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Gillian E. Metzger

Columbia Law School, gmetzg1@law.columbia.edu

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ORDINARY ADMINISTRATIVE LAW AS CONSTITUTIONAL COMMON LAW

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BY:

PROFESSOR GILLIAN E. METZGER
COLUMBIA LAW SCHOOL

ORDINARY ADMINISTRATIVE LAW AS CONSTITUTIONAL COMMON LAW

Gillian E. Metzger*

Much has changed in constitutional law since 1975 when Henry Monaghan published his Harvard Law Review Foreword on *Constitutional Common Law*.¹ Whole areas of doctrine have been born — and in some cases died.² Yet *Constitutional Common Law* remains remarkably au courant. Indeed, it presaged several of the central themes in constitutional law scholarship over the last decade, such as the role of the political branches and popular movements in constitutional interpretation or the relationship of constitutional doctrine to constitutional meaning.³ More importantly, the practice of constitutional common law continues to this day and so too does the debate over its legitimacy.

By constitutional common law Monaghan referred to “a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions . . . [and] subject to amendment, modification, or even reversal by Congress.”⁴ Such common law rules, he argued, represent “a surprising amount of what passes as authoritative constitutional ‘interpretation’”—a feature of our constitutional practice obscured by the “mystique surrounding *Marbury v. Madison*⁵ and the *Marbury* view of the Court as the “authoritative and final” determiner of constitutional meaning.⁶ Monaghan gave several examples of this phenomenon, moving from structural matters like the dormant Commerce Clause to individual liberties, most famously some of the Court’s seminal criminal procedure rulings such as the warnings required under *Miranda v. Arizona*.⁷ In each of these contexts, the

* Professor of Law, Columbia Law School. Special thanks to Mitchell Berman, Ariela Dubler, Henry Monaghan, Trevor Morrison, Peter Strauss.

¹ Henry P. Monaghan, The Supreme Court, 1974 Term — Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1 (1975).

² Contemporary constitutional doctrine allowing limits on campaign contributions, for example, was born in 1976 with the Court’s decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), rose to its heights in *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377 (2000) and now seems headed for extinction. The extensive constitutional case law on the use of race in affirmative action has also grown up in this period, starting with *Regents of the University of California v. Bakke*, 435 U.S. 265 (1978).

³ The scholarship on each of these topics is extensive, so the following list makes no attempt to be comprehensive. For discussions of the role of the political branches and social movements in constitutional interpretation, see, e.g., Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004); Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (1999); Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 Harv. L. Rev. 1594 (2005); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 Cal. L. Rev. 1027 (2004). For discussions of the relationship between constitutional doctrine and constitutional meaning, see Richard Fallon, *Implementing the Constitution* (2001) [hereinafter Fallon, *Implementing*]; Mitchell N. Berman, *Constitutional Decision Rules*, 90 Va. L. Rev. 1] (2004), Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 Va. L. Rev. 1649 (2005); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. Chi. L. Rev. 190 (1988).

⁴ Monaghan, *supra* note , at 2-3.

⁵ 5 U.S. (1 Cranch) 137 (1803).

⁶ Monaghan, *supra* note , at 2-3.

⁷ 384 U.S. 436, 467-68 (1966); Monaghan, *supra* note , at 3-25.

Court expressly acknowledged that its constitutional rulings were to some extent revisable by Congress.⁸

From the outset, some scholars have condemned constitutional common law as illegitimate judicial lawmaking or alternatively as insufficiently protective of constitutional rights.⁹ Indeed, the Court itself was notably ambivalent about Congress's ability to revise judicial constitutional determinations.¹⁰ Over the years, the Court has become more reluctant to characterize its constitutional rulings as contingent or acknowledge a robust role for Congress in constitutional individual rights interpretation. The 2001 decision in *United States v. Dickerson* is a prime exemplar of this trend: While not insisting that "the *Miranda* warnings are required by the Constitution, in the sense that nothing else will suffice to satisfy constitutional requirements," the Court there concluded that the *Miranda* warnings represented a constitutional rule binding on Congress, at least to the extent of necessitating invalidation of a congressional statute that the Court characterized as intended to overrule *Miranda*.¹¹ Similarly indicative is the Court's greater scrutiny of congressional enactments under Section 5 of the Fourteenth Amendment and its insistence in that context on *Marbury*-style judicial review with the Court as the supreme arbiter of constitutional meaning.¹² Significantly, the Court also has not identified a role for Congress when expanding the scope of constitutional protections, thus signaling that its reluctance to involve Congress is not simply a reflection of a narrower view of the constitutional rights involved.¹³

⁸ See Monaghan, *supra* note , at 11, 20, 27-30; *Illinois v. City of Milwaukee*, 406 U.S. 91, 107 (1972); *Miranda*, 384 U.S. at 467; *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 425 (1946); see also *Bush v. Lucas*, 462 U.S. 367, 389-90 (1983) (post-*Constitutional Common Law* decision bearing out Monaghan's prediction that congressional actions may determine whether a *Bivens* action will lie).

⁹ See *infra* TAN 86-91. Indeed, some scholars have rejected Monaghan's claims that these decisions represent constitutional common law at all. See, e.g., Grano, *supra* note, at 103, 119-22 (arguing that included in constitutional common law are "rules that really belong to the *Marbury* tradition," including rules with respect to the right to counsel); Schrock & Welsh, *supra* note , at 1138-40 (rejecting argument that Congress's power to authorize dormant commerce clause violations is an instance of constitutional common law)

¹⁰ See, e.g., *Katzenbach v. Morgan*, 385 U.S. 641, 651 n.10 & 652-56 (1966) (upholding congressional prohibition on many English literacy voting qualifications and stating that "it is enough that we be able to perceive a basis upon which the Congress might resolve the conflict" between state interests and constitutional concerns about ending discrimination in governmental services and in voting qualifications, but adding that Congress lacks power to dilute judicially determined constitutional protections).

¹¹ 530 U.S. 428, 437-43 (2000). *Dickerson* is ambiguous as to whether a congressional effort to replace the *Miranda* warnings would be constitutionally acceptable, limiting itself to noting that the substitute Congress enacted, a totality of the evidence analysis, was not adequate and was rejected by the Court in *Miranda* itself. *Id.* at 441-43. Even so, the Court's characterization of the warnings as a constitutional rule contrasts notably with its earlier, post-*Miranda* precedent that described the warnings as not constitutionally mandated and other decisions more overtly acknowledging a role for the political branches. See *id.* at 450-454 (describing and quoting from intervening decisions stating that the *Miranda* warnings were not constitutionally protected); see also *Smith v. Robbins*, 528 U.S. 259, 265 (2000) (describing *Anders* rule for when appointed counsel have fulfilled their duties of representation on appeal as a prophylactic rule and stating that "States are free to adopt different procedures, so long as those procedures adequately safeguard a defendant's right to appellate counsel"); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 Va. L. Rev. 1649, 1668-72 (2005) (discussing *Dickerson* and *Smith*).

¹² *City of Boerne v. Flores*, 521 U.S. 507 (1997), see also *Board of Trustees v. Garrett*, 531 U.S. 356, 374 (2001).

¹³ See, e.g., *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816-17 (2008) (making no reference to a congressional role in defining the scope of the Second Amendment right to possess a gun for self-defense in the home, other than noting that longstanding prohibitions on firearms possession were not being called into question); *Crawford v. Washington*, 541 U.S. 36 (2004) (making no reference to alternative rules that Congress or the states could adopt in holding that the Confrontation Clause bars testimonial out-of-court statements by witnesses). The

Yet the Court's resistance to acknowledging constitutional interpretive plurality has not spelled the end of constitutional common law. One area in which constitutional common law remains particularly prevalent, though largely unrecognized as such, is ordinary administrative law.¹⁴ Administrative law is generally understood as having constitutional as well as what I will call "ordinary law" components, with ordinary law here referring to statutory and regulatory requirements, such as the Administrative Procedure Act (APA)¹⁵ or Executive Order 12866,¹⁶ and associated administrative law doctrines.¹⁷ What is less often acknowledged, particularly by courts, is the degree to which constitutional concerns permeate ordinary administrative law, in particular doctrines of judicial review of agency action. A striking example of this lack of acknowledgment is the decision last term in *Federal Communications Commission (FCC) v. Fox Television Stations*, in which the Court expressly refused to link ordinary administrative law to constitutional concerns.¹⁸

Fox involved a challenge to the FCC's new policy imposing greater restrictions on broadcast of indecent language. In a 5-4 decision, the Court rejected the claim that the FCC had failed to adequately justify its change in policy and thereby violated the APA's prohibition on arbitrary and capricious agency action. Justice Scalia's majority opinion was primarily focused on defeating the suggestion that an agency necessarily faces a higher burden to explain a change in existing policy than in adopting a new policy when none previously had existed.¹⁹ But the opinion also denied that agency decisions implicating constitutional liberties trigger more stringent arbitrary and capricious review. Instead, the Court said, whether an agency action is

closest the Court has come to acknowledging an implementation role for the political branches (state as well as federal) was its decision this last Term in *Melendez-Diaz v. Massachusetts*, 2009 WL 1789468 (June 25, 2009), in which it noted with seeming approval state notice-and-demand statutes as a mechanism for meeting the demands of the Confrontation Clause. See *id.* at *12; see also Jennifer Sokoler, [], In another decision last term, *Corley v. United States*, 2009 WL 901513 (Apr. 6, 2009) the Court accepted without discussion Congress's power to limit the Court's *McNabb-Mallory* doctrine excluding confessions made during periods of unreasonable delay before presentment to a judge, but this reflected the understanding of *McNabb-Mallory* as an exercise of the Court's supervisory power over the federal courts rather than a constitutionally mandated requirement that would apply to state courts as well.

¹⁴ Many of Monaghan's specific examples remain good law as well, particularly those involving constitutional structure, such as the dormant commerce clause and interstate water pollution. Recent decisions on *Bivens* actions all fall into the constitutional common law mold, although the Court's recent *Bivens* jurisprudence also reveals substantial retrenchment in the availability of *Bivens* actions. See Fallon et al. eds., *Hart & Wechsler's the Federal Courts* 660-63, 733-42 (6th ed. 2009); see also Gillian E. Metzger, *Congress, Article IV and Interstate Relations*, 120 Harv. L. Rev. 1468, 1480--85 (2007) (describing Congress's power to authorize state violations of the dormant commerce clause). Perhaps the most frequently instance of constitutional common law today, however, is application of the constitutional canons in statutory interpretation. See *infra* TAN 132-136.

¹⁵ 5 U.S.C. § 551 et seq. (2006)

¹⁶ 3 C.F.R. 638 (1993), reprinted as amended in 5 U.S.C. § 601 (2006).

¹⁷ See, e.g., *Motor Vehicle Mfrs Assn v. State Farm Mut Auto Ins. Co.*, 463 U.S. 29 (1983) (explicating meaning of APA "arbitrary and capricious" standard). See also Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. Rev. 461, 463-64 (2003) [hereinafter Bressman, *Beyond Accountability*] (distinguishing between ordinary administrative law and constitutional administrative law).

¹⁸ 129 S.Ct. 1800, 1811--12 (2009) ("If the Commission's action here was not arbitrary or capricious in the ordinary sense, it satisfies the Administrative Procedure Act's "arbitrary [or] capricious" standard; its lawfulness under the Constitution is a separate question to be addressed in a constitutional challenge.")

¹⁹ *Id.* at 1811 (stating "no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review.")

“arbitrary and capricious” and whether it is unconstitutional are “separate question[s].”²⁰ Arguing that the canon of constitutional avoidance applied only to judicial review of statutory language, Justice Scalia stated that “the only context in which constitutionality bears upon judicial review of authorized agency action” is when a court determined the action is unconstitutional.²¹ He dismissed the dissent’s suggestion that the agency be required to reconsider its policy in light of constitutional concerns, terming such an approach “judicial arm-twisting or appellate review by the wagged finger.”²²

Simply stated, my argument here is that *Fox* is wrong, and importantly so. The Court’s protestations aside, constitutional concerns often affect judicial review of authorized executive action. In fact, constitutional law and ordinary administrative law are inextricably linked: Statutory and regulatory measures are created to address constitutional requirements; constitutional concerns, particularly those sounding in separation of powers, underlie core ordinary administrative law doctrines; and agencies are encouraged to take constitutional concerns seriously in their decisionmaking. The net result is that a fair amount of ordinary administrative law qualifies as constitutional common law. Its doctrines and requirements are constitutionally informed but rarely constitutionally mandated, with Congress and agencies enjoying broad power to alter specific administrative mechanisms notwithstanding their constitutional aspect.

Recognizing the interrelationship between constitutional law and ordinary administrative law is important both for the ongoing debate over the legitimacy of constitutional common law and for proper appreciation of the role administrative agencies can play in our constitutional order. Underlying many attacks on constitutional common law is a view of constitutional law as having a narrow and determinate scope, with a clear divide separating constitutional and nonconstitutional law. Yet in the context of administrative law at least, this divide simply does not exist. Although some administrative law requirements are plainly constitutionally required and others clearly rooted only in statutory or regulatory enactments, a number of basic doctrines occupy a middle ground. The latter are simultaneously based in ordinary law and constitutional law, and these two dimensions are too overlapping and interactive to be isolated. Administrative law thus suggests that the vision of constitutional law as a distinct and determinate entity is a false one. Moreover, this overlapping and interactive relationship between the constitutional and ordinary dimensions of administrative law, combined with Congress’s broad control over the latter, is what serves to transform ordinary administrative law into a species of constitutional common law.

Of course, that as a descriptive matter judges infuse constitutional values into their development of administrative law doctrines or readings of ordinary administrative requirements does not, standing alone, suffice to justify the practice. But this deeply embedded practice does indicate the degree of disruption that would result were constitutional common law extirpated from administrative law. Moreover, the normative basis needed to justify such a disruption is lacking. In particular, seeking to enforce constitutional norms through ordinary administrative law better accords with constitutional principles than efforts to segregate out the two. This is true of judicial development of administrative law doctrines that respond to constitutional concerns associated with administrative government--such as doctrinal authorization for at times quite searching scrutiny of the reasonableness of agency decisionmaking. Such doctrines are closely akin to other common moves in the judicial constitutional law repertoire, in particular

²⁰ Id. at 1812.

²¹ Id.

²² id. at 1812 n.3

constitutional avoidance canons. Addressing these concerns through ordinary administrative law preserves a degree of flexibility that better accommodates changing regulatory needs and Congress' primacy in structuring government than more immutable constitutional law prescriptions, and is also more likely to yield meaningful constraints.

But the benefits of addressing constitutional concerns through ordinary administrative law are especially evident with respect to the form of administrative constitutionalism condemned in *Fox*: Judicial use of ordinary administrative law to encourage agencies to take constitutional concerns seriously in their own decisionmaking. Administrative agencies today are responsible for much of the federal government's decisionmaking. Excluding such primary decisionmakers from a judicially enforceable obligation to take constitutional concerns seriously in wielding their delegated authority is at odds with the structural imperatives of our constitutional system. Agencies are not only well positioned to enforce constitutional norms effectively, but they are also better able than courts to determine how to incorporate constitutional concerns into a given regulatory scheme with the least disruption. In addition, it is far easier for agencies to respond to judicial decisions remanding administrative decisions for failure to take account of constitutional concerns than for Congress to respond to judicial narrowing of statutes through application of constitutional canons or judicial invalidation of measures on constitutional grounds. As a result, segregating constitutional law concerns from ordinary administrative law may well cause greater intrusion on the policymaking prerogatives of the political branches rather than linking the two.

To my mind, the better critique is not the extent to which constitutional common law surfaces in administrative contexts, but rather the lack of transparency that accompanies it. The causes of the Court's reluctance to acknowledge the constitutional dimension of ordinary administrative law are murky, but likely center on concerns with preserving the proper judicial role--both ensuring that courts do not intrude onto the policymaking prerogatives of the political branches and with protecting the Court's supremacy in constitutional interpretation. Whatever the cause, the harmful effects of this reluctance are evident. Judicial failure to openly acknowledge the constitutional role played by ordinary administrative law has left our understandings of the constitutional demands imposed on the modern administrative state underdeveloped and untested by criticism. This failure has further meant that the capacity of administrative agencies to advance and protect constitutional norms remains largely unexploited. At the same time, judicial obfuscation has undermined the extent to which agencies are held accountable for the constitutional judgments they do make.

In what follows, Part I identifies a number of ways that constitutional concerns permeate ordinary administrative law and argues that the net result is best understood as constitutional common law. Part II then analyzes the implications of this characterization of ordinary administrative law for the debate over constitutional common law and seeks to justify the use of ordinary administrative law to ensure that administrative agencies take constitutional concerns seriously in their decisionmaking.

I. CONSTITUTIONAL COMMON LAW IN ADMINISTRATIVE CONTEXTS

Constitutional law regularly surfaces in administrative contexts, shaping how agencies make decisions, the substance of those decisions, and judicial review of agency decisionmaking.

