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From the History to the Theory of Administrative Constitutionalism

*Sophia Z. Lee**

There is a natural affinity between history and the study of how agencies interpret and implement the Constitution, what scholars call “administrative constitutionalism.”¹ The number of historians incorporating administrative constitutionalism into their work is growing.² At the same time,

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¹ This chapter defines administrative constitutionalism to include only agencies’ interpretation and implementation of the United States Constitution. Other scholars have proposed broader definitions of the term. William Eskridge and John Ferejohn use 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.” WILLIAM N. ESKRIDGE & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 33 (2010). Gillian Metzger would also include “the statutes and legal requirements that create and govern the modern administrative state.” Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1899 (2013). Jerry L. Mashaw uses the term to describe the “institutional and legal developments” that secured the constitutional legitimacy of the early administrative state. JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* vii (2012). I am not opposed to these broader definitions. If they are adopted, however, it would be helpful to have a way linguistically to differentiate the overlapping but distinct topics of how agencies create constitutional meaning and how administrative law doctrines ensure the constitutionality of administration itself, what Mashaw and at times Metzger use the term to describe, or how the regulatory state more generally shapes the nation’s core commitments, as Eskridge and Ferejohn use the term.

² SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* (2014) [hereinafter LEE, *THE WORKPLACE CONSTITUTION*]; 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*]; Karen M. Tani, *Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor*, 100 CORNELL L. REV. 825 (2015); Jeremy Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 COLUM. L. REV. 1083 (2014); Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1457 (2015).

legal scholars interested in administrative constitutionalism often look to the past.³

This should not come as a surprise. Legal scholarship on administrative constitutionalism grew out of the broader field of extra-court constitutionalism, a body of work that emphasizes positive constitutional theory.⁴ Even scholars more interested in the normative merits or demerits of administrative constitutionalism find those usefully informed by actual administrative practice.⁵ And administrative constitutionalism often unfolds over time, accreting slowly through memos, reports, adjudications, and regulations.⁶ The fact that agency records are easier to acquire from the National Archives than through Freedom of Information Act (FOIA) requests also pushes scholars of administrative constitutionalism into the past.⁷ At the same time, the history of administration is burgeoning.⁸ As historians burrow into administrative agencies, they often encounter the Constitution. Administrative constitutionalism gives a new lens through which to view and understand their sources.

The points of contact between the history and theory of administrative constitutionalism are sufficiently robust and growing to merit systematic analysis. This chapter focuses on what history can offer the theory of administrative constitutionalism. In particular, it argues that historical accounts of administrative constitutionalism invite a more robust normative defense of the practice than theorists have thus far provided.

³ ESKRIDGE & FERREJOHN, *supra* note 1; Bertrall L. Ross II, *Embracing Administrative Constitutionalism*, 95 B.U. L. REV. 519 (2015); Anjali S. Dalal, *Shadow Administrative Constitutionalism and the Creation of Surveillance Culture*, 2014 MICH. ST. L. REV. 59.

⁴ LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009); Robert C. Post and Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003). On positive constitutional theory generally, see Jack M. Balkin, *What Brown Teaches Us about Constitutional Theory*, 90 VA. L. REV. 1537 (2004).

⁵ See, for instance, Metzger, *supra* note 1, at 1904–1909.

⁶ The National Labor Relations Board (NLRB) deliberated for over thirty years about its constitutional duty to police racial discrimination by the unions it oversaw. LEE, *THE WORKPLACE CONSTITUTION*, *supra* note 2, at 35–55, 97–114, 135–54, 175–93, 212–22.

⁷ While I could find rich archival sources on the Board's internal deliberations during the 1940s to 1970s, I lacked similar sources for the 1980s because such “deliberative process” material is excepted from the records that the government must divulge in response to a FOIA request. *Compare id.* at 135–74 *with id.* at 238–56.

⁸ DANIEL R. ERNST, *TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940* (2014); JOANNA GRISINGER, *THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL* (2012); NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940* (2013).

The normative debate about administrative constitutionalism is still relatively nascent.⁹ Nonetheless, scholars have identified a number of questions regarding the practice's definition and defensibility. Some may be answerable in the abstract, but, in many instances, history sheds useful light on the conversation. Below I use evidence from history to argue that administrative constitutionalism may be virtuous even if it has qualities its critics reject and lacks virtues its defenders seek. I argue in Section I that administrative constitutionalism can be normatively desirable even if it is neither transparent nor participatory. In Section II, I contend it is even defensible if it varies from court doctrine and is contrary to congressional command.

I EXPERTISE AND ENGAGEMENT AS INDEPENDENT VALUES

Scholars argue that it is desirable for agencies to be transparent and invite public participation when they undertake administrative constitutionalism. At times, they even seem to contend that transparency and participation are definitional or normatively necessary. Below I use historical examples to argue that fostering agency engagement with constitutional questions and benefiting from agency expertise are independent values that warrant recognizing, and normatively defending, administrative constitutionalism even when it is opaque or nonparticipatory.

Defending Opacity

Gillian Metzger has asked whether, in categorizing an agency action as an instance of administrative constitutionalism, it matters whether the agency engages expressly with the Constitution when it publicly explains its action.¹⁰ History suggests that counting express published reliance on the Constitution only would exclude from consideration instances when the Constitution plays a strongly influential and even decisive role. Such a definition thus seems descriptively under inclusive. As history indicates, that definition also avoids important questions about how agencies should engage the Constitution.

In questioning whether agencies must explicitly and publicly rely on the Constitution to engage in administrative constitutionalism, Metzger referenced my work on the Federal Communications Commission (FCC) during

⁹ Bertrall Ross observed recently that “no one has yet offered a comprehensive normative account” of administrative constitutionalism. Ross, *supra* note 3, at 523 n.11.

¹⁰ Metzger, *supra* note 1, at 1898.

the 1960s and 1970s.¹¹ I found that the FCC, in adopting equal employment rules for the broadcasters it regulated, considered constitutional arguments internally and recognized them publicly.¹² But the FCC found ultimately that it need not decide its constitutional obligation to adopt those rules due to its statutory authority to do so.¹³ The agency had substantial discretion as to whether to exercise this authority, however, given its broad statutory charge to regulate in the “public interest, convenience, and necessity.”¹⁴ Thus, even though the FCC avoided the constitutional question publicly, “equal protection turned a statutory *can* into a constitutional *must*.”¹⁵

Karen Tani has since unearthed multiple instances during the 1960s when the Department of Health, Education, and Welfare (HEW) also publicly “clothe[d] administrators’ constitutional interpretation in statutory garb.”¹⁶ For decades after the Social Security Act’s passage, agency officials relied on equal protection to justify the restrictions it imposed on states’ administration of federal public assistance programs. In the early 1960s, however, the agency “steadily backed away from the business of constitutional interpretation,” at least in its published explanations.¹⁷

The agency’s reasons for doing so differed in salient ways. As Tani recounts, in 1961 its Secretary was dissuaded from declaring unconstitutional a Louisiana law that denied benefits to mothers whose homes were deemed unsuitable. His Assistant Secretary convinced him that such a ruling would raise congressional ire and public concerns about executive overreach.¹⁸ The agency relied publicly on its statute instead.¹⁹ In 1963, an agency lawyer counseled abandoning the agency’s decades-long reliance on equal protection to justify why state welfare plans could only use “reasonable classifications” to set eligibility.²⁰ Now that the Court had declared equal protection a powerful check on racial discrimination, she urged, finding ““that the Constitution followed every Federal dollar to its ultimate destination,”” could lead to massive defunding of state welfare programs.²¹ In her view, the agency’s “‘weapon’ . . . had become ‘too big.’”²² She advised that the agency could and should use its statute instead

¹¹ *Id.* at 1898 n. 11.

