreover, this same expertise means that agencies have a better grasp of the effect of certain actions, and thus of their constitutional significance, than courts do—and greater ability to investigate and assess the factual bases that underlie constitutional claims.<sup>142</sup> The history of the response to pregnancy discrimination by lawyers at the Equal Employment Opportunity Commission and the Supreme Court is a case in point. As Eskridge and Ferejohn detail, the EEOC lawyers’ appreciation of the impact of pregnancy discrimination on women’s careers, as well as their understanding of Title VII as aimed at protecting women’s employment and of pregnancy as inseparable from sex for equal protection purposes, led to the inclusion of pregnancy discrimination as presumptively sex discrimination in the EEOC’s guidelines.<sup>143</sup> By contrast, the Court famously viewed pregnancy discrimination as simply a distinction drawn between pregnant and nonpregnant persons and not sex discrimination in violation of equal protection or Title VII<sup>144</sup>—a view that Congress expressly rejected shortly thereafter by enacting the Pregnancy Discrimination Act.<sup>145</sup>

The pregnancy discrimination saga is useful in another important respect, in that it resists the assumption that agencies are deviating from their role as Congress’s faithful agents in taking constitutional concerns and values into account. No doubt, there are occasions where injection of particular constitutional concerns may be hard to square with a given statutory regime. But it also seems plausible that in many contexts Congress would be willing to trade more vigorous enforcement for greater administrative attention to constitutional concerns, especially if the agency believes judicial trimming or invalidation of the statute on constitutional grounds might otherwise occur. This is, in fact, an assumption often invoked to justify judicial application of the constitutional avoidance canon.<sup>146</sup> Some scholars disagree, arguing that “Congress would very likely prefer the Executive Branch to enforce its legislation according to its best understanding of Congress’s intent, and then to let the courts sort out the

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141. Metzger, *Ordinary Administrative Law*, *supra* note 20, at 533.

142. Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 *YALE L.J.* 64, 96 (2008).

143. ESKRIDGE & FEREJOHN, *supra* note 15, at 30–32.

144. *E.g.*, *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 137–38 (1976); *Geduldig v. Aiello*, 417 U.S. 484, 496–97 (1974).

145. ESKRIDGE & FEREJOHN, *supra* note 15, at 47–48, 56.

146. Metzger, *Ordinary Administrative Law*, *supra* note 20, at 523.

constitutional issues as needed.”<sup>147</sup> But even this more skeptical approach would still leave room for administrative constitutionalism if the agency believed that Congress did in fact intend it to take the relevant constitutional concerns at stake seriously. And the fact that agencies are often deeply engaged in development and enactment of legislation may give them greater knowledge of Congress’s approach to the constitutional matters involved.<sup>148</sup>

Equally important, administrative constitutionalism accords with, and indeed fosters, our constitutional structure. The reality is that most governance today occurs at the administrative level. Agencies often operate under broad delegations of authority that grant them substantial policymaking and enforcement discretion.<sup>149</sup> Despite ongoing claims that this arrangement is unconstitutional, it has become a hard-and-fast feature of the nation’s constitutional landscape.<sup>150</sup> Rather than representing yet another manifestation of this illegitimate transfer of authority to unaccountable administrative hands, administrative constitutionalism stands as a necessary corollary of the reality of administrative government:

As those primarily responsible for setting governmental policy, agencies should have an obligation to take constitutional norms and requirements seriously in their decisionmaking. Such an obligation can be inferred simply from the structure of our constitutional order, under which the Constitution governs all exercises of governmental authority and all government officials have an independent duty to support it. It could also be seen as a condition of delegation. . . . [I]f Congress has an independent . . . obligation to take constitutional norms and values into account, . . . then the constitutional price of delegation should be that congressional delegates face this obligation too.<sup>151</sup>

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147. Morrison, *Avoidance*, *supra* note 41, at 1222; *see also* Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 92–93 (making this criticism of the constitutional avoidance canon generally).

148. KENT GREENAWALT, *STATUTORY AND COMMON LAW INTERPRETATION* 149–51 (2013); Peter L. Strauss, *When the Judge is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 346–51 (1990).