Yet that role is surprisingly unacknowledged and unspecified, particularly by courts.²³ Similarly unremarked is the influence that ordinary administrative law has on defining the scope of constitutional rights. These two features—the tacit and indeterminate role played by constitutional concerns, as well as the reciprocal relationship between statutory or regulatory administrative mechanisms and constitutional requirements—mean that Congress has power over the substance of administrative law, including its constitutional components. Combined with the evolving and emergent quality of many ordinary administrative law doctrines, the net result is a form of constitutional common law.

A. Connections Between Constitutional Law and Ordinary Administrative Law

Constitutional law's manifestations in administrative contexts can usefully be divided into three categories. First, ordinary administrative law provides mechanisms that are either constitutionally-mandated or that avoid constitutional violations. Second, constitutional norms and concerns underlie and are evident in a number of administrative law doctrines. Third, both courts and the political branches sometimes use doctrinal mechanisms or substantive requirements to encourage agencies to take constitutional concerns seriously, with the result that constitutional concerns influence the shape of agency decisionmaking.

1. Ordinary Administrative Law As Constitutionally Mandated. The most obvious point of contact between ordinary administrative law and constitutional law is that ordinary administrative constraints on executive officials are sometimes constitutionally required. Perhaps the classic example is provisions for administrative hearings, which are often adopted to satisfy procedural due process's requirements of notice and some opportunity for a hearing.²⁴ Another instance involves the First Amendment. The Court has repeatedly held that administrative licensing systems or other forms of prior restraint based upon the content of speech must contain objective standards to circumscribe official discretion in order to be constitutional, as well as procedural safeguards such as the right for speedy judicial review of any administrative license denial.²⁵ Most recently, the Court's decisions on parade licensing

²³ Scholars periodically notice the constitutional underpinnings of ordinary administrative law doctrines. See, e.g., Bressman, *Beyond Accountability*, at 468; Kevin A. Stack, *The Constitutional Foundations of Cheney*, 116 *Yale L. J.* 952, 958-59 (2007); see also William D. Araiza, *In Praise of a Skeletal APA: Norton v. Southern Utah Wilderness Alliance, Judicial Remedies for Agency Inaction, and the Questionable Value of Amending the APA*, 56 *Admin. L. Rev.* 979, 1002 (2004) (noting "the maxim that administrative law is applied constitutional law").

²⁴ See, e.g., *Wilkinson v. Austin*, 545 U.S. 209, (2005) (detailing administrative system used for classifying prisoners for supermax, which included provisions for notice, hearing, and internal review, and concluding that this system, devised on the eve of trial, satisfied procedural due process requirements); see also Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 *Yale L. J.* 2, 31 (2008) (arguing that in a number of instances the government is required to use elaborate procedures if adopting a constitutionally doubtful decision).

²⁵ See *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Cox v. New Hampshire*, 312 U.S. 569 (1941); see also *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992) (emphasizing lack of objective standards for fee assessments, lack of requirement that county administrator explain fee decisions and lack of reviewing as basis for holding county parade fee ordinance unconstitutional); see also Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 *Va. L. Rev.* 1 (2000) (discussing the historical intertwining of free speech claims and administrative law).

have underscored the importance of officials being required to explain their decisions, a typically administrative requirement.²⁶

In other contexts, specific administrative mechanisms are not constitutionally mandated but suffice to avoid constitutional violations. A prime example here arises in regard to *Bivens* actions.²⁷ On several occasions, the Court has identified the availability of administrative complaint systems by which harmed individuals could obtain redress to redress individual harms as a factor counting against implying a *Bivens* damages remedy.²⁸ Yet another example is the separation of functions requirements of the APA and other provisions for independent agency review.²⁹ Although the Court has rejected the claim that combining investigative and adjudicatory functions necessarily violates due process, it has also acknowledged the possibility that such a combination may undermine an individual's due process right to an unbiased decisionmaker.³⁰ Such a possibility is forestalled, however, by the APA's separation of functions requirements. Indeed, due process concerns underlay Congress's decision to include these provisions as well as detailed procedural protections for formal agency adjudication in the APA.³¹ Like the procedural process and First Amendment licensing decisions discussed above, constitutional concerns are acknowledged to be in play in these contexts. But the Court has not held these administrative mechanisms to be constitutionally required, instead concluding they are adequate to avoid constitutional violation. The result is that governments enjoy greater discretion in shaping these administrative mechanisms as they determine best.³²

²⁶ See *Forsyth County*, 505 U.S. at 133; see also *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 324 (2002) (upholding a parade licensing scheme that limited the factors government officials could consider, required that reasons for any denials be clearly explained, and were subject to review); *Seattle Affiliate of Oct. 22nd Coalition v. City of Seattle*, 550 F.3d 788, 798 (9th Cir. 2008) (“The Supreme Court has expressed particular concern about statutes that do not require the licensor to provide any explanation for his decision, and where that decision is unreviewable”) (internal quotations and additions omitted).

²⁷ *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 396-97 (1971) (recognizing an implied private right of actions for damages against federal officers alleged to have violated constitutional rights).

²⁸ See *Wilkie v. Robbins*, 551 U.S. 537, 2598-2600, 2604-05 (2007) (emphasizing availability of existing mechanisms by which respondent could have obtained administrative review and subsequently judicial review of almost all challenged actions by federal officials and ultimately concluding that this availability, along with functional concerns, made implying a *Bivens* action inappropriate); *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) (noting respondents had full access to administrative remedy program in course of refusing to infer a *Bivens* action against private prison corporation); *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988) (emphasizing administrative review process available to social security disability claimants, including option of seeking judicial review once administrative remedies exhausted, in refusing to imply a *Bivens* action); *Bush v. Lucas*, 462 U.S. 367, 386 (1983) (concluding that administrative system created by Congress “provides meaningful remedies for employees who may have been unfairly disciplined for making critical comments about their agencies” and refusing to create a *Bivens* action to vindicated employees’ First Amendment rights).

²⁹ See 5 U.S.C. §§ 554, 556-57.

³⁰ See *Withrow v. Larkin*, 421 U.S. 35, 46--55 (1975) (rejecting claim that combination of investigative and adjudicatory functions necessarily violates due process); see also *In re Murchinson*, 349 U.S. 133, 139 (1955) (holding that procedure under which judge charged witnesses with contempt and also tried and convicted them violated due process).

³¹ See *Jordan*, 299-312; *Shepperd*, *Fierce Compromise*.

³² This is particularly true in contrast to the First Amendment licensing context, where the Court has imposed fairly specific procedural requirements. See *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992). The Court is often quite deferential to governmental choices in assessing procedural due process challenges. See, e.g., *Walters v. National Ass’n of Radiation Survivors*, 473 U.S. 305, 323-26 (1985) (emphasizing great weight due government’s desire to preserve informality and non-adversarial character of veterans’ benefits system).

Ordinary administrative law can also serve a greater avoidance role, not only guarding against recognized constitutional violations but further allowing courts to avoid even addressing some constitutional issues at all. Again, procedural due process provides a case in point. Although the Court periodically insists that procedural due process imposes no significant constraints on general policymaking, in doing so it relies on precedents going back to the beginning of the twentieth century, before the advent of the modern administrative state, and in contexts in which substantial opportunity for notice and comment had been provided.³³ The Court has not had to address the question of whether procedural due process requires some minimal level of notice and opportunity to be heard in regard to regulatory rulemaking in its modern form---in which rulemaking is pervasive and agencies exercise broad discretion in devising requirements that can have substantial impact on identified groups---because the APA already mandates such procedures.³⁴ Similarly, Lisa Bressman has argued that the availability of ordinary administrative law doctrines prohibiting arbitrary agency decisionmaking has allowed the Court to avoid determining whether the Constitution requires agencies to issue standards to guide exercise of their delegated powers.³⁵

2. *Ordinary Administrative Law As Constitutionally Inspired.* The description of ordinary administrative law as allowing courts to avoid constitutional issues is only partially accurate. It fails to capture the ways that constitutional concerns have shaped development of ordinary administrative law doctrines---sometimes overtly, often tacitly. The central exemplar of this phenomenon is the emergence of hard look review of agency decisionmaking. The APA's prohibition on arbitrary and capricious agency action is today read as providing the basis for at times quite searching judicial scrutiny. As the Court stated in its famous decision in *Motor Vehicle Manufacturers Association v. State Farm Mutual Auto Insurance Company*: "Agencies are required to "examine the relevant data and articulate a satisfactory explanation for its action[,] including a 'rational connection between the facts found and the choice made,'"³⁶ and courts are instructed to set aside agency action if they find an agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before [it] or is [too] implausible that it could not be ascribed to a difference in view of the product of agency expertise."³⁷ It is generally accepted, at least by scholars, that "arbitrary and capricious" review under *State Farm* is a far cry from the lenient scrutiny originally intended by the Congress that adopted the APA. When the APA was adopted, "arbitrary and capricious" was understood to entail the same minimal scrutiny as constitutional rationality review. Over the years, however,

³³ See, e.g., *United States v. Florida E. Coast Ry. Co.*, 410 U.S. 224, 244-46 (1973) (invoking *Londoner v. Denver*, 210 U.S. 783 (1910) and *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915)) and holding procedural due process did not require additional procedures in rulemaking in which Court concluded that the agency's ultimate notice "could not have been more explicit or detailed" and interested parties had sufficient time to present objections); see also *Vermont Yankee Nuclear Corp. v. NRDC*, 435 U.S. 519, 543 (1978) (citing *BiMetallic* and *Florida East Coast* and stating "[s]ince this was clearly a rulemaking proceeding in its purest form, we see nothing to support [the] view" that "additional procedural devices were required under the Constitution," in regard to a rulemaking in which agency had provided detailed notice, including underlying staff reports, and held an oral hearing).

³⁴ See 5 U.S.C. § 553.

³⁵ See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. Rev. 461, 518 (2003); Lisa Schultz Bressman, *Disciplining Delegation After Whitman v. American Trucking Ass'ns*, 87 Cornell L. Rev. 452, 459-66 (2001).

³⁶ *Motor Vehicle Mfrs Assn v. State Farm Mut Auto Ins. Co.*, 463 U.S. 29 (1983).

³⁷ *Id.* at 43.

the courts came to read arbitrary and capricious in a far more rigorous fashion until it came to embody today's hard look review.³⁸

Part of the explanation for this expansion of substantive judicial scrutiny of agency decisionmaking lies in constitutional concerns with the broad delegations of power to agencies and the attendant risk of unaccountable and arbitrary exercises of administrative power. Intensified judicial scrutiny of administrative actions developed in response to the dramatic expansion in regulatory authority that attended enactment of major environmental, health and safety, and consumer protection statutes during the 1960s and 1970s. This period was also marked by increasing loss of faith in administrative expertise and fears of agency capture by regulated interests.³⁹ The requirement that agencies supply a substantial, contemporaneous, and reasoned explanation for their decisions exerts a powerful disciplining force on the agency's decisionmaking process.⁴⁰ In particular, hard look review prioritizes expertise and technocratic decisionmaking within the agency, in the process downplaying more raw political considerations.⁴¹ At the same time, requiring that agencies explain and justify their actions also arguably reinforces political controls, by helping to ensure that Congress and the President are aware of what agencies are doing.⁴²

In short, this basic requirement of reasoned explanation is central to alleviating core separation of powers concerns associated with the administrative state.⁴³ In his *Fox* concurrence Justice Kennedy recently noted this constitutional connection, describing the reasoned decisionmaking requirement as "stem[ming] from the administrative agency's unique

³⁸ See Alfred C. Aman, *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 *Corn. L. Rev.* 1101, 110 n.28, 1134-43 (1988); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 *Stan. L. Rev.* 1189, 1300-1315 (1986). For an example of the type of deferential scrutiny originally thought to be the measure of arbitrary and capriciousness review, see *Pac. States Box & Basket Co. v. White*, 296 U.S. 176, 181-82 (1935).

³⁹ See Thomas W. Merrill, *Capture Theory and The Courts: 1967-1983*, 72 *Chi-Kent L. Rev.* 1039, 1039-44, 1059-67 (1997); Rabin, *supra* note , at 1308-13; see also Gillian E. Metzger, *The Story of Vermont Yankee: A Cautionary Tale of Judicial Review and Nuclear Waste*, in *Administrative Law Stories* 125, 143-48 (Peter L. Strauss, ed. 2006) (tracing the D.C. Circuit's responses to concerns about agency accountability presented by expanded rulemaking).

⁴⁰ Some scholars say too disciplining. See, e.g., Jerry L. Mashaw & David L. Harfst, *The Struggle for Auto Safety* 224-28 (1990); R. Shep Melnick, *Regulation and the Courts: The Case of the Clean Air Act* 294-98 (1983); McGarrity, 75 *Tex L. Rev.* 525, 549. Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 *Duke L.J.* 1385, 1387-96, 1400-03, 1419 (1992); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 *Admin. L. Rev.* 59, 60-62, 65-68 (1995). For more optimistic accounts of the benefits of hard look review, see William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 *Yale L. J.* 38, 59-60 (1975); Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 *Cornell L. Rev.* 486, 490-91, 522-26, 543-47 (2001).

⁴¹ See Kathryn A. Watts, *Proposing A Place for Politics in Arbitrary-and-Capricious Review*, SSRN draft at 18, 21-22 (forthcoming 119 *Yale Law Journal*); Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 *Sup. Ct. Rev.* 54, 64-65 (2007).

⁴² See Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 *Colum. L. Rev.* 1749, 1780-83 (2007), McNollgast, *Administrative Procedures as Instruments of Political Control*, 3 *J.L. Econ. & Org.* 243, 257-58 (1987); Kevin A. Stack, *The Constitutional Foundations of Chenery*, 116 *Yale L. J.* 952, 958-59 (2007).

⁴³ See Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 *Duke L. J.* 387, 425-28; Stack, *supra* note , at 992-1000; see also Jerry L. Mashaw, *Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance*, 76 *Geo. Wash. L. Rev.* 99, 111 (2007) (noting the constitutional basis of the reasoned decisionmaking requirement); Richard W. Murphy, *The Limits of Legislative Control Over the "Hard Look,"* 56 *Admin. L. Rev.* 1125, 1132-34 (2004) (same).

constitutional position” and the danger that “[i]f agencies were permitted unbridled discretion, their actions might violate important principles of separation of powers and checks and balances.”⁴⁴ The Court implicitly made such a link in *State Farm*, emphasizing the difference between statutes and administrative action and arguing that the latter did not merit the same “presumption of constitutionality” and minimal rationality review due the former.⁴⁵ Similarly, as Kevin Stack demonstrated in his recent article on the landmark *SEC v. Chenery* decision, the demand that agencies offer a contemporaneous statement of the grounds for their actions derives from modern constitutional concerns about delegation of authority to administrative agencies.⁴⁶ The Court made this connection express in opinions issued in the early decades of the twentieth century, as the modern administrative state was beginning to emerge, stating “[i]n creating such an administrative agency, the Legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function.”⁴⁷

Today, however, the Court is less willing to acknowledge the constitutional basis of the reasoned decisionmaking demand; Kennedy’s statement in *Fox* is unusual. Despite highlighting the distinctive position of agencies, *State Farm* ultimately rooted hard look review simply in the APA’s prohibition on arbitrary and capricious agency action, without addressing whether such intense scrutiny was originally intended.⁴⁸ Even more striking is the 2001 decision in *American Trucking Ass’n v. Whitman*. The Court there insisted that the constitutionality of a delegation turns solely on whether Congress supplied an intelligible principle to guide the agency and not on how the agency exercises its delegated power.⁴⁹ Although the Court also indicated that what counts as a constitutionally sufficient intelligible principle may vary with the scope and nature of delegated responsibilities, unlike earlier precedent it treated the presence of alternative checks,

⁴⁴ 2009 WL 1118715 at 20; see also *Bowen v. Am. Hosp. Ass’n*, 476 U.S. 610, 627 (1986). Jerry Mashaw has argued that the core administrative law notion that “discretion is always conferred on administrators on the implicit assumption that it will be reasonably exercised” is evident in an 1815 separate opinion by Chief Justice Marshall in *Otis v. Watkins*, 13 U.S. (9 Cranch) 339, 358 (1815), although the Court itself rejected the requirement that a government official must use “reasonable care in ascertaining the facts on which to form an opinion,” *id.* at 355-56. See Jerry L. Mashaw, *Reluctant Nationalists: Federal Administrative Law in the Republican Era*, 116 *Yale L. J.* 1636, 1677-78 (2007).

⁴⁵ 463 U.S. at 43 n.9.

⁴⁶ Stack, *supra* note , at 982-989; compare Ann Woolhandler, *Delegation and Due Process: The Historical Connection*, 2009 *Sup. Ct. Rev.* 223, 225-26 (analyzing the effect of legislative delegation on procedural due process and arguing that the Court initially imposed process requirements on delegates to ensure that their determinations had factual support, but “later supplemented, or in some cases replaced, the requirement of process with a requirement—enforced by judicial review—that the delegate’s action not be substantively arbitrary.”).

⁴⁷ *Wichita Railroad & Light Co. v. Public Util. Comm’n*, 260 U.S. 48, 58-59 (1922); see also Stack, *supra* note , at 983--89 (discussing *Wichita Railroad* and similar contemporaneous decisions).

