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### Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present

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OUR ADMINISTERED CONSTITUTION: ADMINISTRATIVE  
CONSTITUTIONALISM FROM THE FOUNDING  
TO THE PRESENT

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SOPHIA Z. LEE†

INTRODUCTION ..... 1700

I. THE CONSTITUTION’S ADMINISTRATIVE FOUNDATIONS,  
1776–1900 ..... 1710

    A. *Administering the Constitution Before the Civil War* ..... 1710

    B. *Administrative Constitutionalism During Reconstruction and the  
    Gilded Age* ..... 1719

II. PROGRESSIVE ERA ADMINISTRATIVE CONSTITUTIONALISM,  
1900–1933 ..... 1729

III. ADMINISTERING THE CONSTITUTION SINCE THE NEW DEAL,  
1933–THE PRESENT ..... 1733

CONCLUSION ..... 1744

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## INTRODUCTION

Administrative law has long been a quiet corner of legal scholarship. Debates occurred over changes at the margin: how much of a role should cost-benefit analysis play? How could notice-and-comment rulemaking better live up to its promise of public engagement? How big a problem is the revolving door or industry capture of agency agendas? The literature excited insiders, but was viewed by most outsiders as technical, specialized, and, often, dry.

No longer. For the first time in nearly a century, the scholars, judges, lawyers, and advocacy groups challenging the constitutional foundations of the modern administrative state have reached a critical mass. Detractors have existed since the New Deal settled the current legal framework for administration. But critics, while garnering attention from time to time, have remained largely at the fringes of scholarly, judicial, and political discourse. Now their critiques top the agenda of even the largest-tent conservative legal organization, the Federalist Society; have revived legislative proposals that could dramatically change the New Deal settlement; and potentially command a majority on the Supreme Court.

Legal scholars have played a central role in generating this constitutional critique. Until recently, the New Deal settlement governed judicial doctrine. Hints of the critique might crop up in an opinion by Justice Clarence Thomas or the D.C. Circuit Court of Appeals might send up a trial balloon.<sup>1</sup> But by and large, the constitutional critique of the modern administrative state appeared in think tank publications and the pages of law reviews.<sup>2</sup> Its

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<sup>1</sup> See, e.g., *Whitman v. Am. Trucking Ass'ns.*, 531 U.S. 457, 486-87 (2001) (Thomas, J., concurring) (questioning whether the modern nondelegation doctrine prevents all unconstitutional delegations of legislative power); *Am. Trucking Ass'ns. v. EPA*, 175 F.3d 1027, 1034 (D.C. Cir. 1999) (finding that a provision of the Clean Air Act was an unconstitutional delegation of legislative power).

<sup>2</sup> See, e.g., Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1388 (1987) (arguing that "the expansive construction of the clause accepted by the New Deal Supreme Court is wrong . . . and that a host of other interpretations are more consistent with both the text and the structure of our constitutional government."); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994) ("The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution."). The Cato Institute also fostered this line of critique in its *Regulation* magazine. See, e.g., Douglas H. Ginsburg, *Delegation Running Riot*, REGULATION, Winter 1995 at 83, 84 (reviewing DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993)) ("[F]or 60 years the nondelegation doctrine has existed only as part of the Constitution-in-exile, along with the doctrines of enumerated powers, unconstitutional conditions, and substantive due process . . . . The[ir] memory . . . is kept alive by a few scholars who labor on in the hope of a restoration . . . ."; see also RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 1 (2004) ("Since the adoption of the Constitution, courts have eliminated clause after clause that interfered with the exercise of government power. . . . [This] culminated in the post-New Deal Court that gutted the Commerce Clause and the . . . Tenth Amendment, while greatly expanding the unwritten 'police power' of the states.").

architects, labeled defenders of the “Constitution in Exile,” called for a return to what they described as the pre–New Deal constitutional order.<sup>3</sup>

The influence of this critique has grown rapidly in recent years. In 2005 Jeffrey Rosen contended that the “Constitution in Exile” movement planned to pack the courts. Rosen described John Roberts, who President George W. Bush was considering for a Supreme Court appointment, as one of the movement’s fellow travelers.<sup>4</sup> Roberts was soon confirmed as Chief Justice. Since then, that court-packing plan has advanced in leaps and bounds, so much so that these days, Chief Justice Roberts looks like a relative moderate on the Court.<sup>5</sup>

Meanwhile, the substance of the critique has also evolved. Now the Progressive Era rather than the New Deal marks the moment the nation turned its back on the founding constitutional order and ushered in the modern administrative state.<sup>6</sup> This shift has made the nineteenth century a

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<sup>3</sup> Jeffrey Rosen, *The Unregulated Offensive*, N.Y. TIMES MAGAZINE, April 17, 2005 (describing a “Constitution in Exile” movement”). Rosen took the name from Ginsburg, *supra* note 2, at 84. Members of the alleged “Constitution in Exile” movement strongly disputed its existence. *See, e.g.*, Michael S. Greve, *Liberals in Exile: Beware Their Grand Plan to Impose a Radical, European-Style Constitution in America*, LEGAL TIMES (May 2, 2005), <https://www.aei.org/publication/liberals-in-exile> [<https://perma.cc/KzTV-5A98>] (“[T]here is no Constitution in Exile movement”). *But see The Constitution in Exile*, THE CONSTITUTION SOCIETY, <http://www.constitution.org/cons/exile/exile.htm> [<https://perma.cc/U56W-3RL9>] (last visited Sept. 16, 2018) (embracing the term as a description of a self-described libertarian movement to restore the Constitution to that “originally understood by the Founders”; though arguing that those principles were first abandoned not in the twentieth century, but in *McCulloch v. Maryland*, 17 U.S. 316 (1819)).

<sup>4</sup> Rosen, *supra* note 3.

<sup>5</sup> For instance, Chief Justice Roberts joined the majority to uphold the Affordable Care Act in *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). Nonetheless he frequently joins or authors opinions questioning the foundations of administration and administrative law. *See, e.g.*, *Gundy v. United States*, 139 S. Ct. 2116, 2139 (2019) (Gorsuch, J., dissenting) (arguing that the nondelegation test the Court has used since the New Deal “has no basis in the original meaning of the Constitution, its history, or even the decision from which it was plucked”); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2425 (2019) (Roberts, C.J., concurring in part) (creating a majority for the parts of an opinion preserving a narrowed version of judicial deference to agencies’ interpretations of their regulations but specifying that he did not see that decision as “touch[ing] upon” the continued viability of *Chevron* deference, according to which judges defer to agency interpretations of statutes).

<sup>6</sup> *See, e.g.*, RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* 2 (2007) (contending that the New Deal Court’s constitutional transformation “grew out of the intellectual work of the Progressive Era”); PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 109, 228, 302, 453 (2014) (describing the late-nineteenth and early-twentieth centuries as when the intellectual, judicial, legislative, and executive branch foundations of the modern administrative state were laid); JOSEPH POSTELL, *BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE’S CHALLENGE TO CONSTITUTIONAL GOVERNMENT* 167 (2017) (arguing that circa 1900 “administrative law had remained relatively static for over a century” but that a “sea change in administrative law and American constitutionalism was on the horizon”). *Cf.* RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* 124 (2016) (arguing that after spending the period from the founding to the 1900s building a constitutional order that respected individual rights, Progressives led the courts to abandon that approach for one that privileged democratic majorities). That said, the New Deal still looms large in critiques of the modern administrative state. *See* Gillian E.

central battleground for contemporary arguments about the future of administration,<sup>7</sup> and the template for scholars' prescriptions about how to restore the administrative state's constitutionality.<sup>8</sup>

At a general level, critics who argue for a return to nineteenth-century administrative law emphasize several features said to characterize the period. First, they argue that Congress legislated with far greater specificity than it does today, granting agency actors little to no discretion to adopt regulations that bound the public.<sup>9</sup> Second, they contend that Congress tasked courts, not agencies, with enforcement of the most coercive policies and *de novo* judicial review was available for agency decisions implicating what one scholar has

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Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 63 (2017) [hereinafter Metzger, *1930s Redux*] (rooting contemporary "anti-administrativism" in rejection of the New Deal). A new generation of legal scholars is also critiquing administration and administrative law from a more functionalist than formalist or traditionalist perspective. See, e.g., Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112, 115 (2011) (arguing that varying judicial review when agencies change course depending on how the agency justified its original action "strikes an appropriate balance between the need for agency flexibility and the paramount importance of a stable rule of law"); Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 NW. U. L. REV. 1569, 1572-73, 1576 (2013) (arguing that courts should review agency adjudications of private rights more closely than those of public rights to vindicate Article III and nondelegation principles); Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377, 1379-80 (2017) (suggesting that courts should rethink *Chevron* deference in light of the self-delegation concerns raised by agency involvement in drafting statutes). Note that recent political histories depart from the account of American history underlying critiques focused on a Progressive-Era turn away from constitutional foundations. See, e.g., BRIAN BALOGH, A GOVERNMENT OUT OF SIGHT 16-17 (2009) (arguing that the federal government played an important if hidden role in the lives of ordinary Americans throughout the nineteenth century, that the emphasis on individual rights as a check on government in the late-nineteenth century was the "exception rather than the rule in American governance," and that Progressives advocated primarily for delegating national authority to the private sector instead of building the administrative state). On the extent of regulation at the local level, see WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996).

<sup>7</sup> Compare JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 6 (2012) [hereinafter MASHAW, CREATING] (arguing that the constitutional foundations of the modern administrative state were laid during the nineteenth century), with POSTELL, *supra* note 6, at 167 (arguing that administrative law remained about the same from the Founding to 1900 and changed dramatically thereafter).

<sup>8</sup> See *infra* notes 9-13 and accompanying text.

<sup>9</sup> See HAMBURGER, *supra* note 6, at 109-10 (arguing that, on the whole, before the twentieth century Congress did not delegate to agencies the power to legally bind the public); POSTELL, *supra* note 6, at 74-78, 99-102, 145-53, 164 (arguing that the scope of congressional delegations to agency actors in the nineteenth century was narrow); Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL'Y 147, 151 (2017) (arguing that the nondelegation doctrine "should return to its historic [nineteenth-century] roots" by allowing delegations of discretion only for sufficiently unimportant decisions and only where those decisions relate to the constitutional powers of the delegate). Others focus on returning to the nineteenth-century scope of Congress's enumerated powers. See, e.g., EPSTEIN, *supra* note 6, at 2 (challenging the modern administrative state on the grounds that it departs from nineteenth-century limits on Congress's Commerce Clause powers, commitments to federalism, and protection of individual liberties).

called the “core private rights” to life, liberty, and property.<sup>10</sup> Agencies could issue final decisions only as to “public rights,” such as the distribution of public lands, and private “privileges,” such as a license to operate.<sup>11</sup> Third, they argue that, other than during the mid-nineteenth century, federal courts reviewed agency action for its comportment with the law.<sup>12</sup> Fourth, in conducting that review, they contend, courts gave weight to executive branch interpretations if they were longstanding or contemporaneous to the law’s enactment, but, they argue, “there was . . . no general rule . . . requiring ‘deference’ to executive interpretation qua executive interpretation.”<sup>13</sup>

Throughout this literature, one premise has been assumed without being examined: that courts played a primary role in constitutional interpretation, including determining the constitutionality of agency action. For instance, Joseph Postell describes courts in the nineteenth century as “exercising authority to overturn agency action on constitutional grounds.”<sup>14</sup> Aditya Bamzai describes courts’ constitutional review of the executive branch in this period as *de novo*.<sup>15</sup>

But what if instead agencies, not the courts, took the lead in interpreting the Constitution during the nineteenth century? Indeed, what if courts hardly reviewed the constitutionality of agency action at all? What if it is, in fact, the modern administrative law that these critics want to restore to its nineteenth-century roots that has shifted responsibility for constitutional interpretation from agencies to courts and expanded courts’ constitutional review of agency action? A growing body of work on what is called administrative constitutionalism suggests this may very well be the case.

I found my way to the term “administrative constitutionalism” through historical research. I was encountering mid-twentieth-century agency interpretations of the Constitution that differed notably from those of the

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<sup>10</sup> See HAMBURGER, *supra* note 6, at 293-96 (arguing that with the exception of “military orders and warrants issued under suspensions of habeas” only courts, and not agencies, could issue legally binding decisions; instead, agency decisions would be reviewed *de novo* by the courts); POSTELL, *supra* note 6, at 90-92 (noting that judicial enforcement was common in the most coercive policy areas such as customs penalties and forfeitures and patent and copyright protection); Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 565 (2007) (contending that in the nineteenth century, with partial exceptions for tax enforcement and eminent domain, and categorical exceptions for the territories as well as military commissions and tribunals, Congress did not delegate to executive branch officers the disposition of what he terms “core private rights” to life, liberty, and property).

<sup>11</sup> *Id.*

<sup>12</sup> POSTELL, *supra* note 6, at 134-36.

<sup>13</sup> Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 965 (2017).

<sup>14</sup> POSTELL, *supra* note 6, at 168.

<sup>15</sup> Bamzai, *supra* note 13, at 964 (“There was no stark distinction drawn between *de novo* constitutional and deferential statutory interpretation.”).

Supreme Court and did not know what to make of them.<sup>16</sup> Legal scholarship on the role Congress plays in making constitutional law gave me a way to make sense of that historical record. It also gave me a nomenclature: if Congress's engagement with the Constitution was "legislative constitutionalism," what I was finding was "administrative constitutionalism."<sup>17</sup> In 2010, I first used the term to describe agencies' interpretation and implementation of the United States Constitution.<sup>18</sup> Since then, historians who encountered the Constitution in agency archives have built a burgeoning literature on how agencies have interpreted and implemented the Constitution.<sup>19</sup>

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<sup>16</sup> See generally SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* (2014) [hereinafter LEE, *WORKPLACE*]; Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799 (2010) [hereinafter Lee, *Race, Sex, and Rulemaking*].

<sup>17</sup> See generally Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003).

<sup>18</sup> A number of legal scholars found their way simultaneously to the term and formulated arguments about its scope, substance, and value, enriching how I understood and viewed the practice. See WILLIAM N. ESKRIDGE & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 33 (2010) (using the term "administrative constitutionalism" to refer to the process by which legislators, executives, and administrators work out "America's fundamental normative commitments," a process that "include[s] but [is] not limited to Constitutional analysis"); MASHAW, *CREATING*, *supra* note 7, at vii (using the term to describe the "institutional and legal developments" that secured the constitutional legitimacy of the early administrative state); Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1899 (2013) (including "the statutes and legal requirements that create and govern the modern administrative state" in the definition of administrative constitutionalism); Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 485 (2010) (using administrative constitutionalism to refer to agencies "tak[ing] constitutional concerns seriously in their own decisionmaking" and to ordinary administrative law doctrines that encourage this behavior).

<sup>19</sup> See Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1018-19 (2015) [hereinafter Ablavsky, *Beyond*] (arguing that early American executive branch actors "gave concrete meaning to the Constitution's sparse framework," thereby establishing "federal authority over Indian affairs"); Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134, 2141-42 (2014) [hereinafter Collins, *Illegitimate Borders*] (arguing that administrators played a key role in encoding "nativist policies" into the definition of citizenship); Sam Erman, *Citizens of Empire: Puerto Rico, Status, and Constitutional Change*, 102 CALIF. L. REV. 1181, 1183 (2014) (arguing that administrators, not only courts, played a key role in shifting "the constitutional order . . . from according U.S. citizenship and robust rights to all nontribal U.S. people and toward acceptance of U.S. colonialism"); Jeremy Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 COLUM. L. REV. 1083, 1085 (2014) (arguing that executive branch officials "took the lead in forging" the modern understanding of civil liberties); Karen M. Tani, *Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor*, 100 CORNELL L. REV. 825, 828-29 (2015) [hereinafter Tani, *Administrative Equal Protection*] (arguing that welfare officials developed and implemented a novel interpretation of how equal protection governed income assistance programs during the mid-twentieth century); see generally KAREN M. TANI, *STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935-1972* (2016) [hereinafter TANI, *STATES OF DEPENDENCY*] (recounting multiple examples of agency officials interpreting and implementing the Constitution).

Using this history, scholars of constitutional and administrative law have developed a rich literature on the theoretical and normative questions administrative constitutionalism raises. These include how public, self-conscious, or determinative constitutional considerations have to be to count as administrative constitutionalism; what institutional factors foster, deter, and shape administrators' engagement with the Constitution; when, if ever, agencies can interpret the Constitution differently than the courts; and whether courts should defer to agencies' constitutional interpretations.<sup>20</sup>

Administrative constitutionalism can be defined broadly or narrowly. Defined most broadly, it refers to agencies' role in constructing constitutional norms such as adequate due process, the bounds of free speech, or the scope of executive power, whether or not agencies consider themselves to be doing so. More narrowly, it includes only instances in which agencies self-consciously consider the meaning of the Constitution in designing policies and issuing decisions.<sup>21</sup>

Broadly defined, it includes all instances in which agencies implement the Constitution, even if they do so merely as a precursor to determination of the constitutional question by Congress or the courts. More narrowly defined,

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<sup>20</sup> See, e.g., David E. Bernstein, *Antidiscrimination Laws and the Administrative State: A Skeptic's Look at Administrative Constitutionalism*, 94 NOTRE DAME L. REV. 1381, 1399-1400 (2019) (arguing that administrators have been insufficiently protective of First Amendment rights); Anjali S. Dalal, *Shadow Administrative Constitutionalism and the Creation of Surveillance Culture*, 2014 MICH. ST. L. REV. 59, 64 (2014) (criticizing "shadow administrative constitutionalism" whereby agency actions determine constitutional understandings "without the necessary public consultation, deliberation, and accountability"); Olatunde C. Johnson, *Lawyering That Has No Name: Title VI and the Meaning of Private Enforcement*, 66 STAN. L. REV. 1293, 1296 (2014) (arguing that effective Title VI lawyering requires "shaping" and "overseeing" agency implementation of this constitutionally congruent statute); Metzger, *Administrative Constitutionalism*, *supra* note 18, at 1901 ("justify[ing] administrative efforts to move the nation beyond recognized constitutional requirements to develop new constitutional understandings"); Joy Milligan, *Subsidizing Segregation*, 104 VA. L. REV. 847, 850 (2018) (arguing that "agency design plays an under-appreciated role in shaping administrators' interpretations of the Constitution"); Bertrall L. Ross II, *Embracing Administrative Constitutionalism*, 95 B.U. L. REV. 519, 522 (2015) (praising how "agencies' constitution-based value judgments . . . become part of our broader constitutional framework and value system"); Adrian Vermeule, *Deference and Due Process*, 129 HARV. L. REV. 1890, 1893 (2016) (calling for judicial deference to "reasonable agency decisions about the design of procedural arrangements"). For my engagement with these questions, see Sophia Z. Lee, *From the History to the Theory of Administrative Constitutionalism*, in ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW 109-33 (Nicholas R. Parrillo ed., 2017). The subject has even crossed borders. See Matthew Lewans, *Administrative Constitutionalism and the Unity of Public Law*, 55 OSGOODE HALL L.J. 515, 518-19 (2018) (arguing that Canadian courts "should respect administrative decisions concerning constitutional matters").