¹² LEE, *THE WORKPLACE CONSTITUTION*, *supra* note 2, at 161–65; Lee, *Race, Sex, and Rulemaking*, *supra* note 2, at 810–34.

¹³ LEE, *THE WORKPLACE CONSTITUTION*, *supra* note 2, at 165; Lee, *Race, Sex, and Rulemaking*, *supra* note 2, at 833.

¹⁴ *See, e.g.*, 47 USC § 309.

¹⁵ Lee, *Race, Sex, and Rulemaking*, *supra* note 2, at 834. ¹⁶ Tani, *supra* note 2, at 873.

¹⁷ *Id.* at 877. ¹⁸ *Id.* at 872–73. ¹⁹ *Id.* at 871. ²⁰ *Id.* at 880. ²¹ *Id.* ²² *Id.*

to reach results “quite similar to those obtained from the equal protection rationale.”²³

HEW’s proffered reasons for “dressing constitutional concerns in statutory garb” are questionable.²⁴ Worrying that adopting a constitutional theory in one instance will cause the agency to take on too much constitutional duty across the board overlooks one of the defining features of the administered Constitution. Because agencies engage the Constitution at their discretion, a decision to implement a particular interpretation of the Constitution does not have the same generalizing, precedential effect of a judicial interpretation.²⁵ The agency’s constitutional weapon thus remains a scalpel not, as the HEW lawyer warned, a “hydrogen bomb.”²⁶ Reaching a decision on constitutional grounds but justifying it in statutory terms to avoid drawing the ire of Congress and the public is troubling. Arguably doing so thwarts agency accountability and undermines agency legitimacy. Indeed, Metzger warns that if agencies rely on the Constitution internally but only statutes publicly, courts, Congress,

²³ *Id.* at 881. ²⁴ *Id.* at 873.

²⁵ For the argument that generalization is a defining feature of law and legal reasoning see Frederick Schauer, *The Generality of Law*, 107 W. VA. L. REV. 217 (2004). Scholars debate whether judges’ constitutional decisions should or do have a binding effect on future cases. For an overview and defense of constitutional decisions’ precedential (and thus generalizing) effect, see Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107 (2008); see also Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 (1989).

²⁶ Tani, *supra* note 2, at 880. The scalpel/hydrogen bomb distinction can break down once an agency is (or is anticipating) defending an action on constitutional grounds to a court. But if an agency is acting rather than litigating – and particularly acting in a zone protected from judicial review – the “hydrogen bomb” concern is inapt. While scholars have recognized weak forms of agency *stare decisis* that result from courts’ “arbitrary and capricious” review under the Administrative Procedure Act (APA), this (1) presumes the agency is anticipating judicial review, and (2) has only, as far as I am aware, been applied to the agency’s future decision of the *same* policy issue, not *like* policy issues. See, e.g., Mark V. Tushnet, *Legislative and Executive Stare Decisis*, 83 NOTRE DAME L. REV. 1339, 1350 (2008) (citing *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 US 29, 43 (1983)). The Office of Legal Counsel’s own practice of *stare decisis* could also indirectly lead an agency to be bound at time two by a constitutional position taken at time one. Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1460 (2010). Because seeking OLC’s advice is largely at the agency’s discretion, however, this would impose little constraint. Further, OLC is most willing to depart from its precedents when requested to by the agency most affected by them. *Id.* at 1489–91. Lastly, to the extent that agencies generalize not because they have to but because they (like many institutions) develop norms and path dependencies, those forces operate whether the agency is interpreting a statute or the Constitution; in other words, this poses a different generalizing threat than the one the HEW lawyer feared.

the President, and the public cannot hold them accountable for their constitutional interpretations.²⁷

Constitutional opacity is not illegal, however. If an agency can justify its actions as being a reasonable interpretation of the relevant statutes and as passing arbitrary and capricious review, it need not disclose any additional constitutional influences. In a closed-record proceeding, any constitutional arguments made by the parties would be part of the record on review. Otherwise, the agency would only have to disclose constitutional considerations if they were: (1) introduced by actors outside the agency; (2) “relevant to the merits of the proceeding;” and (3) the outside actor was an “interested person.”²⁸ For open-record actions, an agency need only establish nonarbitrary reasons based on the information before it at the time of decision.²⁹ If it can do so without advertent to the Constitution, it should not run afoul of arbitrary and capricious review. In the particular context of informal notice-and-comment rulemaking, agencies have to disclose to the public during the comment period some information on which it relies,³⁰ but the courts have yet to expand this to include legal analysis.³¹ Thus, with the possible narrow exception of ex-parte contacts in closed-record proceedings, agencies do not seem to be legally required to disclose constitutional influences to the public, parties, or reviewing courts, provided they offer other nonarbitrary reasons for their actions.

Whether there are reasons agencies *should* be legally required to disclose constitutional influences is another matter. That case would have to be made with reference to the normative values of administrative constitutionalism, such as the opportunities it provides for public input into or interbranch discussion of constitutional questions, or to the normative values underpinning administrative law more generally.³² To the extent that normative concerns about agencies’ hidden resort to the Constitution persist, they only enhance arguments to include such actions within the category “administrative constitutionalism.” Accountability and legitimacy concerns may be reasons to press

²⁷ Metzger, *supra* note 1, at 1902.

²⁸ Administrative Procedure Act, 5 USC § 557(d)(1)(A)–(B).

²⁹ *Citizens to Preserve Overton Park v. Volpe*, 401 US 402, 419–20 (1971).

³⁰ APA 5 USC § 553(b)–(c).

³¹ *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008).

³² Scholars have debated the analogous question of whether agencies should have to disclose political influences on their decisions. See, for example, Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2 (2009); Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127 (2010); Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141 (2012).

for more transparency, in other words, but they are not reasons to define such background influences out of administrative constitutionalism.

Further, as is argued below, there are other values such as engagement and expertise that can sustain administrative constitutionalism normatively in the absence of transparency. Indeed, where they are in tension with transparency, they may even trump it.

Questioning Participation

Theorists posit that administrative constitutionalism offers a more democratically accountable mode of constitutional interpretation that overcomes the courts' countermajoritarian difficulty.³³ Indeed, agencies' notice-and-comment rulemaking procedures are more publicly accessible than even the legislative process, given that participation is of right.³⁴ Scholars praise this potential, observing that agencies can engage in a "more deliberative process" than courts,³⁵ and are more "constantly engag[ed] with the public."³⁶

Here the lessons history offers are complex. On the one hand, if the past is a guide, there is nothing inherently public, open, or dialogic about administrative constitutionalism. On the other hand, agencies have repeatedly opened their constitutional deliberations to the public in ways that surpass the access offered by courts or legislatures. Notably, they have done so of their own accord, demonstrating that at least some agencies at some times embraced administrative constitutionalism's participatory potential.

Administrative constitutionalism is not categorically democratic. Jeremy Kessler has unearthed how the Wilson Administration's War Department used the Constitution to create a military exemption for secular conscientious objectors.³⁷ As Kessler explains, this World War I policy was deeply "countermajoritarian, frustrating the legislative will in the interests of a few thousand idiosyncratic draftees."³⁸ But it was also undemocratic in the participatory sense, forged through an internecine war of memos.³⁹ Anjali Dalal has

³³ Metzger, *supra* note 1, at 1928–29; Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 529 (2010); Ross, *supra* note 3, at 526.