149. *See* Metzger, *Embracing*, *supra* note 19, at 1322–23 (emphasizing the impediments to congressional action that lead to broad delegations); *cf.* Daniel J. Meltzer, *The Supreme Court’s Judicial Passivity*, 2002 SUP. CT. REV. 343, 386 (noting the limitations on Congress’s ability to specify answers to questions created by a given statutory scheme in advance). *But see* Daniel B. Rodriguez & Barry R. Weingast, *Is Administrative Law Inevitable?* 29 (Mar. 9, 2009) (unpublished manuscript), <http://escholarship.org/uc/item/6mx3s46p> (arguing that Congress frequently imposes detailed procedural constraints on agencies). *See generally* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1695–97 (1975) (offering different accounts of why Congress delegates).

150. *See* SCHOENBROD, *supra* note 128, at 158 (acknowledging that broad delegation of lawmaking power to agencies has become entrenched in both jurisprudence and scholarship despite strong historical and structural arguments that such delegation is unconstitutional).

151. Metzger, *Ordinary Administrative Law*, *supra* note 20, at 522 (footnote omitted).

Put simply, in an administrative world administrative agencies must become a locus for independent constitutional enforcement to do justice to the principle of constitutionally constrained government.

Of course, the argument that administrative constitutionalism serves the goal of constitutionally constrained government is precisely what the agency-aggrandizement critique denies. Yet this critique rests on debatable assumptions. One such assumption is that agencies will seek to maximize their power, or that their deep engagement and commitment to particular statutory regimes—sometimes called administrative “tunnel vision”—will make them reluctant to give much weight to constitutional concerns that could seriously impede their regulatory efforts.<sup>152</sup> To be sure, the risk that agencies will undercount constitutional constraints is a real one, and accounts of administrative constitutionalism detail examples of when it has occurred.<sup>153</sup> But these accounts also describe instances in which agencies have read constitutional constraints on their powers broadly and not sought to maximize their authority.<sup>154</sup> Agencies are complicated organizations and they may not be inclined to downplay constitutional constraints in any consistent fashion, particularly if agency personnel view such constraints as advancing important policy goals.<sup>155</sup>

Perhaps more importantly, the aggrandizement critique ignores that agencies act subject to judicial supervision. While judicial review may be lacking in some contexts, such as national security,<sup>156</sup> it is hardly the norm. Far more common is for agency actions to be subject to judicial review—and where judicial review is available administrative constitutionalism should not

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152. Merrill, *Institutional Choice*, *supra* note 120, at 755–56; *cf.* Metzger, *Ordinary Administrative Law*, *supra* note 20, at 526 (noting that administrative constitutionalism only requires that agencies take seriously the constitutional concerns involved, not that these concerns necessarily trump other factors).

153. *See* Dalal, *supra* note 52, at 14–23 (describing how free speech constraints have been loosened in allowing the unregulated expansion of the FBI’s mission, the FBI’s use of questionable methods, and the FBI’s use of an intelligence-gathering process “cloaked in secrecy”); Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1567–73 (2007) (detailing flaws in OLC’s Torture Memo, including its assessment of the President’s commander in chief power).

154. *See* Lee, *supra* note 4, at 813–17, 824–27 (describing efforts by FCC and other executive branch attorneys to read equal protection requirements more broadly than existing doctrine required); Metzger, *New Federalism*, *supra* note 130, at 2078–79 (noting that agencies have often denied that their decisions preempt state law and arguing that public choice accounts of agencies seeking to maximize their power are too simplistic).

155. *See, e.g.*, ESKRIDGE & FERREJOHN, *supra* note 15, at 31–33 (detailing support for broad equal protection readings from EEOC attorneys seeking to advance women’s equality); Lee, *supra* note 4, at 813–17, 827–28 (describing different arguments for broad equal protection readings offered by the FCC attorneys and the FCC Commissioners).

156. *See* Dalal, *supra* note 52, at 35–39 (examining the lack of meaningful judicial intervention in cases dealing with national security issues because of limited judicially enforceable rights, standing hurdles, and the growth of the executive privilege); Pillard, *supra* note 41, at 692 (highlighting the courts’ deferential approach to cases involving foreign policy, national security, the military, and immigration).

affect courts' ability to enforce judicial constitutional requirements directly, by invalidating administrative actions that run afoul of constitutional commands.<sup>157</sup> Moreover, where judicial review is not available, and thus the aggrandizement risk is at its greatest, administrative constitutionalism is all the more important as it will represent the main means for ensuring that constitutional constraints are enforced.<sup>158</sup>

