"ADMINISTRATIVE CONSTITUTIONALISM": CONSIDERING THE ROLE OF AGENCY DECISION-MAKING IN AMERICAN CONSTITUTIONAL DEVELOPMENT

By David E. Bernstein*

Abstract: *The last decade or so has seen an explosion of scholarship by American law professors on what has become known as administrative constitutionalism. Administrative constitutionalism is a catchphrase for the role of administrative agencies in influencing, creating, and establishing constitutional rules and norms, and governing based on those rules and norms. Though courts traditionally get far more attention in the scholarly literature and the popular imagination, administrative constitutionalism scholars show that administrative agencies have been extremely important participants in American constitutional development. Section I of this essay identifies three different versions of administrative constitutionalism—(1) Engagement with Existing Constitutional Doctrine; (2) Resolving Questions of Statutory Meaning that Implicate Constitutional Questions; and (3) Shadow Administrative Constitutionalism—and provides examples from the scholarly literature to illustrate these distinct manifestations of administrative constitutionalism. Section II of this essay discusses the normative turn in administrative constitutionalism scholarship. Much of this normative literature is implicitly or explicitly premised on the notion that agencies are more likely to pursue progressive goals than are other government actors. Section III of this essay disputes the notion that agency constitutional decision-making is "democratic" and that agencies are naturally inclined to serve progressive goals. Finally, Section IV of this essay notes that scholars who support broad agency autonomy to work out and enforce their own constitutional visions have failed to consider how their work fits in with the economic and political science literature on agency behavior. One can predict, based on that literature, that agencies given broad autonomy under the guise of administrative constitutionalism will primarily be inclined to expand their scope and authority at the expense of countervailing considerations.*

KEY WORDS: administrative law, administrative agencies, constitutional law, democratic theory, legal history, public choice, separation of powers

The last decade or so has seen an explosion of scholarship by American law professors on what has become known as administrative constitutionalism. As will be discussed in more detail below, administrative constitutionalism is a catchphrase for the role of administrative agencies in influencing, creating, and establishing constitutional rules and norms, and governing based on those rules and norms.

Administrative agencies are government agencies, attached to the executive branch, that are charged with enforcing the law. Familiar examples in the United States government include the Environmental Protection

* Antonin Scalia Law School, George Mason University, dbernste@gmu.edu. The author thanks Jeremy Kessler, Sophia Lee, Karen Tani, an anonymous referee, and the other contributors to this volume for helpful comments.

doi:10.1017/S0265052521000248

Agency, the Food and Drug Administration, and the Equal Employment Opportunity Commission. While agencies' official constitutional role is limited to enforcement of existing statutes, given the vague language of many laws and the complicated nature of matters like environmental regulation, agencies in practice have a great deal of discretion in how they interpret the laws they enforce.

While in theory agencies are under the supervision of the incumbent president and his political appointees, the day-to-day operation of agencies is largely free from presidential control.[1] Despite its oversight responsibilities, Congress also exercises limited control over agencies.[2] Most agency decisions, especially informal ones such as "regulatory guidance" that do not have the official force of law, are never subject to judicial review. When agency decisions are subject to judicial review, courts generally defer to the agency. In short, administrative agencies have a fair amount of autonomy, both to soundly fulfill their statutory missions, and to undertake legally creative and at times legally dubious measures related to those missions.

In contrast to populist caricatures of out-of-control bureaucrats, administrative constitutionalism scholarship "asks us to take administrators seriously as constitutional actors, and to tease out the mix of constitutional and statutory interpretation, and of legal, intellectual, and political motives involved in administrative decision-making."[3] Indeed, though courts traditionally get far more attention in the scholarly literature and the popular imagination, administrative constitutionalism scholars suggest that "administrative agencies have been the primary interpreters and implementers of the federal Constitution throughout the history of the United States."[4]

Section I of this essay discusses in more detail what legal scholars mean when they discuss administrative constitutionalism. This section identifies three different versions of administrative constitutionalism—(1) Engagement with Existing Constitutional Doctrine; (2) Resolving Questions of Statutory Meaning that Implicate Constitutional Questions; and (3) Shadow Administrative Constitutionalism—and provides examples from the

[1] See Lisa Schultz Bressman and Michael P. Vandenbergh, "Inside the Administrative State: A Critical Look at the Practice of Presidential Control," *Michigan Law Review* 105, no. 1 (2006): 47–52; Peter L. Strauss, "Overseer, or 'The Decider'? The President in Administrative Law," *George Washington Law Review* 75, no. 4 (2007): 704–5.

[2] See Anne Joseph O'Connell, "Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State," *Virginia Law Review* 94, no. 4 (2008): 867–71 (showing that agency behavior tends to stay constant despite changes in partisan control of Congress); David B. Spence, "Managing Delegation Ex Ante: Using Law to Steer Administrative Agencies," *Journal of Legal Studies* 28, no. 2 (1999): 445–46 (concluding that Congressional control over agencies is limited).

[3] Joanna L. Grisinger, "Municipal Administrative Constitutionalism: The New York City Commission on Human Rights, Foreign Policy, and the First Amendment," *University of Pennsylvania Law Review* 167, no. 7 (2019): 1670.

[4] Sophia Z. Lee, "Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present," *University of Pennsylvania Law Review* 167, no. 7 (2019): 1716.

scholarly literature to illustrate these distinct manifestations of administrative constitutionalism.

While most administrative constitutionalism scholarship is historical and descriptive rather than presentist and normative, some legal scholars have enthusiastically championed administrative constitutionalism.[5] Proponents of administrative constitutionalism argue that agencies have several advantages over courts as participants in constitutional development. Among these advantages are that agencies employ a notice-and-comment rulemaking process that is more transparent than judicial decision-making; agencies utilize a more deliberative process than do courts; and agencies are more accountable to public opinion than are courts.[6] A recent article argues that administrative action "not only reflects but also refracts our constitutional order, shedding new light on our most basic legal commitments. Administrative practice can in such cases serve as a zone of constitutional experimentation."[7]

Section II of this essay discusses the normative turn in administrative constitutionalism scholarship. In particular, scholars have expressed support for administrative agencies using their discretion to advance a constitutional vision based on the agencies' own understanding of what values underlie the American constitutional system. Much of this normative literature is implicitly or explicitly premised on the notion that agencies are more likely to pursue progressive goals than are other government actors.

Section III of this essay disputes the notion that agency constitutional decision-making is "democratic" and that agencies are naturally inclined to serve progressive goals. On the first point, Section III notes that agency action is much more likely to be a product of the interests of the agencies' narrow constituencies than to be responsive to the interests of the public as a whole. With regard to progressivism, Section III delineates examples of agencies pursuing reactionary agendas, especially regarding the rights of minority groups.