³⁴ Compare APA § 553(c) (requiring the agency to give "interested persons an opportunity to participate in the rule making") with *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 US 441, 445 (1915) ("The Constitution does not require all public acts to be done in town meeting or an assembly of the whole.").

³⁵ Metzger, *supra* note 1, at 1928. ³⁶ Ross, *supra* note 3, at 574–75.

³⁷ Kessler, *supra* note 2, at 1111–12, 1115, 1119–20, 1122. ³⁸ *Id.* at 1115.

³⁹ *Id.* at 1123–30. The issue of participation is distinguishable from that of opacity addressed above. For instance, in the FCC example, the agency process was participatory, even though the ultimate regulation's reliance on the Constitution was opaque.

recovered a similarly nonparticipatory instance of administrative constitutionalism in the Justice Department's and FBI's evolving policy for domestic surveillance in the late twentieth century.⁴⁰ The Attorney General Guidelines on this subject and the FBI manual implementing them were developed without public input.⁴¹

Administrative constitutionalism can, however, live up to the participatory ideal. As Bertrall Ross has recognized, this is most necessarily the case when agencies engage constitutional questions in notice-and-comment rulemakings.⁴² The FCC used a series of notice-and-comment rulemakings to consider requiring regulated entities to adopt equal employment programs during the late 1960s and early 1970s.⁴³ An early notice of proposed rulemaking announced that the agency had before it arguments that it was constitutionally obligated to adopt such a regulation.⁴⁴ A range of individuals, officials, and groups responded with an avalanche of constitutional argument.⁴⁵ It was their arguments that the agency recognized but avoided in its first equal employment regulation.⁴⁶

Agencies have also fostered broad public participation even when that was not statutorily required. In the 1970s, the NLRB considered when, procedurally, to address a union's racial discrimination: prior to or after certifying the union as the exclusive representative of the workers it sought to represent?⁴⁷ At first, the Board attempted to adopt a procedural rule, which the Administrative Procedure Act (APA) does not require an agency to do via notice-and-comment rulemaking.⁴⁸ Still, the agency sought voluntarily the views of the lawyers who practiced before it.⁴⁹ The Board, unable to reach consensus on a rule, instead decided in a series of split orders that it was constitutionally required to tackle union discrimination before certification.⁵⁰ Several years later, the agency revisited this policy choice.⁵¹ Although it again eschewed notice-and-comment rulemaking, this time in favor of adjudication, the Board nonetheless opted for a far more open and participatory process than was statutorily required. The agency notified the public that it would hold a hearing on the subject and invited those interested to submit briefs on the question to the Board.⁵² That process exposed the Board to a range of constitutional arguments, which its members tested and debated during the hearing.⁵³ Tani likewise describes how HEW voluntarily considered a host of amicus briefs making Fourteenth

⁴⁰ Dalal, *supra* note 3, at 99–102. ⁴¹ *Id.* at 97–98. ⁴² Ross, *supra* note 3, at 526, 574.

⁴³ LEE, THE WORKPLACE CONSTITUTION, *supra* note 2, at 155–174. ⁴⁴ *Id.* at 160–61.

⁴⁵ *Id.* at 161–64. ⁴⁶ *Id.* at 165. ⁴⁷ See generally *id.* at 175–92.

⁴⁸ *Id.* at 179–80; APA § 553(b)(A). ⁴⁹ *Id.* at 183. ⁵⁰ *Id.* at 182.

⁵¹ See generally *id.* at 212–22. ⁵² *Id.* at 212. ⁵³ *Id.* at 215–17.

Amendment arguments in its formal hearing about Louisiana's suitable home law.⁵⁴

History thus supports the conclusion that administrative constitutionalism can, but does not always, live up to the participatory ideal. More importantly, history provides tools for considering whether it is (always) a problem that administrative constitutionalism can fall short of that ideal. Dalal is critical of what she calls the FBI's "shadow administrative constitutionalism." But would it be better if Congress brought the public into the process? The same APA provision that exempted the NLRB rule from notice-and-comment rule-making also exempted the surveillance guidelines and manuals. Imagine that Congress required the FBI to engage in notice-and-comment rulemaking when it created otherwise exempt policies if the FBI was considering those policies' civil liberties implications. Faced with a choice between engaging constitutional questions through public participation and not engaging them at all, it seems likely the FBI would choose the latter (and in my opinion less desirable) course.⁵⁵ Indeed, Daphna Renan argues that some civil liberties concerns can best be addressed through embedding such oversight within the executive branch.⁵⁶

Whether Kessler's example of the War Department's conscientious objection policy is an instance of administrative constitutionalism gone awry is more complicated. The Secretary of War made a functional case for keeping the program and its justification secret: "publicity of lenient treatment might have encouraged 'unconscientious' objection as well as attacks from the Administration's right-wing critics," Kessler reports.⁵⁷ One might add that the program's secrecy avoided raising Congress's ire⁵⁸ and the possibility of Supreme Court review.⁵⁹ Sorting out the merits of Kessler's example involves working through thorny and interlocking questions about the respective powers of the President

⁵⁴ Tani, *supra* note 2, at 870. ⁵⁵ *But see* Metzger, *supra* note 1, at 1902.

⁵⁶ Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211, 289–90 (2015); Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039 (2016) [hereinafter Renan, *The Fourth Amendment*].

⁵⁷ Kessler, *supra* note 2, at 1124.

⁵⁸ The administrators who conceived of the program constructed primarily the President's commander-in-chief powers. US CONST. art. II, § 2. Whether the secular conscientious objection program actually fell exclusively within the President's commander-in-chief powers or trespassed on Congress' overlapping powers is an open question. US CONST. art. I, § 8, cl. 14. Some in Congress became aware of the Secretary of War's program but only after the war was over. See, for example, 57 CONG. REC. 3234–35 (Feb. 12, 1919); 58 CONG. REC. 3065–68 (July 23, 1919).

⁵⁹ Assuming someone has standing to sue, the Supreme Court has been willing to police the boundary and conflicts between Congress's war powers and the president's commander-in-chief powers. *Hamdan v. Rumsfeld*, 548 US 557, 591–93 (2006) (collecting cases).

and Congress during wartime, the oversight Congress and the courts have over the President's exercise of his commander-in-chief powers, and the weight policy reasons such as deterring "unconscientious' objection" should be given. However one answers whether the program's total secrecy was justified, the reasons in favor of secrecy are most weighty as to the general public. Notice to Congress may have been warranted,⁶⁰ but opening the policy up for public dialogue arguably was not.

The case for demanding public participation is strongest, but not airtight, with regards to independent agencies. Those agencies do not share the secrecy and national security interests of Dalal's FBI or the military in Kessler's case study. Even in the case of independent agencies, however, while agency action without public input lacks administrative constitutionalism's participatory virtue that does not mean it is therefore vicious. For instance, what if the NLRB had forged a procedural rule to address its constitutional obligations without seeking public input? Congress *could* require such a rulemaking to comply with some or all notice-and-comment procedures, but should it? Such a constitutional carve-out from the general treatment of procedural rulemaking would create the same disincentives for administrative constitutionalism as in the FBI scenario above. By instead treating such a hypothetical rule like any other procedural rule, an opportunity for public deliberation might be missed but one for agency constitutional engagement would be gained.

