

## THE ADMINISTRATIVE CONSTITUTION IN EXILE

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### ABSTRACT

*For decades, the aspiration of administrative law has been to develop legal structures that would constrain and legitimate the exercise of agency power. The fruition of that hope was the complex internal blueprint that has made modern administrative governance both successful and legitimate—the framework for executive action that many have hailed as the “administrative constitution.” Today, however, novel exercises of administrative power are crowding out old and familiar varieties, making the conventional forms of administrative action less and less relevant to the conduct of government.*

*This Article examines how the administrative constitution has changed over time and how that transformation can be better understood by reference to constitutional theory. Administrative law today confronts a conceptual choice similar to that faced by constitutional law in the wake of the New Deal: whether to treat fundamental constitutional change as exile or as evolution. When faced with that choice, living constitutionalists did not simply declare by fiat that the Constitution was “living.” Instead, they justified that assessment by explaining how democratically legitimate constitutional change occurs as a result of an entire system of constitutional*

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*construction working in concert—a system that includes courts, political parties, citizens, and social movements.*

*The problem for administrative law is that it lacks such an account of legitimate administrative constitutional evolution. The legal, political, and social mechanisms that ensure that the living Constitution is simultaneously robust, adaptable, and democratically legitimate apply much more weakly to the dynamics responsible for administrative constitutional change. Administrative law thus faces a daunting challenge: to ensure that administrative constitutional change itself occurs in a constrained and legitimate fashion. If that challenge is not met, we run the risk that we will be governed not by a robust and living administrative constitution, but by an administrative constitution “in exile.”*

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## INTRODUCTION

For the last century, the aspiration of administrative law has been to develop legal structures that would structure and channel the exercise of agency power.<sup>1</sup> This challenge was answered by the crafting of what many have called an “administrative constitution.”<sup>2</sup> These ground rules for administrative law include “structural and substantive measures,”<sup>3</sup> such as the Administrative Procedure Act (APA) and open-government laws, as well as the key precedents and conventions that shape agency action, such as *Chevron* and the presumption that agency action will be reviewable.<sup>4</sup> This core body of law is frequently credited with performing the functions of constitutional law,<sup>5</sup> but with an extra kick that the Madisonian blueprint lacks—the bonuses of efficiency, deliberativeness, and transparency. To many, modern administrative governance owes both its success and its legitimacy to this complex and enduring legal structure.<sup>6</sup>

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1. See Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 532 (2015) (“Administrative law, at root, is the process by which otherwise-unencumbered agency officials are legally and politically constrained in an effort to prevent abuse and to confer legitimacy on the power that is exercised. It is how both rational and accountable administration is promoted.”).

2. Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1899-900 (2013) (“[A]dministrative constitutionalism also encompasses ... the construction (or ‘constitution’) of the administrative state through structural and substantive measures.”); see *infra* notes 25-42 and accompanying text (describing term’s origins and modern usage).

3. Metzger, *supra* note 2, at 1900.

4. See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 651-52 (2000) (“Under this [*Chevron*] doctrine, courts will defer to an agency’s interpretation of an ambiguous statute if the agency has been charged with administering the statute and the agency’s interpretation is based on a ‘permissible’ reading of the statute.”); Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 739 (2004) (“[T]he doctrine of *Chevron v. Natural Resources Defense Council* calls generally for judicial deference to agency statutory interpretations. Unless Congress has clearly answered the question at hand, *Chevron* instructs a court to defer to the agency’s reasonable interpretation of a statute it administers.”).

5. See, e.g., Emily S. Bremer, *The Unwritten Administrative Constitution*, 66 FLA. L. REV. 1215, 1221 (2014) (“[A]dministrative 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.”); *id.* at 1219 (“While this unwritten administrative constitution is not formally entrenched, it has proven remarkably enduring.”).

6. See *id.* at 1219-20.

Recently, however, others have discerned deepening cracks in this edifice. In these accounts, the administrative constitution's central commitments are becoming irrelevant to the ongoing functioning of the administrative state. Administrative law has become a "lost world," Daniel Farber and Anne Joseph O'Connell recently wrote in one such account, as the administrative state's "actual workings ... have increasingly diverged from the assumptions animating the APA and classic judicial decisions."<sup>7</sup>

We have come to a strange pass. As emphatically as some have insisted upon the utility, centrality, and durability of the administrative constitution, others now argue that the basic constraints of that administrative constitution have become attenuated. The administrative constitution is widely hailed as a meaningful checkpoint that rationalizes and legitimates consequential administrative action—and is also dismissed as an outmoded set of rules that no longer has real purchase on a significant set of such actions. The term "administrative constitution" is becoming something akin to one of those oddities of English, the contronym; it has come to carry, like the words "moot" or "sanction," two simultaneous and contradictory connotations—that it is both essential and dispensable.

So, which is it? Just what sort of constitution is this "administrative constitution," and what exactly is happening to it right now? Are the march of time and the pressure of politics rendering it, and the values it aspires to shield, obsolete? Or, alternatively, is it essentially intact and simply adapting, as certain constitutions seem to do when circumstances demand?<sup>8</sup>

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7. Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1140 (2014). Related accounts, upon which I draw throughout, include David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265 (2013); Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 536 (2009); Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1800 (2015); Michaels, *supra* note 1; and Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1133 (2009).

8. See Bremer, *supra* note 5, at 1233 ("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.... 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.") (footnotes omitted).

On one threshold point—whether a significant type of change is afoot—there is little room for disagreement. As with privatization<sup>9</sup> and new governance,<sup>10</sup> we are witnessing the proliferation of new and “unorthodox” forms of administrative government; but *unlike* privatization or new governance,<sup>11</sup> these new forms of administrative government are emerging within the four walls of the existing administrative state. For their legality, these new measures rely upon facets of administrative law—the exercise of enforcement discretion, regulation free of judicial review, exceptions to rulemaking requirements, and so forth—that have long existed as a formal matter, but that traditionally have had a modest footprint. Today, regulatory measures predicated on these formerly exceptional facets of administrative law affect the rights and obligations of millions of individuals and public and private entities in myriad regulatory contexts.<sup>12</sup>

In thinking about what to make of this shift, consider an analogy to constitutional law. Before the New Deal, the Commerce Clause and the spending power existed. But *before* the New Deal era, the combined significance of these provisions was much narrower than their collective significance *after* the New Deal era. The consequence of this change was a dramatic shift in power toward the federal government and away from the states, and toward the state and federal governments from private parties.<sup>13</sup>

Today, administrative law stands at a similar fork. The provisions of administrative law that authorize regulation free from procedural constraint or judicial review have attained a degree of significance in the conduct of government very different from the significance they formerly had. These aspects of administrative law—like the post-New Deal Commerce Clause and spending power—have a far larger footprint than they used to have. The

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9. See generally Jon D. Michaels, *Privatization's Progeny*, 101 GEO. L.J. 1023 (2013).

10. See, e.g., Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 546 n.6 (2000); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 344 (2004).

11. See Gluck, O'Connell & Po, *supra* note 7, at 1800 (enumerating several “tools” for unorthodox rulemaking that are “being used in many instances for different purposes than those for which they were initially introduced, and often with increasing frequency”).

12. See *infra* Part II.

13. See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 425 (1987).

consequence, again, has been to shift how effective power is allocated among the branches of government and the public—in this case, by moving power toward the federal executive and away from Congress, the judiciary, and private parties. In short, what is occurring in administrative law today looks similar to what occurred in constitutional law in the New Deal period.

The analogy is not a perfect one, of course, and it is one that should not be overstated. Still, the comparison helpfully illuminates the curious ambivalence we now observe about the status of the administrative constitution. When some scholars looked back at the New Deal era, they famously (or infamously) concluded that the original meaning of the Constitution went into “exile”<sup>14</sup> or was “lost”<sup>15</sup> in that era. Today, something analogous is happening within administrative law scholarship. As anomalous exercises of administrative power have proliferated in scope and grown in significance, the original administrative constitution seems to be vanishing into a kind of exile of its own. The diagnosis of loss or exile is one response to a dawning recognition that a set of “conventions” with constitutional flavor is gradually coming unraveled.<sup>16</sup>

Of course, as constitutional law scholarship reflects, exile is not the only possible diagnosis for such a shift. Like constitutional law in the wake of the New Deal, administrative law today confronts a simple conceptual choice: whether to treat fundamental constitutional change as *exile* or as *evolution*. When faced with that choice, the constitutional theorists who rejected the notion of exile did not do so by simple fiat. Rather, they justified their assessment of the Constitution as a “living” document by offering nuanced descriptions of how *legitimate* constitutional change occurs.<sup>17</sup> Such change,

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14. See Douglas H. Ginsburg, *Delegation Running Riot*, REGULATION, Winter 1995, at 83, 83-84 (1995) (book review), <http://object.cato.org/sites/cato.org/files/serials/files/regulation/1995/1/v18n1-9.pdf> [<https://perma.cc/F7HQ-YQYL>] (contending that since the New Deal, the nondelegation doctrine, the doctrine of enumerated powers, substantive due process, and other constitutional rules have been in “exile” or banishment).

15. See generally RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION (2004).

16. See Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1182, 1186 (2013) (describing the role of conventions, or “extrajudicial unwritten norms,” in shaping administrative law).

17. I use the term “living constitutionalism” as shorthand for varying theories of constitutional law that, at their core, seek to explain and justify constitutional change outside the Article V amendment process. As David Strauss put it, “[l]iving constitutionalism is about

according to one typical account, depends on an “entire *system* of constitutional construction” working in concert—a system that includes “political branches, courts, political parties, social movements, interest groups, and individual citizens.”<sup>18</sup> If the Constitution is a living tree, then this is the surrounding ecosystem that keeps that tree rooted in democratic soil even as it continues to grow and change.<sup>19</sup>

The problem is that this kind of account, attractive though it may be for ordinary constitutional change, does not easily translate to the context of administrative law. The networks and mechanisms that ensure that constitutional law is simultaneously robust, adaptable, and democratically legitimate apply much more weakly to administrative law.<sup>20</sup> Whereas courts, political parties, civil society, and social movements have been careful superintendents of ordinary constitutional change, they play significantly diminished roles in monitoring administrative constitutional change.<sup>21</sup>

We are thus left with a challenge. If we are to continue to take seriously the concept of the administrative constitution, we must also think seriously about how that constitution can permissibly evolve over time.<sup>22</sup> To put it another way, just as constitutional law has long aspired to do, administrative law must seek to ensure that *its* constitutional evolution is legitimate.<sup>23</sup> This will be no small task.

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how constitutional principles change, not about how they get established in the first place.” DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 117 (2010). This family of theories includes those propounded by David Strauss, Ronald Dworkin, Laurence Tribe, Bruce Ackerman, Jack Balkin, and others.

18. JACK M. BALKIN, *LIVING ORIGINALISM* 279 (2011) (emphasis added).

19. See STRAUSS, *supra* note 17, at 36-37.

20. See *infra* Part IV.

21. See *infra* Part IV.

22. See Stephen E. Sachs, *The “Constitution in Exile” as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253, 2256 (2014) (“[All] sensible constitutional theor[ies] ... distinguish between the law and legal practice, and they require changes in practice to take a certain form—whether as high politics, slow common law evolution, or construction of capacious constitutional text—to effect a valid change in the law. Changes without that form are deemed legally invalid, even if they eventually gain acceptance.”).

23. See William N. Eskridge, Jr., *America’s Statutory “constitution”*, 41 U.C. DAVIS L. REV. 1, 44 (2007) (“[W]hether we think in Aristotle’s terms of a small ‘c’ constitution or in contemporary terms of the Large ‘C’ document, the fundamental institutions and norms of our democracy require a balance of (1) stability over periods of time, (2) adaptability to new socioeconomic and political circumstances, and (3) legitimation through popular deliberation.”).

But until it is accomplished, we risk the prospect of being governed not by a robust and living administrative constitution, but instead by an administrative constitution in exile.

A final point must be stressed at the outset. Throughout, this Article applies the argot of constitutional law to elements of administrative law that are obviously statutory, regulatory, or common law in character. In one sense, not much turns on this choice of locution; swap in “fundamental administrative law values” for “the administrative constitution,” and the account below remains essentially intact. But one should not rush to make that swap. Administrative law has much to learn from constitutional theory on the topic of understanding and addressing fundamental legal transformation. For that payoff alone, the metaphor of the administrative constitution is well worth treating seriously.<sup>24</sup>

This Article proceeds in four parts. Part I introduces the idea of the administrative constitution in some important areas of federal law. Part II describes the marginalization of the administrative constitution. Part III sets out the conceptual choice between a constitution in exile and a living administrative constitution. Part IV assesses the extent to which living constitutionalist accounts translate to the administrative law context. A brief conclusion follows.

## I. THE IDEA OF THE ADMINISTRATIVE CONSTITUTION

No court has ever used the term “administrative constitution.”<sup>25</sup> The term seems to have made its debut in legal scholarship in an

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24. This project adds to a growing collection of articles that apply constitutional theory to administrative law. *See, e.g.*, Bremer, *supra* note 5; Sharon B. Jacobs, *The Administrative State's Passive Virtues*, 66 ADMIN. L. REV. 565 (2014); Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207 (2015); Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479 (2010) [hereinafter Metzger, *Ordinary Administrative Law*]; Vermeule, *supra* note 16, at 1165. An earlier wave of this work fruitfully harnessed federalism theory to enrich our understandings of the administrative state. *See, e.g.*, Stuart Minor Benjamin & Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress*, 57 DUKE L.J. 2111 (2008); Mendelson, *supra* note 4; Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023 (2008).

25. For tractability, this narrative focuses on federal administrative law in the period from 1900 onwards, but the administrative state is of more venerable vintage than that. *See generally* Jerry L. Mashaw, *The American Model of Federal Administrative Law: Remembering the First One Hundred Years*, 78 GEO. WASH. L. REV. 975 (2010).

article by Richard Stewart, to whom the term denoted “a charter of basic principles for regulatory and administrative law.”<sup>26</sup> At almost the same time, Donald Elliott described the “constitution of the administrative state” as providing “structure and control over the enormous array of federal ... agencies ... and authorities that now exercise power to make law in various forms.”<sup>27</sup> Writing more narrowly about the APA, Steven Croley assessed the “simile” that treats that statute as “the constitution of the regulatory state.”<sup>28</sup> Jerry Mashaw, who used the term in the title of his comprehensive historical account of the early years of the administrative state, likewise used the phrase to refer to the law that “structures political control, administrative process, and judicial review.”<sup>29</sup> Gillian Metzger explored the concept in her illuminating account of administrative constitutionalism, a related but distinct idea.<sup>30</sup> Most recently, Emily Bremer provided a thorough explication and a ringing defense of the “unwritten administrative constitution.”<sup>31</sup>

Even if the term as such is employed relatively infrequently, the idea itself has long been floating around. Everyone has heard the APA described as “constitutional” or “quasi-constitutional.”<sup>32</sup> Other measures that bind and constrain agencies, such as the Freedom of Information Act (FOIA), are likewise often labeled “constitutional” in character.<sup>33</sup> By the same token, when proposals are floated

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26. Richard B. Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 YALE L.J. 1537, 1539 (1983).