<sup>21</sup> As described further below, while there is abundant evidence of the broader type of administrative constitutionalism in the nineteenth century, historians are just beginning the archival excavations necessary to determine the scope of the narrower type. As I indicate *infra* notes 53-56, 65, 72-76, 121-131, 136 and accompanying text, the evidence available thus far suggests the latter type was prevalent as well.



administrative constitutionalism encompasses only those instances in which an agency has the final say or interprets the Constitution in a way that sets it against the courts or Congress.<sup>22</sup>

However defined, this Article argues that historians' case studies of administrative constitutionalism suggest that administrative agencies have been the primary interpreters and implementers of the federal Constitution throughout the history of the United States, although the scale and scope of administrative constitutionalism has changed significantly over time as the balance of opportunities and constraints has shifted.<sup>23</sup> That said, the Article also contends that over the twentieth century, and especially since the New Deal, courts have cast an increasingly long shadow over the administered Constitution. In part, this is because of the well-known expansion of judicial review during this period. But the shift has as much to do with changes in the legal profession, legal theory, and lawyers' roles in agency administration. The result is that administrative constitutionalism may still be the most frequent form of constitutional governance, but it has grown, paradoxically, more suspect even as it has also become far more dependent on and deferential to judicial interpretations.<sup>24</sup>

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<sup>22</sup> Again, while there is evidence of the broader type, see *infra* notes 67–71, 111–120, and 138–139 and accompanying text, extant historical work also indicates examples of the narrower type of administrative constitutionalism. See *infra* notes 34–37, 42–48, 53, 57–66, 101–105, 121–131 and accompanying text.

<sup>23</sup> To be fair, I am stating my claim in its strongest possible form and a number of factors might weaken it. For one, I mean primary in a numerical sense. But comparing the number of constitutional questions decided by agencies versus courts or Congress may not be the best measure. Even if Congress or the courts made fewer constitutional decisions, those they made might have been more consequential. Further, even if a numerical comparison is compelling, I am basing my comparison on conjecture from a few scattered case studies and sources that may prove unrepresentative. Also, only some of those sources involve agencies explicitly referencing the constitutional import of their decision; in others there is no way to know if the agency was knowingly making a constitutional decision. Thus, much more research is required to quantify how often agencies consciously versus de facto decided constitutional questions and the significance of the constitutional decisions they made. Further complicating things, making explicit invocation of the Constitution the measure of administrative constitutionalism may be ahistoric given scholars' view that constitutionalism drew from multiple sources and was far less text-bound in the early American period. See, e.g., Gregory Ablavsky, *Administrative Constitutionalism in the Northwest Territories*, 167 U. PA. L. REV. 1631, 1637 (2019) [hereinafter Ablavsky, *Administrative Constitutionalism*] (noting "the eclecticism of sources that had long characterized early American constitutionalism"). I have highlighted below evidence that suggests my claim is plausible, but hope others will assess it with the sort of original research that is beyond the scope of this Article.

<sup>24</sup> Writing the history of administrative constitutionalism is a synthetic task that depends on and benefits from the resurgence of political history and the proliferating historical work on administrative constitutionalism. Any definitive account is far in the future. But beginning the project now offers a scaffold for later case studies to lean on, augment, and dismantle. It is a history, in other words, worth building as we go.

The history of administrative constitutionalism offered here is likely to trouble those who seek to restore administrative law to its nineteenth-century foundations (whom I will call “foundationalists”).<sup>25</sup> They are unlikely to find appealing a nineteenth century in which agencies took the lead in deciding constitutional questions, subject to some oversight by Congress and the President, but virtually none by the courts. These critics hold out constitutional law as uniquely important: that law is what powers their arguments that the United States should turn back the clock. And they prefer nineteenth-century agencies because they depict them as exercising little consequential legal power.<sup>26</sup> But this history suggests that those agencies had the first and often final word on the Constitution’s meaning. Foundationalists also assume that reinstating the nineteenth-century constitutional order would empower courts to more closely scrutinize agency action.<sup>27</sup> The history presented here instead suggests that it would all but eliminate judicial review of those actions’ constitutionality. Indeed, the burgeoning history of administrative constitutionalism indicates that anyone who wants to ensure that courts review the constitutionality of agency action has to appeal to theories that are rooted in constitutional evolution, not origins, and in twentieth—not nineteenth—century administrative law and judicial practice.

Of course, it is also possible that scholars who seek a return to nineteenth-century administrative law would not be troubled by the history presented here. In their account, agencies in the nineteenth century determined public rights and private privileges only, while the Constitution guaranteed judicial resolution of core private rights.<sup>28</sup> If judicial resolution of core private rights was ensured, that would also ensure judicial determination of any constitutional issues raised. And if judicial resolution of public rights and private privileges was unnecessary, foundationalists might argue, so was any judicial determination of the constitutional issues their adjudication involved. A full response is beyond the scope of this Article, but here, briefly, are several reasons I think foundationalists would be wrong to be unconcerned by the account that follows.

Even assuming that foundationalists’ account of the distribution of agency and judicial authority in the nineteenth century is correct, they should still

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<sup>25</sup> I mean foundationalist in its historic and doctrinal rather than philosophical sense. Further, my prediction about foundationalists admittedly involves speculation since none of them have addressed administrative constitutionalism. But given their following assumptions and assertions, I think the prediction is warranted.

<sup>26</sup> See *supra* note 9.

<sup>27</sup> Metzger, *1930s Redux*, *supra* note 6, at 38 (observing that today’s critics of the administrative state look to judicial rather than presidential oversight as the antidote); see also *supra* notes 10–13 and accompanying text.

<sup>28</sup> See *supra* notes 10–11.

be troubled by the history presented here for two reasons. First, the history that follows reveals an important exception to the availability of *de novo* judicial review of agency action implicating core private rights. As foundationalists recognize, such judicial review could be barred if a court found that the federal agent had acted within his legal authority.<sup>29</sup> As I explain further below, the evidence thus far suggests that, in making those determinations, courts rarely if ever considered *constitutional* limits on the agent's authority until the beginnings of modern administrative law at the close of the nineteenth century.<sup>30</sup> That means that even for core private rights, courts were not providing *de novo* judicial review of agency action that exceeded constitutional, as contrasted to statutory, limits on agency authority. This would seem to create a concerning loophole for those who contend that returning to nineteenth-century administrative law would ensure judicial resolution of all core private rights.

Second, foundationalists may in fact be concerned by administrative constitutionalism even when it involves the adjudication of public rights and privileges. For instance, foundationalists' arguments rely on a particular delineation of legislative, executive, and judicial powers. In cases that foundationalists would categorize as public rights cases, nineteenth-century agency actors determined constitutional issues, including the extent of executive power,<sup>31</sup> agencies' inherent power to issue rules and regulations,<sup>32</sup> and the scope of the President's treaty power.<sup>33</sup> The fact and substance of this administrative constitutionalism should concern foundationalists because it may require them to revise how they delineate and distinguish legislative, executive, and judicial powers. As these examples suggest, the history presented here also highlights the important constitutional issues that can arise in the adjudication of public rights and private privileges. Were foundationalists to succeed in restoring nineteenth-century administrative law, they would leave resolution of these important constitutional issues exclusively to agencies. But are they really comfortable, say, relegating the First Amendment rights of broadcast licensees to agencies to decide?

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<sup>29</sup> See, e.g., HAMBURGER, *supra* note 6, at 294-95 and discussion *infra* notes 42-43 and accompanying text.

<sup>30</sup> See *infra* notes 42-48 and 94-120 and accompanying text.

<sup>31</sup> See, e.g., No. Pac. R.R., 19 Pub. Lands Dec. 87, 88-90 (1894) (rejecting the Secretary of Interior's claim to inherent executive authority to withdraw public lands from sale to use for other public purposes).

<sup>32</sup> Hessong, 9 Pub. Lands Dec. 353, 359 (1889) (finding that the Secretary of Interior "had the right to prescribe rules and regulations for the proper disposition of the Osage lands, by virtue of the general powers of the Executive under the constitution") (internal quotations omitted).

<sup>33</sup> Herriott, 10 Pub. Lands Dec. 513, 518 (1890) (reasoning that the President's treaty power and his inherent authority permitted him to reserve lands even absent statutory authorization).

But foundationalists' description of the nineteenth century as a time when agency adjudication of core private rights was subject to de novo judicial review may not be accurate in ways that should also make foundationalists concerned about the history of administrative constitutionalism. First, there may well have been agency adjudications of core private rights during the nineteenth century that were not subject to de novo judicial review. The historical work to determine with any certainty whether agencies finally adjudicated private rights has yet to occur and is especially unclear for the nation's first decades.<sup>34</sup> To the extent that agencies actually adjudicated rights that foundationalists care a lot about, such as vested property rights, then those scholars should also care about how agencies used the Constitution in determining those rights and how courts supervised agencies' use of the Constitution in those cases.

Second, foundationalists' account of the nineteenth century relies on distinguishing away practices in the federal territories, where they acknowledge their model did not pertain. There, during the nation's Founding era and beyond, there was no de novo *judicial* review of agency adjudications implicating core private rights because even the courts were staffed by executive branch—or at least not judicial branch—officials.<sup>35</sup> But

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<sup>34</sup> For instance, how the Land Office and its precursors (for simplicity's sake, collectively referred to herein as "the Land Office") are categorized is central to these jurisdictional claims. Foundationalists argue that Land Office officials determined only whether someone was due a benefit of public land. HAMBURGER, *supra* note 6, at 196-97; Nelson, *supra* note 10, at 578. Gregory Ablavsky, however, has done extensive research in the Land Office records and observes that its officers primarily determined title that predated the United States' assumption of sovereignty rather than gave away unclaimed public land. Gregory Ablavsky, *The Rise of Federal Title*, 106 CALIF. L. REV. 631, 658 (2018). In other words, the Land Office appears to have adjudicated vested rights.

Foundationalists might respond that, even if the Land Office was adjudicating vested rights, any third party with a claim of a prior vested interest in the property at issue could go to court to challenge the office's land patent once it had issued, preserving de novo judicial review. HAMBURGER, *supra* note 6, at 196-97; Nelson, *supra* note 10, at 578. They may be right, but (1) this would not have helped a party with a vested interest who was denied a patent by the Land Office, and (2) their supporting evidence leaves decades of early practice unaccounted for. Nelson supports his claim with two Supreme Court cases decided about a century after the nation's founding, which themselves cite cases dating back to only 1820. Nelson, *supra* note 10, at 578 n.75 (citing *Smelting Co. v. Kemp*, 104 U.S. 636, 641-42 (1881) and *Litchfield v. Register*, 76 U.S. (9 Wall.) 575, 578 (1870)). Further, the judicial review described in the cases Nelson cites is cabined in multiple ways. See *Smelting Co.*, 104 U.S. at 647-48. Hamburger cites Nelson, an 1858 letter from the Interior Secretary, and possibly (its precise relevance is unclear) an 1859 opinion by the Attorney General. HAMBURGER, *supra* note 6 at 561 n.13. I would welcome more extensive research into the workings of the land offices and courts from the Founding forward to ascertain with more precision when unsuccessful patent claimants and third-parties were and were not able to use courts to vindicate their property rights claims.

<sup>35</sup> See Ablavsky, *Administrative Constitutionalism*, *supra* note 23, at 1633 n.12 (observing that determining the status of territorial judges is complicated but that the evidence suggests they were understood to be officers of the United States, or at least not part of the Article III judiciary); see also Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853, 891-93

the territories were where much if not most federal administration occurred before 1900.<sup>36</sup> This raises a question of descriptive accuracy: how persuasive is it to describe *de novo* judicial determination as the rule during a period when most federal agency adjudications impacting core private rights, such as vested property rights, were determined without *de novo* review by a member of the judicial branch? Because the exception arguably swallows the rule, perhaps the rule should be rejected, or at least the exception better incorporated into the rule.<sup>37</sup> And if the rule is changed to accommodate executive—or at least non-judicial—branch determination of vested property rights, then concern about how the Constitution governed those determinations should follow.

The remainder of the Article is devoted to developing the history of administrative constitutionalism from the Founding to the present day. I return briefly to the implications of this history for critics of the modern administrative state in the Conclusion.

## I. THE CONSTITUTION'S ADMINISTRATIVE FOUNDATIONS, 1776–1900

For administrative constitutionalism, the long nineteenth century was one mainly of opportunities rather than constraints. The relative prevalence of administrative constitutionalism was a constant during this period. The Civil War, however, marked an important shift in the scale, scope, and practice of administrative constitutionalism, as the opportunities for its practice far outpaced the constraints it faced.

### A. *Administering the Constitution Before the Civil War*

The U.S. Constitution framed but hardly resolved burning questions about the new nation. One need look no further than the Federalists and Anti-Federalists to see deep disputes over the division of power between the state and federal governments. Arguments about whether the 1798 Sedition Act

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(1990) (critiquing *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511 (1828), for holding territorial courts were not Article III courts); Nelson, *supra* note 10, at 575 (contending that territorial judges exercised judicial power but recognizing that the Supreme Court did not treat them as Article III courts). On the total absence of Article III courts' appellate or primary jurisdiction during the Founding era, see James Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 707 (2004). It was not until 1805 that Congress gave the Supreme Court appellate jurisdiction over territorial courts. *Id.* at 712 n.308.

<sup>36</sup> Indeed, this is the central argument of Brian Balogh's comprehensive and synthetic history of administration in this period. BALOGH, *supra* note 6, at 11.

<sup>37</sup> See Ablavsky, *Administrative Constitutionalism*, *supra* note 23, at 1635 ("As for the suggestion that the territories were a minor exception to 'normal' structures of constitutional governance, this assertion, dubiously descriptive of the present, is particularly inapposite for the eighteenth and nineteenth centuries.").

violated the First Amendment's guarantees of freedom of speech and the press demonstrate that the implications of the Constitution's rights provisions were no more settled than was its structural architecture.<sup>38</sup>

Scholars who study this period, including the above disputes, have recognized that the courts did not have much to say on many of the constitutional questions of the day.<sup>39</sup> While the Supreme Court began reviewing the constitutionality of federal laws in the mid-1790s, it only decided 62 such cases before the Civil War, more than half of them after 1830, and most "regarding the institution of the Judiciary itself or the boundary between the state and federal governments."<sup>40</sup>

As for reviewing the acts of government officials as they went about the business of administering the territories, collecting customs, and delivering the mails, courts did not, as a general matter, weigh in on the constitutionality of their actions.<sup>41</sup> For the most part, affected individuals were limited to

<sup>38</sup> Indeed, whether the Constitution was "deeply indeterminate, by necessity and design" or a "textual artifact . . . whose content was defined by the language in which it was written" was itself an unsettled question. JONATHAN GEINAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA* 10 (2018).

<sup>39</sup> Cf. Farah Peterson, *Interpretation as Statecraft: Chancellor Kent and the Collaborative Era of American Statutory Interpretation*, 77 MD. L. REV. 712, 716 (2018) ("In a sense, federal courts [of the 1790s–1820s] were not even 'courts' . . . Their jurisdiction was tiny, and what jurisdiction they had was so freighted with non-legal pressure that their decisions provide little helpful data for understanding the development of statutory interpretation as a legal, rather than diplomatic, activity."); Christopher Beauchamp, *Repealing Patents*, 72 VAND. L. REV. 647, 665–66 (2019) (observing that in the early American period, particularly though not exclusively in the context of invention patents, federal courts served roles we would consider today more administrative than judicial).

<sup>40</sup> Keith E. Whittington, *Judicial Review of Congress Before the Civil War*, 97 GEO. L.J. 1257, 1267 (2009). The pace of review did not reach one case per year until the 1820s or exceed that until after the 1840s. *Id.* at 1268. In the lower courts, there were few cases in the first two decades of the nation's history and at most on average one every other year until the 1830s when the frequency climbed, reaching a peak average of two a year in the 1840s. *Id.* at 1268–69. As Whittington notes, this probably undercounts the number of actual cases due to spotty reporting of decisions. *Id.* at 1268. Scholars debate when and how the Supreme Court came to exercise the power of what we today call "judicial review," or the power to declare acts of Congress unconstitutional. See generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); WILLIAM E. NELSON, *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW* (Peter Charles Hoffer & N. E. H. Hull eds., 2000); Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502 (2006); Daniel J. Hulsebosch, *A Discrete and Cosmopolitan Minority: The Loyalists, the Atlantic World, and the Origins of Judicial Review*, 81 CHI.-KENT L. REV. 825 (2006); William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455 (2005); Whittington, *supra*.

<sup>41</sup> Judicial review of the constitutionality of agency action in this period has received almost no scholarly attention. The closest scholars have gotten to the subject is touching on it incidentally to examining judicial review of agency action generally. See, e.g., MASHAW, *CREATING*, *supra* note 7, at 139, 210, 216–18 (describing the general structure of judicial review of agency action before the Civil War and noting that courts were not even inclined to "insure that the administrative process gave private parties a fair hearing on their claims"); Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 YALE L.J. 1636, 1689–90

bringing ordinary common law claims against federal officials in their personal capacities.<sup>42</sup> Statutory authority to act was an absolute defense. Constitutional questions could arise in these actions. First, the constitutionality of a statute asserted in defense could be raised, but in those cases it was the constitutionality of an act of Congress, not the agency, that was being reviewed.<sup>43</sup> Second, conceivably, a plaintiff might contend that an act taken pursuant to a constitutional statute was nonetheless carried out in an unconstitutional manner. Any such cases would be examples of constitutional review of a federal agency actor.<sup>44</sup> The existing literature does not provide evidence of this type of review and determining whether such cases exist is beyond the scope of this Article. My preliminary exploration of published opinions that raised due process issues in common law actions against federal agents, however, did not identify a single case in the federal

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(2007) [hereinafter Mashaw, *Reluctant Nationalists*] (noting absence of due process challenges to agency actors' summary seizures and review thereof under the Embargo Act); Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197, 202-04, 211-12, 218-19 (1991) (describing the general structure for pre-Civil War judicial review of agency action and noting that courts lacked concern about the adequacy of agency process and considered constitutional duties only indirectly, insofar as they might be reflected in common law actions). The scholar to have given the question of constitutional review of agency action its most sustained (though still fleeting) treatment finds that it occurred little to never during this period. MASHAW, CREATING, *supra* note 7, at 217.