As a result, administrative constitutionalism also does not undermine the courts' constitutional role. As Trevor Morrison has argued, in those administrative contexts where judicial review is lacking or limited, encroachment on the courts is not a realistic possibility.<sup>159</sup> And again, where judicial review is available, administrative constitutionalism should not impede the courts' ability to enforce constitutional requirements directly against agencies when agencies violate these requirements.<sup>160</sup> True, judicial review could be forestalled if agencies forego certain actions out of constitutional concerns. Yet such agency forbearance would seem if anything a prime benefit of administrative constitutionalism, and in any event the preclusion of judicial review in nonenforcement contexts is not unique to administrative constitutionalism.<sup>161</sup> Mashaw cautions that administrative constitutionalism may also limit the occasions of indirect judicial enforcement through constitutional avoidance and other constitutional canons because agencies themselves might forego constitutionally dubious assertions of authority.<sup>162</sup> But it is hard to see such indirect enforcement as a necessary part of the Court's constitutional role, especially if the net effect remains that constitutionally questionable conduct is avoided. In any event, administrative constitutionalism may serve to expand other forms of indirect judicial constitutional enforcement, as for example if courts used their

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157. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) (noting the availability of a direct constitutional challenge); Metzger, *Ordinary Administrative Law*, *supra* note 20, at 526 (noting that courts may invalidate administrative actions as unconstitutional). The availability of judicial review may have an indirect policing effect as well, by making agencies unwilling to run too close to the constitutional line for fear of reversal. For the classic account of agency fear of reversal and timidity in the face of judicial review, see JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 225–26 (1990).

158. See Johnsen, *supra* note 153, at 1564 (emphasizing the limits of ex post external constraints on the executive branch and thus the need for effective internal constraints).

159. Morrison, *Avoidance*, *supra* note 41, at 1222.

160. Dalal suggests that over time administrative constitutionalism can have a corrosive effect on the scope of constitutional protections when agencies narrow their understanding of constitutional rights, but, as she acknowledges, the national-security context she analyzes is also one of limited judicial receptivity to constitutional challenges. Dalal, *supra* note 52, at 35–39. It is difficult to know whether the administrative and judicial resistance to the Fourth Amendment rights at issue are endogenous or exogenous phenomena; it seems at least as possible that lack of judicial receptivity emboldened agencies' narrowing approaches as vice versa. *Id.* at 40 (asserting that lack of oversight by other branches of the government, including the judiciary, "allowed for the insular agency decision-making and the norm entrenchment that followed").

161. See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (holding that executive branch nonenforcement decisions are presumptively unreviewable).

162. Mashaw, *Norms*, *supra* note 111, at 508.

ordinary administrative law review to ensure that agencies take constitutional concerns seriously in their decisionmaking.<sup>163</sup>

What administrative constitutionalism does reject is judicial constitutional exclusivity, under which judicial determinations represent the sole and definitive expositors of constitutional meaning. Instead, it is premised on a principle of pluralistic constitutional interpretation, wherein judicial decisions may impose constitutional floors but not constitutional ceilings, and other governmental actors have a role to play in constitutional development.<sup>164</sup> It also rejects the notion that the Constitution has hard-and-fast edges, such that what is constitutionally required is discernible, determinate, and unchanging. Under administrative constitutionalism, the focus is on applying constitutional norms and values in contexts of specific policymaking and law implementation—often quite creatively and expansively. Not only does the meaning of the Constitution evolve, but so does the scope of what is viewed as constitutional.

Yet to my mind, these are strengths of administrative constitutionalism, not weaknesses. Its institutionally pluralistic approach is a trait shared by any number of other accounts of constitutional interpretation and supported by constitutional text and historical practice.<sup>165</sup> Given that courts remain able to ensure agencies adhere to constitutional requirements, the complaint that administrative constitutionalism illegitimately interferes with judicial constitutional prerogatives is particularly weak. Assessing the import of constitutional values or framework principles in specific contexts is a central feature of political constitutional analysis, as is the ongoing elaboration of

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163. This dynamic is evident in several recent decisions where the Supreme Court appeared to scrutinize administrative decisions more rigorously because of their federalism implications. See Metzger, *New Federalism*, *supra* note 130, at 2048–69, 2109 (arguing that these recent cases indicate that the Court may “[be using] administrative law as a vehicle for addressing federalism concerns”). But see Metzger, *Ordinary Administrative Law*, *supra* note 20, at 500–02 (noting that courts rarely expressly acknowledge using ordinary administrative law to encourage administrative attention to constitutional concerns).