27. E. Donald Elliott, *INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 169-70.

28. Steven P. Croley, *The Administrative Procedure Act and Regulatory Reform: A Reconciliation*, 10 ADMIN. L.J. AM. U. 35, 36-39 (1996).

29. JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 285-86 (2012) (describing the emergence of the “set of constitutional conventions concerning the place of administration in American government” in the first one hundred years of America’s history).

30. See Metzger, *supra* note 2, at 1900 (distinguishing the concept of the administrative constitution from “administrative constitutionalism,” which has roots in the departmentalist notion that executive branch actors can and should articulate constitutional norms); see also Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799 (2010) (discussing administrative interpretation and implementation of the Constitution in the context of equal employment).

31. Bremer, *supra* note 5, at 1219.

32. See *infra* note 49.

33. See, e.g., Elliott, *supra* note 27, at 170 (describing how FOIA is quasi-constitutional because, as a framework statute for administrative law, it has some characteristics of

for amending the core elements of the administrative constitution, discussions of those proposals frequently deploy constitutional language.<sup>34</sup> For example, almost twenty years ago, as Newt Gingrich gavelled in a Republican-majority House, Steven Croley remarked on the widespread perception among legal commentators that the proposals for regulatory reform pending before that Congress were “tantamount to an attack on the regulatory constitution itself, a constitutional crisis of sorts.”<sup>35</sup> *Plus ça change, plus c’est la même chose*: in 2015, as a newly installed Republican majority in the 114th Congress introduced repackaged versions of many of Gingrich’s regulatory reform ideas, prominent opponents of those proposals from the legal academy once again framed their criticisms in administrative constitutional terms, noting that “[t]he APA has served for nearly 70 years as a kind of Constitution for administrative agencies and the affected public.”<sup>36</sup>

It hardly needs saying that these scholars, and the scores of others who have used this terminology, are not the collective victims of some kind of mass category error about the kind of law that qualifies as fundamental or constitutional in the American legal system. Clearly, the “administrative constitution” is neither codified in a single place nor formally entrenched against change in the way that the “large C” Constitution is,<sup>37</sup> and it is safe to assume that nobody

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constitutional law).

34. See, e.g., *infra* notes 35-36.

35. See Croley, *supra* note 28, at 36. Professor Croley did not feel these worries were well-founded. See *id.* at 47-48 (arguing that the reform proposals then under consideration “hardly constitute a dramatic departure from the current administrative-process regime”).

36. Letter from Admin. Law Professors to Bob Goodlatte, Chairman, and John Conyers, Jr., Ranking Member, House Comm. on the Judiciary (Jan. 12, 2015) [hereinafter Letter] (on file with the House Comm. on the Judiciary) (“The APA has served for nearly 70 years as a kind of Constitution for administrative agencies and the affected public—flexible enough to accommodate the variety of agencies operating under it and the changes in modern life. For that reason, it has been rarely, and only in a minor way, amended in all those years.... [H.R. 185, the proposed Regulatory Accountability Act of 2015] would make ordinary rulemaking so expensive and cumbersome as, essentially, to bring it to a halt.”).

37. See Bremer, *supra* note 5, at 1233-34 (“[A]dministrative 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 APA tomorrow with no need to amend the Constitution or resort to extraordinary procedures.... Similarly, administrative law is not higher law, as evidenced by its relationship to both the Constitution and ordinary statutes. If an administrative law conflicts with the Constitution, the latter prevails.”) (footnote omitted).

who uses that term thinks that it is. Rather, what the widespread and persistent use of this locution reflects is simply the realist recognition that the core components of administrative law play the functional role of a constitution for the regulatory state notwithstanding their lack of formal codification or entrenchment. As Emily Bremer puts it, the rules of the administrative constitution “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.”<sup>38</sup> The norms of the administrative constitution are simply a subset of the many “small-c” or “extracanonical” constitutional norms that persist outside the parchment boundaries of the canonical Constitution.<sup>39</sup>

The components of the administrative constitution emerged gradually over a considerable period of time. Jerry Mashaw describes the twentieth century as a period in which “[a]dministrative process went from being the artifact of particular statutes and practices within individual agencies to one based importantly on transsubstantive legislation and judicial interpretations.”<sup>40</sup> The process of standardization described by Mashaw eventually coalesced around a standard legal picture of administrative law.<sup>41</sup> In this picture, administrative law is organized around certain transsubstantive elements: constraints on agency process to ensure reasoned and fair

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38. *Id.* at 1235; see also ADAM TOMKINS, PUBLIC LAW 3-4 (2003); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 415-17 (2007) (discussing the need for more constituting than the Constitution provides due to the complex nature of the United States’s legal system).

39. E. Donald Elliott, *Constitutional Conventions and the Deficit*, 1985 DUKE L.J. 1077, 1097 (“[M]uch of the law that performs the function of constituting our government and defining power relationships among institutions is performed not by the Constitution as such, but by a framework of statutes and other laws.” (citing Gerhard Casper, *The Constitutional Organization of the Government*, 26 WM. & MARY L. REV. 177, 187, 197-98 (1985))); Young, *supra* note 38, at 459 (“The overwhelming majority of changes in our constitutional structure since the Founding have resulted from changes and additions to the extracanonical norms by which we implement, specify, and supplement the canonical document.”).

40. Mashaw, *supra* note 25, at 980-81.

41. See Farber & O’Connell, *supra* note 7, at 1142 (describing the underlying conceptual framework: “Using the authority granted to it by [one or more statutes], the [agency issued (or occasionally, declined to issue)] an [order/rule] by applying [the standard established by the statute(s)] to the facts before it”).

decision making, internal checks and balances, judicial oversight, and transparency.<sup>42</sup>

These are the elements of the administrative constitution as that term is used here.<sup>43</sup> Each of these elements plays a dual role: it *constrains* administrative action in various ways, and, as a result, it *legitimizes* that action.<sup>44</sup> The link between constraint and legitimacy is vital.<sup>45</sup> For many commentators—scholarly and popular—the answer to the question, “Is the administrative state basically good or basically bad?” seems to move in lockstep with the answer to the question, “Is the administrative state properly constrained?” In a two-by-two grid of responses to these two yes-or-no questions, really only two cells have any significant headcount: the one where the administrative state is “good and constrained,” and one where it is “bad and unconstrained.” Those who think that the administrative state is basically a bad idea tend not to admit that it is meaningfully constrained.<sup>46</sup> Perhaps the most notable candidates for

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42. See Bremer, *supra* note 5, at 1234-44.

43. Variations will inevitably occur, but most people would probably include this quartet of elements on their list of administrative constitutional components. See *id.* at 1235 (“Identifying the subset of rules that make up the administrative state’s unwritten constitution has its difficulties, and some indeterminacy may be unavoidable.”). Several other laws are also plausible candidates for a list of administrative constitutive provisions (for example, the Federal Advisory Committee Act (FACA), the Negotiated Rulemaking Act (NRA), and the National Environmental Policy Act (NEPA)). These are all transsubstantive enactments that, like the APA and FOIA, regulate executive action in a broad-gauge fashion. I take no strong view on their inclusion or exclusion; my project here is to describe what is likely to be the least common denominator between varying conceptualizations of the administrative constitution. To this end, my account emphasizes elements with either the greatest footprint on administrative law practice or the longest pedigree in administrative law—in some cases, with roots extending back over a century *before* the New Deal. See MASHAW, *supra* note 29, at 312-13 (describing nineteenth-century administrative law’s establishment of “relatively stable patterns of expectations ... concerning the organization and processes of administrative functions”).

44. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1670-71 (1975) (“The traditional conception of administrative law ... bespeak[s] a common social value in legitimating, through controlling rules and procedures, the exercise of power over private interests by officials not otherwise formally accountable.”).

45. See Michaels, *supra* note 1, at 519 (“[D]espite this uncertainty [during the early years of the Administrative Era], important work was done anticipating, challenging, and most significantly starting to constrain these burgeoning power players. The fruit of that work is known today as Administrative Law.”) (footnote omitted).

46. See, e.g., PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014) (arguing that administrative law is not a natural development of contemporary law but an unlawful and unconstitutional return to absolutism).

inclusion in the fourth cell—the “good but unconstrained” box—are Richard Stewart and Adrian Vermeule. Stewart maintained his *sang froid* notwithstanding reaching the conclusion, in his justly famous article, that agency discretion in the use of delegated power is restricted neither by traditional “procedural mechanisms” nor by the then-emerging “interest representation model.”<sup>47</sup> More recently, Vermeule endorsed the ongoing “tradeoff” that “justif[ies] abuses of power as the unavoidable byproduct of a package solution that is increasingly desirable overall.”<sup>48</sup>

The point is that defenses of the administrative state generally correlate with the view that controls on the administrative state are robust; attacks upon the administrative state generally correlate with the view that those controls are absent or weak. The administrative constitution is the collection of the most important constraints on the administrative state. The perception of administrative government’s legitimacy will therefore vary as a function of these constraints. With that in mind, let us review the various elements of the administrative constitution.

### A. Agency Procedure

At the center of the administrative constitution sits the APA, a statute that for decades has been hailed as “constitutional” or

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47. Stewart, *supra* note 44, at 1805 (concluding that “the delegation of broad authority to agencies has gravely undermined the ability of the traditional model to control government power, but that no general solution—either in terms of procedural mechanisms or authoritative rules of decision—for the resulting problem of administrative discretion has yet emerged”).

48. Adrian Vermeule, *Optimal Abuse of Power*, 109 Nw. U. L. REV. 673, 685 (2015); see also *id.* at 694 (noting that the administrative state has “grop[ed] towards a set of arrangements that tolerate a certain amount of official abuse as the unavoidable byproduct of a package solution that achieves the other aims of the administrative state”).

“quasi-constitutional” in stature.<sup>49</sup> Today, the APA is “[t]he framework for understanding most national lawmaking.”<sup>50</sup>

The APA was the fruit of a historic political compromise,<sup>51</sup> and its text has survived largely intact since 1946.<sup>52</sup> The APA was enacted in response to concerns of American lawyers and politicians that the newly powerful administrative state was in risk of “lurching toward tyranny.”<sup>53</sup> This perception flowed from a widely shared sense that “[a]gency proceedings were opaque, processes diverged markedly from standard judicial adversary procedures, and agencies’ combinations of legislative, executive, and judicial functions struck many as aggrandizing executive power and creating the potential for bias and prejudice in administrative determinations.”<sup>54</sup> The

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49. See, e.g., Bremer, *supra* note 5; Croley, *supra* note 28 (analyzing the “simile” between the APA and the Constitution); Tom Ginsburg, *Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law*, in *COMPARATIVE ADMINISTRATIVE LAW* 117, 125 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010) (“It seems difficult to exclude the US Administrative Procedures Act, for example, from the scope of the ‘constitution outside the constitution.’”); Mashaw, *supra* note 25, at 980 (calling the APA “quasi-constitutional”); Metzger, *supra* note 2; Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 *VA. L. REV.* 253, 253 (1986) (“My thesis is a simple one: the APA is more like a constitution than a statute.”); Antonin Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and the Supreme Court*, 1978 *SUP. CT. REV.* 345, 363 (noting the “obvious” fact that “the Supreme Court regarded the APA as a sort of super-statute, or subconstitution, in the field of administrative process”); Note, *Comparative Domestic Constitutionalism: Rethinking Criminal Procedure Using the Administrative Constitution*, 119 *HARV. L. REV.* 2530, 2530 (2006) (gathering sources for proposition that the APA “is as much a constitution as a statute”).

50. WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 10 (2010).

51. See generally Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 *VA. L. REV.* 219 (1986) (discussing the events in Congress that led to investigations into the methods of federal agencies, ultimately resulting in the enactment of the APA); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 *NW. U. L. REV.* 1557 (1996) (discussing the political debate surrounding the formation and enactment of the APA).

52. See Croley, *supra* note 28, at 39 (“Though controversial legislation sometimes proves short-lived, the New Deal’s administrative-process statute has endured. Its core provisions have seen very few substantive amendments since its framing in 1946.... The provisions of section 553, the Act’s revolutionary rulemaking section, have remained much intact since the Act’s passage.”) (footnote omitted).

53. Mashaw, *supra* note 25, at 980; see also Heckler v. Chaney, 470 U.S. 821, 848 (1985) (Marshall, J., concurring) (“[T]he *sine qua non* of the APA was to alter inherited judicial reluctance to constrain the exercise of discretionary administrative power—to rationalize and make fairer the exercise of such discretion.”).

54. Mashaw, *supra* note 25, at 980.

“standard account” of the APA is that it should be conceptualized as “an attempt to translate liberal legalism into a world of large-scale delegation to the executive, substituting procedural controls and judicial review for legislative specification of policies.”<sup>55</sup>

The APA requires that agency decision making not be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>56</sup> It requires agencies to base their decisions on the statutory factors specified by Congress<sup>57</sup> and to eschew consideration of any factors *not* specified by Congress.<sup>58</sup> The APA also places numerous restrictions on the processes by which agencies create binding legal rules and decide cases.<sup>59</sup> The agency “must have evidence before it acts and must provide (or at least be prepared to provide) an explanation for its actions that links the decision to the statutory standards.”<sup>60</sup> Whether the agency is acting by rulemaking or by adjudication, the APA shields the right of private parties to submit evidence to the agency for its consideration, and courts have construed the statute to require the agency to consider the full corpus of the evidence submitted when deciding how to act.<sup>61</sup>

As Alan Morrison explains, “the APA has been, by and large, a guardian of justice and a protector of the people’s right to review the actions of their government and its relations with other societal institutions.”<sup>62</sup> Such sentiments are not uncommon.<sup>63</sup> The APA grounds the claim that agency action carries at least as much legitimacy as congressional action.<sup>64</sup> The APA’s safeguards and

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55. ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 9 (2011).

56. 5 U.S.C. § 706(2)(A) (2012).

57. *See* *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-14 (1971).

58. *See* *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 645-47 (1990).

59. *See* Farber & O’Connell, *supra* note 7, at 1152.

60. *Id.*

61. *See id.* at 1153; Morrison, *supra* note 49, at 258-59.

