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The Unwritten Administrative Constitution

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THE UNWRITTEN ADMINISTRATIVE CONSTITUTION

*Emily S. Bremer**

Abstract

It is widely accepted that the powers of the federal government flow from the U.S. Constitution. Yet in practice, most federal power is exercised through administrative agencies, institutions not mentioned in the Constitution. Since the New Deal Era, administrative law—the seemingly disparate set of rules governing agency action that are found in statutes, judicial decisions, and executive directives—has accommodated the emergence of this fourth branch of government not contemplated by the Framers. Familiar principles, including the separation of powers, the rule of law, and individual liberties, permeate administrative law. But these principles cannot be expressly located in the U.S. Constitution. So what is their legal and theoretical foundation? And how are they found in administrative law?

This Article argues that administrative law provides an unwritten constitution governing federal administrative agencies. American administrative law is illuminated through the lens of constitutional theory, and particularly principles of British constitutionalism. This Article shows that administrative law rules, though not formally entrenched, perform essential constitutional functions where the written Constitution has little or no application. These functions include constituting government agencies, determining institutional boundaries, establishing the government–citizen relationship, and protecting fundamental values.

This unwritten constitution theory provides a legal and theoretical foundation for ensuring that the administrative state operates consistently with constitutional principles. It also legitimates administrative common law and illuminates political obligations to respect constitutional principles in administrative law development and reform.

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INTRODUCTION

Constitutional principles predominate in administrative law, the body of seemingly disparate legal requirements that controls the exercise of federal power through the modern administrative apparatus.¹ Administrative law is found in the Administrative Procedure Act (APA) and in an array of other statutes, federal judicial decisions, and executive directives that establish crosscutting requirements that generally apply to all agencies. Operating at a level above the laws that define individual, substantive fields of administration, administrative law more generally defines agency authority, determines agency structure, establishes minimal procedural requirements for agency action, measures the validity of agency decisions, and dictates the relationships between agencies and the three primary branches of the federal government.² Familiar constitutional concerns—the separation of powers, rule of law, and protection for individual liberties—are often at the heart of these requirements.³ Reflecting this reality, much administrative law scholarship focuses on constitutional issues.⁴

Yet these seemingly constitutive components of administrative law rarely derive from the U.S. Constitution. While the Constitution's first three articles define the respective authority and relationships among Congress,⁵ the President,⁶ and the Judiciary,⁷ there is no article similarly devoted to administrative agencies.⁸ Indeed, it is widely agreed that the rise of the modern administrative state has significantly altered the original institutional structure created by the Constitution.⁹ Discrete

1. See, e.g., A.A. Berle, Jr., *The Expansion of American Administrative Law*, 30 HARV. L. REV. 430, 439 (1917) (noting that administrative law “concerns the machinery of transmission of governmental will from the point of its origin to the point of its application”).

2. STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES* 3 (5th ed. 2002). Administrative law thus excludes the substantive and procedural rules that define the many individual fields of administration, such as labor law, environmental law, food and drug law, etc. See *id.* (“Administrative law deals with the more general principles and rules that cut across the particular substantive fields to embrace all forms of administrative activity.”).

3. See *infra* Part III; see, e.g., Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 484 (2010) (explaining that “a fair amount of ordinary administrative law qualifies as constitutional common law”).

4. See generally, e.g., Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984) (articulating examples of constitutional issues that arise in administrative law).

5. See U.S. CONST. art. I.

6. See *id.* art. II.

7. See *id.* art. III.

8. See, e.g., Jerry L. Mashaw, *Governmental Practice and Presidential Direction: Lessons from the Antebellum Republic?*, 45 WILLAMETTE L. REV. 659, 660 (2009) (“[T]here is a hole in the Constitution where administration might have been.”).

9. See *infra* Section I.A.

provisions of the Constitution rarely mandate administrative law rules. For example, while the Due Process Clause imposes certain procedural requirements on agency adjudication,¹⁰ it has only limited application to rulemaking.¹¹ Often, the constitutional concerns that animate administrative law are not tethered to any particular constitutional provision.¹² The phenomenon is particularly noticeable in administrative common law, where courts frequently appeal to background constitutional principles in crafting administrative rules that are neither mandated by the Constitution nor required by statute.¹³ Congressional and executive contributions to administrative law often have a similarly “small-c” or quasi-constitutional¹⁴ character.¹⁵

This Article argues that administrative law has evolved into an unwritten constitution that governs the administrative power not contemplated by the U.S. Constitution. This Article establishes this theory by examining American administrative law through the lens of constitutional theory, particularly principles of British constitutionalism. While the United Kingdom does not have a written constitution (in the sense that there is no codified document called “The Constitution”), it is governed by a constitutional framework marked by certain fundamental principles that find expression in statutes, judicial decisions, and the customs and practices of political institutions. The legal instruments that make up this so-called unwritten constitution are identified by reference to the constitutional functions they perform.¹⁶

10. See, e.g., *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 288 n.4 (1974) (“[T]he Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation.”).

11. See *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (“There must be a limit to individual argument in such matters [of Due Process] if government is to go on.”); *Londoner v. Denver*, 210 U.S. 373, 378 (1908) (holding that a state does not violate due process when it authorizes improvements following charter provisions and without notice to landowners).

12. See Metzger, *supra* note 3, at 481, 486–87 (defining and explaining the components of the term “constitutional common law”).

13. See generally Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293 (2012) (exploring the constitutional character of administrative common law).

14. Although some may ascribe different meanings to the terms “small-c” and “quasi-constitutional,” they are for my purposes interchangeable.

15. Several scholars have examined the quasi-constitutional status of federal statutes. See, e.g., WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010) (discussing how “political contrivances have become entrenched, indeed to the point of molding the Constitution itself”); Daniel A. Farber, *Legislative Constitutionalism in a System of Judicial Supremacy*, in *THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE* 431 (Richard W. Bauman & Tsvi Kahana eds., 2006) (noting that congressional rules “at least deserve to be called quasi-constitutional”).

16. See generally BEAU BRESLIN, *FROM WORDS TO WORLDS: EXPLORING CONSTITUTIONAL*

Applying this analysis to American administrative law, this Article argues that administrative law performs constitutional functions: creating and ordering important political institutions, authorizing and limiting the exercise of government power, and defining relationships both among government institutions and between the government and citizens.¹⁷ As in the British system, this constitutional order is “unwritten” in that it is not codified in the Constitution.¹⁸ Instead, its principles are found in statutes, judicial decisions, and executive policy directives that authorize, regulate, and limit the exercise of sovereign power¹⁹ through the now well-established²⁰ “fourth branch” of the federal government.²¹ While this unwritten administrative constitution is not formally entrenched, it has proven remarkably enduring and has evolved to become the primary means through which fundamental constitutional values are extended into the modern administrative context.²²

Viewing administrative law as an unwritten constitution has various beneficial implications. At the broadest level, it provides a theoretical and legal foundation for integrating the modern administrative state, despite its apparent inconsistencies with the written Constitution, into the federal constitutional structure. By providing a way to “escape the

FUNCTIONALITY (2009).

17. Cf. Tom Ginsburg, *Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law*, in *COMPARATIVE ADMINISTRATIVE LAW* 117–18 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010) (arguing that in the comparative context, administrative law has a constitutional character).

18. Cf. CHRISTOPHER G. TIEDEMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES: A PHILOSOPHICAL INQUIRY INTO THE FUNDAMENTALS OF AMERICAN CONSTITUTIONAL LAW* 45 (1890) (arguing that “the great body of American constitutional law cannot be found in the written instruments, which we call our constitutions”); Ernest A. Young, *The Constitution Outside the Constitution*, 117 *YALE L.J.* 408, 411 (2007) (arguing that most constitutional work in the American legal system is resolved “by legal norms existing outside what we traditionally think of as ‘the Constitution’”).

19. See *ESKRIDGE & FERRELL*, *supra* note 15, at 1.

20. See, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 *HARV. L. REV.* 1231, 1232 (1994) (“[T]he essential features of the modern administrative state have, for more than half a century, been taken as unchallengeable postulates by virtually all players in the legal and political worlds.”); Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 *COLUM. L. REV.* 369, 369 (1989) (“We all live, as we all know, in an administrative state.”).

21. The term “fourth branch of government” was originally used as an epithet, but is used today as a common term for the administrative state. See *REPORT OF THE COMMITTEE WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT* 38–39 (1937); see RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIL, *ADMINISTRATIVE LAW & PROCESS* 32 (5th ed. 2009).

22. See JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 285–86 (2012) (discussing the “change in the role of central government” throughout American history and how it affects our understanding of constitutional history).

difficulty of fitting the ‘round peg’ of administrative government into the ‘square hole’ of the nation’s constitutional culture,²³ the unwritten constitution theory coherently explains administrative agencies’ place in the federal government.²⁴ It also provides a foundation for ensuring that agencies operate consistently with the nation’s normative commitment to the principle of constitutionalism. This in turn may help legitimate modern administrative government.²⁵

More concretely, the theory explains and justifies the courts’ development of core administrative law requirements through the creation of administrative common law.²⁶ The courts’ development and use of federal common law rules is controversial, particularly in constitutional doctrine.²⁷ Yet much administrative law is federal common law, and it often has a constitutional dimension. For example, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*²⁸ does not even cite the APA’s judicial review provisions in establishing the test for determining when a court must defer to an agency’s statutory interpretation.²⁹ The *Chevron* doctrine is commonly understood as a prime example of administrative common law. And it has important constitutional consequences: ratifying Congress’s practice of delegating legislative authority to agencies, ensuring that agencies do not act beyond the scope of delegated authority, and defining the courts’ relationships with both Congress and the agencies. Administrative common law doctrines such as *Chevron* are essential to administrative law, but scholars have struggled to justify them. The unwritten constitution theory puts administrative common law in a broad institutional context and provides a solid, structural foundation for the

23. Sidney A. Shapiro & Richard W. Murphy, *Eight Things Americans Can’t Figure Out About Controlling Administrative Power*, 61 ADMIN. L. REV. 5, 6 (2009) (footnote omitted) (internal quotation marks omitted).

24. See Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of Second Best*, 80 CORNELL L. REV. 1, 2 (1994) (noting the embedded status of administrative agencies in the federal bureaucracy); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1194 (1986) (“Although Congress and the courts have never fashioned a coherent theory of administrative government, fundamental questions about the scope of regulatory power have often been put to rest by prescription . . .”).

25. The administrative state is surely here to stay, but so too are doubts about its constitutional legitimacy. See generally, e.g., Lawson, *supra* note 20 (arguing that the administrative state is unconstitutional).

26. Cf. Paul R. Verkuil, *Crosscurrents in Anglo-American Administrative Law*, 27 WM. & MARY L. REV. 685, 685–86, 706–08 (1986) (comparing British and American administrative law as a means of understanding the evolution of public law in dominant common law countries).

27. See *infra* Section IV.A.

28. 467 U.S. 837 (1984).

29. See *id.* at 865–66.

practice. It explains why, in the administrative context, federal common law is necessary to preserve the separation of powers and other fundamental constitutional values. The theory has implications beyond the courts, too, illuminating congressional, executive, and administrative obligations to contribute to the development and protection of the administrative state's unwritten constitution.

Part I of this Article explores the constitutional character of administrative law. With the written Constitution largely silent on the subject of administration, administrative law has evolved to perform the functions ordinarily associated with constitutions, including constituting administrative institutions, defining institutional boundaries, establishing the agency–citizen relationship, and protecting core political values. Though not formally entrenched, this unwritten constitutional order has proven remarkably stable and has facilitated the modern administrative state's integration into the federal government's original, tripartite structure. Part II first identifies the legal instruments that compose the unwritten administrative constitution. It elaborates on administrative law's constitutional functions through an examination of key administrative statutes. Part II then identifies additional components of the unwritten constitution found in judicial common law and executive directives. Part III explores the substantive constitutional values protected by this unwritten constitutional order. Through this discussion, Part III extracts general political duties that flow from recognizing administrative law's constitutional character. Finally, Part IV explores more concrete normative consequences of the unwritten constitution theory for evaluating the legitimacy of administrative common law and for guiding legislative reform efforts.

I. ADMINISTRATIVE LAW'S CONSTITUTIONAL CHARACTER

Most of the work of the modern federal government is performed by administrative agencies, institutions that are legislatively created and not so much as mentioned in the U.S. Constitution. Where the Constitution is silent, however, administrative law has evolved to perform essential constitutional functions. The statutes, judicial decisions, and executive directives that perform these functions make up an unwritten constitution that governs the fourth branch of government not contemplated by the written Constitution. Though these legal instruments are neither entrenched nor endowed with higher law status, they provide an essential legal and theoretical foundation for extending fundamental constitutional principles to administrative agencies.

A. Accommodating the Rise of the Administrative State

The Constitution has almost nothing to say about administration.³⁰ It speaks of Congress, the President, and the federal courts,³¹ but not of administrative agencies.³² Indeed, it is generally agreed that there is significant tension, if not outright conflict,³³ between the institutional structure erected by the Constitution and the reality of the modern administrative state.³⁴ For example, whereas the Constitution divides sovereign power between three distinct branches,³⁵ individual administrative agencies typically may exercise the powers of all three.³⁶ And agencies exercise these powers free from the particular requirements that the Constitution establishes to restrain and regulate each respective power. Thus, agencies exercise delegated legislative power free of the bicameralism and presentment requirements that apply to congressional exercises of legislative power.³⁷ The rise of the administrative state thus “complicated American constitutional law generally, presenting issues not anticipated by the framers of the Constitution,”³⁸ and rarely answered by the Constitution’s text.³⁹

There is nonetheless little doubt that the administrative state is a permanent feature of the federal government. Even those who argue that administrative agencies are unconstitutional view the agencies’

30. *E.g.*, Metzger, *supra* note 13, at 1337; Strauss, *supra* note 4, at 597.

31. *See* U.S. CONST. arts. I, II, III.

32. Mashaw, *supra* note 8, at 659–60.

33. Some have argued that the administrative state is unconstitutional. *E.g.*, Lawson, *supra* note 20, at 1231. The more common view, however, is that the administrative state merely raises manageable constitutional tensions. *See, e.g.*, Metzger, *supra* note 13, at 1337–41.

34. *E.g.*, Metzger, *supra* note 13, at 1336 (“That our national administrative state poorly fits our constitutional framework is well known.”); *see also, e.g.*, Lawson, *supra* note 20, at 1231 (“Faced with a choice between the administrative state and the Constitution, the architects of our modern government chose the administrative state, and their choice has stuck.”); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 447–48 (1987) (explaining that the New Deal “altered the constitutional system in ways so fundamental as to suggest that something akin to a constitutional amendment had taken place”).

35. The Constitution creates and distinguishes between the Congress, the President, and the courts, but does not provide a clear way to distinguish between legislative, executive, and judicial powers. *See* Lawson, *supra* note 20, at 1238 & n.45.

36. *See* Metzger, *supra* note 13, at 1336–37 (“Where the Constitution divides legislative, executive, and adjudicatory power among the three branches and guarantees due process, modern administrative schemes instead consolidate all three functions in a single agency . . .”).

37. *See* William N. Eskridge, Jr. & John Ferejohn, *Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State*, 8 J.L. ECON. & ORG. 165, 166–67 (1992) (stating that “a great deal of lawmaking and statutory interpretation has been delegated to agencies”).

38. *Id.* at 165.

39. *See* Metzger, *supra* note 13, at 1338 (discussing the Constitution’s silence on matters of administrative law).

abolition as “unthinkable,”⁴⁰ for both pragmatic and political reasons. Administrative agencies today bear substantial responsibility for carrying out the day-to-day work of the federal government.⁴¹ Without them, the federal government could not fulfill its modern regulatory, economic, and social responsibilities.⁴² Since the New Deal, the Supreme Court has consistently rejected constitutional challenges to the core features of the federal administrative apparatus.⁴³ Only twice in its history has the Court invalidated a statute for unconstitutionally failing to provide an “intelligible principle” to guide an agency’s exercise of delegated legislative authority.⁴⁴ Other constitutional arguments against administrative structures have had similarly limited success.⁴⁵ The upshot is that “although the Court may tinker with administrative arrangements at the edges, the core structure of the modern administrative state is here to stay.”⁴⁶

It is troubling that the Constitution has so little to say about this important and enduring component of the federal government. “Virtually every major aspect of contemporary life is affected by government regulation.”⁴⁷ Citizens are accordingly more likely to come into contact with federal power in an administrative context than in any other context. Most citizens will never be charged with a crime and thus be affected by the protections of criminal procedure; they may never

40. McCutchen, *supra* note 24, at 41–42.

41. See PETER L. STRAUSS, *ADMINISTRATIVE JUSTICE IN THE UNITED STATES* 69 (2d ed. 2002); see also JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* 6 (1978) (“In virtually every relevant respect, the administrative process has become a fourth branch of government, comparable in the scope of its authority and the impact of its decision making to the three more familiar constitutional branches.”).

42. See Metzger, *supra* note 13, at 1338 (noting that “the federal government’s dominance reflects the changed nature of the national economy and society”).

43. *Id.*

44. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474 (2001); see *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (holding that a statute does not state an “intelligible principle”); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 430 (1935) (same).

45. There is a surprising variety of administrative structures, even among the “Executive Branch” agencies. See generally DAVID E. LEWIS & JENNIFER L. SELIN, *SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES* (2012) (describing the “diversity of federal agencies”). This Article engages neither these nuances nor the broader distinction between “Executive” and “independent” agencies, because its focus is not on *agencies*, but on the constitutional character of administrative *law*.