164. Cf. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1226–27 (1978) (arguing that “judicially underenforced constitutional norms should be regarded as legally valid to their conceptual limits” rather than being only valid to the extent they are enforced by the courts, and that “public officials have an obligation in some cases to regulate their behavior by standards more severe than those imposed by the federal judiciary”).

165. See, e.g., BALKIN, *supra* note 30, at 17 (“Much of the most important constitutional work does not come from courts. It comes from acts of constitutional construction by executive officials and legislatures.”); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1966–71 (2003) (emphasizing the institutional differences between congressional and judicial constitutional interpretation); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 848 (2002) (“The courts are not the exclusive interpreters of the Constitution, and often are not its ultimate or most authoritative interpreters either. . . . The authority to interpret the Constitution is shared by multiple institutions and actors within our political system, and tends to flow among them over time.”).

constitutional meaning.<sup>166</sup> The courts cannot legitimately claim a monopoly on these activities. In like vein, judicial law creation, especially in response to perceived constitutional concerns, is a frequent occurrence, and courts do not illegitimately intrude on the political branches by pursuing this path with respect to review of agency action.<sup>167</sup> Indeed, given agency expertise and the greater ease with which agencies can respond to judicial reversals than Congress, judicial encouragement of administrative constitutionalism may well prove less restrictive of political choices than direct constitutional review.<sup>168</sup>

A last virtue of administrative constitutionalism is the feature on which Eskridge and Ferejohn place prime emphasis: the opportunities it provides for political and public engagement with constitutional meaning.<sup>169</sup> Here the contrast with courts is particularly stark. To be sure, federal courts are more connected to popular sentiment and majority views than suggested by the iconic image of federal judges from the civil rights era as lone defenders of constitutional principle.<sup>170</sup> But the courts' relationship to public debate and politics is often attenuated and episodic.<sup>171</sup> Agencies, by contrast, are constantly engaging with the public: with stakeholders and other parties affected by administrative action, social movement groups, business and industry associations, unions, and political representatives at all levels.<sup>172</sup> They are in constant interaction with any number of executive branch entities—such as the Office of Information and Regulatory Affairs, which

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166. For descriptions and defenses of “living constitutionalism,” see sources cited *supra* note 32. For a critique of the weight ascribed to free-floating values and general principles in judicial constitutional analysis, see John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2008 (2009), in which Professor Manning writes, “When judges enforce freestanding ‘federalism,’ they ignore the resultant bargains and tradeoffs that made their way into the [text of the Constitution].”

167. See Metzger, *Embracing*, *supra* note 19, at 1297, 1343–48 (arguing that “administrative common law represents a legitimate instance of judicial lawmaking”).

168. Metzger, *Ordinary Administrative Law*, *supra* note 20, at 531–33.

169. ESKRIDGE & FEREJOHN, *supra* note 15, at 12–18, 27.

170. See BALKIN, *supra* note 30, at 19. See generally BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009). For a traditional image of the courts, see generally J.W. PELTASON, *FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION* 134 (Illini Books 1971) (1961).

171. See Christopher L. Eisgruber, *Dimensions of Democracy*, 71 FORDHAM L. REV. 1723, 1733 (2003) (noting that judges “serve long terms that may attenuate their connection to public opinion and popular judgments about justice”).

172. This is not to suggest that administrative interactions are evenhanded, or that the public broadly is engaged in agency decisionmaking. Recent scholarship has highlighted problems on both scores. See Nina A. Mendelson, *Foreword: Rulemaking, Democracy, and Torrents of E-mail*, 79 GEO. WASH. L. REV. 1343, 1345–47 (2011) (criticizing agencies for discounting mass public comments on matters of broad public policy in rulemaking proceedings); Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA’s Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 103–04, 151 (2011) (finding empirical evidence that “at least some publicly important rules that emerge from the regulatory state may be influenced heavily by regulated parties, with little to no counterpressure from the public interest”).



undertakes central regulatory review, OLC, other agencies and expert bodies, or inspectors general.<sup>173</sup> Agencies are also subject to legally enforceable requirements of reasoned decisionmaking and responsiveness, and must demonstrate the basis for their decisions and how these decisions conform to governing law.<sup>174</sup> Of course, these features do not guarantee that agencies actually serve as sites for broad public constitutional engagement. Agencies might instead simply advance the policy priorities of political supervisors, the interests of well-connected groups, or their own parochial concerns. Yet these features at least offer a potential opportunity for greater popular involvement in the construction of constitutional meaning.