62. Morrison, *supra* note 49, at 270.

63. *See, e.g.*, Evan J. Criddle, *Mending Holes in the Rule of (Administrative) Law*, 104 NW. U. L. REV. 1271, 1276 (2010) (“Traditional administrative procedures such as notice-and-comment rulemaking facilitate public justification by compelling agencies to articulate objectively reasonable, public-regarding justifications for their policy choices.... [T]he practice of public justification serves as both the currency of public legitimacy and the guardian of legality within the administrative state.”).

64. *See* Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1407-08 (2000) (describing Peter Schuck’s argument that “agency decisionmaking is more responsive to the public interest than

restrictions on agency action are widely accepted as playing a critical role in guiding and legitimating administrative decision making.<sup>65</sup>

### *B. Internal Checks and Balances*

A second central component of the administrative constitution is the internal separation of powers rules that structure the exercise of authority within agencies. Although “[t]he meaning of ‘internal separation of powers’ is not immediately self-evident,” the concept “is most often equated with measures that check or constrain the Executive Branch, particularly presidential power,” in which those measures operate within the confines of the executive branch.<sup>66</sup>

Perhaps most prominent among these mechanisms are agency rules that place Chinese walls between the performance of the rule-making and adjudicative functions of an agency and the performance of its investigation and enforcement functions.<sup>67</sup> This “separation of functions” principle protects the due process value of unbiased decision making in the context of adjudication.<sup>68</sup>

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is congressional legislation”); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1515 (1992) (calling bureaucracy “the best hope of implementing civic republicanism’s call for deliberative decisionmaking informed by the values of the entire polity”); Peter M. Shane, *The Rule of Law and the Inevitability of Discretion*, 36 HARV. J.L. & PUB. POL’Y 21, 25-26 (2013) (contrasting—unfavorably—the process of legislating with the process of notice-and-comment rulemaking by the FCC).

65. See, e.g., Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 697 (2000) (noting that “regulatory decisionmaking needs special forms of legitimation that enhance popular participation, provide ongoing tests for bureaucratic claims of knowledge, and encourage serious normative reflection upon the policy choices inevitably concealed in abstract statutory guidelines”); Eskridge, Jr., *supra* note 23, at 12 (“The APA scales down the Constitutional rules for lawmaking and adjudication for the modern administrative state, with openness and judicial review as the primary checks on arbitrary agency decisions.”).

66. Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 426, 429 (2009).

67. See *id.* at 429.

68. Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 759 (1981) (describing the “separation of functions” principle as one that prevents “agency staff members who have prepared or presented evidence or argument on behalf of or against a party to an administrative proceeding [from participating] in the decision”); Metzger, *supra* note 66, at 430 (noting that the “[d]ivision of employees into distinct organizational units or agencies can also serve to limit the role of raw political calculations in setting policy, in part by breeding agency cultures that foster more professional decision making based on expertise”).

The professional civil service supplies another internal check. As Jon Michaels has emphasized, “[c]ivil servants are politically insulated” and are thus “well positioned to push back on any tendency agency leaders might have to skirt laws and promote hyperpartisan interests.”<sup>69</sup> They thus play a crucial role in ensuring that “apolitical expertise” helps to drive agency decision making.<sup>70</sup>

Like the other components of the administrative constitution, the rules protecting internal checks and balances serve not only a practical purpose but also play a legitimating function. Michaels notes that “the separating and checking of administrative powers is about more than simply preventing abuse. Administrative separation of powers has an affirmative component as well: the legitimization of administrative power.”<sup>71</sup> By preventing the concentration of state power in a single unchecked source, administrative separation of powers protects pluralism in administrative governance and thereby enhances support for the administrative state. “Administrative separation of powers,” in this account, represents nothing less than “an act of constitutional restoration, anchoring administrative governance firmly within the constitutional tradition of employing rivalrous institutional counterweights to promote good governance, political accountability, and compliance with the rule of law.”<sup>72</sup>

### *C. Judicial Review*

A third central component of the administrative constitution is the doctrine that shapes the availability and form of judicial review. As Jody Freeman observes, “[t]he purpose of judicial review is to guarantee the legality of agency decision making by monitoring fidelity to legal procedure and compliance with substantive norms of rationality.”<sup>73</sup> The key role played by courts is to constrain agency action by ensuring that agencies engage in reasoned decision making that is faithful to their statutory mandates.<sup>74</sup> Courts require

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69. Michaels, *supra* note 1, at 540-41.

70. *Id.* at 554.

71. *Id.* at 530.

72. *Id.* at 520.

73. Freeman, *supra* note 10, at 546 n.6.

74. Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1815 (2012) (“Under prevailing understandings of the

agencies to have reasons for their decisions, and courts also determine which kinds of reasons “count” and which do not.<sup>75</sup> Reasons that are “[t]raditionally” regarded as valid “have taken the form of empirical evidence, policy arguments, agency expertise, or logical arguments based on statutory language or the purpose of the broader statutory scheme administered by the agency.”<sup>76</sup>

A related but distinct role played by judicial review is to enforce reason-giving by agencies.<sup>77</sup> In *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*, the Supreme Court interpreted *SEC v. Chenery Corp.* to lay down the principle that a court conducting judicial review “may not supply a reasoned basis for the agency’s action that the agency itself has not given.”<sup>78</sup> By forcing agencies to shoulder the burden of supplying a reasoned decision, *Chenery* “[made] agencies into reason-giving institutions.”<sup>79</sup>

Judicial review of agency action counters nondelegation concerns.<sup>80</sup> Although the breadth of power delegated to executive and

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arbitrary-and-capricious standard, a court’s role in reviewing agency exercises of policymaking discretion is to ensure “that agencies have engaged in reasoned decision making.”)

75. *See id.*

76. *Id.*

77. *See* Barron & Rakoff, *supra* note 7, at 327 (“While Congress has no general obligation to provide reasons for the rules it promulgates ... agencies do.”); Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 876 (2009) (“[I]n administrative law, the agency’s obligation to explain its actions is rooted in the APA and is significantly more burdensome than the government’s obligation to explain under rational basis review.”).

78. *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

79. Paul R. Verkuil, *The Wait Is Over: Chevron as the Stealth Vermont Yankee II*, 75 GEO. WASH. L. REV. 921, 922 (2007); *see also* Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952, 960 (2007).

80. *See Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (D.C. Cir. 1976) (Leventhal, J., concurring) (“Congress has been willing to delegate ... broadly—and courts have upheld such delegation—because there is court review to assure that the agency exercises its delegated power within statutory limits, and that it fleshes out objectives within those limits by an administration that is not irrational or discriminatory.”); Metzger, *Ordinary Administrative Law*, *supra* note 24, at 491 (pointing to the role played by judicial review under the arbitrary-and-capricious standard in mitigating “constitutional concerns with broad delegations of power to agencies and the attendant risk of unaccountable and arbitrary exercises of administrative power”). Other administrative law incarnations of the nondelegation doctrine have also been identified or proposed. *See* Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 NW. U. L. REV. 1569, 1595 (2013) (arguing for a nondelegation canon protective of Article III values); Stack, *supra* note 79, at 958-59 (arguing that *Chenery*’s requirement of contemporary agency explanation is a form of nondelegation doctrine); *see also* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 329 (2000).

independent agencies may appear “questionable” as a formal constitutional matter, these broad delegations “have been allowed largely on the assumption that courts would be available to ensure agency fidelity to whatever statutory directives have been issued.”<sup>81</sup> The checking function of judicial review both constrains and legitimates agency action.<sup>82</sup>

#### *D. Transparency*

Due to concerns about “bureaucratic unaccountability” shared by “[c]itizens and lawmakers alike,” Congress in the 1960s and 1970s enacted laws that would open government “to the light of public scrutiny.”<sup>83</sup> Among these were the original and the amended FOIA.<sup>84</sup> Like the APA, these statutes were enacted to ensure the existence of agency decision-making structures that are responsive to the reasoned public interest.<sup>85</sup>

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81. CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 143 (1990); see also Peter L. Strauss, *The President and the Constitution*, 65 *CASE W. RES. L. REV.* 1151, 1162 (2015) (“And for the decisions of the mediated presidency, it is not so that [q]uestions ... which are, by the constitution and laws, submitted to the executive, can never be made in this court.’ Rather, the ability of citizens to obtain judicial review to assess the legality of actions adversely affecting them appears to be the very coin by which the legislative creation of those duties must be purchased. As Judge Harold Leventhal once trenchantly remarked, ‘Congress has been willing to delegate its legislative powers broadly—and courts have upheld such delegations—because there is court review.’”) (footnote omitted).

82. See LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 320 (1965) (“The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid.”); Criddle, *supra* note 63, at 1276 (“Upon judicial review, agencies must also persuade courts that their actions have a reasonable legal and factual basis, and courts, in turn, must publicly justify their own rulings based on relevant legal principles. By ensuring that those who exercise public powers satisfy the rule of law’s constraints, the practice of public justification serves as both the currency of public legitimacy and the guardian of legality within the administrative state.”); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 *U. CHI. L. REV.* 1383, 1413 (2004) (noting that in the “dominant narrative of modern administrative law,” courts are “key players who help tame, and thereby legitimate, the exercise of administrative power”).

83. Fred H. Cate et al., *The Right to Privacy and the Public’s Right to Know: The “Central Purpose” of the Freedom of Information Act*, 46 *ADMIN. L. REV.* 41, 46 (1994) (quoting *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 372 (1976)).

84. See *id.* at 46-48 (describing FOIA’s enactment and its amendment by the government in the Sunshine Act and the Anti-Drug Abuse Act).

85. See Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 *STAN. L. REV.*

FOIA has been widely hailed “as a part of modern ‘small c’ constitutional practice.”<sup>86</sup> “The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”<sup>87</sup> Because open government laws perform this vital checking role, these laws also have a legitimating function.<sup>88</sup> Transparency of agency action is a key chip “in the bargained-for exchange of agency power for agency accountability that underpins the legitimacy of the modern administrative state.”<sup>89</sup>

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The elements just described define the administrative constitution, and they bespeak the values it is meant to promote: transparency, fairness to regulated entities, reasonable and deliberate government action, and democratic legitimacy.<sup>90</sup> It is important to note one final feature of this constitution: it is not watertight. The “APA’s procedural provisions are littered with loopholes,” including “categorical exceptions and definitional quirks” that exempt many sorts of agency action from otherwise applicable

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1189, 1287 n.329 (1986) (describing FOIA as “yet another strategy for controlling administrative discretion—one based on widespread access to agency records and decisions” (citing K.C. DAVIS, *ADMINISTRATIVE LAW TEXT* 68-87 (3d ed. 1972))).

86. Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011, 1013 (2008).

87. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). As Alan Morrison has written, these transparency-enhancing statutes “reflect a fundamental change in the amount of trust that the people and Congress are willing to place in administrative agencies.” Morrison, *supra* note 49, at 269.

88. See Mila Sohoni, *The Power to Privilege*, 163 U. PA. L. REV. 487, 525 (2015) (“It is not for nothing that FOIA was codified in the sections of the U.S. Code immediately preceding the rulemaking and adjudication provisions of the Administrative Procedure Act (APA). In exchange for the ongoing privilege of wielding broad delegated power, agencies were required to be accountable to the courts and to the public.”) (footnotes omitted).

89. *Id.* at 554.

90. See Criddle, *supra* note 63, at 1276 (describing administrative law’s efforts as “cultivating governmental deliberation, transparency, fairness, reasonableness, and integrity”). Adrian Vermeule has argued that there is some irreducible level of “Schmittian” unconstraint inherent in administrative law. Vermeule, *supra* note 7, at 1104. Interestingly, the factors he cites as determining the *degree* to which administrative law is Schmittian are the elements of the administrative constitution. See *id.* at 1103-04 (citing unavailability of judicial review and broad use of APA’s exceptions as the factors that enlarge the size of the system’s “black holes and grey holes”).

procedural rules.<sup>91</sup> Open government laws likewise exempt many kinds of documents and government information from disclosure.<sup>92</sup> Judicial review is not a uniform check; the law of standing (and in particular the law of enforcement discretion) and the occasional statutory preclusion of judicial review exempt various kinds of agency action from checking by courts.<sup>93</sup> These features of administrative law—what I will loosely call its “loopholes” or its “exceptions”—enable agencies to take action that is procedurally unfettered and unchecked by courts. The next Part will elaborate on the increasing importance of this sort of agency action.

## II. THE RULE OF THE EXCEPTIONS

As Daniel Farber and Anne Joseph O’Connell have observed, administrative law generally

conceives of the administrative process as operating as follows: (1) The implementation of statutory directives (2) by statutorily designated administrators ... (3) based on reasoned consideration of the statutory standard (4) as applied to formally designated evidence (5) using procedures imposed by Congress or determined by the agency, which (6) can then be reviewed by the courts.<sup>94</sup>

But “[t]he reality,” they point out, “diverges considerably” from this picture.<sup>95</sup> In fact, “the contemporary operation of the administrative state frequently involves overlapping, unreviewable agency decisions made by unconfirmed acting agency heads or unconfirmed presidential aides, based on procedures and criteria enunciated in presidential executive orders rather than statutes.”<sup>96</sup> Other scholars

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91. See Criddle, *supra* note 63, at 1273 (footnote omitted); see also 5 U.S.C. § 553(a)-(b) (2012) (listing exceptions).

92. See 5 U.S.C. § 552(b)(1) (exempting certain executive orders from disclosure).

93. See *id.* § 701(a)(2) (exempting from judicial review agency actions that are “committed to agency discretion by law”); Heckler v. Chaney, 470 U.S. 821, 828, 830-33 (1985).