46. Metzger, *supra* note 13, at 1339.

47. Cary Coglianese, Heather Kilmartin & Evan Mendelson, *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924, 924 (2009); see also *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (“[P]erhaps more values today are affected by [agency] decisions than by those of all the courts, review of administrative decisions apart.”); Lawson, *supra* note 20, at 1236 (“There is now virtually no significant aspect of life that is not in some way regulated by the federal government.”).

need to claim the speech or assembly protections of the First Amendment or invoke the Fifth Amendment to defend their property from government seizure. Rather, the average citizen will confront the power of the state “in myriad petty interactions,” when filing for social security benefits, applying for a passport or visa, financing their child’s education with federal grants and loans, or securing building or business permits from federal authorities.⁴⁸ “It is here that the rubber meets the road for constitutionalism, where predictability and curbs on arbitrariness are least likely to be noticed but more likely to affect a large number of citizens.”⁴⁹

Fortunately, where the Constitution is silent, administrative law steps into the breach. Statutes, judicial decisions, and executive policies establish uniform procedures and requirements that define, regulate, and limit the exercise of agency authority.⁵⁰ These legal instruments are often explicitly designed to promote substantive constitutional values, such as the separation of powers, rule of law, and individual rights.⁵¹ But if these seemingly constitutional rules do not come from the Constitution, then what legal or theoretical foundation supports them?

B. *Constitutionalism Where the Constitution Is Silent*

The inquiry begins with the most basic question: what is a constitution? Constitutional theory and comparative constitutional law provide a wealth of identifying characteristics and theoretical distinctions that help answer this question. Constitutions may be written or unwritten. They may embody the principle of constitutionalism, or they may not. They may be political or legal. They may be formally entrenched, or be otherwise enduring and stable without being formally entrenched.⁵² But all constitutions, regardless of which of these characteristics they possess, serve certain key functions within a polity. Examining administrative law through this lens, we find at its heart the *functional* constitution of the administrative state.

Written constitutions are the easiest to identify—you need only find the codified document called “The Constitution.”⁵³ As others have observed, the terminology here, though well established, is unfortunate and inaccurate.⁵⁴ The core difficulty is that “[t]he unhappily misleading

48. Ginsburg, *supra* note 17, at 118.

49. *Id.*

50. *See infra* Part II.

51. *See infra* Part III.

52. *See infra* Section I.C.

53. *See Young, supra* note 18, at 410.

54. *See, e.g., id.* (arguing that “the American ‘constitution’ consists of a much wider range of legal materials than the document ratified in 1789 and its subsequent amendments”).

phrase, ‘written constitution’ really means ‘codified constitution.’”⁵⁵ The United States thus has a written or codified constitution because its “principal constitutional rules” find specific canonical formulation in a single document called “The Constitution.”⁵⁶ In contrast, the British have a so-called unwritten constitution.⁵⁷ While “much (indeed, nearly all) of the [British] constitution *is* written, somewhere,”⁵⁸ the United Kingdom lacks a single document codifying its principal constitutional rules.⁵⁹ In the interest of accuracy, some scholars have eschewed the traditional terminology of “written” and “unwritten” constitutions, instead referring respectively to “canonical” and “extracanonial” constitutional norms.⁶⁰ This approach has some appeal, but this Article nonetheless adheres to the traditional terminology. For despite their deficiencies, the terms “written” and “unwritten” remain familiar terms of art.⁶¹

The distinction between written and unwritten constitutions takes on less importance once one recognizes that even written constitutions rarely contain *all* of a nation’s principal constitutional rules.⁶² This is true even in the United States.⁶³ Indeed, “a cursory glance at the American constitutional text suffices to illustrate that notwithstanding its almost sacred status in the USA it does not contain a complete code of all [of] America’s constitutional rules, nor even of all the important ones.”⁶⁴ This observation has served as the foundation of several scholars’ work urging the identification of constitutional principles and meaning outside the written Constitution.⁶⁵ Professor Ernest Young urges us to consider the possibility of a “constitution outside the

55. ADAM TOMKINS, PUBLIC LAW 7 (2003); *see also* Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 152, 153 (Larry Alexander ed., 1998) (identifying canonical formulation as a defining feature of constitutions).

56. TOMKINS, *supra* note 55, at 7; *see* Raz, *supra* note 55, at 153.

57. TOMKINS, *supra* note 55, at 7.

58. *Id.*

59. Young, *supra* note 18, at 410.

60. *Id.* at 415.

61. *See* TOMKINS, *supra* note 55, at 7 n.4.

62. *See id.* at 9 (arguing that “all constitutions are (at least in part) unwritten” because no constitution can contain all constitutional rules).

63. *Id.* at 8–9.

64. *Id.* at 8. *See generally* TIEDEMAN, *supra* note 18 (exploring the phenomenon of unwritten norms in American constitutional law).

65. *See* AKHIL REED AMAR, AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY (2012); Matthew S.R. Palmer, *Using Constitutional Realism to Identify the Complete Constitution: Lessons from an Unwritten Constitution*, 54 AM. J. COMP. L. 587, 588–89 (2006) (identifying scholarship that “shows signs of recognizing the existence of something more than text in a constitution”).

[C]onstitution.”⁶⁶ Dr. Matthew S.R. Palmer, a New Zealand public law scholar, urges realism in constitutional discourse, arguing that “an adequate conception of a complete constitution would encompass those elements that significantly influence how public power is exercised in reality,” even if those elements are not found in the written Constitution.⁶⁷ And Professor Akhil Amar offers a “panoramic account of the American constitutional experience” by exploring how materials extrinsic to the text of the Constitution give that text meaning and effect.⁶⁸

As mentioned earlier in this Article, the written Constitution makes no mention of the administrative state⁶⁹—and yet there is a fundamental set of rules governing the exercise of public authority through the administrative apparatus.⁷⁰ This Article argues that these rules form the unwritten constitution of the administrative state. Scholars and practitioners have long recognized that the administrative component of the government is unique and must be constituted and regulated by rules and principles not found in the Constitution. In a 1938 lecture, Professor James Landis said, “it is obvious that the resort to the administrative process is not, as some suppose, simply an extension of executive power.”⁷¹ Rather, the administrative state arose in response to a need, created by the industrial revolution, for an utterly new kind of governance.⁷² Instead of merely enforcing existing laws, administrative agencies were called upon “to provide for the efficient functioning of the economic processes of the state,”⁷³ using “an assemblage of rights normally exercisable by government as a whole.”⁷⁴ In this account, the rise of the administrative state demanded a new philosophy of government that could define the administrative branch of government and its relationship to the other three branches of government.⁷⁵ Administrative law has evolved to meet this need.⁷⁶ This reality is evident even in the most critical accounts of the administrative state.

66. Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408 (2007).

67. Palmer, *supra* note 65, at 589.

68. AMAR, *supra* note 65, at xvi.

69. See *supra* Section I.A.

70. See *infra* Parts II–III.

71. JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 15 (1974).

72. See generally *id.* at 6–18 (describing how the industrial revolution influenced the administrative state).

73. *Id.* at 16.

74. *Id.* at 15.

75. See, e.g., *id.* at 17 (recognizing the significant need “for differentiation in the nature and composition of administrative agencies and in their relationship to the other branches of government”).

76. See ESKRIDGE & FEREJOHN, *supra* note 15, at 10–11 (noting the relationship between the administrative state and the Legislative Branch).

For example, Professor Gary Lawson argues that “[t]he post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution.”⁷⁷ The written Constitution says nothing of administration, and so administrative law has evolved to supply the unwritten constitutional rules required in the wake of the administrative revolution.

When constitutional principles are unwritten, as are those governing the administrative state, how does one identify them? By reference to the one thing all constitutions have in common: the functions they perform.⁷⁸ The essence of a constitution is that it defines, orders, and limits the exercise of political authority within the state:

The constitution of a state may be described as the definition of the order and structure of the body politic, while constitutional law consists of those fundamental principles and rules in accordance with which the government is constructed and its orderly administration is conducted. Constitutional law may be described as the anatomy and physiology of the body politic.⁷⁹

In the broadest sense, then, “[a] constitution is about public power and how it is exercised.”⁸⁰ So too is administrative law. At its core are the formal instruments that order the administrative component of the federal government.⁸¹

The central importance of function is manifest in the principle of constitutionalism, which holds that political power is created and must be legally controlled.⁸² There is an important distinction between constitutions and the principle of constitutionalism. Constitutions are fundamental legal documents or orders. In contrast, constitutionalism is a philosophical commitment to the principled restraint of political power. The distinction is important because constitutions and constitutionalism do not always go together. A written constitution may

77. Lawson, *supra* note 20, at 1231 (footnote omitted).

78. See Young, *supra* note 18, at 410 (“In a polity without a codified constitution, the content of ‘The Constitution’ must be derived functionally, not formally.”).

79. TIEDEMAN, *supra* note 18, at 16.

80. Palmer, *supra* note 65, at 588.

81. See BRESLIN, *supra* note 16, at 8 (explaining the theoretical scope and definition of a constitution); see also Henry St. John Bolingbroke, *A Dissertation upon Parties* (1733–34), quoted in CHARLES HOWARD MCILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* 3–4 (rev. ed. 1947) (defining “constitution” as “that assemblage of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain fixed objects of public good, that compose the general system, according to which the community hath agreed to be governed”).

82. See BRESLIN, *supra* note 16, at 14 (defining the principle of constitutionalism); HILAIRE BARNETT, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 5 (5th ed. 2004) (same).

not adhere to the principle of constitutionalism, while a polity that observes the principle of constitutionalism may not have a written constitution.⁸³

For this Article's purposes, the key point is that it is possible for a nation to have a legal order that functions consistently with constitutionalism in the absence of a written constitution. Britain is an excellent example,⁸⁴ and the British experience suggests that the U.S. Constitution's silence on the subject of administration poses no impediment to the creation and maintenance of a legal order that extends the principle of constitutionalism to the administrative context. To determine which rules within a legal order contribute to an unwritten constitution, we must determine which rules give effect to constitutionalism. To put it another way, we must identify the rules that perform constitutional functions.

Although formulations differ among scholars,⁸⁵ constitutions serve at least five primary functions. First, constitutions create and define the institutions of government—that is, they constitute the government.⁸⁶ Second, constitutions determine and establish the relationships among various government institutions.⁸⁷ Third, constitutions regulate the relationship between the government and the governed.⁸⁸ This includes defining the individual rights of citizens.⁸⁹ Fourth, constitutions espouse political principles, which are typically understood to express a common ideology or “the common beliefs of the population about the way their society should be governed.”⁹⁰ Finally, constitutions often entrench the rules and structures they create, making them difficult or impervious to change.⁹¹ Part II of this Article explores how administrative law performs many, albeit not all,⁹² of these constitutional functions.

83. See BRESLIN, *supra* note 16, at 15 (“Some regimes boast constitutional texts, but we would not call them constitutionalist. Others are constitutionalist in principle but have decided, for whatever reason, to do without a written charter.”).

84. See TOMKINS, *supra* note 55, at 7–8.

85. Compare TOMKINS, *supra* note 55, at 3 (listing three main tasks of constitutions, including creating institutions, regulating relationships among those institutions, and regulating relationships between government and citizens), with Raz, *supra* note 55, at 153–54 (setting out seven features of constitutions), and Young, *supra* note 18, at 411–12 (identifying three primary functions of constitutions, including constituting the government, identifying individual rights against government, and entrenchment).

86. See TOMKINS, *supra* note 55, at 3; Raz, *supra* note 55, at 153; Young, *supra* note 18, at 411–12.

87. See TOMKINS, *supra* note 55, at 3; Raz, *supra* note 55, at 153.

88. See TOMKINS, *supra* note 55, at 3; Raz, *supra* note 55, at 153–54.

89. Young, *supra* note 18, at 412.

90. Raz, *supra* note 55, at 153–54.

91. *Id.* at 153; Young, *supra* note 18, at 412.

92. See *infra* Part I.C.

It bears noting that a constitution may perform its functions through either political or legal means. A political constitution holds the government to account for constitutional wrongs through political means and political institutions.⁹³ Examples of political components of the Constitution can be found where the political question doctrine operates. For instance, whether legislative rules governing impeachment violate the Impeachment Trial Clause⁹⁴ is nonjusticiable and must be resolved within the legislature itself.⁹⁵ “A legal constitution, on the other hand, is one which imagines that the principal means, and the principal institution, through which the government is held to account is the law and the court-room.”⁹⁶ As will be discussed, the unwritten administrative constitution includes political components, such as statutes and executive orders that subject administrative agencies to political oversight.⁹⁷ It also has legal components that are primarily given effect through judicial review and administrative common law.

C. *On Entrenchment and Related Concepts*

Entrenchment, a feature or function⁹⁸ typically associated with constitutional rules, warrants early, independent examination. A rule is entrenched if formal protections make it harder to change than an ordinary law. For example, Article V entrenches the written Constitution by establishing a special, onerous procedure for constitutional amendments.⁹⁹ Rules may be entrenched to various degrees. That is, a rule may be entrenched in the sense that it “may not be altered ever, may not be altered for a certain length of time, and/or may not be altered except by extraordinary procedures.”¹⁰⁰ Article V itself demonstrates this point. The provision is best known for establishing an extraordinary procedure for constitutional amendments. But Article V also prohibited amendments—at least until 1808—to certain provisions of Article I related to the constitutional compromise

93. TOMKINS, *supra* note 55, at 18.

94. *See* U.S. CONST. art. I, § 3, cl. 6.

95. *See* Nixon v. United States, 506 U.S. 224, 226 (1993) (holding that legislative rules governing the Impeachment Trial Clause are nonjusticiable and thus may not be resolved by the Judiciary).

96. TOMKINS, *supra* note 55, at 19.

97. *See, e.g.*, Exec. Order No. 12,866, 3 C.F.R. 638 (1994) (articulating executive policy on regulatory oversight reform).

98. *Compare* Raz, *supra* note 55, at 153 (identifying entrenchment as a “feature” of constitutions), *with* Young, *supra* note 18, at 426 (describing entrenchment as a “function” of constitutions).

99. *See* U.S. CONST. art. V.

100. Larry Alexander, *Introduction to CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS* 2 (Larry Alexander ed., 1998).

on slavery.¹⁰¹ Furthermore, Article V absolutely prohibits constitutional amendments that would deprive any state “of its equal Suffrage in the Senate” without that state’s consent.¹⁰² The provision thus includes three different degrees of entrenchment applicable to three different categories of constitutional rules. Regardless of degree, entrenchment is a common, albeit not universal, feature of constitutions.¹⁰³ Although it is less common, ordinary statutes may also be entrenched to some degree.¹⁰⁴

Entrenchment is related to, but distinct from, the notion that constitutional rules have “higher law” status.¹⁰⁵ A constitution has such status if it is understood to be superior to all other laws in the same system, such that an “ordinary law which conflicts with the constitution is invalid or inapplicable.”¹⁰⁶ Again, the written Constitution is higher law by this definition.¹⁰⁷ If a statutory or other ordinary law conflicts with a provision of the Constitution, it is a nullity.¹⁰⁸ This principle is enforced primarily by the courts, via the doctrine of judicial review,¹⁰⁹ because the Constitution is, for the most part, justiciable.¹¹⁰ The concept

101. U.S. CONST. art. V; *see id.* art. I, § 9, cl. 1, 4.

102. *Id.* art. V.

103. *See* TOMKINS, *supra* note 55, at 16 (“[T]he [English] constitution is said to be unentrenched because there is nothing in it that cannot be changed.”).

104. *See* John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CALIF. L. REV. 1773, 1779–82 (2003) (discussing “examples of binding entrenchment in the history of legislative bodies”); *see also* Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379 (discussing the difficulties of legislative entrenchment); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491 (1997) (same); Palmer, *supra* note 65, at 609 (defining a New Zealand statute that “may only be amended by a 75 percent majority vote in Parliament or a majority in a national referendum” as “entrenched”).

105. Some scholars treat these two concepts as one. *See, e.g.,* Young, *supra* note 18, at 426 (suggesting that “entrenchment may be *all* that sets the canonical Constitution apart from the rest of [the] legal system”). There is undoubtedly some overlap. A rule with the status of higher law likely has a limited degree of inherent entrenchment in the sense that it is impervious to amendment or repeal by implication. But without formal entrenchment, such a rule remains susceptible to express amendment or repeal via “ordinary . . . means.” *Id.*

106. Raz, *supra* note 55, at 153.

107. *Cf.* TIEDEMAN, *supra* note 18, at 16 (stating that “the fundamental principles which form the constitution of a state cannot be created by any governmental or popular edict”). *See generally* EDWARD S. CORWIN, *THE “HIGHER LAW” BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* (2008) (examining the historical context and political philosophy behind the tradition of the “higher law” status of the U.S. Constitution).

108. *See* U.S. CONST. art. VI, cl. 2.

109. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–79 (1803).

110. *Cf.* Raz, *supra* note 55, at 153 (identifying justiciability as a feature of constitutions). Judicial supremacy in interpreting and enforcing the Constitution is not absolute. *See, e.g.,* *Baker v. Carr*, 369 U.S. 186, 210–15 (1962) (noting that some constitutional questions are nonjusticiable political questions). Nor is it entirely accepted. *See, e.g.,* Robert F. Nagel,

of higher law centers on the relationship between rules within the same legal system, determining which rule governs in the event of a conflict. In contrast, entrenchment is about change, not conflict. A rule is entrenched when it is protected, to some degree, from being changed or eliminated. While an entrenched rule may also be higher law—as in the case of the written Constitution—it is also possible for a rule to possess only one of these two distinct features. For example, Congress could entrench an ordinary statute, but doing so would not give the statute higher law status. It may be more difficult to amend or repeal such a statute, but in the event of a conflict between the entrenched statute and the Constitution, the latter would prevail.