<sup>42</sup> While there are shadings to the accounts of general judicial review of agency action, they agree that the main way such review occurred before the Civil War was in common law actions against government officers in their personal capacity. MASHAW, CREATING, *supra* note 7, at 139, 210, 216-17; Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1299 (2014); Frederic P. Lee, *Origins of Judicial Control of Federal Executive Action*, 36 GEO. L.J. 287, 295 (1948) [hereinafter Lee, *Origins of Judicial Control*]; Mashaw, *Reluctant Nationalists*, *supra* note 41, at 1688; Woolhandler, *supra* note 41, at 202-04, 206-10, 212. Before the Civil War, these cases proceeded mainly in state courts, with appellate review to the U.S. Supreme Court. Pfander, *supra* note 35, at 730.

<sup>43</sup> *Cf.* *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 280 (1856) (finding that a statute authorizing the Secretary of Treasury to issue a distress warrant against the property of a customs collector, and thereby subject it to sale by a marshal, did not violate due process).

<sup>44</sup> Some common law causes of action incorporated elements that mimicked constitutional provisions. For instance, lack of probable cause was an element of the tort of malicious prosecution. A fruitful inquiry would be to examine how, in such cases, courts handled an officer's absolute defense of legal authorization. Perhaps courts used proof of the constitutionally resonant element of the tort to also establish that the officer had carried out his statutorily authorized duties in excess of his constitutional authority. If so, at least in those cases, arguably judicial review of the constitutionality of agency action occurred. *Cf.* *Merriam v. Mitchell*, 13 Me. 439, 453 (1836) (suggesting, in a part of the report that may be conveying the judge's reasoning, that the probable cause element of the malicious prosecution tort furthers Fourth Amendment purposes). For more on *Merriam*, see James E. Pfander, *Suits Against Officeholders*, in *THE CAMBRIDGE COMPANION TO THE UNITED STATES CONSTITUTION* 361-63 (Karen Orren & John W. Compton eds., 2018). Thank you to Jim Pfander for pointing this case, and possibility, out to me.

courts and state supreme courts during this period.<sup>45</sup> A search to identify constitutional challenges to customs seizures yielded no results.<sup>46</sup>

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<sup>45</sup> I conducted an exploratory and merely suggestive search of Westlaw's database of state supreme court, federal district and appellate court, and U.S. Supreme Court decisions in the antebellum period for any cases using the term "due process" but excluding cases with the term "criminal." I chose due process because it was a constitutional claim likely to show up across multiple agencies and because it seemed to be used as an umbrella for unconstitutionality such that a proceeding that was otherwise constitutionally inadequate might be argued to also fail to provide due process. *See, e.g.*, *Hodgson v. Millward*, 3 Grant 406, 409-10 (Pa. 1863) (finding that seizing property without a warrant violated the Fourth Amendment and interpreting the statute that authorized the seizure to implicitly require that it occur "by due process of law"). While my search revealed no due process cases, it did turn up one 1816 case that might have involved constitutional review of a federal agent. *Jacobs v. Levering*, 2 D.C. (2 Cranch) 117, 117 (1816) (finding, in a one-sentence resolution of an action for trespass categorized by Westlaw as a war powers case but itself silent as to the basis for its holding, that a General's order to the militia to impress horses did not justify their impressment). There was also one 1852 state case that involved a due process analysis but reviewed an act of a territorial legislature. *Swan v. Williams*, 2 Mich. 427, 442-43 (1852) (finding territorial act of incorporation that authorized the resulting railroad company to exercise powers of eminent domain over private property without notice to owners did not violate the Northwest Ordinance or the U.S. Constitution). *Cf. Webster v. Reid*, 52 U.S. (11 How.) 437, 459-60 (1850) (holding territorial statute violated the Seventh Amendment because it denied a jury trial before deprivation of property and declaring nullities trials in which notice to parties (provided as required by the statute) was inadequate); *Reed v. Wright*, 2 Greene 15 (Iowa 1849) (holding territorial statute "unconstitutional" because it denied landowners judicial process before depriving them of their land but using the term to refer to a violation of the Northwest Ordinance not the U.S. Constitution). How to conceive of territorial legislatures—as exercising executive or legislative power; as being purely federal creatures or exercising independent sovereignty akin to states—is unresolved, to say the least. *See Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1878 (2016) (Breyer, J., dissenting) (arguing that Puerto Rico's laws had previously been treated as the product of an independent sovereign but also suggesting this was peculiar to that territory); Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 900-05 (1990) (arguing that territorial legislatures fail to conform with the structural Constitution whether understood as exercising legislative or executive powers). Note, however, that even if the territorial legislatures are understood as executive branch actors, the cases reviewing their work share the structure of the more common cases in which the constitutionality of an act of Congress was at issue and not of an agency actor.

<sup>46</sup> I searched all cases in Westlaw during this period for those with the terms "constitution," "seizure," "certificate," and "customs." Customs officers faced with suit in their personal capacity could petition a federal district court for a certificate of probable cause that would provide immunity from the private action. Customs seizures are held up in the literature as the paramount example of common law challenges to administrative action. The search did not turn up any such challenges involving constitutional issues. *See also* GAUTHAM RAO, *NATIONAL DUTIES: CUSTOM HOUSES AND THE MAKING OF THE AMERICAN STATE* 152-54 (2016) (discussing key legal challenges to customs enforcement in the early republic, none of which involved judicial determination of constitutional questions). Note that my searches are merely suggestive not only due to any imperfections in the search parameters but also because they only capture published opinions for a period during which most cases were unpublished. Research into whether unpublished state and federal cases involving common law suits against federal agents raised constitutional issues would be most welcome. Providing a further suggestive check, as far as I've been able to ascertain, none of the sources cited *supra* notes 41-42 describe a case involving constitutional review of a federal officer's actions.



The other, albeit rarely applied, type of review was through a writ of mandamus.<sup>47</sup> Because that was available only for discretionless acts required by Congress, however, the constitutionality of the administrative action was unlikely to arise there either. Instead, in the rare instances when constitutional issues arose in actions against federal agency actors, the Supreme Court focused on structural constitutional questions and its review was more concerned with the scope of the courts', President's, or Congress's power than the constitutionality of administrative action.<sup>48</sup>

This has led to the conclusion that the Constitution governed during the Founding and early republic as much or even primarily through the interpretations of the President or Congress.<sup>49</sup> But for every congressional debate over the constitutionality of the Sedition Act,<sup>50</sup> or presidential

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<sup>47</sup> For the unavailability of mandamus review of federal officers before the Civil War, see James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex Parte Young*, 72 STAN. L. REV. (forthcoming 2020) (manuscript at 24-26) (on file with author). That changed with *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 609-10 (1838) (holding that under the Constitution's separation of powers, Congress can command and courts can enforce through a writ of mandamus an executive branch officer's performance of a purely ministerial act). The door *Kendall* opened was effectively closed soon after by *Decatur v. Paulding*, 39 U.S. (5 Cranch) 497, 515 (1840) (narrowly defining when acts were sufficiently ministerial to be eligible for a writ of mandamus). See also *infra* note 94 and accompanying text.

<sup>48</sup> See, e.g., *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845) (holding that under the Constitution's design, except for "enumerated instances," the judicial branch could only hear those cases authorized by statute such that Congress could constitutionally bar assumpsit actions against custom collectors); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804) (holding that an executive order authorizing capture of American vessels sailing from France could not bar the captor's liability for damages where Congress had enacted a law authorizing capture only of those vessels bound for France, and dismissing the argument that the claim for damages would properly lie against the government). See also *Kendall v. United States*, *supra* note 47. Cf. *Brown v. United States*, 12 U.S. (8 Cranch) 110, 128-29 (1814) (holding, in an action brought by a U.S. Attorney for forfeiture of enemy property, that the forfeiture could not be authorized by the President's war powers alone). For a caution against overreading the power *Cary v. Curtis* found Congress had to limit federal courts' jurisdiction, see Kristin Collins, *Social Movements, Legal Elites, and the Transformation of Article III*, at 18-19 (2019) (draft manuscript) (on file with author). For an argument that Chief Justice John Marshall sought to create some degree of military officer immunity in *Little v. Barreme* despite its holding on presidential power, see Jane Manners, *Executive Power, Officer Indemnity, and A Government of Laws, Not of Men: A Re-Reading of The Charming Betsy and Little v. Barreme* 16-17 (2019) (draft manuscript) (on file with author).

<sup>49</sup> As an illustration, the chapters in H. Jefferson Powell's history of the Constitution do not focus exclusively or even predominantly on the Supreme Court until after the Civil War. H. JEFFERSON POWELL, *A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS* (2002). See also GEINAPP, *supra* note 38, at 13 (describing Congress as the "principal site of constitutional development and transformation" in the 1790s). For Congress's constitutionalism during the antebellum period, see David P. Currie's multivolume work *THE CONSTITUTION IN CONGRESS*. For a history of the gradual expansion of federal courts' jurisdiction during the nation's first decades, see Alison LaCroix, *Federalists, Federalism, and Federal Jurisdiction*, 30 L. & HIST. REV. 205, 236-40 (2012).

<sup>50</sup> Marc Lender, "Equally Proper at All Times and at All Times Necessary": *Civility, Bad Tendency, and the Sedition Act*, 24 J. OF THE EARLY REPUBLIC 419 (2004).

message on federal authority over the states,<sup>51</sup> there were many more instances of ordinary administrators, from Secretaries of State down to local customs collectors, who decided what the Constitution meant in practice.<sup>52</sup> Until recently, their contributions to creating constitutional meaning were overlooked. Thanks to recent scholarship, however, a new account of the Constitution during the United States' first decades is coming into view and it is one in which administrators took the lead. Further, due to limited oversight from Congress or the President and next to none from the courts, agencies provided not only the first, but often the last or only word on constitutional questions.

Historians have shown that Congress left key questions of constitutional structure and rights to agencies to determine, and that agencies self-consciously undertook answering them. Gregory Ablavsky, in his article in this issue, describes how administrators worked out the scope of military versus civilian jurisdiction in the territories—a question they understood to be of constitutional import—without clarification from Congress.<sup>53</sup> Elsewhere, Ablavsky has written about how Congress's expansive grant of discretion to the executive branch to govern Indian affairs left that branch to give “concrete meaning to the Constitution's sparse framework . . .”<sup>54</sup> These officials understood their task to involve constitutional interpretation, as reflected in the words of Washington's Secretary of War, who asserted that the federal government had, “under the [C]onstitution, the sole regulation of

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<sup>51</sup> Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999 (2014) [hereinafter Ablavsky, *Savage Constitution*].

<sup>52</sup> As noted *supra* note 23, I state my claim in its strongest possible form in the hopes that doing so will inspire others to assess it with the sort of original research that is beyond the scope of an article that synthesizes existing scholarship.

<sup>53</sup> Ablavsky, *Administrative Constitutionalism*, *supra* note 23, at 1649-51. The battle over military versus civil jurisdiction in the territories, Ablavsky notes, was “among the earliest discussions of some of the most fundamental constitutional questions in U.S. history.” *Id.* at 1638.

<sup>54</sup> Ablavsky, *Beyond*, *supra* note 19, at 1019.

Indian affairs, in all matters whatsoever.”<sup>55</sup> The Postmasters General also directed subordinates on the scope of First Amendment protections.<sup>56</sup>

In an era when courts did not review agency action for its comportment with due process,<sup>57</sup> if Congress did not set adjudicatory procedures, administrators were left to determine what sufficed. Federal regulation of steamboat boiler safety in the antebellum period fits this model.<sup>58</sup> As Jerry Mashaw describes, Congress gave the local boards the authority to hold hearings and swear witnesses but did not prescribe any procedures.<sup>59</sup> Instead, the local boards “filled the gap based on custom and notions of fundamental fairness” with procedures that included ample notice and opportunity to put on a defense or introduce mitigating circumstances.<sup>60</sup> An important subject of further study is whether officials designing adjudicatory procedures during this period understood the Due Process Clause to be relevant to their decisions. As is discussed below, there is evidence from the late-nineteenth century that agencies considered the constitutionality of their procedures.<sup>61</sup>

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<sup>55</sup> *Id.* at 1042. As all three branches embraced during the mid-nineteenth century a conception of executive power over Natives that did not derive from and was not limited by constitutional power or subject to judicial review, agencies were freed to operate without need to consider constitutional limits on their actions. See Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1829 (2019) [hereinafter Blackhawk, *Federal Indian Law*] (observing that *United States v. Rogers* developed a doctrine of executive power over Indian Country that was “wholly separate from and not limited by the Constitution”); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 46-47 (2002) (explaining that *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846), grounded Congress’s authority over Indian tribes in an extraconstitutional doctrine of discovery that precluded judicial review of its exercise). A question for further research is whether administrators exercising these plenary powers considered constitutional limits on their actions despite the Supreme Court saying they did not have to.

<sup>56</sup> See, e.g., H.R. REP. NO. 37-51, at 4-5, 8 (1863) (reproducing, among others, transmission of the Postmaster General from August 22, 1835 expressing his view that it was constitutional for the New York Postmaster to refuse to forward abolitionist newspapers to states that barred them and concluding that the constitutionality of excluding from the mails “newspapers and other printed matter, decided by postal officers to be insurrectionary, or treasonable, or in any degree inciting to treason or insurrection” was established by the Post Office’s subsequent “course of precedents . . . known to Congress, [and] not annulled or restrained by act of Congress”). For debates over postal policy regarding abolitionist newspapers, see RICHARD J. JOHN, SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE ch. 7 (1995).

<sup>57</sup> Woolhandler, *supra* note 41, at 211.

<sup>58</sup> For a groundbreaking argument that Congress created this and other nineteenth-century agencies to implement the public’s constitutional right to petition, see Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538, 1546-47, 1597-1600 (2018), arguing that petitioning pursuant to the Petition Clause shaped the development of administrative agencies from the First through the Eightieth Congress, including the regulation of steamboats.

<sup>59</sup> MASHAW, CREATING, *supra* note 7, at 204.

<sup>60</sup> *Id.* at 199-200. *But cf.* POSTELL, *supra* note 6, at 102 (arguing that the local boards’ adjudicatory power was less significant than Mashaw suggests).

<sup>61</sup> See *infra* notes 121-122 and accompanying text.

Even when Congress sought to exert control over administration by legislating in great detail, administrators still filled in important, constitutionally relevant gaps. As Mashaw describes, the Republican-era Congress sought to control federal administration through ever more detailed statutes. But as his treatment of the Land Office shows, “[s]tatutory specificity simply was not up to the job of instructing officials in the field.”<sup>62</sup> This included determining the constitutionally required process land claimants were due. Unlike the steamboat example above, here Congress spelled out a number of procedural details for the hearings it authorized. Yet, “federal legislation left a substantial number of questions to be resolved by administrative rule or practice.”<sup>63</sup> These included details currently understood as part of due process’s bundle of procedural sticks such as whether witness testimony could be in writing or legal representation would be allowed.<sup>64</sup> As Kevin Arlyck has shown, the Secretary of Treasury added procedural protections and what Arlyck argues was leniency grounded in the Eighth Amendment to the civil forfeiture remissions the Secretary decided.<sup>65</sup> Further, as early as the 1810s, Congress shifted away from trying to control administration via detailed statutory prescriptions and toward granting broader delegations and performing greater ex post investigation and oversight.<sup>66</sup> As a result, the cabined procedural discretion of the Land Office gave way to the more expansive administration of due process seen in the steamboat example above.

Congress and the courts, when they weighed in on constitutional questions during this period, often codified answers worked out in the first instance by administrators. For example, the 1790 Indian Trade and Intercourse Act, which left the executive branch with such broad discretion to determine federal control of Indian affairs, was itself drafted by the administration and enacted by Congress with little debate.<sup>67</sup> When the Supreme Court first addressed Indian affairs in the 1830s, it adopted the view of federal power worked out by the executive branch.<sup>68</sup> While Mashaw does not discuss constitutional questions specifically, he notes that by the Jacksonian period, Congress increasingly recognized “that the knowledge

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<sup>62</sup> MASHAW, CREATING, *supra* note 7, at 126.

<sup>63</sup> *Id.* at 132.

<sup>64</sup> *Id.*

<sup>65</sup> Kevin Arlyck, *The Founders’ Forfeiture*, 119 COLUM. L. REV. (forthcoming 2019) (manuscript at 55-59) (on file with author). If Arlyck is right that Eighth Amendment concerns informed the Secretary’s leniency, his implementation of this constitutional limit far exceeded that of the courts: Arlyck found that whereas the Secretary granted ninety-one percent of remission petitions, the government prevailed eighty-nine percent of the time in court. *Id.* at 37.

<sup>66</sup> MASHAW, CREATING, *supra* note 7, at 135.

<sup>67</sup> Ablavsky, *Beyond*, *supra* note 19, at 1043-44.