94. Farber & O’Connell, *supra* note 7, at 1154.

95. *Id.*

96. Lisa Heinzerling, Response, *Classical Administrative Law in the Era of Presidential Administration*, 92 TEX. L. REV. SEE ALSO 171, 172 (2014), <http://www.texaslrev.com/wp-content/uploads/Heinzerling-92-SeeAlso.pdf> [<https://perma.cc/AN26-DUCA>].

have similarly observed an uptick in novel and unorthodox administrative forms and structures.<sup>97</sup>

This Part illustrates these observations by describing some consequential regulatory actions that shunt aside the conventional rules of the administrative constitution. The examples discussed here share two simple but important features. First, they are a big deal. These regulatory measures affect the rights and obligations of millions of individuals and public and private entities in myriad regulatory contexts.<sup>98</sup> Second, these regulatory measures are *procedurally unfettered*. By this, I mean that in undertaking these regulatory measures, the relevant agencies did not issue a contemporaneous justification for why the measure was necessary; they did not issue a proposed policy for comment in advance of its adoption; and they did not respond publicly to input from affected parties before finalizing the action. Moreover, these regulatory measures have not so far been, and may never be, subject to judicial review on the merits (with one important exception).<sup>99</sup>

Of course, that a measure is procedurally unfettered (or not reviewable by a court) does not mean it is illegal.<sup>100</sup> As noted above, administrative law itself contemplates and authorizes various kinds of procedurally unfettered agency action.<sup>101</sup> For purposes of the

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97. See, e.g., Barron & Rakoff, *supra* note 7, at 272; Jacob E. Gersen, *Administrative Law Goes to Wall Street: The New Administrative Process*, 65 ADMIN. L. REV. 689, 690 (2013) (observing “we are in the midst of something of an agency design renaissance—a time period of fundamental change with respect to the federal bureaucracy” and arguing these changes “deriv[e] mainly, although not exclusively, from the emergence of new administrative forms of financial regulation”); Gluck, O’Connell & Po, *supra* note 7, 1800-03 (assembling empirical evidence of increasing prevalence in “unorthodox practices,” including “unconventional rulemaking” that occurs without notice and comment, the use of “executive memoranda and directives for major policy moves,” “regulation by guidance” (which is “now more common than notice-and-comment regulation”), and “unorthodox workarounds that outsource controversial issues to boards and commissions”); Strauss, *supra* note 81, at 1163 (“The Executive Office of the Presidency has grown from a handful of officials ... to hundreds of bureaucrats acting as intermediaries between President and agency, with ‘czars’ responsible for major policy concerns acting outside public administrative procedures and shielded by White House prerogatives from public view.”).

98. See *infra* note 118.

99. See *infra* notes 155-56.

100. Conversely, agency action is not automatically legal simply because it is procedurally fettered and judicially reviewable. See 5 U.S.C. § 706(a)(2) (2012) (listing several factors that may make agency action “unlawful”). See generally *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

101. See 5 U.S.C. § 553(a)-(b) (listing exceptions).

discussion here, let us stipulate that these measures are both constitutional and statutorily authorized, and furthermore that they are correctly predicated on one or more of the “loopholes” or “exceptions” to the administrative constitution.<sup>102</sup> Let us stipulate that they are, in short, *legal*. What I seek to demonstrate here is that, notwithstanding their legality, these measures do not align with the values that the administrative constitution is designed to promote.

### A. *Waivers and Delays*

During the early months of the George W. Bush Administration, the energy industry had a powerful ally in Washington, D.C.: Vice President Dick Cheney.<sup>103</sup> In 2001, President Bush established the National Energy Policy Development Group, an energy task force, and appointed Cheney as chair.<sup>104</sup> After three months of meetings, Cheney’s task force issued a report recommending reduced regulatory burdens on power, oil, and gas companies.<sup>105</sup> To carry out that recommendation, the EPA issued a rule known as the “twenty percent rule,” which dramatically increased the scope of the statutory “routine maintenance” exception to new source review.<sup>106</sup> The rule was short-lived; three years after the rule was issued, the D.C. Circuit held that it violated the Clean Air Act, which unambiguously required new source review of “‘any physical change’ that increase[d] emissions.”<sup>107</sup>

What happened next illustrates the power of silent enforcement policy: “New enforcement activity for NSR [new source review] violations all but disappeared.... [T]he twenty percent rule lived on throughout the Bush Administration as an informal enforcement policy, with the practical effect of halting NSR enforcement altogether.”<sup>108</sup>

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102. Obviously, for some measures discussed here, all three parts of this stipulation are hotly contested. This is what makes the stipulation a useful one.

103. See Eric Dannenmaier, *Executive Exclusion and the Cloistering of the Cheney Energy Task Force*, 16 N.Y.U. ENVTL. L.J. 329, 330-31 (2008).

104. *Id.* at 330.

105. See *id.* at 332.

106. Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 N.Y.U.L. REV. 795, 811 (2010).

107. *New York v. EPA*, 443 F.3d 880, 883 (D.C. Cir. 2006).

108. Deacon, *supra* note 106, at 812 n.114 (“[T]he EPA has indicated that in any event it

This vignette illustrates how agencies can achieve indirectly, via nonenforcement, what they cannot do directly.<sup>109</sup> Many agencies have relied on policies of nonenforcement to achieve aims that arguably were not authorized by statute.<sup>110</sup> On other occasions, the executive has publicly announced a policy of waiver that exempts individuals or entities from otherwise applicable legal or regulatory schemes.<sup>111</sup> Although nonenforcement and waiver policies are distinguishable—notably because nonenforcement generates less reliance<sup>112</sup>—they are points on a (rather short) spectrum; in either case, the executive branch is shaping the implementation of a statutory scheme through the exercise of enforcement discretion.

The waiver power has a long history of usage, one that cuts across party lines and administrations.<sup>113</sup> What has changed in recent years is the prominence of the executive branch's use of this administrative method. Through the use of waiver, the executive branch has facilitated “nearly wholesale administrative revision’ of major regulatory initiatives in fields ranging from the budget to education

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may apply the safe harbor in its case-by-case analysis of whether to bring enforcement actions, thus giving it de facto effect.” (quoting Jonathan Remy Nash & Richard L. Revesz, *Grandfathering and Environmental Regulation: The Law and Economics of New Source Review*, 101 NW. U. L. REV. 1677, 1678-79 (2007)).

109. *See id.* at 812-13 (“What the D.C. Circuit struck down as a clear violation of statutory authority could simply be transformed into an enforcement policy and insulated from judicial scrutiny.”).

110. *See id.* at 808-10 (collecting examples of nonenforcement by the FDA, the EPA, and the FTC).

111. *See* Catherine Y. Kim, *Immigration Separation of Powers and the President’s Power to Preempt*, 90 NOTRE DAME L. REV. 691, 693 n.6 (2014) (describing “[a]dministrative policies granting categorical relief from removal [that] pre-date the Obama Administration”).

112. *See* Barron & Rakoff, *supra* note 7, at 275 n.26 (“At the limit, administrative waivers may be hard to distinguish from administrative decisions not to enforce.”). At one end of the spectrum are “discrete, informal, and wholly revisable” one-shot nonenforcement decisions; in the middle are announced, affirmative policies of nonenforcement characterized by “clarity and ... generality”; and, finally, at the other end of the spectrum are waivers, which “assure[] the regulated party that any future conduct that conflicts with the requirement will be *lawful* so long as the waiver remains in effect.” *Id.* at 272-75. Though waivers are “often general,” they need not be. *Id.* at 275.

113. *See id.* at 272 (“Waiver is a long-standing administrative power—and not only when the requirement that is being waived is a regulation of the agency’s own making. The power to waive a *statutory* requirement ... is also something administrative actors possessed very early in our history.”). Barron and Rakoff go on to note, however, that what they dub “big waiver” is a relatively recent development; the examples they collect span the period from 2001 to 2013. *Id.* at 278-90.

to welfare policy.”<sup>114</sup> In health care,<sup>115</sup> immigration,<sup>116</sup> and education,<sup>117</sup> the executive branch has issued waivers to statutory provisions or delayed the implementation of statutory provisions beyond specified deadlines. These recent waivers and delays do not affect merely the regulatory burdens that must be borne by a subset of companies in a single regulated industry; rather, they affect individuals and entities on a massive scale.<sup>118</sup>

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114. David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 43 (2014) (quoting Barron & Rakoff, *supra* note 7, at 268).

115. See Nicholas Bagley, *The Legality of Delaying Key Elements of the ACA*, 371 NEW ENG. J. MED. 1967, 1968 (2014) (collecting five examples of delays to Affordable Care Act [ACA] provisions beyond specified statutory effective dates); see also Robert Pear, *Changes and Delays to the Health Law*, N.Y. TIMES, <http://www.nytimes.com/interactive/2013/12/20/us/politics/changes-and-delays-to-health-law.html> [<https://perma.cc/XF2E-2JQP>] (last updated Mar. 6, 2014) (enumerating fifteen major delays in the ACA's implementation).

116. See Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec. [DHS], to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf't [ICE], R. Gil Kerlikowske, Comm'r, U.S. Customs & Border Prot. (Nov. 20, 2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf) [<https://perma.cc/Z6C5-RQ38>] [hereinafter Johnson Memorandum] (describing the policy changes made under the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program).

117. See Barron & Rakoff, *supra* note 7, at 279 (describing the Department of Education's "displace[ment] [of] the statutory requirements of the No Child Left Behind Act [NCLB]" as an attempt "to substantially revamp the legislation").

118. The 2012 and 2014 immigration waivers are estimated to affect five million immigrants. See Michael D. Shear & Robert Pear, *Obama's Immigration Plan Could Shield Five Million*, N.Y. TIMES (Nov. 19, 2014), <http://www.nytimes.com/2014/11/20/us/politics/obama-care-unlikely-for-undocumented-immigrants.html> [<https://perma.cc/JUN3-2V5F>]. The state waivers to NCLB collectively affect the educational standards applicable to tens of millions of students in forty-three states, the District of Columbia, and Puerto Rico. See *ESEA Flexibility*, U.S. DEP'T OF EDUC. [DOE], <http://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html> [<https://perma.cc/2ZEN-5Q6N>] (last modified Jan. 28, 2016). The ACA employer mandate delay for small- and medium-size employers affected over 73 percent of the private sector workforce. See Robert Pear, *Further Delays for Employers in Health Law*, N.Y. TIMES (Feb. 10, 2014), <http://www.nytimes.com/2014/02/11/us/politics/health-insurance-enforcement-delayed-again-for-some-employers.html> [<https://perma.cc/QW4P-L2A2>]. The footprints of the other notable ACA waivers are more difficult to gauge, but are probably far smaller.

A heated debate on these waivers' constitutionality has waged in law reviews,<sup>119</sup> in op-ed pages,<sup>120</sup> and in the Capitol.<sup>121</sup> Much of this debate has overlooked a distinct question: how these measures comport with *administrative* constitutional values.<sup>122</sup> The remainder of this subsection addresses recent examples of well-known waivers in three prominent domains: immigration (Deferred Action Waiver Programs),<sup>123</sup> health care (ACA Waivers),<sup>124</sup> and education (NCLB

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119. See, e.g., Derek W. Black, *Federalizing Education by Waiver?*, 68 VAND. L. REV. 607 (2015); Pozen, *supra* note 114, at 43 (theorizing these developments “as an advertisement for executive self-help”); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671 (2014); Courtney K. Morgan, Note, *Executive Action in the Face of Congressional Inaction: Education Waivers Circumventing the Legislative Process*, 2014 BYU EDUC. & L.J. 347.

120. See Josh Blackman, Opinion, *Obama's Overreach? Look in the Mirror, Congress*, L.A. TIMES (Nov. 21, 2014), <http://www.latimes.com/opinion/op-ed/la-oe-blackman-obama-immigration-20141123-story.html> [<https://perma.cc/X5SH-XVDR>]; Michael W. McConnell, *Obama Suspends the Law*, WALL ST. J. (July 8, 2013, 7:28 PM), <http://www.wsj.com/articles/SB10001424127887323823004578591503509555268> [<https://perma.cc/8XHF-LRG8>]; Eric Posner et al., *Constitutional Limits of Presidential Action on Immigration*, N.Y. TIMES: ROOM FOR DEBATE (Nov. 18, 2014), <http://www.nytimes.com/roomfordebate/2014/11/18/constitutional-limits-of-presidential-action-on-immigration-12> [<https://perma.cc/F27G-ZZUH>].

121. See, e.g., *The President's Executive Actions on Immigration and Their Impact on Federal and State Elections: J. Hearing Before the H. Subcomm. on Nat'l Sec., the H. Subcomm. on Health Care Benefits & Admin. Rules, and the H. Comm. on Oversight & Gov't Reform*, 114th Cong. (2015); *Keeping Families Together: The President's Executive Action on Immigration and the Need to Pass Comprehensive Reform: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. (2014); *No Child Left Behind: Early Lessons from State Flexibility Waivers: Hearing Before the S. Comm. on Health, Educ., Labor & Pensions*, 113th Cong. (2013).

122. *But see* Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 AM. U. L. REV. 1183, 1194 (2015). Margulies recently argued, inter alia, that the Deferred Action Waivers fail to qualify for any exception to notice-and-comment rulemaking.

123. The waivers referred to as the “Deferred Action Waiver Programs” are the 2012 and 2014 deferred action programs. See Johnson Memorandum, *supra* note 116; Memorandum from Janet Napolitano, Sec’y of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs., John Morton, Dir., ICE (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/9986-69Q5>].

124. The waivers referred to as the ACA Waivers are the following: (1) the first and second waivers of the ACA’s employer mandate, first for all employers (announced July 2, 2013) and then for mid-size employers (announced February 10, 2014) and (2) the first and second “like it, keep it” fix waivers (announced on November 14, 2013, and March 5, 2014, respectively). See Bagley, *supra* note 115, at 1968; see also Ashley Parker & Robert Pear, *Obama Moves to Avert Cancellation of Insurance*, N.Y. TIMES (Nov. 14, 2013), <http://www.nytimes.com/2013/11/15/us/politics/obama-to-offer-health-care-fix-to-keep-plans-democrat-says.html> [<https://perma.cc/>].

Waiver Program).<sup>125</sup> Though a similar analysis could be applied to earlier exercises of waiver power, it makes sense to confine the discussion to this trio because of their recency and prominence. A basic familiarity with their general substantive features is assumed;<sup>126</sup> the discussion below drills down on various aspects of these waivers as necessary to illuminate their fit with administrative constitutional values.

### *1. Notice and an Opportunity to Comment*

The Deferred Action Waiver Program, the ACA Waivers, and the NCLB Waiver Program have affected tens of millions of Americans and thousands of entities.<sup>127</sup> But the public had neither meaningful advance notice of nor the opportunity to comment on these waivers in advance of their adoption.

The three waivers under discussion here were all announced abruptly. The initial waiver to the ACA's employer mandate provision was announced in a blog post on the Treasury website on July 2, 2013 (the day before a holiday weekend);<sup>128</sup> a week later, a Q-and-A style notice was issued by the Treasury and the IRS.<sup>129</sup> The first "like it, keep it" fix was announced in a presidential statement in

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cc/EE2W-P7MT].

125. The NCLB Waiver Program refers to the program announced on September 23, 2011 to permit states to apply for waivers from compliance with the No Child Left Behind Act. See *ESEA Flexibility*, *supra* note 118.

126. For details on each, see Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 138-42 (2015) (immigration); Bagley, *supra* note 115 (health care); Barron & Rakoff, *supra* note 7, at 279 (education).

127. See *supra* note 118.

128. Mark J. Mazur, *Continuing to Implement the ACA in a Careful, Thoughtful Manner*, U.S. DEP'T TREASURY (July 2, 2013), <http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner-.aspx> [<https://perma.cc/QF8H-CECR>]; see also Sarah Kliff, *White House Delays Employer Mandate Requirement Until 2015*, WASH. POST (July 2, 2013), <http://www.washingtonpost.com/news/wonkblog/wp/2013/07/02/white-house-delays-employer-mandate-requirement-until-2015/> [<https://perma.cc/53L4-ERHW>].