⁴⁸ *State Farm*, 463 U.S. at 41-43; see also *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971) (similarly invoking only the APA, though with general references to the appropriate roles of courts and agencies). The Court’s refusal to address whether extensive substantive scrutiny accords with the intentions of Congress in adopting the APA stands in particular contrast to its insistence that courts not impose procedural controls beyond those in the APA. See Metzger, *supra* note 38, at 160-62; compare *Vermont Yankee v. NRDC*, 435 U.S. 519, 523-24, 543-44 (1978) with *id.* at 549.

⁴⁹ 531 U.S. 457, 472 (2001). The specific issue in *Whitman* was whether an agency’s failure to adopt determinative guidelines to limit its discretion created an unconstitutional delegation, but the Court’s insistence that an agency’s actions in exercising its delegated authority are irrelevant to assessing the delegation’s constitutionality would presumably extend to denying the relevance of whether the agency engaged in reasoned decisionmaking. *Whitman* does not, however, exclude the possibility that the reasoned decisionmaking requirement is rooted in the Due Process Clause.

such as agency-promulgated limits or even judicial oversight, as irrelevant.⁵⁰ The constitutional forces that produced contemporary arbitrary and capriciousness review have thus faded from immediate view, yet they nonetheless represent a fundamental basis on which this basic administrative law doctrine rests.

The role that constitutional concerns play in inspiring ordinary administrative law is even more evident in *Chevron v. NRDC*, which famously established the rule that courts should defer to reasonable agency interpretations of ambiguous statutes that the agencies are charged with implementing.⁵¹ *Chevron* represents a mechanism for checking agencies somewhat different from hard look review, in that it emphasizes political controls in addition to (some scholars argue more than) agency reasoning and expertise.⁵² The Court's explanation in *Chevron* for this deference rule was cursory, but it suggested there that one basis was congressional intent, arguing that in delegating implementation to an agency Congress was also implicitly delegating gapfilling interpretive authority.⁵³ But such an across-the board implication of congressional intent is, of course, purely fictional.⁵⁴ The real question is why read statutory delegations as including implicit delegation of interpretive authority, rather than insist on courts exercising independent judgment on questions of statutory meaning absent express instructions from Congress to the contrary. The Court appears to have been influenced by separation of powers and institutional competency concerns about the appropriate judicial role, combined with recognition of the impossibility of separating questions of statutory meaning from questions of

⁵⁰ Id. at 475. The Court's refusal in *Whitman* to link judicial review to the constitutionality of delegations was at odds with its opinion in *INS v. Chadha*, 462 U.S. 919 (1983), which stated that "[t]he bicameral process is not necessary as a check on the Executive's administration of the laws because his administrative activity cannot reach beyond the limits of the statute that created it" and emphasizing that "[t]he courts, when a case or controversy arises, can always 'ascertain whether the will of Congress has been obeyed' and can enforce adherence to statutory standards." Id. at 953 n. 16 (quoting *Yakus v. United States*, 321 U.S. 414, 425 (1944) and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)); *Amalgamated Meat Cutters v. Connolly*, 337 F. Supp. 737, 759 (DDC 1971) ("Another feature that blunts the 'blank check' rhetoric is the requirement that any action taken by the Executive under the law, subsequent to the freeze, must be in accordance with further standards as developed by the Executive."); see also Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452, 485-88 (1989) (detailing the shift in delegation doctrine between a focus on "power divided to power kept in check").

⁵¹ 467 U.S. 837, 843 (1984). More specifically, *Chevron* famously established that courts are instructed to undertake a two-step inquiry in assessing agency statutory interpretations: "At the first step, we ask whether the statute's plain terms 'directly address[s] the precise question at issue.'" Id. at 843. If the statute is ambiguous on the point, we defer at step two to the agency's interpretation so long as the construction is "a reasonable policy choice for the agency to make." Id., at 845. Subsequent decisions have made clear that a court must initially establish that "Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority" for *Chevron* deference to apply--a requirement occasionally referred to as *Chevron*'s step zero. *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001).

⁵² See Bressman, *supra* note , at 1763-64; Watts, *supra* note , at 35-38. But see Peter L. Strauss, *Overseer or "The Decider"?* The President in Administrative Law, 75 *Geo. Wash. L. Rev.* 696, 752 (2006) ("While *Chevron* sensibly accepts the President's political role as mediating the difficulties of focused bureaucratic expertise, it does not purport to displace reliance on the latter. . . . Not a word in *Chevron* suggests tolerance for the proposition that decision could be made by anyone but the administrator of the EPA.").

⁵³ 467 U.S. at 844.

⁵⁴ See David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 *Sup. Ct. Rev.* 201, 216-25. Indeed, the *Chevron* Court appeared to acknowledge as much. See 467 U.S. at 865 (describing several possible accounts of why Congress adopted the statutory language it did, and stating "[f]or judicial purposes, it matters not which of these things occurred").

policy.⁵⁵ Later in the opinion the Court acknowledged this constitutional basis for its approach, emphasizing the impropriety of judges making policy decisions as well as the need to leave such determinations to officials politically accountable through the President: “The responsibilities for assessing the wisdom of . . . policy choices and resolving the struggle between competing views of the public interest are not judicial ones. ‘Our Constitution vests such responsibilities in the political branches.’”⁵⁶

Constitutional values also surface expressly when the Court invokes constitutional canons of interpretation in reading administrative statutes.⁵⁷ For example, the Court has applied a “strong presumption that Congress intends judicial review of administrative action,” a presumption rooted in both due process and separation-of-powers concerns.⁵⁸ Just last term, in *Wyeth v. Levine*, the Court relied in part on the federalism-inspired presumption against preemption in refusing to defer to the Food and Drug Administration (FDA)’s view that a state law failure to warn suit was preempted by the FDA’s approval of the drug label at issue.⁵⁹ Indeed, the Court has identified federalism concerns as supporting narrower interpretations of the scope of an agency’s delegated authority or more aggressive statutory readings under step one of *Chevron* even when the constitutional canons are not in play.⁶⁰ Several scholars have argued that nondelegation and other constitutional concerns underlie other notably narrow interpretations of administrative statutes, though the Court has often been less open about the constitutional basis of these decisions.⁶¹

⁵⁵ See, e.g., Farina, *supra* note , at 456 (“*Chevron* invoked the principles of separation of powers and legitimacy”); Jerry L. Mashaw, Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation, 57 *Admin. L. Rev.* 501, 505 (2005) (“*Chevron* relies on constitutional structure, Congress’s legitimate authority to delegate lawmaking power. . . and [agencies’] political accountability”). Although most agree that constitutional concerns were one basis for *Chevron*, the extent to which *Chevron*’s deference rule can be constitutionally justified has sparked some controversy. Compare Thomas W. Merrill & Kristin Hickman, *Chevron*’s Domain, 89 *Geo. L. J.* 833, 870-73 (2001) (expressing doubt about constitutional basis and rooting instead in presumed congressional intent) with Richard J. Pierce, reconciling *Chevron* with Stare Decisis, 85 *Geo. L. J.* 2225, 2227 (1997) (defending *Chevron* as constitutionally based) and Cass R. Sunstein, Law and Administration after *Chevron*, 90 *Colum. L. Rev.* 2071, 2086-91 (1990) (doubting separation of powers or congressional intent can justify and arguing instead that institutional competency concerns provide a plausible justification)

⁵⁶ *Id.* at 866 (citing *TVA v. Hill*, 437 U.S. 153, 195 (1978)); see also *id.* (“[A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely on the incumbent administration’s views of wise policy . . . While agencies are not directly accountable to the people, the Chief Executive is.”)

⁵⁷ On the role of the canons and constitutional values in interpreting regulatory statutes, see Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 *Harv. L. Rev.* 405, 459, 469-74 (1989); see also William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 *U. Pa. L. Rev.* 1007, 1019-36 (1988) (discussing role of constitutional values in statutory interpretation generally, not limited to administrative contexts); Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 *B.U. L. Rev.* 1023, 1024, 1032-79 (1998) (arguing that background normative principles are central to interpretation of administrative law statutes, though not linking these principles to specifically constitutional concerns).

⁵⁸ *Bowen v. Michigan Acad.*, 476 U.S. 667, 670 (1986); see also *Abbot Labs. v. Gardner*, 387 U.S. 136, 140 (1967).

⁵⁹ 129 S. Ct. 1187, 1194-95, 1198, 1200-1202 (2009). In like fashion, the constitutional avoidance canon in particular is sometimes identified as a basis for denying the deference usually accorded reasonable agency statutory interpretations of ambiguous statutes under *Chevron*. See *Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991).

⁶⁰ See *Gonzales v. Oregon*, 126 S. Ct. 904, 922-25 (2006) (emphasizing the federalism concerns raised by the Attorney General’s interpretation of the CSA but holding that it was not necessary to employ a clear statement rule or presumption against preemption to find the interpretation invalid); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 *Duke L. J.* 2023, 2032-36, 2063-69 (2008).

⁶¹ See, e.g., *Brown & Williamson v. FDA*, [cite] (refusing to read the FDCA as authorizing FDA regulation of tobacco, noting in part the substantial expansion in agency power that would result and stating that “Congress

3. *Encouraging Administrative Constitutionalism.* The third connection between ordinary administrative law and constitutional law is significantly different. Rather than involving judicial assessment of constitutional requirements or judicial development of administrative law doctrines to respond to constitutional concerns, the approach here centers on encouraging agencies to take constitutional values and concerns into account in their decisionmaking. The goal of such administrative constitutionalism is not simply avoiding judicial invalidation of unconstitutional agency actions, but fostering a more affirmative and independent agency role in implementing constitutional requirements. This version of the constitutional law-administrative law interplay is the one curtly dismissed in *Fox*, and on other occasions as well the Court has displayed ambivalence about encouraging such administrative constitutionalism. Nonetheless, this linkage between constitutional law and administrative decisionmaking surfaces with some regularity in judicial decisions, and it is often fostered by political branch enactments.

A recent illustration came in *Wyeth*, issued just a month before *Fox*. In the course of holding that courts ultimately have the power to decide when preemption exists, absent a delegation to agencies of power to preempt, the Court emphasized that it often gives “some weight” to an agency determination that state law would pose obstacles to a federal regulatory scheme.⁶² According to the Court, the weight actually given to “the agency’s explanation of state law’s impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness.”⁶³ The Court then refused to defer to the FDA’s opinion that its approval of a prescription drug label preempted state law failure to warn claims, noting the agency had “reverse[d] [its] own longstanding position without providing a reasoned explanation” and through a process that failed to offer “States or other interested parties notice or opportunity for comment.”⁶⁴ *Wyeth*’s net effect is to give agencies a clear incentive to take federalism concerns raised by preemption seriously, solicit comment from affected governments, and carefully justify any conclusion that state law would be an impediment to a federal regulatory scheme.

Another recent decision displaying this type of connection between constitutional law and administrative decisionmaking is *Boumediene v. Bush*.⁶⁵ In a 5-4 decision, the Court there held that the Military Commissions Act’s restrictions on the ability of Guantanamo Bay detainees to challenge their detention through habeas corpus constituted a violation of the Suspension Clause.⁶⁶ In so holding, Justice Kennedy’s majority opinion underscored procedural deficiencies with the government’s internal administrative proceedings, the combatant status review tribunals (CSRTs), in the process repeatedly suggesting that use of more robust internal procedural protections could lead to a different result. According to the Court, “the adequacy of

does not hide elephants in mouseholes”); see also John F. Manning, The Nondelegation Doctrine as a Canon of Avoidance, 2000 Sup. Ct. Rev. 223, 227 (2001) (characterizing *Brown & Williamson* as animated by nondelegation concerns); Hiroshi Motomura, Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Constitutional Interpretation, 100 Yale L. J. 545, 564-75, 580-600 (arguing that “phantom constitutional norms”---norms rooted in due process, equal protection, and the First Amendment but fundamentally at odds with plenary power doctrine---underlie many immigration decisions); Cass R. Sunstein, Nondelegation Canons, 67 U. Chi. L. Rev. 315 (2000) (identifying a number of canons of statutory interpretation as motivated by nondelegation concerns).

⁶² 129 S. Ct. 1187, 1200-1201 (2009).

⁶³ *Id.* at 1201.

⁶⁴ *Id.*

⁶⁵ 128 S. Ct. 2229 (2008).

⁶⁶ *Id.* at 2240.

the process through which [a detainee's] status determination was made" is a relevant factor "in determining the reach of the Suspension Clause."⁶⁷ In addition, the Court emphasized that, in determining whether alternative procedures provide an adequate substitute for habeas, "[w]hat matters is the sum total of procedural protections afforded to the detainee at all stages, direct and collateral."⁶⁸ Again, the effect is to give the government an incentive to craft internal administrative procedures that address the constitutional weakness the majority identified in the current system, specifically the detainees' limited ability to challenge the factual basis on which they are being held as enemy combatants, in order to limit the scope of subsequent judicial review.⁶⁹

Decisions applying the constitutional avoidance canon to agency-administered statutes create similar incentives for agencies to take constitutional concerns seriously.⁷⁰ Concern that a reviewing court may invoke the canon in lieu of *Chevron* deference may lead an agency to forego broad assertions of authority or interpretations of ambiguous statutes that tread close to the constitutional pale. True, the agency thereby cedes some power it might prefer to preserve, but it forestalls an independent judicial determination of statutory meaning that could more seriously impinge on its authority.⁷¹ The immigration context provides a contemporary example of this dynamic. In *Zavydas v. Davis*, the Court invalidated the government's interpretation of federal immigration statutes as authorizing indefinite detention aliens ordered removable. The Court invoked the canon of constitutional avoidance as support for reading the statutes as authorizing only the detention of such aliens for a period reasonably necessary to secure their removal.⁷² In response, the government promulgated a new interpretation of the governing statute, one which preserved its authority to indefinitely detain some aliens but significantly narrowed the categories of aliens over which it could exercise such authority. The government argued in subsequent court challenges that its new regulation avoids the constitutional problems with its prior approach and therefore qualifies for *Chevron* deference.⁷³

⁶⁷ Id. at 2259.

⁶⁸ Id. at 2269; see also id. at 2268 ("the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings").

⁶⁹ The Obama administration appears headed in this direction. See David Johnston, In the Senate, Debate on Detainee Legal Rights, N.Y. Times, July 8, at A18.

⁷⁰ See Trevor W. Morrison, Constitutional Avoidance in the Executive Branch, 106 Colum. L. Rev. 1189, 1197 (2006).

⁷¹ In *Rapanos v. United States*, Chief Justice Roberts noted this point in castigating the Army Corps of Engineers and the EPA for failing to respond to a prior Supreme Court decision that had invoked constitutional concerns as ground for refusing to defer to an agency interpretation of the Clean Water Act (CWA)'s scope. See 547 U.S. 715, 758 (2006) (Roberts, C.J., concurring) (arguing that given the "generous leeway [afforded agencies] in interpreting the statute[s] they are entrusted to administer" and the "broad, somewhat ambiguous, but nonetheless clearly limiting terms" of the CWA, "the Corps and the EPA would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority."

⁷² 533 U.S. 678, 682 (2001); see also *Clark v. Martinez*, 543 U.S. 371, 378 (2005) (holding that the statutory interpretation of *Zadyvas* applies to aliens ordered removed who are inadmissible under the governing statute).

⁷³ See 8 C.F.R. § 241.14; see also INS, Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56967-01 (Nov. 14, 2001); Br. For Appellants, *Hernandez-Carrera v. Carlson*, 2008 WL 2513972, at *15-*26. A circuit split currently exists on the question of whether the government's new regulation qualifies for *Chevron* deference. Compare 547 F.3d 1237, 1245-56 (10th Cir. 2008) (holding that the new interpretation does not raise serious constitutional doubts and that *Chevron* deference appropriate) with *Tran v. Mukasey*, 515 F.3d 478, (5th Cir. 2008) (holding deference inappropriate); see also Kenneth A. Bamberger, Normative Canons in the Review of Administrative Decisionmaking, 118 Yale L. J. 64, 76-84 (2008) (describing case law on the relationship between the constitutional canons and *Chevron* deference).

Decisions like *Wyeth*, *Boumediene*, and *Zadyvas* signal the important role that administrative agencies play in ensuring that constitutional requirements are met. Initial responsibility for addressing constitutional questions frequently falls to agencies. Moreover, although their decisions are subject to judicial scrutiny, agencies nonetheless are able to exert substantial influence in setting administrative policies or procedures that can have substantial constitutional import. Recognition of their ability to limit subsequent judicial interventions on constitutional grounds can be a powerful mechanism for encouraging agencies to take constitutional concerns seriously.