Finally, Section IV of this essay notes that scholars who support broad agency autonomy to work out and enforce their own constitutional visions have failed to consider how their work fits in with the economic and political science literature on agency behavior. One can predict, based on that literature, that agencies given broad autonomy under the guise of administrative constitutionalism will, for reasons discussed in Section IV, primarily be

[5] For example, Olatunde C. A. Johnson, "Overreach and Innovation in Equality Regulation," *Duke Law Journal* 66, no. 8 (2017): 1773; Bertrall L. Ross II, "Embracing Administrative Constitutionalism," *Boston University Law Review* 95, no. 3 (2015): 519-85.

[6] See Sophia Z. Lee, "From the History to the Theory of Administrative Constitutionalism," in Nicholas R. Parrillo, ed., *Administrative Law from the Inside Out: Essays on Themes in the Work of Jerry L. Mashaw* (New York: Cambridge University Press, 2017): 114–15 (recounting these arguments).

[7] Blake Emerson, "Affirmatively Furthering Equal Protection: Constitutional Meaning in the Administration of Fair Housing," *Buffalo Law Review* 65, no. 2 (2017): 169.

inclined to expand their scope and authority at the expense of countervailing considerations.

I. What is Administrative Constitutionalism?

The rise of the administrative state is an extremely important development in American history. Until recently, however, law professors largely ignored administrative agency contributions to and participation in American constitutional development. Starting a little over a decade ago, a group of young legal historians teaching at prominent law schools began to redress that oversight. Given that legal historians have dominated the field, unsurprisingly the literature on administrative constitutionalism is largely positive rather than normative. While the historical literature sometimes betrays an interest in the potential normative implications of administrative constitutionalism,[8] it nevertheless is mostly descriptive, not proscriptive.

Below, this essay teases out three different types of administrative constitutionalism that one can identify from this descriptive work.

A. Engagement with Existing Constitutional Doctrine

The most straightforward and least controversial understanding of administrative constitutionalism is that it describes instances when administrative agencies engage in decision-making explicitly based on their interpretation of extant constitutional law while at least purporting to respect existing Supreme Court doctrine.[9] Gillian Metzger describes this as "the application of established constitutional requirements by administrative agencies."[10]

The pioneering scholar—indeed, the scholar who invented the phrase—of administrative constitutionalism is University of Pennsylvania School of Law historian Sophia Lee. While researching her dissertation (and eventual book) on "the workplace constitution,"[11] Lee discovered that in the 1960s administrators at the Federal Communications Commission (FCC) and the Federal Power Commission (FPC) were faced with the question of whether the Constitution's equal-protection-of-the-law guarantee required them

[8] This may be less a product of the authors' own priorities, and more a reflection of the fact that law reviews that publish the relevant scholarship are almost all student-run, and the law students who run these law reviews have a bias in article selection toward work with a clear normative perspective, and disfavor purely historical articles.

[9] Sophia Z. Lee, "Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present," *Virginia Law Review* 96, no. 4 (2010): 891 (defining administrative constitutionalism as "regulatory agencies' interpretation and implementation of constitutional law").

[10] Gillian E. Metzger, "Administrative Constitutionalism," *Texas Law Review* 91, no. 8 (2013): 1901.

[11] Sophia Z. Lee, *The Workplace Constitution from the New Deal to the New Right* (New York: Cambridge University Press, 2014).

to enforce equal employment opportunity rules in the industries they regulated.[12]

Judicial precedent dating from the 1950s required the federal government to refrain from race discrimination,[13] but the Supreme Court was silent on whether this had any implications for heavily-regulated private corporations. The Constitution, on its face, bans only government and not private actors from discriminating. Advocates of imposing nondiscrimination rules on FCC licensees argued that there should be an exception for private actors that get extraordinary market power from the government, such as telecommunications companies that receive licenses from the FCC. In such circumstances, advocates argued, the private actors' actions are sufficiently entangled with government action that any discrimination by the private party should be legally attributable to the government, and therefore unconstitutional. The FCC was, by this reasoning, obligated to enforce prohibitions on employment discrimination by licensees.

By the early 1970s, the FCC had adopted this theory and implemented and enforced broad, extensive equal opportunity rules for licensees. The FPC, by contrast, decided not to impose such rules on the power companies it regulated. Even though they reached opposite conclusions, both agencies took seriously what they saw as their obligation to ensure that their policies were consistent with existing Supreme Court doctrine.

Engagement with existing constitutional doctrine can, however, sometimes lead to defiance when the courts clarify that the agency has gone astray, constitutionally speaking. Lee notes that the Supreme Court eventually ruled that private companies are not bound by constitutional antidiscrimination rules, even if they benefitted from monopolistic power granted by the government. The implication of the Court's rulings was that the FCC had no constitutional authority to continue to impose antidiscrimination rules. Nor did any statute give it the authority to do so. The FCC studiously ignored its apparent lack of lawful authority, and continued to enforce its antidiscrimination rules, including affirmative action rules that conflicted with emerging Supreme Court jurisprudence. The FCC persisted in enforcing its affirmative-action-in-employment-rules even after the Supreme Court invalidated as unconstitutional the FCC's own broadcast license preference for minority applicants. These preferences had been based on a similar legal theory as the antidiscrimination rules, but the

[12] Sophia Z. Lee, "Race, Sex, and Rulemaking," 799. For Lee's account of how she stumbled on "administrative constitutionalism," see Lee, "Our Administered Constitution." Some work that preceded "administrative constitutionalism" emerging as a defined line of research later came to be seen as part of the administrative constitutionalism literature, even though it had not self-consciously been such. For example, Risa L. Goluboff, *The Lost Promise of Civil Rights* (Cambridge, MA: Harvard University Press, 2007); Anuj Desai, "Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy," *Stanford Law Review* 60, no. 2 (2007): 556–58.

[13] *Bolling v. Sharpe*, 347 U.S. 497 (1954).

FCC chose to continue its policies in the absence of a direct order from the judiciary to desist.

B. Resolving Questions of Statutory Meaning that Implicate Constitutional Questions

Bertrall Ross defines administrative constitutionalism as "when agencies resolve questions of statutory meaning that implicate deeper constitutional questions."[14] This involves an administrative process in which agencies undertake constitutional value judgments that result "in the elaboration of constitutional meaning."[15] According to Ross, "Even if the agencies do not consciously set out to weigh in on constitutional questions, by fleshing out statutes that rest on constitutional values, the agencies are construing the Constitution. These Constitution-based value judgments do not necessarily become embedded into the Constitution itself, but the agencies' constitutional judgments do become a part of our broader constitutional framework and value system represented by the statutes."[16]

Partisans of "originalism," that is, the view that the U.S. Constitution should be interpreted as nearly as possible according to the original public meaning of the words in the document, would of course reject this version of administrative constitutionalism. Indeed, some hard-core originalists would reject the notion that "constitutional values" can be gleaned outside of the four corners of the text.