129. I.R.S. Notice 2013-45, 2013-31 I.R.B. (July 9, 2013), [https://www.irs.gov/irb/2013-31\\_IRB/ar08.html](https://www.irs.gov/irb/2013-31_IRB/ar08.html) [<https://perma.cc/3SLR-N44Q>]. Though comments were solicited and received on many aspects of the rules, no comments were solicited on the delay. See Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. 8544, 8545 (Feb. 12, 2014) (to be codified at 26 C.F.R. pts. 1, 54, 301).

the White House pressroom<sup>130</sup> and was formalized in a letter sent the same day from Centers for Medicare and Medicaid Services (CMS) to state insurance commissioners.<sup>131</sup> The second “like it, keep it” waiver, which announced a two-year extension to the first waiver, was posted in a technical bulletin on the CMS website.<sup>132</sup> The final NCLB Waiver Program was announced at a White House event and on the Department of Education webpage.<sup>133</sup> The 2012 and 2014 Deferred Action Waivers were announced, respectively, in a televised address by the President and in a speech delivered in the Rose Garden.<sup>134</sup> Simultaneously with these announcements, the new policies were released in fully articulated form on the DHS website.<sup>135</sup>

The speeches, press releases, and other documents just discussed occasionally refer, in general terms, to executive branch discussions with concerned groups or individuals.<sup>136</sup> It is likely true, then, that

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130. See President Barack Obama, Statement by the President on the Affordable Care Act (Nov. 14, 2013), <https://www.whitehouse.gov/the-press-office/2013/11/14/statement-president-affordable-care-act> [<https://perma.cc/3ASZ-3GTF>].

131. See Letter from Gary Cohen, Dir., Ctr. for Consumer Info. & Ins. Oversight, to Ins. Comm’rs (Nov. 14, 2013), <https://www.cms.gov/CCIIO/Resources/Letters/Downloads/commissioner-letter-11-14-2013.pdf> [<https://perma.cc/2SLF-86RN>].

132. See Bulletin from Gary Cohen, Dir., Ctr. for Consumer Info. & Ins. Oversight (Mar. 5, 2014), <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/transition-to-compliant-policies-03-06-2015.pdf> [<https://perma.cc/A6JW-KGVN>]; see also Greg Sargent, *Happy Hour Roundup*, WASH. POST (Mar. 5, 2014), <https://www.washingtonpost.com/blogs/plum-line/wp/2014/03/05/happy-hour-roundup-305/> [<https://perma.cc/72H3-7FLD>].

133. See Michele McNeil & Alyson Klein, *Obama Outlines NCLB Flexibility*, EDUC. WK., Sept. 28, 2011, at 1.

134. See President Barack Obama, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), <https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration> [<https://perma.cc/D9SN-4S5L>] (televised address announcing 2014 Deferred Action Waiver Program); President Barack Obama, Remarks by the President on Immigration (June 15, 2012), <https://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration> [<https://perma.cc/4BMS-ZYN9>] (Rose Garden speech on 2012 Deferred Action Waiver Program); see also Kate Andrias, *The President’s Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1117 (2013) (calling the 2012 Deferred Action Waiver Program “an aggressive use of enforcement discretion but one that was prominently disclosed”).

135. See *supra* notes 123-25.

136. See, e.g., Letter from Arne Duncan, Sec’y, DOE, to Chief State Sch. Officers (Sept. 23, 2011), <http://www2.ed.gov/policy/gen/guid/secletter/110923.html> [<https://perma.cc/RK37-VNJF>] [hereinafter Duncan Letter] (“Instead of fostering progress and accelerating academic improvement, many NCLB requirements have unintentionally become barriers to State and local implementation of forward-looking reforms designed to raise academic achievement.

at least some groups or individuals did in fact have the chance to review and provide feedback on these waivers prior to their announcement and adoption. But advance input from the public at large was neither solicited nor received.<sup>137</sup>

## 2. *Contemporaneous Reason-Giving*

In the usual course, administrative law requires agencies to offer a contemporaneous explanation of the basis for their decisions.<sup>138</sup> “The idea of reasoned explanation at the time of agency action is deeply embedded in administrative law.”<sup>139</sup> Records compiled in rulemaking or adjudication can include copious arrays of scientific studies, surveys, or other materials supportive of the agency’s determinations.<sup>140</sup> In contrast, the contemporaneous explanations supplied for the Deferred Action Waiver Program, the ACA Waivers, and the NCLB Waiver Program have adopted quite different formats—the press release, the blog post, the technical bulletin, or the open letter.

Form, of course, often dictates content. Consequently, the justifications supplied for the waivers under discussion here have tended to be informal in tone, sparse in content, or both. For example, the letter from Secretary of Education Arne Duncan explained the NCLB Waiver Program as an effort to undo the

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Consequently, many of you are petitioning us for relief from the requirements of current law.”); Obama, *supra* note 130 (“Now, as I indicated earlier, I completely get how upsetting this can be for a lot of Americans, particularly after assurances they heard from me that if they had a plan that they liked, they could keep it. And to those Americans, I hear you loud and clear.”).

137. See Black, *supra* note 119, at 614 (“No one imagined that the federal government could substantively reform curriculum standards and teacher evaluations without new legislation, much less do it preemptively through administrative action. The waiver process happened so quickly and unilaterally that it was not until it was over that Congress, state officials, and scholars seriously considered whether the Secretary did, in fact, have the power he purported to exercise.”).

138. See Farber & O’Connell, *supra* note 7, at 1152-54.

139. *Id.* at 1152.

140. See Home Box Office, Inc. v. FCC, 567 F.2d 9, 54 (D.C. Cir. 1977) (“[I]mplicit in the decision to treat the promulgation of rules as a ‘final’ event in an ongoing process of administration is an assumption that an act of reasoned judgment has occurred, an assumption which further contemplates the existence of a body of material—documents, comments, transcripts, and statements in various forms declaring agency expertise or policy—with reference to which such judgment was exercised.”).

unintended pernicious effects of NCLB requirements,<sup>141</sup> which is rather like explaining that the reason for adopting a 55-mph-speed limit is to prevent the dangers of driving at 56 mph.<sup>142</sup> The blog post announcing the first employer mandate delay contained just two sentences explaining the delay, one of which was tautological.<sup>143</sup> Contrast this level of detail with an ordinary administrative rulemaking, in which the agency might provide dozens of pages of explanation for a change of this magnitude, including detailed responses to public comment.

A distinct problem afflicts the explanations supplied for these waivers. As David Pozen has noted, the White House has hinted that these waivers are a justified response to congressional intransigence.<sup>144</sup> But, as he continues on to note, the executive branch has not forthrightly acknowledged that rationale, instead framing its decisions as resting on considerations of the kind more conventionally palatable to administrative law.<sup>145</sup> This lack of candor stands in some tension with the administrative law norm that demands disclosure of the actual basis of agency decisions, even when those reasons are essentially political and not policy-based.<sup>146</sup> Looked at

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141. See Duncan Letter, *supra* note 136.

142. See Andrias, *supra* note 134, at 1121 (arguing that agencies should be expected to provide an “articulation of reasonable statutory rationales for enforcement (and nonenforcement) policy decisions,” a requirement that will “strengthen the process of political checks and root those checks in law”).

143. See Mazur, *supra* note 128 (explaining that the delay’s purpose was to “provide time to adapt health coverage and reporting systems while employers are moving toward making health coverage affordable and accessible for their employees”).

144. See Pozen, *supra* note 114, at 78 (“The basic pattern that has emerged in these cases” consists of “a latitudinarian reading of statutory and constitutional restrictions [combined] with a suggestion, typically made in a less formal setting, that Congress’s institutional pathologies have enhanced the President’s discretion as a matter of policy if not also of law”).

145. See *id.*; see also *id.* at 77 (“Legislative gridlock goes unmentioned in the various documents that defend the NCLB waivers.”).

146. See Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1175-77 (2010). Scholars debate the list of permissible ingredients in executive decision making, but most agree that the ingredients that actually wind up in the pot—including political ones—should be openly avouched. Indeed, the principle that the actual motivations for executive decisions *should* be disclosed is sometimes the variable that drives scholarly prescriptions on what factors may be permissibly considered. Put differently, permitting political considerations to play a role in agency decision making worries some scholars precisely because agencies are unlikely to candidly disclose the political factors in their decision making, thereby corroding the worth of the public reason-giving. See Heinzerling, *supra* note 96, at 178 (condemning the “charade” of letting agencies reach

from this perspective, it is problematic that the executive branch has failed to state forthrightly that it was congressional intransigence—rather than, say, a need to undertake a more extensive study of tax reporting systems—that motivated and justified these waivers.<sup>147</sup>

A final point must also be made about reason-giving: that *explanation* and *legal justification* are not synonymous. When the 2014 Deferred Action Waiver Program was announced, the Office of Legal Counsel in the Department of Justice released a legal opinion (OLC Memorandum) contemporaneously with the announcement of the revised immigration policy that signed off on certain aspects of it.<sup>148</sup> But the OLC Memorandum is a lawyer's opinion; it is not a policy explanation of the sort that ordinarily accompanies an agency decision.<sup>149</sup> Administrative law requires agencies to elucidate the reasons why they are taking an action—not merely why the action they have determined to take is within legal bounds.<sup>150</sup>

### 3. *Judicial Review*

For reasons that have been well elaborated elsewhere, litigants face a steep challenge when they seek judicial relief from executive-branch inaction.<sup>151</sup> The chief obstacles are standing and the doctrines regarding the nonreviewability of agency failure to act.<sup>152</sup>

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decisions for political reasons but then rely on technocratic reasons before courts); Mendelson, *supra*, at 1159 (“At the level of individual agency decisions—even highly significant ones—agencies usually submerge executive influence or control, rather than open it to public view.”); Mendelson, *supra* at 1159-70 (criticizing lack of transparency by agencies and suggesting ways to increase the visibility of presidential influence on agency decision making).

147. See Mazur, *supra* note 128.

148. See U.S. DEP'T OF JUSTICE [DOJ], OLC, THE DEPARTMENT OF HOMELAND SECURITY'S AUTHORITY TO PRIORITIZE REMOVAL OF CERTAIN ALIENS UNLAWFULLY PRESENT IN THE UNITED STATES AND TO DEFER REMOVAL OF OTHERS (2014) [hereinafter OLC Memorandum], <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> [<https://perma.cc/GRH9-3Q8E>].

149. See *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983) (holding that agency's explanation for its decision must be “sufficient to enable us to conclude that [it] was the product of reasoned decisionmaking”).

150. *Id.*

151. Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195, 1226-30 (2014).

152. See 5 U.S.C. § 701(a)(2) (2012) (stating agency action is committed to agency discretion by law); *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62-63 (2004); *Heckler v. Chaney*, 470

Though there have been a few attempts to bring court challenges to the ACA Waivers, the cases attacking these waivers have been dismissed on threshold questions.<sup>153</sup> The cases that have not yet been dismissed likely will be dismissed for similar, if not identical, reasons.<sup>154</sup> With respect to the Deferred Action Waiver Program, a challenge to the program by several states has survived dismissal in the lower courts.<sup>155</sup> It remains to be seen whether the Supreme Court will agree with the lower courts that the plaintiffs in that case have standing and reach the merits of the challenge.<sup>156</sup>

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U.S. 821, 828 (1985); *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 677 (D.C. Cir. 1994) (“It is conceivable that a document announcing a particular non-enforcement decision would actually lay out a general policy delineating the boundary between enforcement and non-enforcement and purport to speak to a broad class of parties,” thereby triggering judicial review). For a time, it seemed that *Massachusetts v. EPA* had radically changed the law on the reviewability of agency failure to act. See Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 3 (2008). But as Cass Sunstein and Adrian Vermeule note, the case is arguably “overbroad on this score, inconsistent with the larger structure of administrative law, and thus vulnerable to subsequent reconsideration.” They go on to note that “the few relevant decisions to date in the courts of appeals have more or less ignored that aspect of *Massachusetts v. EPA*.” Cass R. Sunstein & Adrian Vermeule, *The Law of “Not Now”: When Agencies Defer Decisions*, 103 GEO. L.J. 157, 192-93 (2014).

153. See, e.g., *Ass’n of Am. Physicians & Surgeons, Inc. v. Koskinen*, 768 F.3d 640, 642 (7th Cir. 2014) (dismissing physicians’ association’s constitutional and APA challenges to delay of ACA’s employer mandate for lack of standing); *U.S. House of Representatives v. Burwell*, No. 14-1967 (RMC), 2015 WL 5294762, at \*17 (D.D.C. Sept. 9, 2015) (dismissing for lack of standing suit by the House of Representatives to challenge delay of employer mandate).

154. See Complaint, *W. Va. ex rel. Morrissey v. U.S. Dep’t of Health & Human Servs.*, No. 14-cv-01287 (D.D.C. July 29, 2014).

155. See *Texas v. United States*, No. 15-40238, 2015 WL 6873190, at \*3, \*19-22 (5th Cir. Nov. 9, 2015) (holding that Texas had standing to challenge DAPA and granting nationwide preliminary injunction against enforcement of DAPA because, inter alia, the plaintiffs were likely to succeed on the merits of the claim that the administration should have used notice-and-comment rulemaking to adopt DAPA); cf. *Arpaio v. Obama*, 27 F. Supp. 3d 185, 192 (D.D.C. 2014) (dismissing challenge to immigration waivers on standing grounds and in reliance on *Heckler v. Chaney*).

156. See *Texas v. United States*, 787 F.3d 733, 754, 767-69 (5th Cir. 2015). On January 19, 2016, the Supreme Court granted the petition for a writ of certiorari and directed the parties to brief an additional question not decided by the lower courts: “Whether the Guidance violates the Take Care Clause of the Constitution.” See *Texas v. United States*, 787 F.3d 733 (5th Cir. 2015), cert. granted, (U.S. Jan. 19, 2016) (No. 15-674), [http://www.supremecourt.gov/orders/courtorders/011916zor\\_15gm.pdf](http://www.supremecourt.gov/orders/courtorders/011916zor_15gm.pdf) [<https://perma.cc/E7W3-A5DX>].