Some scholars willing to recognize the existence of constitutional norms outside the written Constitution further argue that such norms are entrenched or endowed with higher law status.¹¹¹ For example, Professors William Eskridge and John Ferejohn recently published a book that “presents a nontraditional framework for thinking about American constitutionalism.”¹¹² This framework “focuses on the primary instruments of the political process itself—statutes, executive orders, congressional-executive agreements, agency rules—and reveals how those political contrivances have become entrenched, indeed to the point of molding the Constitution itself.”¹¹³ The project, which is the culmination of much previous work, is quite directly a response to what the authors perceive as the judiciary’s failure to “generate important changes in the Constitution” by recognizing certain social and economic rights.¹¹⁴ Statutes and other political instruments, however, have established some of these rights.¹¹⁵ By characterizing these political instruments as having a constitutional character, the authors aim to establish that the instruments have been entrenched through the political process, rather than through the usual means of judicial interpretation of the Constitution.¹¹⁶ The practical consequence, if the theory is accepted, is that certain rights created by statute are formally protected against future change or revocation.

Judicial Supremacy and the Settlement Function, 39 WM. & MARY L. REV. 849 (1998) (criticizing the view of judicial supremacy without qualification).

111. See generally Young, *supra* note 18, at 413–14 (“Other scholars, from Karl Llewellyn in the 1930s to Bruce Ackerman, William Eskridge, John Ferejohn, and many others today, have . . . insisted on treating . . . extracanonical norms as ‘higher law[.]’ . . .”); see also ESKRIDGE & FEREJOHN, *supra* note 15, at 1 (arguing that “political contrivances have become entrenched, indeed to the point of molding the Constitution itself”).

112. ESKRIDGE & FEREJOHN, *supra* note 15, at 1.

113. *Id.*

114. *Id.* at 4.

115. See, e.g., *id.* at 6, 9 (noting several examples of major Supreme Court decisions modifying constitutional provisions that rose out of statutory enactments).

116. See *id.* at 5 (stating that “statutes commonly provide positive rights to people” and that some positive rights “have a Large ‘C’ Constitutional basis”).

One could plausibly argue that administrative law is *functionally* entrenched.¹¹⁷ Indeed, one of the remarkable features of American administrative law is the longevity of its institutions and basic legal requirements. Once an agency is created, it is rarely destroyed.¹¹⁸ And the APA has proven nearly impervious to change since its enactment in 1946.¹¹⁹ This kind of stability is also a common feature of administrative structures in other nations. In the context of comparative administrative law, one scholar notes that administrative institutions may be generally more stable and enduring than many constitutions.¹²⁰ While some legal norms of the administrative state have evolved with changes in technology, ideas, and politics,¹²¹ administrative structures have generally proven quite durable. Even some key legal norms, such as the APA's procedures, seem to meet the constitutional "criteria of de facto entrenchment and substantive reach."¹²²

But "functional entrenchment" isn't really entrenchment at all—it's stability. Though frequently conflated, stability and entrenchment are distinct concepts.¹²³ Entrenchment is a formal protection against change, while stability is itself the absence of change. Constitutional rules are entrenched in the hopes of producing—or at least increasing the likelihood of—stability. Stability is the end, and entrenchment is only a means to achieve it. It is fallacious to conclude that administrative law is entrenched merely because it has achieved the stability that is the goal of, but in practice eludes, some nations' entrenched constitutions.

117. See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 2–3 (1982) (seeking a solution to the functional entrenchment of federal statutes).

118. One commonly cited exception is the Interstate Commerce Commission, which was eliminated in 1995. Its remaining authority was transferred to the Surface Transportation Board. See 49 U.S.C. § 702 (2006). Another notable exception, in the author's admittedly biased view, is the Administrative Conference of the United States. The Conference was also defunded in 1995 and remained defunct until 2010. H.R. REP. NO. 112-154, at 4 (2011). But the Conference was merely *defunded*; its organic statute was never repealed and its authority and mission were not transferred to another federal agency. See *id.* This example shows not only the difficulty of changing institutional structures but also the crucial distinction between formal law and functional reality.

119. See, e.g., Lawson, *supra* note 20, at 1231–32 (discussing the New Deal model of administration as unchanged since the late 1930s).

120. Ginsburg, *supra* note 17, at 122.

121. *Id.*

122. *Id.* at 125.

123. See, e.g., Raz, *supra* note 55, at 153 (distinguishing stability, entrenchment, and superiority as separate features of constitutions); cf. TIEDEMAN, *supra* note 18, at 77 (explaining that in the English system, "if an act of Parliament should be passed in accordance with some great public demand, the fact that it violated [unwritten constitutional] principles would not prevent its enforcement by the courts").

The remarkable stability of American administrative law may well be explained by another characteristic it shares with other unwritten constitutions: it consists of fundamental principles that have evolved over time in response to the nation's political needs.¹²⁴ The principles that form the administrative constitution were not "created by any governmental or popular edict," but are rather "found imbedded in the national character" and have been "developed in accordance with the national growth."¹²⁵ If "[c]onstitutions are effective only so far as their principles have their roots imbedded in the national character, and consequently constitute a faithful reflection of the national will,"¹²⁶ then it is easy to see how administrative law has grown to be such an enduring component of the nation's constitutional order. Administrative law's evolution over more than a century of lawmaking, regulation, crises, political compromises, and legal challenges, has forged a legal order that truly reflects the nation's needs, expectations, and values.¹²⁷

Despite its stability, administrative law is neither entrenched nor higher law. Formally, it remains ordinary law that can be changed by Congress at will through the ordinary legislative process. Congress could amend the APA¹²⁸ tomorrow with no need to amend the Constitution or resort to extraordinary procedures. A court could not refuse to give effect to a properly enacted amendment to the APA or other administrative statute on the ground that the change violated the fundamental principles of the unwritten administrative constitution. Rather, such an amendment "would have to be taken as a repeal of the constitutional rule previously enunciated."¹²⁹ This is the "limitation of the unwritten constitution, which finds no authority whatever in the written Constitution, and yet as long as public opinion does not undergo a change, it is as binding as any written limitation, and even more binding than some of the plainest directions of the written Constitution."¹³⁰ Similarly, administrative law is not higher law, as evidenced by its relationship to both the Constitution and ordinary

124. *See, e.g.*, Palmer, *supra* note 65, at 627 (using a comparison with New Zealand's unwritten constitution to illustrate similar influences in the United States).

125. TIEDEMAN, *supra* note 18, at 16.

126. *Id.* at 18.

127. The creation of the Interstate Commerce Commission in 1887 is conventionally understood to mark the beginning of modern administration, but some argue that administrative law has much deeper historical roots. *See* MASHAW, *supra* note 22, at 3-4 (describing misperceptions regarding the history of administrative law).

128. Indeed, Congress has previously amended the APA via ordinary legislation. *See* Act of June 5, 1967, Pub. L. No. 90-23, 81 Stat. 54; Act of July 4, 1966, Pub. L. No. 89-487, 80 Stat. 250.

129. TIEDEMAN, *supra* note 18, at 53.

130. *Id.*

statutes. If an administrative law conflicts with the Constitution, the latter prevails.¹³¹

There may be, however, an intermediate position between formal entrenchment and stability in fact. Government officials may recognize that certain legal instruments, even if not formally entrenched, are so fundamental to the political order that they *should not* be changed. This phenomenon is observable in other contexts, such as in prudential standing, abstention, and political question doctrines.¹³² These doctrines determine the circumstances in which prudent courts ought to refrain from exercising judicial authority. Such restraint is often exercised to protect fundamental constitutional values, such as the separation of powers or federalism.¹³³ Administrative law rules may be entrenched in this sense, because they are essential to give effect to fundamental constitutional values in the administrative context. All branches of government should, as prudential matter, view the core rules that make up the unwritten administrative constitution as deserving special respect. This Article turns next to identifying these “core rules”¹³⁴ before examining in greater detail the substantive constitutional values these rules promote.¹³⁵

II. THE UNWRITTEN ADMINISTRATIVE CONSTITUTION

While administrative law does not derive from a written, formally entrenched constitution endowed with higher law status, it nonetheless performs the essential functions of any constitution. At the highest level, “[t]he subject matter of administrative law is, first and foremost, government and its operation.”¹³⁶ More specifically, administrative law

131. The APA arguably possesses some limited higher law status in the sense that it is protected from implied amendment or repeal. *See* 5 U.S.C. § 559 (2012).

132. *See* *Bennett v. Spear*, 520 U.S. 154, 163 (1997) (noting that prudential standing applies to legislation unless Congress expressly negates it); *Ohio Civil Rights Comm’n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 626 (1986) (stating that the abstention doctrine arises “from strong policies counseling against the exercise of [jurisdiction in the District Court] where particular kinds of state proceedings have already been commenced”); *Baker v. Carr*, 369 U.S. 186, 210 (1962) (“[I]t is the relationship between the judiciary and the coordinate branches of the Federal Government . . . which gives rise to the ‘political question.’”).

133. *See, e.g., Nixon v. United States*, 506 U.S. 224, 252 (1993) (Souter, J., concurring in the judgment) (“[T]he political question doctrine is essentially a function of the separation of powers, existing to restrain courts from inappropriate interference in the business of the other branches of Government” (citation omitted) (internal quotation marks omitted)); *Goldwater v. Carter*, 444 U.S. 996, 1000 (1979) (Powell, J., concurring in the judgment) (“[T]he political-question doctrine rests in part on prudential concerns calling for mutual respect among the three branches of Government.”).

134. *See infra* Part II.

135. *See infra* Part III.

136. STRAUSS, *supra* note 41, at 1.

rules often serve the four functions of constitutions.¹³⁷ They create and map important government institutions, regulate the boundaries among those institutions, establish the relationship between agencies and citizens, and protect and promote commonly held core values.

This is not to say that all administrative law rules perform constitutional functions. Identifying the subset of rules that make up the administrative state's unwritten constitution has its difficulties, and some indeterminacy may be unavoidable.¹³⁸ At the same time, “[i]t is not sensible to conceive of every trivial influence on the exercise of public power as worthy of note as constitutional.”¹³⁹ A functional analysis holds the best promise for addressing this difficulty.¹⁴⁰ For this Article's purposes, which do not include establishing the formal entrenchment of the administrative state's unwritten constitution, some definitional indeterminacy is acceptable.¹⁴¹

This Part seeks to identify, by reference to constitutional function, the most important “legal instruments that embody constitutionalism”¹⁴² in the American administrative state. As in Great Britain and other nations governed by unwritten constitutions, qualifying legal instruments “clearly include legislation that influences the exercise of public power, to which can be added other formal instruments of the legislative, executive or judicial branches of government.”¹⁴³ Upon an examination of key administrative statutes, the constitutional functions of administrative law are evident. Administrative common law and executive policy directives often have a similar constitutional functionality and provide essential additional components of the administrative state's unwritten constitution.¹⁴⁴ It bears noting, however, that the goal of this Part is to identify the most important components of the unwritten constitution, not to exhaust the possibilities.

137. *See infra* Section II.A.

138. *Cf.* Ginsburg, *supra* note 17, at 125 (“Without a clear rule that helps to identify particular norms as constitutional or not-constitutional, the boundaries of the category become fuzzy.”).

139. Palmer, *supra* note 65, at 595.

140. *See, e.g.*, Ginsburg, *supra* note 17, at 125 (“In considering what norms outside the constitution might be considered uncoded constitutional norms, it seems clear that those rules that are relatively enduring, and purport to regulate the relationship between the state and society, should be within the definition.”).

141. *See infra* notes 339–45 and accompanying text.

142. Ginsburg, *supra* note 17, at 125.

143. Palmer, *supra* note 65, at 608; *see* TIEDEMAN, *supra* note 18, at 16–17. Administrative decisions, customs, and practices may also provide elements of the administrative constitution. *See* Palmer, *supra* note 65, at 608. Examining the role of such custom and practice is a worthy but significant undertaking. *See, e.g.*, Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163 (2013). That undertaking is mostly beyond the scope of this Article, but *see infra* Section IV.C.

144. *See* Young, *supra* note 18, at 420 (noting that the Constitution leaves room for other legal materials to fill in where there is a gap).

A. Constitutional Functions of Administrative Statutes

Much of the administrative state's unwritten constitution is found in an array of statutes that establish "a legal framework for agency action."¹⁴⁵ The most important, of course, is the APA.¹⁴⁶ This enduring law provides the basic framework for the administrative state. Enacted in 1946 with broad support,¹⁴⁷ the APA was the culmination of more than a decade of examination and discussion of administrative processes.¹⁴⁸ Efforts to make the federal administrative process more consistent and uniform had begun as early as 1929.¹⁴⁹ The legislative history of the APA suggests that legislators at least implicitly understood that the statute's passage was an event of constitutional import.¹⁵⁰ Upon its adoption, Senator Pat McCarran, the Chairman of the Senate Committee on the Judiciary, described the law in decidedly constitutional terms, as:

a strongly marked, long sought, and widely heralded advance in democratic government. [The APA] embarks upon a new field of legislation of broad application in the "administrative" area of government lying between the traditional legislative and fundamental judicial processes on the one hand and authorized executive functions on the other. Although it is brief, it is a comprehensive charter of private liberty and a solemn undertaking of official fairness. It is intended as a guide to him who seeks fair play and equal rights under law, as well as to those invested with executive authority. It upholds law and yet lightens the burden of those on whom the law may impinge. It enunciates and emphasizes the tripartite form of our democracy and brings into relief the ever essential declaration that this is a government of law rather than of men.¹⁵¹

145. Lisa Blomgren Bingham, *The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance*, 2010 WIS. L. REV. 297, 305.

146. Cf. Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 717, 719 (2005) (identifying the APA as "a framework setting out the default methods of decision making for administrative agencies").

147. STRAUSS, *supra* note 41, at 191.

148. See generally K.C. Davis & Walter Gellhorn, *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 507, 516–17 (1986) (discussing the development of and ideology behind the APA).

149. See *Wong Yang Sung v. McGrath*, 339 U.S. 33, 37 (1950) ("Concern over administrative impartiality and response to growing discontent was reflected in Congress as early as 1929."); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1566 (1996) (identifying the "first legislation for constraining administrative agencies" in 1929).

150. See Shepherd, *supra* note 149, at 1571, 1576–77.

151. Pat McCarran, *Foreword to ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY*, at iii (1946).

In other words, the APA was intended to incorporate principles of constitutionalism into the American administrative process.¹⁵² The APA is concerned with core constitutional principles, including separation of powers, the rule of law, and a commitment to the protection of individual liberty.¹⁵³

Beyond the APA, other statutes contribute to the administrative state's unwritten constitution. These statutes are often crosscutting, governing how many or all "agencies of government operate on a day-to-day basis in enforcing the law, making policy, and resolving disputes."¹⁵⁴ While not every provision of each statute performs a constitutional function, it is common for a single statute to perform multiple constitutional functions. The important point, however, is that administrative statutes are a crucial component of the administrative state's unwritten constitution.

1. Constituting the Administrative State

The most basic constitutional function of administrative statutes is constitutive: creating and mapping the institutions that form the federal administrative apparatus.¹⁵⁵ The APA in a sense constitutes the administrative state, defining an "agency" as an "authority of the Government of the United States" aside from Congress, the courts, state or local governments, or military authorities.¹⁵⁶ Other statutes are constitutive in more targeted ways, creating individual institutions for discrete administrative purposes.¹⁵⁷ A particularly important (and surprising) example is the Paperwork Reduction Act of 1980 (PRA), which created the Office of Information and Regulatory Affairs (OIRA).¹⁵⁸ OIRA has since developed into the locus of executive

152. See, e.g., Metzger, *supra* note 3, at 489 (stating that procedural protection for formal agency adjudication provisions in the APA were in part due to concerns of due process).

153. See *id.* at 488–90.

154. Michael Asimow, *Chair's Foreword* to FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK, at iii (William F. Funk et al. eds., 4th ed. 2008).

155. See BRESLIN, *supra* note 16, at 70 ("One of the principal functions of a constitution, therefore, is to organize or coordinate the institutions of the polity."); Raz, *supra* note 55, at 153 ("[T]he constitution defines the constitution and powers of the main organs of the different branches of government."); Young, *supra* note 18, at 432 ("The basic function of a constitution is to draw boundaries among the institutions of the government . . .").

156. 5 U.S.C. § 551(1) (2012); see also *Soucie v. David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971) ("[T]he APA apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions.").

157. See, e.g., National Environmental Policy Act of 1969, Pub. L. No. 91-190, §§ 202, 204; 83 Stat. 852, 854–55 (codified at 42 U.S.C. §§ 4342, 4344) (creating the Council on Environmental Quality, an agency within the Executive Office of the President, to oversee compliance with the Act).