Most constitutional scholars, however, endorse some version of "living constitutionalism." This means interpreting the Constitution's broad, general language in light of the felt necessities of modern times. This can result in quite aggressive interpretations of the Constitution. For example, the Constitution's equal protection clause bans the government from denying any person "equal protection of the law." Many constitutional scholars interpret this provision in light of the civil rights movement and resulting antidiscrimination statutes such as the 1964 Civil Rights Act and the 1965

[14] Bertrall L. Ross II, Embracing Administrative Constitutionalism, *Boston University Law Review* 95, no. 3 (2015): 522.

[15] Ibid. at 529.

[16] Bertrall L. Ross II, "Denying Deference: Civil Rights and Judicial Resistance to Administrative Constitutionalism," *University of Chicago Legal Forum* 1 (2014): 229. A somewhat different version of statutory "administrative constitutionalism," propounded by Professors William Eskridge and John Ferejohn in their book, *A Republic of Statutes*, is beyond the scope of this essay. Focusing on the importance of influential statutes, they argue that "America enjoys a constitution of statutes supplementing and often supplanting its written Constitution as to the most fundamental features of governance" (William N. Eskridge, Jr. and John Ferejohn, *A Republic of Statutes: The New American Constitution* [New Haven, CT: Yale University Press, 2010], 11–12). These statutes both serve to fill gaps left by the written Constitution, and influence how other constitutional actors interpret the Constitution. They define administrative constitutionalism as the process through which the norms created by these statutes become an implicit part of the American constitutional system. See also Jerry L. Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (New Haven, CT: Yale University Press, 2012).

Voting Rights Act. These scholars argue that reading the clause in light of later statutory and political developments establishes a general constitutional value of racial equality that transcends the original or literal meaning of the equal protection clause. The constitutional value of racial equality, in turn, can justify racial preferences in higher education despite the literal unequal treatment they provide for, or allow for the regulation of hate speech despite the Constitution's free speech protections. The Supreme Court has never endorsed such a broad and amorphous interpretation of equal protection, but agency administrators, especially those working for mission-driven antidiscrimination agencies, may be disposed to agree more with the Court's academic critics than with the judiciary.

Ross and others argue that administrative actors are especially well-placed to participate in "the elaboration of constitutional meaning" via statutory interpretation. Regardless of whether one agrees with Ross in theory, agencies have in practice played a very significant role in elaborating the meaning of the Constitution through statutory interpretation. Indeed, at times agencies' forays into constitutionalism have eventually influenced Supreme Court jurisprudence.

For example, in the 1960s, federal welfare officials relied on their understanding of constitutional norms and values to provide procedural protections to recipients of federal assistance, even though these protections had at best an ambiguous statutory basis.[17] These efforts influenced the Supreme Court's controversial decisions on poverty law during the late 1960s. In particular, administrative constitutionalism by federal welfare agencies laid the groundwork for the Supreme Court's decision in *Goldberg v. Kelly*.[18] *Kelly* announced a novel constitutional right to a hearing before a claimant's public assistance benefits could be discontinued. *Kelly* treated public assistance as a property right subject to the due process protections of the Constitution. Previously, such assistance had been treated by the courts as a discretionary gift by the government.

The notion that an underlying constitutional value of race and sex equality can trump competing considerations has had particular influence on administrative interpretation of antidiscrimination statutes. For example, Department of Housing and Urban Development rules promulgated during the Obama administration require regulated parties under the Fair Housing Act to "affirmatively … further fair housing" (AFFH).[19] These rules require recipients of HUD funds "to engage in and document a data-driven, participatory, race-conscious planning process to promote

[17] Karen M. Tani, "Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor," *Cornell Law Review* 100, no. 4 (2015): 825–99. See also Karen M. Tani, *States of Dependency: Welfare, Rights, and American Governance, 1935–1972* (New York: Cambridge University Press, 2016).

[18] 397 U.S. 254 (1969).

[19] Blake Emerson, "Affirmatively Furthering Equal Protection: Constitutional Meaning in the Administration of Fair Housing," *Buffalo Law Review* 65, no. 2 (2017): 163–235.

residential integration, reduce housing disparities, and increase access to opportunity in racially or ethnically concentrated areas of poverty."[20]

These rules have no clear basis in the Fair Housing Act, but instead implicitly represent HUD's understanding that there should be a right to discrimination-free housing, and of how such a right should be implemented. The AFFH rules meanwhile run contrary to the gist of recent Supreme Court opinions on equal protection and race.[21] The AFFH rules, while purporting to be the product of ordinary statutory interpretation, are in effect a bold progressive attempt by HUD's civil rights bureaucracy to rely on its own understanding of American constitutional values to reform "public policies that relate to housing fairness, inclusion, and opportunity."[22]

Another example of an agency implicitly invoking its own understanding of constitutional values when purportedly interpreting a statute involves the Office of Civil Rights at the Department of Education (OCR). OCR is charged by Title IX of the Education Amendments of 1972 with prohibiting universities and colleges from engaging in sex discrimination. Sex discrimination by such institutions has been defined by the courts to include tolerating a hostile environment for women, which in turn has been defined to include a failure to adequately police sexual assault. During the Obama administration, OCR imposed new rules for on-campus investigative and adjudicatory processes of sexual assault claims that critics considered draconian.[23] The new rules ignore and indeed are at odds with Supreme Court precedent, particularly regarding the requirements of due process of law.[24] They thus provide a stark example of bureaucrats defying existing constitutional law in favor of rules that better comport with the values they and their agency's constituents hold. Moreover, these rules were not so much an interpretation of Title IX as a response to the perceived inadequacies of Title IX.[25]

C. Shadow Administrative Constitutionalism

The most capacious, and perhaps most problematic, version of administrative constitutionalism involves what one scholar calls "shadow administrative constitutionalism"—"a process of agency-norm entrepreneurship and entrenchment that occurs without public consultation, deliberation, and

[20] Ibid.
[21] Ibid., 165–66.
[22] Ibid., 167.
[23] Karen M. Tani, "An Administrative Right to Be Free from Sexual Violence? Title IX Enforcement in Historical and Institutional Perspective," *Duke Law Journal* 66, no. 8 (2017): 1847–1903.
[24] As explained in David E. Bernstein, "The Abuse of Executive Power: Getting Beyond the Streetlight Effect," *Florida International University Law Review* 11, no. 2 (2016): 289–305.
[25] Julie Novkov, "Equality, Process, and Campus Sexual Assault," *Maryland Law Review* 75, no. 2 (2016): 607–8.

accountability."[26] Agencies, in other words, create internal rules and norms that create a baseline of citizen rights, and thus function as the equivalent of an internal agency constitution. The rules and norms, however, are almost entirely the creation of the agency itself, adopted with little if any transparency or noticeable influence from the formal Constitution, judicial precedent, or extant statutes. Perhaps unsurprisingly, the literature on this form of administrative constitutionalism tends to be less sanguine than in other contexts about the role of agencies in constitutionalism.