As the above discussion has demonstrated, the Deferred Action Waiver Program, the ACA Waivers, and the NCLB Waiver Program all depart in varying ways from administrative constitutional values. The constraints of the administrative constitution have had little purchase on the executive's exercise of waiver and delay—powers that have become increasingly consequential.<sup>157</sup>

### *B. Counterparties and Conservators*

The financial analyst Nassim Taleb famously dubbed the financial crisis of 2008 a “black swan event”—a highly improbable occurrence that thoroughly disrupted long-settled assumptions grounded in a wealth of previous knowledge and experience.<sup>158</sup> Because “one single observation can invalidate a general statement derived from millennia of confirmatory sightings of millions of white swans,” a black swan event “illustrates ... the fragility of our knowledge.”<sup>159</sup>

The financial crisis was not only a black swan event for the financial markets, but also a black swan event for administrative law. It spurred the use of administrative methods that were entirely unique and that had been unthinkable prior to their materialization. It exposed—and continues to expose—the “fragility of our knowledge” about the administrative state.<sup>160</sup>

In late summer 2008, the financial sector was teetering on the brink of collapse, and a second Great Depression seemed to loom.<sup>161</sup> The federal government's initial response was to encourage private deal making among critical financial institutions.<sup>162</sup> The Treasury

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157. Cf. Gluck, O'Connell & Po, *supra* note 7, at 1818 (describing the “waiver process” as “a legal black box” because “[f]or the most part, there are no laws, procedures, or assurances of transparency that regulate the state-federal negotiations that result in these large exemptions from federal statutory mandates”).

158. Nassim Nicholas Taleb, *The Black Swan: The Impact of the Highly Improbable*, N.Y. TIMES (Apr. 22, 2007), [http://www.nytimes.com/2007/04/22/books/chapters/0422-1st-taleb.html?pagewanted=all&\\_r=1&\[https://perma.cc/8U4F-MVRS\]](http://www.nytimes.com/2007/04/22/books/chapters/0422-1st-taleb.html?pagewanted=all&_r=1&[https://perma.cc/8U4F-MVRS]).

159. *Id.*

160. *Id.*

161. For a helpful overview of the 2008 crisis and the response it provoked, see Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613 (2009).

162. See Davidoff & Zaring, *supra* note 7, at 536.

encouraged stronger banks to acquire weaker banks and tried to broker injections of equity into weaker banks by deep-pocketed investors.<sup>163</sup>

Although initially these deals were entered into on an “ad hoc” basis, eventually it became clear that the executive would need to turn to Congress for more powerful weaponry.<sup>164</sup> Among the most notable of these congressional tools was the Emergency Economic Stabilization Act’s (EESA) creation of the Troubled Asset Relief Program (TARP) in October 2008.<sup>165</sup> The statute authorized the Treasury to use \$700 billion to purchase assets needed to prop up financial institutions.<sup>166</sup> The Treasury announced that it would use TARP funds to “inject equity directly into financial institutions by buying preferred stock.”<sup>167</sup> By the end of 2008, the U.S. government owned stakes in the nine largest American banks and America’s largest insurer, AIG.<sup>168</sup>

As David Zaring and Steven Davidoff Solomon have argued, this form of regulation—“regulation by deal”<sup>169</sup>—ignored core administrative law values.<sup>170</sup> There was no notice to the public or opportunity to comment on the deals that the government was cutting or brokering.<sup>171</sup> Little in the way of contemporaneous explanation or justification was provided; to the contrary, information about the government’s role in some of these transactions was kept close to the vest and was revealed only after the fact by investigative

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163. *See id.* at 508-12 (describing the FDIC’s role in J.P. Morgan’s purchase of failed bank Washington Mutual, the FDIC’s role in Wells Fargo’s acquisition of Wachovia, and the Treasury’s involvement in Mitsubishi’s purchase of a stake in Morgan Stanley).

164. *Id.* at 536 (“Clearly, the government’s ad hoc strategy was failing and a greater response was needed.”).

165. *See* Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 3(9)(B), 122 Stat. 3765, 3767.

166. *Id.* (defining authorized “troubled assets” as including “any other financial instrument that the Secretary ... determines the purchase of which is necessary to promote financial market stability”).

167. Posner & Vermeule, *supra* note 161, at 1626.

168. Davidoff & Zaring, *supra* note 7, at 465, 496.

169. *Id.* at 536; *see also* Steven M. Davidoff, *Uncomfortable Embrace: Federal Corporate Ownership in the Midst of the Financial Crisis*, 95 MINN. L. REV. 1733, 1760 (2011).

170. *See* Davidoff & Zaring, *supra* note 7, at 536 (noting that regulation by deal “rejects some of the usual values of administrative law, such as predecision notice to affected parties and the public and comment-ventilated policymaking”).

171. *Id.*

journalism.<sup>172</sup> Regulation by deal was regulation by *fait accompli*.<sup>173</sup> And EESA largely cut courts out of the picture in cases arising out of the Treasury's implementation of TARP: it restricted courts from ordering injunctive or equitable relief against the Treasury Secretary except in cases of constitutional violation.<sup>174</sup> The result has been that challenges to the propriety of the executive branch's actions in this period have been exceedingly rare.<sup>175</sup> The scant handful of bailout cases that have gained some traction raise "creative[...]" constitutional claims, mainly grounded in the Due Process and Takings Clauses, "rather than through traditional resort to, say, the Administrative Procedure Act, which is the usual way that government action is evaluated by the courts."<sup>176</sup>

The financial crisis was a crisis of governance, not just of the markets.<sup>177</sup> But its effects upon administrative law extended far beyond the immediate crisis period. One of the crisis's most important ongoing impacts has been upon the government's involvement with the two government-sponsored enterprises that finance the American housing market: Fannie Mae and Freddie Mac.

Fannie Mae and Freddie Mac are mortgage insurance companies whose portfolios collapsed as home prices plummeted during the crisis.<sup>178</sup> In July 2008, Congress enacted the Housing and Economic Recovery Act (HERA), which created a new regulator, the Federal Housing Finance Agency (FHFA) and authorized it to place Fannie and Freddie into conservatorship or to liquidate them.<sup>179</sup> By early

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172. See, e.g., ANDREW ROSS SORKIN, *TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM FROM CRISIS—AND THEMSELVES* (2009).

173. See Davidoff & Zaring, *supra* note 7, at 468.

174. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 119, 122 Stat. 3765, 3787 (providing that "[n]o injunction or other form of equitable relief shall be issued against the Secretary for actions pursuant to" the Treasury's purchase, insurance, or sale of troubled assets); see Matthew R. Shahabian, Note, *The Government As Shareholder and Political Risk: Procedural Protections in the Bailout*, 86 N.Y.U. L. REV. 351, 368 (2011).

175. David Zaring, *Litigating the Financial Crisis*, 100 VA. L. REV. 1405, 1408 (2014) ("The government did not have to defend its actions in court in the midst of the crisis and has not been subject to much post-crisis review."); see also *id.* at 1421-22, 1424.

176. *Id.* at 1409.

177. See Posner & Vermeule, *supra* note 161, at 1676.

178. See Davidoff & Zaring, *supra* note 7, at 485-86. From 2007 to 2008, I served as an attorney for Fannie Mae on a lawsuit unrelated to the events described in this Article.

179. Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, § 1311, 122 Stat. 2654, 2661-62.

September 2008, the deepening crisis in the markets had caused both firms to run out of cash.<sup>180</sup> The government then seized both firms and placed them into conservatorship with FHFA as conservator.<sup>181</sup> Simultaneously, the government made a commitment to infuse massive amounts of money into the two firms in exchange for the rights to a large share—79.9 percent—of the equity in each entity and one million preferred shares with a dividend of 10 percent of any future profits earned by the firms.<sup>182</sup> The two companies ultimately drew upon the federal government’s funding commitment to the tune of nearly \$200 billion.<sup>183</sup>

The upshot of this arrangement was that the two firms survived the crisis with the government as their effective super-majority shareholder.<sup>184</sup> The government was not, however, the only shareholder; hedge funds, pension plans, and other shareholders also held junior preferred shares in both companies.<sup>185</sup> As the markets stabilized in the post-crisis period, these minority shares, which were still traded publicly, began to show a modest rise in value.<sup>186</sup> These shares were held by thousands of investors.<sup>187</sup>

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180. See Steven Davidoff Solomon & David Zaring, *After the Deal: Fannie, Freddie, and the Financial Crisis Aftermath*, 95 B.U. L. REV. 371, 382 (2015).

181. See Charles Duhigg et al., *As Crisis Grew, a Few Options Shrank to One*, N.Y. TIMES (Sept. 7, 2008), <http://www.nytimes.com/2008/09/08/business/08takeover.html> [<https://perma.cc/56C3-UFS7>].

182. See U.S. DEP’T OF THE TREASURY, FEDERAL HOME LOAN MORTGAGE CORPORATION WARRANT TO PURCHASE COMMON STOCK (2008), <http://www.treasury.gov/press-center/press-releases/Documents/warrantfrec.pdf> [<https://perma.cc/6ECK-EUHM>]; U.S. DEP’T OF THE TREASURY, FEDERAL NATIONAL MORTGAGE ASSOCIATION WARRANT TO PURCHASE COMMON STOCK (2008), <http://www.treasury.gov/press-center/press-releases/Documents/warrantfnm3.pdf> [<https://perma.cc/G5NA-8EHM>].

183. See FED. HOUS. FIN. AGENCY [FHFA], PERFORMANCE AND ACCOUNTABILITY REPORT 110 (2013), [https://www.fhfa.gov/AboutUs/Reports/ReportDocuments/2013\\_PAR\\_N509.pdf](https://www.fhfa.gov/AboutUs/Reports/ReportDocuments/2013_PAR_N509.pdf) [<https://perma.cc/P5ZY-8LQF>]; Solomon & Zaring, *supra* note 180, at 383 n.48 (“Through the end of Q1 FY2012, Fannie Mae drew on \$116.2 billion and Freddie Mac drew on \$71.3 billion for a total draw of \$187.5 billion.”).

184. See Davidoff & Zaring, *supra* note 7, at 491 (discussing events leading up to the “partial nationalization” of Fannie and Freddie).

185. See Solomon & Zaring, *supra* note 180, at 382-84.

186. See *id.* at 385.

187. See Gretchen Morgenson, *The Untouchable Profits of Fannie Mae and Freddie Mac*, N.Y. TIMES (Feb. 15, 2014), [http://www.nytimes.com/2014/02/16/business/the-untouchable-profits-of-fannie-mae-and-freddie-mac.html?\\_r=0](http://www.nytimes.com/2014/02/16/business/the-untouchable-profits-of-fannie-mae-and-freddie-mac.html?_r=0) [<https://perma.cc/T584-XZUE>] (noting that 2010 regulatory filings showed that 18,000 investors held 1.1 billion shares of Fannie Mae common stock and 2100 investors held 650 million Freddie Mac shares).

Abruptly, in August 2012, FHFA and the Treasury reached an agreement (the Third Amendment) to alter the terms applicable to the government's preferred shares so that the Treasury would receive as dividends all profits that each firm was thereafter able to generate.<sup>188</sup> The Third Amendment made the equity stakes held by non-government shareholders "worthless."<sup>189</sup>

When viewed from the perspective of administrative constitutional values, the Third Amendment fell short on several scores. No advance notice of or opportunity for comment was afforded to investors or the public before the Third Amendment was announced.<sup>190</sup> No contemporaneous record of the grounds for the decision was compiled.<sup>191</sup> The public justification for the Third Amendment was stated in press releases, which shed scant light on

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188. See FHFA, THIRD AMENDMENT TO AMENDED AND RESTATED SENIOR PREFERRED STOCK PURCHASE AGREEMENT (2012), [http://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/2012-8-17\\_SPSPA\\_FannieMae\\_Amendment3\\_508.pdf](http://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/2012-8-17_SPSPA_FannieMae_Amendment3_508.pdf) [<https://perma.cc/DYE4-MPLV>] (altering terms of government's agreement with Fannie Mae); FHFA, THIRD AMENDMENT TO AMENDED AND RESTATED SENIOR PREFERRED STOCK PURCHASE AGREEMENT (2012), [http://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/2012-8-17\\_SPSPA\\_FreddieMac\\_Amendment3\\_N508.pdf](http://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/2012-8-17_SPSPA_FreddieMac_Amendment3_N508.pdf) [<https://perma.cc/AF5D-65GE>] (altering terms of government's agreement with Freddie Mac).

189. See Solomon & Zaring, *supra* note 180, at 384 ("Because a share in a company is only worth its claim on future corporate profits, the Third Amendment rendered the common and junior preferred stock worthless.").

190. As Morgenson reports, the policy appears to have been formulated at the Treasury by December 2010 but was not publicly disclosed. See Morgenson, *supra* note 187 (describing internal Treasury memo referring to "the administration's commitment to ensure existing common equity holders will not have access to any positive earnings from the G.S.E.'s in the future").

191. See Notice of Filing Document Compilation by Defendants Federal Housing Finance Agency and Edward DeMarco Regarding Third Amendment to Senior Preferred Stock Purchase Agreements at 2, *Fairholme Funds, Inc. v. FHFA*, No. 13-cv-1053 (D.D.C. Dec. 17, 2013) ("As the APA does not permit review of actions of the Conservator (5 U.S.C. § 701(a)(2)), Defendants FHFA and DeMarco are not required to—and have not—created or maintained an administrative record relating to the execution of the Third Amendment.").

the agencies' reasoning<sup>192</sup> and also seemed to contradict past public statements by the Treasury and by FHFA.<sup>193</sup>

Finally, the administrative constitutional constraint of judicial review has also been absent here. HERA contained a broadly worded preclusion of judicial review of FHFA's actions.<sup>194</sup> Relying on that provision, the federal District Court for the District of Columbia declined to consider whether the Third Amendment was arbitrary and capricious,<sup>195</sup> whether the government compiled an adequate record for its decision,<sup>196</sup> whether the government candidly disclosed its motivations for entering into the Third Amendment,<sup>197</sup> or whether FHFA's decision making was sound.<sup>198</sup> The court then dismissed the complaints in ringing terms.<sup>199</sup>

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192. See FHFA, CHANGES TO FANNIE MAE AND FREDDIE MAC PREFERRED STOCK PURCHASE AGREEMENTS (2012), <http://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-of-FHFA-Acting-Director-Edward-J-DeMarco-on-Changes-to-Fannie-Mae-and-Freddie-Mac-Preferred-Stock-Purchas.aspx> [<https://perma.cc/YWN5-TQQM>]; Press Release, U.S. Dep't of the Treasury, Treasury Department Announces Further Steps to Expedite Wind Down of Fannie Mae and Freddie Mac (Aug. 17, 2012) [hereinafter Wind Down], <http://www.treasury.gov/press-center/press-releases/Pages/tg1684.aspx> [<https://perma.cc/LC4M-E76E>].