History suggests that agencies are capable of principled deliberation absent public input. In 1955, the NLRB *sua sponte* appointed a committee of staff members to study how the Supreme Court's rapidly changing equal protection doctrine of the late 1940s and early 1950s should affect the agency's policies governing union recognition.⁶¹ The committee carefully studied the case law as well as the relevant statutory text and legislative history. These were explicated and weighed in a detailed report, and the implications debated in two concurrences.⁶² Likewise, in the procedural rulemaking example discussed above, NLRB staff deliberated extensively about how to translate their constitutional duties into agency procedure.⁶³ There are no guarantees an agency will proceed with commensurate deliberativeness. But checks other than public participation are available; for instance, through *ex post* judicial

⁶⁰ Cf. Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1237–39 (2006) (arguing that while the executive branch can in some circumstances interpret statutes to avoid perceived constitutional problems, it should at the least notify those in Congress with oversight authority over the statute in question).

⁶¹ LEE, *THE WORKPLACE CONSTITUTION*, *supra* note 2, at 102–06.

⁶² *Id.* at 102–03, 304–05 nn.15–16. ⁶³ *Id.* at 179–80, 345 nn.12–13.

review.⁶⁴ Creating internal structures to ensure deliberation and check misguided interpretations is another intriguing option.⁶⁵

Thus far, theoretical writing has suggested public participation is a, if not the, defining virtue of administrative constitutionalism. History supports participation's virtues, but also demonstrates that it may not be a necessary condition to finding administrative constitutionalism virtuous.

Valuing Expertise

Theorists argue that administrative constitutionalism is desirable because it allows administrators to bring their policy expertise to bear on constitutional questions. This can enable agencies to reach and resolve constitutional issues courts find outside their competency.⁶⁶ Agency expertise can also enhance the quality of constitutional interpretation. Ross favors administrative constitutionalism because “agencies, as institutions staffed and structured to regulate specific fields and actions, have a comparative advantage over more generalist courts.”⁶⁷ Metzger emphasizes that “agencies approach constitutional questions and normative issues from a background of expertise in the statutory schemes they implement and the areas they regulate.”⁶⁸ As a result, “they are likely to be better at integrating constitutional concerns with the least disruption to these schemes and regulatory priorities.”⁶⁹

Metzger and Ross point to different ways expertise benefits administrative constitutionalism. Ross seems to have in mind what might be called constitutional expertise. His leading examples involve agencies such as the Equal Employment Opportunity Commission (EEOC) that are, as he puts it, charged with “fleshing out and applying statutes that rest on constitutional values.”⁷⁰ In implementing antidiscrimination laws, Ross contends, the

⁶⁴ Any procedural rule the agency adopted would likely be deemed “final agency action” and thus be subject to judicial review under the APA for, among other things, its constitutionality. 5 USC § 706(2)(B). Of course, a rule could be constitutional for purposes of section 706(2)(B) irrespective of whether it was constitutionally necessary. Currently, the Supreme Court does not appear inclined to examine an agency’s constitutional reasoning as part of its arbitrary and capricious review under section 706(2)(A). *FCC v. Fox*, 556 US 502, 516 (2009). Gillian Metzger argues that it should. Metzger, *supra* note 33, at 484–86.

⁶⁵ Cf. Renan, *The Fourth Amendment*, *supra* note 56. ⁶⁶ Metzger, *supra* note 33, at 514, 527.

⁶⁷ Ross, *supra* note 3, at 579. ⁶⁸ Metzger, *supra* note 1, at 1922.

⁶⁹ *Id.* at 1922–23. See also Adrian Vermeule, *Deference and Due Process*, 129 HARV. L. REV. 1890 (2016); Nicholas Parrillo, *Administrative Constitutionalism and Administrative Power*, REG BLOG (Apr. 1, 2015), <http://www.regblog.org/2015/04/01/parrillo-administrative-constitutionalism>.

⁷⁰ Ross, *supra* note 3, at 522.

agency has “developed multiple applications of equal protection principles,” from how to determine discrete and insular minorities to the proper intent standard.⁷¹ Under this view, what agencies offer is expertise in the particular constitutional value involved.

Metzger emphasizes what might be termed regulatory expertise. For Metzger what agencies bring to the table – and courts lack – is expertise in the intricacies of a statutory and regulatory regime, as well as the subject areas and entities the agency regulates. Unlike for Ross, there is no presumption that agencies are expert in the particular constitutional value, be it free speech or equal protection, they apply. Instead, agency expertise comes into play when an agency’s regulatory domain intersects with ancillary constitutional issues. In such instances, the argument goes, agencies are best suited to harmonize the intersecting constitutional value with the particularities of their statutory and regulatory regimes.⁷²

History provides abundant examples of both types of agency expertise. In terms of constitutional expertise, William Eskeridge and John Ferejohn have described how, in the mid-1970s, lawyers at the EEOC fused their knowledge of sex discrimination with a statutory charge believed to codify equal protection requirements.⁷³ The result was a cutting-edge theory of pregnancy discrimination as a form of sex discrimination that violated the employment discrimination provisions of the 1964 Civil Rights Act (Title VII).⁷⁴ As my work has shown, during the 1960s and 1970s, the EEOC also argued that, under Title VII and the constitutional provisions it implemented, “regulators must demand – and regulated firms must establish – affirmative action policies.”⁷⁵ During this period, the United States Commission on Civil Rights, a watchdog agency, likewise put itself forward not only as an expert on civil rights but also on how the Constitution applied to that issue.⁷⁶ Kessler’s account of the World War I

⁷¹ *Id.* at 561–62.

⁷² That said, an agency’s regulatory charge may develop its expertise in particular constitutional problems, such as the FCC’s frequent interface with First Amendment issues. Thus, regulatory expertise could, but need not, overlap with constitutional expertise. Vermeule, in *Deference and Due Process*, argues that courts should defer to this sort of blended expertise. Vermeule, *supra* note 69.

⁷³ ESKRIDGE & FEREJOHN, *supra* note 1, at 30–33. For the perception that Title VII of the 1964 Civil Rights Act, Pub. L. No. 88–352, 42 USC § 2000(e) (2012), codified the Constitution’s equal protection guaranties, see LEE, *THE WORKPLACE CONSTITUTION*, *supra* note 2, at 160–62. For the Court’s ultimate rejection of this position, see *id.* at 219.

⁷⁴ ESKRIDGE & FEREJOHN, *supra* note 1, at 31.

⁷⁵ Lee, *Race, Sex, and Rulemaking*, *supra* note 2, at 801. ⁷⁶ *Id.* at 829, 849–50.

conscientious objector program could also be seen as an instance of constitutional expertise.⁷⁷

Much of the extant historical work on administrative constitutionalism, however, has produced examples of regulatory expertise. This was involved in Tani's account of the equal treatment requirements HEW imposed on state and local welfare offices. It is also seen in the NLRB's efforts to square its policies with equal protection and the FCC's adoption of equal employment regulations. None of these agencies were created to administer equal protection. Their expertise was in income assistance, labor-management relations, broadcasting, and common carriers. What they brought of value was their in-the-weeds understanding of how to administer equal protection with minimal interference to, or even salubrious congruence with, the statutory and regulatory ecosystem they oversaw. As an exception that proves this rule, during the 1970s, the Federal Power Commission (FPC) declined to adopt equal employment rules.⁷⁸ Although the agency acknowledged the constitutional values the rules would codify, it reasoned that they were too far afield from the agency's regulatory mandate.⁷⁹ They could not, in the agency's view, be integrated into that ecosystem without threatening it.