Anjali Dalal, who invented the phrase "shadow administrative constitutionalism," examined the evolution of the Attorney General Guidelines. These guidelines govern the procedures and practices of the FBI.[27] Dalal concluded that the U.S. national security bureaucracy often operates "under the radar of meaningful checks and balances" and with an "institutional proclivity towards mission creep" where "norms developed become entrenched through a process of path-dependency and faith in historical practice."[28] In other words, national security officials invent their own constitutional norms in a nontransparent way with little oversight from Congress, the courts, or other executive branch officials, and with little if any public input.

Similarly, a recent article in the *Harvard Law Review* describes the rise of federal prisons that house only noncitizens—a development the author decidedly disfavors—as a "vivid example" of administrative constitutionalism in action. In the absence of clear direction from courts or legislation, bureaucrats in the federal Bureau of Prisons "determine the rights and benefits associated with citizenship status, and thus regulate the terms of membership in the American polity."[29]

Another scholar, meanwhile, suggests that the history of administrative constitutionalism in the Northwest Territory in the early years of the United States provides an example of how administrative constitutionalism can be "a particularly congenial tool for serving normatively undesirable ends."[30] Among other things, operating more or less autonomously, the government of the Northwest Territory institutionalized white supremacy and created a model for future American imperialist ventures in which persons living in American-controlled territory were not permitted to participate in democracy or exercise constitutional rights.[31]

Karen Tani, meanwhile, has examined administrative decision-making in the contexts of the Freedmen's Bureau interpreting the scope of the

[26] Anjali S. Dalal, "Shadow Administrative Constitutionalism and the Creation of Surveillance Culture," *Michigan State Law Review* 59, no. 1 (2014): 61–137.
[27] Ibid., 64
[28] Ibid.
[29] Emma Kauffman, "Segregation by Citizenship," *Harvard Law Review* 132, no. 5 (2019): 1432.
[30] Gregory Ablavsky, "Administrative Constitutionalism in the Northwest Territory," *University of Pennsylvania Law Review* 167, no. 7 (2019): 1666.
[31] Ibid.

Thirteenth Amendment's ban on involuntary servitude, and federal immigration officials enforcing the Chinese Exclusion Act. In each context, administrators did not prove themselves to be consistent friends of enlightened racial egalitarianism, to put it mildly.[32]

Agencies have, however, sometimes advanced liberal causes via shadow administrative constitutionalism. While government bureaucracies had once tormented homosexuals, by the mid-1980s many bureaucrats, especially in liberal urban areas, had become allies of gay-rights causes.[33] For example, some civil servants failed to enforce statutory bans on gay and lesbian foster and adoptive parents, while others promoted public school curricula that preached tolerance of homosexuality.[34] These actions were not dictated by legislative changes, but by the bureaucrats' own understanding of their constitutional and moral obligations to their fellow citizens; in other words, via "shadow administrative constitutionalism."

II. The Normative Turn in Administrative Constitutionalism Scholarship

Scholarly interest in administrative constitutionalism was never entirely free of subtle ideological considerations. Studying the history of administrative constitutionalism provides progressives who have an interest in constitutional development with an alternative to studying the "conservative" Supreme Court. While the Court occasionally gives progressives victories such as mandating that states recognize same-sex marriage,[35] the Court has only been dominated by what is generally considered to be the "left" from approximately 1937 to 1973, a small fraction of the Court's overall history, and has been dominated by moderate conservatives since the early 1970s. Worse from a left-leaning perspective, Donald Trump's election in 2016 and appointment of three young conservative Justices to replace three older Justices makes it likely that conservatives will control the Court for at least another generation.

The history of administrative agencies "making" constitutional law, sometimes in service of progressive goals, provides a more pleasant area of constitutional and administrative law research for progressives than studying the Supreme Court. It also provides hope that the Court's conservatism may be resisted or at least mitigated to some degree by administrative actors committed to a progressive agenda involving activist government.

[32] Karen M. Tani, "Administrative Constitutionalism at the 'Borders of Belonging': Drawing on History to Expand the Archive and Change the Lens," *University of Pennsylvania Law Review* 167, no. 7 (2019): 1603–1630.

[33] Marie-Amélie George, "Bureaucratic Agency: Administering the Transformation of LGBT Rights," *Yale Law and Policy Review* 36 (2017): 83–154; Marie-Amélie George, "Agency Nullification: Defying Bans on Gay and Lesbian Foster and Adoptive Parents," *Harvard Civil Rights–Civil Liberties Law Review* 51, no. 2 (2016): 363–422.

[34] Ibid.

[35] *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

Nevertheless, the early (and much of the subsequent) administrative constitutionalism literature was primarily historical and descriptive rather than normative. Over time, legal scholars interested in administrative constitutionalism—who after all work in an academic field dominated by scholarship with an explicitly normative agenda—gradually began to strongly defend, rather than just describe, administrative constitutionalism.

Leading proponents of expansive administrative constitutionalism, that is giving agencies a large and autonomous role in the evolution of American constitutionalism, such as Professors Sam Bagenstos, Gillian Metzger, and Bertrall Ross, are not legal historians. Rather, they are scholars of administrative law who have an ideological preference for a liberal, activist federal government. Administrative constitutionalism is attractive to progressive scholars because even in its most liberal phase, the Supreme Court has been extremely reluctant to countenance "positive" rights, and instead tends to see the Constitution as a "charter of negative liberties."[36] The Supreme Court has provided little constitutional protection of the sorts of positive or social rights favored by progressives, such as the right to a minimum income or the right to be free from private-sector discrimination. Studying administrative constitutionalism allows progressive legal scholars to focus on how agencies have given implicit or explicit constitutional meaning to positive rights. Moreover, normative legal scholarship on administrative constitutionalism was a natural outgrowth of the progressive literature on the "Constitution outside the courts," or "popular constitutionalism."[37]

[36] *DeShaney v. Winnebago County Department of Social Services*, 812 F.2d 298, 301 (7th Cir. 1987), affirmed, 109 S. Ct. 998 (1989). Progressive frustration with focusing on the Supreme Court and with the Court's jurisprudence was well-summarized by Barack Obama in a radio interview in 2001:

> The Supreme Court never ventured into the issues of redistribution of wealth and sort of more basic issues of political and economic justice in this society. And to that extent, as radical as I think people tried to characterize the Warren Court, it wasn't that radical. It didn't break free from the essential constraints that were placed by the founding fathers in the Constitution, at least as it's been interpreted, and [the] Warren Court interpreted in the same way that, generally, the Constitution is a charter of negative liberties, says what the states can't do to you, says what the federal government can't do to you, but it doesn't say what the federal government or the state government must do on your behalf. And that hasn't shifted.
>
> One of the, I think, the tragedies of the civil rights movement, was because the civil rights movement became so court focused, I think that there was a tendency to lose track of the political and community organizing activities on the ground that are able to put together the actual coalitions of power through which you bring about redistributive change, and in some ways we still suffer from that.