### III. Revisiting the Ordinary Law–Constitutional Law Divide

Administrative constitutionalism is thus not simply inevitable, it also offers several potential benefits as a means of constitutional interpretation and development. Put differently, it is a feature and not a bug of our constitutional practice. The histories of administrative constitutionalism help document its central role in constitutional implementation and constitutional development. Equally important, however, these accounts offer evidence on whether the potential benefits from administrative constitutionalism play out in practice.

Here, a cautionary tale emerges. The two common themes of administrative constitutionalism—its embeddedness in ordinary law contexts and the frequent lack of transparency that surrounds it—create an identification challenge. Distinguishing administrative constitutionalism from ordinary administrative policymaking can be difficult. This identification challenge is not unique to administrative constitutionalism but instead exists generally with respect to constitutional construction, which often involves the gradual development of new constitutional understandings through the guise of ordinary political debates and legal enactments.<sup>175</sup> Defenders of constitutional construction have resisted viewing the identification challenge as a problem, arguing that drawing a clear line between constitutional construction and ordinary politics only matters “if something important turns on being able to mark that boundary with

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173. See Metzger, *Interdependent*, *supra* note 35, at 427–32 (explaining the significance of these internal checks within the executive branch).

174. See STRAUSS ET AL., *supra* note 75, at 926–38, 976–1010 (discussing the reasoned decisionmaking requirements applied to agency actions).

175. See *supra* text accompanying notes 83–92; see also Pozen, *supra* note 32, at 2060 (“This willingness to expand the horizons of the constitutional raises an *identification problem*: How do we distinguish genuine popular constitutionalism from simulacra or impostors thereof, ‘judgment[s] about constitutional meaning’ from ‘policy-driven, constitution-blind’ acts of opportunism or reform?”); Young, *supra* note 15, at 448–55 (identifying this line-drawing difficulty as the rule-of-recognition problem).

precision.”<sup>176</sup> But they maintain nothing does, because the constitutional character of certain ordinary law measures does not change their formal legal status; they remain ordinary law and subject to repeal by new legislation in the unlikely event that sufficient support for such a repeal exists.<sup>177</sup>

Yet the difficulty of distinguishing between the ordinary and the constitutional seems likely to be more acute with respect to administrative constitutionalism than other instances of constitutional construction. As named constitutional actors, Congress, the President, and the Supreme Court may have more occasion to engage in overt disputes over constitutional principle or to develop their constitutional understandings expressly—for example, in order to gain interbranch acknowledgement or to counter another branch’s constitutional claims.<sup>178</sup> Agencies, however, occupy a more constitutionally ambiguous space, and their actions are always embedded in statutory and regulatory regimes. Agencies also are subject to multiple relationships of oversight and control, and their incentives may be more towards hiding the constitutional dimensions of their actions so as to avoid provoking resistance to their proposed courses of action.

In addition, the identification challenge poses particular problems for administrative constitutionalism’s legitimacy. If agency efforts at constitutional development were clearly evident as distinct from ordinary policymaking and as meriting closer scrutiny by external actors, then the potential danger of unauthorized administrative actions might be lessened. By contrast, when administrative constitutionalism occurs in secret and is hard to discern, legal and political oversight of the process may be stymied. Perhaps the President will have greater awareness of the constitutional basis of an agency’s decisionmaking, given the likelihood of broader executive branch interactions, but that simply enhances the danger of one-sided constitutional assertions—and revives the concern that administrative constitutionalism will operate to the detriment of Congress. And, if agencies engage with constitutional concerns clandestinely, there will be scant

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176. Young, *supra* note 15, at 454, *see also* BALKIN, *supra* note 30, at 300 (“In sum, it is best not to worry too much about where constitutional construction leaves off and merely ordinary politics begins. The key point, instead, is to recognize how practices within the constitutional scheme can subtly adjust the scheme itself in addition to the formal processes of constitutional amendment.”).

177. BALKIN, *supra* note 30, at 311–12; Young, *supra* note 15, at 454; *see also* WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 30, at 15 (stating that arguments concerning constitutional construction “never leave the realm of politics” and that even accepted constructions “are subject to future political struggle”).