Interestingly, however, the Court rarely discusses this incentivizing effect. *Wyeth* and *Boumediene* are as express as it gets, and even there the Court spoke somewhat indirectly, emphasizing that better agency decisionmaking and procedures might result in greater deference or avoidance of judicially-imposed remedies rather than directly urging agencies to take constitutional concerns more seriously. Similarly, the Court rarely overtly acknowledges the incentives created by its constitutional canon decisions or its decisions holding that administrative protections can satisfy constitutional individual rights requirements. Indeed, in some contexts—the Fourth Amendment in particular—the Court has been notably reluctant to tie satisfaction of constitutional requirements to use of administrative measures in a way that would incentivize adoption of the latter.⁷⁴ This is true even though the Court has implicitly linked these two and acknowledged the potential constitutional benefits of administrative measures that limit police officer discretion.⁷⁵ Administrative constitutionalism is further discouraged by doctrines excusing constitutional challenges from usual exhaustion requirements, as well as the standard rule that “adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies.”⁷⁶

Of greater relevance here, to the extent the Court has sought to encourage agencies to consider constitutional concerns, it has generally done so outside of ordinary administrative law doctrines and direct administrative review. Although *Wyeth* involved the question of how much deference to accord to an agency’s interpretation of a statute as preemptive, it arose—as has much of the Court’s administrative preemption jurisprudence—in a state tort suit, not a direct

⁷⁴ See *United States v. Whren*, 517 U.S. 806, 814-16 (1996) (rejecting Fourth Amendment claim even though police officer’s stop of automobile did not conform to governing police regulations); David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 Va. L. Rev. 1229, 1275-76 & nn. 161-63 (2002) at 1276-78.

⁷⁵ For implicit linkages, see e.g., *New York v. Burger*, 482 U.S. 691, 702-03 (1987) (upholding warrantless administrative inspections of closely regulated industries but only if, among other factors, the discretion of inspecting officers is limited); *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, ___ (1990); see also Warren La Fave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 Mich. L. Rev. 442, 451-86 (1990); Sklansky, *supra* note , at 1275-76 & nn. 161-63 (listing examples). Academic commentators have long advocated reading the Fourth Amendment to require administrative rulemaking, and the Court noted the idea supportively in dicta in *United States v. Caceras*, 440 U.S. 741, 755 (1979); see generally, Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 415-28 (1973); LaFave, *supra* note , at 448-51.

⁷⁶ *Thunder Basin Coal. Co. v. Reich*, 510 U.S. 200, 215 (1992) (internal quotations omitted). The Court’s statements in this context have been somewhat ambivalent, as it has also emphasized that exhaustion “is not mandatory,” *id.*, and at times has urged the advantages of “provid[ing] the agency the opportunity to reconsider its policies, interpretations, and regulations in light of . . . challenges,” including constitutional claims. *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 24 (2000).

challenge to administrative action.⁷⁷ *Boumediene* also was a constitutional challenge to executive action as violating the Habeas Clause, rather than an administrative law challenge. And, finally, the Court has indicated that application of the constitutional canons trumps ordinary administrative law deference doctrines.⁷⁸ I have argued elsewhere that in recent decisions the Court has appeared to use ordinary administrative law as a mechanism for vindicating constitutional federalism concerns.⁷⁹ But these judicial moves towards the use of ordinary administrative law as a federalism surrogate are implicit and rarely acknowledged as such by the Court.⁸⁰ Thus, the *Fox* majority appears largely correct when it insisted that the Court has not expressly employed ordinary administrative doctrines, in particular arbitrary and capriciousness review, to force agencies to consider the constitutional implications of their actions. Nonetheless, the incentives for agencies to address constitutional concerns administratively remain present, even if ordinary administrative law is not usually the mechanism by which such incentives are created.

The Court's failure to encourage administrative constitutionalism through ordinary administrative law stands in marked contrast to the approach taken by the political branches. Congress and the President frequently impose statutory and regulatory restrictions on administrative decisionmaking that reflect their desire for agencies to attend to constitutional concerns. Such restrictions are particularly prevalent in the federalism context: Congress often requires agencies to consult with states before taking certain actions and agencies must justify imposition of particularly costly rules on states.⁸¹ The President has long sought "to ensure that

⁷⁷ See, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883-86 (2000) (stating, in context of state tort suit, that the Department of Transportation's position that a federal regulatory standard preempted the state tort action at issue should be accorded "some weight," but holding deference unnecessary to conclude that preemption was appropriate); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 495-96 (1996) (stating, in context of state tort suit, that Court's determination that a statute did not preempt state tort claims was "substantially informed" by federal regulations and that the agency's views of the statute should be given "substantial weight"); see also *Watters v. Wachovia Bank*, 127 S. Ct. 1559, 1572-73 & n.13 (2007) (holding, in context of preemption declaratory judgment action, that federal statute clearly preempted state action at issue and thus no need to reach question of deference due federal agency's preemption determination).

⁷⁸ See, e.g., *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 2009 WL 1738645 at *9, *11-13 (2009) (applying canon of constitutional doubt and rejecting implementing agency's interpretation of the Voting Rights Act without invoking deference); see also *Bamberger*, supra note , at 77-78 (analyzing the Court's position on the relationship of the canon of constitutional avoidance and *Chevron* deference).

⁷⁹ In several instances—including *Gonzales v. Oregon*, 126 S. Ct. 904 (2006), *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), and *Watters v. Wachovia Bank*, 127 S. Ct. 1559 (2007)—the Court used aggressive *Chevron* step zero or step one inquiries to avoid troubling federalism issues raised by federal agency preemption of state law. The Court has also been more willing to defer to agency action when the record indicates that an agency has been sensitive to the federalism implications of its actions.⁷⁹ But these judicial moves towards the use of ordinary administrative law as a federalism surrogate are implicit and rarely acknowledged as such by the Court. See *Metzger*, supra note , at 2030-39, 2053-62. Notably, one recent occasion in which the Court did acknowledge that federalism concerns affected its analysis—the discussion of state standing in *Massachusetts*, 127 S.Ct. at 1454-55—involved application of constitutional jurisdictional requirements rather than ordinary administrative law.

⁸⁰ See *Metzger*, supra note , at 2039, 2054-55, 2059-60. The Court has been more overt about this connection in the past, much as it was previously more open about the constitutional bases of reasoned decisionmaking. See, e.g., *Florida v. United States*, 282 U.S. 194, 211-12 (1931) "[W]henver the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear. . . . [If] the Commission undertakes to prescribe a state-wide level of intrastate rates in order to avoid an undue burden, from a revenue standpoint, upon the interstate carrier, there should be appropriate findings upon evidence."

⁸¹ See, e.g., *Unfunded Mandates Reform Act of 1995 (UMRA)*, 2 U.S.C. §§ 1531-32, 1535 (2006); *Metzger*, supra note , at 2056-57.

the principles of federalism established by the Framers guide the executive departments and agencies in the formulation and implementation of policies” through executive orders.⁸² The latest example of such federalism concerns is President Obama’s recent memorandum imposing limits on when agencies can act to preempt state laws.⁸³ Yet these statutory and regulatory demands that agencies consider constitutional values are not limited to federalism principles; they also surface in conjunction with individual rights. A notable example involves limitations on federal funds. A number of agencies have developed regulations to implement statutory prohibitions on federal funds being used in racially discriminatory or otherwise unconstitutional fashion.⁸⁴ A contemporary instance is OMB’s guidance on the use of federal stimulus funds, which provides that agencies must ensure grant recipients comply with federal antidiscrimination statutes and program requirements.⁸⁵

A second point worth noting is simply the reality that administrative constitutionalism occurs, sometimes even in the face of hostile judicial review. This point is most frequently made in regard to the work of the Office of Legal Counsel and the Solicitor General, whose official responsibilities include analyzing constitutional issues arising in proposed legislation, agency actions, and litigation.⁸⁶ But though these agencies are no doubt the most attuned to constitutional issues, they are not the sole location for constitutional interpretation within the executive branch. Scholars are beginning to document a number of instances in which other administrative agencies were at the forefront of developing new understandings of constitutional rights. William Eskridge and John Ferejohn, for example, have described how officials at the EEOC developed the view that pregnancy discrimination was sex discrimination.⁸⁷ Sophia Lee has offered an account of the role that constitutional arguments played in the emergence of licensee equal employment and nondiscrimination requirements at the FCC and other federal

⁸² Exec. Order No. 13,132 (preamble), 3 C.F.R. 206 (2000), reprinted in 5 U.S.C. § 601. Executive Order 13,132 replaced an earlier executive order, promulgated by President Reagan in 1987, which similarly sought to ensure agencies paid attention to federalism principles and required assessment of the federalism impact of proposed agency actions. See Exec. Order 12,612, 52 Fed. Reg. 41685 (Oct. 26, 1987).

⁸³ Presidential Memorandum: Preemption, 74 Fed. Reg. 24,693 (May 20, 2009).

⁸⁴ See, e.g., 34 C.F.R. § 100 (effectuating Title VI with respect to program or activity receiving financial assistance from Department of Education); 45 C.F.R. § 80 (same, Department of Health and Human Services). Similarly, agencies have adopted regulations to ensure equal treatment of faith based organizations. For example, in *Zobrest v. Catalina Foothills School Dist.*, the Supreme Court considered 34 CFR § 76.532(a)(1) (1992), which it explained, “implements the Secretary of Education’s understanding of (and thus is coextensive with) the requirements of the Establishment Clause.” 509 U.S. 1, 7 n.7 (1993). Today, many such regulations provide for equal treatment of religious organizations. See, e.g., 45 C.F.R. § 87.1(b) (“Religious organizations are eligible, on the same basis as any other organization, to participate in any Department program for which they are otherwise eligible....”). A particularly interesting example is the IRS’s interpretation of the tax code as prohibiting tax exempt status to private schools that racially discriminated in admissions. See Olati Johnson, *Bob Jones v. United States: Race, Religion, and Congress’s Extraordinary Acquiescence* (manuscript draft on file with author).

⁸⁵ Office of Mgmt. & Budget, Memorandum for the Heads of Departments and Agencies, Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009 (Feb. 18, 2009).

⁸⁶ See Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. Rev. 1559, 1576-1601 (2007) (analyzing OLC’s role and critically assessing its approach to national security issues under the Bush administration); Cornelia T.L. Pillard, *The Unfulfilled Potential of the Constitution in Executive Hands*, 103 Mich. L. Rev. 676, 702-17, 740-41 (2005) (describing the work of OLC and the SG and their effect on constitutional interpretation elsewhere in the executive branch); Morrison, *supra* note , at 1218--20 (discussing OLC’s approach to constitutional avoidance).

⁸⁷ See William Eskridge & John Ferejohn, *A Republic of Statutes* (4/6/09 draft at 9-11)

agencies.⁸⁸ Like Eskridge and Ferejohn, Lee emphasizes the extent to which “administrative constitutionalism”—defined as “regulatory agencies’ independent interpretation and implementation of constitutional law”—is “a recurring aspect of the modern American state.”⁸⁹ Anuj Desai has traced the development of the idea of communications privacy, now an established Fourth Amendment principle, to early decisions and practice within the post office.⁹⁰ Law enforcement agencies provide further instances of administrative attention to constitutional requirements, with a notable example being the Department of Justice’s U.S. Attorney Manual, which mandates disclosure policies for U.S. attorney offices to ensure compliance with the constitutional requirement that prosecutors’ disclose exculpatory evidence to defendants.⁹¹ Indeed, administrative constitutional interpretation arguably occurs whenever government employees take actions that have potential constitutional significance—in short, all the time.⁹²

B. The Constitutional Common Law Character of Ordinary Administrative Law

Several features of the appearances of constitutional law in administrative contexts merit particular emphasis and support their characterization as instances of constitutional common law. One is the largely indeterminate character of constitutional law when it surfaces. In some instances, such as the First Amendment licensing context, constitutional demands on administrative law are judicially specified with relative clarity. More commonly, however, the Court invokes general constitutional norms or standards and the scope of specific constitutional requirements remains uncertain. This indeterminacy is evident in procedural due process, given the *Mathews v. Eldridge* case-by-case balancing analysis and the fact that statutory and regulatory procedural protections often obviate the need for courts to determine the precise contours of procedural due process in administrative contexts.⁹³ Such indeterminacy is especially true, however, of separation of powers and federalism principles invoked by courts or the political branches to justify ordinary administrative law doctrines and decisions. Little doubt exists, for example, that under existing case law courts do not violate either Article I or Article III when they interpret ambiguous statutes, that Congress could delegate broad power to administrative agencies to regulate major economic sectors with minimal specific guidance, or that Congress could preempt broad swaths of state law through regulatory statutes. As a result, doctrines such as *Chevron* or insistence on clear congressional authorization of broad delegations

⁸⁸ Sophia Z. Lee, *Race Sex and Rulemaking, 1964-77: Revising Equal Protection History, Recovering Administrative Constitutionalism* (draft, get permission) at 12-63. For examples of the FCC’s attention to constitutional concerns, see

⁸⁹ *Id.* at 4, 5.

⁹⁰ Anuj C. Desai, *Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy*, 60 *Stan. L. Rev.* 553, 568-77 (2007).

⁹¹ See Dep’t of Justice, U.S. Attorneys’ Manual, Title 9: Criminal Resource Manual §5.001 (2006), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm.; Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 *N.C. L. Rev.* 721, 762-63 (2001). On the whole, however, law enforcement agencies have been slow to adopt meaningful administrative constraints to guard against constitutional violations. See Sklansky, *supra* note , at 1272-73; see also Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 *Colum. L. Rev.* 551, 661-62 (1997) (noting areas in which police guidelines have been adopted and continued resistance to such administrative approaches).

⁹² See David A. Strauss, *Presidential Interpretation of the Constitution*, 15 *Cardozo L. Rev.* 113, 114 (1993).

⁹³ *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976); see *supra* TAN 24 -25.

or of preemptive effect are hard to categorize as constitutionally mandated.⁹⁴ Instead, they are best described as constitutionally-inspired requirements that reflect these general constitutional principles, while the exact nature of their constitutional underpinnings remains unspecified.

This indeterminate character is reinforced by the tacit quality of much constitutionalism in administrative law. As noted above, the 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.⁹⁵ Why the Court is so reluctant to acknowledge the role played by constitutional concerns in the development of ordinary administrative law is somewhat of a puzzle. Resistance to openly acknowledging constitutional indeterminacy is not ultimately a plausible explanation, given the extent to which the Court has embraced such indeterminacy in other aspects of constitutional analysis and in its application of the constitutional canons, a point discussed further below.⁹⁶ A more likely cause is the Court's increased resistance to independent federal court lawmaking outside the constitutional context, a resistance also evident in the decline of implied rights of action and curtailment of federal common law.⁹⁷ No doubt the Court's greater insistence on judicial supremacy in constitutional interpretation is also playing a role. Administrative law decisions are replete with references to Congress's ability to control--and in particular reduce--the substantive and procedural requirements that govern agency action.⁹⁸ From a judicial supremacy perspective, such congressional authority is difficult to square with an understanding of ordinary administrative law as having a constitutional component. Whatever the cause, the effect of the Court's refusal to openly acknowledge the role constitutional concerns play in fashioning administrative law is to leave the scope of the constitutional core of ordinary administrative law unclear.

An additional factor that obscures the boundaries between constitutional law and ordinary administrative law is the occasional reciprocal nature of their relationship. Not only do constitutional concerns underlay much ordinary administrative law, but ordinary administrative schemes and requirements in turn can inform judicial understandings of what the Constitution requires. Under *Matthews* balancing, procedural due process analysis puts a thumb on the scale in favor of existing procedures being deemed constitutionally sufficient by framing the inquiry as

⁹⁴ See Barron & Kagan, *supra* note , at 215; Merrill & Hickman, *supra* note , at 866-67, 915; Metzger, *supra* note , at 2048-52. Indeed, some scholars have argued that the *Chevron* doctrine is in fact constitutionally suspect. See Farina, *supra* note , at 487-98 (arguing that *Chevron* deference in fact raises separation of powers concerns and is at odds with history of delegation doctrine); Jonathan T. Molot, The Judicial Perspective in the Administrative State; Reconciling Doctrines of Delegation with the Judiciary's Structural Role, 53 Stan. L. Rev. 1 (2000) (arguing that *Chevron* deference undermines the structural constitutional role originally assigned to the judiciary).

⁹⁵ See *supra* TAN 34-35.

⁹⁶ See *infra* TAN 139-146.

⁹⁷ See TAN 9-11; *Alexander v. Sandoval*, 532 U.S. 275 (2001) (limiting implied right of action); *Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001) (applying federal common law, but finding claim preclusion "classic case for adopting, as the federally prescribed rule of decision, the law that would be applied by state courts in the State in which the federal diversity court sits"); see also Paul Lund, The Decline of Federal Common Law, 76 B.U. L. Rev. 895, 899 (1996) (arguing that Supreme Court has restricted federal common lawmaking power by "holding that state law rather than federal common law governs certain issues that federal common law would have governed under prior case law" and by "requiring federal courts to incorporate state law rules as federal law even when federal common law does govern a particular issue or case.").