Quoted in Steve Benen, "Radio Days," *Washington Monthly*, October 27, 2008, https://washingtonmonthly.com/2008/10/27/radio-daze. See also Justin Driver, "The Constitutional Conservatism of the Warren Court," *California Law Review* 100 (2012): 1101–1168.

[37] Lee, "Our Administered Constitution." For examples of the "Constitution Outside the Courts" literature, see Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (New York: Farrar, Straus and Giroux, 2009); Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004).

This literature was itself a product of progressives' despair about what they perceived as the Supreme Court's recalcitrant conservatism.

Support for administrative constitutionalism also serves as a defense to increasing attacks from conservatives on the modern administrative state,[38] leading to a countervailing desire among progressives to defend that state, including its contributions to constitutional law and norms.[39] Conservatives once hoped that the federal bureaucracy managed by Republican presidents could be a source of resistance to judicial activism. They therefore advocated doctrines requiring fairly extreme judicial deference to agency decision-making.[40]

More recently, conservatives have concluded that relying on having Republican presidents in control of the bureaucracy is short-sighted. For one thing, the hold that Republicans seemed to have on the presidency in the Reagan/Bush years, and thus their hold on executive branch appointments, has slipped. Republican candidates have received more votes than their Democratic opponents received only once in the past seven presidential elections, with two Republican presidents—Bush in 2000 and Trump in 2016—squeaking by with victories in the electoral college while trailing in the overall vote tally.

Perhaps more important, conservatives have come to recognize that federal agencies are stocked with civil servants who are generally progressive in their politics, and even more significant, strongly believe in their own agencies' broad missions (civil rights enforcement, environmental protection, and so forth) that lend themselves to expansive regulatory policies that conservatives typically oppose.[41] A bureaucracy that is ideologically and

[38] The most prominent academic work in this genre is Philip A. Hamburger, *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2015).

[39] For an example of progressive alarm at these attacks, and a vigorous defense of the administrative state, see Gillian E. Metzger, "The Supreme Court, 2016 Term–Foreword: 1930s Redux: The Administrative State Under Siege," *Harvard Law Review* 131, no. 1 (2017): 1–95. For a rejoinder, see Aaron L. Nielson, "Confessions of an 'Anti-Administrativist,'" *Harvard Law Review Forum* 131, no. 1 (2017): 1–12. See also Daniel R. Ernst, *Tocqueville's Nightmare: The Administrative State Emerges in America, 1900–1940* (New York: Oxford University Press, 2014); Cass R. Sunstein and Adrian Vermeule, "Libertarian Administrative Law," *University of Chicago Law Review* 82, no. 2 (2015): 398–400.

[40] For example, *Auer v. Robbins*, 519 U.S. 452 (1997); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Justice Antonin Scalia, a leading conservative Supreme Court Justice, was also a leading advocate of deference to agencies for most of his judicial career. Thomas W. Merrill and Kristin E. Hickman, "*Chevron's* Domain," *Georgetown Law Journal* 89, no. 3 (2001): 867.

[41] Jennifer Bachner and Benjamin Ginsberg, *What Washington Gets Wrong* (New Haven, CT: Yale University Press, 2016), 60: "When agencies that provide such benefits as healthcare and welfare hire employees and secure the services of consultants and contractors, they quite naturally attract individuals who by personal belief and prior training are committed to the organization's goals." Steven P. Croley, *Regulation and Public Interests: The Possibility of Good Regulatory Government* (Princeton, NJ: Princeton University Press, 2008), 49: "[W]hat motivates many administrators in the first place … is some philosophical commitment to an agency's regulatory mission." Ibid. at 93: "[I]t seems plausible that administrators self-select into an employment pool consisting of individuals who share some ideological commitment to a given agency's mission or, more generally, who believe that regulation can ameliorate difficult social

institutionally inclined to resist challenges to its scope and authority cannot easily be controlled by a reformist conservative president and his political appointees. Indeed, conservative political activists have come to use the phrase "Deep State" to refer to what they see as the intransigent bureaucracy that operates semi-autonomously.

For the same reasons many conservatives distrust the administrative state, many progressives have embraced it. They see agencies as a means to bypass Congressional gridlock, evade hostile judicial rulings, manage public opinion, stymie corporate and ideologically motivated demands for deregulation, and promote progressive goals—goals that progressives rightly or wrongly believe are widely shared by American voters, and are therefore "democratic" to pursue.[42] Even historical work on administrative constitutionalism without an obvious normative agenda, such as a recent review of the literature on the history of administrative constitutionalism, is often inspired in part by the question of whether conservative nostalgia for a golden age of administrative constraint rings true historically.[43]

In 2013, early in the surge of administrative constitutionalism scholarship, Metzger wrote the first article to provide a strong normative defense of administrative constitutionalism.[44] She concluded that "administrative constitutionalism's virtues outweigh these concerns with unauthorized administrative or judicial action," and indeed that "administrative constitutionalism can represent a particularly legitimate form of constitutional development."[45] Nevertheless, Metzger acknowledged that "the accountability challenges" administrative constitutionalism "poses are real," given that agencies often fail to publicly acknowledge that their decision-making involves a form of constitutional lawmaking.[46]

In 2015, Ross published an article with the pregnant title "Embracing Administrative Constitutionalism."[47] Ross's article embraced the debatable proposition—one certainly not accepted by originalists—that the principal goal of American constitutionalism is "the adaptation of the Constitution to evolving societal context."[48] Administrative agencies, Ross added, have much more flexibility to experiment with different applications of constitutional principles and ideals. Such experimentation by agencies invites public deliberation over the justness, fairness, and efficacy of agency action. The experiments that win public and judicial support become welcome

---

and economic problems …. Over time, then, those who remain with an agency and climb its ranks are those who tend to believe in its mission …."