178. *Cf.* WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 30, at 5–6 (juxtaposing the concepts of constitutional interpretation and constitutional construction and arguing that the latter is “essentially [a] political task, regardless of the particular institution exercising that function, to construct a determinate constitutional meaning to guide government practice”). *But cf.* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 438–47 (2012) (demonstrating how the “Madisonian conception” of interbranch competition fails to account for Congress’s failure to systemically defend legislative authority against executive encroachment).

occasion for broad public constitutional deliberation. Lack of transparency with respect to judicial contributions to administrative constitutionalism is similarly problematic. By not highlighting the common law character of administrative law, courts curtail assessment of judicial choices by the political branches and undermine the public's ability to hold courts to the rule of law.<sup>179</sup>

But transparency comes at a price. Administrative constitutionalism may well flourish best in the shade. The flip side of greater public engagement is greater opportunity for political or judicial veto of administrative efforts at constitutional development. And fears of such vetoes may lead agencies to forego administrative constitutionalism altogether, particularly administrative efforts to expand upon existing judicial constitutional understandings. The recent HUD rule outlining the disparate impact standard and methodology applicable to FHA claims is a case in point. HUD has long claimed that the FHA encompasses disparate impact claims, and describes its new rule as simply codifying that view and providing clarity by specifying a proof standard under which such claims should be assessed.<sup>180</sup> On the other hand, both the availability of disparate impact claims under the FHA and application of a disparate impact standard to governmental actions like enactment of land use rules and ordinances implicate highly contentious constitutional debates. In *Ricci v. DeStefano*,<sup>181</sup> the Supreme Court left open the question of whether imposition of a disparate impact standard with respect to race violates equal protection, as a form of government-required race-based decisionmaking.<sup>182</sup> A separate question is whether application of a disparate impact standard to state and local governments exceeds Congress's power under Section Five of the Fourteenth Amendment to enforce the Constitution's equal protection guarantee.<sup>183</sup> More broadly, the rule implicates the question of what kinds of protections are needed to root out racial segregation in housing and its continued effects.<sup>184</sup> Even though the dispute over disparate impact in the

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179. Metzger, *Embracing*, *supra* note 19, at 1356.

180. See Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,460–61 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100) (noting that in adopting the final rule it was “formaliz[ing] its long-held recognition of discriminatory effects liability under the [FHA]” and implementing a burden-shifting test to ensure consistent application of the rule).

181. 557 U.S. 557 (2009).

182. *Id.* at 584, 593; see also *id.* at 594–95 (Scalia, J., concurring) (discussing the claimed constitutional violation); Primus, *supra* note 10, at 1354–62 (detailing the constitutional dimensions of *Ricci*).

183. See, e.g., Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 495 (2003) (noting that one “issue was whether federal statutes prohibiting facially neutral practices with racially disparate impacts were valid . . . as means of enforcing equal protection under Section 5 of the Fourteenth Amendment”).

184. See generally Johnson, *supra* note 10 (broadly discussing the problem of racial segregation in housing and proposed strategies to achieve greater integration).

FHA context has focused on statutory authority,<sup>185</sup> it is hard to imagine that these constitutional issues were not raised in internal discussions at HUD or within the executive branch generally. Yet had HUD publicly engaged these constitutional questions it would have immediately situated the rule in the midst of a contentious constitutional debate—and, given the Supreme Court’s current hostility to race-based action, increased the chances the Court might invalidate the rule.

The challenge thus is that the very means needed to ensure administrative constitutionalism’s legitimacy—greater transparency—is simultaneously what may deter administrative constitutionalism from occurring. One potential response is to embrace the ordinary law–constitutional law interplay more robustly, and use ordinary administrative law scrutiny to encourage agencies to engage with relevant constitutional issues.<sup>186</sup> Doing so not only helps ensure agencies take constitutional issues seriously, it also gives them an incentive to be more overt about their constitutional deliberations, for fear that if they did not publicly engage with significant constitutional aspects of their decisions courts might remand for further consideration. Perhaps as important, having courts address administrative constitutionalism through ordinary administrative law helps frame their review in more deferential terms and with recognition of agency expertise, which might lead to greater judicial–administrative dialogue on the constitutional issues involved.<sup>187</sup> To be sure, in some cases agencies themselves may not be aware of their actions’ potential constitutional significance because their constitutional character may only become apparent over time. Hence, using ordinary administrative law to encourage agency engagement with and transparency about constitutional concerns will not end the identification challenge. And courts might well still invalidate agency actions on straightforward constitutional grounds. Yet this approach may offer some counter to administrative inclinations to shield the full dimensions of their actions while inviting greater judicial acknowledgement of the overlapping character of ordinary and constitutional law.