<sup>68</sup> *Id.* at 1044-45 (discussing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)).

necessary for effective policy making now resided with the administrators of the various governmental departments.”<sup>69</sup> Legislators sought administrators’ input before legislating regarding patents and reorganizing or creating agencies.<sup>70</sup> While further work is needed to be certain, it seems likely that the pattern seen in the 1790 Act held for other legislation that touched on constitutional questions.<sup>71</sup>

Presidential oversight of administration was also so limited as to make the administrators’ constitutionalism theirs and not his. Presidential input varied. Ablavsky’s work on the Washington administration’s position on Indian affairs lies on the more involved end of the spectrum. Ablavsky observes that “[t]he most pressing issue for early Americans was federalism: would the states or the national government possess authority over Indian relations?”<sup>72</sup> Ablavsky notes that George Washington adopted the view that, under the Constitution, “the United States . . . possess[es] the only authority of regulating an intercourse with [the Indians], and redressing their grievances.”<sup>73</sup> Washington charged his Secretary of War with implementing that authority.<sup>74</sup> But as Ablavsky observes, the Secretary “was only the most vociferous member of an administration committed to federal supremacy over Indian relations,” including administrators who otherwise leaned toward states’ rights.<sup>75</sup> They all understood this to be a matter of constitutional construction, explicitly referencing the Constitution in their debates.<sup>76</sup> Outside of the period’s most pressing issues, the President’s influence over the administrative resolution of constitutional questions was even weaker. As Ablavsky describes in his article in this issue, the President never responded regarding the constitutional questions roiling the territories.<sup>77</sup> Mashaw similarly describes presidential “involvement, indeed micromanagement” as the exception not the rule before the Civil War.<sup>78</sup> Even during the Jacksonian period, when presidentialism strengthened, Mashaw remarks, the growing “scale and complexity of administration tended to reduce political control by

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<sup>69</sup> MASHAW, CREATING, *supra* note 7, at 220-21.

<sup>70</sup> *Id.*; see also, POSTELL, *supra* note 6, at 102 (“Legislators agreed that agencies’ input should be sought to ensure that new laws are guided by their experience . . .”).

<sup>71</sup> This is especially so given the later evidence that even as to constitutional issues, Congress followed rather than led administrators. See *infra* note 138 and accompanying text.

<sup>72</sup> Ablavsky, *Beyond*, *supra* note 19, at 1019.

<sup>73</sup> *Id.* at 1041 (alterations in original) (quoting Letter from George Washington to Thomas Mifflin (Sept. 4, 1790), in 6 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 396 (Mark A. Mastromarino ed., 1996)).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 1042.

<sup>76</sup> *Id.*

<sup>77</sup> Ablavsky, *Administrative Constitutionalism*, *supra* note 23, at 1644, 1648.

<sup>78</sup> MASHAW, CREATING, *supra* note 7, at 141.

both the President and Congress even as both busily reasserted its necessity.”<sup>79</sup>

Thus, by the Civil War, emerging scholarship suggests that many constitutional questions were resolved in the first, and often in the last or only, instance by administrators.<sup>80</sup> Further, in many cases, the evidence shows these administrators doing so self-consciously and explicitly.

#### B. *Administrative Constitutionalism During Reconstruction and the Gilded Age*

Administration expanded notably after the Civil War. There were glimmerings of more robust judicial review of administration but little actual changes. Meanwhile, congressional and presidential involvement remained scant. As a result, the growth in administration meant that, if anything, administrators’ primacy in constitutional interpretation and implementation increased during the last decades of the nineteenth century.

Civil War, Reconstruction, and industrialization were among the many forces that multiplied administration, and its opportunities for constitutionalism, in the late-nineteenth century. As is well known, the Civil War generated a massive increase in the administration of war pensions. There were half a million cases by 1890, a load that nearly doubled by 1900.<sup>81</sup> Congress also added a number of new agencies. The war led to the formation of the Bureau of Refugees, Freedmen, and Abandoned Lands (Freedmen’s Bureau). In addition, Congress added departments of agriculture, labor, justice, and education. It created the Interstate Commerce Commission as well, long identified as the harbinger of the modern administrative state.<sup>82</sup>

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<sup>79</sup> *Id.* at 220.

<sup>80</sup> Note that one should not adopt an overly rosy picture of the practice of administrative constitutionalism in the nineteenth century, as histories of the governance of Natives make clear. *See, e.g.*, STEPHEN J. ROCKWELL, *INDIAN AFFAIRS AND THE ADMINISTRATIVE STATE IN THE NINETEENTH CENTURY* 3, 8 (2010) (describing westward expansion as forging “a vibrant, complicated federal bureaucracy, planning and performing complex and difficult tasks in politically charged environments” that ultimately “removed, contained, and dispossessed American Indians and tribes” nationwide); Blackhawk, *Federal Indian Law*, *supra* note 55, at 1823 (describing the military violence and coerced removal that resulted from “unfettered executive power” over relations with Native peoples). The point is not that the nineteenth-century experience proves the normative desirability of administrative constitutionalism in general or in every particular instance, but that the period does not provide a usable past for checking the constitutionality of agency action through the courts or centralizing in those courts the task of constitutional interpretation.

<sup>81</sup> MASHAW, *CREATING*, *supra* note 7, at 257.

<sup>82</sup> *See, e.g.*, THOMAS K. MCCRAW, *PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN* 61-62 (1984) (observing that “[m]ost of the later federal commissions were patterned on the Interstate Commerce Commission”). *But see* POSTELL, *supra* note 6, at 164 (arguing that the Commission was more akin to nineteenth-century administration than that of the twentieth century).

During this period, Congress included multiple constitutionally resonant charges to agencies in its statutes, delegating to them the work of interpretation and implementation. As Karen Tani describes in her article in this issue, the Freedmen's Bureau implemented the Constitution's newest amendment, generating the first interpretations of "involuntary servitude."<sup>83</sup> Others have described how Freedmen's Bureau officials enforced "equal protection of the laws" as well as the First Amendment.<sup>84</sup> The Comstock Act of 1873 empowered the Post Office to exclude obscene materials from the mail, putting it in charge of deciding what speech to allow and what to censor.<sup>85</sup> Congress also directed the Interstate Commerce Commission to disallow "discrimination" in rail travel, a task that could also require determining the meaning of the Fourteenth Amendment.<sup>86</sup> Relatedly, with the expansion of the United States' imperial ambitions, old statutory language governing the citizenship status of children born to American citizens abroad became newly relevant. As Kristin Collins has argued, administrators played a key role in determining which children could qualify for the American citizenship the statute authorized.<sup>87</sup>

Agencies remained relatively free of congressional direction as they implemented these constitutionally resonant provisions or filled in constitutionally sensitive statutory gaps. As Mashaw argues, during the Gilded Age, administrative authority was "poorly circumscribed by either statutory

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<sup>83</sup> Karen M. Tani, *Administrative Constitutionalism at the "Borders of Belonging": Drawing on History to Expand the Archive and Change the Lens*, 167 U. PA. L. REV. 1603, 1611 (2019); see also AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION 35-39 (1998) (discussing how Freedmen's Bureau officials created, rather than merely implemented, the meaning of free labor).

<sup>84</sup> ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866-1876, at 31-32, 200-01 nn.23-24 (2005).

<sup>85</sup> Comstock Act, ch. 258, 17 Stat. 598 (Mar. 3, 1873). Because the Comstock Act authorized criminal prosecutions, courts could examine the constitutionality of post officers' determinations but the courts adopted such a broad construction of obscenity that administrators were largely the actors setting its bounds. See DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS, 1870-1920, at 24 (1997) ("[J]udicial decisions developed an expansive interpretation and provided postal officials with virtually unreviewable discretion to censor publications as 'obscene.'"). For an example of how judicial deference gave administrators broad ambit to determine the scope of First Amendment protections in the early-twentieth century, see Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1 (2000) [hereinafter Schiller, *Free Speech and Expertise*]. Even before the Civil War, the Post Office had been playing a similar role through its determinations of mailability. MASHAW, CREATING, *supra* note 7, at 268-69.

<sup>86</sup> Cf. Statement of the Case, *Winfield F. Cozart v. S. Ry. Co.*, at 7, 9, ICC No. 1718, 16 I.C.C. 226 (1909) (arguing that the railway's failure to provide black passengers with first class accommodations equivalent to those provided to white passengers abridged the "privileges and rights guaranteed by the Fourteenth Amendment" in addition to violating the Interstate Commerce Act) (thank you to Barbara Welke for sharing this source with me).

<sup>87</sup> Collins, *Illegitimate Borders*, *supra* note 19, at 2140-41.

specificity or congressional budgetary controls.”<sup>88</sup> Instead, even when Congress enacted detailed statutes, “critical questions remained for administrative determination.”<sup>89</sup> Elsewhere, Congress “ceded virtual *carte blanche* to the implementing authorities to develop substantive policy.”<sup>90</sup> As administration grew, Congress’s silence on questions of agency procedure continued to leave administrators in charge of determining what process was due.

The presidency was, if anything, a weaker check on administrative constitutionalism in the postbellum than in the antebellum period. Even as civil service reforms wrenched government office-giving from local politicians and partisans, it still left the President far from controlling the ever-growing federal bureaucracy.<sup>91</sup> The series of weak presidents who followed Lincoln’s assassination only expanded administrators’ freedom.<sup>92</sup> Electoral instability, with divided government and partisan switches in power from election to election further ensured that the President, in the words of Steven Skowronek, “had never risen far above the status of a clerk.”<sup>93</sup>

Judicial review remained a weak check on administration, including the constitutional questions it raised. During the last decades of the 1800s, courts increased somewhat the opportunities for judicial review. In 1880, the Supreme Court for the first time in 42 years found an executive function ministerial and thus eligible for a writ of mandamus.<sup>94</sup> Subsequent cases, however, continued to prohibit mandamus whenever the executive action involved an exercise of discretion or judgment.<sup>95</sup> The Supreme Court also made common law actions against officers in their personal capacity easier by

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<sup>88</sup> MASHAW, CREATING, *supra* note 7, at 233.

<sup>89</sup> *Id.* at 242.

<sup>90</sup> *Id.* at 244.

<sup>91</sup> See MASHAW, CREATING, *supra* note 7, at 239 (“Presidents won some victories concerning the maintenance of their removal powers and could reduce congressional and local influence with each new batch of federal government employees covered into the civil service system by executive order. But this is a far cry from having effective control over the federal bureaucracy.”); POSTELL, *supra* note 6, at 136-45 (describing the Pendleton Act as only modestly effective at ending the spoils system); STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 49 (1982) (“In 1871, the civilian payroll of the federal government supported a mere 53,000 employees; by 1901, it had increased fivefold to 256,000.”).

<sup>92</sup> MASHAW, CREATING, *supra* note 7, at 239 (“Presidential power was at a low ebb from Lincoln’s assassination to the inauguration of Theodore Roosevelt”).

<sup>93</sup> SKOWRONEK, *supra* note 91, at 169.

<sup>94</sup> See *United States v. Schurz*, 102 U.S. 378, 396-97 (1880) (finding ministerial and thus enforceable by mandamus the act of delivering a land patent that was already duly signed, sealed, countersigned, recorded, transmitted, and received); Lee, *Origins of Judicial Control*, *supra* note 42, at 295 (“After the *Kendall* case in 1838 it was forty-two years (1880) before the Supreme Court held another executive function to be ministerial.”).

<sup>95</sup> See, e.g., *Carrick v. Lamar*, 116 U.S. 423, 426 (1886) (“It is settled by many decisions of this court, that in matters which require judgment and consideration to be exercised by an executive officer of the government, or which are dependent upon his discretion, no rule for a mandamus to control his action will issue.”).



narrowing when officers were determined to be acting within their jurisdiction and thus protected from suit.<sup>96</sup> Equitable review of agency action was initially subject to similar limits as writs of mandamus.<sup>97</sup> But access to it also expanded during the 1870s.<sup>98</sup> Yet, the space opened for judicial review of agency action during this period remained very narrow. For instance, the Court did not hold that Congress could grant a direct appeal of agency determinations to the federal courts until 1899.<sup>99</sup> And judicial authority to review mistakes of law remained limited into the early-twentieth century.<sup>100</sup>

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<sup>96</sup> Woolhandler, *supra* note 41, at 219-220, 233. *But see* Bagley, *supra* note 42, at 1300 (arguing that “by midcentury the norms of mandamus review had seeped over into most damages actions”).

<sup>97</sup> Bagley, *supra* note 42, at 1298; Lee, *Origins of Judicial Control*, *supra* note 42 at 296; Jerry L. Mashaw, *Rethinking Judicial Review of Administrative Action: A Nineteenth Century Perspective*, 32 CARDOZO L. REV. 2241, 2247 (2011) [hereinafter Mashaw, *Rethinking Judicial Review*]; Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 16 (1983).

<sup>98</sup> See *Johnson v. Towsley*, 80 U.S. (13 Wall.) 72, 83-84 (1871) (finding that, even when the decision of a “tribunal, within the scope of its authority, is conclusive upon all others. . . . there has always existed in the courts of equity the power in certain classes of cases to inquire into and correct mistakes, injustice, and wrong in both judicial and executive action . . . when it invades private rights . . . .”); POSTELL, *supra* note 6, at 133-35 (observing that *Towsley* “marked a departure from the Taney Court’s attempt to remove administrative determinations from review in federal court”); see also Bamzai, *supra* note 13, at 955-56 (describing how, while courts had interpreted some earlier statutes to grant equitable review of specific types of administrative action, the creation of federal question jurisdiction in 1875 made such review more widely available); Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 949 (2011) (same). Cf. LaCroix, *supra* note 50, at 236-40 (2012) (describing how the Marshall Court laid the basis for the constitutionality of federal courts’ statutorily granted “arising under” jurisdiction in the first decades of the nineteenth century). Daniel Ernst argues that by the “end of the nineteenth century, judges used injunctions to have the last word on a host of regulatory matters.” DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940*, at 37 (2014).

<sup>99</sup> *United States v. Duell*, 172 U.S. 576, 589 (1899) (rejecting separation of powers challenge to statute that provided for direct appeal to the federal courts of Commissioner of Patent determinations in interference actions); see also Mashaw, *Rethinking Judicial Review*, *supra* note 97, at 2250 (describing the Supreme Court in *Duell* as “relenting” in its rejection of direct appeals of agency actions to federal courts).

<sup>100</sup> For most of the nineteenth century, there was no mandamus or equitable review for agency mistakes of law. MASHAW, *CREATING*, *supra* note 7, at 246-49, 274-75; Lee, *Origins of Judicial Control*, *supra* note 42 at 296; Monaghan, *supra* note 97, at 16-17. See, e.g., *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 497 (1840) (finding that the Court could only give its judgment on an administrator’s construction of a law in a case within its jurisdiction and that a mandamus action challenging an administrator’s exercise of discretion and judgment was not such a case). Mistakes of law were only reviewable if Congress clearly provided for judicial review of agency action. Woolhandler, *supra* note 41, at 225-26. In the 1870s, however, courts began reviewing mistakes of law even in land cases, where review had traditionally been most limited, when the facts were uncontested. *Id.* at 220, 233, 241. Cf. Bamzai, *supra* note 13, at 944-47 (collecting examples of courts setting aside executive branch construction of statutes and including cases from 1870s and later only). The Supreme Court did not make judicial review of agency mistakes of law a general principle until 1902. MASHAW, *CREATING*, *supra* note 7, at 248-49 (discussing *Magnetic Healing v. McAnnulty*, 187 U.S. 94, 109-11 (1902)).

When it came to the constitutionality of agency action, review was rare.<sup>101</sup> Indeed, Thomas Cooley, in his 1868 constitutional law treatise, observed that “[g]reat deference has been paid in all cases to the action of the executive departments, where . . . it is to be presumed [] they have . . . endeavored to keep within the letter and the spirit of the Constitution.”<sup>102</sup> Instead, the Court remained disinterested if not hostile to constitutional challenges to administrative action. The Court deemed the factual basis of Post Office mailability determinations “essentially unreviewable.”<sup>103</sup> Mashaw describes the Court as seeming “exasperated by due process claims,” quoting an opinion in which the Court as late as 1904 insisted that “due process of law does not necessarily require the interference of the judicial power.”<sup>104</sup>

An exploratory search of Westlaw for state supreme and federal court due process decisions during this period supports the conclusion that judicial review of agency actors was new, expanded gradually, and did not become firmly established until the nineteenth century’s close.<sup>105</sup>

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<sup>101</sup> Tellingly, the Court’s well-known and oft-cited early forays during this period into enforcing constitutional rights did not involve review of agency proceedings but of criminal or quasi-criminal enforcement cases in the federal courts. They also focused largely or exclusively on the constitutionality of the statutes being enforced rather than on the acts of the government agents. See *Boyd v. United States*, 116 U.S. 616, 632-34, 638 (1886) (finding that the statute that authorized a court’s order that an importer was required to produce an invoice in a civil forfeiture action was essentially criminal and violated the Fourth and Fifth Amendments such that the district attorney’s subsequent notice of the order and review of the invoice were also unconstitutional); *Ex Parte Jackson*, 96 U.S. 727, 737 (1878) (finding constitutional, on a petition for habeas review of a criminal conviction, the statute that the petitioner was charged under, which excluded certain materials from the mails and made violation of the act a crime).

<sup>102</sup> THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE AMERICAN UNION 69 (1868).

<sup>103</sup> MASHAW, CREATING, *supra* note 7, at 274. Indeed, the Court upheld Congress’s power to exclude some materials from the mails without expressing any concern about the First Amendment implications. *Id.* at 270 (describing *Ex Parte Jackson*). On the judiciary’s similar lack of concern about the federal government’s exercise of its tax powers, see AJAY K. MEHROTRA, MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS, AND THE RISE OF PROGRESSIVE TAXATION, 1877-1929, at 56-59 (2013) (describing how treatises in the nineteenth century recognized the courts’ “general deference toward Congress’s taxing powers” such that those powers were nearly plenary and appeals of tariff appraisals had to be made to the Department of Treasury).

<sup>104</sup> MASHAW, CREATING, *supra* note 7, at 249 (quoting *Pub. Clearing House v. Coyne*, 194 U.S. 497, 508-09 (1904)); see also *id.* at 274 (“[T]he Supreme Court was unreceptive to claims that due process required judicial process before the Post Office could intercept someone’s mail.”). Cf. THOMAS M. COOLEY, CONSTITUTIONAL HISTORY OF THE UNITED STATES AS SEEN IN THE DEVELOPMENT OF AMERICAN LAW: A COURSE OF LECTURES BEFORE THE POLITICAL SCIENCE ASSOCIATION OF THE UNIVERSITY OF MICHIGAN 230-32 (1890) (noting the Justices’ failure to define the meaning of due process in the Fourteenth Amendment). The Court’s resistance to due process challenges may reflect Amalia Kessler’s discovery that due process was not understood to entail an adversarial process (as opposed to the kind of inquisitorial processes common before agencies) until after the Civil War. AMALIA KESSLER, INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800-1877, at 316-19 (2017).