Notably, expertise provides another benefit that can make administrative constitutionalism normatively desirable even if it does not provide the benefits of transparency or participation. In some instances, agencies were explicit about their reliance on the Constitution (the NLRB's certification policies, for example). In others, such as the FCC's equal employment rules, they were not. Similarly, sometimes these exercises of agency expertise were participatory, as was the case for the FPC's equal employment rulemaking. But many were not, including some of Tani's HEW policies and all the examples above of constitutional expertise.

II RESPECTING COURTS AND CONGRESS

Before anyone coined the term "administrative constitutionalism," Jerry L. Mashaw weighed in on agencies' "direct implementation of the Constitution"

⁷⁷ The Privacy and Civil Liberties Oversight Board, a newly created independent agency, will bring this sort of constitutional expertise to its work. Privacy and Civil Liberties Protection and Oversight, 42 USC §2000ee (2012).

⁷⁸ See generally LEE, *THE WORKPLACE CONSTITUTION*, *supra* note 2, at 193–211.

⁷⁹ *Id.* at 202, 209–10. Notably, the Supreme Court accepted, with only slight modification, the judgments of the FCC and the FPC as to whether equal employment rules were appropriate for their regulatory regimes. *Id.* at 210.

in a pathbreaking article on another little-studied subject: agencies approach to statutory interpretation.⁸⁰ In what was a generative, if brief, engagement with the concept, Mashaw argued that agencies should interpret constitutionally resonant statutory terms such as “hearing” to entail at least “the constitutional minima that the Supreme Court has specified.”⁸¹ But, he contended, while courts avoid statutory interpretations that raise serious constitutional questions (known as the “constitutional avoidance canon”), agencies should not.⁸² “Constitutionally timid administration,” Mashaw warned, “compromises faithful agency [to Congress] and potentially usurps the role of the judiciary in harmonizing congressional power and constitutional command.”⁸³ Agency use of the avoidance canon underscores Metzger’s observation that administrative constitutionalism “fits uneasily with a constitutional system that vests legislative power in Congress and judicial power in the courts.”⁸⁴

Historical examples introduce nuances and counterarguments to this debate. A conclusive argument is beyond the scope of this chapter. Below, however, history and theory are marshalled to suggest that agency use of the avoidance canon may actually be faithful to Congress and respectful of, even collaborative with, the judiciary.

Dissecting Avoidance

Scholars divide the avoidance canon into two types. Under the “modern” avoidance canon, courts identify and avoid but do not resolve the serious constitutional questions a statutory interpretation raises.⁸⁵ This can be contrasted to “classical” avoidance, which held sway in the nineteenth and early twentieth centuries, according to which the courts answered the serious constitutional questions a statutory interpretation raised in order to decide whether an avoidant interpretation was warranted.⁸⁶ The modern avoidance canon is more aggressive toward Congress than its classical predecessor because it can result in avoiding plausible interpretations of statutes that are constitutionally questionable but not actually unconstitutional. It therefore makes it harder for Congress to enact constitutionally questionable but ultimately constitutional laws.⁸⁷

⁸⁰ Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 507 (2005).

⁸¹ *Id.* at 508. ⁸² *Id.* ⁸³ *Id.* ⁸⁴ Metzger, *supra* note 1, at 1920.

⁸⁵ *Ashwander v. Tennessee Valley Auth.*, 297 US 288, 347–48 (1936) (Brandeis, J., concurring).

⁸⁶ *Hooper v. California*, 155 US 648, 657 (1895). For the classical/modern taxonomy, see Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945 (1997).

⁸⁷ For examples of this critique, see Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2128 (2015); Richard A.

TABLE 4.1 *Formulations of the Avoidance Canon*

Classical/Plausible	Modern/Plausible
Classical/Implausible	Modern/Implausible

Neal Katyal and Thomas Schmidt identify another divide in the courts' deployment of the avoidance canon. In the standard formulation, the Court uses avoidance to reject a plausible, but constitutionally questionable, statutory interpretation in favor of another plausible interpretation. Katyal and Schmidt observe that the Court also sometimes adopts *implausible* interpretations that essentially rewrite statutes to avoid constitutional difficulty, what they call "active" avoidance.⁸⁸ Freed from their rhetoric of judicial activism, their taxonomy distinguishes between avoidance in favor of a plausible interpretation ("plausible avoidance") and an implausible one ("implausible avoidance").⁸⁹ Putting the criteria together, we get the four-by-four grid in Table 4.1.

Whether courts' use of classical/implausible or modern/plausible avoidance is more aggressive toward Congress depends on how persuaded one is by the respective critiques of modern and implausible avoidance. But I expect that most would agree that classical/plausible is the least and modern/implausible is the most aggressive use of avoidance. Below, I defend agency use of all four types of avoidance, roughly from least to most aggressive, illustrating each through historical examples.

Agency Use of Classical/Plausible Avoidance

The mid-century NLRB developed a "contract-bar rule" that disallowed rival unions from petitioning the agency to replace a Board-certified union for the duration of that union's contract with the employer. In 1962, the NLRB held that it would not grant this protection to union contracts that segregated the terms for black and white workers. The Board based its rule on "clear court decisions . . . which condemn governmental sanctioning of racially separate groupings."⁹⁰

Posner, *Statutory Interpretation: In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983).

⁸⁸ Katyal & Schmidt, *supra* note 87, at 2112, 2116, 2118.

⁸⁹ The boundary between plausible and implausible avoidance will, like that between plausible and implausible interpretations, be contested.

⁹⁰ *Pioneer Bus Co., Inc.*, 140 NLRB 54, 55 (1962) (citing, e.g., *Brown v. Board of Education*, 347 US 483 (1954)).

The NLRB's 1962 order was an instance of classical/plausible avoidance. There was nothing in the NLRA about the contract-bar rule; it was a policy the agency built in the statute's interstices. It was thus as plausible to interpret the Act to include the 1962 exception to the rule as it was to interpret the Act to allow the rule in the first instance. Further, the Board did not avoid a *possible* constitutional problem; it chose its construction only after deciding that a contract-bar rule without an exception for discriminatory contracts would be inconsistent with the Court's equal protection decisions. It therefore engaged in classical rather than modern avoidance.

Even among critics of agency avoidance, this is an uncontroversial instance of administrative constitutionalism. Mashaw has clarified that his concern is with agency use of modern avoidance only.⁹¹ Nor should extrapolating critiques of judicial use of the avoidance canon to the agency context pose a problem because they focus on its modern and implausible variants. Indeed, even those NLRB members who rejected more aggressive forms of avoidance accepted the 1962 rule.⁹² Congress and the courts seem to approve as well. Indeed, there is a long-standing tradition of agencies interpreting their statutory authority to stay within their understanding of the Constitution's commands and Congress as well as the courts later adopting the resolution as their own.⁹³

Agency Use of Classical/Implausible Avoidance

During the 1970s, the NLRB struggled with a perceived conflict between its statutory and constitutional duties when it debated whether to consider a union's discrimination prior to certifying it.⁹⁴ Board members disagreed whether it would be unconstitutional for the Board to certify a discriminatory union. But assuming that it would, could the Board therefore withhold certification given that the National Labor Relations Act (NLRA) stated that the Board "shall certify" the results of a union election?⁹⁵ Some Board members had long opined that it was fine for the Board to incorporate constitutional principles into policy choices that the NLRA left to the agency's discretion (i.e., plausible avoidance). But if the agency was faced with an express and contrary

⁹¹ Email from Jerry L. Mashaw to Sophia Z. Lee (Dec 22, 2015) (on file with author).