158. Murray Weidenbaum, *Regulatory Process Reform: From Ford to Clinton*, REG., Winter 1997, at 20, 22.

oversight of administrative agencies.¹⁵⁹

Organic statutes perform much of administrative law's constitutive work. An organic statute establishes an agency, defines that agency's regulatory mission, and delineates the boundaries of the agency's authority.¹⁶⁰ Such statutes are the primary vehicles of substantive federal policy, and a significant proportion of any organic statute will therefore be utterly ordinary. But as the primary constitutive elements of the administrative constitution, these organic statutes cannot be ignored. For example, the Communications Act of 1934¹⁶¹ expressly "constituted" the Federal Communications Commission (FCC),¹⁶² specifying the number, qualifications, compensation, terms of office, and method of appointing FCC commissioners.¹⁶³ Similarly, the Federal Food, Drug, and Cosmetic Act of 1938 constitutes the Food and Drug Administration (FDA),¹⁶⁴ while the National Aeronautics and Space Act of 1958 constitutes the National Aeronautics and Space Administration (NASA).¹⁶⁵ Other examples abound.¹⁶⁶

2. Drawing Institutional Boundaries

Other administrative statutes perform the constitutional function of defining the boundaries between the various institutions of the federal government. Such statutes determine the respective authority of federal institutions and regulate the relationships between federal administrative

159. OIRA was initially charged with supervising the enforcement of the PRA. *See id.* Not long after, President Ronald Reagan "expanded OIRA's mission to encompass review of regulations promulgated by executive branch agencies." *Id.*; see Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2277–78 (2001); see also Exec. Order No. 12,291, 3 C.F.R. 134 (1982), *revoked by* Exec. Order No. 12,866, *supra* note 97, at 649. "[E]very president since Ronald Reagan has relied on OIRA to scrutinize agencies' planned regulations and collections of information, along with the analyses supporting them." Susan E. Dudley, *Observations on OIRA's Thirtieth Anniversary*, 63 ADMIN. L. REV. (SPECIAL ISSUE) 113, 114–15 (2011).

160. BLACK'S LAW DICTIONARY 1544 (9th ed. 2009).

161. ch. 652, Pub. L. No. 73-416, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. §§ 151–621 (2006)).

162. *Id.* § 1, at 1064 (codified as amended at 47 U.S.C. § 151).

163. *Id.* § 4, at 1066–67 (codified as amended at 47 U.S.C. § 154(a)–(d)).

164. *See* Federal Food, Drug, and Cosmetic Act, ch. 675, § 902, 52 Stat. 1040, 1059 (1938) (codified as amended at 21 U.S.C. § 387b) (granting the FDA authority to oversee the safety of foods, drugs, and cosmetics).

165. *See* National Aeronautics and Space Act of 1958, Pub. L. No. 85-568, § 202, 72 Stat. 426, 429 (repealed 2010).

166. *See, e.g.,* Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41–58) (establishing the Federal Trade Commission); National Environmental Policy Act of 1969, Pub. L. No. 91-190, § 202, 83 Stat. 852, 854 (1970) (codified at 42 U.S.C. § 4342) (constituting the Council on Environmental Quality within the Executive Office of the President).

agencies and the Legislative, Executive, and Judicial Branches.¹⁶⁷ Here too the APA provides a ready example. Its judicial review provisions serve as the foundation of the relationship between agencies and courts.¹⁶⁸ This relationship finds further definition in the judicial review provisions embedded in a wide variety of administrative statutes. These provisions may permit or prohibit judicial review.¹⁶⁹ Or they may forge a middle course¹⁷⁰ by allowing only procedural review,¹⁷¹ allowing only substantive review of final rules,¹⁷² requiring the exhaustion of available administrative remedies as a precondition to the availability of judicial remedies,¹⁷³ or imposing other conditions or restrictions on the scope of judicial review.

Other statutory provisions govern institutional relationships by providing for congressional or executive oversight of administrative action. Statutes establishing regulatory analysis requirements often provide for executive oversight to ensure agency compliance.¹⁷⁴ Another approach is found in so-called oversight framework laws, which authorize independent officers to check abuses of administrative and executive power.¹⁷⁵ Still other statutes facilitate congressional

167. See Strauss, *supra* note 4, at 575–78 (exploring three approaches used to understand the relationship between agencies and the three branches of government).

168. See TOM C. CLARK, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 9 (1947), available at <http://www.law.fsu.edu/library/admin/attorneygeneralsmanual.pdf>.

169. See, e.g., 5 U.S.C. § 805 (2012) (“No determination, finding, action, or omission under this chapter shall be subject to judicial review.”).

170. See, e.g., *id.* § 552b(k) (providing for limited judicial review under the Sunshine Act).

171. See, e.g., *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227–28 (1980) (explaining that judicial review under NEPA is limited to providing procedural, rather than substantive, oversight); *Allied Local & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 81 & n.22 (D.C. Cir. 2000) (holding that a court can compel the production of an impact statement under the Unfunded Mandates Reform Act but has no authority to review a statement's substance).

172. Under the Negotiated Rulemaking Act, the agency's decision to establish, assist, or terminate a negotiated rulemaking committee is not reviewable, but judicial review is available for the rules produced through the process. See *Ctr. for Law & Educ. v. U.S. Dep't of Educ.*, 315 F. Supp. 2d 15, 30–33 (D.D.C. 2004), *aff'd on other grounds*, 396 F.3d 1152, 1162 (D.C. Cir. 2005); cf. *USA Grp. Loan Servs., Inc. v. Riley*, 82 F.3d 708, 714 (7th Cir. 1996) (holding that agency promises made during the negotiations regarding the outcome of the final rule are unenforceable).

173. See FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK, *supra* note 154, at 635 (discussing exhaustion requirements under the Federal Tort Claims Act).

174. See, e.g., 5 U.S.C. § 552a(v) (2012) (defining OMB's oversight and guidance roles with respect to Privacy Act implementation); 44 U.S.C. § 3504 (2006 & Supp. V. 2011) (enumerating OMB responsibilities under the PRA, to be carried out through OIRA); Jeffrey S. Lubbers, *Paperwork Redux: The (Stronger) Paperwork Reduction Act of 1995*, 49 ADMIN. L. REV. 111 (1996) (examining OIRA's expanded role in the PRA process following the 1995 amendments to the PRA).

175. Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U. L. REV. 59, 59–60 (1983).

oversight of the administrative state through administrative or executive reporting requirements.¹⁷⁶ The Congressional Review of Agency Rulemaking Act (CRA) establishes a more direct, robust form of congressional oversight by establishing a process through which Congress can review and disapprove of rules promulgated by federal agencies.¹⁷⁷ The CRA has arguably not fulfilled its purpose¹⁷⁸—to date, Congress has disapproved only one rule.¹⁷⁹ The law's central concern regarding the proper relationship between Congress and regulatory agencies, however, is a fundamentally constitutional concern that continues to be the subject of legislative reform efforts.¹⁸⁰ Finally, some administrative statutes regulate the relationship between federal agencies and state and local government institutions.¹⁸¹

3. Establishing the Agency–Citizen Relationship

A third constitutional function of administrative statutes is establishing the relationship between administrative agencies and the citizens whose lives and interests are affected by agency action. The APA determines the basic relationship between agencies and the public by requiring agencies to inform the public about their organization, procedures, and rules, and by permitting the public to participate in the rulemaking process.¹⁸² Other statutes govern how administrative agencies collect information from the public and how they use that information in day-to-day operations.¹⁸³

Statutes promoting public engagement in agency processes are important to this particular constitutional function. For example, statutory publication requirements facilitate public engagement by requiring agencies to provide public notice of administrative action and centralized access to regulations. The most important of these statutes is the Federal Register Act,¹⁸⁴ which Congress enacted in response to a

176. See, e.g., 5 U.S.C. § 552b(j) (2012) (requiring agencies covered by the Sunshine Act to report annually to Congress); 44 U.S.C. § 3514 (2006) (requiring OMB to report annually to Congress regarding its PRA oversight efforts and other developments in PRA implementation).

177. See 5 U.S.C. § 801(d) (2012).

178. See FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK, *supra* note 154, at 201; Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95, 109–10 (1997); Morton Rosenberg, *Whatever Happened to Congressional Review of Agency Rulemaking?: A Brief Overview, Assessment, and Proposal for Reform*, 51 ADMIN. L. REV. 1051, 1052–53 (1999).

179. FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK, *supra* note 154, at 201.

180. See Regulations from the Executive in Need of Scrutiny Act of 2011 (REINS Act), H.R. 10, 112th Cong. § 2 (2011).

181. See 2 U.S.C. §§ 1501–71 (2012).

182. U.S. DEP'T OF JUSTICE, *supra* note 168, at 9.

183. See 44 U.S.C. §§ 3501–20 (2006 & Supp. V 2011).

184. See 44 U.S.C. §§ 1501–11 (2006).

Supreme Court decision involving an agency's attempt to enforce regulations that turned out not to exist.¹⁸⁵ The case revealed a fundamental problem in administrative governance: regulations were essentially unavailable, even to agency personnel tasked with enforcing them.¹⁸⁶ The Act solved this problem by requiring the Government Printing Office (GPO) to print and distribute the *Federal Register*, a serial publication of important executive and administrative materials.¹⁸⁷ The Federal Register Act further requires GPO to publish the Code of Federal Regulations, a special edition of the *Federal Register* presenting an orderly codification of all agency documents "having general applicability and legal effect."¹⁸⁸ The agencies' publication duty—and the citizens' concomitant right of access—has taken on new dimension as administrative practice has entered the electronic age.¹⁸⁹

Open government statutes similarly shape the agency–citizen relationship. The Freedom of Information Act (FOIA) imposes extensive open records requirements on agencies,¹⁹⁰ while the Privacy Act protects individually identifiable, personal information maintained by the agency in a "system of records."¹⁹¹ This latter law requires agencies to give individual citizens their own records¹⁹² but forbids broader dissemination of protected information, except to the extent required by FOIA.¹⁹³ The Federal Advisory Committee Act (FACA)¹⁹⁴ facilitates a different kind of openness. Enacted out of "concern about the influence of private advisory groups upon administrative activities,"¹⁹⁵ the law limits agency use of advisory committees and requires such committees to have a clear purpose, balanced membership, and open meetings.¹⁹⁶ The Government in the Sunshine Act similarly opens some agencies' deliberative processes to public scrutiny¹⁹⁷ by requiring agencies "headed by a collegial body" to hold

185. See *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 433 (1935).

186. See Erwin N. Griswold, *Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation*, 48 HARV. L. REV. 198, 204–05 (1934) ("[O]fficers of the government itself frequently do not know the applicable regulations."); H.R. REP. NO. 74-280, at 2 (1935) (voicing the concern that rules and regulations published by agencies are difficult to find).

187. See 44 U.S.C. §§ 1503–05.

188. See 44 U.S.C. § 1510.

189. See 40 U.S.C. § 305; 44 U.S.C. §§ 3501, 3601–06.

190. 5 U.S.C. § 552 (2012); PIERCE, SHAPIRO & VERKUIL, *supra* note 21, at 449.

191. See 5 U.S.C. § 552a.

192. PIERCE, SHAPIRO & VERKUIL, *supra* note 21, at 448.

193. FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK, *supra* note 154, at 1074.

194. 5 U.S.C. app. §§ 1–16 (2012).

195. PIERCE, SHAPIRO & VERKUIL, *supra* note 21, at 517.

196. See FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK, *supra* note 154, at 550.

197. See RICHARD K. BERG ET AL., AN INTERPRETIVE GUIDE TO THE GOVERNMENT IN THE

“every portion of every meeting . . . open to public observation.”¹⁹⁸ Finally, the Ethics in Government Act of 1978¹⁹⁹ seeks to reveal and reduce conflicts of interest by requiring federal employees to make financial disclosures and decline certain kinds of outside income and employment.²⁰⁰

Still other statutes establish the agency–citizen relationship by making agencies more accountable to individual citizens. Perhaps the most prominent such statute is the Federal Tort Claims Act (FTCA), which waives sovereign immunity for certain kinds of actions against the federal government and allows citizens to sue the government for injury, death, or loss of property caused by the negligent or wrongful acts or omissions of federal employees acting within the scope of their employment.²⁰¹ Various other statutes follow the FTCA’s lead by affording administrative or judicial remedies for harms caused by the government.²⁰² The Contract Disputes Act of 1978²⁰³ creates consistent, fair, and efficient mechanisms for resolving government contract disputes,²⁰⁴ while the Administrative Dispute Resolution Act (ADRA)²⁰⁵ authorizes federal agencies to use a wide array of voluntary alternative dispute resolution (ADR) methods to more effectively and efficiently resolve routine disputes in administrative programs.²⁰⁶ Finally, the Equal Access to Justice Act (EAJA)²⁰⁷ is a fee-shifting

SUNSHINE ACT 67 (2d ed. 2005) (“In contrast with the FOIA, which protects an agency’s predecisional or deliberative processes, the Sunshine Act is specifically designed to open those processes to public observation.”).

198. 5 U.S.C. § 552b(a)–(b) (2012).

199. Pub. L. No. 95-521, 92 Stat. 1824 (codified at 5 U.S.C. app. §§ 101–11).

200. PIERCE, SHAPIRO & VERKUIL, *supra* note 21, at 521; *see* Thomas D. Morgan, *Appropriate Limits on Participation by a Former Agency Official in Matters Before an Agency*, 1980 DUKE L.J. 1, 18–21 (discussing the legislative history of the Ethics in Government Act of 1978).

201. 28 U.S.C. §§ 1346(b), 2671–80 (2012). *See generally* LESTER S. JAYSON & ROBERT C. LONGSTRETH, *HANDLING FEDERAL TORT CLAIMS: ADMINISTRATIVE AND JUDICIAL REMEDIES* (2012).

202. FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK, *supra* note 154, at 636 (noting that there are “more than 40 ‘meritorious claims’ and other ancillary statutes” affording a remedy for losses due to government action); *see* George A. Bermann, *Federal Tort Claims at the Agency Level: The FTCA Administrative Process*, 35 CASE W. RES. L. REV. 509, 519 (1985) (“[T]he FTCA is foremost among existing statutory vehicles for the disposition of tort and tort-like claims against the government.”).

203. 41 U.S.C. §§ 601–13 (2006).

204. *See* FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK, *supra* note 154, at 441–42.

205. 5 U.S.C. §§ 571–84 (2012).

206. *See* FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK, *supra* note 154, at 399–400 (listing various alternative dispute resolution methods); *see also* 5 U.S.C. § 571(2) (defining “administrative programs”); *id.* § 571(3) (defining “alternative means of dispute resolution”); *id.* § 571(8) (defining “issue in controversy”).

207. 28 U.S.C. § 2412 (2006).

statute that authorizes the payment of fees and costs to individuals who prevail in certain kinds of adversarial administrative adjudications and civil cases against administrative agencies.²⁰⁸ Particularly when considered in the aggregate, these various statutes profoundly affect the agency–citizen relationship.

4. Protecting Common Values

A final constitutional function evident in administrative statutes is the protection and promotion of important, commonly held values.²⁰⁹ Although “administrative law is rarely ascribed symbolic resonance,”²¹⁰ a closer look reveals that it extends to the administrative context many of “the general principles under which the country is governed.”²¹¹ In broadest terms, administrative law gives effect to the nation’s commonly held views regarding the proper role of government. It promotes democratic values, including public participation and political accountability. It even incorporates the written Constitution’s fundamental structural principles, including the separation of functions and federalism.²¹²

Administrative statutes perform this constitutional function by requiring agencies to give special consideration and (if possible) accommodation to vulnerable groups or important values that may be affected by agency action. For example, the National Environmental Policy Act (NEPA)²¹³ uses an “impact statement” approach to make agencies consider the environmental effects of regulations via an open, public process.²¹⁴ The Regulatory Flexibility Act²¹⁵ uses a similar process to require agencies in notice-and-comment rulemaking to consider the special needs of small entities that may be subject to a proposed rule.²¹⁶ Another example is FOIA, which fosters democratic values and political accountability in the administrative state, as was the intention of those who urged its passage and expansion.²¹⁷ The

208. See FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK, *supra* note 154, at 509–10.

209. See, e.g., Metzger, *supra* note 3, at 510 (explaining that much administrative law is “‘constitutional’ in the sense of embodying basic contemporary normative commitments with respect to how government should operate”).

210. Ginsburg, *supra* note 17, at 123.

211. Raz, *supra* note 55, at 153.

212. See *infra* Parts III–IV.

213. 42 U.S.C. §§ 4321–47 (2006).

214. See FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK, *supra* note 154, at 851–52.

215. 5 U.S.C. §§ 601–12 (2012).

216. *Id.* § 609(a).

217. See Elias Clark, *Holding Government Accountable: The Amended Freedom of Information Act*, 84 YALE L.J. 741, 742–43 (1975) (“[T]he Freedom of Information Act lets the citizen strip away the secrecy that surrounds the lawmaking process and discover who is making the law, for what purposes, to affect whom.”); Ralph Nader, *Freedom from Information: The Act*

enumerated exemptions to FOIA balance the value of transparency against other important public values.²¹⁸ These and other administrative statutes perform an important constitutional function by incorporating core social and political values into the administrative context.

Perhaps the most important value that administrative law protects is a commitment to constitutionalism. “[C]onstitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law.”²¹⁹ This principle encompasses “the idea that constitutions create power”²²⁰ and that governments therefore cannot exert power without constitutional authorization. As discussed in greater detail below, one of administrative law’s most stable and enduring principles holds that agencies may exercise only the authority granted to them.²²¹ A related aspect of constitutionalism is “the requirement that polities identify specific mechanisms that will successfully limit the power of the sovereign.”²²² Administrative law matches up here, too; it is rife with requirements designed to control and limit federal regulation, both procedurally and substantively.²²³ Indeed, much judicial review of agency action under the APA is aimed at ensuring that agencies do not exercise government authority in an arbitrary and capricious fashion.²²⁴

B. *The Federal Common Law Component*

Other components of the administrative state’s unwritten constitution are found in federal common law. The common law is a traditional feature of the constitutional landscape in nations governed by an unwritten constitution. Indeed, “Dicey’s laws of the constitution [of Britain] also clearly include judgments in the common law that

and the Agencies, 5 HARV. C.R.-C.L. L. REV. 1, 2 (1970) (noting that FOIA was passed with the notion that an individual has the right of access to government information unless otherwise justified by the government). *See generally* HAROLD L. CROSS, THE PEOPLE’S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS (1953) (surveying the existing laws, case law, and regulations on the state, federal, and administrative agencies and urging the government to improve access to information); Kenneth Culp Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761 (1967) (exploring the intricacies of FOIA).