<sup>105</sup> See *supra* note 45 for a description and explanation of the search parameters.

As before the Civil War, parties challenged the constitutionality of the statutes federal agency actors implemented.<sup>106</sup> Such challenges arose in suits against federal agents in their personal capacity (one before 1880,<sup>107</sup> and three during the 1880s and 1890s<sup>108</sup>), in four suits where the government was a party,<sup>109</sup> and in one between private parties.<sup>110</sup>

Now, however, as many state or federal cases involved judicial review of the constitutionality of agency actions (as opposed to the work of Congress), though only one of them occurred before 1880 and most were clustered in the 1890s. Four cases involved actions at law or equity against federal agents in their personal capacity; one was produced by the exigencies of the Civil War,<sup>111</sup> one arose in the 1880s,<sup>112</sup> and the rest in the 1890s.<sup>113</sup> There were nearly

<sup>106</sup> See *supra* notes 40, 43, 48, and accompanying text.

<sup>107</sup> Pullan v. Kinsinger, 20 F. Cas. 44, 45, 48, 50 (C.C.S.D. Ohio 1870) (rejecting due process, takings, and separation of powers challenges to tax statute that prohibited suits to enjoin the assessment or collection of that tax and thus refusing to enjoin tax official defendants from collecting taxes owed under the statute). Cf. Lee v. Kaufman, 15 F. Cas 204, 207-08 (C.C.E.D. Va. 1879) (rejecting federal officers' proffered jury instruction because their proposed interpretation of the statute under which the plaintiff's land was sold in a tax sale would unconstitutionally deprive plaintiff of due process and amount to an ex post facto penal rule); Mason v. Rollins, 16 F. Cas. 1061, 1063 (C.C.N.D. Ill. 1869) (refusing to enjoin tax officials from enforcing a law that the plaintiff claimed violated due process when the plaintiff had not yet engaged in the business activity subject to the tax).

<sup>108</sup> See *Parsons v. Dist. of Columbia*, 170 U.S. 45, 51-52, 56 (1898) (finding that special assessment statute did not violate due process either by failing to provide adequate notice of the assessment or because of the powers it conferred on commissioners); *Craighill v. Lambert*, 168 U.S. 611, 614 (1898) (upholding the constitutionality of a statute authorizing a federal commission to assess local residents for the costs of building a public park in the District of Columbia); *Hilton v. Merritt*, 110 U.S. 97, 106-07 (1884) (constructing customs statute to bar judicial review of appraisements and finding that the statute, so constructed, did not deny due process).

<sup>109</sup> See *Parsons*, 170 U.S. at 45; *Passavant v. United States*, 148 U.S. 214, 222 (1893) (finding no due process violation where statute did not allow judicial review of appraisal and provided for adequate procedures); *Springer v. United States*, 102 U.S. 586, 594 (1880) (rejecting defense to ejection action by the United States because there was no due process problem with a statute that denied the right to judicial adjudication prior to seizure of property for unpaid taxes); *Allman v. Dist. of Columbia*, 3 App. D.C. 8, 23 (1894) (finding act authorizing improvement assessment failed to require the notice due process demands).

<sup>110</sup> See *Orchard v. Alexander*, 157 U.S. 372, 383 (1895) (upholding power of Secretary of Interior to review local land officers' determinations of preemption and stating that due process can be satisfied by an agency hearing and does not require "that the hearing must be in the courts").

<sup>111</sup> See *Hodgson v. Millward*, 3 Grant 406, 409-10 (Pa. 1863) (finding that seizing property without a warrant violated the Fourth Amendment and did not constitute the requisite "due process of law"). Cf. *Bailey v. N.Y. Cent. R.R.*, 89 U.S. (1 Wall.) 604, 638 (1874) (rejecting claim that tax assessment had not comported with statutorily required procedures where any error was harmless).

<sup>112</sup> See *United States v. Lee*, 106 U.S. 196, 218 (1882) (case consolidated with *Kaufman v. Lee*, a suit against federal agents) (finding, in ejection action brought by Robert E. Lee's estate, that a tax sale of the estate's lands to the United States was unconstitutionally "without any process of law and without any compensation").

<sup>113</sup> See *Noble v. Union River*, 147 U.S. 165, 171-72 (1893) (finding that the Secretary of Interior violated due process in revoking an already issued land title); *Scranton v. Wheeler*, 57 F. 803, 809 (6th Cir. 1893) (holding that there was no due process or takings violation because the challenged

as many cases (one in 1884,<sup>114</sup> and three in the 1890s<sup>115</sup>) in which the government itself was a party and wherein courts reviewed the constitutionality of actions taken by the government's agents.<sup>116</sup> During the 1880s and 1890s, the constitutionality of federal agents' actions was also raised in two suits between private parties.<sup>117</sup>

When the Court expanded constitutional review of agency action in the 1880s and 1890s, it reflected innovation in judicial review, not administration. First, these cases involved the oldest forms of government activity: land and invention patents, taxes and takings.<sup>118</sup> Second, whereas plaintiffs largely

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federal improvement project did not take or invade plaintiff's property). *Cf.* *Brown v. Hitchcock*, 173 U.S. 473, 478 (1899) (affirming lack of court jurisdiction to review a Secretary of Interior decision regarding designation of lands as swampland until title had issued but suggesting in dicta that court review might be available if there was evidence of a due process violation).

<sup>114</sup> See *United States v. Lawton*, 110 U.S. 146, 148 (1884) (affirming due process violation where tax commissioners sold rather than returned land seized in excess of taxes owed).

<sup>115</sup> See *Shoemaker v. United States*, 147 U.S. 282, 306 (1893) (finding that it was consonant with due process to preclude judicial review of commissioners' assessment of the value of land for purposes of exercising eminent domain); *Allman*, 3 App. D.C. at 23 (finding tax commissioners provided inadequate notice prior to their assessment of taxes on landowners for improvements); *Jones v. Dist. of Columbia*, 3 App. D.C. 26, 30 (1894) (same). *Cf.* *Lem Moon Sing v. United States*, 158 U.S. 538, 550 (1895) (rejecting due process challenge where statute precluded habeas review).

<sup>116</sup> Notably, two of these cases dealt with taxes assessed in the District of Columbia for improvements, which the court treated as akin to review of a state or local tax.

<sup>117</sup> See *McCormick Harvesting Mach. Co. v. C. Aultman & Co.*, 169 U.S. 606, 609, 612 (1898) (finding that only a court can invalidate an already issued invention patent and that it would violate due process to allow a patent officer to do so); *Gilmore v. Sapp*, 100 Ill. 297, 303 (1881) (holding that Congress could not delegate to land commissioner, and commissioner could not exercise, the power to cancel an already issued patent because that authority vested only in the judiciary). *Cf.* *Hanford v. Davies*, 163 U.S. 273, 279-80 (1896) (affirming dismissal of dispute over land title for want of a federal question where the due process claim against the territorial probate court was too vaguely pled and untimely raised).

<sup>118</sup> As in the period before the Civil War, there were also several cases that involved constitutional review of the work of territorial legislatures. See *Mason v. Messenger & May*, 17 Iowa 261, 271-72 (1864) (holding Constitution's due process provision does not require territorial legislature's act allowing partition sales to provide for personal service on all property owners); *Winfield v. Ott*, 54 P. 714, 715 (Okla. 1898) (upholding, in action by bank depositor against bank director, territorial statute creating strict liability for bank officers who accepted deposits when they knew or should have known the bank was insolvent or failing); *Guthrie Nat. Bank v. McElhinney*, 47 P. 1062, 1063 (Okla. 1897) (finding a territorial statute establishing a commission to transfer debts of voluntary associations that preceded an incorporated municipality to that municipality failed to provide due process prior to transfer of debt); *Jenkins v. Ballentyne*, 30 P. 760, 760 (Utah 1892) (finding constitutional, in an action between private individuals, a territorial ordinance authorizing killing by any person of unregistered and tagged dogs). *Cf.* *Cottrel v. Union Pac. Ry.*, 21 P. 416, 417 (Idaho 1889) (striking down a territorial statute that created a strict liability regime to compensate owners for livestock killed by trains without mentioning due process or the Constitution but later categorized by Westlaw as a due process case). On the difficulties with classifying these cases as judicial review of agency action, see *supra* note 45. There were also two cases that involved constitutional review of agency actors in employment disputes involving former government agents. See *United States ex rel. Wedderburn v. Bliss*, 12 App. D.C. 485, 492-93 (1898) (dismissing due process challenge by patent agent excluded from working before the Department of Interior); *Cameron v.*

failed in their challenges to the *statutes* agency actors implemented,<sup>119</sup> they often succeeded when challenging administrators' *actions*.<sup>120</sup> Nonetheless, innovative as these cases were, there were only ten of them.

Agencies, meanwhile, seem to have been actively engaged with the Constitution. If and how agencies considered the Constitution in carrying out their duties has yet to be systematically examined. A cursory search of agency decisions available in Westlaw and HeinOnline indicates agencies were hearing and deciding constitutional questions with some regularity, at least during the 1880s and 1890s.<sup>121</sup> Indeed, my search turned up about as many due process decisions by the Land Office alone in those decades as cases involving due process review of any agency actor in all state supreme and federal courts.<sup>122</sup> Other issues decided by agencies included the President's

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Parker, 38 P. 14, 29 (Okla. 1894) (finding no property right in territorial government office and no basis for judicial review of territorial governor's decision to remove plaintiff from office).

<sup>119</sup> Only one case among those involving the constitutionality of a statute the government had implemented, *Allman v. Dist. of Columbia*, found a due process violation (and that involved an act authorizing improvements for the District of Columbia, which the court treated much like a state or local tax). See *supra* notes 106–110.

<sup>120</sup> Courts found merit to the constitutional claims in eight of the ten cases that involved review of agency actors. See *supra* notes 111–117. Note that this suggests that the growth of horizontal judicial supremacy took hold earlier than Barry Friedman and Erin Delaney catch in their article, which dates it to 1895 at the earliest. Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137, 1142, 1167, 1169 (2011).

<sup>121</sup> Westlaw would not provide information on the database parameters that would allow any conclusions to be drawn about whether the density of claims in these decades is due to the years their databases cover or to agencies not considering these issues much before then. I also cannot tell whether the preponderance of Land Office decisions is an artifact of the database's holdings or because the Land Office actually was more engaged with the Constitution than other agencies. HeinOnline does specify the documents in its database and they reflect a seemingly random and sparse assortment of agencies and time periods that seem driven by the happenstance of an agency having published a report and HeinOnline including it. Note that the Land Office began publishing its decisions in 1881, suggesting that earlier examples may well reside in its earlier unpublished records.

<sup>122</sup> *Tibergheim*, 6 Pub. Lands Dec. 483, 483-84 (1888) (finding no deprivation of property without due process of law and holding that a preponderance of the evidence standard is adequate evidentiary standard); *Dayton*, 8 Pub. Lands Dec. 248, 251 (1889) (on review) (finding Lyman Dayton had received due process of law before Department canceled his homestead entry); *Bone*, 8 Pub. Lands Dec. 452, 454-56 (1889) (finding lack of notice to someone who was party of interest under statute fell short of due process); *Hessong*, *supra* note 32, at 359 (finding adequate notice given); *Ary*, 13 Pub. Lands Dec. 506, 506 (1891) (on review) (overruling motion where it was determined that all questions raised, including deprivation of property without due process of law claim, had been "duly considered and passed upon" in prior decisions by the department); *Aylen*, 21 Pub. Lands Dec. 565, 571 (1895) (finding no deprivation without due process of law based on findings regarding right to scrip and that, if such error "be admitted for the sake of argument" in prior decisions, it "is now cured by the present proceeding"); *Guerten*, 23 Pub. Lands Dec. 479, 479 (1896) (finding due process requires granting motion for hearing to Guerten); *Hayden*, 27 Pub. Lands Dec. 455, 457-58 (1898) (remanding for hearing upon review of due process challenge).

appointment,<sup>123</sup> general,<sup>124</sup> treaty,<sup>125</sup> Take Care Clause,<sup>126</sup> and inherent powers;<sup>127</sup> the Supremacy Clause's effect;<sup>128</sup> the nature of Congress's contract and legislative powers;<sup>129</sup> the limits imposed by the Ex Post Facto Clause and the Fourth Amendment's search and seizure protections;<sup>130</sup> and the impact of the Full Faith and Credit Clause on agencies.<sup>131</sup> In other words, even without entering the archives where the vast majority of agency records are held, it appears that agencies were deliberating on a wide range of structural and rights provisions, often with little or no guidance from the courts.

If agencies' attention to procedure is any indication, they imposed constraints on their authority with even greater consistency and elaboration than during the antebellum period, suggesting that an administered Constitution was not a meaningless one. Administration was professionalized during the late-nineteenth century and officials extended internal hierarchical controls to ensure greater consistency.<sup>132</sup> As Mashaw catalogues, the result was an ever more standardized and elaborate set of agency procedures from the Land to the Pension to the Post Office. For instance, Mashaw argues that the process for pension adjudications during this period looked similar to the

<sup>123</sup> Foster's Case, *Decisions of the Comptroller General of the United States* at 445, 450-51 (Comp. Gen. 1883) (finding, based on the President's appointment powers, that the President could require a diplomat to remain in the United States but that the diplomat was not due compensation for that period).

<sup>124</sup> Hessong, *supra* note 32.

<sup>125</sup> Herriott, *supra* note 33.

<sup>126</sup> Tucker, 13 Pub. Lands Dec. 628, 630-31 (1891) (relying on Take Care and Supremacy clauses to determine that the President had the authority to create the Zuni reservation).

<sup>127</sup> No. Pac. R.R., *supra* note 31; Herriott, *supra* note 33.

<sup>128</sup> Keyes, 14 Pub. Lands Dec. 529, 531 (1892) (relying on Supremacy Clause to reject claim based on a Dakota statute); Tucker, *supra* note 126.

<sup>129</sup> Railway Compensation Case, *Decisions of the Comptroller General of the United States* at 188, 199-201 (Comp. Gen. 1883) (reasoning that because the Contract Clause does not expressly limit Congress's power to pass laws impairing contracts, Supreme Court decisions prohibiting Congress from changing the compensation structure of charter-contracts of bond-subsidized companies must rely on a "constitutional limitation' inherent in legislative power").

<sup>130</sup> Harrison, 4 Pub. Lands Dec. 179, 180 (1885) (ex post facto); Detection-Appropriation Case, *Decisions of the Comptroller General of the United States* at 73-74 (Comp. Gen. 1883) (search and seizure).

<sup>131</sup> Carriere, 17 Pub. Lands Dec. 73, 76 (1893) (interpreting the Full Faith and Credit Clause to apply in executive agencies as the Supreme Court has ruled that it applies in the courts); Alrio, 5 Pub. Lands Dec. 158, 161 (1886) (same).

<sup>132</sup> See MASHAW, CREATING, *supra* note 7, at 231 (describing the shift in the civil service toward greater meritocracy and specialization in the post-war period). On professionalization's connection to regularization of procedure, see *id.* at 256, describing how, at the Land Office, "regularization of procedural and substantive adjudicatory norms often went hand in hand with the specialization and professionalization of administrative offices." *But see* NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940, at 39-40 (2013) (arguing that the rise of salaried public servants was accompanied by an increase in their exercise of discretion).

Social Security Administration's disability determinations today.<sup>133</sup> Meanwhile, the Post Office's fraud order hearings, while not quite matching the independence of proceedings overseen by modern administrative law judges, nonetheless were designed to create independence by decision-makers and to use an inquisitorial approach in which government was not an adversary but an ostensibly disinterested factfinder.<sup>134</sup> During this period, agencies also began publishing their adjudicative decisions.<sup>135</sup> There is evidence to suggest that these efforts were animated by constitutional concerns. As Joseph Postell has observed, when Thomas Cooley assumed the first chairmanship of the Interstate Commerce Commission, he insisted that agency and not judicial procedures were all that due process demanded. But he "sought to compensate for diminished judicial review by establishing thorough procedures for ICC determinations, going well beyond what was required by statute."<sup>136</sup> Further, while agencies often rejected constitutional challenges, they also sometimes vindicated them.<sup>137</sup>

As in the antebellum period, to the extent that Congress and the courts weighed in on constitutional, or constitutionally resonant, questions after the Civil War, it was generally to codify the work of administrators. Congress continued the practice of relying on administrators to draft statutes, including constitutionally sensitive questions such as the scope of agency jurisdiction, agency organization, and agency procedures.<sup>138</sup> The Supreme Court also followed rather than led administrators' answers to constitutional questions. As Anuj Desai has shown, when the Court in dicta weighed in on Fourth Amendment protection of letters in the 1878 case *Ex Parte Jackson*, it adopted a view of their privacy that had been developed by postal officials in the first instance. Desai explains that "the constitutional principle" voiced in *Jackson* "was simply the affirmation of long-standing law and custom in the post office."<sup>139</sup>

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<sup>133</sup> MASHAW, CREATING, *supra* note 7, at 259-60.

<sup>134</sup> *Id.* at 278 ("[N]otwithstanding the absence of judicial demands for administrative due process, the adjudicatory processes at . . . the Post Office paid significant attention to issues of adjudicatory fairness.").

<sup>135</sup> *Id.* at 254.

<sup>136</sup> POSTELL, *supra* note 6, at 159.

<sup>137</sup> See Hayden, 27 Pub. Lands Dec. 455, 457-58 (1898) (remanding for hearing upon review of due process challenge); Guerten, 23 Pub. Lands Dec. 479, 479 (1896) (finding due process required granting motion for hearing to Guerten); No. Pac. R.R., *supra* note 31; Bone, 8 Pub. Lands Dec. 452, 454-56 (1889) (finding lack of notice to someone who was party of interest under statute fell short of due process).

<sup>138</sup> MASHAW, CREATING, *supra* note 7, at 233, 242-43.

<sup>139</sup> Anuj C. Desai, *Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy*, 60 STAN. L. REV. 553, 557 (2007).

## II. PROGRESSIVE ERA ADMINISTRATIVE CONSTITUTIONALISM, 1900–1933

Administration continued to multiply and develop greater independence from the political branches during the Progressive Era, further expanding opportunities for administrative constitutionalism. At the same time, while federal courts grew more watchful, judicial review was a weak constraint on agencies that pursued those opportunities. Indeed, in the newly salient area of civil liberties, the Constitution remained administered first and foremost.