Arguably, a similar approach should be taken to judicial review more broadly and not limited to the administrative context. According to Young, for example, the constitutional role of ordinary law suggests that courts

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185. The Supreme Court recently sought the views of the Solicitor General on the question of whether the FHA embodies a discriminatory impact standard. *Twp. of Mount Holly v. Mount Holly Gardens Citizens in Action, Inc.*, 133 S. Ct. 569 (2012). The term before it had granted certiorari on a case presenting the same question, but the case was dismissed on the parties’ request. *Magner v. Gallagher*, 132 S. Ct. 1306 (2012).

186. Metzger, *Ordinary Administrative Law*, *supra* note 20, at 484–86. Congress and the President could similarly require greater public administrative engagement with constitutional concerns. *See, e.g.*, Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521, 570–72 (2012) (suggesting mechanisms to ensure better administrative attention to federalism impacts from preemption).

187. Metzger, *Ordinary Administrative Law*, *supra* note 20, at 484–86.

should avoid drawing a clear doctrinal line between the two.<sup>188</sup> Thus, not only should courts address constitutional concerns through ordinary law measures such as canons of statutory interpretation, but in addition courts should resist according deference to agency views of statutes that perform constitutive functions—just as courts do not defer to administrative interpretations of the Constitution.<sup>189</sup> Eskridge and Ferejohn reach a similar conclusion about the benefits of addressing Large “C” constitutional concerns through more ordinary law means like canons of statutory interpretation, which can reinforce the need for constitutional deliberation.<sup>190</sup> But they contend that the deference relationship should be reversed, in that the courts should treat measures that have become entrenched through legislative and administrative constitutionalism as precedents that should guide judicial constitutional deliberation.<sup>191</sup>

I am more ambivalent about collapsing doctrinal distinctions between ordinary and constitutional law so broadly. Such an approach has the attraction of having doctrine map actual constitutional practice, as well as the benefit of allowing constitutional law to develop in a more democratically legitimate and dialogic fashion. But there are also good reasons to resist erasing the doctrinal distinction between constitutional and ordinary law across the board. To begin with, courts do not stand in the same relationship to Congress and the President as they do to agencies. Judicial review of the basis for administrative decisionmaking is far more robust, rooted both in core administrative statutes and in constitutionally informed administrative law doctrines.<sup>192</sup> Such scrutiny is less justifiable with respect to decisions by constitutionally coequal and more politically accountable branches. All the more so given that the rationale of the courts using ordinary administrative law to encourage transparency about administrative constitutionalism is the

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188. See Young, *supra* note 15, at 452 (suggesting that there should not be a dichotomy “between ‘the higher lawmaking’ entailed in the Constitution and ‘ordinary lawmaking’ entailed in statutes”).

189. *Id.* at 467–70. Professor Young argues:

[F]irst, . . . where a statutory scheme plays a constitutive role in the constitutional structure, courts should not hesitate to employ normative canons of statutory construction that reflect the constitutional values underlying the relevant aspect of the structure. Second, courts should be reluctant to accord . . . deference to statutory interpretations by administrative agencies where the statute in question plays a constitutive role.

*Id.* at 467.

190. ESKRIDGE & FEREJOHN, *supra* note 15, at 24.

191. *Id.* at 434–36, 445–47 (“[L]egislative and administrative constitutionalism does play *and* ought to play a critical role in the operation of judicial Constitutionalism.”).

192. See Metzger, *Ordinary Administrative Law*, *supra* note 20, at 490 (explaining how an administrative statute’s—the APA’s—prohibition on arbitrary and capricious agency action provides a basis for judicial scrutiny of agency decisions); see also *id.* at 496 (explaining the Supreme Court’s strong presumption that Congress intended judicial review of administrative decisionmaking and how that presumption is rooted in constitutional due process and separation of powers).

need to foster greater oversight of agency constitutional moves by these branches.