218. *See, e.g.*, 5 U.S.C. § 552(b)(6) (exempting “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy”).

219. MCLWAIN, *supra* note 81, at 20–21.

220. BRESLIN, *supra* note 16, at 21.

221. *See infra* Section II.B.

222. BRESLIN, *supra* note 16, at 21.

223. *See, e.g.*, Ginsburg, *supra* note 17, at 121 (“Administrative law concerns the control of regulatory institutions.”).

224. *See* 5 U.S.C. § 706 (giving different standards of review for agency action); *see also* discussion *infra* Part III.B.

influence the exercise of public power.”²²⁵ It has long been observed “that American administrative law is mostly judge-made.”²²⁶ But the phenomenon is controversial.²²⁷ And it can be difficult to discern which judicial decisions or doctrines are properly defined as “common law,” in part because common law decisions are often nominally grounded in a provision of the Constitution or a statute, particularly the APA. Nonetheless, some important administrative law doctrines are readily identifiable as common law. A prime example is the *Chevron* doctrine.²²⁸ Such common law doctrines provide crucial components of the administrative state’s unwritten constitution. They define the basic political authority of federal agencies, determine the respective roles of the various branches of government in crafting federal regulatory policy, and regulate the relationship between administrative agencies and citizens.

In this context, “common law” refers to the “law that courts have created without interpreting a constitutional or statutory provision.”²²⁹ Under this definition, not all judge-made administrative law is administrative common law. Rather, judge-made administrative law may take the form of constitutional interpretation, statutory interpretation, or common law.²³⁰ But these categories are more distinct in theory than in practice. Most cases involve some combination of the three, and not necessarily in easily identifiable proportions.

*Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*²³¹ provides an illustrative example. The Court begins with Section 706(2)(A) of the APA, which empowers courts to set aside “arbitrary” or “capricious”

225. Palmer, *supra* note 65, at 608.

226. Kenneth Culp Davis, *Administrative Common Law and the Vermont Yankee Opinion*, 1980 UTAH L. REV. 3, 3; Ginsburg, *supra* note 17, at 120; cf. Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 277–78 (1986) (“Judge-made doctrines primarily sought to enable regulated entities to fend off unlawful government action . . .”).

227. See Jack M. Beermann, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1, 24–26 (2011) (criticizing the APA’s standard of review system); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 189–90, 192 (1998) (discussing the different views surrounding the *Chevron* doctrine). Section IV.A discusses the controversy in greater detail.

228. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

229. Davis, *supra* note 226, at 3. Professor Davis further defines “administrative common law” as “either common law created by courts about the administrative process, or common law created by agencies through adjudication.” *Id.* Consistent with other recent scholarship on this issue, this Article examines only the former. See, e.g., Beermann, *supra* note 227, at 3.

230. Davis, *supra* note 226, at 4.

231. 463 U.S. 29, 43–44 (1983).

agency action.²³² While ostensibly engaged in statutory interpretation, however, the Court establishes a standard of “hard look” review,²³³ under which courts evaluate whether an agency has “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action” that does not consider inappropriate factors, exclude “an important aspect of the problem,” or “run[] counter to the evidence before the agency.”²³⁴ The *State Farm* standard thus “represents a significant judicial elaboration of” the statutory text.²³⁵ At some point in the analysis, the Court moves quietly from statutory interpretation to the development of common law. But the move is implicit, and the boundary between the two modes of judicial decision making is fuzzy.

It is difficult to distinguish administrative common law—especially that with constitutional significance—from judicial decisions involving constitutional or statutory interpretation. One reason for the difficulty is that the very existence of federal common law is controversial. “A truly basic fact about the common law is that judges who create new law customarily purport not to.”²³⁶ The literature, however, increasingly embraces the validity of administrative common law,²³⁷ in some cases urging courts to be more forthright about what they are doing when they make federal common law in the administrative context.²³⁸ A second reason for the difficulty involves distinguishing the constitutional aspects from the ordinary aspects of administrative common law. Some administrative common law relates to the substance of federal regulation and has little constitutional functionality. Constitutional and nonconstitutional issues are often intertwined, making it difficult to tell where the ordinary common law rule ends and the constitutional rule begins.²³⁹ In addition, judicial reticence toward administrative common law generally manifests more specifically in a reluctance to acknowledge “the constitutional concerns that animate” the resulting rules.²⁴⁰

Despite these difficulties, contemporary examples of the common

232. See 5 U.S.C. § 706(2)(A) (2012).

233. Metzger, *supra* note 13, at 1299.

234. *State Farm*, 463 U.S. at 43.

235. Metzger, *supra* note 13, at 1299.

236. Davis, *supra* note 226, at 5; accord Metzger, *supra* note 13, at 1356 (“[C]ourts rarely acknowledge the judicially created basis of administrative law doctrines or the constitutional concerns that animate them.”); Beermann, *supra* note 227, at 2 (acknowledging that courts have “been reluctant to be open about their use of common law in the administrative law arena”).

237. See Beermann, *supra* note 227, at 3.

238. See Metzger, *supra* note 13, at 1356 (noting that “the lack of transparency poses [a] real legitimacy challenge for administrative common law”); *id.* at 1355–70 (discussing the issue at length).

239. For a more detailed discussion about the constitutional issues that surround administrative law, see *supra* Part I.

240. See Metzger, *supra* note 13, at 1356.

law components of the administrative state's unwritten constitution abound. Many such examples are found among the standards governing judicial review of agency action (*Chevron*, *Skidmore*, hard-look, de novo, etc.). Perhaps the best of these is the *Chevron* doctrine, which establishes a two-step inquiry to guide judicial review of an agency's interpretation of a statute the agency is charged with implementing.²⁴¹ At *Chevron* step one, the court asks whether the statutory provision at issue is unambiguous. If it is, that ends the matter. The agency must adhere to Congress's unambiguous statutory commands. But if, as is more often the case, the relevant statutory provision is ambiguous, the court proceeds to step two, determining whether the agency's interpretation is reasonable.²⁴² *Chevron* is functionally constitutional: at its core, it is about the respective roles of the Legislature, the Judiciary, and the administrative state in interpreting the law and establishing regulatory policy. Indeed, the Court explicitly justified its decision based on these constitutional considerations.²⁴³ It did not even cite the APA.²⁴⁴ For these reasons, *Chevron* has consistently been identified as a "quintessential common law creation."²⁴⁵

Federal common law is essential in defining the constitutional function of administrative agencies. For example, judicial review has been credited with transforming the informal rulemaking process into something much more complex than contemplated when the APA was adopted. "When Congress adopted the [APA], the notice and comment requirement for rulemaking was viewed as a variant on the legislative process that would allow agencies to adopt and amend rules quickly in response to changing circumstances."²⁴⁶ Beginning with the statutory expansion of judicial review in the 1970s, however, judicial review transformed "the notice and comment process into one requiring extensive documentation of the information on which the agency relies and detailed explanation of the choices the agency made in deciding to adopt a rule."²⁴⁷ Federal common law doctrines can be credited with much of this transformation. As Part III discusses, administrative common law decisions are also a primary vehicle by which fundamental constitutional principles such as the separation of powers and the rule of

241. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43.

242. See *id.*

243. See *id.* at 865–66; Metzger, *supra* note 13, at 1302.

244. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting) ("There is some question whether *Chevron* was faithful to the text of the [APA], which it did not even bother to cite.")

245. Beermann, *supra* note 227, at 21; see also, e.g., Metzger, *supra* note 13, at 1301 ("*Chevron* analysis represents judicially created administrative law.")

246. Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 FLA. ST. UNIV. L. REV. 533, 533 (2000) (citing Rabin, *supra* note 24, at 1265).

247. *Id.* at 533.

law are transported into the administrative context.²⁴⁸

C. *Executive Policy and Administrative Constitutionalism*

Executive orders and related policy documents provide additional components of the administrative state's unwritten constitution. These legal instruments, which typically apply only to Executive Branch agencies, often serve the same constitutional functions as the statutes and federal common law doctrines examined above. Because executive orders and related policy documents are created and controlled exclusively by the Executive, however, they may be more vulnerable to changing political currents than statutes such as the APA. For this reason, at least in theory, these documents may be among the least stable components of the administrative constitution. In practice, however, a number of crucial executive policies have endured across both Republican and Democratic administrations.

Two examples suffice to demonstrate that executive directives are properly considered part of the unwritten administrative constitution. Perhaps the best example is Executive Order 12,866, which governs Executive Branch review of administrative action.²⁴⁹ It is a crucial instrument regulating executive-administrative relations. Executive Order 12,866 is the governing manifestation of an executive review regime that has proven durable across several administrations and has in certain respects been internalized and implicitly sanctioned by Congress.²⁵⁰ Another example is Executive Order 13,132, which directs agencies to consult with state and local governments when considering proposed rules that may have preemptive effect.²⁵¹ This instrument ensures that agencies consider how regulations may affect federalism.²⁵² Other executive policy directives have different constitutional

248. *See infra* Part III.

249. *See* Exec. Order No. 12,866, *supra* note 97, at 638 (“With this Executive order, the Federal Government begins a program to reform and make more efficient the regulatory process.”).

250. Susan E. Dudley, *Observations on OIRA’s Thirtieth Anniversary*, 63 ADMIN. L. REV. (SPECIAL ISSUE) 113, 114–15 (2011) (noting the Executive Order’s durability). Executive review began with the Reagan Administration’s issuance of Executive Order 12,291. When Congress enacted the Congressional Review Act in 1996, it imported Executive Order 12,291’s definition of “major rule” to define the rules that administrative agencies must submit to.

251. *See* Exec. Order No. 13,132, 3 C.F.R. 206 (2000).

252. *Cf.* Agency Procedures for Considering Preemption of State Law, 76 Fed. Reg. 81 (Jan. 3, 2011) (recommending how agencies can improve procedures for considering state interests in potentially preemptive rulemakings). *See generally* Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521 (2012) (evaluating the internal procedures that agencies use to ensure compliance with executive orders that require consideration of state interests in potentially preemptive rulemakings).

implications.²⁵³

III. SUBSTANTIVE VALUES AND POLITICAL OBLIGATION

As previously discussed, administrative law performs constitutional functions, but this raises two further questions: what substantive values guide the performance of these constitutional functions; and what are the implications of acknowledging the constitutional character of administrative law? The key substantive values of the administrative state's unwritten constitution include the separation of powers, rule of law, and other (often conflicting) subsidiary values. Examining how these substantive values manifest in administrative law reveals several generalized political obligations that flow from administrative law's constitutional character.

A. *Separation of Powers and Sources of Substantive Values*

The principle most commonly known as “separation of powers,” an important concept of the written Constitution,²⁵⁴ also finds expression in administrative law.²⁵⁵ The term encompasses three distinct but related approaches to resolving disputes regarding the proper roles of and relationship among the branches of government. The eponymous first approach characterizes each branch according to the kind of work it does (legislating, enforcing, adjudicating) and, in order to provide structural protection against tyranny, allocates each type of work to the single, appropriate branch.²⁵⁶ In contrast, the “checks and balances” approach rejects an absolute separation of power among the branches of government and focuses instead on “whether the relationship of each of the three named actors of the Constitution to the exercise of those

253. See, e.g., Bingham, *supra* note 145, at 342 (examining a White House memo that “tie[d] together transparency, participation, and collaboration,” and “set policy goals for these three dimensions of the relationship between government and the governed”).

254. E.g., *INS v. Chadha*, 462 U.S. 919, 951 (1983) (“The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility.”); see also U.S. CONST. art. I, § 1 (“All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”); *id.* art. II, § 1 (“The executive Power shall be vested in a President of the United States of America.”); *id.* art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

255. Strauss, *supra* note 4, at 577. See generally BREYER ET AL., *supra* note 2, at 37–144 (thoroughly examining the constitutional position of administrative agencies). There are myriad examples of separation of powers principles in administrative law. This section identifies only as many examples as are necessary for its analysis.

256. Strauss, *supra* note 4, at 577; see also, e.g., THE FEDERALIST NO. 47 (James Madison) (examining how the separation of powers provides structural protection against tyranny).

powers is such as to promise a continuation of their effective independence and interdependence.”²⁵⁷ The third approach, “separation of functions,” uses procedural protections to ensure fairness in individual proceedings, rather than using structural arrangements to prevent tyranny on a more general level.²⁵⁸ This approach permits administrative agencies to do the work of all three branches, “albeit in a web of other controls,” including “judicial review and legislative and executive oversight.”²⁵⁹

In the administrative context, principles of the separation of powers manifest in several ways, the first of which defines the relationships among the three primary branches of government—Executive, Legislative, and Judicial—in controlling the administrative apparatus. For example, separation of powers principles derived from the written Constitution determine the respective authority of Congress and the President regarding the removal of high-ranking administrative officials.²⁶⁰ Another example is found in the standards governing judicial review. These standards effectively allocate authority over administrative policy making among the three branches of government.²⁶¹ Judicial review provides an essential check on administrative power.²⁶² Doctrines governing the exercise of this check also determine the respective roles of agencies, courts, and Congress. For example, *Chevron* deference is not based solely on agency expertise²⁶³ but is also grounded in the principle that the political

257. Strauss, *supra* note 4, at 578.

258. *Id.* at 577.

259. *Id.*

260. See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3147 (2010) (holding that “multilevel protection from removal is contrary to Article II’s vesting of the executive power in the President”); *Humphrey’s Executor v. United States*, 295 U.S. 602, 629 (1935) (upholding Congress’s authority to limit the President’s ability to remove governing members of independent agencies); cf. *Morrison v. Olson*, 487 U.S. 654, 695–97 (1988) (upholding congressional restrictions on the power of principal executive officers to remove their subordinates); *United States v. Perkins*, 116 U.S. 483, 485 (1886) (same). See generally *Myers v. United States*, 272 U.S. 52, 106, 176 (1926) (holding that the President does not have exclusive power to remove an officer who was appointed with the advice and consent of the Senate).

261. See generally Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989) (examining the structural implications of *Chevron* for allocating authority among the Legislature, the courts, and agencies).

262. E.g., LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 320–53 (1965) (examining the right to judicial review); Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983) (discussing the judicial review of administrative actions).

263. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (“In these cases the Administrator’s interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies.”); see also *Pub. Citizen v.*

branches of government, rather than the Judiciary, should make policy choices.²⁶⁴ This rule is evident in the structure of the two-step inquiry required by *Chevron*, which requires courts to defer to an agency's reasonable interpretation of the law only if the statute does not unambiguously require a particular course of action.²⁶⁵ As the D.C. Circuit succinctly explained, “[t]he reason undergirding *Chevron*’s Step One is to be found in democratic theory; judicial deference to agencies is, upon reflection, but one form of obedience to the will of the legislative body.”²⁶⁶

A second manifestation of the separation of powers in the administrative context involves the relationship between administrative agencies and each of the other branches of government. One example of this function is the nondelegation doctrine, which establishes the conditions under which Congress may constitutionally delegate its legislative authority to others, including administrative agencies.²⁶⁷ Similarly, judicial review doctrines restrict the Judiciary’s ability to intrude upon an agency’s delegated authority. For example, when reviewing “a determination or judgment which an administrative agency alone is authorized to make,” a court must “judge the propriety of [agency] action solely by the grounds invoked by the agency.”²⁶⁸ To do

Burke, 843 F.2d 1473, 1477 (D.C. Cir. 1988) (explaining that *Chevron* deference is warranted not only because of agency expertise but “also because the Executive Branch, populated by political appointees, is thought to have greater legitimacy than the non-political Judiciary in resolving statutory ambiguities, in light of policy concerns, when congressional intent is unclear”); *Cablevision Sys. Dev. Co. v. Motion Picture Ass’n of Am.*, 836 F.2d 599, 609 (D.C. Cir. 1988) (“*Chevron*’s rationale for deference is based on more than agency expertise.”).

264. *See, e.g.*, *Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986) (“If the statute is clear and unambiguous ‘that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.’” (quoting *Chevron*, 467 U.S. at 842–43)).

265. *Chevron*, 467 U.S. at 842–44.

266. *Ass’n of Maximum Serv. Telecasters v. FCC*, 853 F.2d 973, 976 (D.C. Cir. 1988).

267. Early cases rigidly held that the written Constitution prevented Congress from delegating its legislative authority to others. *E.g.*, *Field v. Clark*, 143 U.S. 649, 692 (1892) (recognizing that “Congress cannot delegate legislative power to the President”); *Shankland v. Mayor of Wash.*, 30 U.S. (5 Pet.) 390, 395 (1831) (“[T]he general rule of law is, that a delegated authority cannot be delegated.”). The possibility of delegation was later admitted, provided it was accompanied by an intelligible principle governing the exercise of the delegated authority. *See ICC v. Cincinnati, New Orleans & Tex. Pac. Ry.*, 167 U.S. 479, 505 (1897) (stating that Congress has previously delegated power to the agency and that if Congress intended to delegate such power to the ICC, it would have used “clear and direct” language); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 429–30 (1935) (holding that delegation of legislative power to an agency is valid if Congress lays out an “intelligible principle”). This formulation of the nondelegation doctrine persists to this day, but the Supreme Court has “found the requisite ‘intelligible principle’ lacking in only two statutes.” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474 (2001).

268. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

otherwise “would propel the court into the domain which Congress has set aside exclusively for the administrative agency.”²⁶⁹ Yet another example of this manifestation of the separation of powers is Executive Order 12,866, which governs executive review of regulatory action.²⁷⁰

A third and final manifestation of the separation of powers in administrative law shapes the internal operation of agencies in the exercise of their delegated regulatory authority. In this context, it is more accurate to speak of the “separation of functions” because agencies use all three governmental functions (legislative, executive, and judicial) to fulfill their statutory mandates.²⁷¹ In exchange for this consolidation of functions, agencies are subjected to procedural requirements designed to protect the public against the abuse of administrative power.²⁷² The precise contours of this tradeoff vary depending upon whether the agency is engaged in rulemaking or adjudication.²⁷³ This procedural dichotomy is grounded in the written Constitution,²⁷⁴ case law,²⁷⁵ and statutes, most notably the APA.²⁷⁶

269. *Id.*

270. *See* Exec. Order No. 12,866, *supra* note 97; *cf.* Kagan, *supra* note 159 (examining how Presidents review and control regulatory policy).

271. *E.g.*, Berle, *supra* note 1, at 440, 442–43 (arguing that an administrative body “may, and often does, exercise all three of the usual trinity of powers”); *see also* Benjamin W. Mintz, *Administrative Separation of Functions: OSHA and the NLRB*, 47 CATH. U. L. REV. 877 (1998) (examining the separation of functions within two particular agencies).

272. *See supra* notes 2–4 and accompanying text.

273. *See* BREYER ET AL., *supra* note 2, at 641.

274. Courts have consistently recognized that the Constitution generally imposes no procedural requirements on the exercise of legislative authority by Congress or by administrative agencies. *See, e.g.*, *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 291 (1984) (holding that there is no special constitutional protection granted by the public’s “interest in a government audience for their policy views”); *Interport Pilots Agency v. Sammis*, 14 F.3d 133, 142 (2d Cir. 1994) (“Official action that is legislative in nature is not subject to the notice and hearing requirements of the [D]ue [P]rocess [C]ause.”); *McMurtray v. Holladay*, 11 F.3d 499, 504 (5th Cir. 1993) (stating that where a legislation “affects a general class of people, the legislative process provides all the process that is due”); *Coniston Corp. v. Vill. of Hoffman Estates*, 844 F.2d 461, 468–69 (7th Cir. 1988) (“[I]f a state legislature wishes to reserve to itself the type of decision that in other systems might be given to the executive or judicial branches, it can do so without violating the federal Constitution.”). The Constitution does, however, impose some procedural requirements on an agency’s exercise of adjudicative power. *See Londoner v. Denver*, 210 U.S. 373, 385 (1908) (holding that in adjudicative matters, there must be notice and an opportunity to be heard).

275. The Supreme Court has, however, restricted courts from imposing procedures beyond those required by the Constitution, the APA, or other statutes. *See Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978).

276. *See* 5 U.S.C. § 551(5), (7) (2012) (defining “rule making” and “adjudication”). *Compare id.* § 553 (establishing the procedural requirements for agency rulemaking), *with id.* § 554 (establishing the procedural requirements for agency adjudication). Agencies may also be subject to heightened procedural requirements established in an organic statute. *See* BREYER ET AL., *supra* note 2, at 641.

This discussion reveals the importance of the administrative state's unwritten constitution for establishing the fundamental substantive values governing the exercise of government power through the administrative apparatus. Questions regarding the allocation of authority among the primary three branches of government—Congress, the Executive, and the Judiciary—with respect to administrative governance may sometimes be resolved by reference to the written Constitution.²⁷⁷ But that document “leaves undiscussed what might be the necessary and permissible relationships of each of these three constitutional bodies to the agency making the rule.”²⁷⁸ It similarly leaves undiscussed the separation of functions within administrative agencies.²⁷⁹ In these areas, the administrative state's unwritten constitution—as found in statutes, federal common law, and executive directives—must furnish the governing separation of powers principles. The unwritten constitution must also provide other substantive values of administrative governance.

An essential first implication of this Article's theory emerges here: the many actors in the system who contribute to the development of the components of the administrative state's unwritten constitution must imbue those components with substantive value.²⁸⁰ To fulfill this obligation, these actors must acknowledge and understand the constitutional implications of their work, whether it consists of drafting statutes, crafting common law, or composing executive directives. Further nuances of this central obligation will emerge below, as this Article continues to examine the implications of a constitutional theory of administrative law through the lens of the substantive values and evolutionary characteristics of the administrative state's unwritten constitution.

277. See *supra* note 260 and accompanying text.

278. Strauss, *supra* note 4, at 577; see also Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994) (discussing the debate surrounding a constitutionally established plenary power for the President to control administration of the law); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994) (discussing the constitutional understanding of Congress and the President's roles in the administration of laws).

279. As previously discussed, the written Constitution may impose some obligations on agencies in the exercise of their delegated authority. See *supra* note 260 and accompanying text.

280. Cf. Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332 (2008) (examining how the rise of administrative law and judicial review has affected the exercise of mercy in the criminal justice system); Jerry L. Mashaw, “Rights” in the *Federal Administrative State*, 92 YALE L.J. 1129, 1129 (1983) (explaining the “dependence of the judiciary on the legislative and administrative branches of government for the very conception of law that animates judicial judgment”).

B. *The Rule of Law and the Protection of Substantive Values*

Further implications of this Article's theory can be gleaned by examining a second core substantive value of the administrative constitution, a value inextricably linked to the separation of powers: the rule of law.²⁸¹ In its most succinct formulation, the rule of law demands "a government of laws and not of men."²⁸² The rule of law requires the exercise of governmental authority to be grounded in law,²⁸³ subjects government officials to the same legal requirements applicable to citizens,²⁸⁴ and demands evenhandedness and impartiality of government officials.²⁸⁵ The rule of law is a fundamental concept underlying the written Constitution²⁸⁶ because it "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals."²⁸⁷ Courts have found the rule of law

281. *E.g.*, BREYER ET AL., *supra* note 2, at 37 (explaining that the separation of powers "is part and parcel of the ideal of the rule of law"); *see* Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (stating that the purpose behind the separation of powers doctrine was "to save the people from autocracy"); Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 304 (1989) (suggesting that under the rule of law, separation of powers has the purpose of "neutraliz[ing] conflicts of interest inherent in the governmental process").

282. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); *see* JOHN ADAMS, *Novanglus; or, a History of the Dispute with America, from Its Origin, in 1754, to the Present Time* (pt. 7), in 4 THE WORKS OF JOHN ADAMS 99, 106 (Charles Francis Adams ed., 1851) ("If Aristotle, Livy, and Harrington knew what a republic was, the British constitution is much more like a republic than an empire. They define a republic to be a *government of laws, and not of men.*").

283. *E.g.*, Richard E. Levy, *The Tie That Binds: Some Thoughts About the Rule of Law, Law and Economics, Collective Action Theory, Reciprocity, and Heisenberg's Uncertainty Principle*, 56 KAN. L. REV. 899, 900 (2008) (explaining that the rule of law "means that governmental authority must have a basis in law and that the actions of government and government officials are subject to the law and constrained by it").

284. *See, e.g.*, Harry W. Jones, *The Common Law in the United States: English Themes and American Variations*, in POLITICAL SEPARATION AND LEGAL CONTINUITY 91, 129 (Harry W. Jones ed., 1976) ("[T]he 'rule' or 'supremacy' of law means simply that all members of society, government officials as well as private persons, are equally responsible to the law and . . . 'equally amenable to the jurisdiction of ordinary tribunals.'").

285. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 633 (1996) ("Central . . . to the idea of the rule of law . . . is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.").

286. *See* *Citizens United v. FEC*, 130 S. Ct. 876, 921 (2010) (Roberts, C.J., concurring) (stating that the constitutional idea is the rule of law); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) ("[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time . . ."). *See generally* Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1 (1997) (examining attempts to define the rule of law and explaining four types of rule-of-law ideals).

287. *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986); *cf.* *Lockhart v. McCree*, 476 U.S. 162, 176 (1986) ("[T]hose who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set

equally foundational in administrative law.²⁸⁸

In some cases, the rule of law manifests in administrative law as a result of written constitutional norms. For example, the written Constitution's prohibition on bills of attainder and ex post facto laws²⁸⁹ compels a distinction between agency rulemaking and agency adjudication.²⁹⁰ As discussed in greater detail above, this distinction has important consequences for agency procedures and the protection of individual rights.²⁹¹

Unwritten rule of law principles are also often invoked in administrative law, particularly in the context of judicial review. Courts recognize that the axiomatic principle "that a federal agency does not have the power to act unless Congress, by statute, has empowered it to do so"²⁹² flows from scrupulous observance of the rule of law.²⁹³ Judicial review doctrines are rooted in this most basic principle and are predicated, at least in part, on the assumption that agencies observe the rule of law in promulgating legally binding regulations.²⁹⁴ Congress has enshrined such rule-of-law principles in the APA. For example, "[t]he presumption of reviewability under the APA is based on a set of considerations, loosely captured in the notion of the rule of law, that relate to the perceived need to constrain the exercise of discretionary power by administrative agencies."²⁹⁵

aside their own beliefs in deference to the rule of law.").

288. *Maximum Serv. Telecasters v. FCC*, 853 F.2d 973, 976 (D.C. Cir. 1988) ("The fundamental principle in our polity, even in the modern administrative state, is not deference, but the rule of law.").

289. U.S. CONST. art. I, § 9, cl. 3.

290. *See Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915).

291. *See supra* note 274 and accompanying text.

292. *Transohio Sav. Bank v. Dir., Office of Thrift Supervision*, 967 F.2d 596, 621 (D.C. Cir. 1992) (citing *Rubin, supra* note 20, at 402); *see also 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."); *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.").

293. *See, e.g., S. Union Gas Co. v. Fed. Energy Regulatory Comm'n*, 840 F.2d 964, 972 (D.C. Cir. 1988) ("Like the common law, the administrative state is very much a common-sense affair, shaped by experience and consistent with the rule of law as laid down by Congress.").

294. *E.g., Menkes v. U.S. Dep't of Homeland Sec.*, 637 F.3d 319, 349 (Brown, J., dissenting in part) ("[A]dministrative review assumes a structured, rule-of-law infused process."); *see also Transohio*, 967 F.2d at 621 (citing WALTER GELLHORN ET AL., *ADMINISTRATIVE LAW* 66 (8th ed. 1987)) ("Agency actions beyond delegated authority are '*ultra vires*,' and courts must invalidate them."); *id.* (quoting 5 U.S.C. §§ 701, 706(2)(C)) (defining the scope of "judicial review for agency actions 'in excess of statutory jurisdiction, authority, or limitations'").

295. Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 655 (1985).

Rule-of-law considerations have implications for agencies' internal operations, as well as courts' corresponding duties on judicial review. For example, "the Rule of Law requires that agencies apply the same basic standard of conduct to all parties appearing before them."²⁹⁶ Congress has codified this requirement of nonarbitrary agency action in the APA's judicial review provisions.²⁹⁷ As the D.C. Circuit eloquently explained, another command grounded in the rule of law is that agencies provide a reasoned explanation when they change course from a previously established policy:

Lodged deep within the bureaucratic heart of administrative procedure . . . is the . . . essential proposition that, when an agency decides to reverse its course, it must provide an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law.²⁹⁸

This requirement in turn has implications for judicial responsibilities in reviewing agency action, for when an agency changes course, a court reviewing the action must "understand the basis of the agency's action" and "judge the consistency of that action with the agency's mandate."²⁹⁹ The reasoned explanation requirement does not produce a very strong norm of consistency because the courts apply it predominately as a procedural requirement, giving substantial deference to the agency's determination that the offered explanation substantively warrants the policy shift.³⁰⁰ However modest its demands, the requirement nonetheless has a

296. *Teamsters Local Union 769 v. NLRB*, 532 F.2d 1385, 1392 (1976); *see also* *Local 777, Democratic Union Org. Comm. v. NLRB*, 603 F.2d 862, 881 n.51 (D.C. Cir. 1978) (explaining "the axiom of administrative law that agencies are only entitled to deference when they act according to the rule of law, in an equitable and non-arbitrary fashion").

297. *See* 5 U.S.C. § 706(2)(A) (2012) (empowering courts to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

298. *CBS v. FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971); *e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (holding that an agency rescinding its rule must provide a reasoned analysis for the change in course); *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) (stating that an agency must "articulate with reasonable clarity its reasons for [a] decision").

299. *Atchison, Topeka & Santa Fe Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973); *Telecomms. Research & Action Ctr. v. FCC*, 800 F.2d 1181, 1184 (D.C. Cir. 1986); *see* *NAACP v. FCC*, 682 F.2d 993, 998 (D.C. Cir. 1982) ("[W]here policy has been altered, the court should be satisfied both that the agency was aware it was changing its views and has articulated permissible reasons for that change, and also that the new position is consistent with the law.>").

300. *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009) ("In such cases it is not that further justification is demanded by the mere fact of the policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.>").

constitutional character and purpose, for “[j]udicial vigilance to enforce the Rule of Law in the administrative process is particularly called upon where . . . the area under consideration is one wherein the [agency’s] policies are in flux.”³⁰¹

There is a correlation between these decisions and the consequences of viewing administrative law through the lens of constitutional theory. Rule-of-law principles operate in administrative law to balance the natural, beneficial evolution of administrative norms and policy against the need for stability and neutrality in the creation and enforcement of legally binding rules. In like fashion, the administrative constitution’s unwritten nature both flows from and enables its incremental evolution in response to changing national needs.³⁰² This inherent flexibility of the administrative constitution has facilitated the modern administrative state’s operation.³⁰³ But it must be balanced with stability—an essential feature of constitutionalism and a requirement of the rule of law.³⁰⁴

The affinity between constitutionalism and the rule of law reveals a second implication of this Article’s theory: those responsible for shaping the substantive values of the administrative state’s unwritten constitution must protect and promote the stability of those values even as the unwritten constitution evolves. This calls upon the Legislature, the Executive, the Judiciary, and agencies to balance the flexibility that arises from the administrative constitution’s unwritten character against the stability demanded by faithful adherence to constitutionalism and the rule of law. This obligation is the source of administrative law’s prudential entrenchment.³⁰⁵

C. *Subsidiary Values and Coping with Complexity*

Beyond the foundational values of the separation of powers and the rule of law, administrative law also vindicates a variety of subsidiary values. For example, administrative law has historically valued the elevation of technical expertise over political considerations.³⁰⁶ This

301. *Greater Bos. Television Corp.*, 444 F.2d at 852 (D.C. Cir. 1970).

302. *See supra* notes 72–77, 124–26, and accompanying text.

303. For example, in limiting procedural requirements for the administrative assessment of a generally applicable tax, the Supreme Court explained that “[t]here must be a limit to individual argument in such matters if government is to go on.” *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915).

304. *Cf. Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (“[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.”).

305. *See supra* text accompanying note 133.

306. *See, e.g., Berle, supra* note 1, at 439–40; *see also Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (“Through this policy of deference, agencies, not courts, retain control over which permissible reading of the regulations they will enforce. Appropriately so, since it is the agencies, not the courts, that have the technical expertise and political authority to

approach may reflect the Progressive belief “that government could be separated into a realm of value-laden politics and a realm of administrative expertise based on scientific principles.”³⁰⁷ Administrative law also “seeks to guide the use of government authority in ways that promote values such as democracy, fairness, effectiveness, and efficiency.”³⁰⁸ And, as discussed previously, various statutes require administrative agencies to consider the needs of vulnerable populations and respect certain fundamental values.³⁰⁹

These values are often in tension, if not outright conflict, with one another.³¹⁰ Experience has proven regulatory policy making to be a value-laden endeavor, requiring more than just technical expertise. This gives rise to inevitable tensions between democratic values and the preference for expert regulatory decisions.³¹¹ Such tension is evident in FACA, which promotes transparency by encumbering agencies’ ability to convene advisory committees capable of sharing relevant expertise with agency decision makers.³¹² The value in creating expertly crafted rules may similarly conflict with efforts to encourage public participation in the rulemaking process.³¹³ Promoting transparency may conflict with facilitating collaborative governance.³¹⁴ Perhaps the most

carry out statutory mandates.” (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 864–66 (1984))).

307. Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165, 169 (1999); see Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 371 (2004) (“The central proposition of the New Deal regulatory model was that a few well-educated, specially trained, and publicly appointed professionals could make the best decisions about national policies.”).

308. Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 U. ILL. L. REV. 1111, 1114.

309. See *supra* Subsection II.A.4.

310. E.g., PETER CANE, ADMINISTRATIVE LAW 410 (Paul Craig ed., 5th ed. 2011); see also Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739, 742–43 (1976) (exploring the propensity of administrative values to conflict with one another and the difficulty of reconciling such conflicts).

311. See generally Kathleen Bawn, *Political Control Versus Expertise: Congressional Choices About Administrative Procedures*, 89 AM. POL. SCI. REV. 62 (1995) (articulating a model showing the “trade-off between control and expertise” and how it affects the “degree of independence delegated to an agency”).

312. See *supra* notes 194–96 and accompanying text.

313. See Coglianese, Kilmartin & Mendelson, *supra* note 47, at 928–30. Indeed, efforts to facilitate public participation in rulemaking may be viewed as an attempt to shift the balance between the political insulation necessary for expert judgments and the political accountability necessary to create rules genuinely responsive to public needs. See Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 359–62 (1972); see also Stephen Breyer, *The Legislative Veto After Chadha*, 72 GEO. L.J. 785, 787–88 (1984) (describing “the classic conflict in the administrative state between political accountability and the necessary complexity of regulatory decisionmaking”).