The factors that contributed to the expansion of federal administration during the Progressive Era are legion. As Morton Keller has noted, changes in labor, enterprise, production, technology, marketing, distribution, and consumption resulted “in a far more complex and variegated economic order than Americans had ever experienced before.”<sup>140</sup> Everything from businesses’ ever-larger size to the massive rise in accidents resulting from technological innovation generated interest in government action.<sup>141</sup> A cultural as much as an intellectual shift from a nineteenth-century ethos of individual liberty to an early-twentieth-century preference for protection from risk also fed the turn toward the state.<sup>142</sup> The rise of nationally organized action groups committed to reform, from women’s groups to labor unions to professional organizations, increased pressure on the government to respond.<sup>143</sup> Elites’ growing distaste for political corruption and partisan spoils, their fascination with German bureaucracy, and their formation of professions that promised technocratic expertise and political independence all fed a turn toward

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<sup>140</sup> MORTON KELLER, *REGULATING A NEW ECONOMY: PUBLIC POLICY AND ECONOMIC CHANGE IN AMERICA, 1900–1933*, at 3 (1990).

<sup>141</sup> See generally ALFRED D. CHANDLER JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* (1977); JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS AND THE REMAKING OF AMERICAN LAW* (2004).

<sup>142</sup> See generally JENNIFER KLEIN, *FOR ALL THESE RIGHTS: BUSINESS, LABOR, AND THE SHAPING OF AMERICA’S PUBLIC-PRIVATE WELFARE STATE* (2003); BARBARA YOUNG WELKE, *RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION, 1865–1920* (2001); WITT, *supra* note 141, at 5.

<sup>143</sup> See generally JULIE GREENE, *PURE AND SIMPLE POLITICS: THE AMERICAN FEDERATION OF LABOR AND POLITICAL ACTIVISM, 1881–1917* (1998); DANIEL T. RODGERS, *ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE* (1998); ELIZABETH SANDERS, *ROOTS OF REFORM: FARMERS, WORKERS, AND THE AMERICAN STATE, 1877–1917* (1999); THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* (1995); SKOWRONEK, *supra* note 91. For an example of this dynamic, see DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928*, at 257–70 (2001). National organizations existed in the nineteenth century but their prevalence and relevance increased after the turn of the century.



administered solutions to the days' pressing problems.<sup>144</sup> Meanwhile, world war, waves of immigration at a time when its policing was newly federalized, and the growth of the United States' overseas empire put additional expansionist pressures on the federal government.<sup>145</sup>

Not surprisingly, administration multiplied, morphed, and developed greater autonomy from parties and politicians.<sup>146</sup> Congress created new agencies such as the Federal Trade Commission (FTC) and a hodgepodge of public corporations including the U.S. Emergency Fleet Corporation and the Federal Land Banks.<sup>147</sup> Existing departments gained new responsibilities as the Department of Agriculture began to regulate food and drugs and the Treasury Department implemented the newly constitutional federal income tax.<sup>148</sup> World War I drove Congress to greatly expand the breadth of its delegations to agencies, brought administration to many sectors of the economy, and grew new capacities within the Department of Defense to handle everything from excusing conscientious objectors to managing munitions.<sup>149</sup> After the war, Prohibition produced a massive increase in the federal government's investigative and prosecutorial apparatus.<sup>150</sup>

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<sup>144</sup> These are canonical features of the Progressives. On Americans' turn to administration to liberate themselves from corrupt legislatures, see ERNST, *supra* note 98, at 141. On the professions' role in expanding administration during this period, see CARPENTER, *supra* note 143; RODGERS, *supra* note 143; SKOWRONEK, *supra* note 91. For the influence of German intellectuals and bureaucratic traditions, see ERNST, *supra* note 98; RODGERS, *supra* note 143. For specific examples, see MEHROTRA, *supra* note 103; WITT, *supra* note 141.

<sup>145</sup> Recent works looking at how administrators responded to each of these pressures include MARGOT CANADAY, *THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY AMERICA* (2011); Erman, *supra* note 19; Kessler, *supra* note 19.

<sup>146</sup> This pattern of growth was far from uniform of course. Agencies had differing success at achieving independence. CARPENTER, *supra* note 143, at 9-10. And even as agencies and their powers proliferated in the early-twentieth century, they provoked profound anxieties about their legitimacy and resistance to their endeavors. ERNST, *supra* note 98.

<sup>147</sup> On federal experiments with public corporations, see GAIL RADFORD, *THE RISE OF THE PUBLIC AUTHORITY: STATEBUILDING AND ECONOMIC DEVELOPMENT IN TWENTIETH-CENTURY AMERICA* chs. 1, 2, 4 (2013).

<sup>148</sup> On the Pure Food and Drug Act, see CARPENTER, *supra* note 143, at 256-57. On the formation of the federal "fiscal state" during the Progressive Era, see MEHROTRA, *supra* note 103, at 15, 284. Daniel Carpenter notes that even as the number of independent agencies grew during this period, "the vast share of nonmilitary state activity, government employment, and public expenditure" occurred in executive departments. CARPENTER, *supra* note 143, at 9.

<sup>149</sup> On World War I's impact on congressional delegations, see ERNST, *supra* note 98, at 44. For the administrative apparatus for conscientious objectors, see Kessler, *supra* note 19, at 1111. For statist management of the economy during the war, see DAVID M. KENNEDY, *OVER HERE: THE FIRST WORLD WAR AND AMERICAN SOCIETY* 94 (1980). See generally CHRISTOPHER CAPOZZOLA, *UNCLE SAM WANTS YOU: WORLD WAR I AND THE MAKING OF THE MODERN CITIZEN* (2008).

<sup>150</sup> For the argument that Prohibition was critical to building the modern American state, see LISA MCGIRR, *THE WAR ON ALCOHOL: PROHIBITION AND THE RISE OF THE AMERICAN STATE* (2016).

As administration expanded, so too did the opportunities for administrative constitutionalism. Reuel Schiller notes that adding the federal regulation of radio to that of the mails multiplied administrators' power to censor speech.<sup>151</sup> The Sixteenth Amendment required government lawyers to implement their understanding of the government's constitutional authority to tax.<sup>152</sup> The federal income tax also constituted a massive increase in the government's ability to surveil and inspect businesses and the public, touching on Fourth Amendment concerns.<sup>153</sup> The FTC's investigations into business records likewise put the agency at the center of debates about the Fourth Amendment.<sup>154</sup> At the War Department, administrators' commitment to excusing secular conscientious objectors led them to construct the scope of the President's Commander-in-Chief powers and forge new civil liberties.<sup>155</sup>

Congress continued to follow rather than lead agencies' implementation of the Constitution. As mentioned above, its signature actions in the areas of taxes, fair trade, and prohibition expanded government surveillance with little legislative guidance. Congress policed administration through high-profile investigations, not detailed instructions regarding agency procedure or regulation of privacy and speech.<sup>156</sup> Although Congress eventually debated the constitutionality of the War Department's program for secular conscientious objectors, for instance, it was an inconclusive and largely post hoc affair.<sup>157</sup> Meanwhile, bureaucrats at the Post Office and the Department of Agriculture outmaneuvered opponents in Congress to secure desired programs and powers, exercising what Daniel Carpenter termed a new form of "bureaucratic autonomy."<sup>158</sup>

Despite a series of strong presidencies, agencies continued to own their constitutionally salient policies. The century's first three presidents had sufficient partisan strength in Congress, political independence, and administrative reform ambitions to usher in the modern administrative state.<sup>159</sup> Their abilities to check administrative action were nonetheless limited. Even Theodore Roosevelt found himself outmaneuvered by agency

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<sup>151</sup> Schiller, *Free Speech and Expertise*, *supra* note 85, at 45-46 (2000).

<sup>152</sup> MEHROTRA, *supra* note 103, at 297-98.

<sup>153</sup> *Id.* at 284.

<sup>154</sup> Ken I. Kersch, *The Reconstruction of Constitutional Privacy Rights and the New American State*, 16 *STUD. IN AM. POL. DEV.*, Spring 2002, at 61, 63.

<sup>155</sup> Kessler, *supra* note 19, at 1112-13, 1139-40, 1161.

<sup>156</sup> For a popular account of one of the era's most famous congressional investigations, see generally LATON MCCARTNEY, *THE TEAPOT DOME SCANDAL: HOW BIG OIL BOUGHT THE HARDING WHITE HOUSE AND TRIED TO STEAL THE COUNTRY* (2008).

<sup>157</sup> See Kessler, *supra* note 19, at 1145-47. See generally 58 Cong. Rec. H3065-68 (July 23, 1919) (statement of Rep. Newton); 57 Cong. Rec. H3233-35 (Feb. 12, 1919) (statement of Rep. Chandler).

<sup>158</sup> CARPENTER, *supra* note 143, at 111-12; 257-70.

<sup>159</sup> SKOWRONEK, *supra* note 91, at 171-75.

heads, for instance when the Post Master General refused to use his powers against Roosevelt's political opponents in 1905.<sup>160</sup> His successor, William H. Taft, sought to impose a more narrow and judicialized Constitution on the administrative state. His reform agenda was gravely hampered, however, when he lost his Republican controlled Congress as well as the support of moderate Republicans midway through his term.<sup>161</sup> Early in Woodrow Wilson's administration, he allowed Congress to take the lead in controlling administration in exchange for getting his reforms through, a bargain he later found difficult to reverse.<sup>162</sup> Even the presidential appointment power, a key method of control, was of limited effect during this period, at least for agencies that were able to develop sufficient political legitimacy and support.<sup>163</sup>

Courts stepped up their review of administration, particularly regarding the constitutional limits on agency action. Judicial review generally expanded and grew more muscular during this period. Courts famously struck down a record number of laws on Commerce Clause and substantive due process grounds.<sup>164</sup> Agencies did not escape courts' more robust scrutiny. The Supreme Court in 1902 extended judicial authority to review agencies' conclusions of law into a general principle of judicial review of agency action.<sup>165</sup> Simultaneously, courts ate away at their once absolute deference to agencies' factual findings, carving out new categories of "jurisdictional" and "constitutional" facts subject to de novo review.<sup>166</sup> Their willingness to review agencies for procedural shortcomings also grew.<sup>167</sup>

There were pronounced limits on this newly robust judicial oversight, however, leaving agencies striking discretion regarding the scope of constitutional protections. As Daniel Ernst observes, the Supreme Court (though not always federal judges) applied the constitutional and jurisdictional fact doctrines carefully, leaving abundant space for judicial deference to administrative decision making.<sup>168</sup> In a range of constitutionally sensitive areas,

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<sup>160</sup> CARPENTER, *supra* note 143, at 2.

<sup>161</sup> SKOWRONEK, *supra* note 91, at 173-74.

<sup>162</sup> *Id.* at 175.

<sup>163</sup> CARPENTER, *supra* note 143, at 361.

<sup>164</sup> This trend gave the "Lochner era" its name but note that the Court still upheld the vast majority of state and federal statutes it reviewed. See Keith E. Whittington, *Congress Before the Lochner Court*, 85 B.U. L. REV. 821, 830-31 (2005) (finding the Court upheld federal statutes in 85 percent of cases between 1890 and 1919 and describing other scholar's findings that the Court upheld state statutes in over 94 percent of cases).

<sup>165</sup> See MASHAW, CREATING, *supra* note 7, at 248-49, 274-75 (discussing *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902)).

<sup>166</sup> ERNST, *supra* note 98, at 36.

<sup>167</sup> *Id.* at 38. For an example, see LUCY E. SALYER, *LAW HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* 175-78 (1995), discussing *Chin Yow v. United States*, 208 U.S. 8 (1908).

<sup>168</sup> ERNST, *supra* note 98, at 29-30, 41-43.

judicial deference and vague doctrine left agencies a free hand. Sam Erman describes how the ambiguity of the Court's decisions in the *Insular Cases* left federal officials "freedom . . . in charting federal policies for U.S. imperial acquisitions," including the constitutional rights of their inhabitants.<sup>169</sup> Reuel Schiller documents judicial deference to administrators' decisions about permissible speech.<sup>170</sup> In the sphere of immigration, Lucy Salyer argues that despite repeated efforts to expand courts' oversight of agency procedures, "[j]udicial justice' was not seen as particularly essential or relevant in the administrative realm."<sup>171</sup> Ken Kersch tells a similar story of Fourth Amendment protections, as the Supreme Court "began to repeatedly distance itself from the most sweeping readings of its . . . precedents and to negotiate a rapprochement with the perceived imperatives of the new American state."<sup>172</sup>

Indeed, by the 1920s, Stephen Skowronek describes the "institutional politics in American national government" as being "organized around administrative power and a stalemate of constitutional controls" by Congress, the courts, and the President.<sup>173</sup>

### III. ADMINISTERING THE CONSTITUTION SINCE THE NEW DEAL, 1933–THE PRESENT

The scale, scope, and nature of administration transformed during and after the New Deal. Meanwhile, Congress continued to charge agencies with constitutionally resonant responsibilities even as it struggled to develop effective tools for monitoring agencies' exercise of those responsibilities. The President filled the breach by centralizing and expanding White House oversight of agencies but, as the executive branch expanded dramatically to meet that challenge, it also diluted and fractured its influence. The Supreme Court, for its part, drew ever more administrative action under its review while also asserting more aggressive supremacy regarding constitutional interpretation. At the same time, lawyers gained influence in agencies, bringing greater deference to the judiciary with them. As a result, although administrative constitutionalism persisted, it grew more deferential to the

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<sup>169</sup> Erman, *supra* note 19, at 1230.

<sup>170</sup> Schiller, *Free Speech and Expertise*, *supra* note 85, at 21-22.

<sup>171</sup> SALYER, *supra* note 167, at 214. *See generally id.* at ch. 7; *see also* Kristin A. Collins, *Bureaucracy as the Border: Administrative Law and the Citizen Family*, 66 DUKE L.J. 1727, 1740 n.4 (2017) [hereinafter Collins, *Bureaucracy as the Border*] (discussing *United States v. Ju Toy*, 198 U.S. 253, 260, 261-63 (1905), which deemed agency determinations of citizenship status conclusive and not subject to judicial review for their comportment with due process).

<sup>172</sup> Kersch, *supra* note 154, at 78.

<sup>173</sup> SKOWRONEK, *supra* note 91, at 176; *see also id.* at 16 ("The new American state emerged with a powerful administrative arm, but authoritative controls over this power were locked in a constitutional stalemate.").

courts. This deference was accompanied by a diminution, rather than an increase, in judicial respect for administrative constitutionalism, however.

The New Deal and World War II transformed administration and unsettled the roles of the Court, Congress, the President, and agencies in determining due process in agency hearings. The Great Depression and the exigencies of world war massively expanded the administrative state. As Joanna Grisinger describes, by the end of the 1930s, the work of agencies had “dwarfed the caseload of Congress and the federal courts” and “taken on the lion’s share of federal governance.”<sup>174</sup> Further, as James Sparrow observes, “[t]he agencies that conducted the mobilization for the Second World War quickly dwarfed the New Deal programs . . . .”<sup>175</sup> Worried that expansionist New Dealers had abandoned key checks on administration established by agencies over the past century, Chief Justice Charles Evan Hughes led the Supreme Court in more aggressively specifying core procedural requirements.<sup>176</sup> The lawyers who had rushed into the New Deal government heeded the Court both in their drafting of new legislation and the procedures they designed and enforced within their agencies.<sup>177</sup> Even corporate lawyers, generally seen as the enemies of administration, preferred the consistency of agencies to the uncertainty of special legislative bills and common law courts and thus backed Hughes’ proceduralist approach.<sup>178</sup>

While the battles over agency procedure had largely subsided within the courts and the legal profession by World War II, the political storm persisted.<sup>179</sup> In 1939, President Roosevelt tasked the Attorney General with forming a committee to investigate administrative procedures. He did so in large part to fend off legislative action by critics in Congress.<sup>180</sup> The committee’s 1941 report set off years-long interbranch negotiations. In 1946, Congress codified in the Administrative Procedure Act a procedural compromise that looked more or less like that already reached among bench, bar, and agencies.<sup>181</sup> Congress also streamlined its oversight of agencies

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<sup>174</sup> JOANNA L. GRISINGER, *THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL* 2 (2014).

<sup>175</sup> JAMES T. SPARROW, *WARFARE STATE: WORLD WAR II AMERICANS AND THE AGE OF BIG GOVERNMENT* 6 (2011); see also IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* 18-20, chs. 11-12 (2013) [hereinafter KATZNELSON, *FEAR ITSELF*] (arguing that World War II transformed the American state by building a newly robust, centralized, and globally vigorous national security apparatus); Mariano-Florentino Cuéllar, *Administrative War*, 82 *GEO. WASH. L. REV.* 1343, 1347 (2014) (arguing that World War II “led to a surge in the power and size of the federal administrative state”).

<sup>176</sup> Ernst, *supra* note 98, at 5, 51-71.

<sup>177</sup> *Id.* at 68, 71-76. See generally PETER H. IRONS, *NEW DEAL LAWYERS* (1982).

<sup>178</sup> ERNST, *supra* note 98, at 5-6, 142.

<sup>179</sup> GRISINGER, *supra* note 174, at 4-6, 16-17, 26-31.

<sup>180</sup> ERNST, *supra* note 98, at 132.

<sup>181</sup> *Id.* at 137.

through the Legislative Reorganization Act to counter Roosevelt's earlier consolidation of executive control.<sup>182</sup> In the early 1950s, the Supreme Court signaled that it would now defer to Congress and agencies on the scope of due process protections.<sup>183</sup>

The battle over agency procedure followed a mostly familiar pattern of agencies' constitutional experimentation ultimately leading to court and congressional codification, albeit with a more robust role for the Court and a newly systematic codification by Congress. But changes in judicial review, lawyering, legal theory, and attorneys' roles in agencies that began at the same time fundamentally changed the dynamics of administrative constitutionalism going forward.