⁹² LEE, *THE WORKPLACE CONSTITUTION*, *supra* note 2, at 147–48, 220–21.

⁹³ MASHAW, *supra* note 1; Anuj C. Desai, *Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy*, 60 *STAN. L. REV.* 553 (2007); Ablavsky, *supra* note 2.

⁹⁴ *See supra* notes 47–53.

⁹⁵ The NLRA states that the Board "shall" provide a preelection hearing and that if the Board "finds upon the record of such hearing that such a question of representation exists, it *shall* direct an election by secret ballot and *shall* certify the results thereof." National Labor Relations Act § 9(c)(1), 29 USC §401–531 (2012) (emphasis added).

congressional mandate, the Board had to “assume [the directive’s] Constitutionality” and do “what Congress intended.”⁹⁶ For those who held this view, the NLRA’s command meant that the agency could not deny certification to a union that had won an election, regardless of any constitutional problems the certification would raise.⁹⁷ For others, the agency had a duty to interpret its organic statute in light of the Constitution’s commands even when the latter conflicted with the former.⁹⁸ “What the Board lacks,” they insisted, “is not the statutory power to withhold the certificate, but rather the constitutional power to confer it.”⁹⁹ Over several years, the Board flip-flopped from refusing to providing certification to unions with a history of discrimination. As a Board majority chastised in 1977, refusing certification had wrongfully “arrogated to this Board the power to determine the constitutionality of mandatory language in the Act we administer.”¹⁰⁰

The NLRB was not faithless to Congress when it read a nondiscrimination qualification into its certification policies notwithstanding statutory text to the contrary. In 1954, the Court declared segregation in public schools unconstitutional in *Brown v. Board of Education*.¹⁰¹ Legislatures did not need to amend their laws to make this happen. Instead, those who implemented state and local segregation laws were expected to assume they no longer had force. This applied to all school districts, not only to the handful that were defendants in the cases before the Court. Indeed, the Court soon clarified that its rule applied to state-imposed segregation generally, not only in schools.¹⁰² Administrators who implemented the Court’s interpretation of equal protection despite segregation statutes on the books were not being faithless agents to their legislatures. Instead, we assume that legislatures intend to act constitutionally, an intention to which their agents are faithful if they make corrections when statutes fall out of step with constitutional doctrine.¹⁰³ If those school administrators were not faithless agents, neither was the NLRB a faithless agent of Congress when it used classical/implausible avoidance to limit its statute in light of the Constitution’s nondiscrimination mandate.

⁹⁶ LEE, *THE WORKPLACE CONSTITUTION*, *supra* note 2, at 148. ⁹⁷ *Id.* at 182, 221.

⁹⁸ *Id.* See also *id.* at 148–49. Note that this very debate was an instance of administrative constitutionalism as the agency was grappling with structural constitutional questions about agencies’ relationship to Congress and the Court.

⁹⁹ *Id.* at 182. ¹⁰⁰ *Id.* at 221. ¹⁰¹ 347 US 483 (1954).

¹⁰² See, for example, *Holmes v. City of Atlanta*, 350 US 879 (1955) (mem.) (per curiam) (municipal golf course); *Mayor and City Council of Baltimore City v. Dawson*, 350 US 877 (1955) (mem.) (per curiam) (public beach and bathhouse).

¹⁰³ As discussed below at note 130, the Court’s canons of statutory interpretation are built on the assumption that Congress intends to act constitutionally.

The harder question is whether the NLRB was faithless to Congress when it implemented equal protection despite doctrinal uncertainty as to whether the agency's involvement with discriminatory unions was the type of state action to which that principle applied.¹⁰⁴ In other words, although the agency reached and decided the constitutional question as classical avoidance demands, the correct answer was not as clear-cut as in the school segregation example above. This aspect of the historical example presses questions about how, not just whether agencies can employ avoidance, including the classical/implausible variant. Even under these circumstances, the agency's use of avoidance is unobjectionable. Agencies are unlikely to take adventurous constitutional positions in the first instance and all the more so when that position leads the agency to reject an express statutory command. If an agency oversteps, Congress has sufficient checks to counter a disfavored deployment of avoidance. The most costly is a legislative override. But Congress has a number of more easily wielded tools, including jaw boning by individual legislators, oversight hearings, and appropriations threats or riders.¹⁰⁵ Agencies, in turn, have strong political incentives to fall in line when these are used.¹⁰⁶

Nor was the agency usurping the judicial role. As to applying the Court's antisegregation rule, the NLRB was respecting – not usurping – the judicial role. The case for usurpation is stronger as to the NLRB's reliance on a theory of state action broader than any the Court had adopted.¹⁰⁷ But as the Court later explained, it defined state action narrowly in part due to federalism and separation of powers concerns.¹⁰⁸ To use Larry Sager's term, the Court

¹⁰⁴ I discuss below whether the NLRB was justified in interpreting state action more broadly than the courts. See *infra* notes 107–110 and accompanying text.

¹⁰⁵ Congress's ability to review agency avoidance may be rendered theoretical if the agency's action is secret. This suggests the desirability of a notice requirement. Cf. Morrison, *supra* note 60.

¹⁰⁶ For a classic example of agencies bowing to pressure from congressional committees, see Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 L. & CONTEMP. PROBS. 273, 288–91 (1993).

¹⁰⁷ LEE, THE WORKPLACE CONSTITUTION, *supra* note 2, at 135–54, 175–222. This, however, speaks to whether it is justifiable for agencies to employ classical/implausible avoidance on the basis of constitutional interpretations that differ from the courts', not whether agencies use of this type of avoidance is justifiable at all.

¹⁰⁸ *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 US 40, 52 (1999) ("Faithful application of the state action requirement . . . ensures that the prerogative of regulating private business remains with the States and the representative branches, not the courts."); *Lugar v. Edmondson Oil Co.*, 457 US 922, 936 (1982) ("Careful adherence to the 'state action' requirement . . . avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed"). See also *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 US 288, 295 (2001); *Nat'l Collegiate Athletic Ass'n v. Trakanian*, 488 US 179, 191 (1988) (quoting *Lugar*); *Blum v. Yaretsky*, 457 US 991, 1004 (1982).

“underenforced” the state action doctrine.¹⁰⁹ If so, the Court anticipated that officials could find that the Constitution’s equality guarantees applied even when the Court would not find a state or federal actor liable for discrimination by private entities. Under this reasoning, the NLRB was complementing rather than usurping the judicial role when it relied on broader state action theories than those the Court employed.¹¹⁰

The NLRB was not usurping the judicial role in another sense as well. Some of its antidiscrimination policies were subject to judicial review. All a union had to do if it was penalized under a Board policy it found to be grounded in an unsupportable constitutional interpretation was to challenge it in court.¹¹¹ Judicial review was generally unavailable for the Board’s certification policies as they were committed to the agency’s exclusive jurisdiction.¹¹² As a result, there was no judicial role to usurp. The case for the agency deployment of classical/implausible avoidance is arguably even stronger here: If the agency did not do it, no one would, leaving unreviewable agency action a

What matters here is state action doctrine in the 1970s, but note that even the more recent *United States v. Morrison*, 529 US 598 (2000), which was widely seen as limiting the state action doctrine, spoke to regulation of private individuals in the absence of state action not the conditions under which state actors can find themselves sufficiently involved with private discrimination to be constitutionally liable, other than dicta stating that maladministration and non-enforcement of laws did not suffice. 529 US at 624–25.