314. But see Emily S. Bremer, *Incorporation by Reference in an Open-Government Age*, 36 HARV. J.L. & PUB. POL’Y 131, 137 (2013) (suggesting that a “collaborative approach

pervasive and persistent value conflict in administrative law is the “inherent conflict between efficiency and fairness.”³¹⁵ One example of this conflict is the issue of whether to provide individuals with a trial-type hearing in an administrative adjudication.³¹⁶ Even if greater fairness and accuracy can be achieved through the provision of such procedures, it may be achieved at the cost of administrative efficiency.³¹⁷

The evolution of administrative law has been driven largely by continuous efforts to properly calibrate and recalibrate the balance between these various values.³¹⁸ The unwritten nature of the administrative constitution is essential to this enterprise because it facilitates such incremental, evolutionary development. It provides administrative actors with the latitude to respond to changed conditions that might reveal a previous value judgment to be inadequate or undesirable. The emergence of electronic methods of communication, for example, has offered new opportunities to simultaneously improve both transparency and political accountability.³¹⁹ At the same time, taking advantage of these opportunities required legislative action and posed significant new challenges for administrative actors.³²⁰

provides the best chance for improving public access while retaining the benefits of the well-established federal standards policy”).

315. Roland M. Frye, Jr., *Restricted Communications at the United States Nuclear Regulatory Commission*, 59 ADMIN. L. REV. 315, 325–26 (2007) (footnote omitted); see Henry J. Friendly, “*Some Kind of Hearing*,” 123 U. PA. L. REV. 1267, 1268 (1975) (discussing the benefits and drawbacks of administrative hearings and notice and comment procedures); Jerry L. Mashaw, *The Supreme Court’s Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 57–58 (1976) (arguing that a procedural structure that incorporates agency decisions and a separate administrative appeal process is a “necessary compromise between consistency and individualization”); cf. Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 623–24 (1969) (explaining that preoccupation with “considerations of fairness and equity” has caused regulatory experts to ignore “[i]ssues as or more important to the welfare of society—issues of economic efficiency in the broadest sense of that term”).

316. See Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 401–02 (1973).

317. See, e.g., Administrative Conference of the United States, *Recommendation 80-1: Trade Regulation Rulemaking Under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act*, in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 3, 3–5, 7 (1980); Administrative Conference of the United States, *Recommendation 79-1: Hybrid Rulemaking Procedures of the Federal Trade Commission*, in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 3, 7–10 (1979).

318. See, e.g., Bingham, *supra* note 145, at 302; Sidney A. Shapiro, *A Delegation Theory of the APA*, 10 ADMIN. L.J. AM. U. 89, 90 (1996).

319. Marshall J. Breger, *Government Accountability in the Twenty-First Century*, 57 U. PITT. L. REV. 423, 424–25 (1996).

320. See Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 466–69 (2004) (explaining the E-Rulemaking Initiative and its three implementation

The failure to recognize the constitutional character of administrative law has historically prevented reformers from understanding the larger implications of their incremental contributions to the administrative state's unwritten constitution. That is, "the everyday politics of regulatory reform has been conducted without much concern for establishing a coherent theory of administrative government."³²¹ The result is a legal regime that is fundamentally reactive and riddled with theoretical incoherence. This incoherence is evident upon reviewing the many statutes that contribute to the administrative state's unwritten constitution.³²² Each such statute addresses a discrete problem faced by agencies, typically without confronting the question of how the proffered solution affects the balance of key values within the administrative constitution as a whole.³²³ Over many decades, some values have consistently risen to the top. But without awareness of the overarching policies and principles of administrative constitutionalism, each incremental step threatens to undermine administrative law's conformity to fundamental constitutional values.

Two final, related implications of the unwritten constitution theory become apparent here. Acknowledging the constitutional character of administrative law requires constitutional actors to recognize the existence, complexity, and perennial tension among administrative law's various subsidiary values. It also requires these actors to consider how each incremental change to core administrative requirements will affect the administrative constitution as a whole.³²⁴ In short, administrative law's constitutional character obligates Congress, the Executive, the Judiciary, and agencies to take a holistic approach to reform in order to ensure that each incremental change in administrative law furthers the coherent evolution of the administrative state's unwritten constitution.

IV. THE CONSEQUENCES OF CONSTITUTIONAL REALISM

Acknowledging the constitutional character of administrative law thus reveals four related, generalized political obligations to: (1) affirmatively shape the substantive constitutional values of the administrative state; (2) protect and promote the stability of those

modules).

321. Rabin, *supra* note 24, at 1194.

322. *See, e.g.*, Bingham, *supra* note 145, at 304–15 (examining the origins and theory of each major administrative statute).

323. *See id.*

324. *Cf.* Jeffrey S. Lubbers, *Paul Verkuil's Projects for the Administrative Conference of the U.S. 1974–1992*, 32 CARDOZO L. REV. 2421, 2430 ("[T]he quest is to find the optimum balance of fairness, efficiency, and satisfaction to the participants (sometimes called 'acceptability') in administrative proceedings.").

values as the unwritten constitution of the administrative state evolves; (3) find and maintain an appropriate balance between substantive values that are in perennial tension or even outright conflict with one another; and (4) employ a holistic approach to ensure that each step in the evolution of administrative law furthers the overall theoretical coherence of the administrative state's unwritten constitution. By virtue of their respective positions within the structure of the federal government, however, Congress, the Executive, the Judiciary, and agencies are called upon to discharge these obligations in different ways.

Viewing administrative law as an unwritten constitution has several more concrete, beneficial implications. First, the theory provides a legal and theoretical foundation for the controversial phenomenon of administrative common law. By placing that phenomenon in a broader institutional context, the theory shows why and how judicial lawmaking in the administrative context presents less of a threat to the separation of powers and federalism than such lawmaking presents in other contexts. Indeed, the theory shows that judicial participation in the creation and maintenance of the unwritten administrative constitution may be necessary to preserve the separation of powers and mitigate the potential constitutional harms of an administrative state subject to the political branches' exclusive control. Second, embracing administrative law's constitutional character clarifies Congress's prudential obligations to approach administrative reform proposals with respect for the fundamental constitutional values protected by existing administrative law. Finally, the unwritten constitution theory of administrative law facilitates a more nuanced understanding of the realities of administration and reveals the opportunity to harness the power of conventions to encourage administrative constitutionalism.

A. *Justifying Administrative Common Law*

Despite its centrality to administrative law, federal common law is generally disfavored.³²⁵ Indeed, in the 1938 case of *Erie Railroad Co. v. Tompkins*,³²⁶ the Supreme Court flatly declared that “[t]here is no federal general common law.”³²⁷ The reality is more complicated than *Erie* suggests.³²⁸ For federal courts, particularly when sitting in diversity

325. Cf. Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 585 (2006) (“Despite *Erie*’s declaration that ‘[t]here is no federal general common law,’ well-established and stable pockets of federal common law persist in several areas . . .”).

326. 304 U.S. 64 (1938).

327. *Id.* at 78.

328. See, e.g., *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2535 (2011) (noting that *Erie* led to several federal laws addressing national concerns); *Nw. Airlines, Inc. v. Transp. Workers Union*, 451 U.S. 77, 95–96 (1981) (explaining the commonly understood scope of

or adjudicating private rights, the rule generally remains that, “[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.”³²⁹ But the Supreme Court has recognized the legitimacy of federal common law rules in a few narrow enclaves, including cases that affect the United States’ rights and obligations, controversies between states, international relations, and admiralty.³³⁰ In some circumstances, the practice is considered legitimate because Congress has authorized the courts to create common law rules necessary to effectuate a federal statutory scheme.³³¹ In other circumstances, the Court “has recognized a [judicial] responsibility, in the absence of legislation, to fashion federal common law in cases raising issues of uniquely federal concern.”³³² Even in cases that call for the application of federal common law rules, however, federal courts must draw on state law to give content to those rules, unless doing so will create significant conflict with federal policies, interests, or statutory objectives.³³³

Federal common law’s disfavored status is based on a blend of separation of powers and federalism concerns. Independent judicial assumption of federal common lawmaking authority is in tension with the Constitution’s vesting the federal lawmaking power in Congress.³³⁴ The tendency of federal common law to displace state law is similarly incompatible with both federalism³³⁵ and the traditional view of federal

federal common law).

329. *Erie*, 304 U.S. at 78; *see also* 28 U.S.C. § 1652 (2006) (“The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”); Tidmarsh & Murray, *supra* note 325, at 586 & n.8.

330. Tidmarsh & Murray, *supra* note 325, at 594; *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). The Court has also approved federal common law in more narrow areas related to the government contractor defense and certain federal rules of preclusion. Tidmarsh & Murray, *supra* note 325, at 594.

331. *See Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991); *Texas Indus.*, 451 U.S. at 642. The existence of a federal statute does not give the courts free reign to create related federal common law. *See Kamen*, 500 U.S. at 97–98 (citations omitted). Rather, the practice is permitted “only when the [statutory] scheme in question evidences a distinct need for nationwide legal standards, or when express provisions in analogous statutory schemes embody congressional policy choices readily applicable to the matter at hand.” *Id.* at 98 (citations omitted).

332. *Nw. Airlines*, 451 U.S. at 95.

333. *See O’Melveny & Myers v. FDIC*, 512 U.S. 79, 83–85 (1994) (stating that federal courts should adopt state law to give depth to federal common law rules, unless it “would . . . contradict an explicit federal statutory provision”); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988) (same).

334. *E.g., Nw. Airlines*, 451 U.S. at 95.

335. *See Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938) (declaring that neither Congress nor the federal courts have the power to declare state common law applicable).

law as largely interstitial.³³⁶ Some further argue that federal common law is illegitimate because it shifts responsibility for creating the law from democratically accountable state or federal officials to unelected federal judges. These critics also express skepticism that the courts have sufficient institutional competence to create federal common law rules.³³⁷ Finally, the Supreme Court has warned against “the runaway tendencies of ‘federal common law’ untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy.”³³⁸ The lesson, it seems, is that federal common law may pose a greater threat to separation of powers and federalism in the absence of an extrinsic, overarching policy that can simultaneously cabin judicial lawmaking authority and provide a foundation for evaluating the substantive validity of federal common law rules.

The stakes are higher when federal common law rules have constitutional roots. A judicial ruling mandated by the Constitution effectively takes on the formally entrenched status of the underlying constitutional provision: barring a constitutional amendment, the ruling binds state and federal political authorities. In contrast, because constitutional common law rules are designed to vindicate constitutional rights or principles but are *not* mandated by the Constitution, such rules are “subject to amendment, modification, or even reversal by Congress” through ordinary legislative means.³³⁹ The Fourth Amendment’s exclusionary rule³⁴⁰ and the Fifth Amendment’s *Miranda* warning requirements³⁴¹ have been offered as two examples of constitutional common law rules. It is often very difficult, however, to determine where constitutional interpretation ends and constitutional common law begins.³⁴² The Supreme Court rarely draws the line explicitly and sometimes even blurs it by denying Congress’s authority to deviate from what otherwise appears to be a common law rule.³⁴³ Thus, while the Supreme Court first acknowledged the authority of Congress and the states to devise effective alternatives to the required *Miranda*

336. Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 931 (1986).

337. Tidmarsh & Murray, *supra* note 325, at 614–15.

338. *O’Melveny & Myers*, 512 U.S. at 89.

339. Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2–3 (1975); see Metzger, *supra* note 3, at 481 (noting that in several contexts involving constitutional common law rules, “the Court [has] expressly acknowledged that its constitutional rulings were to some extent revisable by Congress”).

340. See Monaghan, *supra* note 339, at 3–5.

341. See *id.* at 20; see also *Miranda v. Arizona*, 384 U.S. 436, 467–68 (1966).

342. See Monaghan, *supra* note 339, at 30–34 (“[A]ny distinction between constitutional interpretation and constitutional common law may be far too uncertain to be useful.”).

343. See Metzger, *supra* note 3, at 481–82.

warnings,³⁴⁴ the Court subsequently invalidated such a statutory alternative as insufficiently protective of Fifth Amendment rights.³⁴⁵ The danger of constitutional common law, then, lies in the extraordinary consequences that flow from erroneously classifying a rule as either constitutional interpretation or constitutional common law. A common law rule treated as constitutional interpretation produces an unwarranted limitation on the political branches' sovereign authority. Alternatively, treating a rule of constitutional interpretation as a common law rule improperly diminishes the status and protection of entrenched constitutional norms.

Administrative common law fits uneasily into the broader legal regime that determines the legitimacy of federal common law. It is a field far too broad to qualify as an enclave.³⁴⁶ Courts rarely acknowledge the dominant common law character of administrative law,³⁴⁷ and a few Supreme Court opinions have been read to suggest some resistance to the phenomenon.³⁴⁸ Administrative law does not govern private conduct that would ordinarily be subject to state law,³⁴⁹ but instead regulates the “constitutional function[s] or power[s]”³⁵⁰ of agencies that derive their authority from federal statutes.³⁵¹ This would seem to counsel in favor of the legitimacy of administrative common law. On the other hand, the “constitutional function[s] and power[s],” that the Supreme Court has cited appear to be those grounded in the written Constitution.³⁵² As previously seen, the core doctrines of administrative common law typically do not come from the written Constitution. And they often have little substantive connection with the federal statutes that authorize agency action.³⁵³ Some provisions of administrative statutes, such as the APA, are so broadly written that they “necessarily have been given concrete meaning and application by a process of case-by-case judicial decision in the common-law

344. See *Miranda*, 384 U.S. at 467 (“We encourage Congress and the States to continue their laudable search for increasing effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws.”).

345. See *Dickerson v. United States*, 530 U.S. 428, 437–43 (2000).

346. See *Metzger*, *supra* note 13, at 1344.

347. See *Beerermann*, *supra* note 227, at 2.

348. See, e.g., *Metzger*, *supra* note 13, at 1305 (describing the Supreme Court’s administrative law decisions as forming a “pattern of judicial common law development punctuated by periodic resistance”).

349. See, e.g., *Boyle v. United Techs. Corp.*, 487 U.S. 500, 506 (1988).

350. *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943).

351. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726–27 (1979).

352. Compare *Clearfield Trust*, 318 U.S. at 366 (“When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power.”), with U.S. CONST. art. I, § 9 (authorizing Congress to appropriate funds as required by law).

353. See *Metzger*, *supra* note 13, at 1311 (discussing the disconnect between administrative law doctrines and legislators).

tradition.”³⁵⁴ But administrative common law is a broad field composed of a wide variety of rules. In the aggregate, it is difficult to establish that uniformity considerations require each administrative common law rule or that the rules that state law would supply necessarily conflict with federal interests or policies.³⁵⁵

Understanding administrative law as an unwritten constitution dispels much of this unease by unifying and revealing the federal constitutional import of the seemingly disparate rules that govern the administrative state. The theory explains that, even though administrative common law rules do not derive from the written Constitution, such rules have a constitutional character similar to that which the Supreme Court has previously found sufficient to legitimize the creation of federal common law.³⁵⁶ Administrative agencies are entirely creatures of federal law. Their existence and authority are “in no way dependent on the laws of . . . any . . . state.”³⁵⁷ Agency authority derives instead from the statutes, judicial decisions, and executive directives that together protect and promote an identifiable, uniform set of federal constitutional values.

The unwritten constitution theory thus clarifies that administrative law ought to be governed by uniform principles created by federal sovereign authorities, including federal courts. The laws that comprise the unwritten administrative constitution implicate a uniquely federal “interest in getting the Government’s work done,”³⁵⁸ and are properly understood as a “peculiarly federal concern, warranting the displacement of state law.”³⁵⁹ Uniform federal rules are required in the administrative context because applying state law “would subject the rights and duties of the United States to exceptional uncertainty.”³⁶⁰

354. *Nw. Airlines v. Transp. Workers Union*, 451 U.S. 77, 95 (1981); see Metzger, *supra* note 13, at 1350 (stating that the “APA’s text is silent on several key issues”); Duffy, *supra* note 227, at 130 (observing that the APA is written “broadly to provide courts with a measure of flexibility in interpreting the Act”).

355. See, e.g., *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 508 (1988).

356. See *Kimbell Foods*, 440 U.S. at 726 (“Since the agencies derive their authority . . . from specific Acts of Congress passed in the exercise of a ‘constitutional function or power,’ their rights, as well, should derive from a federal source.” (citation omitted)); *Clearfield Trust*, 318 U.S. at 366–67 (stating that the duties and rights of the federal government come from federal sources).

357. *Clearfield Trust*, 318 U.S. at 366.

358. *Boyle*, 487 U.S. at 505; see *Westfall v. Erwin*, 484 U.S. 292, 295–97 (1988) (noting that official immunity for federal officials “insulate[s] the decisionmaking process from the harassment of prospective litigation”); *Barr v. Mateo*, 360 U.S. 564, 572–73 (1959) (explaining that the privilege defense available to federal officials is an “expression of a policy designed to aid in the effective function of government”).

359. *Boyle*, 487 U.S. at 505; see *Nw. Airlines*, 451 U.S. at 95.