⁹⁸ *Vermont Yankee Nuclear Power Corp. v. Natural Res. Defense Council, Inc.*, 435 U.S. 519, 523-24, 548 (1976); see also *Webster v. Doe*, 486 U.S. 592, 599-603 (1988) (noting Congress's ability to preclude judicial review),

the extent to which additional procedures would add to the accuracy of agency determinations.⁹⁹ Similarly, an administrative complaint mechanism can offer very different relief from that available under *Bivens*—and in particular, no opportunity for money damages—and yet suffice for the Court to conclude that an individual’s constitutional rights are satisfied.¹⁰⁰ Alternatively, in some cases the Court may use existing administrative requirements to define the content of constitutional requirements. Of particular relevance here is *Miranda*: the constitutional warnings there required by the Court were not its own independent creation, but instead were the procedures the FBI had devised to ensure that confessions were not coerced.¹⁰¹ Another example emerges from the context of institutional reform litigation, in which successful programmatic initiatives become identified as remedies for constitutional violations through their incorporation in consent decrees.¹⁰² More generally, the Solicitor General is an influential litigant at the Supreme Court, and thus the federal government’s accounts of its administrative needs and the impact of constitutional protections is likely to be taken seriously by the Court in setting the boundaries of constitutional rights.¹⁰³ This impact of ordinary administrative law and administrative practice in setting the scope of constitutional requirements is of a piece with the numerous ways in which constitutional law has bent and transformed in response to the institutional and regulatory needs of the modern administrative state.¹⁰⁴

A final feature of note is the evolving nature of ordinary administrative law, particularly administrative law as applied by the courts.¹⁰⁵ Despite occasional efforts by the Court and

⁹⁹ *Matthews v. Eldridge*, 424 U.S. 319, (1976). While the Court has insisted that legislatively provided procedures cannot be the measure of all the process that is due, see *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, (1985), this analytic framing of the inquiry takes the government’s provided procedures as the baseline against which additional requirements must be justified, rather than a more independent judicial assessment of what types of procedures are appropriate given the interests involved.

¹⁰⁰ For a recent example, see *Correctional Servs. Corp. v. Malesko*, where the Court noted that the inmates in question had the alternative of pursuing “injunctive relief and grievances filed through the [Bureau of Prisons’] Administrative Remedy Program (ARP).” 534 U.S. 61, 74 (2001). For a discussion of two earlier cases, *Schweiker v. Chilicky* and *Bush v. Lucas*, see *supra* note 28

¹⁰¹ See *Miranda v. Arizona*, 384 U.S. 436, 483--86 (1966) (citing letter from FBI describing Bureau practice of issuing warning at beginning of interview, including “right to say nothing and a right to counsel, and that any statement [suspect or person under arrest] does make may be used against him in court” as well as “right to free counsel”); see also Sheldon H. Elsen & Arthur Rosett, 67 Colum. L. Rev. 645, 653 (1967) (arguing that FBI practice actually differed with respect to right to counsel *during* interrogations, and that “FBI experience merited deeper probing than it received” from the Court).

¹⁰² See David Zaring, National Rulemaking Through Trial Courts: The Big Case and Institutional Reform, 51 UCLA L Rev. 1015, 1047-62 (2004) (identifying housing and prison litigation as two instances in which this phenomenon has occurred): see also Charles A. Sabel & William H. Simon, Destabilization Rights: How Public Law Litigation Succeeds, 117 Harv. L. Rev. 1015, 1016 -52 (2004) (arguing that experimentalist administrative methods, in particular benchmarking, performance measurement, and monitoring, are increasingly being required in consent decrees as mechanisms for remedying constitutional violations).

¹⁰³ See Pillard, *supra* note , at 689.

¹⁰⁴ Numerous examples exist, including the rejection of meaningful limits on congressional delegations, acceptance of administrative agencies combining legislative, executive, and adjudicatory powers and novel structures, and massive expansion in the scope of federal regulatory authority. For a critical account, see Gary Lawson, The Rise and Rise of the Administrative State, 107 Harv. L. Rev. 1231 (2007); compare Peter L. Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573, 579 (1984) (arguing that modern administrative agencies are compatible with constitutional principles). Such accession to administrative imperatives is also evident in regard to individual rights, as for instance in the acceptance of lower Fourth Amendment protections in administrative contexts, see *Marshall v. Barlow*, 436 U.S. 307, 313-14, 320-21 (1978) (noting the closely regulated exception to the warrant requirement and emphasizing lower standard for establishing probable cause even in other contexts).

¹⁰⁵ The executive branch’s approach to administrative law has also changed markedly over the years, most

commentators to posit a static and statutorily-based account of administrative law,¹⁰⁶ any such account fails to capture much of current administrative law doctrine. Instead, a dominant feature of ordinary administrative law is its common-law, evolving character.¹⁰⁷ This evolving character is especially evident in regard to the standards and availability of judicial review under the APA. The Court not only has intensified arbitrary and capricious review over time and further refined its *Chevron* doctrine, it has also dramatically expanded the range of persons who could challenge agency action. Moreover, the Court's rules with respect to timing and preclusion of judicial review are overwhelmingly common-law derived, rather than statutorily-determined, and as a result have also developed over time.¹⁰⁸ This evolutionary process is equally apparent with respect to the APA's procedural requirements for informal rulemaking, with current requirements of notice and agency response to comments far exceeding what the text of the APA suggests was originally expected.¹⁰⁹

Constitutional concerns with unchecked agency power underlay all these judicial developments.¹¹⁰ Expanded rulemaking procedures and greater court access, along with heightened substantive scrutiny, helped guard against otherwise unaccountable agency abuses of delegated power.¹¹¹ But tying the evolution of ordinary administrative law solely to constitutional concerns and judicial development ignores the degree to which this evolution is also politically driven. Statutes like the Freedom of Information Act (FOIA)¹¹² and government

notably with the advent of Executive Order 12,866 and regulatory review, but for purposes of connecting to discussions of constitutional common law my focus here is more on the evolving cast of judicial doctrine.

¹⁰⁶ See *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 272 (1994) (arguing that the APA must be interpreted according to its original meaning when adopted in 1946); *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 523-24 (1976) (arguing that courts lack power to impose procedural requirements not required by the APA, other statutes or regulations, or the Constitution); see also John Duffy, *Administrative Common Law in Judicial Review*, 77 *Tex. L. Rev.* 113 (1998) (acknowledging the common law character of much of administrative law but arguing that administrative law is becoming increasingly statutory and praising this development).

¹⁰⁷ See Jack M. Beerman, *Common Law and Statute Law in U.S. Federal Administrative Law*, in Linda Pearson et al. eds., *Administrative Law in a Changing State: Essays in Honor of Mark Aronson* 45,45-47 (2008); Kenneth Culp Davis, *Administrative Common Law and the Vermont Yankee Opinion*, 1980 *Utah L. Rev.* 3, 3-10.

¹⁰⁸ See Richard Stewart, *The Reformation of American Administrative Law*, 88 *Harv. L. Rev.* 1667, 1723-56 (1975); see also Merrill, *supra* note , at 1039-44, 1074-83 (tracing expansion and subsequent contraction in doctrines affecting the availability of judicial review).

¹⁰⁹ See 5 U.S.C. §§ 553(b)-(c) (requiring mere "description of the subject and issues involved" and "concise general statement of [a rule's] basis and purpose" will suffice); *Am. Radio Relay League v. FCC*, 524 F.3d 227, 245-47 (D.C. Cir. 2008) (Kavanaugh J., concurring and dissenting in part); Jack M. Beerman & Gary Lawson, *Reprocessing Vermont Yankee*, 75 *Geo. Wash. L. Rev.* 856, 882-900 (2007) (arguing that a number of current rulemaking requirements go beyond § 553's text).

¹¹⁰ See *supra* TAN 31-34.

¹¹¹ See Stewart, *supra* note , at 1711-60 (analyzing changes as representing a transformation in judicial review to focus on ensuring that all affected interests are fairly represented and considered by administrative agencies). Courts emphasized the connection between enhanced notice and participation requirements and checks on agency decisionmaking, see, e.g., *Connecticut Light & Power v. NRC*, 673 F.2d 525, 530-31 (1982); *U.S. v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 251-53 (2d Cir. 1977), as well as at times invoked seemingly due process-based concerns of fundamental fairness, see, e.g., *PGBC* [2nd cir]. Although express invocations of fundamental fairness in the rulemaking context have not fared well at the Court, see *Pension Benefit Guarantee Corp. v. LTV Corp.*, 496 U.S. 633, 655-56 (1990); *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 541-43 (1978), the Court has made little effort to curb § 553's expansion. See *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 127 S. Ct. 2339, 2351 (2007) (accepting the logical outgrowth rule and its emphasis on "fair notice"); Metzger, *supra* note , at 161-62.

¹¹² Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (2006)).

in the sunshine requirements¹¹³ embodied new political demands for open government that may have catalyzed judicial procedural developments.¹¹⁴ Similarly, the norm of expert, informed decisionmaking embodied in the reasoned explanation requirement traces back to creation of the civil service and protections for administrative independence from politics in the formative period of the national administrative state.¹¹⁵ Over the years this norm has been reinforced by a vast array of other measures—prime among them the APA, but also substantive statutory provisions that demand a scientific basis for regulations and or provisions creating agency structures that give prominent role to professionals and substantive expertise.¹¹⁶ Agencies also often voluntarily adopt regulatory requirements that limit their discretion and expand procedural protections.¹¹⁷ These statutory and regulatory enactments sometimes reflect the political branches’ understandings of what the Constitution demands. But they are more clearly “constitutional” in the sense of embodying basic contemporary normative commitments with respect to how government should operate.¹¹⁸

The net result of these features is that a good deal of ordinary administrative law could be characterized as constitutional common law. As Monaghan defined it, constitutional common law has two core components: the specification of requirements that are not themselves constitutionally mandated but serve to implement constitutional demands; and a role for the political branches in specifying the shape that these requirements take.¹¹⁹ Ordinary administrative law reflects the same characteristics. Its doctrines are constitutionally rooted but not constitutionally required, and emerge over time in a reciprocally informing fashion. Most significantly, Congress enjoys extensive power to control the contours of ordinary administrative law notwithstanding its constitutional dimensions.¹²⁰ To be sure, there may be limits to such

¹¹³ See, e.g., Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976), codified as amended at 5 U.S.C. §§552b, 557(d); Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. App. II §§ 1-15).

¹¹⁴ See Peter L. Strauss, Statutes that Are Not Static, 14 J. Contemp. Legal Issues 767, 788-90, 796-99 (2005) (arguing that FOIA provided statutory support for judicial expansion of APA requirements, and noting that Congress also enacted other, statute-specific hybrid procedures).

¹¹⁵ See Stephen Skowronek, Building a New Administrative State; The Expansion of National Administrative Capacities, 1877-1920 at 78-210 (1982) (describing progressive emphasis on expertise and opposition to the spoils system, and gradual expansion of merit-based civil service)

¹¹⁶ See, e.g., 42 U.S.C. §§ 7408-09 (requiring that the EPA promulgate national air quality standards based on criteria that reflect latest scientific knowledge); 21 C.F.R. §§ 14.100, 14.80 (listing standing advisory committees at the FDA and qualifications for membership).

¹¹⁷ See, e.g., Richard J. Pierce, Jr., 1 Administrative Law Treatise §7.10 at 504 (noting that many agencies have issued rules obliging them to use notice-and-comment rulemaking for “matters involving public property, loans, grants, benefits, or contracts,” despite the APA’s exemption of these matters from rulemaking requirements); Food & Drug Administration’s Development, Issuance and Use of Guidance Documents, 62 Fed. Reg. 8961 (Feb. 27, 1997), subsequently adopted and amended by Congress in the Food and Drug Administration Accountability and Modernization Act, at 21 U.S.C. § 371(h); Rachel E. Barkow, Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law, 61 Stan. L. Rev. 869, 891 (2009) (noting that most agencies follow the APA’s separation of functions requirements whenever imposing punishment, even if not required by terms of the APA).

¹¹⁸ They are thus arguably examples of what Professors William Eskridge and John Ferejohn call small-c constitutional law, or what Ernest Young recently described as the constitution outside the Constitution. See Eskridge & Ferejohn, *supra* note , at 7-33; Ernest A. Young, The Constitution Outside the Constitution, 117 Yale L.J. 408, 411-14, 447 (2007); see also Tom Ginsburg, On the Constitutional Character of Administrative Law, Draft, at *2--*3 (May 7, 2009) at <http://www.law.yale.edu/academics/conference.htm> ()

¹¹⁹ See Monaghan, *supra* note , at 2-3.

¹²⁰ The president and administrative agencies themselves also play an important role, but their participation is in the form of adding additional constraints rather than reducing statutory requirements. Elizabeth Magill, Foreword: Agency Self-Regulation, 77 Geo. Wash. L. Rev. 859 (2009).

congressional authority; efforts by Congress to exempt agencies wholesale from duties of explanation or to preclude judicial review of broad swaths of agency action would likely face judicial resistance.¹²¹ But those are general systemic constraints that leave Congress broad discretion to reshape ordinary administrative law in particular contexts.¹²² Moreover, Congress has shown little interest in diluting ordinary administrative law in such an across-the-board fashion, and at times added new constraints.¹²³ Indeed, recently the political branches have been more overt than the courts in their efforts to use administrative law to address constitutional concerns.

II. Implications of the Constitutional Character of Ordinary Administrative Law

Recognizing the linkages between ordinary administrative law and constitutional law has several important implications for the debate over constitutional common law. Critiques of constitutional common law are often premised on the assumption that a clear divide exists between ordinary law and constitutional law, but as a descriptive matter, that divide does not exist in the administrative law context. Perhaps more importantly, as a normative matter the constitutional common law status of ordinary administrative law has much to commend it. The real weakness in the Court's jurisprudence is not its intermixing of constitutional law and ordinary administrative law, but rather its failure to embrace judicially-enforced administrative constitutionalism more thoroughly and overtly.

A. The False Divide Between Constitutional and Nonconstitutional Law

Constitutional common law has long been attacked as illegitimate. One prominent line of criticism argues that constitutional common law violates basic separation of powers and federalism principles of our constitutional system, which combine to limit the federal courts' independent lawmaking role.¹²⁴ As the Court famously put the point in *Erie Railroad Company v. Tompkins*, "[t]here is no federal general common law."¹²⁵ Of course, the *Erie* principle has not

¹²¹ See Murphy, *supra* note, at 1127, 1132-34 (suggesting that "elimination [of hard look review] would affect how courts interpret other means of judicial control which *are* rooted in the Constitution," in particular nondelegation doctrine").

¹²² Cf. Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1778-79, 1787-91 (1991) (arguing that while "the aspiration to effective individual remediation for every constitutional violation represents an important remedial principle," Congress may constitutionally deviate from that goal provided it supplies "a system of constitutional remedies adequate to keep government generally within the bounds of law").

¹²³ See 29 U.S.C. §655 (2006) (outlining procedure by which occupational health and safety standards are set, including provision by which, *inter alia*, interested persons can request an oral hearing and standards must be justified by substantial evidence); *supra* TAN 112-114 (discussing FOIA and open government requirements added in the 1970s). That said, Congress has sought to reduce judicial review of administrative actions in particular contexts, immigration being a central one. See 8 U.S.C. § 1252(a)(2).

¹²⁴ Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 Nw. U. L. Rev. 100, 123-29 (1985); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1, 13-27 (1985); Thomas S. Schrock & Robert C. Welsh, *Reconsidering The Constitutional Common Law*, 91 Harv. L. Rev. 1117, 1126-315 (1978); see also Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. Pa. L. Rev. 1245, 1248-49, 1256-64, 1269-71 (1996) (outlining the constitutional argument against "open-ended federal common lawmaking by courts").

¹²⁵ 304 U.S. 64, 78 (1938).

governed in anything near such absolute form, with the Court sanctioning development of federal common law in several contexts.¹²⁶ Yet the Court has increasingly emphasized that such exceptions are “few and restricted, limited to situations where there is a significant conflict between some federal policy interest and the use of state law”¹²⁷ and all subject to congressional override.¹²⁸ Hence, as a general matter courts can displace federal and state law only in the course of enforcing either the Constitution or some other binding federal enactment. In the case of constitutional common law, however, the constitutional rule applied by the courts is by definition provisional and subject to congressional revision, yet is used to trump state law. Some critics deny that the federal courts have the authority to impose a constitutional rule that is not actually constitutionally required.¹²⁹

Constitutional common law has not lacked for defenders.¹³⁰ Some scholars have sought to salvage at least portions of constitutional common law by arguing that the rules imposed actually are constitutionally required unless Congress imposes an adequate substitute “that provides roughly the same degree of protection for constitutional policies as the federal common law rule.”¹³¹ A number of others have insisted that institutional competency concerns, such as limits on the courts’ ability to identify constitutional violations and enforce amorphous tests, are legitimate factors for the courts to consider and inevitably result in constitutional doctrines that differ in scope from the constitutional provisions they enforce.¹³² Sometimes the resultant doctrines are prophylactic and prohibit actions the Constitution might seem to allow; at other times, institutional concerns lead to underenforcement of constitutional requirements.¹³³

¹²⁶ See *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1941); see also Richard Fallon et al., *Hart and Wechsler’s The Federal Courts and the Federal System* 685 (6th ed. 2009) (“There is no longer serious dispute that the body of federal law legitimately includes judge-made law—law that cannot be fairly described as simply applying federal statutory or constitutional enactments, and that is subject to legislative override.”).