¹⁰⁹ Lawrence Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 420 (1993). For an application of this argument to the administrative context, see Metzger, *supra* note 33, at 514, 527.

¹¹⁰ Mashaw might accept the agency’s application of the Court’s antisegregation principle as an example of acceptable “constitutionally ‘sensitive’ administration” but reject the agency’s adoption of a broad state action theory as inappropriate “[c]onstitutionally timid administration.” Mashaw, *supra* note 80, at 508–09. Even as to an interpretation that diverges from Court doctrine, however, an agency arguably does not break its faith with Congress. Congress, shares (or ultimately owns) the responsibility to enforce those dimensions of the Constitution under enforced by the courts. For all the reasons Congress delegates broad authority to agencies in the first instance – expertise, efficiency, capacity to consider detail – as well as the regulatory expertise reasons to favor administrative constitutionalism discussed above, Congress would likely want agencies to determine when and how to implement the under-enforced Constitution in the first instance. Should Congress disagree with an agency’s resolution, it is free to correct the agency by oversight nudges or legislative overrides. Nor would an agency implementing the under-enforced Constitution usurp judicial power. The Court’s very reasons for under enforcing the Constitution mark its under-enforced dimensions as ones in which politically accountable actors, such as agencies subject to congressional and presidential oversight, are best suited to determine the Constitution’s commands.

¹¹¹ National Labor Relations Act § 10(e)–(f), 29 USC § 160(e)–(f).

¹¹² *NLRB v. Kentucky River Community Care, Inc.*, 532 US 706, 709 (2001). Note that employers can evade this bar on review of the Board’s representation decisions by refusing to comply, eliciting an unfair labor practice order from the Board, and then challenging that action in court. *Id.* at 709–10.

Constitution-free zone.¹¹³ By this reasoning, the 1977 Board majority was wrong to overturn the agency’s policy because that policy inappropriately arrogated judicial power to the Board. In contrast, it would have been fine for the majority to overturn the policy because it interfered too much with the agency’s statutory charge, it could be addressed adequately post-certification, or the agency was insufficiently involved in the pre-certification union discrimination to be constitutionally liable for policing it.¹¹⁴

Agency Use of Modern/Plausible Avoidance

The FCC’s equal employment rulemaking seems most in line with the sort of modern avoidance Mashaw criticized. In its internal memos and public statements, the FCC identified a “serious constitutional question”:¹¹⁵ that the agency might violate the Constitution’s equal protection commands if it licensed a broadcaster that practiced employment discrimination.¹¹⁶ The FCC’s lawyers recommended, and the agency publicly explained, that it would avoid this question by interpreting its statutes to bar licensees from engaging in this discrimination.¹¹⁷ Given those statutes’ broad “public interest, convenience, and necessity” charge, this was a plausible interpretation of the statute. Such agency deployment of modern/plausible avoidance should not be categorically rejected. Indeed, it may actually be *faithful* to Congress, opening a dialogue between agencies and their congressional overseers that can forestall the more troubling judicial use of avoidance.

If the modern approach to avoidance is justifiable in the courts, it is justified in agencies as well. One justification for the modern approach is that it creates “resistance norms” that force Congress to be more explicit and thus deliberate when it wants to act at the outer limits of its constitutional authority.¹¹⁸ To the extent that such resistance is normatively desirable, having agencies employ

¹¹³ The argument that agency avoidance constitutes faithful agency extends to policy zones that Congress has committed to the agency exclusively. There is no reason to think that Congress intended agencies to be *less* constitutionally sensitive in this zone; indeed, the lack of judicial review suggests Congress would want the agency to pick up the constitutional slack. That court review may be unlikely or unavailable in some circumstances strengthens the case for agency use of avoidance in another sense: the alternative would put the impractical weight on Congress alone to police the United States Code for unconstitutional or constitutionally dubious statutes and the administrative state for similarly troubling statutory interpretations.

¹¹⁴ LEE, *THE WORKPLACE CONSTITUTION*, *supra* note 2, at 220–22.

¹¹⁵ Lee, *Race, Sex, and Rulemaking*, *supra* note 2, at 816.

¹¹⁶ *Id.* at 814–15. ¹¹⁷ *Id.* at 816, 833.

¹¹⁸ Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 *TEX. L. REV.* 1549 (2000).

modern avoidance greatly enhances the beneficial resistance Congress legislates against: statutes will be interpreted by agencies far more than by courts.¹¹⁹

Further, the main critiques of the courts' use of modern avoidance have less force as regards agencies. Scholars critique modern avoidance because it "enlarge[s] the already vast reach of constitutional prohibition beyond even the most extravagant modern interpretation of the Constitution."¹²⁰ This constitutional "penumbra" can bleed from one statutory context to another.¹²¹ When agencies deploy modern avoidance, there is less threat that a constitutional doubt in one context will bleed into other contexts. This is due to the different way precedent operates in courts as opposed to agencies.¹²² And if an agency avoids an interpretation Congress prefers, Congress can correct an agency more easily than it can a court. The only way Congress can override a court's avoidant interpretation is to enact its preferred interpretation, a large if not entirely insurmountable obstacle.¹²³ In contrast, as described above, Congress has many more – and more easily wielded – tools to counter a disfavored agency interpretation.¹²⁴ The fact that agency precedent is far less sticky than court precedent adds to the effectiveness of this oversight.¹²⁵ While more speculative, the political costs to legislatively overriding an agency are likely lower than those for overriding a court, which could make even that check more easily wielded against agency avoidance. Modern avoidance by agencies thus arguably has more of the benefits and less of the costs than when it is used by courts.

Modern/plausible avoidance also need not create the "timid administration" or "faithless agency" Mashaw fears.¹²⁶ The FCC's equal employment rules could have led the agency to deny some licenses it would otherwise have granted. They thus might seem to have the timidity-inducing quality Mashaw was concerned about. But they also empowered the agency to oversee a whole new dimension of regulated entities' business: their employment practices. From the perspective of broadcasters as well as the consumers

¹¹⁹ Cf. Morrison, *supra* note 60. ¹²⁰ Posner, *supra* note 87, at 816.

¹²¹ See, for instance, how the Court's avoidant interpretation of the Railway Labor Act in *International Assoc. of Machinists v. Street*, 367 US 740 (1961) migrated to its interpretation of the NLRA in *Communication Workers of America v. Beck*, 487 US 735 (1988).

¹²² See *supra* notes 25–26 and accompanying text.

¹²³ Katyal & Schmidt, *supra* note 87, at 2119 (contending that when courts rewrite statutes using the avoidance canon, veto gates in Congress mean that the "the rewritten statute is sticky and unlikely to go away"). On congressional overrides generally, see Matthew R. Christiansen & William N. Eskridge, *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317 (2014).

¹²⁴ See *supra* notes 105–106 and accompanying text.

¹²⁵ See *supra* note 26 and accompanying text. ¹²⁶ Mashaw, *supra* note 80, at 508–09.

who petitioned for the rules, this was *aggressive* – not timid – regulation.¹²⁷ Congress also found the agency rules neither objectionably timid nor faithless. Soon after their promulgation, the Senate rejected an amendment that would have invalidated the rules¹²⁸ and Congress eventually codified them in the agency’s organic statute.¹²⁹ And had Congress disagreed, it could have nudged or even legislatively directed the agency to take a different course of action.