360. *Clearfield Trust*, 318 U.S. at 367; see *Kimbell Foods*, 440 U.S. at 728 (“Undoubtedly,

Perhaps more importantly, drawing on state law for the content of administrative common law would present a significant obstacle to the development and maintenance of essential, federal constitutional principles.³⁶¹ In such circumstances, and “[i]n [the] absence of an applicable Act of Congress[,] it is for the federal courts to fashion the governing rule of law according to their own standards.”³⁶²

This account also helps explain why federal common law in the administrative context poses little threat to—and may even more robustly protect—federalism principles. Part of the explanation is that administrative law is primarily concerned with regulating the *federal* government’s structure and operation. “No subject could be one of more peculiarly federal concern”³⁶³ It is both inappropriate for state regulation and likely to be of little interest to state governments.³⁶⁴ To be sure, the substantive aspects of federal regulation may have significant effects on state governments, state interests, and federalism values. But administrative law rules—particularly those that have a constitutional character—rarely have such effects.³⁶⁵ This is because administrative law rules regulate the administrative state itself; they do not directly affect substantive regulatory decisions.³⁶⁶ Administrative common law rules sometimes even protect federalism values.³⁶⁷ The unwritten constitution theory explains this phenomenon and provides a foundation for encouraging further development of rules that extend considerations of federalism into the administrative context.

By placing administrative common law in a broader institutional context, the unwritten constitution theory shows that the Judiciary’s administrative lawmaking role furthers separation of powers principles³⁶⁸ by revealing unique, extrinsic limits on the Judiciary’s lawmaking authority. The legitimacy of federal common law rules is typically evaluated in relative institutional isolation, with the inquiry

federal programs that ‘by their nature are and must be uniform in character throughout the Nation’ necessitate formulation of controlling federal rules.” (quoting *United States v. Yazell*, 382 U.S. 341, 354 (1966)); *Howard v. Lyons*, 360 U.S. 593, 597 (1959) (holding that the actions of a federal officer should be subject to federal law).

361. *Cf. Kimbell Foods*, 440 U.S. at 728 (“Apart from considerations of uniformity, we must also determine whether application of state law would frustrate specific objectives of the federal programs. If so, we must fashion special rules solicitous of those federal interests.”).

362. *Clearfield Trust*, 318 U.S. at 367.

363. *Howard*, 360 U.S. at 597.

364. *See Metzger*, *supra* note 13, at 1345 (“[T]he Court has repeatedly said that it is inappropriate for state law to control federal administration.”).

365. *See id.* at 1297.

366. *See supra* notes 1–2 and accompanying text.

367. *See Metzger*, *supra* note 13, at 1340, 1342. *See generally* Sharkey, *supra* note 252 (examining how statutory language, judicial review doctrines, and executive policy regulate agency preemption of state law).

368. *See Metzger*, *supra* note 13, at 1346–47.

primarily focused on determining the scope of the Judiciary's independent authority to create a particular rule.³⁶⁹ The role of the political branches in this analysis is quite limited, typically appearing only under the guise of statutory interpretation. Understood as one of several components of the unwritten constitution, however, administrative common law emerges as part of a larger, multi-branch, dialogic effort to situate administrative agencies within the federal government's structure.³⁷⁰ In this account, the long-standing statutory provisions that authorize judicial review of agency action provide a more stable platform for administrative common law.³⁷¹ Moreover, judicially created rules in this context both inform and are informed by the political branches' complementary legal instruments, including core administrative statutes and executive policy directives. These nonjudicial components of the unwritten constitution legally and institutionally tether administrative common law to extrinsic policies and principles. This in turn limits judicial lawmaking authority and provides a basis for evaluating the substantive validity of administrative common law rules.³⁷²

Under the unwritten constitution theory, administrative common law also furthers the separation of powers by embracing a central and complementary role for the political branches in governing the administrative state. The theory explains how administrative common law rules can have a constitutional character without being mandated by the written Constitution.³⁷³ By defining this constitutional character based on the rules' function (e.g., the constitutive function) instead of by the substantive constitutional principles embodied in the rules (e.g., rule of law), the theory addresses the indeterminacy that arises in distinguishing entrenched, written constitutional requirements from administrative common law.³⁷⁴ This improved clarity can help reduce the likelihood that administrative law rules will be erroneously

369. See *supra* notes 329–33 and accompanying text.

370. Cf. William N. Eskridge, Jr. & John Ferejohn, *Constitutional Horticulture: Deliberation-Respecting Judicial Review*, 87 TEX. L. REV. 1273, 1275 (2009) (“The premise of [constitutional adjudication] is that most constitutional horticulture should proceed through deliberation among legislators, executive officials, and voters.”).

371. See *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641–42 (1981); *Nw. Airlines, Inc. v. Transp. Workers Union*, 451 U.S. 77, 95–96 (1981); Metzger, *supra* note 13, at 1347.

372. See *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 89 (1994) (citing *Nw. Airlines*, 451 U.S. at 98) (holding that evaluation of administrative common law rules is more appropriately left to Congress); *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991) (“[A] court should endeavor to fill the interstices of federal remedial schemes within uniform federal rules only when the scheme in question evidences a distinct need for nationwide legal standards.”).

373. See Metzger, *supra* note 3, at 484.

374. See *id.* at 518.

classified as deriving from the written Constitution.³⁷⁵ It thus explains why administrative common law, despite its constitutional character, does not present the dangers ordinarily associated with constitutional common law.³⁷⁶ By clarifying that administrative common law rules are not formally entrenched, the unwritten constitution theory also provides a solid foundation for involving the political branches in shaping the core doctrines that determine the constitutional position of the administrative state. The theory does so by emphasizing that administrative common law rules are “subject to the paramount authority of Congress”³⁷⁷ and should be informed by judicial consideration of relevant executive policies and practices.

Excluding the courts from the important task of creating and maintaining the administrative state’s unwritten constitution would raise significant separation of powers problems.³⁷⁸ As previously discussed, the administrative state represents a significant deviation from the institutional structure originally created by the U.S. Constitution.³⁷⁹ This structural transformation shifted the balance of power from Congress to the President and minimized the role of the independent Judiciary.³⁸⁰ Administrative common law addresses these problems by giving the Judiciary a role in extending constitutional values to the administrative context and “mediating the needs of both political branches for control of agency decisionmaking.”³⁸¹ The phenomenon thus counteracts the administrative state’s diminishment of judicial power, while addressing the imbalance of power between Congress and the Executive.³⁸² Relatedly, administrative common law may be justified because Congress and the President each have compelling reasons to seek control over administrative agencies and use administrative law for purely political purposes. In this context, there may be reason to doubt

375. *See id.* at 518, 525.

376. *See supra* notes 339–45 and accompanying text.

377. *Nw. Airlines*, 451 U.S. at 95 (quoting *New Jersey v. New York*, 283 U.S. 336, 348 (1931)) (internal quotation marks omitted); *see Metzger, supra* note 13, at 1347 (“Congress retains power to overrule judicial administrative law determinations.”).

378. *Cf. Verkuil, supra* note 26, at 687 (explaining that an “accommodation between the judicial and administrative roles was necessary” to the evolution and acceptance of the administrative state because “[a]ny system that modifies or eliminates the judicial role raises the specter of excessive governmental control”).

379. *See supra* Section I.A.

380. *See Eskridge & Ferejohn, supra* note 37, at 165–66, 172 (explaining that Congress is now more willing to “delegate significant lawmaking power to agencies”).

381. Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1753 (2007); *see id.* 1767–71 (discussing how Congress can utilize “administrative procedures to influence agency action” and “obtain more information than it would have otherwise” without resorting to direct oversight).

382. *Cf. McCutchen, supra* note 24, at 21 (“The Court is *required* to seek a second best solution because its duty is to the balance of power embodied in the constitutional text.”).

the political branches' objectivity in creating and adhering to principled rules governing the constitutional position of administrative agencies.³⁸³ For this reason, the courts' involvement in crafting the unwritten administrative constitution is not just defensible—it is indispensable.

B. *Clarifying Congressional Duties*

In the legislative context, acknowledging the constitutional character of administrative law first requires that legislators monitor for changes in circumstance that may necessitate legislative action to preserve the substantive values of the administrative constitution. Such awareness is necessary if legislative reform is to capitalize on “constitutional moments” precipitating major developments in statutory administrative law.³⁸⁴ More generally, recognizing the constitutional dimensions of administrative law can help illuminate the areas of law that most need legislative reform. In short, “constitutional realism helps us to focus on those areas where constitutionalist values are most frequently encountered, even if not always the matters of the highest stakes.”³⁸⁵ The unwritten constitution theory not only embraces the “broad power” of Congress to “alter specific administrative mechanisms notwithstanding their constitutional aspect” but also reveals Congress's obligation to use that power.³⁸⁶

At the same time, the unwritten constitution theory reveals that legislators have a prudential obligation to promote the rule of law through the steady but thoughtful evolution of the administrative constitution. Legislative reform proposals are rarely new—they are usually just the most recent effort to modify the administrative constitution's balance of values.³⁸⁷ Over the long term, ideally, Congress should make such fundamental changes incrementally so as to promote the thoughtful evolution of unwritten constitutional norms.

Statutes establishing political control of agencies via legislative review provide a good example of how this process might work. Beginning in the early 1930s, Congress began inserting legislative veto

383. See Tidmarsh & Murray, *supra* note 325, at 627–30 (theorizing that federal common law is legitimate where there is reason to doubt the objectivity of state law and state courts).

384. See, e.g., Bingham, *supra* note 145, at 342. See generally 1 BRUCE ACKERMAN, *WE THE PEOPLE* 63, 288–89, 307 (1991) (calling for a “sober legal codification of the new constitutional solution”); 2 *id.* at 160, 170–71, 409 (1998) (discussing constitutional change).

385. Ginsburg, *supra* note 17, at 126.

386. Metzger, *supra* note 3, at 484.

387. See, e.g., Bingham, *supra* note 145, at 342 (“The current state of administrative law is the product of unique moments in history that each produced a particular balance of five key dimensions in the relationship between the government and the governed: accountability, efficiency, transparency, participation, and collaboration.”); *cf.* Shapiro & Murphy, *supra* note 23, at 6 (“Important aspects of American administrative law are vague, ambiguous, and more or less permanently contestable.”).

clauses into legislation that delegated authority to the executive and administrative agencies.³⁸⁸ Although such clauses took various forms, a legislative veto generally reserved to Congress the power to nullify an exercise of statutorily delegated authority.³⁸⁹ In 1983, *INS v. Chadha*³⁹⁰ held such congressional veto provisions unconstitutional under the Constitution's presentment³⁹¹ and bicameralism³⁹² requirements.³⁹³ Congress's response to the demise of the legislative veto was to enact the CRA,³⁹⁴ which, as previously discussed, enables Congress to block regulatory action by passing a resolution of disapproval. This component of the unwritten administrative constitution has thus evolved incrementally (and with judicial input) over the course of several decades.

The most recent proposal in the long history of congressional efforts to politically control agencies is the Regulations from the Executive in Need of Scrutiny Act of 2011, popularly known as the REINS Act.³⁹⁵ The REINS Act seeks to strengthen and expand the CRA by requiring Congress to issue a joint resolution of approval before a major rule could go into effect.³⁹⁶ In contrast, nonmajor rules would continue to go into effect absent Congress's issuance of a joint resolution of disapproval.³⁹⁷ This would be a significant constitutional change because it would alter the current balance of power between Congress and agencies.³⁹⁸ Such a profound alteration of the relationship between Congress and agencies could be seen as just the most recent step in the evolution of the political controls over administration. The REINS Act may be too big a step to take at once, however, because it would likely have far-reaching effects on other components of the administrative state's unwritten constitution. Indeed, this reality is evident in the text of the legislation, which predicts (however implausibly) that the law might restrain Congress from imprudently delegating its legislative

388. See Breyer, *supra* note 313, at 786.

389. See *id.* at 785–86.

390. 462 U.S. 919 (1983).

391. See U.S. CONST. art. I, § 7, cls. 2, 3.

392. See U.S. CONST. art. I, §§ 1, 7, cl. 2.

393. See *Chadha*, 462 U.S. at 956–59.

394. See 142 CONG. REC. 8197 (1996) (statement of Sens. Nickles, Reid, and Stevens). See generally Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162 (2009) (examining the origin and purpose of the CRA).

395. H.R. 10, 112th Cong. (2011).

396. See *id.* sec. 3, § 802.

397. See *id.* sec. 3, §§ 803, 807.

398. See Breyer, *supra* note 313, at 793–96; cf. Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 911–13 & nn.73–74 (2008) (discussing the literature assessing the normative and positive dimensions of political control of agency action).

authority.³⁹⁹

The constitutional character of administrative law requires Congress to approach legislation like the REINS Act with “an acute awareness of the past”⁴⁰⁰ and a holistic understanding of the likely effect of the proposed reform on the administrative constitution. These two imperatives are interrelated. Remembering the history and rationale of choices previously made is necessary to fairly and comprehensively evaluate whether a new proposal will serve constitutional values and avoid past mistakes.

C. *Revealing Administrative Constitutionalism*

A final, important consequence of viewing administrative law as an unwritten constitution is to reveal the importance of nonjudicial, subsidiary mechanisms for protecting and promoting fundamental constitutional values in the administrative context. Administrative law is often highly juricentric in the sense that it is governed by a “myth” that “to the extent that law holds administration accountable, it is [the] law in courts that counts.”⁴⁰¹ The APA, as enforced through judicial review, is frequently treated as if it were the primary (if not exclusive) mechanism for ensuring that administrative agencies operate consistently with background constitutional commitments.⁴⁰² As we have seen, a variety of other statutes, executive orders, and pressure exerted through congressional and executive oversight mechanisms constitute the bulk of available controls of administrative action.⁴⁰³ Indeed, “[h]ow administration works . . . depend[s] primarily upon the understandings, statutory precedents, and legal innovations of the executive and legislative branches, not the judiciary.”⁴⁰⁴ Viewing administrative law as an unwritten constitution requires due consideration of these essential components of the administrative constitution.

One particularly important component of the administrative constitution—agency conventions—is brought to the fore *only* by viewing administrative law as an unwritten constitutional order. Conventions, which may also be referred to as “customs and practices,” are “extrajudicial unwritten norms that are enforced by the threat of political sanctions, such as defeat in re-election, retaliation by other political institutions and actors, or the internalized sanctions of

399. See H.R. 10, § 2.

400. BRESLIN, *supra* note 16, at 73.

401. Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1258 (2006).

402. See MASHAW, *supra* note 22, at 6.

403. See *supra* Part II.

404. MASHAW, *supra* note 22, at 6.

conscience.”⁴⁰⁵ By definition, conventions are not law.⁴⁰⁶ They are invisible from a juricentric or legally formalist perspective on administration. Incorporating careful consideration of agency conventions can fill in important doctrinal and operational details that are missed by focusing exclusively on judicial rulings.⁴⁰⁷ Such conventions can also be a powerful force for furthering constitutional values during the day-to-day work of administration. Recognizing their existence and importance is a necessary precondition, however, for inculcating in administrative officials a professional ethic of administrative constitutionalism.⁴⁰⁸

CONCLUSION

This Article seeks to clarify what “constitutional” means in the administrative context. The United States was founded on a commitment to written constitutionalism. This deeply ingrained tradition supports the commonly accepted view that the powers of the federal government flow from the U.S. Constitution. But it is also widely accepted that most of the federal government’s work is accomplished through administrative agencies. These institutions are not contemplated by the Constitution. Rather, they are created by the Legislature and administered through the Executive. In response to this revolutionary change in the nation’s constitutional structure, Congress, the President, courts, and agencies have found ways to imbue administrative law with familiar constitutional principles, including the separation of powers, the rule of law, and protection for individual rights. Over the course of nearly a century of development, administrative law has thus evolved to accommodate the administrative state, filling the Constitution’s silence with an unwritten administrative constitution—a body of seemingly disparate rules that extends a uniform and recognizable set of substantive constitutional values into the modern administrative context.

405. See Vermeule, *supra* note 143, at 1182.

406. *Id.*

407. See *id.* at 1218; see also Elizabeth Fisher, *Food Safety Crises as Crises in Administrative Constitutionalism*, 20 HEALTH MATRIX 55, 66, 73, 76–77 (2010) (discussing examples of how administrative agencies are characterized by the Judiciary and how the characterization is utilized in judicial decision making); cf. John McMillan, *Re-Thinking the Separation of Powers*, 38 FED. L. REV. 423, 423–24 (2010) (urging a new framework for Australian government legal accountability capable of integrating oversight and integrity mechanisms that are independent but nonjudicial and thus do not fit comfortably in the traditional three-branch conception of separation of powers).

408. See Vermeule, *supra* note 143, at 1189–91. A different manifestation of “administrative constitutionalism” involves “actions by federal administrative agencies to interpret and implement the [written] U.S. Constitution.” Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1897 (2013).

Recognizing administrative law as an unwritten component of the nation's constitutional order may have various implications beyond those explored in this Article. In addition to supporting the legitimacy of administrative common law, it may counsel courts to be more transparent regarding the foundation and common law character of key administrative doctrines.⁴⁰⁹ The theory may similarly provide a foundation for greater administrative constitutionalism by encouraging agencies to incorporate constitutional considerations into administrative decision making.⁴¹⁰ It may also aid in assessing the normative implications of discerning legal requirements based on governmental custom and practice, including the customs and practices of the President and agencies.⁴¹¹ In these ways—and perhaps in many others—the unwritten constitution theory clarifies the constitutional character of administrative law and provides a better foundation for continuing efforts to ensure that the administrative state operates consistently with the nation's fundamental normative commitment to constitutionalism.

409. *See, e.g., Metzger, supra* note 13, at 1370 (encouraging courts to be open about their administrative common law decision making efforts).

410. *See, e.g., Metzger, supra* note 3, at 497 (arguing in favor of an approach that “centers on encouraging agencies to take constitutional values and concerns into account in their decisionmaking”).

411. *See Mashaw, supra* note 8, at 662–63 (exploring the difficulty of explaining the normative claim, reach, or practice of federal government).