[42] Samuel R. Bagenstos, "This is What Democracy Looks Like: Title IX and the Legitimacy of the Administrative State," *Michigan Law Review* 118, no. 6 (2020); Gillian E. Metzger, "Administrative Constitutionalism," *Texas Law Review* 91, no. 8 (2013): 1897–1935.

[43] Lee, "Our Administered Constitution."

[44] Gillian E. Metzger, "Administrative Constitutionalism," 1897–1935.

[45] Ibid., 1901–1902.

[46] Ibid., 1902.

[47] Bertrall L. Ross II, "Embracing Administrative Constitutionalism," 519–85.

[48] Ibid., 585.

accretions to our constitutional law. Indeed, in a subsequent paper, Ross defends administrative constitutionalism as a particularly sound example of so-called popular constitutionalism, that is, constitutional principles arising from public opinion outside of the judicial process.[49]

Perhaps the most vigorous normative defense of administrative constitutionalism can be found in a forthcoming review essay by Samuel Bagenstos.[50] In his essay Bagenstos defends the Department of Education's Office of Civil Rights from charges that its regulatory guidance regarding sexual assault on campus has been undemocratic because it involved what amounted to a change in the law that emanated from the agency itself, not a new or amended statute.[51] In fact, Bagenstos argues, the Title IX experience demonstrates the value of administrative constitutionalism, in particular the version that this essay refers to as "shadow administrative constitutionalism."

One obvious objection to shadow administrative constitutionalism is that having agencies invent and apply their own notions of what rights Americans should have is undemocratic. Bagenstos rejoins that the Title IX controversy "supports the claim made by some scholars that administrative agencies can be a key locus of democratic deliberation over the scope of basic rights."[52] OCR, he states, not only has "served as a catalyst for democratic debate," and "a forum in which that debate has played," but chose to "implement of the will of the people."[53]

III. Administrative Constitutionalism: Not a Progressive Panacea

Some manifestations of administrative constitutionalism are difficult to gainsay. In particular, despite judicial ambivalence on whether, and to what extent, administrative agencies should take existing judicial precedent on constitutional issues into account when interpreting and enforcing the law,[54] an agency that explicitly and transparently defers to such precedent can hardly be said to be acting lawlessly. As Professor Lee has emphasized, constitutional issues will inevitably arise in agency decision-making. Better that agencies be transparent about such considerations, with their decisions subject to public scrutiny and judicial review, than for agencies to undertake constitutional determinations covertly and autonomously.

[49] Bertrall L. Ross II, "Administrative Constitutionalism as Popular Constitutionalism," *University of Pennsylvania Law Review* 167, no. 7 (2019): 1783–1861.
[50] Samuel R. Bagenstos, "This is What Democracy Looks Like."
[51] Ibid.
[52] Ibid.
[53] Ibid.
[54] At the federal level, the Supreme Court has noted that "adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies" (*Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 [1994] quoting *Johnson v. Robinson*, 415 U.S. 361, 368 [1974] [internal quotation marks omitted]). The Court added, however, that "[t]his rule is not mandatory" (ibid.).

Other forms of administrative constitutionalism—in particular shadow administrative constitutionalism, which in effect allows agencies simply to make up internal constitutional rules based on values held within the agency—are more troubling. For one thing, there is reason to doubt the notion that autonomous administrative agency action has the sort of democratic legitimacy that the most vocal advocates claim it does. No one elected those in charge of agency decision-making, and it's far from clear why unelected government officials whose official constitutional role is to enforce the law should get to decide whether and how to amend or update statutes. Moreover, regardless of democratic legitimacy, an agency decision to *sua sponte* update or amend a law without a new statute being passed by Congress and signed by the president lacks *constitutional* legitimacy.

Consider Bagenstos's claim, discussed in the previous section, that OCR's implementation of Title IX guidance was not just legitimate but desirable. His argument hinges on the normative claim that in interpreting statutes, agencies should look to neither the precise text of the law nor to the generally accepted public meaning the law had when enacted, but rather to interest group mobilization and shifts in public opinion favoring an "aggressive" interpretation of the statute. Indeed, he explicitly argues that it is not illegitimate for administrators to unilaterally "update" or "amend" a statute.[55] And yet, if agencies are relying on neither the language of a statute nor on inherent, transparent constitutional authority, it's far from clear where they get legitimate authority in a constitutional democracy to be enforcing a particular worldview.

Bagenstos's argument also, crucially, depends on the notion that the anti-sexual assault activists who nurtured the social movement that led OCR to issue its guidance represent not merely a loud, vigorous faction of the public, but the will of the people writ large, making this OCR action therefore legitimate and "democratic." Bagenstos, however, provides no reason to believe that this is so.

More generally, we should be cautious about relying on perceived "democratic legitimacy," as opposed to following the formal rules set forth in the Constitution and in legislation such as the Administrative Procedure Act. There is no consensus as to what constitutes democratic legitimacy, and it is apparent that some scholars quite sloppily define "democratic legitimacy" as being something very close to "results in policies that I prefer."

Progressives such as Metzger, Ross, and Bagenstos seem drawn to broad versions of administrative constitutionalism to evade what some would argue is the inherent conservatism of the American constitutional system. Yet history does not support the assumption that administrative constitutionalism inherently promotes progressive values. This essay has already discussed several examples where administrative flexibility in applying

[55] Bagnestos, "This is What Democracy Looks Like."

"constitutional principles," particularly with regard to race and ethnicity, has led to illiberal policy.

Recall this essay's definition of shadow administrative constitutionalism —"a process of agency-norm entrepreneurship and entrenchment that occurs without public consultation, deliberation, and accountability." Other examples of illiberalism that result from this sort of administrative constitutionalism are easy to come by. Consider, for example, local government administrators who vigorously enforced their states' anti-miscegenation laws, including making their own innovations regarding who was covered by such laws and how their race could be ascertained.[56] Or consider the bureaucrats who put various procedural and other obstacles in the way of Jewish refugees seeking to flee Nazi-occupied areas in the late 1930s, ensuring that even meager immigration quotas would not be filled.[57] Or consider southern voting registrars who took pains to limit or prevent African-American voter registration in the South,[58] or zoning officials and road planners who tried to ensure that segregated housing patterns would be entrenched.[59] Or consider the federal immigration officials who expelled tens of thousands of Mexicans from the United States in the early 1930s, including some who had American citizenship.[60] Or consider federal Indian policy undertaken by executive branch bureaucrats in the nineteenth century, which involved "detention of Native peoples without any avenue for redress, forced separation of Native families, criminalization of religious beliefs, and a violent 'civilizing' process of Native adults and children."[61] For most of American history race-related administrative constitutionalism was mostly neglectful of, and sometimes outright hostile to, the rights and interests of minorities.