¹²⁷ *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) (internal quotations and citations omitted).

¹²⁸ See *Nw. Airlines, Inc. v. Trans. Workers U.*, 451 U.S. 77, 95 & n.34 (1981).

¹²⁹ Grano, *supra*, at 134; see also Merrill, *supra* note , at 54-56 (“[A] body of common law rules “inspired” but not “required” by the Constitution presents far more serious problems of legitimacy than Monaghan acknowledges.”); Schrock & Welsh, *supra* note , at 1131-45. A second line of criticism also leveled at constitutional common law is that the approach was insufficiently protective of constitutional rights, particularly by allowing Congress to revise judicial rules implementing constitutional requirements and encouraging the Court itself to interpret constitutional requirements minimally so as to leave room for experimentation. See Schrock & Welsh, *supra* note , at 1152-53, 1158-71.

¹³⁰ Monaghan, of course, was one of these. His justifications for constitutional common law were largely pragmatic, emphasizing the benefits of the concept as “a satisfactory way to rationalize a large and steadily growing body of Court decisions,” the Court’s special institutional competence in fashioning understandings of the content of constitutional rights, and “the need for a national definition at least the significant dimensions” of constitutional liberties. Monaghan, *supra* note , at 19, 35-36. But he also justified it on grounds of constitutional principle, arguing that the possibility of congressional revision and dialogue addressed separation of powers and federalism concerns and underscoring that “constitutionally inspired common law is . . . designed to effectuate policies found in the text and structure of the Constitution.” *Id.* at 35.

¹³¹ Merrill, *supra*, at 58; Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 *Sup. Ct. Rev.* 61, 76-85 (2000); see also Grano, *supra* note , 119-22, 130-32, (arguing that some of Monaghan’s examples of constitutional common law are actually mandatory constitutional rules).

¹³² See, e.g., Richard Fallon, *Implementing the Constitution* 5-8, 37-41 (2001); Mitchell N. Berman, *Constitutional Decision Rules*, 90 *Va. L. Rev.* 8-10, 92-99 (2004); Roosevelt, *supra* note 3, at 1652-67; David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 *U. Chi. L. Rev.* 190, 194-95, 207-08 (1988).

¹³³ See Strauss, *supra* note , at 195-207; see also Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 *Harv. L. Rev.* 1212, 1214-21, 1227 (1978) (arguing that some constitutional

This debate has played out most recently with respect to the constitutional canons of statutory interpretation. On the surface, this statutory interpretation context might seem quite different from Monaghan-style constitutional common law, which is avowedly constitutional in its focus. But although arising in statutory interpretation contexts, the canons in fact represent a form of constitutional enforcement. Under the canons, the Court seeks to protect constitutional values through means such as presumptions, clear statement rules, and construing statutes to avoid constitutional doubts.¹³⁴ Moreover, the parallel goes deeper, because implicit in the Court's application of the canons and efforts to address constitutional concerns through statutory interpretation is recognition that these efforts are subject to congressional revision, with Congress retaining power to overturn the Court's constitutionally-inspired interpretations.¹³⁵ Hence, the canons constitute another example of constitutional common law—constitutional or constitutionally-inspired determinations that, while binding, are avowedly provisional in nature.¹³⁶ Not surprisingly therefore, some have criticized use of the canons as an illegitimate form of covert constitutional decisionmaking by which courts restrict Congress and rewrite statutes based on amorphous constitutional concerns as opposed to actual constitutional violations.¹³⁷ In turn, defenders of the canons have invoked arguments akin to those raised to justify constitutional common law, in particular maintaining that the canons are no different in principle from much constitutional law and represent doctrinal mechanisms for enforcing constitutional norms that, due to limitations on the courts' institutional competency, are not easily imposed by courts directly.¹³⁸

Underlying many of these attacks on constitutional common law---whether launched earlier at Monaghan's defense of constitutional common law or more recently at the Court's

norms are judicially underenforced for institutional competency reasons but remain fully binding on other government officials).

¹³⁴ See Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 *Tex. L. Rev.* 1548, 1585 (2000); see also Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 *Wm & Mary L. Rev.* 1575, 1582-94, 1735-55 (2001) (describing a number of constitutional "second look" doctrines that emphasize the process Congress uses in reaching decisions and reflect a collaborative approach to constitutional interpretation, and including constitutional common law and the constitutional canons as examples); Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 *Calif. L. Rev.* 397, 450--52 (2005) (arguing canon of constitutional avoidance is "is a rule of constitutional adjudication"); Morrison, *supra* note ?, at 1212 ("[T]he overarching norm implemented by the avoidance canon is that if Congress wants to legislate to the limits of its constitutional authority or in a manner that otherwise raises serious constitutional concerns, it mes be clear about its intent to do so.").

¹³⁵ See *Clark v. Martinez*, 543 U.S. 371, 382 (2005) ("The canon [of constitutional avoidance] is ... a means of giving effect to congressional intent, not of subverting it").

¹³⁶ See Manning [[this volume](#)]; see also Dan T. Coenen, *The Pros and Cons of Politically Reversible "Semisubstantive" Constitutional Rules*, 77 *Fordham L. Rev.* 2835, 2843--44 (2009) (describing "clear statement" rule as "constitutional 'how' rule," whose substantive holding is subject to congressional revision); William N. Eskridge & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 *Vand. L. Rev.* 593 (1992) (categorizing the canons as a form of quasi-constitutional law); Mark Tushnet, *Subconstitutional Constitutional Law: Supplement, Sham, or Substitute*, 42 *Wm. & Mary L. Rev.* 1871, 1871 & n3 (2001) (terming them subconstitutionalism).

¹³⁷ See Richard Posner, *The Federal Courts: Crisis and Reform* 285 (1985); Frederick Schauer, *Ashwander Revisted*, 1995 *Sup. Ct. Rev.* 71, 86-89 (1995); see also William K. Kelly, *Avoiding Constitutional Questions As A Three-Branch Problem*, 86 *Cornell L. Rev.* 831, 860-64, 867-91 (2000) (noting concerns about constitutional penumbras voiced by Posner and Schauer and arguing that the canons also illegitimately intrude on the President's Article II take care power).

¹³⁸ See Young, *supra* note , at 1585-87, 1591-93, 1603-06; Sunstein, *supra* note , at 337-42.

expanded use of the constitutional canons---is a vision of the Constitution as having determinate limits as well as a binary, on/off character.¹³⁹ Governmental action either violates constitutional requirements or it does not; a judicially-imposed requirement either is constitutionally mandatory or it is not.¹⁴⁰ Wholly excluded is the possibility that no such clear divide between constitutional law and nonconstitutional law exists, that a given governmental action could implicate constitutional values in a way meriting judicial response yet not be a sufficient basis for a court to hold the action unconstitutional or to preclude congressional revision of judicial determinations.¹⁴¹ Ernest Young articulated this alternative vision in his defense of the constitutional canons, in which he rejected the binary model and argued instead that some constitutional requirements surface as “resistance norms” that “are best enforced through doctrinal tools in the context of statutory construction.”¹⁴²

The critics’ view of constitutional law as having determinate limits and a binary character is descriptively false when it comes to administrative law.¹⁴³ Far more accurate is Professor Young’s resistance norms model, with general constitutional values and principles being enforced through nonconstitutional mechanisms such as statutory construction and administrative policymaking. As noted above, constitutional law frequently surfaces in ordinary administrative law in a highly indeterminate form; constitutional concerns shape administrative law doctrines and lie in the background of numerous administrative enactments, but often the precise scope of the constitutional requirements involved remains opaque.¹⁴⁴

¹³⁹ To some extent, Monaghan himself also accepted a distinction between constitutional and nonconstitutional law, distinguishing constitutional common law from, on the one hand, more pure *Marbury*-style constitutional interpretation and on the other ordinary federal common law. See Monaghan, *supra* note , at 30--34 (distinguishing *Marbury* style review); *id.* at 11--13 (describing standard technique of deriving federal common law). Yet in setting out in essence a tripartite framework—constitutional interpretation, constitutional common law, and nonconstitutional law, including federal common law—and in acknowledging that the distinction between constitutional interpretation and constitutional common law was a matter of degree, see Monaghan, *supra* note , at 31, Monaghan resisted the insistence on a clear constitutional/nonconstitutional demarcation.

¹⁴⁰ For recent articulations of this constitutional vision, see *Dickerson v. United States*, 530 U.S. 428, 454 (Scalia, J., dissenting); John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 *Harv. L. Rev.* 2003 (2009).

¹⁴¹ Young, *supra* note , at 1593-94. Interestingly, many defenses of constitutional common law evidence a similar acceptance of a divide between the constitutional and nonconstitutional. These defenses have sought to dramatically expand the boundaries of what qualifies as legitimately constitutional, but for the most part have not challenged the assumption that a meaningful divide exists between the constitutional and nonconstitutional. See, e.g., Roosevelt, *supra* note 3, at 1655-58, 1670 (arguing that constitutional decision rules may deviate substantially from the operative meaning of the Constitution, but are nonetheless legitimate); Dorf & Friedman, *supra* note , at 78-80 (attempting to reconcile *Miranda*’s constitutional status with its acceptance of alternative safeguards by reading *Miranda*’s holding narrowly and emphasizing the legitimacy of shared constitutional interpretation); Strauss, *supra* note , at 195-207 (arguing that judicially-imposed prophylactic rules are ubiquitous in constitutional law, rather than questioning the assumption that they must be fully constitutional to be legitimate)

¹⁴² Young, *supra* note , at 1593-94. Young also rejects the assumption that statutory interpretation should be “constitution-free.” Schauer, *supra* note , at 83. arguing that “[s]uch an approach excludes a source of statutory meaning which is no less legitimate than other principles and policies which frequently enter into interpretation.” Young, *supra* , at 1591-92. Other scholars have similarly concluded that statutory interpretation is inseparable from constitutional law. See Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 *Wm. & Mary L. Rev.* 827, 839 (1990) (arguing that all methodological commitments regarding statutory interpretation must ultimately be constitutionally grounded); see also Sunstein, *supra* note , at 411 (necessity of referencing background principles in statutory interpretation).

¹⁴³ See also TAN 59-61.

¹⁴⁴ See *supra* TAN 84-85.

The indeterminacy of constitutional considerations in administrative settings is hardly unique. It is a commonplace that numerous core constitutional demands—due process, equal protection, freedom of speech—are broad enough to support a wide array of meanings.¹⁴⁵ More importantly, constitutional adjudication is characterized by frequent resort to general constitutional values and principles. This is particularly true of separation of powers and federalism analyses, which are often driven more by general structural constitutional norms than by specific constitutional requirements.¹⁴⁶ General values also feature in individual rights contexts, with the Court balancing countervailing constitutional concerns in defining the scope of constitutional protections.¹⁴⁷ Indeed, constitutional common law is sometimes defended as a mechanism for vindicating general constitutional values and policies. As Daniel Meltzer commented: “If federal courts have authority to formulate common law rules to help implement the broad purposes of statutory enactments, why should the same not be true when the source of inspiration is a set of values in the Constitution?”¹⁴⁸

In the administrative law context, indeterminacy surfaces not just in establishing what the Constitution requires, but also in specifying when constitutional requirements end and nonconstitutional administrative law begins. A central feature of ordinary administrative law is the absence of a clear divide between its constitutional and nonconstitutional aspects. To be sure, many ordinary administrative law requirements are clearly constitutional or statutory and regulatory in nature. But what is striking is how many core doctrines and administrative requirements are simultaneously constitutional and nonconstitutional, and these dimensions are too overlapping and interactive to be easily segregated. It is impossible to know, for example, how arbitrary and capriciousness scrutiny would have developed absent constitutional concerns with unchecked agency power that helped (openly at first, and more tacitly later) fuel

¹⁴⁵ See, e.g., Richard H. Fallon, Jr., Forward: Implementing the Constitution, 111 Harv. L. Rev. 56, 58 (1997) (“[R]easonable citizens, lawyers, and judges differ widely about what methodology should be used to interpret the Constitution, about which substantive principles the Constitution embodies, and about how, in more practical terms, constitutional norms should be protected by doctrine.”); Laurence Tribe & Michael Dorf, On Reading the Constitution 4, 73–80 (1991) (noting importance of level of generality at which action is assessed to determination of its constitutionality).

¹⁴⁶ See *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); Gillian E. Metzger, Response: The Constitutional Legitimacy of Freestanding Federalism, 122 Harv. L. Rev. F. 98, 104–05 (2009) (describing structural reasoning in separation of powers caselaw); John F. Manning, Federalism and the Generality Problem in Constitutional Interpretation, 122 Harv. L. Rev. 2003, 2068 (2009) (criticizing constitutional analysis whereby “overall structure takes on a life of its own, providing the source for values that are attached to no particular clause of the document but are nonetheless enforceable as law”).

¹⁴⁷ See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410, 420 (2006) ((describing precedent on constitutional protection for employee speech as seeing “both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions”); *Wyoming v. Houghton*, 526 U.S. 295, 299–300 (1999) (stating that if unclear whether a challenged action was an unreasonable search or seizure under common law, court determines whether action violated the Fourth Amendment by “assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests”); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 875–79 (1992) (concluding that “the undue burden standard is the appropriate means of reconciling the State’s interest [in potential life] with the woman’s constitutionally protected liberty”).

¹⁴⁸ Daniel J. Meltzer, State Court Forfeitures of Federal Rights, 99 Harv. L. Rev. 1128, 1173 (1986); see also Monaghan, *supra* note , at 35 (“constitutionally inspired common law . . . [is] designed to effectuate policies found in the text and structure of the Constitution”); but cf. Manning, *supra* note , at 2005–09 (arguing that the Court’s invocation of free-floating federalism values in constitutional interpretation is at odds with its turn towards textualism and rejection of purposivism in statutory interpretation).

development of current hard look review. It is equally impossible to know what shape constitutional delegation doctrine or rationality review of administrative actions would have taken were the APA not available to courts as a surrogate for addressing these constitutional concerns. As noted above, the availability of such ordinary administrative law constraints---particularly ordinary administrative law constraints that it shaped to address tacit constitutional concerns---has allowed the Court to avoid addressing these constitutional issues directly.¹⁴⁹

Ordinary administrative law thus challenges the image of constitutional law as substantially determinate as well as the closely associated assumption that a clear divide exists between constitutional and nonconstitutional law. This descriptive point carries normative implications. To begin with, it suggests that the critique of constitutional common law is based on an image of constitutional law that differs from how constitutional law actually operates. Constitutional law does not only surface in clearly demarcated contexts, but instead seeps into other areas of law, often operating in the background to shape development of non-constitutional legal requirements.

Further, the implications of adopting a narrow and determinate vision of constitutional law could not be limited to the sphere of constitutional adjudication; instead, broad areas of what are assumed to be nonconstitutional law would also be significantly affected. Even if conceptually possible, segregating out constitutional considerations from ordinary administrative law would be extremely disruptive of current practice. It would force courts to reconsider existing well-established doctrines that appear to exceed their supposed statutory basis, and potentially to address constitutional questions that they have been able avoid through reliance on ordinary administrative law. Worse, because of this reliance, courts may face a gap in constitutional doctrine that they would need to overcome, limiting their ability to proceed incrementally and with flexibility.¹⁵⁰ Moreover, any such effort at segregation would effectively end the common law method of fashioning administrative law doctrine; it is hard to see how a principled distinction can be drawn between ordinary administrative common law and constitutional common law, as the same issue of independent judicial lawmaking is presented in both.¹⁵¹ In any event, as a practical matter, constitutional concerns will likely creep back into administrative law doctrines unless the use of the common law method is more broadly curtailed. In short, rejecting constitutional common law would force a dramatic change in the practice and doctrines of ordinary administrative law.

B. Justifying Administrative Constitutionalism

The case for preserving the constitutional common law character of administrative law goes well beyond avoiding disruption, however. My focus here will be on justifying judicial efforts to encourage administrative constitutionalism, and more specifically on using ordinary administrative law to force agencies to take constitutional values seriously in their decisionmaking. Under such an approach, courts would require agencies to expressly address serious constitutional concerns raised by their actions. Agencies failing to do so would face

¹⁴⁹ See *supra* TAN 33-35.

¹⁵⁰ See, e.g., TAN 24 (noting that the Court's precedents on procedural due process requirements for general policymaking date back to the turn of the century).