In the wake of World War II, agencies' reputations declined, leading to changes in their structure and practices. In part due to agencies' ever-more elaborate procedures, their backlogs grew, along with complaints about their inefficiency.<sup>184</sup> Critics also charged that agencies created during the Progressive and New Deal eras to equalize the public's power with that of industry had instead become beholden to the businesses they regulated.<sup>185</sup> During the next major wave of regulatory legislation in the 1960s and 1970s, Congress responded to the growing distrust of federal agencies and concerns about agency ossification. It passed ambitious laws that blanketed the economy with new requirements touching on civil rights, workplace safety, and the environment. While these laws created some high profile new

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<sup>182</sup> GRISINGER, *supra* note 174, at 10 (describing the act as giving members of Congress "the necessary tools for keeping an eye on the administrative state"). On Roosevelt's earlier consolidation efforts, see Reorganization Act of 1939, Pub. L. 76-19, 53 Stat. 561 (1939); Franklin D. Roosevelt, *Summary of the Report of the Committee on Administrative Management, January 12, 1937*, THE AMERICAN PRESIDENCY PROJECT (last accessed July 29, 2019), <https://www.presidency.ucsb.edu/node/209074> [<https://perma.cc/BAT2-CLC3>].

<sup>183</sup> See *Wong Yang Sung v. McGrath*, 339 U.S. 33, 45-47, 50-51 (1950) (finding it would raise due process concerns if deportation proceedings did not have to comport with the APA's formal adjudication requirements and that those designed by the Immigration Service did not); *McCarren-Walter Act*, Pub. L. 82-414, 66 Stat. 163, sec. 242(b) (1952) (amending the Immigration and Nationality Act to specify the "sole and exclusive" procedures for deportation hearings, including ones that did not comply with the APA's formal adjudication requirements in ways similar to those questioned in *Wong Yang Sung*); *Marcello v. Bonds*, 349 U.S. 302, 308-09, 311 (1955) (finding *McCarren-Walter Act* procedures superseded APA and that its non-APA compliant procedures, upon which *Wong Yang Sung* had cast constitutional doubt, comported with procedural due process). On the persistence and desirability of judicial deference to agency due process determinations, see Vermeule, *supra* note 20.

<sup>184</sup> GRISINGER, *supra* note 174, at 12. See, e.g., Carleton Kent, *Report Rips NLRB Apart on Inefficiency, Delay, Rift*, CHI. SUN TIMES, May 22, 1959 (describing a "devastatingly critical report" by McKinsey Company on the National Labor Relations Board including that staff morale was at a nadir and it was facing huge backlogs in its cases).

<sup>185</sup> GRISINGER, *supra* note 174, at 228-29, 236-37, 251-52. Contemporaneous examples of the capture critique include GABRIEL KOLKO, *RAILROADS AND REGULATION, 1877-1916* (1965); THEODORE J. LOWI, *THE END OF LIBERALISM* (1969).

agencies,<sup>186</sup> they also pushed administration in a more hidden direction, funneling work to local agencies,<sup>187</sup> populating existing federal agencies with low salience offices,<sup>188</sup> and shunting enforcement activity to ordinary Americans and the private bar.<sup>189</sup> In part to respond to charges of inefficiency and bloat, agencies also outsourced work to private contractors and shifted toward regulating via rulemaking rather than adjudication.<sup>190</sup>

Despite agencies' declining reputations, their opportunities to interpret and implement the Constitution persisted, even flowered. During and after World War II, domestic and international pressure on the federal government to advance African Americans' civil rights grew. Southern Democrats' stranglehold on Congress diverted the response from the legislative to the executive branch.<sup>191</sup> As the President and agencies sought ways to advance civil rights, the Constitution provided the authority to act that Congress refused.<sup>192</sup> Meanwhile, administrators used novel constitutional interpretations to standardize and strengthen federal control over state and local agencies' administration of New Deal welfare programs.<sup>193</sup> This strategy provided a template for agencies

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<sup>186</sup> Examples included the Environmental Protection Agency and the Occupational Safety and Health Administration.

<sup>187</sup> Great Society Programs, for instance, bypassed states to funnel funding to local agencies and organizations. On how this strategy helped avoid conflicts with Congress and other federal agencies, see Richard M. Flanagan, *Lyndon Johnson, Community Action, and Management of the Administrative State*, 31 PRESIDENTIAL STUD. Q. 585 (2001). On how it transformed local communities, see THE WAR ON POVERTY: A NEW GRASSROOTS HISTORY, 1964–1980 (Annelise Orleck and Lisa Hazirjian eds., 2011).

<sup>188</sup> For instance, civil rights offices proliferated within existing federal agencies. See generally HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960–1972 (1990).

<sup>189</sup> See generally SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (2010).

<sup>190</sup> See generally JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC (2017); Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139 (2001).

<sup>191</sup> See MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 82–83 (2002) (“On civil rights, [President Truman’s] prospects were particularly bleak because of the hold of Southern Democrats on key Senate committee chairmanships. Truman had greater latitude to act on civil rights when he could act alone.”); IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA x, xv (2005) (documenting how Southern Democrats ensured that the social policies of the 1930s and 40s excluded African Americans from their benefits).

<sup>192</sup> LEE, WORKPLACE, *supra* note 16, at chs. 2, 5, 7. Administrators' response was not uniform. For an example of an agency that interpreted its constitutional duties to advance civil rights unusually narrowly, see Milligan, *supra* note 20. See also Alina Das, *Administrative Constitutionalism in Immigration Law*, 98 B.U. L. REV. 485, 506 (2018) (documenting the Bureau of Immigration Appeals' inconsistent engagement with parties' constitutional arguments).

<sup>193</sup> See generally TANI, STATES OF DEPENDENCY, *supra* note 19; Tani, *Administrative Equal Protection*, *supra* note 19; Karen M. Tani, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 YALE L.J. 314 (2012).

charged with implementing civil rights restrictions on federal funding enacted by Congress in the 1960s and 1970s.<sup>194</sup> Administrators also contended that constitutional constraints attached to federal dollars generally and even to beneficiaries of tax policy.<sup>195</sup> Agencies' shift to rulemaking provided another avenue for administrative constitutionalism, as agencies from the 1960s to the present day used notice-and-comment proceedings to formulate constitutionally informed policies and debate constitutional questions.<sup>196</sup>

Presidential and congressional efforts to ramp up oversight of agencies struggled to keep pace with the growing scope and complexity of administrative action, limiting their ability to direct agencies' constitutional policies. Joanna Grisinger argues that Congress's revised committee structure's "promises of improved oversight proved more significant than the actual results."<sup>197</sup> In the 1980s, the Supreme Court struck down the legislative

<sup>194</sup> See, e.g., Revised Statement of Policies for School Desegregation Plans Under Title VI of the Civil Rights Act of 1964, 45 C.F.R. § 181.54 (1967), reprinted in U.S. COMM'N ON CIVIL RIGHTS, FEDERAL RIGHTS UNDER SCHOOL DESEGREGATION LAW 11-21 (1966) (providing guidance for when school choice plans would be found to meet constitutional requirements); GARY ORFIELD, THE RECONSTRUCTION OF SOUTHERN EDUCATION 101 (1969) (describing the drafting of the guidelines, noting that while they ended up hewing more closely to court interpretations of the Constitution than some drafters preferred, they enabled the administration "to desegregate, in four months time, far more districts than the [f]ederal courts had reached in 10 years"). For earlier debates about the constitutional limits on federal funding, see Milligan, *supra* note 20, at 24-32, describing disputes between Departments of Education and Defense as to whether equal protection or federalism principles governed federally funded schools on military bases in the 1950s and documenting the Department of Education lawyers' view that their Department had to stop funding segregated educational programs after the Supreme Court declared public school segregation unconstitutional because failing to do so would involve "the use of Federal monies for an unconstitutional purpose" (internal quotations omitted); Tani, *Administrative Equal Protection*, *supra* note 19, at 880, recounting pre-Title VI agency officials worried that attaching constitutional constraints to federal funding was ill-advised because it could lead to massive defunding of state welfare programs. See also LEE, WORKPLACE, *supra* note 16, at 107 (describing how President Eisenhower and Vice President Nixon assumed the federal government had heightened obligations to ensure equal employment on federally funded work).

<sup>195</sup> See *Bob Jones Univ. v. United States*, 461 U.S. 574, 586-95 (1983) (allowing the IRS to take equal protection values into consideration in meeting its statutory duty); Comments on the Justice Department Preliminary Memorandum Regarding Expansion of the Definition of Government Contract in the Proposed OFCC Regulations at 1, undated memo [circa 1967], folder 103, box 1, Records of John Doar, Assistant Attorney General, Civil Rights Division, 1960-1967, Department of Justice, RG 60 (National Archives, Washington, D.C.) (arguing that the President has a constitutional "obligation to ensure that assistance the Government extends is not being used to subsidize discriminatory employment practices"); Lee, *Race, Sex, and Rulemaking*, *supra* note 16, at 832, 851 (quoting government officials who argued that federal agencies had a constitutional obligation to ensure contractees and grantees did not discriminate in employment).

<sup>196</sup> See Jeffrey A. Gibbs, Paul L. Ferrari & Anne Marie Murphy, *Ripe for Revision: Reassessing the Constitutionality of Food and Drug Administration Restrictions on Protected Speech*, 58 FOOD & DRUG L.J. 331, 331 (2003) (discussing a notice-and-comment process initiated by the Food and Drug Administration that "solicited comments from the public on a broad range of First Amendment issues"); Lee, *Race, Sex, and Rulemaking*, *supra* note 16.

<sup>197</sup> GRISINGER, *supra* note 174, at 11.



veto, a key oversight tool Congress had developed to review and invalidate agency actions using procedures short of full-blown bicameralism and presentment.<sup>198</sup> By most measures, the President was more successful at centralizing and expanding oversight of agency action.<sup>199</sup> This was accomplished through a range of strategies, including the growth of the White House executive office and use of executive orders imposing cost-benefit and other analyses on agencies.<sup>200</sup> Yet, the very growth of the oversight apparatus diffused its impact. Indeed, a 2006 study found that, although agencies heard policy directives regularly from the White House, those directives came from different sources and often pointed in competing directions.<sup>201</sup> As a result, agencies retained freedom from Congress and the President when interpreting the Constitution.<sup>202</sup>

Continuing limits on judicial review also left ample space for administrative constitutionalism to thrive.<sup>203</sup> The Warren and Burger Courts expanded avenues for courts to impose their constitutional interpretations on agencies through the recognition of constitutional torts,<sup>204</sup> expansion of standing and justiciability doctrines,<sup>205</sup> and erosion of presumptions against the reviewability of agency action.<sup>206</sup> By the mid-1970s, however, the tide had

<sup>198</sup> *INS v. Chadha*, 462 U.S. 919 (1983). *But see* Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 L. & CONTEMP. PROBS. 273 (1993) (documenting that even after *Chadha*, committee and subcommittee vetoes persisted).

<sup>199</sup> For a classic description and defense of these efforts, see Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001). For their origins in the FDR administration, see GRISINGER, *supra* note 174.

<sup>200</sup> Within the White House Executive Office, the White House Office and the Office of Management and Budget, particularly its Office of Information and Regulatory Affairs, are especially salient loci for presidential oversight of federal agencies.

<sup>201</sup> Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2006).

<sup>202</sup> Historical examples exist of Congress considering constitutionally informed agency policies and either codifying them or refusing to reject them. *See* Lee, *Race, Sex, and Rulemaking*, *supra* note 16, at 853-54, 878 n.359 (“As 1971 turned to 1972, equal employment rulemaking continued to be aired and debated publicly, this time on the Senate floor.”).

<sup>203</sup> *See* Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 434 (2007) (describing the wide berth federal courts gave administrative agencies in the wake of the New Deal); *see also* Metzger, *1930s Redux*, *supra* note 6, at 61 (explaining that mid-twentieth-century judicial review of agency action focused primarily on its compliance with statutes not the Constitution).

<sup>204</sup> *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 396 (1971) (recognizing tort claim for violation of the Fourth Amendment).

<sup>205</sup> *See, e.g., NAACP v. Patterson*, 357 U.S. 449, 459 (1958) (allowing third-party standing); Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1133 (2009) (“[T]he Supreme Court acknowledged that these parties had no legally cognizable injury—no legal rights—but it held nonetheless that Congress could authorize such parties to, as the Supreme Court itself said, bring the government’s ‘legal errors’ to the attention of the federal courts ‘on behalf of the public.’”).

<sup>206</sup> *See Abbott Labs. v. Gardner*, 387 U.S. 136, 140-141 (1967) (finding a presumption in favor of reviewability of agency action absent congressional indication otherwise); *Gardner v. Toilet Goods*

turned and the Court used these same levers to steadily constrict judicial review.<sup>207</sup> At the same time, government grew in the last decades of the twentieth century, particularly in areas such as national security, immigration enforcement, and criminal justice, toward the administrators of which the Court showed particular deference.<sup>208</sup> Even where judicial review was available, the Court's own doctrines sometimes left administration of the First,<sup>209</sup> Fourth,<sup>210</sup> Fifth,<sup>211</sup> and Sixth Amendments largely to agencies' discretion.<sup>212</sup> Further, the scope of agency action and the limits on federal courts ensured that judicial review left much agency action untouched.<sup>213</sup>

Changes in lawyering also fed agencies' administrative constitutionalism. Beginning in the 1940s, civil rights advocates shifted their attention to federal

Ass'n., 387 U.S. 167, 184-86 (1967) (Fortas, J., dissenting) (describing the Court's decision in *Abbott Laboratories* as a "surprising revelation" with little support in precedent); see also PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 1307 (11th ed. 2018) (describing *Abbott Laboratories* as a "watershed case" on the reviewability of agency action).

<sup>207</sup> See STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 217 (2017) (arguing the Supreme Court was more successful than Congress, the President, or administrators in rolling back access to courts won during the Warren Court's rights revolution); SARAH STASZAK, NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF JUDICIAL RETRENCHMENT 210-11 (2015) (uncovering the procedural reforms that restricted access to courts in the late-twentieth century and arguing that they were the result not only of a conservative counterattack but also of general institutional reform efforts by actors who supported the goals of the rights revolution).

<sup>208</sup> See, e.g., Collins, *Bureaucracy as the Border*, *supra* note 171, at 1759-62, 1765 (describing how the Supreme Court's plenary powers doctrine left immigration officials wide latitude during the late-twentieth century to determine the meaning of the Constitution's gender equality guarantees); Das, *supra* note 192, at 501-02 (contending that even as the courts have eroded aspects of the plenary power doctrine, "judicial intervention remains limited [in the immigration context] . . . due to other institutional constraints"); Richard H. Fallon, *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1299-1302 (2006) (using military and prisons as the paradigm instances when the Court, in conducting constitutional review, defers to government officials).

<sup>209</sup> See Schiller, *Free Speech and Expertise*, *supra* note 85, at 96-100 (describing how the Court's deference doctrines left the Federal Communications Commission wide latitude for interpreting the First Amendment into the late-twentieth century).

<sup>210</sup> See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 414-28 (1974) (explaining the role of police in promulgating rules to implement and protect the Fourth Amendment right to freedom from unreasonable searches and seizures, and lack of external oversight over the implementation of these rules).

<sup>211</sup> Vermeule, *supra* note 20 (noting that due process doctrine is structured to provide deference to federal agencies' interpretation of this constitutional provision).

<sup>212</sup> See Sara Mayeux, *What Gideon Did*, 116 COLUM. L. REV. 15, 55 (2016) (describing how *Gideon's* "seemingly specific constitutional mandates still required extensive translation to map onto local institutional realities").

<sup>213</sup> See Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1304 (2000) (observing that "in the vast majority of cases . . . executive branch interpretation is not subject to judicial review"); David S. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 115 (1993) (noting that limits on standing, mootness, qualified immunity, and insufficient incentives to sue all ensure that "many executive branch interpretations of the Constitution will not be reviewed in court").

agencies, arguing that the Constitution required them to adopt specific policies.<sup>214</sup> Over the next decades they forced constitutional questions onto an expanding array of regulators.<sup>215</sup> By the 1960s and 1970s, a burgeoning corps of legal services lawyers bent on securing equal treatment, due process, and privacy protections for recipients of government benefits joined them in imposing constitutional duties on government agencies.<sup>216</sup> At the same time, a cadre of lawyers who fought for equal protection for women and minorities within the administrations of Presidents Kennedy and Johnson exited government. Once outside, they sought ways to ensure that the Republican-led agencies of the 1970s and 1980s continued their work.<sup>217</sup> During these years, conservative lawyers opposed to the modern regulatory state also organized. They formed legal advocacy groups that launched constitutional attacks on agencies.<sup>218</sup> The Reagan administration also created new opportunities for conservative lawyers in government, where they advanced their deregulatory constitutional views.<sup>219</sup> Together, these lawyers, participating in what became known as the public interest bar, created new avenues for disseminating constitutional arguments within, and pressing for the adoption of constitutionally informed policies, by federal agencies.

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<sup>214</sup> LEE, *WORKPLACE*, *supra* note 16, at chs. 2, 5.

<sup>215</sup> *Id.* at chs. 7-8; Lee, *Race, Sex, and Rulemaking*, *supra* note 16.

<sup>216</sup> See FELICIA KORNBLOH, *THE BATTLE FOR WELFARE RIGHTS: POLITICS AND POVERTY IN MODERN AMERICA* ch. 3 (2007) (explaining the role of legal aid lawyers in the “legal civil disobedience” movement to improve access to welfare benefits); Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277, 1331 (2015) (discussing the role of anti-poverty lawyers, beginning in the 1970s, in challenging legitimacy laws placing a disparate impact on mothers); see generally MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973* (1993); JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* (1985) [hereinafter MASHAW, *DUE PROCESS*].

<sup>217</sup> See LEE, *WORKPLACE*, *supra* note 16, at ch. 10 (describing how former employees of the United States Civil Rights Commission organized during the 1970s to force federal agencies to advance equal employment); Sophia Z. Lee, *In and Out of Government: Public Interest Organizations and the Making of a Civil Rights State, 1968-1976*, at 31 (unpublished manuscript) (on file with author) (examining the key intermediary role former administrators played in partnerships between public interest lawyers and federal civil rights administrators during the 1970s). For an autobiographical account of this dynamic, see WILLIAM L. TAYLOR, *THE PASSION OF MY TIMES: AN ADVOCATE’S FIFTY-YEAR JOURNEY IN THE CIVIL RIGHTS MOVEMENT* (2004). For the story of Aileen Hernandez, who went from the first Equal Employment Opportunity Commission to help found and lead the National Organization for Women, see SERENA MAYERI, *REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION* ch. 2 (2011).