193. Across two administrations, the executive branch had consistently committed to the goal of ensuring that taxpayers would be paid back for their past investment in the enterprises, but it had never asserted that taxpayers might be entitled to *all future earnings*, even earnings over and above the amounts drawn by the two firms from the government. See Morgenson, *supra* note 187.

194. See 12 U.S.C. § 4617(f) (2012); *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 225 (D.D.C. 2014) (describing HERA as "a statute of exceptional scope that [confers] immense discretion to FHFA as a conservator").

195. See *Perry Capital*, 70 F. Supp. 3d at 221-22 (dismissing APA arbitrary and capricious claims).

196. See *id.* at 226 ("[T]he Court need not view the full administrative record to determine whether the Third Amendment, *in practice*, exceeds the bounds of HERA.").

197. See *id.* ("[T]he Court must look at *what* has happened, not *why* it happened. For instance, the Court will examine whether the Third Amendment *actually* resulted in a *de facto* receivership, *infra*; not what FHFA has publicly stated regarding any power it may or may not have, as conservator, to prepare the GSEs for liquidation. FHFA's underlying motives or opinions ... do not matter for the purposes of § 4617(f).") (internal citations omitted).

198. See *id.* ("Requiring the Court to evaluate the merits of FHFA's decision making each time it considers HERA's jurisdictional bar would render the anti-injunction provision hollow."). The court seemed not to consider the possibility that the anti-injunction bar just bars injunctions against the agency, not all evaluations by a federal court of whether agency action is reasonable.

199. See *id.* at 246 ("Indeed, the plaintiffs' grievance is really with Congress itself. It was Congress, after all, that parted the legal seas so that FHFA and Treasury could effectively do whatever they thought was needed to stabilize and, if necessary, liquidate, the GSEs.").

The plaintiffs in these cases are not all sympathetic figures.<sup>200</sup> Nonetheless, as David Zaring and Steven Solomon have pointed out, the lawsuits challenging the Third Amendment “represent both opportunistic behavior by the funds that swooped in to purchase Fannie Mae and Freddie Mac shares after a bailout and a serious effort to identify constraints on the way the government has managed the financial sector in the wake of the crisis.”<sup>201</sup> Like a polluting power company asserting that an EPA regulation is arbitrary and capricious, the plaintiffs here have sought both private benefits and the enforcement of public values with respect to federal regulatory action.

Fannie Mae and Freddie Mac have long played a critical role—perhaps *the* critical role—in providing liquidity to U.S. housing markets. Between 2008 and 2012, the two companies played a role in preventing millions of mortgage foreclosures and in guaranteeing roughly three-quarters of the country’s newly originated mortgages—loans with a collective worth of \$100 billion *per month*.<sup>202</sup> The Treasury justified the Third Amendment as part of an effort to eventually “wind down” the two entities.<sup>203</sup> But taking administrative action to “expedite” the firms’ wind down was, in 2012, a choice with enormous potential repercussions for U.S. housing finance policy—a choice that Congress was then actively considering and still has not approved.<sup>204</sup>

If an appellate court sustains the government’s victory, it is hard to see the limiting logic that would bar the Treasury and FHFA from entering into a Fourth Amendment, a Fifth Amendment, or a Sixth Amendment in the years to come, without advance notice, contemporaneous explanation, or a meaningful evaluation of the regulators’ decision-making processes by a court after the fact. The continued vitality of the Third Amendment would signify that two

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200. See Solomon & Zaring, *supra* note 180, at 389-90 (describing minority shareholders in the two enterprises as “hedge funds and other speculators”).

201. *Id.* at 374.

202. See FHFA, A STRATEGIC PLAN FOR ENTERPRISE CONSERVATORSHIPS: THE NEXT CHAPTER IN A STORY THAT NEEDS AN ENDING 5, [http://www.fhfa.gov/AboutUs/Reports/ReportDocuments/20120221\\_StrategicPlanConservatorships\\_508.pdf](http://www.fhfa.gov/AboutUs/Reports/ReportDocuments/20120221_StrategicPlanConservatorships_508.pdf) [<https://perma.cc/7BLY-9ZR3>].

203. See Wind Down, *supra* note 192.

204. See Charles Lane, Opinion, *Fix Fannie Mae and Freddie Mac*, WASH. POST (Jan. 7, 2013), [https://www.washingtonpost.com/opinions/charles-lane-fix-fannie-mae-and-freddie-mac/2013/01/07/8baa5f12-58ee-11e2-beee-6e38f5215402\\_story.html](https://www.washingtonpost.com/opinions/charles-lane-fix-fannie-mae-and-freddie-mac/2013/01/07/8baa5f12-58ee-11e2-beee-6e38f5215402_story.html) [<https://perma.cc/AR32-K875>].

major regulators—FHFA and the Treasury—can exert an ongoing role in determining key aspects of domestic housing policy without check by administrative constitutional norms.

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Various scholars have argued that the “lessons learned” from administrative law, its “toolkit,” or its “core values,” should be applied to improve civil procedure,<sup>205</sup> foreign affairs law,<sup>206</sup> bankruptcy law,<sup>207</sup> election law,<sup>208</sup> and many other fields. Animating much of this scholarship is a common underlying vision of the virtues of the administrative constitution.<sup>209</sup> But, as the discussion above has demonstrated, one cannot take that constitution and its virtues for granted. Agency action of enormous consequence and scope can fit through the “outs” to the administrative constitution—free of its constraints and checks, and thus free of the legitimating effects conferred by those constraints and checks. The remainder of this Article grapples with the implications of this partial unraveling of administrative constitutional norms.

### III. EXILE AND EVOLUTION

Unconventional exercises of regulatory power today vie for prominence with conventional exercises of regulatory power. What were formerly exceptions to administrative constitutional constraints, exceptions rarely evoked or evoked only in narrow circumstances,<sup>210</sup>

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205. Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1217-18 (2012).

206. Bradley, *supra* note 4, at 651-52.

207. Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384, 389 (2012).

208. Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach*, 106 COLUM. L. REV. 708, 709 (2006).

209. *See, e.g.*, Pardo & Watts, *supra* note 207, at 384 (arguing that “moving bankruptcy toward an administrative model with a regulatory agency charged with setting bankruptcy policy.... could bring greater expertise, accountability, uniformity, accessibility, transparency, prospective clarity, and flexibility to policymaking in the bankruptcy arena”).

210. *See* Farber & O'Connell, *supra* note 7, at 1161 (describing the recently expanded scope of the good-cause exception, which “was intended to be narrow”); Gluck, O'Connell & Po, *supra* note 7, at 1795 (noting the “increased use” of provisions of the APA that “explicitly permit[] agencies to regulate without notice and comment”); Ronald M. Levin, *Understanding*

are having effects with a sweep and consequence comparable to the sort of action governed by ordinary administrative law.

This is certainly a transformation. Moreover, it is a very specific *kind* of transformation. It is a transformation that involves not the *violation* of the old rules, but that instead involves a shift in emphasis, toward reliance on aspects of the old rules that have always been there as a formal black-letter matter, but that have traditionally been far more lightly used. In this regard, it is a transformation that resembles what happened to constitutional law during the New Deal era. Before the 1930s, the Commerce Clause and the spending power existed. Formally, they were part of the Constitution; they were written right there on the parchment. They played a functional role as well: Congress relied on these provisions to carry out various federal schemes.<sup>211</sup> But *before* the New Deal era, these legal provisions collectively signified something much different than they did *after* the New Deal era.<sup>212</sup>

An analogous phenomenon is now at work within the administrative state. The aspects of administrative law that enable procedurally unfettered regulation have a far larger footprint now than they formerly did; they have attained a new level of importance in the allocation of power across various parts of the government. The New Deal's reformulation of American law famously moved effective power from the states to the federal government and from private parties to state and federal governments.<sup>213</sup> Today, the changing practice of administrative law has also resulted in the transfer of effective power—in this case, toward the executive and away from Congress, the federal courts, and private parties.

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*Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 691 (1990) (noting, in 1990, that the “‘committed to agency discretion’ category of unreviewable administrative action.... has been considered quite small; some theorists have refused to acknowledge that it even exists in a meaningful sense”).

211. See RICHARD F. HAMM, *SHAPING THE EIGHTEENTH AMENDMENT: TEMPERANCE REFORM, LEGAL CULTURE, AND THE POLITY, 1880-1920*, at 9 (1995) (describing progressive reformist use of “the territorial power, the treaty power, the postal power, the taxing power, and the commerce power”); STRAUSS, *supra* note 17, at 120-23.

212. The New Deal “proposed a dramatically different conception of the presidency and a novel set of administrative actors[,] and it rejected traditional notions of federalism.” Sunstein, *supra* note 13, at 425.

213. See Mila Sohoni, *Notice and the New Deal*, 62 DUKE L.J. 1169, 1171 (2013).

The analogy is not perfect. There has been no earth-shaking social upheaval of the kind that accompanied the New Deal constitutional moment,<sup>214</sup> and the shifts in the administrative constitution are milder than the New Deal transformations. But the comparison is still helpful for understanding the particular type of discomfiture that besets scholarship on administrative law today. Famously, or infamously, some constitutional scholars have looked back at the pre-New Deal Constitution, left as it was in the dustbin of history, and have concluded that the original meaning of the Constitution went into “exile”<sup>215</sup> or was “lost”<sup>216</sup> in the course of the New Deal settlement; much administrative law scholarship today exhibits a broadly similar tendency.<sup>217</sup> When a set of norms and conventions that have acquired constitutional stature seems to have become eroded or displaced, one natural and understandable response is to say those norms and conventions have been lost or exiled.

Probing the extent of the analogy is also enlightening. The mainstream view in constitutional law is decidedly *not* that the Constitution is in “exile” or that it was “lost” in the New Deal era. Rather, the typical view is that the Constitution’s meaning changed or evolved in that period so as to authorize and permit the emerging landscape of law. The key question is whether something similar can be said for the current transformation of administrative law. This is not an easy question to answer. Whole libraries have been written by constitutional scholars to explain and justify why the Constitution is a “living” document. As the next Part will show, such accounts do not readily translate to the context of the administrative constitution.

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214. See 2 BRUCE ACKERMAN, *WE THE PEOPLE* 279, 312 (1998) (supplying a theory of constitutional change based on constitutional moments).

215. See Ginsburg, *supra* note 14, at 84 (contending that since the New Deal, the nondelegation doctrine, the doctrine of enumerated powers, economic substantive due process, and other constitutional rules have been in “exile” or banishment); see also *id.* (“The memory of these ancient exiles, banished for standing in opposition to unlimited government, is kept alive [only] by a few scholars who labor on in the hope of a restoration, a second coming of the Constitution of liberty—even if perhaps not in their own lifetimes.”).

216. See generally BARNETT, *supra* note 15.

217. See *supra* note 7.

IV. THE LIVING CONSTITUTION AND THE ADMINISTRATIVE  
CONSTITUTION

The concept of the living constitution has been “at the core of progressive constitutional thought since the 1970s,”<sup>218</sup> but has roots that long antedate that era.<sup>219</sup> Living constitutionalist theories address a simple puzzle—what to make of changes in constitutional practice that do not correspond to changes in the canonical text of the Constitution.<sup>220</sup> In assessing such changes, accounts of living constitutionalism generally join both descriptive and normative elements: they contend that the Constitution both *does* and *should* evolve to reflect the changing times and conditions of American society. Put differently, living constitutionalist accounts generally contend that a living constitution is not just pragmatically necessary but also normatively desirable.<sup>221</sup>

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218. Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 *FORDHAM L. REV.* 545, 568-69 (2006). For an early elaboration, see Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 *STAN. L. REV.* 703, 703 (1975).

219. See Jamal Greene, *Selling Originalism*, 97 *GEO. L.J.* 657, 676-78 (2009) (describing the development of the non-originalist tendency in American constitutional law); Post & Siegel, *supra* note 218, at 569 n.101 (citing K.N. Llewellyn, *The Constitution as an Institution*, 34 *COLUM. L. REV.* 1, 16 (1934), as an “early use of the concept of a ‘living Constitution’”).

220. See BALKIN, *supra* note 18, at 279 (“Thus, living constitutionalism is not a theory primarily addressed to judges; it is addressed to all citizens who want to know how the Constitution-in-practice changes through constitutional construction and why these processes of constitutional change are democratically legitimate.”); David A. Strauss, *Do We Have a Living Constitution?*, 59 *DRAKE L. REV.* 973, 975 (2011) (“What is clear is that even when the text does not change, answers to the question ‘what does the Constitution require’ do change. The real point of dispute about the nature of American constitutional law, I believe, concerns the question of what justifies such a change.”); Young, *supra* note 38, at 455 (describing the “great puzzle of American constitutionalism” as how to “square[]” “dramatic institutional change” with “a commitment to written constitutionalism”).

221. See BALKIN, *supra* note 18; ESKRIDGE & FEREJOHN, *supra* note 50, at 431, 445; STRAUSS, *supra* note 17, at 177; Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 *N.C. L. REV.* 1107, 1113 (2008); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 *HARV. C.R.-C.L. L. REV.* 373, 374 (2007). Of course, other scholars disagree. Scholars and judges in the originalist school criticize the idea of the living constitution on various grounds, including that it leaves constitutional law to the unbridled discretion of judges and that it undermines the rights of individuals to notice of the law. See, e.g., JOHN O. MCGINNIS & MICHAEL RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* (2013); William H. Rehnquist, *The Notion of a Living Constitution*, 54 *TEX. L. REV.* 693, 704-05 (1976); Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U. CIN. L. REV.* 849, 854 (1989). For a helpful précis of this

What grounds the living constitutionalism's normative claim? The normative piece of these various accounts generally rests on some combination of a few separate elements. First, constitutional change is driven by social change and political movements.<sup>222</sup> Second, constitutional change is frequently channeled through action by the political branches engaging in the process of constitutional construction.<sup>223</sup> Third, constitutional change is checked by and legitimated by courts.<sup>224</sup> In one such account, which is not atypical, the process of constitutional change begins with social and political movements, which “express values and press for change both in culture and in politics.”<sup>225</sup> The political branches respond by creating “new laws and institutions.”<sup>226</sup> Ultimately, the courts “ratify changes in social mores and institutional practices, some of which are already reflected in new laws and institutions.”<sup>227</sup> In this view, the courts “work in cooperation with the dominant national political coalition” and, in the long run, respond “to significant changes in constitutional culture produced by successful social and political mobilizations.”<sup>228</sup>

To synthesize, living constitutionalist theories root democratically legitimate constitutional change in the operation of an “entire *system* of constitutional construction” working in concert—a system that includes “political branches, courts, parties, social movements, interest groups, and individual citizens.”<sup>229</sup> In a popular metaphor of living constitutionalism, the Constitution is a “living tree,” and this system of constitutional construction is the surrounding ecosystem that ensures that tree remains rooted in the soil of American democracy as it grows and changes.<sup>230</sup>

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debate, see Wil Waluchow, *Constitutionalism*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2014).