¹⁵¹ See Monaghan, *supra* note , at 13-14.

potential remand of their decisions as arbitrary and capricious, or alternatively a loss of deference on the grounds that their statutory interpretations were unreasonable.¹⁵²

The reasons to focus on this particular intersection between administrative law and constitutional law are twofold. First, it is the least accepted incorporation of constitutional concerns into administrative law. Although some have questioned whether particular measures, such as the *Miranda* rules, can be legitimately derived from the Constitution, the general proposition that governments may be required to adopt some administrative mechanisms to meet constitutional demands is not disputed.¹⁵³ Similarly, federal court reliance when possible on ordinary administrative law in lieu of constitutional law is simply a manifestation of the rule that courts should reach constitutional questions only as a last resort, a deeply embedded and largely accepted judicial technique.¹⁵⁴ Judicial development of ordinary administrative law doctrines to address constitutional concerns is more contentious,¹⁵⁵ but it too has received judicial sanction in the past and at least is not overtly condemned.¹⁵⁶ This approach is also closely akin to application of the constitutional avoidance canon, particularly when it manifests in judicial interpretation of administrative law statutes, and thus is not analytically that unusual. Indeed, the Court's use of constitutional avoidance remains a vibrant part of its approach to statutory interpretation.¹⁵⁷ In comparison, as demonstrated by *Fox*, the Court remains quite reluctant to use ordinary administrative law as a mechanism to encourage administrative constitutionalism.

In addition, judicially-enforced administrative constitutionalism stands out in its emphasis on shared constitutional implementation. Along with constitutional indeterminacy, this is the other key characteristic of constitutional common law. Use of administrative measures to satisfy constitutional requirements, by contrast, is more in keeping with *Marbury*-style constitutional adjudication; involvement of Congress and agencies in determining what constitutes constitutionally-adequate measures is possible, but not necessary. Injection of constitutional concerns into administrative law doctrines has strands of shared constitutional interpretation, as congressional enactments could trump many judicially developed administrative law requirements and the political branches have certainly imposed requirements on agencies that reflect constitutional concerns. Yet the invitation to engage in interbranch constitutional interpretation is much clearer when ordinary administrative law is used to force

¹⁵² For prior suggestions in this vein, see Bamberger, *supra* note , at 111-25 (arguing that agencies should be required to take constitutional concerns into account in their statutory interpretations, on pain of their interpretations being otherwise held unreasonable); Metzger, *supra* note , at 2104--07 (arguing for invalidation of agency action paying insufficient heed to federalism concerns under hard look review).

¹⁵³ See, e.g., *Dickerson*, 530 U.S. at 445-50, 453-54 (Scalia, J.) (accepting that the *Miranda* warnings would be legitimate if constitutionally mandated, but denying that they have such a constitutional status); see also *Lewis v. Casey*, 518 U.S. 343, 349-50 (1996) (noting judicial ability to order administrative changes to remedy constitutional violations).

¹⁵⁴ See *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. "); Vermeule, *supra* note , at ___; see generally Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. Rev. 1003 (1994) (analyzing the appropriateness of the last resort rule in different contexts).

¹⁵⁵ See, e.g., *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 246-48 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part and dissenting in part) (emphasizing the degree to which the courts have expanded the APA's requirements over time beyond what its text requires).

¹⁵⁶ See *infra* TAN 45-47 (discussing the Court's earlier willingness to acknowledge the constitutional underpinnings of the reasoned decisionmaking requirement).

¹⁵⁷ See *Kelley*, *supra* note , at 832-33; *Morrison*, *supra* note , at 1192-93 & n.10.

agencies to take constitutional values into account in their decisionmaking. Development of administrative law doctrine to address constitutional concerns, by contrast, has been largely a judicial endeavor.

Despite its condemnation in *Fox* and general lack of overt employment by the Court, the use of ordinary administrative law to encourage administrative constitutional deliberation has much to commend it. This approach accords well with the administrative character of contemporary federal government and basic structural principles underlying our constitutional system, while at the same time ensuring effective constitutional enforcement and interfering less with political branch prerogatives than more direct judicial constitutional enforcement.

I. Administrative governance and administrative constitutionalism. Perhaps the strongest argument for requiring agencies to take account of constitutional concerns in their decisionmaking is that doing so acknowledges the reality of modern administrative governance. Administrative agencies are today the primary decisionmakers in federal government. To be sure, agency actions are governed by the terms of authorizing statutes and they act subject to at times substantial congressional and presidential oversight. But these controls do not alter the reality that agencies wield considerable independent discretion in setting the shape of national policy and implementing federal programs.

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 governmental officials have an independent duty to support it.¹⁵⁸ It could also be seen as a condition of delegation. The Court has made clear that broad congressional delegations of authority to administrative agencies are constitutional, but it has failed to adequately consider whether such delegations should come with constitutional strings attached.¹⁵⁹ One such string should be that congressional delegations not serve to remove constitutional constraints that would otherwise apply.¹⁶⁰ Hence, if Congress has an independent and to some degree judicially enforceable obligation to take constitutional norms and values into account, as it does under the constitutional canons and other “second look doctrines,” then the constitutional price of delegation should be that congressional delegates face this obligation too.¹⁶¹

¹⁵⁸ U.S. Const., art VI, § 3, cl. 1; Sager, *supra* note , at 1227; Morrison, *supra* note , at 1251 (suggesting that where “agency or other executive component interprets a statute it regularly administers and discusses with Congress,” constitutional avoidance is “not only unnecessary, but also inappropriate”); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 Mich. L. Rev. 676, 687–88 (2005) (discussing obligations and opportunities for executive constitutional interpretation); see also 5 U.S.C. § 3331 (oath of office for federal employees).

¹⁵⁹ Cf. Gillian E. Metzger, *Privatization As Delegation*, 103 Colum. L. Rev. 1367, 1443–45, 1456–61 (2003) (arguing that in the privatization context, the Court has erred in simply upholding delegations of power to private individuals without imposing an obligation to ensure that such delegations are structured to adequately protect constitutional limits).

¹⁶⁰ See *id.*, at 1400–02 (arguing that structural principle of constitutional accountability requires that government power not be delegated in a manner that allows constitutional limits to be evaded); see also *Boumediene v. Bush*, 128 S. Ct. 2229, 2259 (2008) (“To hold the political branches have the power to switch the Constitution on or off at will . . . would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say ‘what the law is.’” (quoting *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803))).

¹⁶¹ Indeed, at one time delegates of legislative power were under greater constitutional constraints than the legislature. See Woolhandler, *supra* note , at 236–47.

One critical difference between Congress and agencies is that agencies lack independent constitutional lawmaking authority and can only exercise those powers delegated to them by Congress.¹⁶² This basic proposition underlies the well-established rule that a court will set aside an agency decision as arbitrary and capricious “if the agency has relied on factors which Congress has not intended it to consider.”¹⁶³ Preserving congressional legislative supremacy thus entails that courts not require agencies to consider constitutional concerns when Congress has expressly or impliedly excluded such factors from agency deliberations. But the instances in which consideration of constitutional concerns is incompatible with a congressional regulatory scheme will be rare. More common will be occasions in which taking constitutional values into account will change the shape of federal regulation and perhaps make it somewhat less effective in achieving congressional regulatory goals. In such contexts, agency consideration of constitutional values absent congressional instruction to the contrary should still be legitimate. Congress might well accept a trade-off of regulatory effectiveness for greater protection of constitutional values. At any rate, the assumption that Congress would do so seems little different from the assumption of congressional constitutional sensitivity that underlies judicial application of the canons.¹⁶⁴ More importantly, given the central role of the Constitution in our governmental structure, unless Congress indicates to the contrary, the default presumption should be that Congress intends administrative agencies to consider constitutional values in their decisionmaking.¹⁶⁵

Requiring that agencies consider the constitutional implications of their actions is far from the radical proposition *Fox* made it seem. Few deny that agencies—like all who exercise governmental power—have a legally enforceable duty to avoid violating the Constitution. True, the *Fox* Court sought to distinguish between this duty and an obligation to consider constitutional norms and principles more generally. Yet such a distinction is impossible to maintain in practice. Agencies must take constitutional norms and principles into account even to avoid actual constitutional violations, as they will often face situations in which the import of precedent and existing constitutional requirements is unclear. Moreover, it is at least arguable that “[t]he executive branch’s independent obligation to enforce the Constitution” may “entail enforcing [some constitutional] norm[s] more robustly than the courts would.”¹⁶⁶

The real dispute in *Fox* is instead over whether agencies’ obligation to consider constitutional concerns should be enforceable by courts under ordinary administrative law. Such judicial enforcement is not logically required by the proposition that agencies have an obligation to take constitutional concerns into account. Indeed, on a departmentalist approach that emphasizes each branch’s independent responsibilities to interpret the Constitution, judicial

¹⁶² See *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.”); Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 *Colum. L. Rev.* 2097, 2109-14 (2004).

¹⁶³ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

¹⁶⁴ But see Morrison, *supra* note , at 1222.

¹⁶⁵ See Strauss, (*Cardozo L. Rev.*), *supra* , at 114; see also Morrison, *supra* note , at 1212-13 (arguing, in defending executive branch application of the canon of constitutional avoidance, that congressional intent is irrelevant when the canon is viewed as a mechanism for constitutional enforcement); cf *Gregory v. Ashcroft*, 501 U.S. 452, 460-64 (1991) (insisting that Congress must have clearly indicated its intention to alter the federal-state balance before a court should read a statute to have that effect).

¹⁶⁶ Morrison, *supra* note , at 1225-26.

enforcement might in fact seem an illegitimate extension of the courts' role.¹⁶⁷ But this complaint ignores the special position of agencies. "[A]n agency is neither Congress nor President nor Court, but an inferior part of government. Each agency is subject to control relationships with some or all of the three constitutionally named branches, and those relationships give an assurance . . . that they will not pass out of control."¹⁶⁸ Whereas judicial imposition of duties of deliberation on Congress and the President raise concerns of unwarranted judicial intrusion into the workings of constitutionally coequal branches, judicial supervision of administrative decisionmaking has long been thought pivotal for ensuring the constitutional legitimacy of administrative action.¹⁶⁹

Thus, just as judicial review ensures that agencies adhere to congressional will and do not exceed or ignore statutory requirements, so too judicial review should ensure that agencies fulfill their constitutional obligations. Importantly, judicial enforcement is only one route by which such policing of agencies' constitutional deliberations occurs; as discussed above, Congress and the President have been quite active in instructing agencies to give weight to constitutional concerns.¹⁷⁰ It is hard to see why judicial encouragement of administrative constitutionalism should be more suspect than similar efforts by the political branches---especially given the courts' traditional role as constitutional enforcers.

That leaves the question of whether courts should enforce agencies' obligation to consider constitutional concerns through the medium of ordinary administrative law as opposed to direct constitutional scrutiny. Using ordinary administrative law for this purpose has several advantages. To begin with, it underscores the argument that judicial review of agencies' constitutional deliberations should not be thought unusual. In addition, this approach better accommodates the various factors, constitutional and nonconstitutional, that agencies must take into account in setting policy. Agencies cannot deliberate about constitutional concerns in a vacuum; instead, they must assess how to take these concerns into account while satisfying their statutory responsibilities and presidential policy priorities.¹⁷¹ Using ordinary administrative law further reinforces the point that what is demanded is consideration of constitutional values, not that these values necessarily trump other concerns, and that the consideration of the relevant values be done by agencies in the first instance. As a result, under ordinary administrative law principles a careful explanation of how constitutional concerns were accommodated or why constitutional concerns are outweighed is all that an agency must supply. It then becomes the courts' responsibility to determine whether the agency's decision accords with constitutional requirements, assuming a constitutional challenge is also brought.

2. *Ensuring adequate constitutional enforcement.* The continued availability of independent constitutional scrutiny merits emphasis. Such scrutiny ensures that reliance on

¹⁶⁷ For descriptions of departmentalism, see Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 Cal. L. Rev. 1027, 1031-33 (2004); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N. Car. L. Rev. 773, 782-83 (2002).

¹⁶⁸ Strauss, (Place of Agencies), *supra* note , at 579.

¹⁶⁹ See *supra* TAN 37-39, & n.41 (discussing development of hard look review and early delegation precedent); see also *Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (D.C. Cir. 1976) (Leventhal, J., concurring) ("Congress has been willing to delegate its legislative powers broadly--and courts have upheld such delegation--because there is court review to assure that the agency exercises the delegated power within statutory limits"); Louis L. Jaffe, *Judicial Control of Administrative Action* 3290 (1965) ("The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid.").

¹⁷⁰ See *supra* TAN 81-85.

¹⁷¹ See Mashaw, *Norms, Practices*, *supra* note ?, at 508-09.

ordinary administrative review does not undermine judicial constitutional enforcement. Even if an agency reasonably opts to pursue a particular policy despite constitutional concerns, and hence satisfies the demands of ordinary administrative review, a court may still invalidate the policy as actually unconstitutional.¹⁷² Thus, skepticism that the executive branch will elevate its political agenda over constitutional considerations should not fuel opposition to the ordinary administrative law approach advocated here.¹⁷³

In fact, however, encouraging agencies to take constitutional concerns into account is likely to prove a valuable mechanism for ensuring effective constitutional enforcement in administrative contexts. Administrative consideration will be particularly important in contexts where constitutional requirements are arguably judicially underenforced, such as federalism, delegation limits, or governmental funding restrictions.¹⁷⁴ In addition, constitutional challenges frequently depend on complex factual determinations, such as the scope of the burden actually imposed by a proposed regulation, the availability of less burdensome alternatives, and the seriousness of the harm the government seeks to address. As Kenneth Bamberger observes, agencies have particular competence in investigating and assessing the factual basis that often underlies constitutional claims.¹⁷⁵ Even if subsequent judicial scrutiny is needed to ensure that adequate constitutional constraints are adequately enforced, that review will be enhanced by agency development of a factual record, the type of record that agencies would need to produce to demonstrate they had considered the constitutional claims at issue.¹⁷⁶ Agencies also have the capacity to devise regulatory solutions that avoid raising constitutional issues in the first instance, whereas courts are limited to responding to regulatory choices made by others. Thus, an agency sensitive to the due process concerns raised by indefinite detention of deportable aliens might choose to forego such detention altogether in lieu of an alternative approach, or decide to employ detention in only some contexts rather than across-the-board.¹⁷⁷ To take another recent example, an agency might decline to preempt state measures out of concern to not

¹⁷² *Fox* underscores the availability of such a challenge. *FCC v. Fox Television Stations*, 129 S. Ct. 1800, 1812 (2009) (stating that the ‘lawfulness [of an agency action] under the Constitution is a separate question to be addressed in a constitutional challenge.’)

¹⁷³ See Pillard, *supra* note , at 699-702. Such skepticism is reinforced by the failures of the Bush administration to give due weight to constitutional and other legal constraints in the national security context. For discussions, see Johnsen, *supra* note , at 1564; see also, Jack Goldsmith, *The Terror Presidency*.

¹⁷⁴ See Metzger, *Duke*, *supra* note , at 2054; Pillard, *supra* note , at 688-98.

¹⁷⁵ See Bamberger, *supra* note , at 94-97; see also Pillard, *supra* note , at 742, 751-52. For a classic analysis of the role of adjudicatory facts in constitutional litigation, see Henry Paul Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 236 (1985).

¹⁷⁶ See, e.g., *Wyeth v. Levine*, 129 S. Ct. 1187, 1201 (2009) (noting that although the Court “ha[s] not deferred to an agency’s *conclusion* that state law is preempted . . . agencies . . . have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state law requirements may pose an obstacle” to the full achievement of congressional purposes to which the Court will give weight, with the degree of weight given depending on the “thoroughness, consistency, and persuasiveness” of the agency’s explanation); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556-566 (2001) (reviewing evidence compiled by state agency in concluding that state regulations banning outdoor advertising of smokeless tobacco and cigars satisfied the *Central Hudson* requirement that restrictions on commercial speech not be based on speculation and conjecture, but holding the regulations nonetheless unconstitutional because the government had failed to show that the regulations were not more extensive than necessary).

¹⁷⁷ See *supra* TAN 47-48 (describing Immigration and Customs Enforcement’s adoption of a more narrowly tailored approach to detention in response to judicial reversal of broader policy).

intrude unnecessarily on state authority.¹⁷⁸ Courts might, of course, impose similar limitations on agency authority, but some constitutional issues may not reach the courts, and at a minimum agency restraint avoids the need for suit to ensure constitutional values are protected.¹⁷⁹

Equally important, agencies are able to adopt and implement far-reaching reforms that can be more effective than court-ordered relief in avoiding and remedying constitutional problems in administrative settings. Decisionmaking by professionals within an agency and external expert review are important checks on agency overreaching and arbitrary determinations, but courts would not impose such personnel measures on agencies unless required by statutes or existing agency regulations.¹⁸⁰ Managerial reforms—such as better training and oversight of personnel or enhanced accountability measures—are often critical in addressing constitutional problems in institutional contexts, and are frequently judicially ordered in the context of institutional reform litigation.¹⁸¹ But such reforms may be most effective when they are developed internally than when externally imposed.¹⁸² In addition, the Court has repeatedly signaled a reluctance to intrude upon federal agency management, insisting on addressing only specific agency actions instead of broader attacks on federal programs.¹⁸³ Although court-ordered systemic relief remains available when necessary to ensure protection of constitutional rights, systemic and broad-scale managerial reforms are far more likely to result from agency initiation than from judicial intervention.¹⁸⁴

¹⁷⁸ See *Nixon v. Missouri Municipal League*, 541 U.S. 125, 140 (2004) (GET PAREN); see also President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies, Preemption (May 20, 2009) (“[P]reemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption.”).