<sup>218</sup> See generally JEFFERSON DECKER, *THE OTHER RIGHTS REVOLUTION: CONSERVATIVE LAWYERS AND THE REMAKING OF AMERICAN GOVERNMENT* (2016); STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008). For their predecessors, see LEE, *WORKPLACE* *supra* note 16, at chs. 3, 6, 12.

<sup>219</sup> See DECKER, *supra* note 218; LEE, *WORKPLACE*, *supra* note 16, at ch. 13; Steven M. Teles, *Transformative Bureaucracy: Reagan’s Lawyers and the Dynamics of Political Investment*, 23 *STUD. IN AM. POL. DEV.* 61 (2009).

Yet, even as administrative constitutionalism persisted, it became far more judicialized. In part, this is due to the Court expanding vastly its review of constitutional questions. In the 1930s, even as the Court stepped back from its *Lochner*-era substantive due process jurisprudence, it began carving out for special protection preferred constitutional rights and politically powerless victims.<sup>220</sup> Simultaneously, anti-regulatory conservatives turned to litigating First Amendment claims in particular and civil liberties generally in the hopes of building a judicially administered constitutional bulwark against the growing regulatory state.<sup>221</sup> They were joined by civil rights and civil liberties advocates seeking protections for disfavored groups such as labor organizers, religious minorities, and African Americans.<sup>222</sup> Those efforts met with considerable success. Starting with the First Amendment and spreading over subsequent decades out to the Fourteenth, Fifth, Sixth, and Fourth Amendments, the Supreme Court steadily expanded the scope of constitutional provisions it found the government had violated.<sup>223</sup> The Court

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<sup>220</sup> See *Jones v. City of Opelika*, 316 U.S. 584, 608 (1942) (Stone, J., dissenting) (“[T]he Constitution, by virtue of the First and the Fourteenth Amendments, has put those freedoms [of speech and religion] in a preferred position.”); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (describing circumstances when the Court may relax its presumption of legislation’s constitutionality, including when a law operates against politically powerless minorities). For historical debates about how complete this shift was, compare Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 POL. RES. Q. 623 (1994) (describing the courts’ modern approach to balancing individual liberty and government power as established by the 1930s), with Risa L. Goluboff, *Deaths Greatly Exaggerated*, 24 L. & HIST. REV. 201, 202 (2006) (arguing that contrary to the convention among historians, the New Deal’s constitutional revolution did not settle the “basic contours of the modern American state” but instead “initiated a period of experimentation with the relationship between individuals and their governments”).

<sup>221</sup> See SAM LEBOVIC, *FREE SPEECH AND UNFREE NEWS: THE PARADOX OF PRESS FREEDOM IN AMERICA* ch. 3 (2016) (describing how anti-New Deal newspaper publishers used the First Amendment to stave off press reforms); LEE, *WORKPLACE*, *supra* note 16, at chs. 3, 6 (explaining how conservatives used First Amendment claims to counter union power); LAURA WEINRIB, *THE TAMING OF FREE SPEECH: AMERICAN’S CIVIL LIBERTIES COMPROMISE* chs. 7-8 (2016) (recovering how conservatives during the New Deal embraced the First Amendment and civil liberties more generally to counter government regulation); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1918 (2016) (arguing that the “First Amendment Lochnerism” legal scholars have identified in the twenty-first century dates back to “the Supreme Court’s initial turn to robust protection of free exercise and free expression in the 1930s and 1940s”).

<sup>222</sup> See generally RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007) (describing constitutional litigation by the NAACP and the Department of Justice’s Civil Rights Section during the 1930s and 1940s that sought to advance African Americans economically); LEE, *WORKPLACE*, *supra* note 16, at chs. 1-2 (describing litigation by civil rights lawyers and black workers to win access to jobs and unions); WEINRIB, *supra* note 221, at chs. 6-7 (describing how civil libertarians turned to the courts to protect the First Amendment rights of workers and unions).

<sup>223</sup> See generally DAVIS, *supra* note 216 (Fifth and Fourteenth Amendments); RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* (1977) (Fifth and Fourteenth Amendments); SERENA MAYERI, *REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION*

also increased the frequency with which it was prepared to so rule and asserted more boldly that its word was the final—and possibly exclusive—answer to such questions.<sup>224</sup> Whereas its *Lochner*-era substantive due process decisions had focused on challenges to the laws Congress enacted, the Court's mid-century rights revolution targeted the way laws were administered. As a result, those decisions steadily infused an ever-denser body of constitutional doctrine into administrative actions and imposed new constitutional constraints on administration.<sup>225</sup>

The legal academy fed the judicialization of administrative constitutionalism. Legal process theory, which dominated jurisprudential thought in the mid-twentieth century, favored judicial, rather than administrative, resolution of constitutional questions. Its expounders bolstered deference to political branches and agencies in some contexts, but also elevated implementation of the Constitution's rights-bearing provisions as a quintessentially, perhaps distinctly, judicial undertaking. In defending the role of courts in a democratic system, they emphasized courts' particular

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(2011) (Fifth and Fourteenth Amendments); WEINRIB, *supra* note 221, at chs. 7-8 (First Amendment); Mayeux, *supra* note 212 (Sixth Amendment); Schiller, *Free Speech and Expertise*, *supra* note 85 (First Amendment); David Alan Sklansky, *One Train May Hide Another: Katz, Stonewall, and the Secret Subtext of Criminal Procedure*, 41 U.C. DAVIS. L. REV. 875 (2007) (Fourth Amendment). See, e.g., *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939) (holding that a ban on political meetings violated First Amendment rights); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641-42 (1943) (holding that the requirement for students to salute the flag or say the Pledge of Allegiance in public schools violated the First Amendment); *Smith v. Allwright*, 321 U.S. 649 (1944) (overturning Texas state law that allowed Democratic Party to use white primaries); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (finding segregation of public schools violated the Fourteenth Amendment); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (holding that the Constitution prohibited segregated public schools in D.C.); *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that evidence obtained in violation of the Fourth Amendment may not be used in state criminal prosecutions); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that defendants who cannot afford an attorney in a criminal case will be provided one); *Katz v. United States*, 389 U.S. 347 (1967) (expanding the reach of Fourth Amendment protections); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that the Fifth Amendment requires an evidentiary hearing before a recipient of government benefits can be deprived of them).

<sup>224</sup> *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (stating that *Marbury v. Madison* “declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system”). For scholarship arguing that, notwithstanding the Court's assertion in *Cooper*, judicial supremacy was a twentieth-century creation, see KRAMER, *supra* note 40; KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* (2009).

<sup>225</sup> Notably, many of the Court's earliest constitutional rights decisions targeted state and local governments rather than the federal government, leaving it largely to federal agencies to decide the implications of such precedents for their work. For instance, of the cases cited *supra* note 223, only *Bolling*, *Goldberg*, and *Katz* reviewed federal action. For the argument that some agencies were designed to prioritize federalism concerns over the Court's rights revolution, see Milligan, *supra* note 20, at 6-8.

institutional competencies. Those involved the capacity for (and duty to engage in) neutral and abstract principled reasoning, exactly the opposite of the grounded, localized interpretations agencies were known for. While process theorists were sensitive to judges' inability to resolve political questions, they helped justify the Court's more robust rights-based constitutionalism. They also defended the supremacy of the courts' interpretations where they did weigh in on constitutional questions.<sup>226</sup>

The Court's rights revolution judicialized administrative constitutionalism in less direct ways as well. Part of the New Deal settlement turned on securing the role of lawyers within agencies to ensure their compliance with due process and other legal values.<sup>227</sup> Lawyers, trained in the Langdellian tradition, brought with them a focus on judicial precedent.<sup>228</sup> They were inclined to serve their role of regulating the regulators by reasoning from case law. And whereas before they might have had no choice but to reason from custom and constitutional first principles, the Court's growing constitutional rights jurisprudence ensured that they had ample judicial sources to which to turn.<sup>229</sup> Agencies' increasingly court-centric legal culture was not the only factor leading them to rely on judicial precedent to answer constitutional questions. The Court's rights activism and assertions of judicial supremacy gave administrators incentives to punt difficult constitutional question to courts.<sup>230</sup>

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<sup>226</sup> Leading historical accounts of process theory include MORTON J. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1992) and LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1996). Classic texts are JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); HENRY M. HART JR. & ALBERT SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (1958).

<sup>227</sup> ERNST, *supra* note 98, at 143-44.

<sup>228</sup> On the origins of the case-method, see Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 5, Pt. IV (1983), discussing why the case-method was widely adopted.

<sup>229</sup> Tani provides a useful example of this in her history of welfare rights. As she describes, welfare administrators' novel interpretations of equal protection and due process thrived in the 1940s and 1950s when courts' found review of their policies nonjusticiable. As courts expanded their review of welfare policies in the 1960s and 1970s, however, agency lawyers began reasoning from judicial precedent and setting their procedures according to the Court's prescribed constitutional minimum. Tani, *Administrative Equal Protection*, *supra* note 19. See also MASHAW, *DUE PROCESS*, *supra* note 216, at 260-61 (explaining that after the Supreme Court established in *Goldberg v. Kelley*, *supra* note 223, what fair hearing procedures welfare recipients were constitutionally due, the federal Department of Health, Education, and Welfare deleted additional procedures they had been planning to provide).

<sup>230</sup> This dynamic is akin to arguments that the courts' ever-widening corpus of constitutional decisions has created a "judicial overhang" that diminishes Congress's engagement in constitutional debate and interpretation. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 57 (2000). For evidence that agencies in the twentieth century marked swaths of constitutional questions outside their authority to consider, see Das, *supra* note 192, at 506-14, 533-35.

In constitutional disputes within agencies, administrators strategically invoked judicial supremacy and precedent to advance their arguments.<sup>231</sup>

The result has been that, since the New Deal, opportunities for administrative constitutionalism have proliferated, but its practice has become more legalistic and more deferential to judicial doctrine. At the same time, while congressional and presidential oversight of the phenomenon remains relatively weak, courts have expanded their constitutional review of agencies and heightened their skepticism toward administrative constitutionalism.

### CONCLUSION

The Court to this day remains deeply ambivalent about administrative constitutionalism. As described above, the Court has vastly expanded its ambit to review, and provide the final word on, the constitutionality of agency action. Yet its decisions still contemplate some areas where agencies can interpret the Constitution free from court review. For instance, at least in theory, the Court allows Congress to foreclose judicial review of constitutional claims against agencies if it does so with sufficient clarity.<sup>232</sup> The Court also continues to declare constitutional challenges to some types of executive branch actions outside its authority to review.<sup>233</sup> And even as the Court has broadened its review of and strengthened its supremacy over the constitutional questions administration raises, it has not asserted exclusivity. Instead, the Court has preserved space for agencies to engage the Constitution. The Court, for example, has held that Congress can require constitutional claims to be heard in the first instance by an agency.<sup>234</sup> Further, while the Court has stated that “adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies[,]” it has declined to so rule.<sup>235</sup> The Court has also

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<sup>231</sup> LEE, *WORKPLACE* *supra* note 16, at ch. 11; Lee, *Race, Sex, and Rulemaking*, *supra* note 16, at 879; Milligan, *supra* note 20, at 32-33. That said, administrators to this day enforce the Constitution in ways that diverge from the courts. *See infra* notes 239-240 and accompanying text.

<sup>232</sup> *Webster v. Doe*, 486 U.S. 592, 603 (1988) (“[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear.”).

<sup>233</sup> *Cf. Trump v. Hawaii*, 138 S. Ct. 2392, 2407, 2409, 2418-19 (2018) (acknowledging but avoiding deciding the reviewability of the Trump administration’s travel ban and reaffirming but finding a limited exception to the rule that “the admission and exclusion of foreign nationals is a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control”) (internal quotations omitted).

<sup>234</sup> *Elgin v. Dep’t of Treasury*, 567 U.S. 1, 5, 12 (2012) (finding that a constitutional challenge to an agency’s governing statute had to first be brought to the agency itself and was no different than the First and Fourth Amendment claims the agency adjudicated).

<sup>235</sup> *Id.* at 16-17 (2012) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994)) (noting past statements that agencies cannot decide the constitutionality of statutes but declining to decide if an agency’s view that it lacked authority to do so was correct).

refused to subject agencies' constitutional interpretations to heightened scrutiny under the Administrative Procedure Act,<sup>236</sup> even if it has also denied deference to agency statutory interpretations that raise serious constitutional questions.<sup>237</sup> When the Court finds itself unable to address constitutional concerns itself by the bounds of its competence or its place in the constitutional structure, Justices have even encouraged agencies to fill these gaps with their own view of their constitutional responsibilities.<sup>238</sup>

To this day, administrators also enforce the Constitution in ways that diverge from the courts.<sup>239</sup> More modestly, they find ways to “conform[] to the letter of current equal protection doctrine, but tangle[] with its spirit.”<sup>240</sup> Further, agencies that do so “regulate us in many meaningful, and sometimes frightening, ways that either evade judicial review entirely or are at least substantially insulated from such review.”<sup>241</sup>

The conservative Justices' growing skepticism about the constitutionality of judicial deference to agency interpretations of statutes and their turn to greater judicial “engagement” does not bode well for the future of administrative constitutionalism.<sup>242</sup> Neither do efforts to deeply constrain agencies' ambit and subject them to far closer judicial scrutiny in the

<sup>236</sup> *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) (declining to “apply a more stringent arbitrary-and-capricious review to agency actions that implicate constitutional liberties”).

<sup>237</sup> *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-74 (2001) (holding that where an administrative interpretation of a statute raises significant constitutional questions Congress did not expressly intend for the statute to raise, the Court is not required to defer to the interpretation). *But see* *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (applying standard deference doctrines where the majority determined that almost any regulations the agency adopted interpreting the statute would likely raise constitutional questions); Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2033-34 (2011) (arguing that the Court is inconsistent in its constitutional review of agency action, sometimes deferring to administrators and sometimes not).

<sup>238</sup> *See, e.g.*, *Trump v. Hawaii*, 138 S. Ct. 2392, 2424 (2018) (Kennedy, J., concurring) (stating that just because government action is not judicially reviewable “[t]hat does not mean those officials are free to disregard the Constitution . . . . Indeed, the very fact that an official may have broad discretion, discretion free from judicial scrutiny, makes it all the more imperative for him or her to adhere to the Constitution and to its meaning and its promise.”). Thanks to Sharmila Sohoni for pointing out this aspect of the opinion.

<sup>239</sup> *See* Max Isaacs, *LGBT Rights and the Administrative State*, 92 N.Y.U. L. REV. 2012, 2030-37 (2017) (cataloguing recent Departments of Education, Housing, and Health and Human Services officials' more robust interpretation of the Constitution's protections against anti-LGBT discrimination than found in court doctrine).

<sup>240</sup> Blake Emerson, *Affirmatively Furthering Equal Protection: Constitutional Meaning in the Administration of Fair Housing*, 65 BUFF. L. REV. 163, 165 (2017) (describing how a recent Department of Housing and Urban Development rule that requires consideration of impacts on racial segregation comports with the courts' equal protection doctrine by eschewing race as a decisional criteria but also works against the Court's underlying goal of lowering the salience of race).

<sup>241</sup> Christopher J. Walker, *Administrative Law Without Courts*, 65 UCLA L. REV. 1620, 1620 (2018).

<sup>242</sup> *See, e.g.*, *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (2016) (Gorsuch, J., concurring) (“Chevron seems no less than a judge-made doctrine for the abdication of the judicial duty.”).



Constitution's name.<sup>243</sup> Yet, the history sketched above suggests that the tools judges, lawyers, and scholars are fashioning to enhance judicial oversight of administration are ill-suited to more conclusively stamping out agency discretion to interpret and implement the Constitution.

Granted, the account above raises as many questions as it answers. Scholars have just begun uncovering the history of administrative constitutionalism. Based on what is known thus far, it seems that for much of the United States' history, agencies had a relatively free hand in implementing constitutionally sensitive policies, resolving structural constitutional questions, and determining what the Constitution's rights-bearing provisions meant in practice. Much less is known about how agencies made use of that discretion, however. For instance, apart from a few scattered case studies, there is very little known about the degree to which agencies during the nineteenth century explicitly considered and decided constitutional questions or merely determined the de facto lived meaning of the Constitution through the policies they adopted. In addition, it seems likely that the general lack of meaningful oversight from the political branches described above extended to oversight of agencies' constitutional determinations, a likelihood that is confirmed in the few case studies that capture the dynamic. But there has not been any sustained study of the question. Also, the shift to more judicialized forms of administrative constitutionalism in the latter half of the twentieth century may be more apparent than real. This is the period for which there is the most sustained study of agencies' actual constitutional practices. As a result, without looking more at those practices in earlier periods, it is not possible to say anything conclusive about the novelty or increased frequency of agencies' deference to judge-made constitutional law after the New Deal.

But even if further study reveals the account of administrative constitutionalism that is least disruptive to current critiques of the administrative state, that history would still disrupt plenty. Perhaps agencies did not frequently consider constitutional questions in the nineteenth century and, once the Court began offering its own answers in the twentieth century, mainly deferred to them. That would still leave us with the near total absence of courts' constitutional review of agency action during the nineteenth century.

Indeed, if the picture sketched above is accurate even in this one particular, it should alter the terrain of current debates about the constitutionality of the modern administrative state writ large. There may be

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<sup>243</sup> See *supra* notes 9–13 and accompanying text; see also Michael Rappaport, *Classical Liberal Administrative Law in a Progressive World* at 105, in *THE CAMBRIDGE HANDBOOK OF CLASSICAL LIBERAL THOUGHT* (Todd Henderson ed., 2018) (arguing for “us[ing] a stricter separation of powers to establish an administrative law that place[s] more constraining limits on government”).

good reasons for courts to more closely scrutinize and conclusively determine the constitutionality of agency action. But those reasons will have to be grounded in changed circumstances or independent normative and theoretical principles. Reinstating the nineteenth-century constitutional order will if anything take us further from that goal.<sup>244</sup>

Yet if critics of the administrative state do adopt more functionalist (rather than originalist or traditionalist) arguments to distribute authority between courts and agencies to interpret the Constitution, a new challenge will arise: how to explain why the past should be our guide for all other matters?

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<sup>244</sup> See *supra* Part I.

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