The FCC was not usurping the judicial role either. Generally, just because courts play a role in policing the outer bounds of legally permissible action, we do not consider their role usurped by an actor they supervise trying to stay within those bounds. Congress does not usurp the courts’ role in trying to pass constitutional laws.¹³⁰ Nor do we think an agency usurps the judicial role by trying to act in a nonarbitrary and capricious manner.¹³¹ Why treat an agency trying to act in a constitutionally faithful way any different? The case for usurpation seems particularly weak in the FCC example because of the availability of judicial review. The equal employment regulations could have been challenged directly or,¹³² if the agency denied a license under them, a broadcaster could seek judicial review of that decision.¹³³ Had the agency adopted its statutory interpretation to avoid a trivial or non-existent constitutional concern, a court could find that it acted unreasonably or arbitrarily and

¹²⁷ Metzger is more concerned with aggressive than timid administration. Agencies’ use of the Constitution to aggressively implement their statutes, she notes, “fits uneasily with a constitutional system that vests legislative power in Congress and judicial power in the courts.” Metzger, *supra* note 1, at 1920. But, like Mashaw’s critique, this concern seems best directed at the ends (timid, faithless, or aggressive administration) rather than the means, whether modern avoidance narrowly or administrative constitutionalism broadly. Their concerns are thus better addressed by debating *how* agencies deploy avoidance or otherwise implement the Constitution and are less persuasive for deciding *whether* they should do so.

¹²⁸ Lee, *Race, Sex, and Rulemaking*, *supra* note 2, at 853. ¹²⁹ *Id.* at 878 n.359.

¹³⁰ CONGRESS AND THE CONSTITUTION (Neal Devins & Keith E. Whittington, eds. 2005); Paul Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57, 62–65 (1986). Indeed, the Court’s avoidance canon is based on the assumption that Congress intends to act constitutionally. *Ashwander v. Tennessee Valley Auth.*, 297 US 288, 346–48 (1936) (Brandeis, J., concurring).

¹³¹ Elizabeth Magill has hypothesized that courts count on agencies internalizing the lessons from judicial review of agency action not only to comply with those lessons but to guide agencies’ choice of procedure *ex ante* as between adjudication and rulemaking. M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383 (2004).

¹³² Parties can even challenge directly agency interpretations of agency regulations. See, for example, *Perez v. Mortgage Bankers Association*, 135 S. Ct. 1199 (2015).

¹³³ The FCC rarely denied broadcaster licenses under its equal employment rules. LEE, *THE WORKPLACE CONSTITUTION*, *supra* note 2, at 169. But license denials are reviewable in court. 47 USC § 402(b).

capriciously – or decline to accord any deference at all.¹³⁴ The FCC rules were never challenged directly, but the Court in dicta later described them as within the agency’s authority to adopt.¹³⁵

Agency Use of Modern/Implausible Avoidance

The most aggressive form of agency avoidance is the modern/implausible variant. Not surprisingly, in the only historical example I am aware of in which an agency considered it, the agency declined to deploy it. According to Tani, in 1962, HEW considered whether it violated equal protection for the federal government to fund racially discriminatory school districts in the South. In other policy contexts, the agency’s General Counsel was willing to condition funding on recipients obeying constitutional commands.¹³⁶ The General Counsel did this despite the fact that whether constitutional commands followed federal dollars was, in his opinion, “open to serious legal doubt.”¹³⁷ What gave him pause in the schools case was that there, avoiding those constitutional doubts “meant contravening a statutory mandate.”¹³⁸ Instead, the agency opted for a more modest and statutorily grounded approach.¹³⁹

HEW need not have been so chary of avoiding its constitutional doubts even in the face of a conflicting statutory command. Above I argued that when the agency faces an ambiguous statute and chooses among interpretations within that zone of ambiguity, Congress has sufficient checks to make the agency’s use of modern avoidance unobjectionable. Does it change the analysis if an agency uses modern avoidance to read exceptions into absolute statutory commands? In one sense, the agency is acting further afield of Congress’s instructions and thus more unfaithfully. But at its heart, the faithless agent critique stems from assumptions about what Congress would want the agency to do. Making this argument in full is beyond the scope of this chapter, but my intuition is that

¹³⁴ The rubric under which the Court would address the question is uncertain. As discussed above in note 64, the Court might not address this issue under arbitrary and capricious review and might not find a constitutional problem under § 706(2)(B). If so, *Chevron* reasonableness review may still provide a meaningful check. *Chevron v. Nat. Res. Def. Council, Inc.*, 467 US 837 (1984). Or a reviewing court might refuse *Chevron* deference where an agency’s statutory interpretation involves constitutional questions. The Supreme Court has done so where an agency interpretation raised serious constitutional questions it determined Congress had not intended to raise. *Solid Waste Agency v. US Army Corps of Eng’rs*, 531 US 159, 172–74 (2001).

¹³⁵ LEE, *THE WORKPLACE CONSTITUTION*, *supra* note 2, at 210. *NAACP v. Fed. Power Comm’n*, 425 US 662, 665 n.2 (1976).

¹³⁶ Tani, *supra* note 2, at 876, 879. ¹³⁷ *Id.* at 879. ¹³⁸ *Id.*

¹³⁹ *Id.* at 879 n.278. Indeed, Tani notes that the agency took its most modest approach in regards to publicly funded hospitals because the funding statute expressly authorized separate but equal hospitals. *Id.*

the key question for this imagined Congress would be whether the agency should avoid constitutionally dubious interpretations at all, not whether it should do so in the face of ambiguous but not determinate statutory text. Further, in the modern/implausible context all the same congressional checks would apply. If those checks are enough to assuage concerns about agencies employing modern/plausible avoidance, they should be enough to assuage those concerns here. In other words, in my view, the more powerful challenge to agencies deploying avoidance is whether or not Congress can adequately check its agent than how far afield of Congress's commands the agency might go. As regards the judicial role, the threat of usurpation stems from the fact of modern avoidance itself, not the statute in question's ambiguity or lack thereof. Therefore, if the FCC example is acceptable, the HEW one should be too.

* * *

History demonstrates that agencies have persistently interpreted and implemented the Constitution in ways that do not meet the transparent, participatory model of administrative constitutionalism defended by its proponents. Agencies have also deployed the constitutional avoidance canon, a form of administrative constitutionalism and statutory interpretation scholars have critiqued. One conclusion would be that whatever theoretical benefits administrative constitutionalism holds, in practice it is a source of concern and a target for correction if not elimination. As I have argued above, however, those historical examples can also invite scholars to broaden the scope of normatively defensible administrative constitutionalism to include instances that are secret, insular, avoidant, in conflict with statutory text, or distinct from Supreme Court doctrine. Such instances of administrative constitutionalism may provide other values such as benefitting from agency expertise and fostering agency engagement with the Constitution. And even if they still raise normative concerns, including ones of accountability and legitimacy, scholars should consider antidotes other than transparency, participation, or prohibition. In addition to the types of congressional and judicial oversight described above, these could include the types of internal managerial controls that Jerry L. Mashaw has long favored.¹⁴⁰ They could also focus on frictional checks within and among agencies.¹⁴¹

¹⁴⁰ See, e.g., JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* (1983); MASHAW, *supra* note 1.

¹⁴¹ Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 *YALE L.J.* 2314 (2006); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 *EMORY L.J.* 423 (2009); Renan, *The Fourth Amendment*, *supra* note 56.

There is much to the transparent, participatory versions of administrative constitutionalism that have been the primary focus of its defenders thus far. This chapter is a preliminary effort to develop historically informed theoretical arguments that administrative constitutionalism can be virtuous even when it lacks those attributes. Perhaps it is the theory, not the history, that needs to change.