¹⁷⁹ See, e.g., *Hein v. Freedom from Religion Found.*, 551 U.S. 587 (2007) (finding tax payer not have standing to sue on basis that Office of Faith-Based Initiatives violates establishment clause); David S. Strauss, Presidential Interpretation Of The Constitution, 15 *Cardozo L. Rev.* 113, 115-16 (1993) (noting that “categories of decisions, in which the issue seldom ends up in court, the executive is less oriented to the courts’ views and the question of executive autonomy in interpreting the Constitution arises” and describing such categories, such as intelligence activities).

¹⁸⁰ See, e.g., *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (rejecting effort to challenge federal government’s general failure to adequately implement federal land statutes on the ground that “respondents cannot seek *wholesale* improvement of this program by court decree, rather than in the Department or the halls of Congress, where programmatic improvements are normally made”); Gillian E. Metzger, *The Interdependence of Internal and External Separation of Powers*, Emory L. J. forthcoming (manuscript at 12-14, 19-20) (emphasizing the importance of internal constraints in improving agency decisionmaking and guarding against executive branch overreaching).

¹⁸¹ See Malcolm M. Feeley & Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America’s Prisons* 16, 162-69 (1998) (describing efforts to increase professionalization and adherence to dominant national standards for prison administration as a core part of prison reform litigation); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 *Harv. L. Rev.* 1015, 1019-22, 1067-73 (2004) (emphasizing the importance of experimentalist institutional reform in which stakeholders in public institutions negotiate remedies that are provisional and outcome-based, often leaving institutions with broad discretion to determining how to meet them).

¹⁸² See Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 *Colum. L. Rev.* 458, 475-78 (2001) (arguing that externally-imposed solutions cannot successfully address certain forms of discrimination that are more structural and implicit because external rules “cannot be sufficiently sensitive to context or integrated into . . . day-to-day practice,” discourage “proactive problem-solving,” and lead to an overemphasis on avoiding liability).

¹⁸³ See, e.g., *Summers v. Earth Island Institute*, 129 S.Ct. 1142, 1149--51 (2009) (finding plaintiffs cannot show concrete an particularized injury based on specific regulations).

¹⁸⁴ See *Lewis v. Casey*, 518 U.S. 343, 350--55 (1996) (noting importance of right of access to court, but finding inmate could not pursue claim because could not show actual injury).

Agencies also hold potential as sites for public deliberation and engagement on constitutional meaning. Much recent constitutional scholarship has focused on extra-judicial constitutional interpretation, particularly through the interaction of social movements with political actors.¹⁸⁵ Agencies play a critical role in these contexts, engaging with the same groups and advocates as broad statutes and presidential statements are translated into concrete policies.¹⁸⁶ But agencies represent a prime locus for public interaction with government more generally. Administrative officials regularly consult with interest groups and receive data and filings from members of the public urging a particular course of action on the government. Moreover, unlike Congress or the President, agencies are held to a duty to consider and respond to the information submitted to them in setting policy—a duty enforced by the courts through ordinary administrative law doctrines such as hard look review. As a result, administrative proceedings also can be occasions in which to initiate popular discussion and deliberation about what the Constitution requires and how constitutional demands should be met.¹⁸⁷ These understandings may then form an occasion for beneficial dialogue with the courts—and perhaps with Congress and the President—about how the Constitution itself should be understood.

3. *Preserving political branch prerogatives.* Finally, any assessment of the appropriateness of enforcing constitutional norms through ordinary administrative law must take account of the alternatives. One possibility is, of course, that the Court will revert to only assessing whether the administrative action at issue is actually unconstitutional, as the *Fox* majority advocated.¹⁸⁸ Although that option might appear to leave more room to agencies to exercise the policymaking discretion delegated to them by Congress, its actual effect might be quite opposite. Direct judicial constitutional enforcement may yield requirements that offer less flexibility to the political branches in structuring government programs and policies. A standard argument made in constitutional common law's defense is that forcing courts to definitively articulate the contours of constitutional rights and requirements risks "improvident constitutionalization" and "imposing an inflexible regime upon Congress and the states."¹⁸⁹ Constitutional common law, by contrast, allows "[p]ressures for change [to be] accommodated either by legislation or by an open reconsideration of the subconstitutional policy concerns underlying an initial formulation of the rule."¹⁹⁰ Preserving the political branches' flexibility in

¹⁸⁵ The literature on popular constitutionalism and the role of social movements is voluminous. See, e.g., William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 Mich. L. Rev. 2062 (2002); Robert Post & Reva Siegel, *Legislative Constitutionalism and Section Five Power: Polycentric Interpretations of the Family and Medical Leave Act*, 112 Yale L.J. 1943 (2003); Reva Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 Cal. L. Rev. 1323 (2006).

¹⁸⁶ See Eskridge & Ferejohn, *supra* note , at 85-86; see also Lee, *supra* note , at 66 (arguing that popular mobilizations, such as letter-writing campaigns, are important in spurring administrative constitutionalism).

¹⁸⁷ Eskridge & Ferejohn, *supra* note , at 11-15; cf. Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 Harv. L. Rev. 1511, 1515 (1992) ("[A]lthough the Congress, the President, and the courts retain an important reviewing function, having administrative agencies set government policy provides the best hope of implementing civic republicanism's call for deliberative decisionmaking informed by the values of the entire polity.").

¹⁸⁸ *FCC v. Fox Tele. Stns.*, 2009 WL 1118715 at *9 (Apr. 28, 2009).

¹⁸⁹ See Meltzer, *supra* note , at 1174.

¹⁹⁰ Monaghan, *supra* note , at 28. An example from the privatization context can help make this point more concrete: Requiring that legislatures or agencies create adequate mechanisms to oversee and ensure accountability of private contractors as a constitutional condition of privatizing limits the political branches' flexibility to structure privatization arrangements as they see fit, but it is less restrictive than the alternative of making the government's

constructing administrative arrangements also supports judicial efforts to develop ordinary administrative law doctrines to address constitutional concerns, such as the reasoned decisionmaking requirement, rather than imposing hard and fast constitutional requirements.

Even *Fox* acknowledged, moreover, that one likely alternative to requiring that agencies take constitutional concerns into account will be judicial enforcement of those concerns through the mechanism of the constitutional canons, in particular the canon of constitutional avoidance.¹⁹¹ Much recent scholarship on the constitutional canons has argued that, despite their seemingly milder appearance, decisions applying the canons can be as intrusive on Congress—indeed, perhaps more so—as decisions holding statutes to be unconstitutional.¹⁹² If these canons are in fact doing any work, then they are yielding statutory interpretations different from the reading that would otherwise obtain.¹⁹³ The effect is to trump the political compromise that underlay enactment of the measure initially; worse, the courts' interpretation may change political dynamics in a way that precludes easy enactment of clarifying or reversing legislation by Congress.¹⁹⁴ Whether or not the formal possibility of congressional reenactment deserves more weight in the equation that these arguments allow,¹⁹⁵ it is hard to dispute that application of the canons can prove a substantial obstacle for Congress, given the difficulties involved in getting federal legislation enacted.

Administrative agencies, however, can respond to judicial reversal more easily than Congress. In part this is because, burdensome though administrative procedures can be, they do not involve the same types of “vetogates” entailed in getting legislation through Congress and signed by the President.¹⁹⁶ Further, reversal of an agency decision on ordinary administrative law grounds generally results in a remand to the agency; this is the standard course, for example, when a court sets aside an agency determination as arbitrary and capricious.¹⁹⁷ As a result, the agency usually has to act in order to have the rule or decision in question take effect,¹⁹⁸ and does not confront the situation Congress may face after application of the canon of constitutional avoidance: continuation of the challenged statute in place in a significantly altered form, but without the political coalition to enact an override of the court's decision. Moreover, although formulation of rules and agency decisions may involve negotiation among many agency personnel, they all at least ostensibly share the goal of formulating the best policy from the agency's perspective, and in the end the agency head frequently wields decisionmaking authority. Thus, a partial remand of an agency decision does not pose the same danger of overturning careful political compromises as does application of the canon of avoidance.

private partners directly subject to constitutional demands. See Metzger, *Privatization As Delegation*, supra note __, at 1457-61.

¹⁹¹ 2009 WL 1118715, at *9 n.3.

¹⁹² See Schauer, supra note __, at 94-95; see also Manning, supra note 61, at 227-56 (arguing that the canon of constitutional avoidance upsets legislative compromises and enshrines legislative results that may not have been obtainable ex ante).

¹⁹³ See *id.* at 87.

¹⁹⁴ See Jerry L. Mashaw, *Greed, Chaos, and Governance* 102-03, 105 (1997); Manning, supra note __, 254-55.

¹⁹⁵ See Metzger, supra note __, at 2094.

¹⁹⁶ See *id.*, at 2090-91. For a description of the vetogates involved in enacting federal statutes, see William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 N.D. L. Rev. 1441, 1444-48 (2008).

¹⁹⁷ 3 Richard J. Pierce, Jr., *Administrative Law Treatise* § 18.1 at 1323 (4th ed. 2002).

¹⁹⁸ Even when a court grants remand without vacatur, the agency knows it must eventually respond or face vacatur in the future. See 1 Pierce, supra note __, § 7.13, at 522.

An additional important advantage that agencies offer is their deep knowledge of the substantive fields they regulate and the federal regulatory schemes in question.¹⁹⁹ This substantive expertise means that agencies are better equipped than courts to determine how to incorporate constitutional values and norms with the least disruption to federal regulatory schemes. Courts may have greater understanding and appreciation of constitutional values and principles in general, but they are less competent in balancing constitutional and policy concerns at a more granular level.²⁰⁰ Often several options will exist through which to address the constitutional concerns raised by a statute or agency action. *Rapanos v. United States* provides a recent illustration. That case involved the scope of federal regulation of intrastate wetlands and the concern that such regulation might exceed constitutional limits on federal power. A number of different regulatory approaches could address this danger. Two were suggested by the plurality and concurrence, respectively: regulating only permanent bodies of water with a continuous connection to waters of the United States,²⁰¹ or undertaking a case-by-case assessment of whether a particular wetland has a “significant nexus” to traditional navigable waters.²⁰² But other approaches were also available, such as exempting any wetlands and tributaries not clearly navigable waters in their own right, or creating a rebuttable presumption that wetlands adjacent to navigable waters or their tributaries are subject to regulation. The federal agencies statutorily charged with implementing the Clean Water Act have the factual and policy expertise needed to determine which of these possibilities best achieves federal water pollution goals while respecting state authority.²⁰³ Those agencies’ greater political accountability compared to courts also means that both the President and Congress will have more openings for influencing this policy choice when undertaken in an administrative context.²⁰⁴

C. The Need for Greater Transparency

In sum, using ordinary administrative law to encourage administrative constitutionalism not only accords with our constitutional structure and modern administrative reality, but also represents an important tool for ensuring constitutional enforcement while also respecting political branch prerogatives. For this approach to reap its hypothesized rewards, however, the Court must be open about the relationship between constitutional law and ordinary administrative law. Otherwise, agencies and courts will lack a clear understanding of agencies’

¹⁹⁹ Cf. *Wyeth v. Levine*, 129 S. Ct. 1187, 1201 (2009) (“While agencies have no special authority to pronounce on preemption absent delegation from Congress, they do have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about [the impact of] ... state requirements”).

²⁰⁰ See Metzger, *supra* note , at 2081-83.

²⁰¹ *Rapanos v. United States*, 547 U.S. 715, 739, 742 (2006) (plurality op.) (internal quotations omitted).

²⁰² *Id.* at 779 (Kennedy, J., concurring in the judgment).

²⁰³ See Bamberger, *supra* note , at 96-97; Metzger, *supra* note , at 2082-83; see also Brian Galle & Mark Seidenfeld, *Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 *Duke L.J.* 1933, 1948--83 (offering a detailed comparison of the comparative institutional strengths of courts and agencies, focusing on preemption issues); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 *Nw. U. L. Rev.* 727, 753--59 (2008) (same).

²⁰⁴ See Bamberger, *supra* note , at 97-100; see also Metzger, *supra* note , at 2083-86 (discussing how procedural requirements can enhance congressional as well as state and local input into federal administrative decisions with federalism implications).

obligation to take constitutional concerns into account, with underexploitation of administrative capacity to address constitutional concerns the likely result.

Lack of transparency, unfortunately, is one of the defining hallmarks of the Court's precedent in this area. 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. This marks a significant difference between the Court's use of ordinary administrative law to address constitutional concerns and its application of the constitutional canons. Critics of the canon of constitutional avoidance frequently take the Court to task for failing to deeply engage with the constitutional concerns leading to the canon's application. But the Court at least identifies the constitutional question at issue and states expressly that constitutional concerns are playing a role in its statutory analysis.²⁰⁵ The Court is similarly overt when it applies constitutionally-derived clear statement rules or presumptions.²⁰⁶ Even that degree of transparency is absent in the Court's development of ordinary administrative law.

To be sure, greater judicial candor and transparency can come at a price. A court's greater honesty about the concerns motivating its decisions may front unpalatable value choices, raise obstacles to securing agreement on multimember bodies, or have worrying implications for future decisions.²⁰⁷ Candor and transparency can also preclude certain results. As suggested earlier, the Court's silence likely reflects its discomfort with independent federal court lawmaking when not constitutionally mandated, combined with its insistence on judicial supremacy within the constitutional sphere.²⁰⁸ Perhaps the Court would not be willing to keep developing ordinary administrative law as it has and pull back from current doctrines if forced to confront the extent to which ordinary administrative law may be at odds with this understanding of the proper bounds of the judicial role.²⁰⁹ My own view is that such a pullback is unlikely; the constitutional concerns raised by the possibility of broad and unconstrained agency power run too deep.

More importantly, the Court's lack of transparency about the constitutional dimensions of ordinary administrative law has significant costs as well---costs that go beyond simply failing to exploit the beneficial potential of administrative constitutionalism. Of greatest concern, lack of transparency is a serious impediment to both judicial and administrative accountability.²¹⁰ The

²⁰⁵ See, e.g., *Northwest Austin Mun. Utility Dist. No. One v. Holder*, 129 S. Ct. 2504, 2512--13 (2009) (noting potential constitutional tension, and interpreting statute to avoid); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994) (same).

²⁰⁶ See, e.g., *Wyeth v. Levine*, 129 S. Ct. 1187, 1194--95 (2009) (presumption against preemption); *Gregory v. Ashcroft*, 501 U.S. 452, 460-64 (1991) (clear statement rule when legislation alters the federal-state balance).

²⁰⁷ See, e.g., Guido Calabresi & Philip Bobbitt, *Tragic Choices* 17-28, 78-79, 195-97 (1978); Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 *Tex. L. Rev.* 1307, 1381-95 (1995). But see Micah Schwartzman, *Judicial Sincerity*, 94 *Va. L. Rev.* 990, 990-91 (2008) (arguing that judicial sincerity about the grounds of their decisions is necessary for judges to fulfill the demands of the judicial role). Moreover, insofar as judges are not aware of the forces motivating their decisions, greater transparency may not be easily possible. See Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 *Geo. L. J.* 353, 408 (1989).

²⁰⁸ See *supra* TAN 96-98.

²⁰⁹ See Zeppos, *supra* note , at 404-05 (arguing that a requirement of candor may prevent courts from serving a checking function)

²¹⁰ Another possible effect, if the Court reviews agency action searchingly out of constitutional concerns but does not state so openly, may be greater lower court scrutiny of administrative action across-the-board, resulting in unnecessary intrusion on administrative decisionmaking when constitutional factors are not in play. See Metzger, *supra* note (Duke), at 2108-09.

constitutional underpinnings of ordinary administrative law doctrines have remained largely undeveloped and untested by criticism. We have little understanding of the extent to which agency explanation and reasoning are constitutionally necessary conditions for delegation, or of the basis on which such constitutional requirements can be justified. Critiques of current hard look review, meanwhile, are incomplete insofar as they target only the doctrine's statutory basis or pragmatic implications without also assessing its putative constitutional basis. Lack of judicial transparency also impedes administrative accountability; not only are the courts less willing to probe how constitutional concerns factored into agency deliberations, but agencies themselves have little incentive to identify and justify the influence such concerns had on their decisionmaking. This worsens the accountability risks associated with administrative constitutionalism, as it becomes much harder for the public, Congress and the courts to police agency constitutional reasoning and ensure that agencies do not base their decisions on insubstantial constitutional concerns. To my mind, these potential gains of greater judicial candor here outweigh its possible harms.

CONCLUSION

The time has therefore come for the Court to be forthright about the constitutional character of ordinary administrative law. The linkages between constitutional law and ordinary administrative are not only diverse, they are longstanding and deeply rooted in current doctrine. Segregating constitutional law and administrative law would thus prove quite difficult and disruptive. Worse, it would forego the significant benefits to be gained from encouraging administrative agencies to take constitutional concerns seriously in their decisionmaking. Rather than clinging to a false divide between constitutional law and ordinary administrative law, the Court would do better to embrace this linkage and acknowledge the important role that administrative agencies can and do play in the development of constitutional law.