The lesson of history is not that administrative constitutionalism leads to "good" or "bad" results from any given ideological perspective, but that administrative agencies will, like other political/governmental actors, act according to circumstances and incentives. Joy Milligan's work has emphasized these factors. Milligan has shown that because of the relevant circumstances and incentives, administrative constitutionalism operated in some contexts to entrench racial segregation. Federal education officials not only

[56] See Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (New York: Oxford University Press, 2009), 205–31.

[57] See Bat-Ami Zucker, *In Search of Refuge: Jews and US Consuls in Nazi Germany* 1933–1941 (London: Vallentine Mitchell, 2001).

[58] J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880–1910* (New Haven, CT: Yale University Press, 1974).

[59] See Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (New York: Liveright, 2017).

[60] Francisco E. Balderrama and Raymond Rodríguez, *Decade of Betrayal: Mexican Repatriation in the 1930s* (Albuquerque: University of New Mexico Press, 1995): 21–22; Abraham Hoffman, *Unwanted Mexican Americans in the Great Depression: Repatriation Pressures*, 1929–1939 (Tucson: University of Arizona Press, 1974).

[61] Maggie Blackhawk, "Federal Indian Law as Paradigm within Public Law," *Harvard Law Review* 132, no. 6 (2019): 1871.

contentedly funded segregated public schools, but did so long after the Supreme Court announced in *Brown v. Board of Education* that segregated schools were unconstitutional.[62] The Federal Housing Administration, meanwhile, continued to fund segregated housing projects not just after *Brown*, but even after the 1964 Civil Rights Act demonstrated Congressional desire to limit racial discrimination.[63] In each case, federal bureaucrats believed that their job was to promote their underlying mission—federal funding of public education and housing, respectively—and that these missions did not include undermining white supremacy. Any attempt by the agencies to undermine segregation would have enmeshed them in controversy and reduced Congressional support for what they saw as their primary goal.

Unfortunately, beyond Milligan's work, legal historians have focused primarily on the proverbial trees (in-depth looks at specific instances of administrative constitutionalism) and neglected the forest (considering how their work fits in with the economic and political science literature on agency behavior). This "forest" is the subject of the next section of this essay.

IV. Agency Incentives and Administrative Constitutionalism

The administrative constitutionalism literature has been almost entirely innocent of insights from the economic and political science literature on agency behavior. As discussed below, the primary lesson to be learned from the latter body of literature is that agencies are inclined to expand the scope of their authority, regardless of countervailing considerations, and will tend to use any autonomy they have to achieve that expansion.

When I waded into the debate over administrative constitutionalism,[64] I discussed examples of administrative agencies charged with enforcing antidiscrimination laws ignoring constitutional constraints on their authority, including the First Amendment right to freedom of speech and Fifth and Fourteenth Amendment rights not to have one's liberty taken without due process of law. I noted that mission-driven agencies tend to adopt a culture in which their paramount goal is to fulfill their mission. Any external constraints on enforcement, including constitutional considerations, are thought best left to the courts, if not ignored entirely.

There are several reasons agencies are inclined to behave this way. First, the dominant theory of statutory interpretation in elite legal circles is "purposivism." Any ambiguities in the text should be resolved in favor of

[62] Joy Milligan, "Subsidizing Segregation," *Virginia Law Review* 104, no. 4 (2018): 847–932; *Brown v. Board of Education*, 347 U.S. 483 (1954).

[63] Joy Milligan, "*Plessy* Preserved" *Yale Law Journal* 129, no. 4 (2020): 924–1018.

[64] David E. Bernstein, "Antidiscrimination Laws and the Administrative State: A Skeptic's Look at Administrative Constitutionalism," *Notre Dame Law Review* 94, no. 3 (2019): 1391–1415.

interpreting statutes broadly in light of the legislature's "purpose" in enacting them.[65]

Purposivism neglects the obvious fact that statutes do not have a single author with a single purpose, but are the product of many individual legislators across two Houses of Congress who engage in compromises as the statute moves through the legislative process. For example, while environmental legislation may have the basic goal of making the air or water cleaner, the final version of the legislation will generally include a variety of compromises intended to address the potential objections of businesses, workers, and others who might be harmed by the pending legislation. Purposivism, however, inclines agencies to ignore such compromises, and interpret any statutory ambiguities solely in favor of additional regulation of air and water quality—the "purpose" of the statute. Purposivism practically invites agencies to find and even create ambiguities so that they can interpret statutes broadly. Agencies believe that they succeed "by accomplishing the goals Congress sets for it as thoroughly as possible—not by balancing its goals against other [considerations]."[66]

The second reason agencies are inclined to expand their power at the expense of other considerations is that mission-driven agencies attract employees ideologically committed to their agency's respective mission, and these employees seek to expand agency authority to fulfill that mission.[67] For example, environmentalists will seek employment at the EPA, union supporters at the Department of Labor, civil rights advocates at the Justice Department's Civil Rights Division or the Department of Education's Office of Civil Rights, and law and order advocates at the FBI, Justice Department Criminal Division, or Bureau of Alcohol, Tobacco and

[65] See, e.g., Adrian Vermeule, *Judging under Uncertainty: An Institutional Theory of Legal Interpretation* (Cambridge, MA: Harvard University Press, 2006): 205–8; Cass R. Sunstein, "The Most Knowledgeable Branch," *University of Pennsylvania Law Review* 164, no. 7 (2016): 1607–1648; Kevin M. Stack, "Purposivism in the Executive Branch: How Agencies Interpret Statutes," *Northwestern University Law Review* 109, no. 3 (2015): 887–900.

[66] Christopher C. DeMuth and Douglas H. Ginsburg, "White House Review of Agency Rulemaking," *Harvard Law Review* 99, no. 4 (1986): 1081.

[67] Jennifer Bachner and Benjamin Ginsberg, *What Washington Gets Wrong: The Unelected Officials Who Actually Run the Government and Their Misconceptions about the American People* (Amherst, NY: Prometheus Books, 2016), 60: "[W]hen agencies that provide such benefits as healthcare and welfare hire employees and secure the services of consultants and contractors, they quite naturally attract individuals who by personal belief and prior training are committed to the organization's goals"; Steven P. Croley, *Regulation and Public Interests: The Possibility of Good Regulatory Government* (Princeton, NJ: Princeton University Press, 2008), 49: "[W]hat motivates many administrators in the first place … is some philosophical commitment to the agency's regulatory mission." Ibid., at 93: "[I]t seems plausible that administrators self-select into an employment pool consisting of individuals who share some ideological commitment to a given agency's mission, or more generally, who believe that regulation can ameliorate difficult social and economic problems … Over time, then, those who remain with an agency and climb its ranks are those who tend to believe in its mission." Steven Kelman, "Occupational Safety and Health Administration," in James Q. Wilson, ed., *The Politics of Regulation* (New York: Basic Books, 1980), 236, 250 (concluding that OSHA's actions are motivated by the "pro-protection values of agency officials, derived from the ideology of the safety and health professionals and the organizational mission of OSHA").