Moreover, collapsing the ordinary law–constitutional law divide could undercut core precepts of our constitutional system. Expansion of the constitutional into ordinary law can lead to greater judicial assertion of authority that operates to limit the political branches’ ability to “build out” the Constitution.<sup>193</sup> One recent example comes from *NFIB v. Sebelius*,<sup>194</sup> where four Justices would have invalidated the massive healthcare reform statute in toto, based in part on constitutionally inspired rules of statutory construction.<sup>195</sup> To be sure, these rules can also come to a statute’s defense; Chief Justice Roberts invoked the canon of constitutional avoidance in holding that the requirement that individuals purchase health insurance or pay a penalty could be sustained as a tax.<sup>196</sup> Still, the very different approaches evident in *NFIB* suggest that scholars’ concerns about these rules as surreptitiously expanding the judicial role have some merit. Although addressing constitutional concerns through ordinary law measures theoretically leaves the political branches more room to respond, in practice the effect can be quite draconian.<sup>197</sup> This practical reality marks another reason to distinguish between administrative constitutionalism and other erasures of the ordinary law–constitutional law divide, as administrative agencies are better situated to respond to ordinary law reversals than Congress is.<sup>198</sup> It also suggests reason to worry about the impact of applying approaches like the constitutional avoidance canon to protect central statutory commitments in addition to Large “C” constitutional concerns.

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193. See William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 635–40 (1992) (noting the unacknowledged countermajoritarian effects of this kind of back-door constitutionalization); see also Schauer, *supra* note 147, at 92–96 (emphasizing the constraints on the political branches from the canon of constitutional avoidance).

194. 132 S. Ct. 2566 (2012).

195. *Id.* at 2642, 2650–56, 2668 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (interpreting the individual mandate to not be a tax and arguing that the only proper response was to invalidate the Affordable Care Act in toto, rather than sever those parts that were unconstitutional); see Gillian E. Metzger & Trevor W. Morrison, *The Presumption of Constitutionality and the Individual Mandate*, in *THE HEALTH CARE CASE: THE SUPREME COURT’S DECISION AND ITS IMPLICATIONS* (Nathaniel Persily et al. eds., forthcoming 2013) (manuscript 1–3) (on file with author) (noting the interaction of statutory construction and constitutional implementation in the decision and the impact of different statutory construction approaches to constitutional principles).

196. *NFIB*, 132 S. Ct. at 2593–600. Interestingly, the Chief Justice took a narrower approach to the canon than is currently the norm, concluding that the measure otherwise actually would be unconstitutional, suggesting his approach was more straightforwardly constitutional and less a blending of constitutional and ordinary law approaches. *Id.* at 2600–01.

197. See John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 425 (2010) (explaining how clear statement rules, by placing an emphasis on additional clarity, can effectively impose a judicial tax on the legislative branch, if that branch wishes to pass legislation to “achieve a constitutionally disfavored result”).

198. See Metzger, *Ordinary Administrative Law*, *supra* note 20, at 532–33 (citing less burdensome procedural requirements and unity of purpose among agency personnel as reasons agencies better respond to judicial reversal).

At the same time, collapsing the ordinary–constitutional distinction also may threaten judicial constitutionalism. Deference to legislative and administrative constitutionalism risks undermining the judiciary’s ability to stand as an independent constitutional interpreter. It may lead both the political branches and the courts to view the constitutional content of existing decisions narrowly, resulting in an erosion of constitutional protections. As David Franklin has put it, “there are advantages to marking out the realm of constitutional decision-making as something distinct from the background noise of political bargaining. . . . After all, if everything is constitutional politics, then everything is ordinary politics.”<sup>199</sup> Alternatively, the desire to identify some constitutional core that transcends politics may lend support to adopting narrow approaches to constitutional interpretive methodology, such as putting primacy on the original expected meaning of the Constitution’s terms, to counterbalance recognition of constitutional change.<sup>200</sup>

Hence, we should be cautious about extending the doctrinal and normative implications of administrative constitutionalism to constitutional construction more generally. Preserving adequate room for constitutional implementation by all the branches may require tolerating some inconsistency between lived constitutional practice and constitutional doctrine. Ordinary law may function as constitutional law and constitutional law may at times be indistinguishable from ordinary law, but perhaps this reality is not one that the courts should broadly acknowledge.

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199. Franklin, *supra* note 88, at 1074–75.

200. See BALKIN, *supra* note 30, at 3–7 (arguing that fidelity to the Constitution requires “fidelity to the original meaning of the Constitution, and in particular, to the rules, standards, and principles stated by the Constitution’s text,” but not original expected applications); Whittington, *Constructing*, *supra* note 30, at 120–22, 133–35 (defining interpretation as a process that attempts to “divine the meaning of the text” and is intended to be enduring, and emphasizing how an originalist approach to constitutional interpretation accords with recognition of constitutional construction).