222. See Post & Siegel, *supra* note 221, at 374 (noting that it is “traditions of popular engagement that authorize citizens to make claims about the Constitution’s meaning and to oppose their government—through constitutional lawmaking, electoral politics, and the institutions of civil society—when they believe that it is not respecting the Constitution”).

223. See *id.*

224. See *id.*

225. BALKIN, *supra* note 18, at 284.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* at 279 (emphasis added).

230. AHARON BARAK, HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT 99 (2015) (citing *Edwards v. Attorney General of Can.*, [1930] AC 124, 136

My point is modest: it is very hard to paint an equally attractive picture of living administrative constitutionalism. The political branches have not been openly debating or embracing some new set of principles for how the regulatory state should be governed. Nor does it appear that the courts and civil society are actively involved with the political branches in a cooperative enterprise of quasi-constitutional norm-articulation in administrative law.

Begin with the executive branch. As several scholars have noted, congressional dysfunction has been the driving factor prompting the executive to experiment with novel forms of administrative action—to use, in the slang, “administrative fixes” such as waivers.<sup>231</sup> The executive actors taking these steps have been focused on using legally available tools to achieve policy goals efficiently and expeditiously. The uneasy fit between these fixes and *administrative* constitutional values has likely been a subsidiary concern, if it was considered at all.

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(PC)); *cf.* ESKRIDGE & FEREJOHN, *supra* note 50, at 445 (discussing a “horticultural” metaphor of a garden in which the Constitution is a plant tended by “gardeners ... [who] are *not* only judges but also legislators, agencies, private groups, and the public at large”).

231. *See, e.g.*, Barron & Rakoff, *supra* note 7, at 271 (noting that waiver “brings the advantages of administration to bear on those existing federal statutory schemes that are themselves in need of revision but that, due to legislative gridlock and the difficulties of contemporary policymaking, cannot easily be revised through the legislative process alone”); Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 5 (2014) (“[T]he central challenge posed by the modern administrative state ... [is] how to balance the pragmatic need for administrative flexibility with respect for the rule of law and democratic values. Our point is simply that typical statutory obsolescence made worse by atypical congressional dysfunction puts tremendous pressure on agencies to do *something* to address new problems, making that central challenge all the more acute.”); Gluck, O’Connell & Po, *supra* note 7, at 1818 (“Sometimes, agencies use waivers to get around the same partisan gridlock that may incentivize unorthodox lawmaking in the first place. In other words, to get around Congress itself.”); Pozen, *supra* note 114, 42-44 (“Faced with a Republican Party that ‘has, at every conceivable juncture, frustrated the [ACA’s] implementation’ and that would undoubtedly block new legislation to clarify or fortify its terms, [President Obama’s] Administration has used ‘myriad delays, waivers, and creative reinterpretations’ to salvage the statute.... The President’s entire ‘We Can’t Wait’ campaign can be seen as an advertisement for executive self-help in response to a Congress that, according to Obama, will not ‘do its job.’”) (footnotes omitted). Others trace the root cause of congressional dysfunction to increases in partisanship spurred by the changing media landscape. *See, e.g.*, Shane, *supra* note 64, at 28 (“If the Rule of Law seems more precarious in 2012 than we imagine it to have been in earlier times, this is not because new forms of administration have emerged. It is because social forces in tension with, or antagonistic to, the Rule of Law culture—think ‘partisanship,’ or ‘media’—have risen in ascendancy.”) (footnote omitted).

Congress has likewise been inattentive to administrative constitutional values. Congress has shown no inclination to address the *procedural* aspects of, for example, the use of waivers by the executive branch. Congressional attention—as evidenced by hearings and proposed legislation—has been focused on the substance of the measures, as opposed to the administrative process through which they were adopted.<sup>232</sup> To the extent that the (Republican-controlled) Congress has shown interest in administrative procedure recently, it has been focused on a completely different area—on imposing additional restrictions on agency rulemaking,<sup>233</sup> with the evident goal of limiting such rulemaking.<sup>234</sup> Obviously, this preoccupation has little to do with checking the use of *exceptions* to notice-and-comment rulemaking; indeed, layering extra requirements on such rulemaking may have the perverse result of driving agencies to use those exceptions more aggressively, thereby further undermining administrative constitutional values.<sup>235</sup>

The basic point is that *realpolitik*, as opposed to deliberation on how the constraints of the administrative constitution should evolve, seems to be the driving force in shaping the political branches' response to administrative constitutional change. Our era is a far cry from that now-distant time when Congress and the

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232. See *supra* note 126. For hearings, see *Review of the President's Executive Actions on Immigration: J. Hearing Before the Subcomm. on Nat'l Sec. and the Subcomm. on Health Care, Benefits, & Admin. Rules of the H. Comm. on Oversight & Gov't Reform*, 114th Cong. (2015); *Unconstitutionality of Obama's Executive Actions on Immigration: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. (2015); *Raising the Bar: Exploring State and Local Efforts to Improve Accountability: Hearing Before the H. Comm. on Educ. & the Workforce*, 113th Cong. (2013); *Obamacare: Why the Need for Waivers?: Hearing Before the Subcomm. on Health Care, D.C., Census & the Nat'l Archives of the H. Comm. on Oversight & Gov't Reform*, 112th Cong. (2011). For proposed legislation, see Repeal Executive Amnesty Act of 2015, S. 129, 114th Cong. (2015); Student Success Act, H.R. 5, 114th Cong. (2015); Healthcare Waiver Fairness Act of 2013, H.R. 2700, 113th Cong. (2013); Empowering States to Innovate Act, H.R. 844, 112th Cong. (2011); Healthcare Waiver Transparency Act of 2011, H.R. 2035, 112th Cong. (2011).

233. See Regulatory Accountability Act of 2015, H.R. 185, 114th Cong. (2015).

234. See Letter, *supra* note 36, at 1 (noting that the Regulatory Accountability Act would add scores of “new procedural and analytical requirements to the agency rulemaking process—many of which would apply to all non-exempt rulemaking”).

235. See *id.* at 2 (noting that the Regulatory Accountability Act’s “new hurdles would likely cause agencies to avoid rulemaking and make increasing use of underground rules, case-by-case adjudication, or even prosecutorial actions, to achieve policies without having to surmount these hurdles”).

executive branch were actively focused on deliberating—for years on end—the structures that would shape administrative procedure for decades to come.<sup>236</sup> Ours has not been a moment of “higher law-making” in administrative law.<sup>237</sup>

What about courts and civil society? In accounts of living constitutionalism, these institutions play starring roles. As Barry Friedman puts it, there has long been a “symbiotic relationship between popular opinion and judicial review.”<sup>238</sup> On abortion, civil rights, affirmative action, and other fraught social controversies, the Supreme Court has served as a translator of popular sentiment into constitutional law.<sup>239</sup> This dynamic both empowers the courts and curbs them: “[i]f courts interpret the Constitution in terms that diverge from the deeply held convictions of the American people, Americans will find ways to communicate their objections and resist judicial judgments.”<sup>240</sup>

In these accounts, public input into constitutional construction by courts is both an essential ingredient of legitimate constitutional change and also an essential check on it. For a variety of reasons, this mechanism does not readily translate into the context of administrative constitutional change. First, the courts may never get a chance to opine on some shifts in administrative constitutional norms. Whereas jurisdiction-stripping over constitutional claims has rarely, if ever, occurred and is viewed with deep suspicion,<sup>241</sup> the preclusion of judicial review over agency action is far more common-

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236. See Kovacs, *supra* note 24, at 1224-27 (describing the enactment of the APA as “following years ‘of public discussion and official deliberation’ within and between Congress, the Executive Branch, the ABA, and the public”).

237. Cf. ACKERMAN, *supra* note 214, at 279 (discussing the role of popular sovereignty in the legal reforms led by the Framers and Franklin Roosevelt).

238. BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 14 (2009).

239. See, e.g., *id.* at 371-72 (“Perhaps more than ever before, Supreme Court decisions run in the mainstream of public opinion. If the people were unhappy with the courts, they could, as they have in the past, signal that discontent. Yet polling data indicate widespread satisfaction with the judiciary.”); Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CALIF. L. REV. 1721, 1750 (2001) (“On only a relative handful of occasions has the Court interpreted the Constitution in ways opposed by a clear majority of the nation.”).

240. Post & Siegel, *supra* note 221, at 374.

241. See RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 342-57 (5th ed. 2003); Lawrence Gene Sager, *The Supreme Court 1980 Term—Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 23-24 (1981).

place,<sup>242</sup> and its use has been vigorously defended.<sup>243</sup> And, of course, the doctrine specifying the scope of available judicial review is itself a roadmap to avoiding judicial review. When non-judicial actors use that roadmap to craft policy in a manner designed to *avoid* judicial review, the potential judicial check can be bypassed entirely. The overall picture differs sharply from constitutional law, in which a more deeply rooted tradition anchors the courts as the final arbiter of legitimate constitutional evolution.

Second, even when courts *do* influence administrative constitutional rules through their decision making, it is not clear that the courts are, or even could be, channeling the public's values in that decision making. Ordinary citizens have little to say about administrative constitutional values. Roughly speaking, administrative law is abstruse and inaccessible, and constitutional law is sexy and easy to grasp.<sup>244</sup> Members of the public hold well-formed views on whether they ought to have the right to burn flags or work for any wage they choose or marry each other; they are unlikely to hold well-formed views on whether agencies should supply justifications for their actions, and if so, when they ought to do so, and at what level of detail. By the same token, administrative law's landmark decisions notably fail to make an appearance in prominent descriptions of the public's influence on the Supreme Court's decision making.<sup>245</sup> Accounts of the public's constraining force on the Supreme Court's decision making (quite rightly) concentrate on cases like *Roe*, *Brown*, and *Lawrence*, not on cases like *Chevron* or *Heckler*.<sup>246</sup> Why *should* these accounts include such cases, when the public had no views on these watersheds? The spirited exchanges between the Court and the public that dominate living constitutionalist accounts do not seem to occur in the colorless "world of midrange institutional struggle"<sup>247</sup> that we call administrative law.

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242. See KENNETH CULP DAVIS, HANDBOOK ON ADMINISTRATIVE LAW 812-67 (1951).

243. See Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1292-93 (2014) (arguing that courts should not apply a presumption of reviewability of agency action to statutory language).

244. See Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 DUKE L.J. 511, 511 ("Administrative law is not for sissies.").

245. See generally ACKERMAN, *supra* note 214; FRIEDMAN, *supra* note 238; STRAUSS, *supra* note 17.

246. See, e.g., FRIEDMAN, *supra* note 238, at 360; STRAUSS, *supra* note 17, at 77-97.

247. POSNER & VERMEULE, *supra* note 55, at 67.

Third and finally, administrative law's lack of public salience ties to a broader issue: the administrative constitution simply lacks the charisma of the ordinary Constitution. Insisting upon one's constitutional rights is an ordinary and natural part of being an American. Insisting upon *administrative* constitutional rights—say, on the advance notice of forthcoming regulations, or on an agency digesting feedback and responding to comments, or on judicial review of the reason undergirding agency action—is not at all natural. There are few constituents out there clamoring for the “APA’s spirit” to be honored. Indeed, the whole project of administrative law has become allied with an unappealing picture of overweening, tyrannical federal regulation<sup>248</sup>—a picture that now has a powerful, unhealthy hold on the American psychology.<sup>249</sup>

All of these factors combine to place administrative constitutional change beneath the radar of public notice and public input. This, by the way, is no small irony. The administrative lawmaking process was self-consciously crafted to encourage a kind of cradle-to-grave public accountability for agency action.<sup>250</sup> In contrast, constitutional law does not openly aspire to that goal. Rather, the Supreme Court manufactures constitutional doctrine with limited formal opportunities for public input, and even those avenues that exist are accessible only to resourceful *cognoscenti*.<sup>251</sup> Given these systemic precommitments, it is therefore mildly surprising that the locale of the closest symbiosis between “the people” and the government is constitutional law and not administrative law.

Ironic or not, the fact of the matter is plain: in administrative law, the dynamics we rely upon to ensure that constitutional change is democratically rooted are attenuated. Moreover, a positive feedback loop links the factors just described. If the Supreme Court acts as a

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248. See, e.g., HAMBURGER, *supra* note 46, at 51.

249. See Mila Sohoni, *The Idea of “Too Much Law”*, 80 *FORDHAM L. REV.* 1585, 1627 (2012) (“[A]rguments against ‘big government’ [have] ... a venerable pedigree in American thought.... In this larger narrative, the amount of federal law is just another yardstick with which to measure the encroaching shadow of the Leviathan.”).

250. See Criddle, *supra* note 63, at 1276.

251. The certiorari process is one example. See Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 *U. PA. L. REV.* 1, 4 (2011) (explaining that the Court “generally does not explain why a particular case will or will not be heard” or “individual Justices’ votes on certiorari petitions”) (footnote omitted); *id.* at 65 (“[W]hen certiorari petitions are filed, they are not made readily accessible to the public.”).

translator of public values, then the less public demand there is for robust *administrative* constitutional protections, the less likely the Court will supply them. And the less the Court has to say about administrative constitutional values, the less salient these values will be to the public—thus depressing public demand for administrative constitutional protections and starting the whole cycle over again. Instead of jointly policing the bounds of administrative constitutional change, the Court and civil society will jointly retreat.

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To this author, at least, it is not evident that the recent movement away from administrative constitutional values has emerged from considered deliberation by the political branches, from an emerging social consensus around new governing principles for the administrative state, or from a rearticulation of governing constitutional norms by publically attuned courts. Put another way, the “ecosystem” or “garden” of administrative constitutional change today seems rather a barren one. This is surely not the only possible prognosis one might offer, and others may wish to supply a rosier account of the genesis and significance of this ongoing transformation in administrative law. We should all agree, however, on the stakes of this debate: whether the significant “changes in practice” in administrative law currently underway ought to count as “valid” changes to the underlying constitutional commitments of the administrative state.<sup>252</sup>

#### CONCLUSION

The creation of the administrative constitution was a tremendous achievement and the fruit of a historic political compromise—but, then again, so was the creation of the Constitution. Neither eons of historical pedigree nor mountains of reliance can insulate either constitution from the pressure to change. Distinguishing between desirable and undesirable forms of constitutional change has long been the central preoccupation of constitutional law. Administrative law must now take up the same task. This will not be easy. But

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252. Sachs, *supra* note 22, at 2256.

unless it is accomplished, we face the risk that we will be governed not by a robust and *living* administrative constitution, but by an administrative constitution in exile.