Firearms. The result is that these agencies develop a culture that favors broad interpretations of the agencies' enforcement power. Moreover, even employees who join an agency for purely careerist reasons or because they are political appointees will often eventually "go native" and become committed to the agency's mission.[68]

Third, and concomitantly, agency staff (unlike generalist judges) generally see enforcing constitutional limitations on government power as the courts' job, not something they need to be concerned with. It should be noted, however, that Milligan's focus on agency design reminds us that if an agency were *designed* to enforce or at least pay attention to constitutional limits on its own authority, it would be much more likely to do so.

Fourth, and likely most important, as public choice economists have taught us agencies are naturally inclined to increase their power, prestige, and budget, as these are the sorts of things that bureaucrats get utility from and have the power and incentive to maximize.[69] While critics have argued that the early public choice literature went too far in using this as a monocausal explanation of agency behavior, more modest versions, presenting this sort of self-interest as one important motive among many, are likely correct.[70] One important way agencies can maximize their power and budget, while also retaining the support of members of Congress and outside interests that provide them political support, is by expansively interpreting the scope of the laws they are charged with enforcing.[71]

Agencies' desire to expand their authority can be mitigated by the risk that doing so in some circumstances will upset their patrons and supporters in Congress, the Executive branch, and in the private sector.[72] And political

[68] See E. Donald Elliott, "TQM-ing OMB: Or It," *Law and Contemporary Problems* 57 (1994): 176 (raising the possibility of political appointees "going native and adopting the characteristic values of their agencies"); Bruce Ackerman, "The New Separation of Powers," *Harvard Law Review* 113, no. 3 (2000): 700–701 (noting concerns that career civil service employees will "succumb to the pressures of the entrenched ideologues to sustain the preexisting mission of the agency even when it deviates from the administration's agenda).

[69] William A. Niskanen, *Bureaucracy and Representative Government* (New York: Transaction, 1971): 9, 37–38; Sam Peltzman, "Toward a More General Theory of Regulation," *Journal of Law and Economics* 19, no. 2 (1976): 211–40: George J. Stigler, "The Theory of Economic Regulation," *Bell Journal of Economics and Management Science* 2, no. 1 (1971): 3–21; Andre Blais and Stephane Dio, eds., *The Budget Maximizing Bureaucrat: Appraisals and Evidence* (Pittsburgh, PA: University of Pittsburg Press, 1991).

[70] See Matthew Stephenson, "Statutory Interpretation by Agencies," in Daniel A. Farber and Anne Joseph Connell, eds., *Research Handbook on Public Choice and Public Law* (Northampton, MA: Edward Elgar, 2010).

[71] Elena Kagan, "Presidential Administration," *Harvard Law Review* 114, no. 8 (2001): 2279 (noting that advocates of centralizing regulatory policy in the Reagan Administration argued that such centralization was necessary "to guard against regulatory failures—in particular, excessive regulatory costs imposed by single-mission agencies with ties to special interest groups and congressional committees.").

[72] For example, in the context of Milligan's work, while the Department of Education and the Federal Housing Administration could have expanded their authority by insisting that recipients of federal money adhere to nondiscrimination norms, that would have risked upsetting various constituencies these agencies relied upon for political support, which could ultimately have resulted in slashed budgets and other limits on their authority.

constituencies can develop that give agencies an incentive to walk back their assertions of expansive authority.[73] Nevertheless, agencies' clear tendency is to expand their authority for the reasons discussed above.

In short, advocates of shadow administrative constitutionalism tend to be much too sanguine about how agencies would likely exercise autonomy to establish their own constitutional common law. Administrative incentives are not to perfect public policy, but to build agencies' internal empires, to please their internal constituents such as ideology-driven employees and also their external constituents in the public and private sectors, and to promote the agencies' agenda at the expense of all other considerations, including important constitutional protections for civil liberties.

V. Conclusion

The administrative constitutionalism literature has succeeded at focusing scholarly attention on the way administrative agencies reckon with, evade, or create constitutional rules and norms. By focusing attention on early examples of administrative constitutionalism, it has also called into question the narrative that the rise of the administrative state was a novel innovation of the Progressive and New Deal eras. At the very least, one can reasonably conclude that administrators played a significantly larger role in the development of American constitutionalism than traditional accounts concede. The administrative constitutionalism literature has also been persuasive in suggesting that to the extent administrative agencies *need* to address constitutional issues when enforcing statutes, it is better that they do so transparently and subject to judicial review than covertly and opaquely.

The administrative constitutionalism literature has not, however, successfully demonstrated that administration agencies should be encouraged to act autonomously to impose their own constitutional visions on the areas of law within their enforcement purview. In addition to the democratic and constitutional concerns such a role raises, advocates of autonomous administrative constitutionalism have not shown that agencies are superior to other political and governmental actors, especially courts, in addressing constitutional considerations. Libertarians and other advocates of limited government would naturally be skeptical of lodging more power in the bureaucracy. Even from a progressive perspective, however, agencies' historical record in creating and enforcing constitutional norms is decidedly mixed. The progressiveness of any particular agency will inevitably depend on the incentives the agency is given, what staff the agency attracts, how the agency is designed, and which political constituencies are interested in the

[73] For example, the Obama Administration's attempt to use Title IX to micromanage the treatment of sexual assault allegations on college campuses in ways that threatened constitutional rights led to a backlash that gave the Trump Administration the incentive and wherewithal to withdraw the previous administration's guidance.

agency's activities. There is, in short, nothing about administrative constitutionalism that inherently inclines agencies toward any given ideological or political perspective.

Meanwhile, the literature on administrative constitutionalism has so far largely ignored a fundamental downside of agency participation in constitutional decision-making: unlike generalist courts, agencies are naturally focused on their missions, and those missions rarely include protecting Americans' constitutional rights from administrative overreach. Indeed, as in the case of OCR's regulatory guidance requiring colleges to strip students accused of sexual assault of due process protections, what many would consider "administrative overreach" would be precisely what administrators believe that their understanding of "constitutional values" requires them to do.

As this essay suggests, there is still a huge amount for the scholarly community to uncover and explain with regard to administrative constitutionalism. There is a danger that the administrative constitutionalism literature will instead become dominated by dubious normative narratives, and like Gresham's Law the more informative scholarship will be driven out, to the detriment of the scholarship overall. One hopes that danger can be avoided.

Law, George Mason University, USA